IN THE HIGH COURT OF AUSTRALIA
ADELAIDE REGISTRY

No. A7 of 2016

BETWEEN:

HALL
Appellant

and

HALL
Respondent

APPELLANT'S REPLY

Part I: Publication

1 This submission is in a form suitable for publication on the internet.

Part II: Reply to argument of respondent

Ground 2.1

2 The husband's submissions on ground 2.1 in the wife's notice of appeal do not engage with that ground or the holding of the Full Court to which it relates. The husband contends that

(a) the primary judge made no findings and did not consider "whether the annual payment benefit ought to have led to discharge of the interim maintenance order";[1] and

(b) "the Full Court was correct to find that the primary judge had erred by failing to make relevant findings in respect of the annual payment benefit and thereby to properly or adequately address the husband's application to discharge the interim maintenance order".[2]

3 The wife's contention on ground 2.1 is that the Full Court erred in upholding the husband's ground 6, which was to the effect that the trial judge had "failed to consider the husband's application for discharge [of the order]" *at all*.[3] For the reasons set out in the wife's primary submissions,[4] this was clearly not the case.

4 The husband's submissions are directed to a *different* point, *viz*, whether the record demonstrates that the primary judge's consideration of the application was adequate, and contend that it was not because there was, in her Honour's reasons, "no mention" of, or finding as to, "the wife's entitlement to the annual payment benefit".[5]

5 Even if the adequacy of her Honour's consideration of the $150,000 payment had been the relevant issue, the husband's submission that she failed to mention or consider the "annual payment benefit" in her reasons is incorrect. Her Honour addressed herself to the submission

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1 Respondent's Submissions (**RS**) [19(c)].
2 RS [20]; see also at [21].
3 Full Court Reasons at [61], [131], [136], [142], [147].
4 At [34]-[38].
5 RS [19].

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made by the husband, namely, that the wife was not unable to support herself[6] because she had "entitlements"[7] under her father's will of three kinds: "[s]hares in a number of private corporate entities", "[a]n annual income or distribution from the [V Group] of $150,000" and "[t]he sum of $16.5 million from the [V] Group".[8] In her reasons, her Honour referred *compendiously* to these asserted "entitlements" as the possible "interest" the wife had "in her late father's estate".[9] She concluded that "there remained considerable dispute about what interest, if any, the wife has in her late father's estate" and that the "possible, but not yet determined, interest in her late father's estate" did not provide sufficient evidence to discharge her earlier orders enjoining dealings with certain real properties.[10] For the reasons set out in the wife's primary submissions,[11] this conclusion must be understood as applying also to that part of the application seeking discharge of the interim maintenance order.

6 The Full Court was, therefore, wrong to uphold the husband's ground 6; further, his present contention, with regard to her Honour's specific consideration of the "annual payment benefit", cannot be sustained.

Ground 2.2 – procedural fairness

7 <u>*First instance*</u>: The husband does not point to any material, whether evidence or submissions, that shows that the issue of the annual payment was raised in the terms ultimately relied on by the Full Court; that the brothers would have caused the V Group to make the annual payment to the wife if she requested it. The only submission made at first instance with regard to the $150,000 was that made in the short passage relied upon by the husband,[12] to the effect that, in addition to income and other assets, she "arguably [had] an entitlement to $150,000 per annum income". That "entitlement" was said to arise under her deceased father's will. No contention was made that, despite the lack of an entitlement, the payment would be volunteered if requested. The evidence and submissions did not deal with that question at all. This should be dispositive of the wife's procedural fairness claim.

8 The husband says at RS [31] that the distinction between a contention that the wife is legally entitled to the payment and a contention that a payment might voluntarily be made to her on request is to "split hairs". This is plainly wrong. The distinction is critical.

9 First, whether or not a spouse is "entitled" to certain income (as opposed to being in a position to ask that it be paid voluntarily) may be central to a determination of whether that spouse is unable to support herself under s 72.

10 Second, the manner the respective contentions might be dealt with by the parties on an application for spousal maintenance (whether by evidence or submission) is different. Here, for example, as the husband accepted,[13] the question of legal entitlement would be determined solely by reference to the terms of the will. In contrast, whether the payment might voluntarily be made upon request requires (amongst other things) consideration of

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6 Affidavit of husband dated 7 March 2014 at [30], [37]. This affidavit set out the husband's contentions with respect to discharge of the interim maintenance order (see first instance transcript at T7.6; T72.33-34).

7 Affidavit of husband dated 7 March 2014 at [33]-[36].

8 Affidavit of husband dated 7 March 2014 at [32].

9 Primary Judge's Reasons at [10]; [25] (referring directly to the husband's affidavit evidence on this point); [29]; [32]; [45].

10 Primary Judge's Reasons at [32], [45].

11 At [37].

12 RS [26], [27], referring to the first instance transcript at T80.45-81.10.

13 See his counsel's argument at first instance at T33.19-34; T33.44-34.28, esp at 34.15-18.

evidence as to the amenability of the brothers to procuring the payment, as well as the capacity of the V Group to make it. Because the husband only raised the argument in terms of the former, and there was the affidavit from Mr Shaw setting out the relevant terms of the will, the wife did not need to put on evidence refuting the latter. That is the crux of her procedural fairness complaint.

11 Next, the husband asserts at RS [32]-[34] that the possibility of a voluntary payment was raised below, relying on (a) a reference by the husband's counsel to the payment "arguably" being an entitlement; and (b) a contention that the meaning of the word "entitlement" in the husband's submissions was not "explored" by the wife's counsel. Neither assists.

12 As to (a), at one point, the husband's counsel contended that despite the precatory language of the will, on its proper construction the father's "wish" might be legally enforceable if "control" of other bequeathed property was "conditional upon the [making of the] gifts".[14] This was the only basis identified by the husband's counsel upon which the wife had "*arguably* an entitlement to $150,000" at T81.6. There was no evidence before the Court of any such conditions being present in the will. In this context, the use of the word "arguably" reflects an acknowledgement by the husband's counsel that his submission on this point was not certain. It does not indicate that the husband's case was being put on the basis that, absent some legal entitlement, the payment might nonetheless be voluntarily made.[15]

13 As to (b), having regard to the way the case was put it was not necessary for the wife to "explore" the meaning of "entitlement" in the husband's submission. If the husband intended that "entitlement" should be understood as connoting merely something that will be available if requested, it was for the husband to articulate that case. He did not do so.[16]

14 *Appeal:* The limited exchanges before the Full Court referring to the annual payment[17] do not provide a basis for concluding that the wife's counsel accepted that the appeal could be decided on a matter that was not raised at first instance.[18]

15 Further, the husband's attempt at RS [44] to avoid his counsel's concession (properly made) that it was not open to the Full Court to draw the critical inference should not be accepted. The context in which the discussion arose was the same as the context for the exchanges relied upon by the husband, namely, the husband's contention (apparently pursuant to ground 7.1 of his grounds of appeal[19]) that the interim maintenance order should have been discharged because the wife had failed to call evidence regarding what she had done to 'chase up' her entitlement to the payment. In any event, the context can hardly undermine the plain

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[14] T34.22-23. At T34.16-18 counsel for the husband submitted that "it's arguable, your Honour, that this is, in fact, a bequest of a legal entitlement" and that one "couldn't possibly elucid whether that's an argument of substance without reference to the whole of the will" (in support of the husband's argument that the will, which had been subpoenaed from the executor, should be produced). See also at T33.26-34 (same).

[15] Moreover, that the husband argued at first instance the wife might be legally entitled to the annual payment based on a 'conditional gift' analysis, does not cure the procedural unfairness to the wife arising as a result of the Full Court deciding the appeal on the basis that the payment would be made voluntarily if requested.

[16] The husband's contention at RS [30] that the wife's counsel accepted (or impliedly accepted) before the Full Court that "the $150,000 payment benefit had been raised" below illustrates the persistent elision by him of two distinct matters. The reference in the father's will to an annual $150,000 payment clearly was raised before the trial judge. However, the difficulty for the husband is that it was raised as a payment to which the wife was arguably *entitled* under the will; not a payment which would be forthcoming even absent such entitlement.

[17] See RS [38]-[42].

[18] Cf RS [48].

[19] Relying on "the wife's duty of disclosure and failure to call evidence": Full Court Reasons at [61].

meaning of the concession. The judge's question whether it was possible to draw an inference that the wife would be given "whatever she wanted" in response to a request was clearly directed to a request to be paid the amounts referred to in the will.

16 Critically, it is not to the point whether the issue of the wife's ability to ask for the annual payment was raised during the appeal (although the wife contends it was not). This cannot cure the unfairness to the wife of being denied the opportunity to lead evidence at first instance.

Ground 3.1: Inference not open

17 The contention at RS [51]-[53] is that the inference drawn by the Full Court was justified because of the wife's failure to lead evidence to refute it. This ignores the wife's primary complaint. Because the matter was not raised at first instance, the wife had no need – and therefore no opportunity – to call evidence on the issue.[20] In any event, the wife's 'failure' to lead evidence refuting the inference does not supply the foundation for drawing it.

18 Further, the husband contends at RS [55] that the Full Court was not required to address the "hypothetical" question of whether the payments – being a gratuitous gift to a third party – would be in the best interest of one or more of the V Group companies such that they could be made conformably with directors duties. Far from being hypothetical, this question was fundamental to the Full Court's conclusion that, if the wife had asked for the payment, *it would be made by the V Group*. Absent consideration of this issue (which the husband admits at RS [55] raises "significant questions") – and absent a positive finding that the payments could lawfully be made by the family companies (or one of them) – it was not possible for the Full Court to conclude that the payments would be made.

Ground 3.2: Application of statutory provisions

19 The husband simply does not address the wife's submission – that the Full Court erred in treating the ability to request a voluntary payment from a third party as a matter relevant to the s 72 analysis. Instead, the husband's argument is predicated on the proposition that the father's wish constituted a "vested benefit" of the wife under the will: RS [65]-[71].

20 This argument does not deal with the approach adopted by the Full Court following its finding that the "wish" was not legally binding on the executor;[21]; that is, the wife had no legal entitlement to the annual payment. The Full Court proceeded on the basis that the benefit might nonetheless be voluntarily conferred on the wife if requested. The relevant question on this appeal is whether the Full Court erred in its treatment of a potential voluntary payment – not a "vested benefit" – under the statutory provisions. No notice of contention has been filed.

21 In any event, it is not correct to characterise the father's wish that the V Group make the annual payments to the wife as a "present and existing benefit or entitlement": RS [70]-[71]. On its proper construction, the will did not impose any legal obligation on the brothers to procure the V Group to make the annual payments (even assuming it was lawful for them to do so). The only obligation imposed on the brothers by the father's wish was a moral one.[22]

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[20] For instance, the husband says at RS [52] that the wife did not call her brothers to "refute the suggestion" that they would comply with their father's wishes. The wife's point is that this "suggestion" was never made.

[21] Full Court Reasons at [132].

[22] *Re Cobcroft* [2015] NSWSC 346 at [33], [35] per Young J (the language of a gift conferred in the deceased's will is "merely precatory" with the consequence that the only obligation on the donee is a "moral obligation").

22 A wish expressed in a will may be one of two types. It may be the expression of a mere hope or expectation. That type of wish does not create any legal obligation.[23] Alternatively, it may be a wish annexed to a bequest in such a way that it creates a trust or conditional gift that has legal effect.[24] The question is one of construction of the terms of the will.

23 In this case, it is plain that the "wish" was merely an expression of the father's hope or desire. On the evidence before the Full Court as to the contents of the will, there was nothing to suggest the bequest of V Group shares to the brothers[25] was conditional on them complying with the father's wish in relation to the annual payment to the wife. To the contrary:

(a) the words "I wish" are typical "precatory words";[26]

(b) the wish was directed to the V Group, not to beneficiaries of the estate (ie the brothers);

(c) the bequests to the brothers and the wish were recorded in different clauses;

(d) the wish contained no reference to any condition or qualification on bequests made elsewhere in the will;

(e) the evidence of the solicitor was that clause 14 – being the clause containing the wish – was the only clause in the will that referred to the wife.[27]

24 On this material, there was no connection between the fathers' wish and the bequests to the brothers. There is therefore no basis for construing clause 14 as a conditional gift. In any event, this was not what the Full Court was asked by the husband to do, or what it did, in discharging the interim maintenance order.

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[23] *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 418 per Dixon J; *Dean v Cole* (1921) 30 CLR 1 at 8 per Knox CJ, Gavan Duffy and Rich JJ; *Re Australia Elizabethan Theatre Trust; Lord v Commonwealth Bank of Australia* (1991) 30 FCR 491 at 505 per Gummow J; *In re Hutchison an Tennant* (1878) 8 Ch D 540 at 542-543 per Jessel MR. See generally *Scott on Trusts* at §25.

[24] In that latter circumstance, the condition may take effect as a a personal obligation on the donee who takes the gift (that may be enforced by the beneficiary of the condition); it may impose an equitable charge over the gifted property in favour of the beneficiary of the condition; it may involve forfeiture of the gift for non-fulfillment; or it may create a trust in favour of the beneficiary of the condition: *Countess of Bective v Federal Commissioner of Taxation* (1932) 47 CLR 417 at 418-419 per Dixon J; *Muschinski v Dodds* (1985) 160 CLR 583 at 605 per Brennan J, 624-625 per Dawson J. Again, the consequence is to be determined by construction of the terms of the will.

[25] See Shaw Affidavit at [33]-[34].

[26] See *Trustees of the Christian Brothers in Western Australia (Inc) v Attorney-General of Western Australia* [2006] WASC 191 at [10]-[11] per Templeman J (observing that "The introductory words 'And it is my wish' are precatory words"); *Re Burton (Deceased), Public Trustee v Burton* [1965] NZLR 712 at 713 per Hardie Boys J ("it must always be the case that, if words in a will are precatory only, effect cannot be given to them"); *Iskandarani v Saarelaht* [2001] VSC 44 at [29] per Gillard J (words of "desire, hope, expectation or wish" are "precatory words only" and are "devoid of legal effect"); *Re Boning* [1997] 2 Qd R 12 at 21-22 per White J (considering authorities as to use of precatory words and the characterisation of conditions); *In the Estate of Fairlie-Jones (Deceased)* (2013) 116 SASR 172 at [16]-[19] per Gray J (same).

[27] Shaw Affidavit at [38]. The wife was also referred to in Annexure B: Ibid.