RECENT DEVELOPMENTS IN FAMILY LAW FORENSIC ACCOUNTING PRACTICE

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INTRODUCTION

1. This paper provides an overview of some recent developments in the area of Family Law forensic accounting practice under the following headings:

   a. recent cases touching on "value to the owner";

   b. other significant recent cases;

   c. aspects of APES 215 *Forensic Accounting Services* and APES 225 *Valuation Services*; and

   d. aspects of the Family Law Rules, including some commentary on expert conferences and the giving of expert evidence.

2. In order to place the recent value to the owner cases in context, I have prepared a separate paper dealing with that general topic, which is annexed hereto. In a paper[1] delivered at the 8th Australian Family Lawyers Conference [2003] Suzanne Delbridge-Bailey gave an overview of the history of significant decisions in the Family Court of Australia dealing with "value to the owner" ("**VTO**") in the context of a discussion of the particular significance of the decision in *Wall*[2]. Rodger Flynn gave an overview of relevant issues in Family Law valuation practice in a 2006 ICAA conference paper[3]. In a paper[4] presented at the same conference Brendan Halligan considered the problem of defining "value". The attached paper is an endeavour to extend these analyses to explore what "value to the owner" means, and to make some comments upon how practitioners called upon to provide valuations in the Family Law context are expected to go about forming a view on value to the owner.

CASES

3. Recent cases dealing with value to the owner are traversed in the attached paper. In the following paragraphs I make brief comments on some other recent developments.

4. Three relatively recent cases deal with the evidential significance of offers. Although the cases relate to offers to acquire real estate there is no reason why the principles do not apply equally to offers for businesses or shares.

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1 "*Application of "Value to the Owner Approach and the Importance of the Decision in Wall and Wall*". A copy may be viewed at http://www.forsythes.com.au/fa-support-documents.aspx

2 *Wall and Wall* (Unreported No EA 83/99). Full Court of the Family Court, 26.10.00. See [2002] Fam CA 257

3 Rodger Flynn, *Recent Issues in Family Law*, paper FA3, ICAA Business Valuation & Forensic Accounting Conference, the Westin Sydney, September 2006.

4 Brendan Halligan, *Some Concepts of Value*, portion of paper BV11 *Valuations and the Concept of Value in the Legal Environment*,, ICAA Business Valuation & Forensic Accounting Conference, the Westin Sydney, September 2006.

Weatherall[5]

5. A joint expert [Ms F] had been appointed to value a hotel complex owned by a company in which the parties and their children had interests. The wife applied to the Court to disclose to the expert an offer which had been received for the hotel. The husband asserted that the offer may not be genuine, was vague and conditional.

6. His Honour noted without explicit endorsement the submission of the wife as to the scope of matters which an expert could consider [at para 43]:

"It was submitted for the wife that "at common law" an expert witness should be permitted to examine all relevant facts, referring to what Megarry J had to say *in English Exporters (London) Ltd v Edonwall* (1973) Ch 415 at 420 (cited with approval by McGarvie J in *PQ b Australian Red Cross Society* (1992) 1 VR 19 at 35). It was submitted by counsel:

" 37 An expert witness in reaching (as in this case) a determination as to the value of land, is not bound by the rules of evidence. An expert may clearly rely on matters of hearsay. When an expert relies on comparable sales, the expert is almost inevitably relying on evidence which is presented to him in a way which does not satisfy the rules of evidence. This knowledge of comparable sales is derived from information published in newspapers and professional journals and from information which is common knowledge in the profession. In reach [sic] his opinion he can rely on matters which are not admissible in evidence. The reasoning in McDonald, even if it were otherwise applicable, does not control the matters to which he can make reference.

38 To refuse to permit the expert to have regard to an extant offer as a matter relevant to the determination of the value of the land is to refuse the expert access to a matter directly relevant to his determination. Any determination made without knowledge of all relevant facts will necessarily be flawed."

7. Guest J reviewed the decided cases dealing with the admissibility of offers as evidence of value. The following extract is useful guide to the use of offers in forming an opinion as to value [para 55]:

"I agree with what Wilcox J had to say in Goold's case that it would be "*anomalous and unjust*" to rely upon what he referred to a "blanket rule" excluding offer evidence. It is plain that an offer followed by a concluded contract may be admissible as evidence of value as would, for example, a signed option given by an owner to sell at a particular price. However, there may be circumstances where an offer alone may, in a limited or general way be of assistance in the determination of value, but not as direct evidence of value. Such a situation would however require both cautious and guarded scrutiny before any reliance could be placed upon it. (See *Adelaide Brighton Cement Ltd v South Australia* (2001) SASC 381 per Debelle J who agreed with the observations of Wilcox J in *Goold*, adding that the use to which evidence of an offer can be made should be very carefully examined, including the genuineness of the offer; Heerey J in *Henderson v Amadio* (supra) and the Full Court of the Federal Court in *Cordelia Holdings Pty Ltd v Newkey Investments Pty Ltd* (supra)). In my view these principles are just as applicable to the provision of the details relating to the offer being put to Ms [F], despite the arguments advanced by counsel concerning Rule 15.54(2) of the Rules. The information sought to be provided has been put very much in issue by the husband and without more affords little, if any, probative value."

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5 *Weatherall and Weatherall & Ors* [2006] FamCA 269; (2006) FLC 93-261 [11 April 2006]

8. The husband submitted that, if the expert was advised of the offer and relied on it, her opinion would itself "*not be admissible, or at least would have to be given less weight*" [at para 48]. Husband's counsel relied on *Makita* [para 47]:

"On the issue of relevance and admissibility, reliance was placed by the husband's counsel upon what Heydon JA had to say in *Makita (Australia) Pty Ltd v Sprowles* (2000) NSW CA 305 (par 60) ((2001) 52 NSWLR 705 esp. at 731-732) namely:

… The basal principle is that what an expert gives is an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, or state explicitly the assumptions as to fact on which the opinion is based. If other admissible evidence establishes that the matters assumed are 'sufficiently like' the matters established 'to render the opinion of the expert of any value', even though they may not correspond 'with complete precision', the opinion will be admissible and material.

Although not referred to in the submissions of counsel, Haydon JA did go on to say in the course of the quotation cited:

"One of the reasons why the facts provided must correlate to some degree with those assumed is that the experts conclusions must have some rational relationship with the facts proved."

9. His Honour dismissed the application on the basis that[6]:

"The offer as it stood at 1 December 2005 and remains this day is so vague, conditional and obtained in circumstances undisclosed to the husband or his advisors so as to reave it of probative value. "

10. His Honour's conclusion gives an insight into what factors an expert may rely on[7]:

"As matters presently stand, I am of the view that despite the wife's assertion the offer is genuine, that is a matter which is yet to be, if necessary, tested and is currently the subject of trenchant criticism by the husband. It is not sourced information from text books, journals, reports of options or other information obtained from professional brethren which may be information upon which an expert witness may rely. It is an offer, the efficacy, genuineness and propriety of which is very much in issue. Even if the reasoning in *McDonald* (supra) was such that it did not control the matters to which Ms [F] can make reference, it is my view that it would be wholly inappropriate for her to receive this information as defined by the limits set out in the letter of offer.

All relevant information ordained by the professional advisors of the parties has been assessed and provided to Ms [F] under cover of the joint letter of instruction dated 18 January 2006 It would, having regard to my findings taint her professional task to now receive the information contained in the letter dated 1 December 2005. Her professional opinion is to be based on facts, not vague and conditional material which, as I have said, as matters presently stand, offers little, if any probative value to her valuation exercise. The release of such information may, in my view, blemish her opinion and arguably tarnish its effect in terms of admissibility or weight."

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6 At para 56
7 At paras 62-3

11. One gets the impression reading the judgement that the decision might have gone either way[8]. The husband submitted whether or not the offer was relevant was a matte for the court and should not be left to the expert "*with no training in evidential issues*"[9]. But it seems that it cannot be for the expert to determine "*evidential issues*"; and expert is not bound by the rules of evidence [see paragraph 6 above]. The experts conclusions must "*have some rational relationship with the facts proved*" but they are not "proved" till the trial. Any reasonable expert would be unlikely to rely on an offer, without more, to support a valuation and the decisions appear to make it clear that, in appropriate circumstances, "*an offer alone may, in a limited or general way be of assistance in the determination of value*", subject to appropriate consideration of bona fides, conditionality and so forth.

Blake[10]

12. The decision of Guest J in *Weatherall* was cited with approval by the Full Court in *Blake*. That decision is discussed in the attached paper on value to the owner.

Barker[11]

13. In *Barker*, the Full Court of the Family Court dealt with an appeal by the Wife seeking to set aside consent orders made on 26 November 2003 by O'Reilly J. The orders had been made on the basis that the total agreed pool was $1.2 million which included a valuation of a property "AW" at $1.65 million. Shortly after the orders were made, the Husband sold AW for $2.65 million, following an offer received on 3 December 2003, [ie around a week after the orders were made]. An offer for the property at $2.3 million received by the husband some weeks before the consent order had been rejected by him. The offer was not disclosed to the wife prior to the signing of the orders.

14. The wife's application to the Court [Jordan J] to have the orders set aside on the basis of miscarriage of justice was dismissed. His Honour found that evidence of the offer and of the sale were relevant and admissible [para 15]. Critically, in the view of the Full Court [para 19], his Honour found that the "*the husband did not regard the purchaser as a genuine purchaser, and he did not believe, the offer [for $2.3 million] was a true offer.*", that the husband wished to retain the property at the time the orders were made, and that "*the husband could not be under any obligation to disclose a disingenuous offer to buy a property that was not for sale.*" [para 23]. The husband had not misled the wife. As the wife was not able to establish that the value of the property at the date of the consent orders was more than $1.65 million – the evidence relating to the actual sale might lead to an inference of undervaluation but "*anything beyond that was mere speculation*" [para 31], - there was no proper basis for setting the orders aside.

15. The wife appealed the decision. No point was taken at the trial or on appeal about admissibility of evidence of the offer. The Full Court noted again with approval [at para 78] the decision in *Blake* (supra). The Full Court said (at para. 79):

"In this case the concessions about admissibility were in our view properly made. The evidence of the offer was not led to establish the value of the property in question. Its relevance, if it was required to be disclosed by the husband to the wife, would be to put the wife on notice that there was a buyer who had offered to pay significantly more for the property than the valuation.

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8 See eg para 49
9 At para 45
10 *Blake & Blake* [2007] Fam CA 10 (19 January 2007)
11 *Barker & Barker* [2007] Fam CA 13 (13 January 2007)

It seems clear to us the decision of the High Court in *McDonald*, as applied by single justices of the High Court in *James Patrick & Co Pty Ltd v Minister of State for the Navy* … and *Gregory v Commissioner of Taxation (Cth)* … is determinative as to whether it is an error to take into account evidence of offers. Whatever weight may be properly given to evidence of offers for limited or general purposes, it is clear that such evidence is not permissible as direct evidence of value.

Insofar as the trial Judge used the evidence in that way he was, we consider, in error in doing so. To the extent that such evidence may be admissible in a general way, as to which see Wilcox J in *Goold v Commonwealth* … and Heerey J *in H v Amadio (No. 1)* …, it provided an insufficient additional basis upon which a conclusion as to value might have been arrived at. Moreover, even if such evidence is used in a general way, it would only be used if it were accompanied by an assessment of relevant factors such as the genuineness of the offer and whether it was made at arms length (see *Goold* at 60)…"

16. It would seem that the conclusions to be drawn that, while a valuer should not rely on an offer as conclusive evidence of value, it may nonetheless be taken account of as part of the valuation materials considered, subject to "*an assessment of relevant factors such as the genuineness of the offer and whether it was made at arms length*".

APES 215

17. APES 215 *Forensic Accounting Services* was issued by the Accounting Professional Ethical Standards Board Standard in December 2008 and is effective for engagements commencing after 1 July 2009.

18. The Standard contains numerous mandatory requirements designed to ensure independence and competence. Even without the standard any member providing expert witness services will be well aware that his or her paramount duty is to the Court and that that duty overrides any duty to the client[12]. The Standard contains as Appendix 1 a useful discussion of the distinction between "facts, "assumptions" and "opinions".

19. As well as compliance with the various requirements of the standard it may be appropriate to insert a paragraph at the end of a report along the following lines:

"The following statements are made in accordance with the requirements of Accounting Professional Ethical Standards Board Standard APES 215 *Forensic Accounting Services* ("**the Standard**"):

a. this report has been prepared in accordance with the Standard;

b. the preparation of the report has been undertaken by Rupunzel Capelli acting independently. The author has had no previous relationship with any of the parties; and

c. the compensation to be paid for the preparation of this report is not contingent on the conclusion, content or future use of this report."

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12 See para 5.4(a) of APES 215and see generally *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705. At pp743-744 Heydon JA summarised the applicable law in relation to the admissibility of expert evidence. See also per the Federal Court in *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354

APES 225

20. APES 215 *Valuation Services* was issued by the Accounting Professional Ethical Standards Board Standard in July 2008 and is effective for engagements commencing after 1 January 2009. Again there is a strong emphasis on independence and competence. However, there is a clear recognition that not every valuation report requires independence [para 3.4,3.5].

21. The Standard contains no definition or discussion of the term "value" Clause 7 provides:

> 7 "Use of glossary of business valuation terms
>
> 7.1 **When using a valuation report, a member shall clearly define the Valuation terms used**. [*this is mandatory*]
>
> 7.2 Members are encouraged to use as far as practicable terms that are in general use for Valuation Services. Members are referred to the International Glossary of Business valuation Terms which are include in the valuation standard of the American Institute of Certified Public Accountants and the Canadian Institute of Chartered Business Valuers."

22. It is not clear why reference is not made to the standards promulgated by the International Valuation Standards Committee – see Appendix A to the attached paper on value to the owner.

23. The standard recognises a distinction between:

a. "a "*Calculation Engagement*" means an Engagement or Assignment to perform a Valuation and provide a Valuation Report where the Member and the Client or Employer agree on the specific Valuation Approaches and Methods that the Member will use and the extent of Valuation Procedures the Member will perform to estimate the value of a business, business ownership interest, security or intangible asset. A Calculation Engagement generally does not include all of the Valuation Procedures required for a Valuation engagement;

b. a "*Limited Scope Valuation Engagement*" means an Engagement or Assignment to perform a Valuation and provide a Valuation Report where the scope of work is limited or restricted. For example, in valuing a business the scope of the work performed by the Member might involve only a limited or restricted review and analysis of the business and the industry in which it operates. A Limited Scope Valuation engagement may also be referred to as a "restricted-scope valuation engagement" or an "indicative valuation engagement"; and

c. a "*Valuation Engagement*" means an Engagement or Assignment to perform a Valuation and provide a Valuation Report where the Member determines an estimate of value of a business, business ownership interest, security or intangible asset by performing appropriate Valuation Procedures and where the Member is free to apply the Valuation Approaches and Valuation Methods that the Member considers appropriate in the circumstances."

24. In my experience, solicitors and clients involved in Family Law matters sometimes request “short form reports” or “preliminary reports”, or “indicative valuations”. Sometimes this is expressly stated to be on the basis that the report is to assist in negotiations, or simply to enable the client to understand the likely parameters of the asset pool. Often the valuer is advised there is a concern to minimise costs. Valuers should be concerned that a limitation on the work undertaken must clearly be set out to ensure compliance with the terms of the Family Court Rules [see paragraph 28a below] and APES 215. Qualifications may well limit the evidentiary value of the report. The expert valuer should rest assured that every qualification will be rigorously explored by opposing counsel if the “limited scope” valuation is used at trial.

25. As well as compliance with the various requirements of the standard it may be appropriate to insert a paragraph at the end of a report along the following lines:

“The following statements are made in accordance with the requirements of Accounting Professional and Ethical Standards Board Standard APES 225 *Valuation Services*:

a. the author of this report is Snowy White ACA, B Ec. Mr White has had more than ten years experience in undertaking the preparation of valuation reports;

b. the valuation has been undertaken by Mr White acting independently; and

c. the compensation to be paid for the preparation of this report is not contingent on the conclusion, content or future use of this report.”

26. Where an expert prepares a valuation in the capacity as expert witness in a Family Law matter both standards will apply. As well as compliance with the various requirements of the standard it may be appropriate to insert a paragraph at the end of a report along the following lines:

“The following statements are made in accordance with the requirements of Accounting Professional Ethical Standards Board Standard APES 215 *Forensic* Accounting Services and APES 225 Valuation Services (“**the Standards**”):

a. this report has been prepared in accordance with the Standards;

b. the author of this report is Goldilocks Bear ACA, B Ec. Ms Bear has had more than fifteen years experience in undertaking the preparation of valuation reports;

c. the preparation of the report has been undertaken by Ms Bear acting independently. The author has had no previous relationship with either of the Parties; and

d. the compensation to be paid for the preparation of this report is not contingent on the conclusion, content or future use of this report.”

ASPECTS OF FAMILY LAW RULES

27. As well as complying with APES 215 and 225 practitioners undertaking expert witness work will be well aware that they are required to comply with the relevant Family Law Rules.

28. Where the expert signs off on a report before swearing an affidavit it will be appropriate to insert a paragraph at the end of a report along the following lines:

Having regard to the terms of paragraph 15.62(2) of the Family Law Rules 2004, I state as follows:

a. I have made all the enquiries I believe are necessary and appropriate and to my knowledge there have not been any relevant matters omitted from this report, except as otherwise specifically stated in this report;

b. I believe that the facts within my knowledge that have been stated in this report are true;

c. The opinions I have expressed in this report are independent and impartial;

d. I have read and understand Divisions 15.5.4, 15.5.5 and 15.5.6 of the Family Law Rules 2004 and have used my best endeavours to comply with them;

e. I have complied with the requirements of the professional codes of practice or protocols that apply to me – see paragraph [INSERT];

f. I understand my duty to the Court and I have complied with it and will continue to do so.

I acknowledge that I will include a statement in the above form in an affidavit verifying this report, as required by the Family Law Rules 2004, if proceedings are commenced and I am asked by the Parties' solicitors to do so."

Concurrent evidence

29. Rule 15.70 of the Family Law Rules 2004, entitled "*Conduct of trial with expert witnesses*" provides for so called "hot-tubbing" of experts:

"At a trial, the court may make an order, including an order that:

.....

(f) cross-examination, or re-examination, of an expert witness is to be conducted:

(i) ……; or

(ii) by putting to each expert witness, in turn, each question relevant to one subject or issue at a time, until the cross-examination or re-examination of all witnesses is completed."

30. This process can be extended well beyond what is explicitly set out to allow a greater exchange of ideas between experts and greater inter-reaction between the judge and the experts. A useful perspective on this approach may be obtained from a viewing of "*Concurrent Evidence: New Methods with Experts*", prepared in 2005 under the auspices of the Judicial Commission New South Wales and the Australian Institute of Judicial Administration.[13]

31. Justice Peter McClellan outlines some of the problems with the conventional cross examination process in the introduction to the DVD:

> "Experience has shown that many experts find the adversarial process to be threatening and they complain that they do not have an opportunity to adequately express their position. This may occur when they are being examined in chief or when being cross examined because they can only respond to the question they have been asked.
> ……
>
> Because they don't see it as a search for the truth, many qualified people have said that they will not give evidence in Court. Another complaint is that the adversarial process can be unsatisfactory because, although the expert knows the question that should be asked, their advocate may not.
> ……
>
> Another problem is that although the expert advising the advocate knows the answer is wrong, again the advocate may not.
> ……
>
> Experience also shows that the conventional process can be lengthy and a great deal of time can be taken in debating matters that are of little or any significance in the resolution of the real problem."

32. The presentation shows a reconstruction of extracts from a real [resumption] case in which concurrent evidence is given and highlights the advantages of that approach, including:

a. the evidence embodies a "structured discussion" built round a framework of issues agreed to require consideration - a genuine exchange of expert views;

b. the judge chairs and controls the process and asks questions [expert valuers will be familiar with the scenario where a judge simply observes cross examination and allows counsel to carefully control what the expert says and does not say – that is part of the traditional system; some judges take a more active role than others];

c. each expert can express views on each topic and on the responses of other experts;

d. the system is less threatening;

e. the system is seen by experts as a search for the truth (rather than participation in a game run by counsel to seek to win the case) and feel they have made a real contribution;

f. experts can ask each other questions;

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13 See www.judcom.nsw.gov.au; www.aija.org.au

g. the process is shorter [and thus less costly] and more efficient, particularly as there is a focus on relevant issues and those issues are explored in depth in turn rather than each expert being examined in turn (or sometimes well apart in time) on all issues;

h. the judge can become better informed on the issues; and

i. cross examination is still provided for on, for example credit, in an environment more conducive to peer review.

Experts conferences

33. The relevant rule is 15.69 of the Family law Rules 2004. Reference may be made to the publication "*Experts' Conference*" on the Family Court website www.familycourt.gov.au. I would just like to draw attention to two extracts from that publication:

"***The participating experts should not seek advice from or guidance from the parties or their lawyers prior to signing the joint statement***."

34. In my view it is not appropriate, for example, to forward an unsigned draft copy of the joint experts' statement to instructing solicitors.

"***The conference may be adjourned and reconvened as necessary***".

35. In my experience, it is often helpful to convene a conference in two (or more) sessions, generally within a short overall time frame. At the first session, the objective is to explore the issues in an environment which is hopefully co-operative and with the objective of understanding why the experts have come to different views and what further information might readily be obtained to clarify factual uncertainties[14] and enable resolution of disagreed matters. Agreement may be reached on some issues and it may be determined that some issues cannot be agreed and why.

36. The conference can then be adjourned for each expert to carefully consider what has been put by the other expert in the light of then known facts and to obtain any additional factual information, before the conference is reconvened. The joint statement can be drafted as the process proceeds and it is determined that items are agreed or disagreed.

37. In my view, particularly in complex cases, the expert should not feel that he or she has been pressured into signing a joint statement without the opportunity to properly consider it, particularly when, as sometimes happens, significant new facts (or asserted facts) have come to light in the course of the conference, valuations are being updated because of the passage of time and /or the other expert endeavours to introduce into the joint statement material which ought properly have been the subject of a further report.

14 I refer to paragraph 148b of the attached supplementary paper.