

COMPLEX BUSINESS STRUCTURES, HIDDEN ASSETS and FORENSIC ACCOUNTANTS

Onus Maynes (Evidex) and Mike Emerson (Emerson Black Lawyers)

Complexity and change are features of modern life. There are many facets of such complexity in today's business world and indeed in every aspect of human behaviour.

Contributing to this complexity are many factors, notably included among them the following:

- **Globalization**
- The ever present impact and development of **information technology**
- The complexity of today's business environment with its myriad of reporting **rules and regulations**
- The **accelerating pace of change**.

In our own field of Family Law there are a number of factors which if present can add an element of complexity to property matters that might otherwise not be present.

Wilson and Calabro, in a comprehensive paper on this topic in 1995, identified a number of those factors and their list warrants repeating here:

- “
- Large **number of entities** in the corporate structure;
 - Involvement of **off-shore entities**;
 - **Minority shareholding** of the parties;
 - **Specialised nature** of the properties;
 - Involvement of **third parties**;
 - Involvement of **transactions** which have the effect of **reducing the available property for distribution**;

- **Defects in the accounting records;**
- **Lack of co-operation** by the parties”.

Aspects of non-disclosure and hiding of assets are of course integral to a number of the factors listed and other factors that may give rise to complexity include the impact of taxes and revenue considerations, particularly capital gains tax.

The cases we deal with reflect the reality of today's business world.

UNDERSTANDING BUSINESS OPERATIONS:

The oldest saying in financial analysis is “figures don't lie but liars can figure”. (Forward to third edition of Financial Statements Demystified (**Hey-Cunningham, 2002**). The principles cited under this heading have generally been extracted from this readily understood text.)

- **Financial statements** primarily present the stories of enterprises such as businesses or investments in dollar terms.
- The **balance sheet** is a snapshot of the assets, liabilities and owners interest (equity) in the business at a particular point in time – whereas the profit and loss and cash flow statements show the history (in summary) of what has happened between two balance sheet dates.
- The **profit and loss statement** shows revenue less expenses and how the owners' interest in the business has changed between the two balance sheet dates due to trading.
- The **cash flow statement** shows cash in and cash out, and reveals how the cash position has changed between the two balance sheet dates.

- Some national accounting standards are renaming the balance sheet as the **“Statement of Financial Position”** and the profit and loss statement as the **“Statement of Financial Performance”**.
- Different **methods of accounting** will give different accounting results. For instance a cash basis (cash transactions only) will differ from an accruals basis which takes into account billings and expenses incurred rather than paid in cash.
- Matters may often have to be structured in certain ways to meet legal requirements but **the legal form does not necessarily show the reality of the situation**. An example of this is where consolidation is used to present financial information for the amalgamation of a number of different entities, typically companies.
- The legal entity is the individual entity. The consolidated group as such has no legal substance. However the **economic reality is the whole group**. So the substance is to present financial statements for the group.
- **“Creative Accounting”** is the calculation and presentation of financial information in a manner which makes the entity look financially healthier than it really is. This involves structuring a situation or financial transaction within a form that hides the true situation – the difficulty in this situation is that the legal form can be so effective that there is little or no disclosure in the accounts to alert you to a situation or transaction of importance in understanding the true financial position of the entity. Progressive changes to accounting standards have reduced the opportunities for creative accounting.
- Accounting rules can differ throughout the world however there is increasing commitment to **consistent accounting standards**.
- **Accounting rules** generally consist of a combination of Government law and regulations, usually under the corporations law, accounting standards, stock

exchange requirements for listed companies and, finally, reputable texts and precedents.

- Generally **company law and accounting standards** require a director's report, director's declaration/statement, auditors report, profit and loss statement, balance sheet, cash flow statement and notes to the accounts.
- Generally **annual financial statements** must include a note to the accounts explaining all significant accounting policies – this information assists the reader when comparing accounts over time and with another entity, as allowance can be made for differing policies when assessing performance.
- The **director's report** (primarily public companies) generally includes information on the directors, profit earned, dividends, review of operations, significant changes in the state of affairs, events subsequent to financial year end and likely developments.
- The **auditors report** provides the auditor's opinions on the truth and fairness of the financial statements. Any qualified opinions should be carefully considered. Generally only public companies are required to be audited.
- The **director's declaration / statement** gives the director's opinion on the truth and fairness of the company's and groups accounts and on the company's ability to pay its debts as and when they fall due.
- The **balance sheet** summarises the shareholders equity, assets and liabilities. Assets and liabilities are classified as current or non-current based on change or usage within (current) or after (non-current) twelve months of the balance sheet date. A significant amount of information is contained in referenced notes to the accounts.
- Besides information on the profit and loss statement balance sheet and cash flow statement, the **notes to the accounts** provide information on matters

such as significant accounting policies, contingent liabilities and future commitments.

- **Assets** are generally valued at cost in financial statements whereas the relevant value to users of financial statements is market value (and this is significant in the Family Law context).
- **Consolidation** is a method of recognising the reality that organisations frequently function through more than one legal form. At law each entity is a separate legal structure and, unless there is some legally binding obligation, the collapse of one does not necessarily mean the other will also collapse. But when viewed in terms of the substance of the situation, the separate legal entities are part of one larger enterprise. Consolidation enables this to be recognised. Basically, consolidation is the aggregation of all the assets, liabilities, profits and cash flows of the whole group. It means presenting the financial statements as one group.

CONTROL:

The key concept in the consolidation accounting standard is control. An entity is consolidated if it is controlled. Control means 'the power to govern the financial and operating policies of an enterprise so as to obtain the benefits from its activities' (International Accounting Standard 6).

WHAT IS A FORENSIC ACCOUNTANT?

A forensic accountant is an expert (in terms of qualification and experience) who has mastered accounting and who is able to apply such expertise to assist lawyers, clients and the courts to understand and apply accounting and financial issues to the law and matters in dispute.

A forensic accountant also has "extensive experience in investigations to determine solutions to disputed accounting matters, to write expert reports on their investigation, and to appear in court as expert witness" (**Telpner and Mostek, 2003**)

WHEN DO YOU NEED A FORENSIC ACCOUNTANT?

- Clearly not every separation requires a forensic examination.
- Generally you just know from experience when to engage a forensic accountant.
- When litigation revolves around facts that require interpretation and discovery of accounting matters, development of accounting issues, accounting opinions or expert opinion on accounting issues, then the engagement of such an expert is signalled (**Telpner and Mostek, 2003**).
- In complex cases involving a number of corporate entities or trusts, a forensic accountant may be required to assist in unravelling the financial structure, lifting the veil to identify the true financial position of a party or parties and to value such interests.
- Similarly, where there is specific knowledge of non disclosure or a high degree of suspicion that all income and/or all assets of the other party have not been discovered then a forensic examination should be undertaken.
- The early engagement of a forensic accountant may, in the right circumstances, save the lawyer time and the client money.
- The role of the forensic accountant as shadow expert goes beyond simply giving expert evidence (where permitted by the court) as the expert may be required to assess and advise in relation to the strengths and weaknesses of the other party's case, assist in devising strategies to deal with the other party's arguments and assess and respond to the strengths and weaknesses of the other expert's report.

- Forensic accountants may also be used to comment on proposed terms of settlement including taxation and capital gains issues and business break up.

WHAT SKILLS DO FORENSIC ACCOUNTANTS OFFER?

- A forensic or investigative accountant in Family Law has special expertise or experience in unravelling complex financial structures and valuing differing business entities or pinpointing discrepancies in financial statements requiring further clarification and then carefully framing questions or requesting particular documents or pursuing lines of inquiry that might assist in clarifying these issues and discrepancies.
- The forensic accountant then usually encompasses his or her rationale and conclusions in a report or reports which are prepared to assist the parties in resolving matters or to assist the court in making findings or reaching conclusions on matters for determination under the *Family Law Act*.

The experience and knowledge of a Forensic Accountant in financial analysis is often invaluable in terms of general advice and structuring a settlement.

COMPLEX BUSINESS ENTITIES: - (HOW THEY ARE COMMONLY DIVIDED UP INTO HOLDING, TRADING AND INVESTMENT ENTITIES)

- In seeking to analyse or value the business interests of the husband and wife in Family Law matters, one is often confronted with a complex group business structure comprising a number of different entities in which one or both of the parties has an actual or contingent interest
- Such **group structures** can include a number or all of the following entities:
 - Proprietary companies
 - Unlisted public companies
 - Unit trusts

- Discretionary trusts
 - Partnerships of individuals
 - Joint ventures of companies or trusts
 - Superannuation funds including self managed funds
 - Offshore entities
- Adding to the complexities of group structures are circumstances where either or both of the husband and wife hold different or **varying equity interests in a number of the entities** that comprise the group. Further in the case of discretionary trusts, the interests of the parties, which usually include their entitlement to participate in income distributions and capital distributions are contingent upon the exercise of the discretion of the trustee, (whom one or either of the parties may be able to influence or control).
 - In a number of group structures there may be **persons other than the husband and the wife** including other family members and non family members who **hold an equity or interest** in one or more of the entities that comprise the group. These are additional factors that can give rise to difficulties when one is required to investigate and value the parties' interests in such a group.
 - The **historical reasons why complex group structures evolve** can vary and may include one or more of the following requirements:
 - Income tax planning
 - Family estate planning
 - Asset protection
 - Business succession planning
 - Other complex group structures can evolve for no specific reason other than as **“bolt on” entities** added as a business or number of businesses develop

and expand. For instance, some individual or entity may purchase another entity with an existing business.

HOLDING COMPANIES:

- Well before the emergence of unit trusts, discretionary trusts and self managed superannuation funds, a typical group structure would include a **dormant holding company** in which family shareholders were issued shares in their required percentage interests.
- The holding company would then hold all the issued shares in one or more trading or operating subsidiary companies. In other words, they are what is known as **wholly owned subsidiaries**.
- In addition to the shares held in the subsidiary companies, the holding company may or may not hold **other passive assets** such as real property, listed public company shares, cash deposits etc. But generally the holding company and its assets were not exposed to the usual trading risks.
- It was not uncommon for either estate planning or tax planning purposes, that the issued **shares** in the holding company held by various family members would be of **different classes**, eg “A” class, “B” class or “C” class, or perhaps redeemable preference shares.
- The different classes of shares would usually have **varying rights, entitlements or privileges** attaching to them which would allow flexibility in respect of voting rights, the payment of dividends and the distribution of assets on the winding up of the company.
- A common estate planning strategy was for the shares held by the parents or controlling family members to have particular rights that gave them control of the company during their lifetime but these particular “**control rights**” would

“collapse” or be extinguished upon their death, thereby transferring voting control and / or asset value to their children.

- This type of family arrangement can create their own difficulties when such “controlling” shares or alternatively, the shares that at some future date will have their value significantly enhanced, have to be **valued in Family Law proceedings**.
- In these circumstances one should carefully consider the relevant provisions in a company’s **Memorandum and Articles of Association or its Constitution** to determine exactly what rights, entitlements or privileges attach to different classes of issued shares.
- Alternatively it may be necessary to review the **company’s minutes** resolving to issue different classes of shares to ascertain what particular rights, entitlements or privileges attach to particular shares that are to be valued.
- One must be alert when there are issued shares of varying classes to be valued, as not having regard to those specific rights, entitlements and privileges can result in a totally erroneous value being determined.

SUBSIDIARY COMPANIES:

- If the subsidiary or subsidiaries are wholly owned by the holding company, it is then a matter of valuing each subsidiary by applying the appropriate valuation methodology and then adjusting the book value of the subsidiary companies shares in the holding company’s balance sheet to their revalued amounts before valuing the holding company or a particular holding of issued shares in the holding company.
- If there are minority shareholders in a subsidiary company, outside the family then allowance has to be made for the minority interest shareholding when valuing the holding company’s shares in that subsidiary.

ASSET PROTECTION:

- In addition to the estate and tax planning purpose of holding companies, a further purpose in having such companies passive or non-trading was to shelter their assets from the usual day to day trading risks.
- If for instance, a particular trading subsidiary became insolvent and had a liquidator appointed, the valuable passive assets or investments held by the holding company would, if proper planning had occurred, be protected from the claims of creditors of the insolvent subsidiary company.
- A variation of the traditional holding company-subsidary company structure would be where the only assets owned by the holding company were the shares in two or more subsidiary companies one of which was a designated passive investment company. This particular “subsidiary” company would hold such assets as real property (including in instances the business premises), public company shares, cash deposits and so on).
- Again if proper planning has occurred the assets of the investment subsidiary would be sheltered from claims by the creditors of a failed trading subsidiary.
- When valuing subsidiaries of different types, due consideration has to be given to the appropriate valuation methodology to adopt to value each subsidiary or the shares in the subsidiaries.
- For example, a capitalisation of maintainable earnings or a discounted cash flow approach may be appropriate for trading subsidiaries whereas a net asset backing or capitalisation of maintainable dividends approach may be relevant to an investment or otherwise passive entity.

TAXATION ISSUES:

- With the company income tax rate of 30% now considerably lower than the top marginal income tax rate of 48.5% (including the Medicare levy) for individual taxpayers and also offering franking credits on dividends paid to shareholders, proprietary limited companies have in recent times regained favour as holding, trading or investment entities.

DISCRETIONARY TRUSTS AND HOW THEY OPERATE:

- Many family businesses operate through a discretionary trust which can be used to distribute profits amongst family members in a tax effective way.
- The use of discretionary trusts as passive holding, investment or trading entities gained popularity in the 1970's.
- At that time there was very little difference between company and individual income tax rates. Also, dividends paid by proprietary limited companies were fully taxable in the hands of shareholders without offering the benefits of the franking credits available today.
- That regime had the effect of “**double taxing**” **company profits**, firstly when it was derived as company income, and secondly when all or part of the company net income was paid to shareholders as dividends.
- Discretionary trusts offered a number of **advantages** including:
 - **No primary tax** at the trust level if the net income of the trust was distributed
 - **Total flexibility** as to which trust beneficiaries received trust income distributions and which could vary from year to year
 - Similar flexibility regarding **distributions of capital** from the trust to beneficiaries

- **Estate planning benefits**
 - The scope to include as **trust beneficiaries a whole range of individuals** who may or may not participate in distribution of trust income or capital which would be dependent upon the exercise of the trustees discretion
 - **Asset protection and business risk protection** by the use of a corporate trustee
 - The capacity of the person / family member/s to **maintain control** by either controlling the corporate trustee or having the power of appointment under the trust deed or both
- What emerged was group business structures comprising a number of **discretionary trusts**, which had the same functions and purpose as the holding company / subsidiary company structures.
 - These structures included “**holding**” **trusts** whose activities were confined to investment and/or holding other passive assets. As well there were trading trusts that would be exposed to normal trading or business risks but limited this exposure by the use of a proprietary limited company as trustee.
 - As company income rates fell and the benefits of franking credits were recognised, a further strategy introduced into group business structures was to include as a trust beneficiary, **a proprietary limited company** that would only be taxed at the company tax rate.
 - This allowed further flexibility by allowing the **rate of income tax** on the net income of the trust to be “capped“ at the company tax rate but at the same time permitting the tax rates applicable to individuals at the lower thresholds to be accessed.
 - However in Family Law proceedings, discretionary trusts can create their own particular **valuation issues**.

- For instance a husband or wife may be named as a beneficiary of a discretionary trust and they may have participated in income distributions in prior years but whether they participate in either income or capital distributions in the future is at the trustee's discretion.
- Further they may or may not have some influence over the trust at the corporate trustee level, either as director or voting shareholder.
- A party may have the Power of Appointment under the Trust Deed which gives him or her effective control over the trust, including the power to remove and replace the trustee.

See **Attachment A** as an illustration of the complex business structure of a group entity.

VALUATION ISSUES IN COMPLEX BUSINESS STRUCTURES

Having investigated and ascertained the group business structure that is the subject of the valuation assignment, it is then necessary to determine the appropriate valuation methodology to apply to each entity within the group, and also to value the separate interests of the relevant parties when there are external parties who also hold interests in one or more of the entities.

Valuation methodologies may include a number of different approaches and considerations, for example:

- (a) capitalisation of estimated maintainable earnings or a discounted cash flow approach for profitable trading entities,
- (b) a net asset value approach for holding and investments entities.

- (c) a net asset value methodology may also be considered appropriate for a trading entity with substantial assets but which operates at a small profit or possibly a loss.
- (d) when the net asset value approach is the appropriate basis one should give further consideration as to whether the entity should be valued on a “going concern” basis or a “liquidation” basis, that is where the costs of assets realisation and related taxation costs should be taken into account.

If one of the earnings based methodologies is appropriate, further consideration has to be given to a range of factors relevant to each entity to determine the capitalisation rate, EBIT (estimated maintainable earnings before interest and tax) multiple or discount rate to apply to the entity’s maintainable earnings or future cash flows.

Where one or both of the parties interest or equity in the entity or entities is a minority interest, consideration has to be given to further discounting the value of their interest or interests for lack of control and lack of negotiability of their interest.

In companies, unit trusts and superannuation funds the parties’ interests are usually ascertainable by reference to their particular shareholding, unit holding or member’s benefits respectively.

Valuing interests in discretionary trusts can provide some difficulties as a beneficiary’s entitlement to income or capital distributions is usually at the discretion of the trustee which is normally exercised on a year by year basis.

While there may be no particular difficulties in valuing the business operated by or the investments held in a discretionary trust, the value of the interests of a particular beneficiary can present difficulties.

Matters that may be taken into account can include:

- historical information of distributions to a beneficiary in prior years;
- the range of beneficiaries, in particular, other family members and outside parties;
- provisions of the Trust Deed that place certain restrictions on distributions to beneficiaries;
- any control or influence the relevant party may have over the trustee, in particular, a directorship and/or shareholding in a corporate trustee;
- who has the Power of Appointment over the trust.

It may be appropriate to include in the Valuation Report details of or reference to the foregoing matters and allow the Court to take those factors into consideration in its determination.

SOURCES OF INFORMATION RE PARTIES' INTERESTS

Information sources regarding the various entities in a group business structure and the equity or interest held in each entity by the relevant parties can include:

- Financial Statements, in particular, Balance Sheets
- Income Tax Returns
- Company searches at the Australian and Investments Securities Commission (ASIC)

- Company Share Registers
- Unit Trust Unit Registrar
- Memorandum and Articles of Association or Company Constitution
- Trust Deeds (including Discretionary Trusts, Unit Trusts and Superannuation Funds)
- Partnership Agreements
- Joint Venture Agreements
- Company Minutes (re issues of shares)
- Titles Searches

See **Attachment B** regarding documents and information that can be required for the financial analysis of a business entity.

WHAT QUALITIES OR ATTRIBUTES SHOULD A FORENSIC ACCOUNTANT HAVE?

- An essential prerequisite is competence and experience. This, of course, includes a thorough understanding of the issues raised in family law proceedings and valuation issues together with knowledge of and experience with the subject matter and knowledge of court processes and procedures. Stature and a good reputation are also important (**Bartfeld, 2002**).
- Forensic accountants “*must have command of and access to business information, financial reporting systems, accounting and auditing standards and procedures, evidence gathering and investigative techniques and litigation processes and procedures*” and “*they need to pragmatically deal with the reality underlying a broad range of facts, figures, books of account and business records*” (**Davidson and English, 2005**).
- It is of the utmost importance that there is a good working relationship between the lawyer and forensic accountant in a particular case. The lawyer needs to

ensure that the accountant is properly briefed on the issues requiring analysis or investigation and have access to all relevant documentation.

- The expert accountant must also be available, as during the course of the litigation it will be necessary for the lawyer to communicate with the accountant about developments in the case or requirements of the process and this is facilitated by clear and accessible communication.
- The accountant needs to be able to communicate at a number of different levels. He or she will interact with the party or parties in the course of the investigation, with the lawyer or lawyers in the case of a court or joint appointed single expert and ultimately with the court itself, providing testimony and answering questions as an expert witness (either single or alternate expert where the court's permission is obtained).
- Communication skills also include the ability to give evidence without recourse to jargon and to explain complex principles in an understandable way.
- The accountant needs to have a confident and articulate but not aggressive demeanour, be used to meeting and dealing with people at all levels and experienced in writing reports and giving evidence and have the necessary resilience to withstand cross examination.
- There are two different types of reports, the first being a confidential report to the client and or lawyer and secondly an expert witness report for production to the court. The second report is usually filed under affidavit and is prepared on a "stand alone" basis in that it will not only include the expert's opinion but also refer to the information, assumptions and references on which the opinion is based. The report needs to be easy to follow and so far as practicable, written in clear readily understood English.

- Notwithstanding his or her appointment by one or both of the parties (in a single expert appointment), the primary duty of the forensic expert is to assist the Court.
- The accountant needs to comply with practice directions and rules of court pertaining to experts. If a single or joint appointed expert or as an alternate expert, then the accountant needs to adhere to strict impartiality and ensure dealings with the parties, lawyers and the court are conducted with the utmost fairness and integrity.
- The expert needs to maintain true independence from the parties and not be an advocate for the case of the person who engaged the expert.
- The Family Law Rules 2004 detail what a single or court appointed expert's report must contain (Rule 15.63) and how questions may be put to the single expert prior to trial (Rule 15.65).
- In any case, for the accountant's opinion to be sustainable it is vital that it does not rest on either inaccurate or biased information or unlikely assumptions. A balanced view of the evidence is essential. **(Bartfeld, 2002)** notes that experts must also have the ability to contemplate the possibility that they are wrong on some issues and to make appropriate concessions when confronted with contradictory evidence and furthermore that *"an ability to think on their feet is a prized commodity"*.
- Similarly with a shadow expert, integrity, impartiality and objectivity are essential if his or her opinion and report are to be of value although the shadow expert can also assist in devising tactics and responses for use by the party in the course of settlement negotiations.
- The expert also needs common sense, perception, a healthy scepticism and knowledge of life and the ways and means of people and the creative methods they can devise to hide assets.

WORKING WITH THE FORENSIC ACCOUNTANT:

- Regardless of whether the accountant is engaged as a single or alternate expert or simply to conduct a forensic investigation, it is essential that the accountant be provided with full and detailed instructions and be appropriately briefed.
- The lawyer should determine and define the precise purpose for which the report is to be prepared and provide as much relevant information as possible to assist the expert accountant, including copies of affidavits, financial statements and material subpoenaed and copies of same if available.
- In a case where the accountant is engaged to assist in locating assets, it is important that a meeting be arranged between client and accountant at an early stage of the process. This will assist in developing a rapport and further, by appropriate questioning the accountant may be able to glean significant information from the party which may assist greatly in achieving a result. It is also important that the accountant have confidence in the client's integrity and in the instructions given.
- It is also important that clear and definite arrangements be made and communicated in relation to payment of fees to the expert accountant for his retainer. There is nothing worse than for an expert to find after carrying out the work required that proper arrangements have not been put in place to ensure his or her fees are paid in a timely manner.

ETHICS AND STANDARDS:

APS II '*Statement of Forensic Accounting Standards*' and the related guidance note GN2 '*Forensic Accounting*' have been approved by both the Institute of Chartered Accountants in Australia and CPA Australia. APS II addresses issues of independence, skills and competence, reasonable care, confidentiality, professional behaviour and incorrect or misleading information and also deals with matters of quality control, the use of estimates, court imposed standards and remuneration whilst the guidance note provides guidance to forensic accountants in their undertakings as consultant accounting experts, issues of engagement, communications and meetings and reports (**Davidson and English, 2005**).

DISCLOSURE:

In proceedings for property settlement, each party has an obligation to make a full and frank disclosure of his or her financial position.

In ***Oriolo and Oriolo (1985) FLC 91-653*** the Full Family Court referred with approval to the words of **Smithers, J** in ***Briese (1986) FLC 91-713*** (delivered June 1985) that in financial proceedings each party must make a full and frank disclosure of all material facts and that such obligation is fundamental to the whole operation of the Family Law Act in financial cases and furthermore that mere compliance with Rules of Court or Practice Directions does not alter the basic principle of the need for full and frank disclosure by the parties.

Rule 13.01 of the Family Court Rules sets out a general duty of disclosure.

Each party is said to have "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."

Failure to comply with such duty may result in the court excluding evidence that is not disclosed or imposing a consequence, including punishment for contempt of court (see **Jansen** – *“Negotiating the Labyrinth of Hidden Assets in Order to Uncover and Recover Them”* – presentation to Family Law Masterclass May 2005).

Rule 13.01(2) states that the duty of disclosure starts with the pre-action procedure for a case and continues until the case is finalized.

Chapter 13 sets out a number of ways that a party is either required, or can be called upon, to discharge the party’s duty of disclosure and these include:

- (a) disclosure of financial circumstances (Division 13.1.2)
- (b) disclosure and production of documents (Division 13.2.1); and
- (c) disclosure by answering specific questions in certain circumstances (Division 13.3)

Rule 13.04 details what is required in terms of full and frank disclosure of the party’s financial circumstances including inter alia, a party’s earnings; vested or contingent interests in property (including interests in property owned by a legal entity fully or partially owned or controlled by a party); other financial resources of a party; trusts over which the party has any direct or indirect power or control; certain disposals of property in the twelve months immediately before or since separation and liabilities and contingent liabilities.

The starting point for disclosure is usually the Financial Statement (Form 13) required to be filed by a party (see Division 13.05).

The court may order a party to file an affidavit giving further particulars in relation to the party's financial affairs.

Division 13.06 requires an updated Form 13 to be filed before certain specified events such as a conciliation conference, pre-trial conference or trial if a party's financial circumstances "have changed significantly" since the initial Form 13 was filed.

Division 13.2.1 details the responsibility of parties to disclose documents which are or have been in the possession, or under the control, of the party disclosing the document; and are relevant to an issue in the case.

Division 13.13 provides for objection to production of a document including where a party claims privilege from production.

Division 13.14 sets out the consequences of non disclosure of a document including the possibility that the court may stay or dismiss all or part of the party's case.

Division 13.15 requires a party to file a written undertaking that to the best of the party's knowledge and ability, the party has complied with, and will continue to comply with, the duty of disclosure; and acknowledging that a breach of the undertaking may be contempt of court.

Division 13.26 makes provision for service of specific questions under certain conditions.

Division 13.4.2 sets out the procedure for obtaining the production of documents by a person who is not a party to a case.

Division 13.33 provides that a requesting party may serve a Notice of Non-Party Production of Documents (Form 12) on a non-party, requiring the non-party to produce to the requesting party a document or documents relevant to an issue in the case; in the possession, or under the control, of the non-party and that the non-party may be required to produce at the trial. However it should be noted that a Form 12 may be served only if there is no other reasonably simple and inexpensive way of proving the issue sought to be proved by the document.

Division 13.39 makes provision for objection to production of some or all of the documents by the non-party, for instance on the grounds of privilege, confidentiality or insufficient particularity.

HIDDEN ASSETS:

WARNING SIGNS OF UNDISCLOSED ASSETS – A CHECK LIST

Following are some examples of how assets may be hidden or undervalued:

- **Failure to disclose or acknowledge cash takings or skimming cash from a business owned.** This may give rise to a false impression as to the value of the business or the party may actually have money physically hidden as cash in some undisclosed place or an inaccessible overseas bank account.
- **Assets simply “hidden”.** Whilst generally all efforts to hide assets are secretive, not all are sophisticated. For instance, burying money was not an uncommon method of hiding it in eras gone by (and no doubt still is).
- **Failure to disclose assets or resources held overseas.** An example of this involved an international pilot who on each trip overseas would make a cash deposit to a secret bank account well beyond the reach of his partner.

Similarly assets including cash can be held in unidentified safe custody boxes. Others may hide assets in offshore tax havens in “blind trusts” where there are no appointors and no specified beneficiaries.

- **Undervaluing assets** - For example, undervaluing assets in balance sheets or in self-managed superannuation funds or having outdated valuations which distort the value of a party's interest.
- **Purchasing or registering assets in the name of “friendly” parties** such as a new partner, family members or close friends.
- **Sale or transfer of business assets or shares at an undervalue** to friendly parties or with the intention of **warehousing** them until the dust settles.
- **Provision of a benefit to a related party** - For example, a new partner might have become involved in or employed by the business at an attractive remuneration and/or with other benefits conferred. Alternatively, a salary may be paid by the business or debt repaid to a non-existent employee or money paid from the business to others for services not actually rendered.
- **Failure to include a goodwill value for a business or undervaluing the goodwill factor.**
- **Failure to disclose assets acquired post separation.** Sometimes a party will assume that the other party has no knowledge of an asset acquired after separation, and simply choose not to disclose it. Needless to say, this can cause grave embarrassment if the asset comes to light.
- **Postponing contractual payments or benefits due to accrue to a party until matters are resolved.**
- **Delay in preparing information.** It is not unusual for a party to delay instructing accountants to prepare up to date financial statements which when prepared may indicate a better financial position than is being portrayed. Certainly if acting for the other party, you should endeavour to obtain access

to the most recent financial information and if necessary delay proceedings until such information is available or have a forensic accountant attend at the business and inspect source financial records to ascertain the true position.

- **Omission of loan accounts** in the balance sheet of companies or partnerships as assets due to parties and the inventive creation of loan accounts and debts and inclusion as liabilities. A further example might be the creation of a loan account by the transfer of assets to an entity at a grossly inflated value.
- **Advances made to a party or a couple by a party's family during the marriage** may suddenly become a loan repayable to the family and even where the advance is clearly documented as a loan, it may have been the intention of the party never to seek repayment and suddenly it becomes repayable and recovery is sought.
- **Omission of work in progress** in a business or partnership or undervaluing stock on hand which affects not only profit but asset value.
- **Prepayments of Tax** or non disclosure of credits arising from previous tax losses carried forward.
- **Contracts not yet performed.** A party may be a party to a contract which has yet to be performed, but be of substantial value.
- **Share options** - which have been included for instance in someone's employment package but not yet allocated, could have substantial value. (These particularly relate to company executives).
- **Bonuses** - could be based on performance in a particular year with payment deferred to a subsequent year. Whilst such bonuses may be entirely discretionary there may be more than a reasonable expectation by a party that a bonus is to be paid. Similarly a party may collude with an employer to delay pay rises or bonuses until after the divorce.

- **Diversion of Funds** - For example, a testator may choose to protect an inheritance from divorce proceedings by leaving a party's share to someone else, perhaps a sibling. The downside is that on the death of the testator the sibling will actually be entitled to that share and may decline to return any part of it when the party seeks its return.
- **Delay in signing long-term business contracts** or renewing leases until after the divorce.
- Similarly **arrangements** may be underway **for a private company to be bought out by a public company at a substantial premium** on share **values**. In such circumstances the party controlling the private company may have more than an inkling that the deal will come off further down the track and knowledge of the likely value per share based on the price to be paid for the company by the predator or white knight. That party could be expected to hurry property settlement negotiations along so as to have a settlement in place prior to the windfall occurring. The advantage to the party lies in the knowledge that party has as to the likelihood of the takeover occurring, knowledge which is most likely denied to the other party.
- **A failure to cooperate in relation to disclosure** may in itself be a strong indication that a party has something to hide. Such failure to cooperate may be part of a strategy to exhaust the resources of the other party by delaying and obstructing the proceedings. In *Briese (1986) FLC 91-713* the Trial Judge held that the husband's attitude was one of basic lack of co-operation and assistance in relation to the ascertainment of the financial facts and that the husband acted upon the basis that he was under no positive duty to endeavour to clarify his position so as to reduce or limit the expenditure of money by the wife in making the investigations.

- **Manipulation of doubtful debts and write offs.** The write offs might simply be cover ups for moneys deposited to an account other than the business account.
- **The second receipt book.** Sometimes a second receipt book is held to acknowledge cash receipts which are not then processed through the accounting system.
- Sometimes people purport to have large cash holdings on their premises and then **feign a robbery**. Reporting the incident to police and lodging an insurance claim gives the alleged loss an air of authenticity.

Whether assets can be easily hidden often depends on the type of asset you are talking about. A small amount in an everyday account is easily hidden by a few ATM withdrawals. Similarly, assets like furniture, clothing and jewellery can be hidden or moved by one spouse with the other spouse unable to locate them or prove they were taken. Investments like shares, businesses and real estate however are harder to hide as there is usually a paper trail which can be identified and followed.

TRACING ASSETS – WHAT DO YOU LOOK FOR AND WHERE?

- **The search for possible hidden assets begins with the initial client interview.** Financial circumstances and intrigue within families differ and a starting point is often the client's perception and knowledge of how the parties lived financially and of changes or events that may have occurred.
- **Establishing the client's perception of when serious matrimonial problems arose** indicates the time when there was motivation for a party to change financial patterns.
- **Subtle changes picked up by the client** such as the manner in which the family's finances were being handled, or when the atmosphere in the

household altered, may provide the lawyer and forensic accountant with a starting point for the investigation.

Jane's Story:

Among the other emotional accusations made during her divorce, Jane informed her attorney that throughout the year immediately before her separation, she had noticed that her husband, John, had changed the way he handled their finances. Bank account balances were depleted, John's pay cheques were no longer deposited regularly into their joint accounts and creditors began to demand payment on delinquent accounts. As Jane described other unusual occurrences, such as more frequent business trips for John during this time, her attorney recognized the probability that John had hidden significant assets from his soon-to-be ex-wife. Unless they are located, these assets cannot be included in the divorce settlement.

(**Michaelson, William M**, 'Divorce: a game of hide and seek?', *Journal of Accountancy* Vol 181 (3), p 67).

There can be obvious signs such as, for example, where you have been used to living a high lifestyle without money being short and suddenly the other party tells you that funds are tight and you will have to cut back on necessities.

- **Lifestyle is also often an indicator** of funds being available which may not have been disclosed or acknowledged. This is particularly so where discretionary items are purchased in a manner uncharacteristic for the party. The lifestyle of the party should be contrasted with the income which is being reported to see if there are discrepancies which require closer examination and which may indicate that unreported income is funding the lifestyle. Inquiry into unexplained lifestyle or extravagant expenditure could leave it open to a judge to draw inferences of undisclosed income. Disparity between

lifestyle and declared income is commonly used by taxation authorities as a basis for conducting audits particularly in the case of “high flyers”.

- **The starting point in terms of documents** is usually the party’s sworn statement of financial circumstances (Form 13). The details in the form 13 can be readily compared with information available from other sources such as
 - Tax returns
 - Real property searches
 - ASIC searches of shareholdings, directorships, register of charges etc
 - Balance sheets and profit and loss accounts of companies, partnerships, trusts and superannuation funds
 - Bank statements
 - Quarterly BAS statements.

Public databases are now easily accessible through technology and provide evidence of assets and transactions.

In relation to the available searches and avenues for investigating generally, see **Jansen, 2005**.

- **Income tax returns** - should provide source details of a party’s income whether derived from employment, or investment. Dividend income indicates the ownership of shares and income and capital distributions from trusts and partnerships suggest the person is an eligible beneficiary in a trust or a partner in a partnership. A claim for superannuation contributions in the tax return could lead you to a self managed superannuation fund. Tax returns from prior years should be analysed to determine the existence of prior tax

refunds. These may be significant and their disposition traced. Interest claims may point to geared investments.

- **Pay slips** - These may reveal items such as fringe benefits, voluntary contributions to superannuation and other voluntary deductions. Similarly, Income Tax Assessment Notices should be accessed.
- **Depreciation schedules may reveal an undervaluing of certain assets.** One should look at the present value of an asset acquired at an earlier time and subsequently depreciated.
- Similarly, a business may carry **assets on a balance sheet which have been depreciated** over time far below their current value. Furthermore, assets which have been fully depreciated may have been **written off the books entirely** even though the assets may still exist and be of significant value. Physical inspection of the business by a suitably qualified person would be the best way of revealing the true position.
- Similarly, with assets in a self managed superannuation fund. One needs to be very careful of **self managed superannuation funds where assets may be significantly undervalued.** (Despite requirements for trustees to regularly update valuations). To obtain a true account of an interest in the fund you need to ensure that assets such as real estate are taken into account at their current value. You may also need to take account of any CGT liability arising for the fund, if it is necessary to roll out one party's entitlement, as the sale of an asset to roll out an entitlement may trigger a CGT liability.
- **Benchmarks** – The financial performance of a particular business can be measured against benchmarks for that particular industry. The forensic accountant if sufficiently experienced would be aware of and have access to these benchmarks.

- **Personal financial statements or loan applications** – These are often powerful discovery tools in divorce. The person applying for the loan is generally likely to portray his or her financial situation in the most beneficial light to maximize the chances of securing the advance, the tendency being to include, rather than omit, assets or interests and insert the most favourable values. The loan application will often prove fruitful for cross examination and production may often be strenuously resisted.
- **Credit card statements** assist greatly in establishing lifestyle issues and discretionary spending and often provide a wealth of information when subpoenaed. Large payments or debits could warrant further investigation. Unusually high spending could be a sign of hidden assets. Statements could also provide details of travel and overseas expenditure and extravagant lifestyle including gifts (to a possible love interest).
- It is prudent to analyse **financial statements for a business over several years** to assess and demonstrate changes over time and obtain an understanding of the trends in an entity's finances.
- **Quarterly BAS statements in the current financial year should be accessed for businesses.** They should provide a mud map of how the business is travelling in the current year since the preparation of the previous year's financial statements.
- **Telephone accounts** may be telling and indicate overseas interests.
- **Websites** can provide material information including details of other businesses with which a party may be linked.
- **Passports** will show travel history of the party - as would frequent flyer information.

- **It is trite but true that it is usually easier to obtain information before separation** than after. Clients may be well advised to make copies of important financial documents, if suspicious of financial misconduct.

EXAMPLES OF NON-DISCLOSURE FROM THE CASES:

In ***Kannis (2003) FLC 93-135*** the husband had transferred some funds to a woman he had been involved with for many years.

A significant issue in the proceedings was whether in addition to monies undisclosed in foreign accounts the husband also held significant assets by way of cash, jewellery and gold bullion which he had failed to discover.

The Trial Judge made an adjustment of 10 per cent of the ascertained pool to make allowance for the findings related to undisclosed assets.

An interesting aspect related to the appointment of the parties son as next friend for the husband on the basis of his diminished mental capacity. The wife was suspicious that the husband's asserted dementia was a ruse to avoid him having to give evidence as to the whereabouts of the alleged missing assets.

The court also held that whether the non-disclosure is wilful or accidental is beside the point.

In ***Efthimiadis (1993) FLC 92-361***, The Full Court found that the evidence of the wife's earnings was quite inconsistent with her outgoings and the business records she produced were virtually useless.

The Trial Judge also held that the husband understated his income. He also concluded that the husband had \$5,000 in a safe and rejected the husband's claim that he had loaned his brother \$10,000.

The Trial Judge used statements made by the wife to her bank in relation to the takings and value of her business to discredit her evidence. He also found an alleged unregistered mortgage purportedly entered into by the wife to be a sham, holding that no loan had been made.

In ***Weir (1993) FLC 92-338*** it was alleged by the wife that her accountant in valuing a relevant company had discovered what he considered to be discrepancies in the accounts of the company involving understatement as to sales which might have impacted on the valuation of the business.

The case also involved evidence being given by the parties' son that it was the husband's practice to pocket cash payments without recording them in the normal course of events.

The wife's counsel submitted that the husband as an ongoing process, deliberately incorrectly coded entries in order to, in effect, mask his misappropriation of cash from cash sales. In the particular facts of the case the Trial Judge was not prepared to make a positive finding on that aspect. However the full Court held that where as in this case there is clear evidence of non-disclosure, "the court should not be unduly cautious about making findings in favour of the other party."

Suiker (1993) FLC 92-463. The husband applied for redundancy without informing the wife. The redundancy entitled him to benefits of approximately \$160,000. The Full court held that in the circumstances applying the husband was under a duty to

disclose to the wife before the Consent Order was made that he had applied for redundancy and what his prospective benefits would be.

Morrison (1995) FLC 92-573. The Full court held that there was wilful non-disclosure by the husband of the true nature of his arrangements with a third party in relation to the sale of an abalone licence and that the failure of the husband to disclose the true position robbed the wife of the opportunity of litigating the issue of the true value of the licence and that the non disclosure was of such magnitude as to amount to a miscarriage of justice.

Mitchell (1995) FLC 92-601. The husband embarked on a financial restructuring involving establishment of a family trust and superannuation fund. The effect of the restructuring was to reduce the net value of the net assets by borrowing funds against the matrimonial home and moving the borrowed funds into superannuation which could (at that stage) only be taken into account as a resource. The Full Court while acknowledging the apparent unfairness that the rearrangement presented to the wife felt that the Trial Judge had gotten around the difficulty by applying s.75(2) to give the wife a substantial adjustment in her favour.

Malpass and Mayson (2000) FLC 93-061. The Trial Judge, Mullane J, found that the husband had significantly understated the income of a number of his companies. He also rejected the husband's evidence that a number of his financial records were stolen from his accountant and was not satisfied that the 1997/98 records provided by the husband were reliable. The husband failed to call the accountant as a witness and the Full Court held that such failure of the husband to call the accountant was an appropriate matter for the Trial Judge to rely upon when drawing adverse inferences against the husband. The Full Court noted that the findings of the Trial Judge in respect of substantiated undisclosed income were based on an acceptance of the

wife's evidence of the husband's statements, a rejection of the husband's denials, the husband's history in cash dealings, the discrepancy between details provided to the court as compared to the details provided to the lending institution, and the views of the husband's valuer and held that there was clearly evidence upon which the Trial Judge could properly make such findings.

The husband's valuer had given evidence that caravan park occupancy rates disclosed in the books of account of the husband were "less than one would expect to achieve with fair or average management".

SOME NON-DISCLOSURE TYPES

- The blatant deceiver
- The secretive business owner
- The person of straw (with the benevolent relative/partner)
- The hopeful investor (all the capital has been applied but the results are not yet apparent)
- The small business operator with the big contract pending
- The international money mover
- The warehouser (the assets are safely parked and maintained)
- The obstructive procrastinator
- The puppet, sham or alter ego (the party is the defacto owner directing another on a day to day basis)
- The money launderer

DIFFERENTIATING BETWEEN LEGITIMATE ASSET PROTECTION STRATEGIES AND ATTEMPTS TO AVOID THE FAMILY COURT'S JURISDICTION:

- Each of the methods of colouring, distorting or avoiding disclosure referred to above involves an element of manipulation or dishonesty and an attempt to defeat the Court's jurisdiction by hiding assets or falling short of the standard of disclosure required of parties.
- On the other hand, there are advisers who see a legitimate role in minimizing the impact of separation on family businesses and dealing as effectively as possible with the consequences of separation.
- Furthermore, the *Family Law Act* itself provides some means of protecting assets in the event of marital separation.
- Dealing firstly with business arrangements, the use of trusts has been prolific in the context of family business over the years, both for tax reasons primarily and as a device to harbour family assets from creditors.
- The Family Court "has substantial power to effect the assets and activities of a trust in circumstances where one of the parties to the marriage, the husband or the wife, has effective control of the trust". (**Kennedy, 1996**).
- Part VIIIA of the *Family Law Act* introduced in December 2000 enabled parties to an intended marriage or who are married, or even after divorce, to enter into a binding financial agreement, the effect of which was to exclude the jurisdiction of the Family Court to make orders for property settlement and/or spouse maintenance for so long as the agreement remains in force.
- Included in the categories of those who would most benefit from a prenuptial agreement (**Doolan, 2001**) were the following:
 - Where one party brings substantial assets to the marriage which outweigh those of the intended spouse;
 - Where there is an ongoing business enterprise or farm which might otherwise have to be sold or divided if the marriage breaks down;

- For parties entering into second marriages, and/or who may have adult children from a prior relationship they wish to protect financially;
- Where there are significant superannuation, employee share/option schemes or trust entitlements to be protected;
- Where there is a potential for one party to inherit significant wealth from a parent or parents;
- Where there is a particular family asset which both parties agree should be excluded from the divisible pool.

Other reasons might include to protect assets which have been in a family for generations or to offer a party or parties the 'certainty' of a formal agreement rather than to expose them to the discretion of the Court.

- Section 90F of the *Family Law Act* specifically retains the power of the Court to disregard agreements if a party is unable to support himself or herself without an income tested pension, allowance or benefit.
- Binding financial agreements offer certain advantages as noted by **Hearl and Lucs, 2005** including the following:
 - no court appearance is required;
 - they can be used at any stage of a relationship;
 - they can be used after separation to effect an interim distribution of property;
 - parties may be able to use binding financial agreements to rearrange their affairs without incurring stamp duty;
 - parties may be able to protect assets if one party is taking on or increasing the risk of a business failure;

- binding financial agreements in respect of spousal maintenance can be a useful device particularly for high income earners seeking to exclude future payments of spousal maintenance.
- A binding financial agreement can also bind an estate.
- There are also of course certain disadvantages including the fact that they do not have to be considered “just and equitable” or scrutinised by the court which may at least in theory make them easier to set aside than consent orders and increase the potential exposure for lawyers in drafting financial agreements after separation.
- Following the well-publicised case of *ASIC v Rich* amendments were made to the *Family Law Act* in April 2005 designed to prevent people using binding financial agreements to defeat the claims of creditors.
- It is beyond the scope of this paper to further explore the intricacies of binding financial agreements but suffice it is to say that provided the agreements meet the requirements of the *Family Law Act* then parties can effectively “contract out” of the Act in so far as it deals with property and/or spouse maintenance rights (**Doolan, 2001**).
- A gift by a parent of a party to their son or daughter prior to or during the marriage can be best protected by means of a formal loan document accompanied by appropriate security or by a binding financial agreement being entered into by the parties noting the contribution and excluding it from the pool of assets available for division on separation.

OTHER AVAILABLE TOOLS TO FIND OR PRESERVE ASSETS

DISCOVERY AND INSPECTION

Proper use of discovery is a critical aspect of assessing the strengths and weaknesses of a case.

Forensic accountants with their expert knowledge and experience can be of invaluable assistance in uncovering accounting, tax and financial facts and issues in the discovery process.

SPECIFIC QUESTIONS

Forensic accountants can also be of great assistance in relation to framing specific questions as part of the discovery process.

SUBPOENAE

In *Lucas Industries v Hewitt (1978) 18 ALR 555* it was stated (at p 570) that:

“The purpose of the process of 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 are required to give evidence.”

Part 15.3 of the Family Law Rules details the requirements in relation to the issuing of subpoenae some of which have changed significantly with the introduction of the 2004 rules. If the subpoena properly complies with the rules including in relation to service then it must be complied with and Part 15.36 provides that non compliance may result in the issue of a warrant for the arrest of a person who fails to comply.

Part 15.19 imposes certain limitations as to time for issuing a subpoena and in the case of an application for Final Orders a party may only ask the court to issue a subpoena after the issue of a trial notice.

Part 15.21 limits the number of subpoenae that a party (other than the Child Representative) may seek to issue to 3 for an Application in a Case or a Child Support or Maintenance Application.

Subpoenae then are a most useful tool available to parties or practitioners to assist in production of records which may divulge hidden assets.

Practical examples of where service of a subpoena may be useful include the following:

- **Bankers or financial institutions used by a party** (bank statements, loan applications, bank officers' diary notes, correspondence, internal memoranda, supporting documents and files).
- **Accountants** – the accountant's file is generally not subject to professional privilege so the entire file including working papers and memos can be subpoenaed. Information can be sought on files regarding the party and

anyone having dealings with him or her. Where the respondent alleges he is managing an asset on behalf of friends or family, telephone attendance records and details as to whom the account issues could be interesting. Other information such as minutes of meetings, changes to structure or significant changes to loan accounts or treatment of assets can be helpful.

- **De-facto spouse or partner** – records may show details of moneys or property received or paid on behalf of the partner by the party and moneys held on behalf of the party by the partner. Attempts at avoiding the Family Court can involve resources being transferred to the new partner or the partner becoming involved in the business at an attractive salary and with other benefits conferred. The forensic accountant may wish to examine information back over several years from this person.
- **The compliant family member** – records of value may include details of day to day operations of entities which the party is controlling even if not the legal owner. Evidence of loan agreements and gifts over a period of time or trust distributions allocated but not paid may be helpful.
- **Credit card provider** – these are invaluable in providing evidence of lifestyle and revealing payments for the benefit of third parties, overseas travel etc.
- **Solicitors** – trust and office ledger records may be revealing and together with non family law files such as conveyancing, tax planning and commercial files may be relevant. Commercial files may reveal advice as to structuring and sales and purchases of assets.
- **Business organizations and employers** – particularly for employment and contractual arrangements including details of any changes in salary package or salary sacrifice.

MAREVA INJUNCTIONS

A Mareva injunction is an order which temporarily freezes assets to prevent dissipation of the asset within the jurisdiction of the court, or removal of the asset from the court's jurisdiction.

Division 14.05 of the Family Law Rules sets out circumstances where a party may apply for a Mareva order restraining another person from removing property from Australia, or dealing with property in or outside Australia.

- Under Division 14.05(1) a party may apply for a Mareva order if:
 - (a) the order will be incidental to an existing or prospective order made in favour of the applicant; or
 - (b) the applicant has an existing or prospective claim that is able to be decided in Australia.

- Division 14.05(2) makes it obligatory for the applicant to file an affidavit in support of the application which includes the following:
 - (a) A description of the nature and value of the respondent's property both inside and outside Australia;
 - (b) The reason the applicant believes the respondent's property may be removed from Australia and why dealing with the property should be restrained.
 - (c) A statement of damage likely to result if an order is not made.
 - (d) A statement identifying anyone other than the respondent who may be affected by the order and how they may be affected.
 - (e) The amount and basis of the substantive claim and if the application is made ex parte details of a possible response to the claim.

In ***Waugh (2000) FLC 93-052*** the Full Family Court held that before the Family Court can make an interlocutory injunction, it must be satisfied that a risk of disposal of property in order to defeat a judgment is evident.

The Full Court relied on the principles of Mareva injunctions adopted by the High Court in ***Jackson v Sterling Industries Ltd (1987) 162 CLR 612*** where in his majority judgment Deane J relying on an earlier statement of principle by Lord Denning MR stated that:

“As a general proposal, it should now be accepted in this country that a Mareva injunction can be granted ...if the circumstances are such that there is a danger of [the defendant] absconding, or a danger of the assets being removed out of the jurisdiction or disposed of within the jurisdiction, or otherwise dealt with so that there is a danger that the plaintiff, if he gets judgment, will not be able to get it satisfied.”

The usual undertaking as to damages is required.

A useful guide to applications for Mareva injunctions can be found in **Sullivan, 1992**.

ANTON PILLER ORDERS

An Anton Piller order is a mandatory injunction requiring the respondent to permit the applicant to enter the respondent's premises to search for, inspect and remove documents or things specified in the order.

Effectively, an Anton Piller order is one for the seizure of evidence to enable a party to be able to prove the existence of an undisclosed asset.

The Anton Piller order derives from the decision in ***Anton Piller KG v Manufacturing Processing Ltd*** [1976] Ch 55 at p 62, where Ormrod LJ specified three essential pre-conditions:-

- 1) There must be an extremely strong prima facie case;
- 2) The damage, potential or actual, must be very serious for the applicant;
- 3) There must be clear evidence that the defendants have in their possession incriminating documents or things and there is a real possibility that the defendants may destroy such material before any application inter partes can be made.

Division 14.04 of the Family Law Rules provides for a party to apply for an Anton Piller order.

The order may:

- (a) require a respondent to permit the applicant either alone or with another person, to enter the respondent's premises and inspect or seize documents or other property;
- (b) require the respondent to disclose specific information relevant to the case; and
- (c) restrain the respondent for a period from informing anyone other than his lawyer that the order has been made.

The applicant may apply for an Anton Piller order without notice to the respondent (and it is invariably made on this basis).

Division 14.04(3) sets out the requirements of the affidavit to be filed in support of an application for an Anton Piller order including the reason the applicant believes the respondent may remove, destroy or alter the document or property unless the order

is made and a statement about the damage the applicant is likely to suffer if the order is not made.

Otherwise the affidavit should include a description of the document/property to be seized / inspected; the address of the premises where the order is to be carried out; a statement about the value of the property to be seized and if permission is granted, the name of the person who the applicant wishes to accompany them to the respondent's premises.

If an order is made, the applicant must serve a copy of the order on the respondent when the order is acted upon (Division 14.04(4)).

General conditions/undertakings which might be required or imposed when an order is made include:

- “2. Execution during business hours;
3. Service and execution of order supervised by a solicitor other than a member of the firm of the solicitors for the applicant;
4. Applicant may be required to give an undertaking that independent legal advice will be made available to the occupier;
5. Solicitor supervising execution to prepare a written report about the execution and serve it on the respondent and present it to the court as soon as possible;
6. Inventories of items seized should be prepared and occupant given permission to check inventory and given a signed copy of the inventory before items are removed;
7. Material seized may be required to be kept by an independent person to be held without disclosure to the applicant until inter partes hearing of the matters in issue.

8. Safeguards should be included in the order that will prevent applicants in person searching for and examining the documents of a trade rival.”
- (These conditions and undertakings are extracted from a **Federal Court Practice Note issued 8 April 1994**).

The application should include the orders proposed in detail and in relation to this and Anton Piller orders generally reference is made to a paper entitled “Searching for Gold etc” prepared by **The Honourable Justice C E Martin** of the Family Court of Western Australia to the 9th National Family Law Conference in Sydney 2000 where additional points noted include the following:

- The applicant must give a written undertaking as to damages.
- Because the orders are sought ex parte, the applicant is required to disclose to the court all matters which are material to the court’s decision whether or not to grant the relief sought.
- The court should be advised who will actually attend the execution of the order and it is suggested that if a forensic accountant is involved then he or she should attend.
- Upon providing the order to the other party, it should be explained in the presence of a witness, and the party invited to contact his or her solicitor to invite their attendance. If the solicitor elects to attend, the inspection ought not to proceed until the solicitor arrives.
- The other party’s solicitor should be allowed to identify privileged documents which should be set aside and not inspected.
- All documents to be removed should be squarely caught by the order and itemized in an inventory which, when complete, should be signed by both solicitors as a correct record.

- The other party's solicitors should be present at court when the documents are lodged.
- After the order has been executed, an affidavit should be filed setting out the details of the inspection, and annexing a copy of the inventory.
- In regard to execution, in the ***Anton Piller*** case cited above, **Lord Ormrod** said at p 62:-

“Great responsibility clearly rests on the solicitors for the plaintiff to ensure that the carrying out of such an order is meticulously and carefully done with the fullest respect for the defendant's right of applying to the court, should he feel it necessary to do so, before permitting the inspection.”

Examples from the cases of ***Anton Piller*** orders being made include the following:

- ***Mazur (1992) FLC 92-305***

An Order was made in circumstances where the only property was a briefcase containing \$20,000 in a closet in the former matrimonial home. The husband denied the existence of the briefcase and money. The wife applied for an order and what tipped the scales in favour of making the order was evidence that the husband had previously disclosed in a statement to the Housing Commission that the parties had around \$20,000 in savings and the fact that this amount of money was the entire property pool of the parties. The court held that it is essential for the court to take steps, when it is necessary, to permit property to be ascertained and to be retained.

- ***Talbot (1995) FLC 92-586***

The wife made an application for an order against the husband and 3 companies and against his solicitor (and fellow director/shareholder of the 3 companies). The wife had been fraudulently induced to enter into consent orders. It was found, based on the elements of the Anton Piller test, that

they were made out in relation to the husband and one corporation but not the solicitor or the others. It was held by **His Honour Justice Lindenmayer** that to grant an order against someone who is not, and will not be a defendant in an inter partes application would be “to introduce an unwarranted extension of the field of operation of what is, in any event, a very draconian procedure.”

Complex accounting and financial issues will always pose problems and issues for lawyers dealing with property settlement on separation. Forensic accountants have a real role to play in assisting lawyers, not only in unravelling complex business structures and arrangements, but in determining the true extent of the asset pool, valuing the interest of a party in an entity, providing advice in relation to structuring a settlement and generally providing advice to lawyers based on a broad understanding of human nature and the business world. Their engagement is often a sound investment in achieving an acceptable outcome.

Mike Emerson

Onus Maynes

EMERSON BLACK LAWYERS.

EVIDEX.

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DOCUMENTS REQUIRED FOR VALUATION PURPOSES

Documents and other information that can be required for the initial review and financial analysis of the business affairs of an entity include the following:

- Legal structure including constituent documents – all entities
- Financial Statements – 3-5 years including at least two years prior to date of separation
 - Trading and Profit and Loss Statements
 - Balance Sheets
 - Notes to and Forming Part of the Accounts
- Income Tax Returns – 3-5 years
- Depreciation Schedules
- Business Activity Statements including current year
- Budgets or Forecasts
- Aged Debtors Listing – 30 June and 31 July
- Creditors Listing – 30 June
- Staff Details – wages and roles/responsibilities – in particular, family members
- Property Valuations

Source records for further examination can include the following:

- General Ledger – translation recorded in ledger accounts
- Journals
 - cash payments
 - cash receipts

- sales
- purchases
- General Journal

- Payroll Records
- Bank Statements
- Cheque Butts
- Deposit Books
- Credit Card Statements
- Stock Records
- Cash Register Rolls
- Recent Finance Applications
- Asset Registers
- Minute Books
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