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Accessing Value

Learned Friends
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Session Outline

- The equitable outcome for the non-business spouse in cases of lower wealth will usually comprise a home, passive investment assets, superannuation and cash
- Do we need to think differently in cases involving a moderate to high wealth pool?
- Has *Smith & Fields* changed the landscape?
- How can we access the value in a successful corporate group?

“Big money” cases

Moderate to high wealth?

- “Moderate” - \$10 to \$30 million
- “High” - \$30 to \$250 million
- “Mega” - >\$250 million

Big money cases

“Comparable big money cases” per Smith & Fields [2012] FamCA 510 (6 July 2012) Para 87:

Smith (2012)	Lynch (JEL & DDF) (2001)	Ferraro (1993)	Webster (1998)
Pool: \$30-40 m Split: \$15-20 m	Pool: \$40 m Split: \$10 m	Pool: \$12 m Split: \$4.5 m	Pool: \$21.3 m Split: \$6.6 m
McLay (1996)	Whiteley (1992)	Phillips (1998)	<i>Assume in today's dollars these are “High” wealth cases</i>
Pool: \$8.8 m Split: \$3.5m	Pool: \$11.3 m Split: \$3.4 m	Pool: \$25 m Split: \$10.3 m	

Big money cases

- All of the “comparable cases” cited in *Smith & Fields* were long marriages, ranging from 15 to 31 years
- Smith and Fields
 - Marriage was 29 years
 - Wealth was created during the marriage

Big money cases

Smith & Fields	Parties retained their joint interests in the business enterprise
Lynch	Wife retained her shares
Ferraro	Wife received property and cash
Webster	Husband paid cash (it appears)
McLay	Wife paid cash
Whiteley	Wife retained artwork
Phillips	Wife retained her shares in the (listed) enterprise, plus extra shares from family trust

● ● ● Accessing value in the enterprise

- Changes to Division 7A in 2014 – ATO change of policy re 109J have made tax effective access to company cash more difficult
- No longer any benefit of joining the company to the proceedings and seeking an order for the payment of cash

● ● ● Accessing value in the enterprise

- Prevailing structure and nature of the assets may facilitate an effective settlement solution
- Example – P and C (Pool \$250 million)
 - Wife personally held a Class share in family company
 - Share rolled from the Wife to NewCo – CGT relief
 - \$125 million paid on class share held by NewCo
 - Private company dividend, no tax payable
 - Asset position of Wife protected in a corporate structure



Accessing value in the enterprise

- What if it isn't that easy and there isn't available cash to utilise?



Accessing value in the enterprise

Methods of buy-out might include:

- Listing – IPO or “back door” listing
- Trade sale
- Selective share buy back
- Vendor financed buy out

ASX Listing (IPO or back door)

- “IPO” – Initial public offering, listing of the company on the ASX (Australian Stock Exchange)
- “Back door listing” – company desiring to go public acquires an already listed entity
- Significant changes on foot re ASX listing requirements
- Perception that a company with a value of \$30-\$100 million is too small to list

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ASX Listing (IPO or back door)

- Cost will include:
 - Legal fees, due diligence \$100-\$150k
 - Listing fees \$50-\$100k, plus ongoing
 - Capital raising cost 5-7%
 - Audit and share registry - \$40k to \$60k per annum
- NSX – less expensive option and lower threshold
Eg., 50 shareholders and \$500,000 market cap

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ASX Listing (IPO or back door)

- Timeframe
 - 3 to 6 months from decision to list if properly structured, already audited
 - Longer if changes required to structure and/or audited for the first time
 - Vendor (parties') shares may be held in escrow for up to 2 years
 - Sale of vendor securities may be subject to a shareholder's agreement



Trade sale

- Often a sale to a competitor, new market entrant (domestic or overseas);
- Valuation multiple likely to be more than status quo but less than IPO
- Costs will be limited to legal fees, investment bankers, no ongoing listing fees etc
- Hybrid solution – trade sale to listed company

Other alternatives

- Selective share buy back (if there is access to cash or finance in the entity)
- Mortgage of shares
 - Bank *may* lend only 10-20%, plant & equip auction value, net of all liabilities incl employee leave provisions
- Part sale to strategic employees, advisers, other
- Part sale to other related party purchaser

Accessing value in the enterprise

- Suggestion for *Smith and Fields* if they hadn't been able to retain their interests in the business enterprise?
 - List on NSX, with small sell down of founder shares, max 50 shareholders, staff buy in;
 - Employee share option scheme;
 - Revolving bank facility secured by real estate;
 - Key strategic shareholder with revolving finance facility



Securing the outcome

- ***Smith and Fields***
 - Separation April 2008, divorce June 2009
 - Trial – 30 Apr – 3 May 2012
 - Trial judgment – 6 July 2012
 - Appeal heard – 26 Nov 2013
 - Appeal judgment – 17 April 2015

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Securing the outcome

- ***Elgin (\$40 m pool, 49 year marriage)***
 - Separation June 2009
 - Trial – 18-20 July 2012
 - Trial judgment – 17 January 2014
 - Appeal heard – 7-8 August 2014
 - Appeal judgment – 7 August 2015

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Securing the outcome

- *Measures to secure the trial outcome pending appeal*