FAMILY COURT OF AUSTRALIA

YIP & WREFORD AND ANOR ***[2015] FamCAFC 21***

FAMILY LAW – APPEAL – CHILD SUPPORT – Where the appellant father sought a review of a child support departure determination and the Social Security Appeals Tribunal increased his taxable income for child support purposes – Where the father's appeal to the Federal Circuit Court was dismissed and the father now seeks to appeal that decision – The primary judge did not err in finding that the Tribunal did not err in law by failing to refer to s 117(7A) of the *Child Support (Assessment) Act 1989* (Cth) – The primary judge did not err in finding that the Tribunal did not err in law by adjusting the father's taxable income – No issue of procedural fairness arises – Application for leave to appeal dismissed – Appellant father ordered to pay costs.

Child Support (Assessment) Act 1989 (Cth), s 35C, s 56, s 57, s 98B, s 98C, s 98S, s 117

Apthorpe v Repatriation Commission (1987) 13 ALD 656
Brent v Commissioner of Taxation (1971) 125 CLR 418
Burns & Grint [2014] FamCAFC 48
Child Support Registrar & Crabbe and Anor (2014) FLC 92-062
Jess and Ors & Jess and Ors [2014] FamCAFC 227
Stanford v Stanford (2012) 247 CLR 108
SCVG & KLD (2014) FLC 93-582
Tasman & Tisdall (SSAT Appeal) [2008] FMCAfam 126

APPELLANT:	Mr Yip
FIRST RESPONDENT:	Ms Wreford
SECOND RESPONDENT:	Child Support Registrar
FILE NUMBER:	BRC 10087 of 2012
APPEAL NUMBER:	NA 3 of 2014
DATE DELIVERED:	19 February 2015
PLACE DELIVERED:	Perth
PLACE HEARD:	Brisbane

JUDGMENT OF:	May, Thackray & Strickland JJ
HEARING DATE:	5 August 2014
LOWER COURT JURISDICTION:	Federal Circuit Court of Australia
LOWER COURT JUDGMENT DATE:	13 December 2013
LOWER COURT MNC:	[2013] FCCA 2103
REPRESENTATION	
COUNSEL FOR THE APPELLANT:	Mr Niall SC
SOLICITOR FOR THE APPELLANT:	Emerson Family Law
COUNSEL FOR THE FIRST RESPONDENT:	In person
SOLICITOR FOR THE FIRST RESPONDENT:	In person
COUNSEL FOR THE SECOND RESPONDENT:	Ms Brennan
SOLICITOR FOR THE SECOND RESPONDENT:	Sparke Helmore Lawyers

ORDERS

(1) The application for leave to appeal be dismissed.

(2) The appellant pay the second respondent's costs of and incidental to the appeal as agreed and in default of agreement, as assessed.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Yip & Wreford and Anor* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT BRISBANE

Appeal Number: NA 3 of 2014
File Number: BRC 10087 of 2012

Mr Yip
Appellant

And

Ms Wreford
First Respondent

And

Child Support Registrar
Second Respondent

REASONS FOR JUDGMENT

Introduction

1. Mr Yip ("the father") seeks leave to appeal, and if leave is granted, to appeal from an order made by Judge Coates of the Federal Circuit Court on 13 December 2013. The order dismissed the father's appeal against a decision of the Social Security Appeals Tribunal ("the Tribunal") in relation to child support payable for the two children of his relationship with Ms Wreford ("the mother").

2. The appeal is opposed by the mother, and also by the Child Support Registrar ("the Registrar") who was named as the second respondent in this appeal.

3. The father contends that Judge Coates erred in failing to find that the Tribunal made an error of law by setting his annual income for child support purposes at $217,000 for the period 4 July 2011 to 31 December 2013. He contends that his income should have been set in accordance with his taxable income as found by the Australian Taxation Office (although in his appeal before Judge Coates he proposed that it be set at $100,000 per annum). If leave to appeal is granted, he seeks that the orders made by Judge Coates and by the Tribunal be set aside, and that the matter be remitted for rehearing "in accordance with law".

Background

4. The following facts are drawn from the reasons of the Tribunal and Judge Coates, and may now be regarded as uncontroversial.

5. The father and the mother have two children, who were aged seven and six at the time the Tribunal made its decision.

6. Prior to resigning on 30 June 2011, the father was employed as a manager of a large company involved in an industry in which he had spent his entire working life. His taxable income for the year ended 30 June 2011 was $115,000.

7. At the time, the father was in a relationship with Ms L who, it seems, had never held full-time employment, but had obtained a licence in April 2011, which she used for two months working for the father's employer.

8. On 4 July 2011, the father advised the Registrar that he estimated he would have no income for the rest of the financial year. An administrative assessment of child support based on this estimate was issued on 11 July 2011.

9. Very soon after advising the Registrar he would have no income, the father and Ms L caused D Pty Ltd to be incorporated. The father and Ms L were the directors and equal shareholders, and the only staff of the business commenced by the company. No funds were needed to establish the business, which had a turnover of more than $500,000 in the year ended 30 June 2012.

10. On 31 January 2012, on the mother's application, a Senior Case Officer made a determination increasing the father's taxable income for child support purposes from nil to $115,000 per annum for the period 16 September 2011 to 15 September 2013. The father objected, but his objection was disallowed.

11. The father then applied for a review, and the Tribunal increased his taxable income for child support purposes to $217,000 per annum for the period 4 July 2011 to 31 December 2013. The father appealed to the Federal Circuit Court, but Judge Coates made an order on 13 December 2013 dismissing the appeal.

Relevant provisions of the child support legislation

12. Subsection 98B(1) of the *Child Support (Assessment) Act 1989* (Cth) ("the Assessment Act") sets out the procedure the mother used to challenge the assessment based on the father's estimate. The subsection provides:

> (1) If, at any time when an administrative assessment is in force …
>
> …
>
> (b) the carer entitled to child support concerned;
>
> is of the view that, because of special circumstances that exist, the provisions of this Act relating to administrative assessment of child

support should be departed from in relation to the child, [the carer] may … ask the Registrar to make a determination under this Part.

13. Subsection 98C(1) sets out matters which must be satisfied before the Registrar can permit departure from an assessment.

> (1) Subject to this Part, if:
>
> (a) an application is made to the Registrar under section 98B; and
>
> (b) the Registrar is satisfied:
>
> (i) that one, or more than one, of the grounds for departure referred to in subsection (2) exists; and
>
> (ii) that it would be:
>
> (A) just and equitable as regards the child, the liable parent, and the carer entitled to child support; and
>
> (B) otherwise proper;
>
> to make a particular determination under this Part;
>
> the Registrar may make the determination.

14. Subsection 98C(2) provides that the grounds for departure are the same as those for an application made to a court pursuant to s 117(2). Subsection 98C(3) goes on to provide that ss 117(4) to (9) apply as if any reference in those subsections to a court were a reference to the Registrar, and as if any reference to an order were a reference to a determination by the Registrar.

15. Section 98S sets out the determinations the Registrar can make. The determination relevant here is that contained in s 98S(g), namely "varying a parent's adjusted taxable income". The words "taxable income" are defined in the Assessment Act. We will come to that definition when we are addressing the relevant part of the argument.

16. As already noted, s 117(2) sets out the grounds to be considered when deciding whether to depart from an assessment. The ground relevant to this appeal is that contained in s 117(2)(c):

> (c) that, in the special circumstances of the case, application in relation to the child of the provisions of this Act relating to administrative assessment of child support would result in an unjust and inequitable determination of the level of financial support to be provided by the liable parent for the child:
>
> …

(ia) because of the income, property and financial resources of either parent; or

(ib) because of the earning capacity of either parent; …

17. Subsection 117(4) details the matters to which the Registrar must have regard in deciding whether it is just and equitable to permit departure from an assessment. The relevant part is as follows:

(4) In determining whether it would be just and equitable as regards the child, the carer entitled to child support and the liable parent to make a particular order … the court must have regard to:

…

(d) the income, property and financial resources of each parent who is a party to the proceeding; and

(da) the earning capacity of each parent who is a party to the proceeding; …

18. Subsection 117(5) sets out the matters to which the Registrar must have regard in determining whether it would be "otherwise proper" to permit departure, but we need not recite the provision, as the father's appeal to the Federal Circuit Court did not challenge the way in which it was applied by the Tribunal.

19. Section 117(7A), which is of central importance to the appeal, provides:

(7A) In having regard to the income, property and financial resources of a parent of the child, the court must:

(a) have regard to the capacity of the parent to derive income, including any assets of, under the control of, or held for the benefit of, the parent that do not produce, but are capable of producing, income; and

(b) disregard:

(i) the income, earning capacity, property and financial resources of any person who does not have a duty to maintain the child, or who has such a duty but is not a party to the proceeding, unless, in the special circumstances of the case, the court considers that it is appropriate to have regard to them; ...

20. Section 117(7B), which is also of significance in this appeal, provides:

(7B) In having regard to the earning capacity of a parent of the child, the court may determine that the parent's earning capacity is greater than is reflected in his or her income for the purposes of this Act only if the court is satisfied that:

(a) one or more of the following applies:

(i) the parent does not work despite ample opportunity to do so;

(ii) the parent has reduced the number of hours per week of his or her employment or other work below the normal number of hours per week that constitutes full-time work for the occupation or industry in which the parent is employed or otherwise engaged;

(iii) the parent has changed his or her occupation, industry or working pattern; and

(b) the parent's decision not to work, to reduce the number of hours, or to change his or her occupation, industry or working pattern, is not justified on the basis of:

(i) the parent's caring responsibilities; or

(ii) the parent's state of health; and

(c) the parent has not demonstrated that it was not a major purpose of that decision to affect the administrative assessment of child support in relation to the child.

The statutory provisions governing this appeal

21. The statutory provisions governing appeals from the Tribunal have recently been discussed in *Child Support Registrar & Crabbe and Anor* (2014) FLC 92-062 and *Burns & Grint* [2014] FamCAFC 48.

22. It is sufficient for present purposes to record that:

- the father was entitled to appeal against the decision of the Tribunal only on a "question of law";
- the father requires leave to appeal from the decision of the Federal Circuit Court; and
- if we grant leave, on hearing the appeal we can affirm, reverse or vary the decision of the Federal Circuit Court, and can make such decision as we consider ought to have been made, or we can order a rehearing.

The application for leave to appeal

23. The father argued in his written submissions that leave to appeal should be granted because the alleged errors made by the Tribunal "go to the fundamental operation of the Act". It was submitted that there was "real doubt as to the correctness of the decision of the Circuit Court and the result is to leave standing a decision that is of significant prejudice to the [father]".

24. The Registrar's submissions in reply noted that the decision of the Tribunal

> like all child support departure determinations increasing the liable parent's liability for child support affects the appellant's substantive liability to child support. Nonetheless, the appellant needs to show that the … dismissal of the appeal from the [Tribunal] involves an error of principle, and/or causes a substantial injustice or raises matters of general importance.

25. The Registrar argued that neither the Amended Notice of Appeal nor the father's Outline of Argument identified any error of principle, and further submitted that no injustice had been done. It was said that the father's case was "so lacking in merit that leave to appeal ought not be granted".

26. No submissions were made in oral argument relating to the test to be applied in dealing with an application for leave to appeal, nor indeed was there any other reference to the issue of leave to appeal.

27. The test referred to by counsel for the Registrar in her written submissions is that which has traditionally been applied in this Court, whereas the test alluded to by senior counsel for the father is that applied in some other intermediate appellate courts, including the Full Court of the Federal Court. This is not an appropriate occasion to consider which test should apply, but see the recent discussion in *Jess and Ors & Jess and Ors* [2014] FamCAFC 227. On either test, it is necessary for the father to at least raise doubt concerning the way the law has been applied by the primary judge.

28. The application for leave and the appeal itself were argued cognately. In deciding whether leave to appeal should be given, we will first consider the father's complaints about how the primary judge addressed the Tribunal's application of the relevant legal principles.

The reasons of the Tribunal

29. His Honour found that there was no question of law raised in the appeal to him from the decision of the Tribunal, and our task is to determine whether his Honour has erred in that finding. In order to do so, it is necessary to consider the reasons for judgment of the Tribunal.

30. Having recorded that the Senior Case Officer decided to set the father's income at $115,000 "on the basis that that was his demonstrated earning capacity", the Tribunal noted at [9] that this decision could only have been made if the requirements in s 117(7B) were met. The Tribunal found at [13] that the requirements had been met and therefore concluded that "regard could be had to [the father's] **earning capacity**" (emphasis added).

31. Having noted that when the Senior Case Officer made her decision, the father's earning capacity was found to be $115,000 per annum, the Tribunal found at [14] that in the course of the review proceedings, the father had "established

that his **current income and financial resources** exceed that figure" (emphasis added).

32. In explaining this finding, the Tribunal said (emphasis added in [16]):

> 14. … During 2011/12 the company had a gross income of $564,733. It incurred listed expenses of $403,410, leaving a profit of $161,633. The listed expenses included a director's fee to [the father] of $43,000 and a director's fee to Ms [L] of $43,000. It also included the entire rental on the house that [the father] and Ms [L] live in, which was $19,053, although the business is run out of only one of the bedrooms of that house. The company does not rent any other space. If one were to generously attribute 20% of the total floor space of [the father] and Ms [L]'s rented house to that one office space, business-related rental expense would be $3,810 and personal rental would be $15,243. [The father] also said that the company paid for all personal telephone expenses which he estimated in his statement of financial circumstances to be $5,200 ($100 per week). In summary, the company incurred business-related expenses of $403,410 - $15,243 - $5,200 = $382,967, leaving a balance of $221,334. Together with directors' fees, $221,334 + $68,000 [sic – the Tribunal no doubt meant to say $86,000, but the error persists in the calculations that followed in a way that was of benefit to the father] = $289,334 was available to remunerate [the father] and Ms [L] in their capacities as directors and shareholders of the company.
>
> 15. The company paid [the father] and Ms [L] equal amounts in director's fees and they have an equal entitlement to the company's profits pursuant to their equal shareholdings. On that basis, [the father's] *legal entitlement* to various income and financial resources would be fairly represented in an adjusted taxable income for child support purposes of $289,334 /2 = $144,667 per annum. Whether it is appropriate to only have regard to that figure will be discussed below.
>
> 16. When [the mother] lodged her departure application the administrative assessment used [the father's] estimate of income of $0. The disparity between that figure and [the father's] **earning capacity**, as well as the disparity between that figure and [the father's] **income and financial resources**, constituted special circumstances such that the application of the administrative assessment would result in an unjust and inequitable determination of child support payable. The Tribunal therefore concludes that a ground for departure exists.

33. Having thus found a ground for departure, the Tribunal then turned to the issue of whether it was just and equitable to permit a departure from the assessment:

> 17. The requirement to consider whether a departure would be just and equitable directs attention to what is fair to the parents and their children. Regard must be had to a variety of factors such as the needs of the children, the parents' commitments and any hardship that would be caused by departing or not departing from the formula.

34. After noting the contrast in the employment histories of the father and Ms L, the Tribunal recorded:

> 21. It was put to [the father] that while he and Ms [L] have elected to have equal shareholding in the company and have elected to receive equal fees as directors, their equal remuneration did not reflect the commercial value of their respective contributions to the company. [The father] did not accept that proposition because he said they both worked roughly 40 to 50 hours per week.

35. The Tribunal next addressed the roles performed by the father and Ms L in the company, and then went on:

> 25. The Tribunal asked [the father] what he thought the respective commercial values of his and Ms [L]'s contributions to the company were. He said he had no idea. It is clear that [the father] is the driving force of the business. He has a wealth of relevant experience which he brings to his position of manager. Without him, there would be no business. The only relevant experience or expertise that Ms [L] appears to have brought to the business at its inception was approximately two months' experience as a casual [employee].
>
> 26. It is difficult to quantify the respective values of [the father's] and Ms [L's] contributions to the company, although they are clearly not equal. The Tribunal will conservatively value [the father's] contribution at 75% and Ms [L's] at 25%. That rather generously values Ms [L's] contribution during 2011/12 at $289,334 x 25% = $72,334, and conservatively values [the father's] contribution during 2011/12 at $217,000.
>
> 27. By structuring the company in a way that does not reflect their respective contributions, [the father] has effectively gifted to Ms [L] income and financial resources that would otherwise be his. Of course, parents are free to give gifts to their partners and others, but that is not a legitimate basis for reducing their child support liability.

36. The Tribunal next examined the expenses of both parents and the two children, before finding at [29] that the father "has an abundant capacity to contribute to the children's expenses". Although the Tribunal did not go on to express satisfaction that it was just and equitable to depart from the assessment, such a

finding is obviously implied. The Tribunal did discuss whether it would be "otherwise proper" to allow a departure, and concluded it would be (at [32]-[33]).

37. Having thus established the existence of the three requirements for departure set out in s 98C, the Tribunal then discussed how to frame the departure order. Although acknowledging one option was to set the amount of child support, the Tribunal concluded at [34] that the preferable approach was to specify the father's adjusted taxable income on the basis that "the formula would then calculate the child support payable based on the average costs of children".

38. In summing up its decision, the Tribunal observed:

> 35. [The father's] legal obligation to provide for his children takes precedence over his election to effectively gift a portion of his ongoing income and financial resources to his partner. Setting [the father's] adjusted taxable income for child support purposes at $217,000 would reflect the position he would be in had he not effectively made that gift, and would result in a current rate of child support of approximately $24,700 per annum …

39. The Tribunal completed its reasons by explaining why the new rate would take effect from 4 July 2011 and conclude on 31 December 2013.

The reasons of the Federal Circuit Court

40. In giving his reasons, the primary judge explained that the appeal could be brought only on a question of law. His Honour acknowledged, however, that an unduly legalistic approach should not be adopted in deciding whether an issue of law is involved.

41. Among the authorities cited by his Honour was *Tasman & Tisdall* (SSAT Appeal) [2008] FMCAfam 126, where Brown FM (as his Honour then was) said (footnotes omitted):

> 43. It is the function of this court to determine whether the decision of the SSAT was within its legal powers. That is what is meant by a question of law. It is not the function of this court to examine the merits of that decision. As such, I should be cautious to approach the decision of the SSAT with "an eye [which is] too keenly attuned to perception of error". Rather I should take a commonsense approach to what the SSAT was saying in its decision and the reasons why it did [sic] said what it said.
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> 44. An administrative tribunal exceeds its powers and thus commits a jurisdictional error, which is correctable on appeal in respect of a question of law, if it:
>
> i) fails to construe properly the legislative provisions applicable;

ii) identifies the wrong issues or asks itself the wrong questions;

iii) ignores relevant material or relies on irrelevant material;

iv) fails to accord procedural fairness to the party before it;

v) makes an erroneous finding of such a magnitude that it goes to the very jurisdiction which it purports to exercise rendering its decision perverse or unreasonable or otherwise offending logic.

42. Although the father raised a miscellany of issues on appeal, Judge Coates found none raised a question of law or, if they did, found the Tribunal did not err in applying the law. The appeal was therefore dismissed.

Grounds of appeal

43. The father's complaints have undergone metamorphosis as his case made its way through the multi-layered appellate process. His original Notice of Appeal filed in the Federal Circuit Court in November 2012 was amended by a Notice filed in June 2013. His Notice of Appeal filed in this Court on 10 January 2014 was amended by a Notice filed on 15 May 2014, but the complaints were then recast in the written Outline of Argument. These, in turn, were further refined by senior counsel for the father in his oral submissions.

44. We propose to address only the three complaints articulated by senior counsel for the father in his oral submissions, which are to be found in Grounds 5 and 6 of the Amended Notice of Appeal. We will not address Grounds 1 to 4, which were not pursued.

First complaint – error in determining father's income and resources

45. The first complaint was that his Honour should have found that the Tribunal had erred in law when determining the father's income and financial resources for the purposes of s 117(2) and s 117(4), in particular by failing to have regard to s 117(7A). It was argued that the Tribunal had conflated the father's income and financial resources with "the altogether different question of **what should be regarded** as the income and financial resources of the father" (emphasis added).

46. Senior counsel took issue with the conclusion of the primary judge that no error of law was raised by the father's contention that the Tribunal had misunderstood the legal relationship between the company, the father and Ms L. Counsel also criticised the conclusion of the primary judge that the Tribunal had done no more than make a finding of fact that the father had gifted an interest in the company to Ms L and a further finding of fact concerning the "contributions" of the father and Ms L.

47. We see no error in the conclusion of the primary judge at [70] that there was no substance in this complaint and no questions of law are raised here. The primary judge accepted at [58] that it was possible, depending on the evidence, that it was "against company law to determine that the [father] has a greater capacity to pay more money" than the other equal shareholder. The Tribunal had also properly understood the legal relationship between the company, the father and Ms L. Throughout the Tribunal's reasons, there is reference to the father and Ms L being in a position of equality, and hence entitled to similar benefits from the corporation (see, for example, [15], [21], [27] and [35]). The finding of the Tribunal at [27] and repeated at [35] that the father had "effectively gifted" what would otherwise have been his income and financial resources constitutes both a recognition of Ms L's legal entitlement and a finding of fact concerning how she came to have that entitlement. The further findings concerning the "contributions" of the father and Ms L cannot be construed as anything other than findings of fact for which there was ample evidence.

48. We do not accept the submission of senior counsel for the father that the "question of whether there was a gift, required, at the threshold that there be a legal analysis of the respective interests of the [father] and [Ms L] in the company". Contrary to what was said by the primary judge at [61], the Tribunal did not find that the father made a gift of "an amount or interest in the company". The findings of the Tribunal were that the father had "effectively gifted to Ms [L] income and financial resources that would otherwise be his" and that he had "effectively gift[ed] a portion of his ongoing income and financial resources" (at [27] and [35]). The repeated use of "effectively" demonstrates that the Tribunal was alive to the fact that the arrangement did not, in fact, constitute a gift.

49. In support of his proposition that the Tribunal had conflated the father's income and financial resources with the question of "what should be regarded as [his] income and financial resources", senior counsel for the father noted that the Tribunal had found that the earlier decision to set the income at $115,000 per annum was based on s 117(2)(c)(ib) (earning capacity). However, it was submitted that the Tribunal's own decision appeared to have been based on s 117(2)(c)(ia) (income and financial resources) and that the Tribunal had therefore erred in law by not considering s 117(7A), which sets out matters to which regard must be had when considering a parent's income and financial resources. If that submission is correct then it is said his Honour erred in failing to recognise that this raised a question of law.

50. Although an alternative reading is available, we accept that the Tribunal's decision can be read as being based on the father's income and financial resources, notwithstanding the Tribunal having recognised that the original decision was based on "earning capacity". Counsel for the Registrar conceded

that the Tribunal's decision was based on the father's income and financial resources, rather than on his earning capacity, but she submitted that:

- "the concepts are fluid because under s 117(7A) in having regard to the income … and financial resources the tribunal necessarily had to have regard to the capacity of the appellant to derive income";
- the Tribunal had examined the father's capacity to derive income and his "actual financial resources" and, having done so, found at [27] that the father had control over the income and resources of the company, which is why he had been able effectively to gift those to Ms L;
- the question whether or not a "question of law" arises from the decision of the Tribunal must take as its premise the approach adopted by, and the facts as found by, the Tribunal; and
- on the facts as found by the Tribunal, and having regard to his capacity to derive income, the father could not legitimately assert that his income and financial resources were not truly reflected by the decision to set his income at $217,000.

51. We accept that, having seemingly decided there was a ground for departure based on the father's income and resources, the Tribunal made no express reference to s 117(7A)(a), which expressly directs a court to have regard to the capacity of a parent "to derive income" when it is having regard to a parent's income and financial resources.

52. One answer to the complaint about the absence of reference to s 117(7A)(a) is that suggested by counsel for the Registrar, namely that it emerges from the reasons that the Tribunal did give attention to the father's capacity to "derive income". However, we are not entirely convinced by this argument, which seems to us to give the same meaning to "earning capacity" as it does to "capacity … to derive income". In our view, those expressions have different meanings in the context of the Assessment Act.

53. That this is so is demonstrated by reference to s 117(7)(a), which deals with the position of the child, as opposed to s 117(7A), which deals with the position of the parents. Subsection 117(7)(a) provides (emphasis added):

> (7) In having regard to the income, **earning capacity**, property and financial resources of the child, the court must:
>
> (a) have regard to the capacity of the child to **earn** or derive income, including any assets of, under the control of, or held for the benefit of, the child that do not produce, but are capable of producing, income; ...

54. While the two provisions are couched in very similar language, s 117(7A) differs from s 117(7)(a) in that the retention in s 117(7A) of "income" and

"capacity … to derive income" is accompanied by the omission of "earning capacity" and "earn". In our view, the variation in terminology points to Parliament's intention that "capacity to **earn** income" not be seen as synonymous with "capacity to **derive** income". This is consistent with authority relating to the meaning of the word "derive" when used in the context of income taxation legislation. For example, in *Brent v Commissioner of Taxation* (1971) 125 CLR 418 at 427, Gibbs J said:

> The word "derived" is not necessarily equivalent in meaning to "earned". "Derived" in its ordinary sense, according to the *Oxford English Dictionary*, means "to draw, fetch, get, gain, obtain (a thing from a source).

55. If "derive" is used in this sense, "capacity to derive income" is apt to cover the example given in both s 117(7A) and s 117(7)(a), namely income that could be obtained from assets already under the control of, or held for the benefit of, the child or the parent. On the other hand, "capacity to derive income" is not, in our view, apt to encompass income that might have been available if the financial affairs of the father had been arranged differently.

56. Counsel for the Registrar may have sought to address this flaw in her argument when she submitted that the Tribunal at [27] had found, albeit obliquely, that the father had control over the income and resources of the corporation by virtue of the fact that he had been able effectively to gift half to Ms L. However, the fact the father elected to give Ms L equal control of the business does not mean that he thereafter retained control, or that she held any part of her interest for his benefit (absent a finding to that effect).

57. Nevertheless, on our construction of the provision, it was unnecessary for the Tribunal to refer to s 117(7A)(a) because it had not been argued that the father had any current capacity to "derive" any additional income from assets held for his benefit or under his control, or that he had any other means of "deriving" income. As the Full Court said in *SCVG & KLD* (2014) FLC 93-582 at [78]:

> factual and legal concessions, if accepted by the court, may conclusively deal with factors that legislation requires be considered and, as a consequence of which, the judgment needs to address only the contentious factual and legal matters which remain outstanding.

58. The fact the Tribunal found a ground for departure based on the father's income and financial resources rather than his earning capacity, and made no finding about his capacity to derive additional income, does not mean that the Tribunal was bound to frame its order by reference to the father's current income or resources, or by reference to the income that might be available if the corporation declared a dividend. Any argument that the Tribunal was so bound overlooks the fact that its power to grant a departure from an assessment comes from s 98C and is dependent only on satisfaction of the criteria stated therein.

59. Having satisfied itself about each of the three criteria, the Tribunal could make any of the determinations mentioned in s 98S. There are no limits contained in the statute on the exercise of the power, save that the determination must be "just and equitable" and "otherwise proper".

60. The fact that s 117(4) and s 117(5) prescribe certain matters that the Registrar or Tribunal must have regard to in deciding whether a particular determination is "just and equitable" does not mean that regard cannot be had to other matters. As the High Court said in *Stanford v Stanford* (2012) 247 CLR 108 at 120 [36] when discussing the same words in s 79(2) of the *Family Law Act 1975* (Cth) (footnote omitted):

> The expression "just and equitable" is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definition. It is not possible to chart its metes and bounds.

61. It follows that the Tribunal was entitled to give such weight as it saw fit to the father's election to effectively give away future income and resources, even though the ground of departure was his current income and resources. We do not read [27] as a finding of control of the corporation by the father, as counsel for the Registrar suggested, but rather as explaining why the Tribunal considered it would be just and equitable to set the father's income on the basis of the income he would have received had he not elected to benefit someone else. The weight placed on this clearly relevant factor can be seen in the Tribunal's summing up, where it was said that the father's "legal obligation to provide for his children takes precedence over his election to effectively gift a portion of his ongoing income and financial resources to his partner" (at [35]).

62. For these reasons, we reject the submission that it was only open to the Tribunal to have regard to the "factual or legal scenario" existing at the time the departure application was being considered. Similarly, we reject the submission that the Tribunal could only look behind the company structure if it was a sham or it was shown the father had control. Such restrictions are not warranted by the legislation, one of the stated objects of which is to ensure

> that the level of financial support to be provided by parents for their children is determined according to their **capacity** to provide financial support and, in particular, that parents with a like **capacity** to provide financial support for their children should provide like amounts of financial support … (emphasis added)

63. Thus, we are satisfied that his Honour did not err in finding that no issue of law is raised here.

64. We turn now to the associated complaint concerning the Tribunal's failure to mention s 117(7A)(b). We accept no reference was made to this provision; however, this could only constitute an error of law if the Tribunal had regard to

Ms L's "income, earning capacity, property and financial resources". In our view, that has not been demonstrated, because the ultimate decision was based on the father's position rather than Ms L's. The fact that Ms L's income or resources would have been diminished if the father had not elected to bestow a benefit on her does not mean the Tribunal had any regard to her income or resources. In any event, as counsel for the Registrar submitted, it could be readily inferred that the Tribunal accepted that the "special circumstances" mentioned in s 117(7A)(b) existed. Thus, again there is no error demonstrated by the primary judge.

65. Senior counsel for the father also submitted that the Tribunal erred by:

- failing to take account of Ms L's "premium for ownership";
- failing to recognise it "would be by no means unusual for, and one would expect it, for retained profits or at least a proportion of the retained profits to be retained for the ongoing viability and operation of the business given its infancy"; and
- overlooking the fact that the profit of a company does not become "an interest of the shareholder" until a dividend is paid.

66. The first two arguments do not give rise to a question of law, and thus did not provide a basis for a successful appeal to the primary judge. Further, all three arguments fail to take account of the facts that:

- the business was commenced without injection of any capital;
- there was no evidence to show the business had any need to retain funds to ensure its viability; and
- there was no evidence to suggest any reason why a dividend could not be paid.

67. For these reasons, we find no merit in the first complaint.

Second complaint – nominating an income other than taxable income

68. The second complaint was that his Honour should have found that it was not open to the Tribunal to nominate a taxable income for the purposes of making a determination that does not reflect the father's actual taxable income or a finding as to his taxable income, and that in doing so, the Tribunal had erred in law.

69. Senior counsel for the father took us to s 56(1) of the Assessment Act which provides (original emphasis):

> For the purposes of assessing a parent in respect of the costs of a child in relation to a child support period, if the parent's taxable income has been assessed under an Income Tax Assessment Act for the last relevant year of

> income in relation to the child support period, the parent's ***taxable income*** for that year is the amount as so assessed.

70. By reference to s 56 and s 57 of the Assessment Act, senior counsel for the father stressed that "taxable income" means "either assessable income under the Income Tax (Assessment) Act or an approximation of that". He argued that what was involved in a determination under s 98S(g) of the Assessment Act was not just a variation of "income" but rather a variation of "taxable income". While acknowledging, by reference to ss 35C, 56(4)(a) and 57(9)(a), that the Registrar is not prevented from making a determination under s 98C based on something other than the taxable income of the paying parent, senior counsel for the father submitted it was still necessary to determine "what it means when … the Tribunal is invited … to make a particular order varying an assessable income".

71. Senior counsel for the father further submitted that:

> [I]t's clear from the tribunal's reasons that there was no attempt to bring the figure of 217,000 back to taxable income concepts. It wasn't derived in any way through some analysis, for example, of imputed dividend, dividend income under the ordinary concepts. It has made no attempt to do that. It has simply identified that it is convenient if we adjust taxable income. Now, in our submission, that has two consequences for the appeal. Firstly, it demonstrates that the tribunal was concerned with income rather than earning capacity and, secondly, it calls into focus how the tribunal can approach the power to adjust the taxable income.

72. Senior counsel for the father also submitted that the s 98S(g) mechanism

> cannot be used, to simply arrive at a taxable income which doesn't bear any reference to the actual taxable income either under income tax legislation, actual income or even any assessment by the registrar as to what the taxable income might be. The whole purpose of the provision is to identify an available amount by reference to the taxable amount … [B]y playing with adjusted taxable income you're attributing an amount which is not available as income but it's purely nominally available as income. Now, in our submission, that doesn't give any or sufficient recognition of the statutory terms that are engaged here.

73. We do not accept that by making a determination pursuant to s 98S(g) the Tribunal was "concerned with income rather than earning capacity". Although there are other means to achieve the objective, decision makers commonly adjust the paying parent's taxable income in order to reflect earning capacity rather than income. We agree with counsel for the Registrar that as a "clear matter of statutory construction it was within the power of the tribunal to vary and substitute by varying the adjusted taxable income as it did in this case". We also accept her submission that:

> to contend otherwise makes the departure provisions inoperable in cases where it is found that a liable parent has financial resources available for the supply of child support that are not reflected in that parent's taxable income so it's no surprise, then, that the Act operates as it is well known to do which allows for the variation of adjusted taxable income with no reference to what might be assessed as taxable income by the Taxation Office.

74. For these reasons, we find the Tribunal did not make an error of law, and there is no merit in the second complaint.

Third complaint – denial of procedural fairness

75. The father's final complaint was that the primary judge should have found that he had been denied procedural fairness in relation to the finding of the Tribunal that "the interest in the company that conducted the business should be split 75:25 notwithstanding the relevant directorships and shareholding".

76. We agree with counsel for the Registrar that the procedural fairness issue raised before the Federal Circuit Court dealt with an entirely different issue than the one now sought to be advanced here. Furthermore, we accept counsel's submission, relying upon accepted authority, that procedural fairness does not normally require decision makers to disclose their thinking processes or proposed conclusions. In any event, during the course of the proceedings before the Tribunal, the presiding member said to the father: "the question arises as to whether … it is appropriate to recognise that legal relationship of fifty-fifty or whether … some other proportion should be involved".

77. We are not persuaded that any issue of procedural fairness arises; his Honour did not err and we therefore find no merit in the third complaint.

The outcome and costs

78. Having found no error by the primary judge in his determination that no question of law was raised in the appeal, we propose to dismiss the application for leave to appeal. Although the father sought costs against the Registrar if his appeal succeeded, he opposed the Registrar's application for costs if he was unsuccessful. Senior counsel for the father sought to justify what he accepted was the "fairly obvious disconnect" by submitting that the role of the Registrar was "not to contend for any particular result but effectively to act as a contradictor … to assist the court" and that "the Commonwealth through the Registrar has a particular role to play … and that would justify that disconnect".

79. In support of her application for costs, counsel for the Registrar observed that all of the complaints in the Federal Circuit Court had failed and that none of the grounds in the appeal to this Court identified how the Federal Circuit Court had erred. Counsel further relied on the fact that the grounds identified in the

Amended Notice of Appeal were not the grounds articulated by senior counsel in his oral argument and that no question of legal principle has been raised.

80. We make no criticism of the way in which senior counsel reframed the father's complaints in his oral submissions as they helpfully condensed the argument. However, the fact remains that none of the grounds were found to have merit. The father, having been wholly unsuccessful, should pay the Registrar's costs.

81. The mother did not seek an order for costs.

I certify that the preceding eighty-one (81) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (May, Thackray & Strickland JJ) delivered on 19 February 2015.
Associate:

Date: 19 February 2015