FEDERAL COURT OF AUSTRALIA

Gidley (Trustee), in the matter of Ripoll (Bankrupt) v Ripoll [2024] FCA 650

File number:	NSD 268 of 2022
Judgment of:	**MARKOVIC J**
Date of judgment:	19 June 2024
Catchwords:	**BANKRUPTCY AND INSOLVENCY** – where notice given by Official Receiver pursuant to s 139ZQ of the *Bankruptcy Act 1966* (Cth) – where trustee sought recovery of money or property – whether binding financial agreement constituted forbearance to sue – whether forbearance to sue can constitute consideration for the transfer of property – where there was no forbearance to sue – where forbearance to sue would not constitute consideration – application allowed
Legislation:	*Bankruptcy Act 1966* (Cth) ss 120, 121, 139ZQ(8) *Family Law Act 1975* (Cth) s 90C
Cases cited:	*Chamberlain v Tilbrook* [2017] FCA 1586 *In the Marriage of C Kennon and D Kennon* (1997) 22 FLR 1 *Official Trustee in Bankruptcy v Lopatinsky* (2003) 129 FCR 234 *Ruzica Varmedja v Svetozar Ved Varmedja* [2007] NSWDC 385
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	General and Personal Insolvency
Number of paragraphs:	71
Date of hearing:	1 May 2024
Counsel for the Applicants:	Mr E Walker
Solicitor for the Applicants:	O'Hearn Lawyers

Counsel for the Respondent: Mr P G Bolster

Solicitor for the Respondent: Jordan Djundja

ORDERS

NSD 268 of 2022

IN THE MATTER OF BANKRUPT ESTATE OF MICHAEL RIPOLL

BETWEEN:	**PAUL WILLIAM GIDLEY IN HIS CAPACITY AS TRUSTEE OF THE BANKRUPT ESTATE OF MICHAEL RIPOLL** First Applicant
	THE BANKRUPT ESTATE OF MICHAEL RIPOLL Second Applicant
AND:	**MS MARY RIPOLL** Respondent

ORDER MADE BY: **MARKOVIC J**

DATE OF ORDER: **19 JUNE 2024**

THE COURT ORDERS THAT:

1. Pursuant to s 139ZQ(8) of the *Bankruptcy Act 1966* (Cth) there be judgment in favour of the applicants against the respondent in the sum of $227,500.

2. The respondent is to pay the applicants' costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MARKOVIC J:

1 The first applicant, Paul William Gidley, is the **Trustee** of the bankrupt estate of Michael Ripoll. The respondent, Mary Ripoll, is Mr Ripoll's former wife.

2 In his further amended application filed on 12 March 2024, as amended by counsel for the Trustee at the hearing of the application, the Trustee seeks:

(1) judgment against the respondent in the sum of $227,500 pursuant to s 139ZQ(8) of the *Bankruptcy **Act** 1966* (Cth);

(2) in the alternative:

(a) a declaration that the transfer of property situated at 10 Redgum Avenue, Cronulla, New South Wales contained in folio identifier 14/29472 (**Property**) to Ms Ripoll on or about 30 May 2017 is void against the Trustee pursuant to s 120 of the Act; or

(b) a declaration that the transfer of the Property to Ms Ripoll on or about 30 May 2017 is void against the Trustee pursuant to s 121 of the Act; and

(3) in the alternative to the order sought in (1) above, judgment in favour of the Trustee against Ms Ripoll in the sum of $267,500 pursuant to s 120 or s 121 of the Act.

3 It is necessary to explain the amount now claimed by the Trustee: in para 1A of the further amended application as filed, the Trustee and the second applicant, the bankrupt estate of Michael Ripoll, sought judgment against Ms Ripoll in the sum of $332,205.27 while in para 5 in the alternative they sought judgment against Ms Ripoll in the sum of $267,500. At the commencement of the hearing counsel for the applicants amended the amount sought by them from Ms Ripoll noting that both by para 1A and, in the alternative, para 5 of their further amended application they sought judgment against Ms Ripoll in the same amount, namely $267,500; and, in the course of argument before me, it became apparent that a Jeep Wrangler vehicle recorded as one of Mr Ripoll's assets in the circumstances described below ought to be taken in account in calculating the amount claimed from Ms Ripoll. On 12 June 2024 the parties informed the Court that that for the purposes of the applicants' claim against Ms Ripoll, the agreed value of the Jeep Wrangler is $40,000. That amount has been applied to reduce the applicants' claim against Ms Ripoll.

4 Thus, the amount in fact claimed by the Trustee from Ms Ripoll is $227,500.

BACKGROUND

5 Mr and Ms Ripoll were married on 16 June 2001.

6 On 5 August 2015 Mr and Ms Ripoll purchased the Property for $1,932,000.

7 Based on Ms Ripoll's evidence, the marriage was not happy. As is clear from her evidence, and as described by counsel appearing for Ms Ripoll, she was subjected to physical, emotional and financial abuse by Mr Ripoll. It was not in dispute that Ms Ripoll continues to receive treatment from a psychologist resulting from the abuse she suffered during her marriage.

8 In 2017 Mr and Ms Ripoll were negotiating the terms of a proposed binding financial agreement pursuant to s 90C of the ***Family Law Act*** *1975* (Cth). By letter dated 6 April 2017 Anne Day & Associates Lawyers, Mr Ripoll's solicitor, provided Mr Ripoll with a copy of the draft financial agreement which had been provided by Ms Ripoll's solicitors. Ms Day's letter provided Mr Ripoll with advice about the draft agreement. It included (emphasis in original):

> …
>
> Can the Financial Agreement be set aside?
>
> In certain circumstances the Court has discretion to set aside a Financial Agreement. These circumstances include:
>
> 1. If there has been failure to disclose relevant information (such as an asset, interest in trust or real estate valuation);
> 2. If the agreement was obtained by fraud or duress;
> 3. If the agreement was entered into for a purpose or for the purpose and included the purpose of defrauding a person who is a party to a de facto relationship of a spouse or defeating the interests of that other person in relation to any possible or pending application for a Court Order in the relation to the de facto relationship;
> 4. If the agreement was entered into for the purpose of defeating or defrauding a creditor or reckless disregard for the interest of a creditor or third party;
> 5. If the performance of the agreement was impractical as a result of the circumstances that have arisen after the date of the agreement;
> 6. If either party to the agreement engaged in unconscionable conduct in relation to the making of the agreement;
> 7. If after the agreement was entered into a material change in the circumstances relating to the care of children under 18 years which will cause hardship to the children or to the person responsible for the care of the children;
> 8. If the agreement is uncertain or incomplete or has been obtained by undue

influence, misrepresentations, mistake, fraud or other contractual irregulatories; **In this regard we consider your desperate financial position is pressing you to seek this agreement to be entered urgently. There is an element of undue influence in these circumstances**.

9. If the agreement dealt with a superannuation interest which was unsplittable (this does not apply in your case).

…

Property Settlement

As you and Mary are separated if you do not enter the Financial Agreement the property settlement would be decided in the usual way under the Family Law Act. When determining a Family Law Settlement the Court would make such Orders as it considers appropriate. The process involves a decision whether it is just and equitable to make Orders and in this case we have a long marriage with jointly owned property so we consider that a Court would make Orders.

But in determining what order to make the Court will look at the assets that you and Mary have at the current time. It would consider the contributions both financial contributions including initial contributions you had at the commencement of your marriage and contributions made during the marriage such as wages, gifts and inheritances.

The Court would also look at non-financial contributions made by each of you on your behalf and this includes contributions for home renovations. The Court would also consider homemaking and parenting contributions. An assessment would be made as to contributions. Our assessment is that the contributions are equal except for any gambling losses (up to $500,000) which may reduce your contributions by 20% to 25%.

…

At the current time assuming if Mary was to receive 65% to 75% of the assets then you have an entitlement to 25% to 35% of the matrimonial pool.

In your case as you can see we have taken Mary's case at its highest including gambling losses. Nevertheless taking those into account you would still have an entitlement to the remaining property. …

9 On 10 April 2017 Mr and Ms Ripoll signed a binding financial agreement under s 90C of the Family Law Act (**BFA**). The BFA described Ms Ripoll as a "sales manager" and Mr Ripoll as "unemployed". It included (emphasis in original):

(1) under the heading "Introduction" the following by way of recitals:

A. This is a financial agreement under Section 90C of the Family Law Act, 1975 (Commonwealth)("the Act") and it is agreed by Mary and Michael to cover all financial matters between them including, but not limited to, how all or any of their property and financial resources are to be dealt with as well as their maintenance.

B. Mary and Michael desire and intend the terms of this Agreement be given effect by any Court called upon to adjudicate on all financial matters (property and maintenance) in issue between Mary and Michael pursuant to the Act.

C. Mary and Michael wish to enter into this Agreement to preclude claims of any nature relating to financial matters, both in relation to property and financial resources as well as spousal maintenance that either has or may have against the other pursuant to the Act and otherwise at law and in equity.

…

E. Mary and Michael acknowledge that they have had an opportunity to, and have made due enquiry as to the assets, financial resources and liabilities of each other and are satisfied that Annexures A and B are accurate.

…

(2) under the heading "Background":

…

1.2. Mary is in full time employment as a sales representative.

…

1.5. At the date of this Agreement Michael is unemployed.

…

(3) under the heading "Assets, liabilities and financial resources of the parties":

2.12. Mary and Michael agree that, in consideration of the terms and conditions of this agreement, including the distribution of personal and real property as set out in Annexures A, B and C neither Mary nor Michael will make any claim concerning the difference in value of that property.

(4) under the heading "Operative part":

3.1. Mary and Michael agree that the assets, liabilities and financial resources, which appear in Annexures A and B are to be dealt with as follows.

3.2. **Division of Separate Property**

(a) Mary will remain solely entitled to the Separate and Jointly owned Property identified at Annexure A to this agreement, including any subsequent appreciation or depreciation on the Separate Property and the proceeds at any sale of Separate Property (including any reinvestment of the proceeds of such sale and any entitlement to superannuation present and expectant) to the exclusion of Michael.

(b) Michael will remain solely entitled to the Separate Property identified at Annexure B to this agreement, including any subsequent appreciation or depreciation on the Separate Property and the proceeds of any sale of Separate Property (including any reinvestment of the proceeds of such sale and any entitlement to superannuation present and expectant) to the exclusion of Mary.

3.3 **Shared Property**

Mary and Michael agree that the Shared Property, which is now identified in Annexure C to this Agreement, is to be distributed as follows:

(a) Michael shall do all acts and things and sign all documents necessary to cause the transfer of his right, title and interest in folio identifier

14 / 29472, being the Cronulla Property to Mary, including but not limited to executing the Transfer, a true copy of which is at Annexure D, simultaneously to executing the Binding Financial Agreement

(b) Mary shall do all acts and things and sign all documents necessary to refinance the loan in respect of the Cronulla Property, to release Michael from any liability in respect of the loan or mortgage over the Cronulla Property.

(c) Within 30 days of the date of this Agreement and upon Michael's compliance with clause 3.3(a), Mary will pay to Michael:

(i) the amount of $30,000 less any amounts already paid, including but not limited to the $5,000 referred to in 3.3(d) and the payment of $5,000 referred to in 3.3(e);

(ii) plus a sum equivalent to the balance outstanding on Michael's credit card number 4564 6800 2200 8667 as at the date of this Agreement but being no more than $27,500, irrespective of the then balance.

(d) On 1 March 2017 Mary paid a deposit of $5,000 to Michael pursuant to his express oral representation that Michael will execute this document.

(e) On the signing of this Agreement by Michael Mary will pay to Michael $5,000.

(e) at the same time as executing this Agreement, Michael will execute an Authority and Direction (at Annexure D) and Mary will, at her earliest convenience and upon Michael's compliance with clause 3.3(a), attend the ANZ bank and access the Offset Account, in which there is a sum of approximately $92,000 and Mary will:

(i) close the Cheque Account, which is overdrawn;

(ii) transfer from the Offset Account approximately $1,100.00, (the exact balance to be advised by the bank at the time of settlement) to cover the overdraft:

(iii) transfer the balance of the Offset Account into a bank account solely operated by Mary, in respect of which:

(A) Mary will then transfer the balance owing pursuant to clause 3.3(c)(i) above;

(B) the balance owing (not exceeding $28,000) pursuant to clause 3.3(c)(ii) above; and

(C) the then remaining amount will be transferred to an account held by Mary solely and no further claim upon that amount will be made by Michael.

10 Annexure B to the BFA set out Mr Ripoll's "Assets, liabilities and financial resources". One of the assets identified was the Jeep Wrangler with an agreed estimated value of $38,000.

Mr Ripoll's listed liabilities included a car loan and ANZ Credit Card debt with agreed estimated values of $37,982 and $27,500 respectively.

11 Annexure C to the BFA set out "Shared assets, liabilities and financial resources of the marriage" and included as an asset the Property with an agreed estimated value of $2.2 m and as a liability the loan from the ANZ Bank secured by way of mortgage over the Property with an agreed estimated value of $1.5 m.

12 On 31 May 2019 Ms Ripoll sold the Property to third parties for $2,150,000. On settlement of the sale the mortgage secured over the Property was discharged.

13 On 21 August 2019 Mr Ripoll completed a Statement of Affairs.

14 On 4 September 2019 Mr Ripoll presented a debtor's petition which was accepted by the Official Receiver. Upon its presentation Mr Ripoll became a bankrupt.

15 On 9 October 2019 the Trustee was appointed as trustee of Mr Ripoll's bankrupt estate by the Official Receiver.

16 On 29 January 2021 a delegate of the Official Receiver issued a notice pursuant to s 139ZQ of the Act to Ms Ripoll (**139ZQ Notice**). The 139ZQ Notice relevantly provided:

> I, James Franze of Level 4, Darling Park Tower 3, 201 Sussex Street, Sydney NSW 2000 as delegate of the Official Receiver, require you, in accordance with section 139ZQ of the *Bankruptcy Act 1966* (Cth) ('the Act'), being a person who has received money or property as a result of a transaction that is void against the Trustee of the above administration, to pay to the Trustee the sum of $332,205.27, being the money or value of property received by you.
>
> …
>
> The facts and circumstances by which I consider that the transaction is void under the Act are set out in the schedule to this notice.
>
> …
>
> If you consider that I should amend or revoke this notice, submissions in writing setting out the grounds why the notice should be revoked or the amount reduced should be made to me on or before 30 days from the date of the service of the notice to you. You should send a copy of any submission to the Trustee. If you choose to make a submission, it does not suspend the operation of this notice or the charge over the property referred to above.
>
> Pursuant to subsection 139ZS(1) of the Act, the court may, on application by you or another interested person, make an order setting aside this notice on the basis of the alleged facts and circumstances set out in this notice. Pursuant to subsection 139ZS(1A), the application must be made to the court not later than 60 days after the day the notice was given to you or, if the application to the court is made by another interested person, it must be made within 60 days of the day the applicant

became aware that the notice had been given.

17 By letter dated 7 December 2021 Ms Ripoll's lawyers, Jordan Djundja, wrote to the Official Receiver in relation to the 139ZQ Notice. That letter commenced by acknowledging the 139ZQ Notice stating:

> Thank you for the time allowed to respond to these matters and in particular to respond to the 139ZQ Notice dated 29 January 2021. We acknowledge at the outset that the normal time allowed under Section 139ZS seeking an order to set aside a Section 139ZQ Notice is normally not later than 60 days.
>
> However, the circumstances of the service of the 139ZQ Notice and our client's reaction to it are as follows: -
>
> 1. The 139ZQ Notice was served upon our client by way of email by an Officer of AFSA. Our client shortly thereafter sent it to her accountant. Her accountant told her, in effect, to ignore the Notice. She acted on the advice of the accountant and did not contact anybody else in relation to the 139ZQ Notice. She did not appreciate its effect nor did she receive any proper advice.
>
> …

18 For the purposes of the proceeding the value of the Property was not in dispute. The Trustee relied on a valuation report dated 9 August 2023 and a supplementary report dated 22 September 2023 both prepared by Malcolm Craig, a certified practising and registered valuer. Mr Craig provided his opinion of the market value of the Property as at:

(1) 6 April 2017 at $2,100,000;

(2) 1 June 2017 at $2,125,000; and

(3) 29 January 2021 at $2,325,000.

19 However, for the purpose of this proceeding and in undertaking his calculation of the amount claimed from Ms Ripoll the Trustee relies on the purchase price paid for the Property by third parties on 19 May 2019, namely $2,150,000.

STATUTORY FRAMEWORK

20 The Official Receiver served a notice on Ms Ripoll pursuant to s 139ZQ of the Act. Section 139ZQ is included in subdiv J of Div 4B of Pt VI of the Act which concerns "Collection of money or property by Official Receiver from party to transaction that is void against the trustee".

21 Section 139ZQ of the Act relevantly provides:

(1) If a person has received any money or property as a result of a transaction that is void against the trustee of a bankrupt under Division 3, the Official Receiver:

(a) if the Official Trustee is the trustee—on the initiative of the Official Receiver; or

(b) if a registered trustee is the trustee—on application by the trustee;

may require the person, by written notice given to the person, to pay to the trustee an amount equal to whichever of the following is applicable:

(c) if:

(i) the transaction is void against the trustee under section 128B or 128C; and

(ii) the transaction is by way of a contribution to an eligible superannuation plan for the benefit of a person (the **beneficiary**) who may or may not be the bankrupt; and

(iii) the beneficiary is a member of the eligible superannuation plan;

whichever is the lesser of the following:

(iv) the money or the value of the property received;

(v) the beneficiary's withdrawal benefit in relation to the eligible superannuation plan;

(d) in any other case—the money or the value of the property received.

(2) The notice must set out the facts and circumstances because of which the Official Receiver considers that the transaction is void against the trustee.

(3) The notice may:

(a) require the amount to be paid at a time or within a period set out in the notice; or

(b) require the amount to be paid at such times, and in such instalments, as are set out in the notice.

(4) After the Official Receiver has given a notice to a person under subsection (1), the Official Receiver may at any time, by a further notice given to the person, revoke or amend the first-mentioned notice.

…

(8) An amount payable by a person to the trustee under this section is recoverable by the trustee as a debt by action against the person in a court of competent jurisdiction.

22 The term "value" is defined in s 139K of the Act as follows:

value, in relation to property referred to in a notice, means the market value of the property when the notice is given.

23 Section 139ZS of the Act provides:

(1) If the Court, on application by a person to whom a notice has been given under section 139ZQ or by any other interested person, is satisfied that this Subdivision does not apply to the person on the basis of the alleged facts and circumstances set out in the notice, the Court may make an order setting aside the notice.

(1A) The application must be made:

(a) not later than 60 days after the day the notice under section 139ZQ was given to the applicant; or

(b) if the applicant is another interested person—not later than 60 days after the day the applicant became aware that the notice has been given.

(2) A notice that has been set aside is taken not to have been given.

24 Sections 120 and 121 of the Act are in Div 3 of Pt VI of the Act. They provide:

120 Undervalued transactions

Transfers that are void against trustee

(1) A transfer of property by a person who later becomes a bankrupt (the ***transferor***) to another person (the ***transferee***) is void against the trustee in the transferor's bankruptcy if:

(a) the transfer took place in the period beginning 5 years before the commencement of the bankruptcy and ending on the date of the bankruptcy; and

(b) the transferee gave no consideration for the transfer or gave consideration of less value than the market value of the property.

Exemptions

(2) Subsection (1) does not apply to:

(a) a payment of tax payable under a law of the Commonwealth or of a State or Territory; or

(b) a transfer to meet all or part of a liability under a maintenance agreement or a maintenance order; or

(c) a transfer of property under a debt agreement; or

(d) a transfer of property if the transfer is of a kind described in the regulations.

(3) Despite subsection (1), a transfer is not void against the trustee if:

(a) in the case of a transfer to a related entity of the transferor:

(i) the transfer took place more than 4 years before the commencement of the bankruptcy; and

(ii) the transferee proves that, at the time of the transfer, the transferor was solvent; or

(b) in any other case:

(i) the transfer took place more than 2 years before the commencement of the bankruptcy; and

(ii) the transferee proves that, at the time of the transfer, the transferor was solvent.

Rebuttable presumption of insolvency

(3A) For the purposes of subsection (3), a rebuttable presumption arises that the transferor was insolvent at the time of the transfer if it is established that the transferor:

(a) had not, in respect of that time, kept such books, accounts and records as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor's business transactions and financial position; or

(b) having kept such books, accounts and records, has not preserved them.

Refund of consideration

(4) The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.

What is not consideration

(5) For the purposes of subsections (1) and (4), the following have no value as consideration:

(a) the fact that the transferee is related to the transferor;

(b) if the transferee is the spouse or de facto partner of the transferor—the transferee making a deed in favour of the transferor;

(c) the transferee's promise to marry, or to become the de facto partner of, the transferor;

(d) the transferee's love or affection for the transferor;

(e) if the transferee is the spouse, or a former spouse, of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*;

(f) if the transferee is a former de facto partner of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975* or the *Family Court Act 1997* (WA).

…

Meaning of ***transfer of property*** *and* ***market value***

(7) For the purposes of this section:

(a) ***transfer of property*** includes a payment of money; and

(b) a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person; and

(c) the ***market value*** of property transferred is its market value at the time of the transfer.

121 Transfers to defeat creditors

Transfers that are void

(1) A transfer of property by a person who later becomes a bankrupt (the ***transferor***) to another person (the ***transferee***) is void against the trustee in the transferor's bankruptcy if:

(a) the property would probably have become part of the transferor's estate or would probably have been available to creditors if the property had not been transferred; and

(b) the transferor's main purpose in making the transfer was:

(i) to prevent the transferred property from becoming divisible among the transferor's creditors; or

(ii) to hinder or delay the process of making property available for division among the transferor's creditors.

Showing the transferor's main purpose in making a transfer

(2) The transferor's main purpose in making the transfer is taken to be the purpose described in paragraph (1)(b) if it can reasonably be inferred from all the circumstances that, at the time of the transfer, the transferor was, or was about to become, insolvent.

Other ways of showing the transferor's main purpose in making a transfer

(3) Subsection (2) does not limit the ways of establishing the transferor's main purpose in making a transfer.

Transfer not void if transferee acted in good faith

(4) Despite subsection (1), a transfer of property is not void against the trustee if:

(a) the consideration that the transferee gave for the transfer was at least as valuable as the market value of the property; and

(b) the transferee did not know, and could not reasonably have inferred, that the transferor's main purpose in making the transfer was the purpose described in paragraph (1)(b); and

(c) the transferee could not reasonably have inferred that, at the time of the transfer, the transferor was, or was about to become, insolvent.

Rebuttable presumption of insolvency

(4A) For the purposes of this section, a rebuttable presumption arises that the transferor was, or was about to become, insolvent at the time of the transfer if it is established that the transferor:

(a) had not, in respect of that time, kept such books, accounts and records

as are usual and proper in relation to the business carried on by the transferor and as sufficiently disclose the transferor's business transactions and financial position; or

(b) having kept such books, accounts and records, has not preserved them.

Refund of consideration

(5) The trustee must pay to the transferee an amount equal to the value of any consideration that the transferee gave for a transfer that is void against the trustee.

What is not consideration

(6) For the purposes of subsections (4) and (5), the following have no value as consideration:

(a) the fact that the transferee is related to the transferor;

(b) if the transferee is the spouse or de facto partner of the transferor—the transferee making a deed in favour of the transferor;

(c) the transferee's promise to marry, or to become the de facto partner of, the transferor;

(d) the transferee's love or affection for the transferor;

(e) if the transferee is the spouse, or a former spouse, of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975*;

(f) if the transferee is a former de facto partner of the transferor—the transferee granting the transferor a right to live at the transferred property, unless the grant relates to a transfer or settlement of property, or an agreement, under the *Family Law Act 1975* or the *Family Court Act 1997* (WA).

…

Meaning of ***transfer of property*** *and* ***market value***

(9) For the purposes of this section:

(a) ***transfer of property*** includes a payment of money; and

(b) a person who does something that results in another person becoming the owner of property that did not previously exist is taken to have transferred the property to the other person; and

(c) the ***market value*** of property transferred is its market value at the time of the transfer.

(Notes omitted.)

25 Also relevant to a resolution of the issues raised by the parties is the operation of aspects of the Family Law Act.

26 Section 79 of the Family Law Act concerns alteration of property interests. It relevantly provides that in property settlement proceedings, the court may make such order as it considers appropriate altering the interests of the parties to the marriage in the property provided the court is satisfied that, in all the circumstances, it is just and equitable to make the order: subs 79(1) and (2). The matters to be taken into account in considering what order should be made under s 79 in property settlement proceedings are set out in s 79(4).

27 Section 90C of the Family Law Act concerns financial agreements made during marriage and relevantly provides:

> (1) If:
>
> (a) the parties to a marriage make a written agreement with respect to any of the matters mentioned in subsection (2); and
>
> (aa) at the time of the making of the agreement, the parties to the marriage are not the spouse parties to any other binding agreement (whether made under this section or section 90B or 90D) with respect to any of those matters; and
>
> (b) the agreement is expressed to be made under this section;
>
> the agreement is a ***financial agreement***. The parties to the marriage may make the financial agreement with one or more other people.
>
> (2) The matters referred to in paragraph (1)(a) are the following:
>
> (a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and during the marriage, is to be dealt with;
>
> (b) the maintenance of either of the spouse parties:
>
> (i) during the marriage; or
>
> (ii) after divorce; or
>
> (iii) both during the marriage and after divorce.
>
> (2A) For the avoidance of doubt, a financial agreement under this section may be made before or after the marriage has broken down.
>
> (3) A financial agreement made as mentioned in subsection (1) may also contain:
>
> (a) matters incidental or ancillary to those mentioned in subsection (2); and
>
> (b) other matters.
>
> …

28 Section 90G of the Family Law Act provides for when a financial agreement is binding and relevantly provides:

> (1) Subject to subsection (1A), a financial agreement is binding on the parties to the agreement if, and only if:
>
> (a) the agreement is signed by all parties; and
>
> (b) before signing the agreement, each spouse party was provided with independent legal advice from a legal practitioner about the effect of the agreement on the rights of that party and about the advantages and disadvantages, at the time that the advice was provided, to that party of making the agreement; and
>
> (c) either before or after signing the agreement, each spouse party was provided with a signed statement by the legal practitioner stating that the advice referred to in paragraph (b) was provided to that party (whether or not the statement is annexed to the agreement); and
>
> (ca) a copy of the statement referred to in paragraph (c) that was provided to a spouse party is given to the other spouse party or to a legal practitioner for the other spouse party; and
>
> (d) the agreement has not been terminated and has not been set aside by a court.

29 Section 90K of the Family Law Act sets out the circumstances in which a court may set aside, among others, a financial agreement and relevantly provides:

> (1) A court may make an order setting aside a financial agreement or a termination agreement if, and only if, the court is satisfied that:
>
> (a) the agreement was obtained by fraud (including non-disclosure of a material matter); or
>
> (aa) a party to the agreement entered into the agreement:
>
> (i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or
>
> (ii) with reckless disregard of the interests of a creditor or creditors of the party; or
>
> (ab) a party (the ***agreement party***) to the agreement entered into the agreement:
>
> (i) for the purpose, or for purposes that included the purpose, of defrauding another person who is a party to a de facto relationship with a spouse party; or
>
> (ii) for the purpose, or for purposes that included the purpose, of defeating the interests of that other person in relation to any possible or pending application for an order under section 90SM, or a declaration under section 90SL, in relation to the de facto relationship; or

(iii) with reckless disregard of those interests of that other person; or

(b) the agreement is void, voidable or unenforceable; or

(c) in the circumstances that have arisen since the agreement was made it is impracticable for the agreement or a part of the agreement to be carried out; or

(d) since the making of the agreement, a material change in circumstances has occurred (being circumstances relating to the care, welfare and development of a child of the marriage) and, as a result of the change, the child or, if the applicant has caring responsibility for the child (as defined in subsection (2)), a party to the agreement will suffer hardship if the court does not set the agreement aside; or

(e) in respect of the making of a financial agreement—a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable; or

(f) a payment flag is operating under Part VIIIB on a superannuation interest covered by the agreement and there is no reasonable likelihood that the operation of the flag will be terminated by a flag lifting agreement under that Part; or

(g) the agreement covers at least one superannuation interest that is an unsplittable interest for the purposes of Part VIIIB.

THE TRUSTEE'S CLAIMS

30 The Trustee makes his claim pursuant to s 139ZQ(8) of the Act or, in the alternative, pursuant to s 120 or s 121 of the Act.

31 In response to each of the claims made by the Trustee Ms Ripoll raises the same defence. Namely, that the consideration she gave for the transfer by Mr Ripoll of his half share in the Property was not limited to the cash amount of $57,500 but included the claims foregone as against Mr Ripoll at the time she entered the BFA.

32 The question of the quantum of consideration given by Ms Ripoll arises on each of the alternate claims made by the Trustee. It can be resolved in the context of the Trustee's principal claim made pursuant to s 139ZQ(8) of the Act.

The parties' submissions

33 The Trustee submits that s 139ZQ of the Act provides an administrative mechanism which circumvents the need for proceedings under s 120 or s 121 of the Act. In the absence of Ms Ripoll having contested the 139ZQ Notice within 60 days of its service on her, the Trustee relies on s 139ZQ(8) of the Act to recover the amount claimed as a debt and contends that judgment for the amount he now claims should be entered in his favour.

34 Ms Ripoll submits, based on her evidence, that she had various potential claims against Mr Ripoll by the time that she executed the BFA including claims arising from:

(1) Mr Ripoll taking steroids and later cocaine;

(2) serious domestic assaults in November 2011, March 2012 and 2014;

(3) an assault on 29 December 2016 when Mr Ripoll returned to the family home following just over three weeks in rehabilitation which led to Ms Ripoll's hospitalisation and criminal proceedings against Mr Ripoll; and

(4) Mr Ripoll's admission that the family finances had been depleted by reason of his gambling by more than $150,000. Ms Ripoll describes how this led to an arrangement being made with the ANZ Bank to require all withdrawals from their joint accounts to be authorised by both Mr and Ms Ripoll.

35 Ms Ripoll submits that the extent to which any payment is due by her to the Trustee is a live issue notwithstanding that she has not made an application pursuant to s 139ZS of the Act.

36 Ms Ripoll submits that the Trustee bears the onus under s 120 of the Act of establishing that the consideration given for the transfer was less than the market value of the property transferred and the burden of establishing a lack of good faith. She says that the Trustee has not addressed the value of causes of action that she had at the time the BFA was made, noting her ability to rely on the matters referred to in *In the Marriage of C* ***Kennon*** *and D Kennon* (1997) 22 FLR 1 so as to increase her entitlement to orders for property settlement.

37 Ms Ripoll contends that, had there been an application by her for a property adjustment under s 79 of the Family Law Act at the time she entered into the BFA, application of the principles in *Kennon* would have had a marked effect on the assessment of the parties' respective contributions for the purposes of s 79 of the Family Law Act. That is, Ms Ripoll submits that the course of violent conduct towards her during the marriage, together with other matters which are the subject of her evidence, made her contributions significantly more arduous than they ought to have been and this would have been reflected in any property settlement.

38 Ms Ripoll submits that in addition the prospect that she might be entitled, at common law, to an award for damages for assault would not have been taken into account under s 75(2)(o) of the Family Law Act to reduce what would otherwise be her entitlement to orders for property settlement. She observes that in *Kennon* the court increased the amount payable to the wife while leaving in place an award for damages for assault.

39 Ms Ripoll submits that her claims against Mr Ripoll have real value and that the BFA, properly construed, by precluding claims for damages in tort by one spouse against the other, amounts to forbearance to sue in respect of any claims of any nature that either may have had against the other, whether at law or in equity. Ms Ripoll says properly construed that includes her ability to make claims arising out of the assaults inflicted upon her.

Consideration

40 In ***Chamberlain*** *v Tilbrook* [2017] FCA 1586 at [22]-[28] Flick J conveniently set out a summary of the principles guiding the operation of s 139ZQ of the Act:

> 22 First, the legislative objective of s 139ZQ is to provide an administrative mechanism for the recovery of dispositions of property that are void as against the Official Trustee or the registered trustee. The section provides "*an administrative shortcut whereby the necessity for protracted proceedings under ss 120, 121 and 122 of the Act could be circumvented*": *Re Rose; Godfrey v Whitton* [2006] FCA 823 at [24] per Graham J. "*The scheme of Subdiv J encourages the saving of costs by, on the one hand, compliance with the notice by the transfer to the trustee of property in respect of the value of which the notice requires payment (s 139ZQ(7)) and on the other, by the revocation or amendment of notices to accommodate a settlement (s 139ZQ(4))*": *Vale v Sutherland* [2009] HCA 26 at [22], (2009) 237 CLR 638 at 647 per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.
>
> 23 Second, the reference in s 139ZQ(1) to "*a transaction that is void against the trustee*" is but one of a number of provisions in the *Bankruptcy Act* directed at identifying transactions that are void and at identifying the circumstances in which property transferred by a bankrupt as a result of such transactions is available to the trustee for distribution to creditors. Sections 120 and 121, for example, are directed respectively at "[*u*]*ndervalued transactions*" and transfers of property that defeat creditors. Section 139ZQ is not drafted in terms of the Official Trustee being of the "*opinion*" or being "*satisfied*" that a person has received money or property as a result of a transaction that is void as against the trustee; the section is drafted in terms of there in fact being a transaction which is void. The power conferred is, accordingly, "*dependent upon the existence of a jurisdictional fact*": *Re McLernon; Ex parte SWF Hoists and Industrial Equipment Pty Ltd v Prebble* (1995) 58 FCR 391 at 401 per Carr J.
>
> 24 Third, s 139ZQ(1) also refers to the giving of a notice to pay "*an amount equal to … the money or the value of the property received*". "*The term 'value' in this provision has the meaning given by the definition of 'value' in s 139K, namely 'the market value of the property when the notice is given'*": *Vale v Sutherland* [2009] HCA 26 at [8], (2009) 237 CLR 638 at 643 per Gummow, Hayne, Heydon, Crennan and Kiefel JJ. See also: *Combis (Trustee) v Spottiswood (No 2)* [2013] FCA 240 at [73], (2013) 11 ABC(NS) 407 at 425 per Logan J.
>
> 25 Fourth, the amount stated in the notice, however, is not conclusive as to the value of the property that has been transferred: *Re Aley; Ex parte Sweeney v Aley* (1996) 63 FCR 294 at 300 to 301. Justice Drummond there observed:

> I am reluctant to read s 139ZR of the Act as making a notice under s 139ZQ of the Act effective to charge property owned by the recipient of the notice with liability to pay the figure asserted in the notice as the value of the transferred property in contrast to the true value of the property at the date of receipt. Section 139ZR(1) of the Act charges the property "with the liability of the person to make payments to the trustee as required by the notice". Under s 139ZQ(1) of the Act, all that the notice can require by way of payment to the trustee is payment of "an amount equal to … the value of the property received". It is that, not for example the amount stated in the notice, that is to be paid. Section 139ZQ(2) of the Act does not require any information as to how the figure demanded by the notice was arrived at to be set out in the notice. The figure stated in the notice as the value of the property received from the bankrupt is not given by the Act any evidentiary force. A notice issued in reliance on s 139ZQ is, in my opinion, only effective to give rise to a debt enforceable under s 139ZQ(8) of the Act and a charge within s 139ZR of the Act if the amount demanded by the notice is, in fact, equal to the value of the property at the relevant time. Such an interpretation should not create any significant difficulty since the concept of the value of property at a particular time will generally involve an imprecise rather than an exact assessment of worth.

Nor is a statement in the notice as to the facts upon which the notice was given conclusive: *Vale v Sutherland* [2009] HCA 26, (2009) 237 CLR 638 at 647. Gummow, Hayne, Heydon, Crennan and Kiefel JJ there observed:

> [24] In an action by the Trustee to recover that amount as a debt, the appellant would be at liberty to establish such matters of fact, from which the liability was alleged to arise, as were disputed. The same would be so in any action to restrain the exercise of the power of sale conferred by s 139ZR(6).

(Footnote omitted.)

In an action to recover the amount claimed in the notice as a debt, the person receiving the notice would thus be able to dispute that amount: *Vale v Sutherland* [2009] HCA 26 at [24], (2009) 237 CLR 638 at 647 per Gummow, Hayne, Heydon, Crennan and Kiefel JJ. Similarly, in *Halse v Norton* (1997) 76 FCR 389 at 399, Lee and RD Nicholson JJ observed:

> If a notice served on a person under s 139ZQ remains uncontested, service of the notice provides the trustee with a right that may be enforced against that person, namely, the right to recover as a debt the sum claimed in the notice. If the claim for the payment of money made in the notice is disputed, s 139ZS provides a means by which the controversy as to the application of Div 3 of the Act to the transaction is to be resolved and determined by the Court. In most cases it will be necessary for the trustee to be joined as a party to a proceeding commenced under s 139ZS, but if the applicant, or the Official Receiver, fails to have the trustee so joined the Official Receiver will stand in the trustee's place and be under the same onus of proof as the trustee.

26 Fifth, inaccuracies in the statement of facts in a notice may not be sufficient, without more, to result in an order under s 139ZS setting aside the notice:

Official Trustee in Bankruptcy v Lopatinsky [2003] FCAFC 109 at [151], (2003) 129 FCR 234 at 256 per Whitlam and Jacobson JJ.

27 Sixth, in circumstances where the amount claimed as a debt is put in issue by the recipient of a s 139ZQ notice, the trustee bears the onus of establishing the facts alleged in the notice: *Halse v Norton* (1997) 76 FCR 389 at 392. In the context of resolving a question as to onus of proof and s 139ZS, Black CJ there observed:

> a trustee has always carried the onus of proving the facts that make a transaction void and in instances in which the onus of proof is to lie elsewhere the Parliament has clearly so provided.

A little later, the Chief Justice further addressed as follows the question of onus in respect to proof of the "*jurisdictional fact*" upon which a notice proceeds, namely the basis upon which it is claimed that a transaction is "*void*" (at 392):

> Clearly, too, s 139ZS is not the exclusive means of challenging a notice under s 139ZQ … and there may well be cases in which there is good reason for the trustee to bring what would be in effect a cross-application for a declaration that a transaction is void … It would be strange if the position of the trustee varied according to the procedure adopted in the particular case.
>
> In these circumstances, but especially because of the nature of the "jurisdictional fact" upon which the power to issue a notice is dependent, I consider that the primary judge was correct in concluding that subdiv J has not changed the position with regard to the burden of proof other than requiring an applicant to put before the Court sufficient evidence to call the validity of the notice into question. Such a situation is not novel in the law; it is not unlike the situation where reliance is placed upon the presumption of regularity but sufficient evidence is put before the Court to challenge the application of the presumption in the particular case, or class of case …

Thus, for example, in *Official Trustee in Bankruptcy v Lopatinsky* [2003] FCAFC 109 at [152], (2003) 129 FCR 234 at 256, Whitlam and Jacobson JJ there observed with reference to the facts of that case that the Official Receiver "*bears the onus of satisfying the Court that s 120 does apply*".

28 Finally, non-compliance with a notice under s 139ZQ constitutes a criminal offence: s 139ZT. See: *Official Trustee in Bankruptcy v Lopatinsky* [2003] FCAFC 109 at [150], (2003) 129 FCR 234 at 256 per Whitlam and Jacobson JJ.

41 As the Trustee submits, the elements of the cause of action to recover a debt under s 139ZQ of the Act are the issue of the notice under s 139ZQ of the Act, service of the notice and the absence of an application under s 139ZS of the Act within 60 days of service challenging the alleged facts and circumstances set out in the notice. To that end, the Trustee has established that: the 139ZQ Notice was served on Ms Ripoll; there has been non-compliance with the 139ZQ Notice; and Ms Ripoll has not served an application pursuant to s 139ZS of the Act.

42 In *Chamberlain* at [35] Flick J found, in the circumstances of the proceeding before him, that the absence of either an application by the respondent pursuant to s 139ZS of the Act and/or an application to dispute any of the facts in the notice relied on to give rise to the debt was sufficient "to establish the debt on the facts and circumstances of the [case]". His Honour observed at [35]:

> "*If a notice served on a person under s 139ZQ remains uncontested, service of the notice provides the trustee with a right that may be enforced against the person, namely, the right to recover as a debt the sum claimed in the notice*": *Halse v Norton* (1997) 76 FCR 389 at 399 per Lee and RD Nicholson JJ. To conclude otherwise, and to require the Trustee to also prove each of the facts upon which the notice was founded, would defeat the object and purpose of s 139ZQ: *Re Rose; Godfrey v Whitton* [2006] FCA 823 at [24] per Graham J; *Vale v Sutherland* [2009] HCA 26 at [22], (2009) 237 CLR 638 at 647 per Gummow, Hayne, Heydon, Crennan and Kiefel JJ.

43 However, here Ms Ripoll disputes the amount demanded in the 139ZQ Notice. That is an issue properly raised and to be resolved on the Trustee's application to recover the amount claimed in the 139ZQ Notice as a debt: see *Chamberlain* at [25].

44 Ms Ripoll says that the consideration she paid pursuant to the BFA is not limited to the cash consideration of $57,500 but includes the amount she would have recovered in an action for the recovery of damages at common law against Mr Ripoll for the treatment referred to at [7] above.

45 The starting point to consider whether that is so is the terms of the BFA.

46 Ms Ripoll relies in particular on cl C of the "Introduction" which provides that "Mary and Michael wish to enter into this Agreement to preclude claims of any nature relating to financial matters, both in relation to property and financial resources as well as spousal maintenance that either has or may have against the other pursuant to the Act and otherwise at law and in equity". That clause, along with the balance of the clauses appearing under the heading "Introduction", forms part of the recitals or background to the BFA.

47 The operative part of the BFA follows. It is preceded by the opening phrase: "[i]t is agreed". Some of the more salient terms of the BFA appear at [9] above. Relevantly, part 2 of the BFA sets out the respective assets, liabilities and financial resources of Mr and Ms Ripoll. It includes cl 2.12 which provides (emphasis added):

> Mary and Michael agree that, in consideration of the terms and conditions of this agreement, including the distribution of personal and real property as set out in Annexures A, B and C **neither Mary nor Michael will make any claim concerning**

the difference in value of that property.

48 Clause 2.12 refers expressly to the consideration given by each of Mr and Ms Ripoll for their entry into the BFA, namely the agreed distribution of the property set out in the schedules annexed to it and their respective agreement not to make any claim against each other in relation to the agreed distribution. Neither cl 2.12, nor any other clause, provides that as part of the consideration Ms Ripoll agrees to forbear to make any claim against Mr Ripoll for claims in tort or for personal injury.

49 Even if cl C of the BFA could be construed as part of its operative provisions, Ms Ripoll would not be assisted. That clause, as well as cl A (see [8(1)] above), also refers to "financial matters", namely matters relating to property, financial resources and spousal maintenance. It is intended that the BFA cover all "financial matters" between Mr and Ms Ripoll and to preclude claims in relation to those matters.

50 The BFA does not permit the construction contended for by Ms Ripoll. It does not permit me to conclude that the consideration she gave for entering into it or the transfer of the "property" covered by it included a forbearance from making any claim for damages against Mr Ripoll for personal injury arising out of the alleged domestic assaults or otherwise.

51 Even if that was not so there are other obstacles to Ms Ripoll's response to the Trustee's claim.

52 The first concerns the meaning of consideration for the purposes of s 120 of the Act.

53 In *Official Trustee in Bankruptcy v* ***Lopatinsky*** (2003) 129 FCR 234 a Full Court of this Court (Lee, Whitlam and Jacobson JJ) considered, among other things, whether there had been a transfer of property from Mr Lopatinsky to Mrs Lopatinsky in October 1999 which attracted the operation of s 120 of the Act.

54 Relevantly, a notice under s 139ZQ of the Act was served on Mrs Lopatinsky claiming payment of $81,387 or, in the alternative, transfer to the **Official Trustee** in Bankruptcy of a 30.71% interest in a property situated at Padstow Heights, New South Wales which she owned. The amount claimed by the Official Trustee in the notice was the amount which the Official Trustee contended Mr Lopatinsky was entitled to receive as part of his share of the proceeds of sale of the former matrimonial home at Peakhurst, New South Wales. There was an informal agreement between Mr and Mrs Lopatinsky pursuant to which Mrs Lopatinsky received

$81,387 more than she would have received from the net proceeds if the funds were divided equally between the joint owners.

55 There were two issue before the primary judge: first, whether Mrs Lopatinsky held an equitable interest in the former matrimonial home equal to at least an 81% share such that there was no transfer to her on which s 120 of the Family Law Act could operate; and secondly, assuming there had been a transfer, whether Mrs Lopatinsky gave no consideration for the transfer to her of the additional sum of $81,837 or she gave consideration that was less than the market value of the sum transferred to her.

56 The primary judge considered the second issue first and found that Mrs Lopatinsky gave consideration for the transfer in the form of a forbearance to sue under s 79 of the Family Law Act for an adjustment of property rights to reflect her contribution to the acquisition of the property and to the welfare of the marriage and that the value of the consideration was not less than the market value of the additional amount that Mrs Lopatinsky received from the sale proceeds in October 1999. Thus the primary judge found that the claim under s 120 of the Act failed and set aside the s 139ZQ notice: *Lopatinsky* at [11]-[15].

57 The Official Trustee appealed from the findings of the primary judge contending: first, that it was not open to the primary judge to find on the evidence that Mrs Lopatinsky had agreed to compromise her claims under the Family Law Act; and secondly, even if there was an implied forbearance to sue by Mrs Lopatinsky, it was worthless because there were no consent orders entered under s 79 of the Family Law Act and the agreement between Mr and Mrs Lopatinsky was not approved under s 87 of the Family Law Act: *Lopatinsky* at [18].

58 The Full Court considered first the question that arose under s 120 of the Act. In doing so Whitlam and Jacobson JJ observed at [92] that s 120 requires the Court to determine the value of the consideration given. Their Honours said at [93]-[97]:

> 93 In carrying out this task, the Court is to treat as having "no value as consideration" the matters referred to in s 120(5)(a) to (d). Some of them, such as a promise to marry, would have been recognised as "valuable consideration" under the previous enactment: see *Official Trustee in Bankruptcy v Mitchell* (1992) 38 FCR 364.
>
> 94 There is nothing in s 120(5) to suggest that the Parliament intended that the term "consideration" in s 120(1)(b) is to be read in anything other than its legal sense. Plainer words would have been required: see *Official Trustee in Bankruptcy v Mitchell* at 368. Moreover, it would be inconsistent with the observations of Wilcox J and Branson J in *Official Trustee in Bankruptcy v Mateo* to proceed upon the basis that "consideration" could be something less

> than the ordinary legal and commercial understanding of that term. Indeed, it would be inconsistent with the statutory purpose of the section which is designed to protect creditors to hold that the Parliament intended to enable a transferee to provide something less than the well-established legal definition of "consideration".
>
> 95 Section 120(5) makes that very assumption. The intention of the legislation in s 120(5) must have been to ensure that matters which might otherwise be thought to have constituted good consideration at common law would have no value for the purposes of determining whether there was any disadvantage to creditors in the impugned transaction.
>
> 96 In our view, it is clear from the above analysis that the Parliament in enacting the 1996 amendments proceeded on the basis reflected in the history of this section that it was to be understood as commercial people would construe it. Thus, in applying s 120(1)(b) the first step is to identify the consideration which was actually given. The second step if consideration was given, is to determine whether its value was less than the market value of the property transferred: see *Sutherland v Brien* (1999) 149 FLR 321 at [20] per Austin J.
>
> 97 The primary judge at [39] proceeded upon the correct basis that Mrs Lopatinsky's contribution to the marriage could not be regarded as consideration for the transfer because it would have constituted past consideration: see *McVeigh v Zanella* [2000] FCA 1890 per Weinberg J.

59 Their Honours found that the primary judge's view of the value of the consideration given by Mrs Lopatinsky depended on factors which could not provide a basis for assessing the value of the consideration given by her, a finding which itself was an answer to the appeal. However, their Honours observed that there were two further answers.

60 The first was that actual forbearance to sue does not constitute consideration unless it is evidence of an implied promise to forbear or it is given at the express or implied request of the other party: *Lopatinsky* at [103].

61 The second was the principle that a wife cannot, by entering into an agreement with her husband, preclude herself from applying to the Court for an order for maintenance or property adjustment: *Lopatinsky* at [105]. Their Honours said at [106]-[109]:

> 106 After a full review of the earlier authorities the Court concluded as follows:
>
> > In our view the cases referred to above clearly indicate that the court's jurisdiction to grant relief under s 74 or s 79 can only be ousted by court order or by an agreement approved pursuant to the provisions of s 87 … [I]t is the dominant and unwavering thread of all of the cases that the parties cannot by their conduct or agreement oust the jurisdiction of the court.
>
> 107 Moreover, the Court went on to observe at 34-35, that the doctrine of equitable estoppel does not prevent it from exercising jurisdiction to make an order under s 74 or s 79, although the facts relied upon to establish circumstances which

> would otherwise give rise to the operation of an estoppel may well be relevant to the question of whether the Court should exercise its discretion to make an order under one or other of those provisions.
>
> 108 In our view, it follows that even if the informal agreement between Mr and Mrs Lopatinsky was supported by consideration in the form of an implied promise not to sue, it could not amount to a legally binding agreement for a compromise of Mrs Lopatinsky's entitlement to make a claim for a further property adjustment. It remained open to her, within the period limited by the *Family Law Act*, to apply to the Court for an adjustment in a larger sum than the $81,387 she received on the sale of the Peakhurst property.
>
> 109 It follows in our view that any forbearance given by Mrs Lopatinsky was of no commercial value because it did not prevent her from approaching the Family Court for an order under s 79 of the *Family Law Act*.

62 The same can be said here.

63 First, consideration is to be understood in its legal sense. The task for the Court under s 120(1) of the Act is to identify the consideration which was in fact given; and if consideration was given, to determine whether its value was less than the market value of the property that was transferred.

64 Secondly, forbearance to sue does not constitute consideration unless it is evidence of an implied promise to forbear, or it is given at the express or implied request of the other party. The BFA does not in its terms evidence an implied promise to forbear in relation to the choses in action identified by Ms Ripoll, namely her claims for damages for personal injury arising out of the alleged assaults. Nor is there any evidence that any forbearance was given at the express or implied request of Mr Ripoll.

65 Thirdly and most compellingly, I am satisfied that the conclusion in *Lopatinsky* that the forbearance in the informal agreement in that case was of no commercial value because it did not prevent Mrs Lopatinsky from approaching the Federal Circuit and **Family Court** of Australia for an order under s 79 of the Family Law Act applies equally to the BFA. In *Lopatinsky* the Full Court referred to and relied on authority of, as it was then, the Full Court of the Family Court of Australia that a wife cannot by entering into an agreement with her husband preclude herself from applying to the court for an order for maintenance or property adjustment: see *In the Marriage of N C and P Woodcock* (1997) 137 FLR 14. There is no reason why that principle would not apply to the BFA. While such an agreement is, subject to compliance with s 90G of the Family Law Act, binding as between the parties to it, it is not approved by the Family Court and it can be set aside. The same conclusion was reached in *Sutherland v Byrne-Smith* [2011] FMCA 632 at [27].

66 The second obstacle faced by Ms Ripoll concerns the quantification of the consideration constituted by the forbearance to sue. Ms Ripoll relies on the decision in *Ruzica **Varmedja** v Svetozar Ved Varmedja* [2007] NSWDC 385 and submits that the Court can and should form a view about the range of damages that might be recoverable if she were able to and in fact did pursue her claims for damages against Mr Ripoll. In other words, it should form a view about the value of the claims she has foregone based on determinations in other proceedings.

67 *Varmedja* was relied on for that purpose. It concerned a claim by the plaintiff for damages for a series of sexual assaults and batteries which she said occurred while she lived with the defendant, her husband at the time. It is not necessary to set out the detail of the assaults that the plaintiff alleged and the court found to have occurred in that case. Ms Ripoll relies, in particular, on *Varmedja* from [110] where the court commenced its consideration of how it should assess damages. The parties in *Varmedja* urged the court to adopt the approach in *Kennon*, which it did. That approach permits the assessment of a lump sum damages value on a series of assaults and batteries, once established. In doing so the court awarded the sums of $150,000 for general damages, $25,000 for aggravated damages and $50,000 for exemplary damages: *Varmedja* at [120], [126] and [128].

68 Ms Ripoll accepted that the conduct found in *Varmedja* was more serious than the conduct she alleged but said that, nonetheless, the Court would not be assisted by an expert opinion on likely damages but is best placed to form a view itself about the range of damages that would be assessed in a case like hers. I disagree. While Ms Ripoll has given somewhat detailed evidence about the alleged assaults there is no evidence before me that would permit me to assess her likely recovery should she bring a successful action for damages against Mr Ripoll. The decision in *Varmedja* turned on its own facts, is only one such decision and does not assist me in forming an opinion about the value of such claims, assuming I was satisfied that they were foregone by Ms Ripoll by her entry into, and formed part of her consideration for, the BFA.

CONCLUSION

69 It follows that I am satisfied that the Trustee has made out his claim pursuant to s 139ZQ(8) of the Act and that judgment should be entered in his favour in the sum of $227,500 which is the sum claimed by the Trustee at the hearing, $267,500, less the sum of $40,000 to take account the agreed value of the Jeep Wrangler included in the BFA.

70 As Ms Ripoll has been unsuccessful, she should pay the Trustee's costs as agreed or taxed.

71 I will make orders accordingly.

I certify that the preceding seventy-one (71) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Markovic.

Associate:

Dated: 19 June 2024