Learned Friends Conference
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4 Orders: How I Learned to Stop Worrying and Love the Level Playing Field

General

1. A dollar for dollar order is,[1] in the usual course, an anticipatory order for costs requiring one party to provide the other party with funds to conduct proceedings.

2. Historically the power to make such an order has been grounded from either:

    a. s.117(costs),
    b. s.74 (maintenance); or
    c. s.79, in conjunction with s.80(1)(h)(interim property).

3. Relevant principles as to the making of such orders have been identified by the Full Court in *Strahan and Strahan* (interim property orders) 2011 FLC 93-466, and *Zschokke and Zschokke* (1996) FLC 92-693.

4. In *Zschokke*, at 83,2017 the Full Court said three matters were relevant:

    a. A position of relative strength on the part of the respondent;

    b. A capacity on the part of the respondent to meet his/her own legal costs; and

    c. Inability on the part of the applicant to meet his/her legal costs.

    The Court also held that in the ordinary course it ought to consider whether, in the circumstances, it is possible to take into account in the final proceedings any sum that might be payable under the order.

5. In *Paris King Investments Pty Ltd v Rayhill* [2006] NSWSC 578 Brereton J said that in addition to the above three matters, the following are relevant at [30] – [32]:

    - an applicant should have "at least an arguable case for substantive relief which deserves to be heard";

    - there should be evidence of the applicant's likely costs of the litigation;

    - it is not essential that the applicant's legal representatives will not continue to act unless the costs are paid or secured on an ongoing basis;

[1] Sometimes called "litigation funding orders"

- an order may make provision for litigation expenses at a rate that appears reasonable in all the circumstances;

- an order can be for costs already incurred as well as for future costs and such matters as well as the question of whether the applicant's lawyers will continue to act in the absence of a litigation costs order may be relevant to the discretion to make an order and the quantum thereof;

- any such order should be framed to protect the parties from risk of injustice which could be done by requiring the funds to be administered by the applicant's solicitors and applied only to meet the expenses referred to in the order.

The Reasons for such Orders in Family Law Litigation

6. The family law jurisdiction, perhaps uniquely, is one where the parties often experience inequities in terms of powers and access to financial resources.

7. Dollar for dollar orders implement an important principle (as articulated by the Full Court in *Strahan)* of ensuring justice between the parties. They recognise that often in matrimonial litigation the wealth and resources of the parties is controlled by one spouse who derives an advantage by being in a superior position to fund his/her costs. The desirability of legal representation for both parties, and the desirability of achieving a '*level playing field*' are objectives promoted within the jurisdiction.

The Form of the Order

8. Watts J in *Moroni and Moroni* [2014] FamCA 464.

9. Austin J in *Zheng and Ng* 16 July 2015; Reported as *Niu & Zhin* [2015] FamCA 599

The Head of Power to Make those Specific Orders, and How it has Evolved

10. The power to make a dollar for dollar order rests in s.117(2) of the Act.

11. The jurisprudence identified upon by first instance Judges to date to support the dollar for dollar orders in terms of those made by Watts J in *Moroni* grew from a number of earlier decisions of Judges at first instance. The relevant passages of the Judgment of Watts J in *Moroni* is as follows:

    39. As indicated, counsel for the husband submitted that there was no power to make a "dollar for dollar" order as sought by the wife. I do not agree. For current purposes, it is sufficient to say that power can be found in s 117(2) of the Act.
    40. In *Farnell and Farnell* (1996) FLC 92-681, Kay J said:
        In the Marriage of Gould, (Appeal EA 37 of 1994, judgment of 29 June 1994), the Full Court coram Fogarty, Kay and Graham JJ[1], overturned an order of the trial Judge wherein her Honour had ordered that pending trial, for every

dollar that the husband had spent on his lawyers, he should provide the wife with a similar amount for costs. The trial Judge had ought to make that order to create what she saw as ''a level playing field''. The Full Court disallowed the orders on the basis that the wife had adequate finances to provide for her own costs by reason of a substantial recent inheritance. In the course of my reasons for judgment I said this:
"I wish to make comment on ... the general philosophical views expressed by her Honour about endeavouring to achieve a level playing field by providing the wife with a dollar for dollar basis for costs. Whilst I agree with his Honour's [Fogarty J's] observations that this may not be an appropriate approach to these cases, I would also like to make reference to an article from the Chicago Daily Law Bulletin of 20 April 1992 which indicated that wives in these circumstances often have to spend much more than dollar for dollar to achieve a level playing field, particularly, and I quote - this is in reference to a survey of the American Bar Association Family Law Section:
'Most of the lawyers agree that women will face higher legal bills in a divorce. Accordingly to 91% of those surveyed women splitting from their husbands will have to pay more for discovery. Husbands traditionally have had full control over the family finances and economic information. This means the wife's attorney must often engage in discovery to gain equal knowledge about assets and income. The lawyer has an obligation to undertake discovery to find out if there are assets in just the husband's name, or if the wife has no knowledge of them.'"

In *Iphostrou & Iphostrou and Ors* [2011] Fam CA 20, Cronin J quoted with approval, a reported decision of O'Reilly J in *G & T* [2003] FamCA 1076; (2004) FLC 93-176. In that decision, Her Honour referred to her previous unreported decision of *McL & McL (30 January 2003)* in which Her Honour said:
110. Section 117(2) provides that if the Court is of opinion that there are circumstances that justify it in doing so the Court may subject to subsection (2A) and the applicable Rules of Court make such order as to costs including by way of interlocutory order as the Court considers just. In my view, that provision provides sufficient power to make the "dollar for dollar" order subject to consideration of the matters in subsection (2A). That provision requires the Court to have regard to the financial circumstances of each of the parties to the proceedings, and certain other matters which are not relevant in this case.

12. While it has long been accepted by Trial Judges that there is power to make a dollar for dollar order, further consideration of the reasoning of Watts J in *Moroni* ought to be undertaken. Historically some dollar for dollar orders have been bold in their terms – infringing on contractual obligations between solicitors and clients without the solicitors being parties to the litigation; and on occasion triggering obligations on a party consequent on the acts of a third party[2].

[2] See Fowler J in *Mitty & Mitty (No. 3)* [2008] FamCA 1043 18 November 2008 – s.106B relief grounded from a primary dollar for dollar order.

13. What is the ratio as to the power beyond any other reasoning save that a prior first instance decision states an opinion that the order is supported by s.117 of the Act?. To date, the proposition has been stated and repeated, but not explained or reasoned.

14. The relevant passages of the Judgment of Austin J in *Ng & Zhang* – Austin J 16 July 2015: reported as *Niu & Zhin* [2015] FamCA 599 were as follows;

> **Litigation funding**
> 91. The wife admitted she could not point to any asset or fund which could be used as a source of payment by the husband to her of money which she could utilise for payment of her legal fees. She therefore re-caste her application from one seeking a lump sum payment to one seeking the husband's payment of monies to her on a dollar-for-dollar basis –that meaning, for every dollar payable by the husband to his own lawyers, he pay an exact amount to the wife's lawyers on her behalf.
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> 92. It was contended on behalf of the husband that such an order is *ultra vires* both the Act and the Rules, which submission I reject. The jurisdiction and power to make such orders have been repeatedly accepted over many years, including recently by Watts J in *Moroni & Moroni* [2014] FamCA 664, in which case his Honour referred to authorities and reasoning establishing jurisdiction and power, which need not be repeated here.

A Sea Change?

15. There can be no issue that there is jurisdiction and power pursuant to the *Family Law Act*, in certain circumstances, to make an order requiring a party to a marriage to provide funds to the other party to the marriage to enable the party to meet his/her legal costs and expenses in the proceedings in advance of them being incurred.[3]

16. In *Niu & Zhin* the appellant had the task of persuading the Full Court that the order made by Austin J was beyond the power resting in s.117(2) of the Act. That appeal, if successful would '*undo decades of jurisprudence.'*

17. Fundamental to any order is the identification of the relevant head of power supporting the orders sought – the source of power determines the necessary preconditions and relevant considerations for the making of the order.[4]

18. The identification of the source of power helps frame the order and determine what legal requirements must be met before the order will be made.

[3] *Strahan and Strahan* (2011) FLC 93-466 per Boland and O'Ryan J at 79-80; *Marchant and Marchant* [2012] FLC 93-520.
[4] See *Zschokke*; *Paris King Investments Pty Ltd v Rayhill.*

19. S.117(2) of the Act provides:

> (2) If, in proceedings under this Act, the court is of opinion that there ***are circumstances that justify it in doing so***, the court may, subject to subsections (2A), (4), (4A) and (5) and the applicable Rules of Court, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, ***as the court considers just***.

20. Hence, the Court is entitled to make such interim of interlocutory costs orders as it considers just where there are circumstances which justify it doing so. Hence there are two thresholds that any application for interim costs must meet.[5]

21. The first finding is that of justifying circumstances. These are the matters identified in *Zschokke* and in *Paris King Investments Pty Ltd v Rayhill*

22. The second is a finding that the order is just.

23. Contended difficulties with orders made in both *Moroni and Niu & Zhin* include:

    a. The amount or amounts which could be necessary to satisfy the order are unknown;

    b. The times at which they are to be paid are unknown; and

    c. The financial circumstances of the recipient at the time of the order are unknown.

24. The primary ground on appeal in *Niu & Zhin* was that the order as made could never satisfy the requirement that the Court would be able to determine it is just. It is impossible to know what the circumstances will be at the time the order is activated – therefore, it becomes impossible to undertake a proper discretionary evaluation of whether the order is just. Putting it another way, if the order never stands the test to determine that it is just, then the precondition of s.117(2) could never be satisfied with a dollar for dollar order – it would be beyond power.

25. In that case, If a third party (the husband's parent) decided to pay the husband's outstanding legal costs by satisfying a debt to his lawyers directly, then the funds would never belong to the husband – they would belong to the third party until they were received by the lawyer, and then they would belong to the lawyer. At no time in this chain does the husband's property enable him to satisfy the costs orders. No part of this chain would enhance the husband' capacity to satisfy any obligation to the wife? How could such circumstance be considered to be just?

26. The appellant in *Niu & Zhin* contended that the orders made by Austin J at first instance were final and not interlocutory. The contention was that each time the order was to be put into effect it would finally dispose of the substantive and practical rights of the husband. That contention was likely to be rejected.

27. Additionally, a likely unsuccessful attempt was made by the appellant in *Niu & Zhin* to rely on an older decision of the Full Court of *Hogan v Hogan* (1986) FLC 91-704. In that matter an order was made pursuant to s.117 of the Act that the husband pay to the wife, from time to time, a sum or sums sufficient to pay the wife's costs of preparation of financial proceedings for trial and that such

[5] *Strahan* at 86.

sums include legal costs and valuation costs. The husband successfully appealed to the Full Court. The Trial Judge was held to be in error in making an open ended order. The Full Court observed:

> *'Whilst recognising that the Court has unlimited discretion in relation to costs, in our view, the whole tenor of the legislative provisions and the history of costs order whether interim or final requires them to be either certain and/ascertainable and any order must be just.'*

The order set aside in Hogan required the husband to pay an unascertained, and unascertainable sum, whether reasonable or not, without the right to dispute the reasonableness of any costs incurred by the wife. The order was not just. It did not reflect the concept of the level playing field. It was open ended and unbalanced.

Support for 4 Orders

28. The starting point as to Orders of this character and construction is the Judgment of the High Court in Re JJT; Ex parte Victoria Legal Aid (1998) 195 CLR 184. Gaudron J said as to the purpose of s.117;

1. *The power conferred by s 117(2) of the Family Law Act 1975 (Cth) ("the Act") is a power to "make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just." That power is not simply a power to make an order for costs. Were it so, it would only authorise orders to indemnify for "costs actually incurred in the conduct of litigation". However, a power to make an "order as to costs" is a broader power. And when regard is had to the consideration that s 117(2) expressly authorises interlocutory orders, that sub-section must, in my view, be construed as authorising orders requiring a party to proceedings under the Act to provide another party with funds to conduct those proceedings.*

Thereafter, Kirby J said

14. *In Aiden Shipping Ltd v Interbulk Ltd, speaking of the provisions of the Supreme Court Act 1981 (UK) affording the power to award costs, Lord Goff of Chieveley remarked: "It is strange that courts should think it right to impose, by way of implication, a limit upon a wide statutory jurisdiction". It is still strange. Limits upon such wide statutory powers may be imposed by constitutional law. Sometimes controls are imposed by the statute itself. But where, by valid legislation, a power to award costs is afforded to a court in general terms, the grant of power should be given an ample interpretation and not narrowly construed.*

29. High Court authority may have suggested that the grounds and contentions made by the appellant in *Niu & Zhin* would attract little Full Court promotion, and that the primary ground of the appeal would not be made out. This matter settled before The Full Court Judgment was delivered.

30. The Full Court has long held that the costs power is a very broad, and the discretion to exercise it is all but unfettered.[6] That said, this discretion must be exercised carefully for the purposes of litigation funding. *Zschokke* sets out clearly the order must be framed *to protect a party from injustice,* especially as to how funds are expended.

31. These litigation funding orders are interlocutory in character The substantive proceedings, or the cause of action, between the parties is not determined or completed. Applications may be made at any time in the future to vary them. The capacity to vary provides a mechanism of *checks and balances* so that there is not '*open slather'*, and ensures the order is not "*open ended*."

32. The dollar for dollar orders made to date contain self-regulatory mechanisms – a degree of control initially rests in the hands of the payer, as to the quantum of, and timing of, payments as to costs. An assumption as to reasonableness, on both these aspects,[7] ensures the order made is just. The orders reflect the level playing field – the payer controls the level; the order sets the balance.

33. Implicit in the orders is a requirement of justice that moderates the amount by which the parties reduce their pool of property in meeting costs, rather than by way of strategic considerations.

34. The mandatory application of justice, for the purposes of s.117(2) dollar for dollar order, is not determined by the identity of the payer – the gravamen of the exercise of discretion as to justice, for the purposes of the section, is weighed and determined by the disadvantaged.

Discretionary Challenges to a 4 Order

35. Can the exercise of power be '*pigeon holed'* as a costs order? The orders sought '*look to the future, not the past.*' Anticipatory costs are not costs that sit comfortably within the design of s.117 of the Act. Is spouse maintenance a preferred pathway?

36. Is it reasonable for work to be done up to the date of any order being made to be paid, and that not be caught by the order? What is the impact of the fact of notice, by way of letter or the application itself, upon a solicitor for costs incurred pursuant to his or her retainer? The retrospective impact of orders sought, and made, ought to be carefully considered – especially as to costs and disbursements incurred by the payer, that are unbilled or unpaid as at the date of the order.

37. The impact of failures to engage in a full and frank disclosure of relevant financial circumstances will go directly to each of the principle matters as identified by the Full Court in *Zschokke* to be considered.

38. Is a '*claw back'* or reversibility capacity of any s.117(2) order mandatory? The Full Court in *Zschokke* (page 83,221) said that while this consideration *'may be fatal to an application under s.80(1)(h), it is not necessarily so to an application under s.117(2). It is just one of the matters to*

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[6] *Penfold v Penfold* (1980) 5 Fam LR 579; *Jensen v Jensen* (1982) FLC 91-263; *McAlpin and McAlpin* (1993) FLC 92-411 and *Brown v Brown* (1998) FLC 92-822.

[7] The payer would not pay the costs accounting for half to the other party if the amount or time of payment was unreasonable. Implicit is the reasonableness of the payment to their own lawyer.

be balanced in the exercise of discretion under the later subsection.' Accordingly, reversibility may be a significant factor in the exercise of discretion, but is not fatal to the exercise of power.

39. The requirement of establishing an arguable case falls into the same category. In *Australian Broadcasting Corporation v O'Neil* (2006) 227 CLR 57 the High Court said at paragraph 65, in the context of observing the principles relevant to the consideration of an interlocutory injunction, that the '*prima facie case'* meant that *'it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation if the status quo pending the trial'.* For the purpose of an interim costs order the applicant ought to carry an onus to demonstrate there is a sufficient likelihood of success, however this factor is to be balanced with other relevant considerations. The merits tie into the consequences of the exercise of discretion to occasion a substantial injustice as identified in *Zschokke*. Again, the lack of reversibility of a litigation funding order made by way of s.117(2) will not carry the day, but will always be a very significant discretionary factor against the making of such an order if the merits of the substantive claim are not strong.[8]

40. A solicitor not continuing to act because they are not being paid, and the impecunious party then being without legal representation, is often submitted an important discretionary consideration to ground the making an order. In response and by way of counter, the circumstances of the retainer, and what is described as the doctrine of entire contract, may be relevant. In summary, once a solicitor is engaged to act in the substantive proceedings, he or she bound by contract to complete the work for which he or she is retained. The solicitor is not permitted to cease representing the party if they cannot, or do not continue to, pay at various stages of work when completed. No decision of the Court appears to deal with any submission as to the '*doctrine of entire contract'*.

41. The making of a dollar for dollar order often can have an unintended effect if the funding source of one party evaporates or ceases. The end result may be the "*downing of tools*" such that the litigation (including the finding of exert opinion evidence) grinds to a halt. Both parties may be in the end unrepresented, and the value, and even identity, of property in the pool unknown.

42. An alternate option may be to limit the quantum of the order to a specific amount, or to a specific period or a Court event, with default implementation mechanisms.

43. Interim costs could be available in a parenting matter – the desire to level the playing field in parenting proceedings ought to be more coveted, attractive and beneficial when the welfare of children is the subject of the Courts enquiry.

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[8] Fletcher & Sager, unreported Johnston J, 24 June 2014