Kennon v Spry: An extended reach for s 79?

Peter Hannan*

In this article the author considers the width of the concept of "property" for the purposes of s 79 of the Family Law Act 1975 (Cth) in light of the 2008 decision of the High Court in Kennon v Spry, and also the subsequent litigation between the parties. While the case of Kennon v Spry addressed wider principles concerning property, trusts and equity, it essentially turned on the construction of s 79 of the Family Law Act, particularly the scope of the phrase "property of the parties to the marriage or either of them". And the majority judgments, in the author's view, must be regarded as an extension of the law and reach of s 79.

INTRODUCTION

The decision of the High Court in *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 is one of the very few decisions of the High Court on appeal from the Full Court of the Family Court of Australia in the last 20 years where there has been no constitutional law element. Although *Kennon v Spry* essentially turns on the construction of s 79 of the *Family Law Act 1975* (Cth), the case does address wider principles concerning property, trusts and equity. As to equity, the irony is that the husband in *Kennon v Spry* is Dr Ian Spry QC, the author of the leading text *Equitable Remedies*, first published in 1971 and now in its 8th edition.[1] That authorship was remarked upon in subsequent litigation between the parties.[2]

The purpose of this article is to consider the width of the concept of "property" for the purposes of s 79 of the *Family Law Act* in light of *Kennon v Spry* – though also in light of the subsequent litigation between the parties which of necessity had to take into account the principles enunciated in that case.

KENNON V SPRY: THE FACTS

The key facts of *Kennon v Spry* were complex. They may, however, be summarised as follows. On 21 June 1968, Dr Spry created a reasonably typical family discretionary trust, the ICF Spry Trust ("Spry Trust"), by parol, albeit in terms of an unexecuted trust instrument. In October 1981, this trust instrument was executed and stamped ("1981 Instrument"). By clause 1 of the 1981 Instrument, Dr Spry was designated the settlor and trustee of the Spry Trust. He also had the power to appoint any person as an additional trustee and remove any such additional trustee.

The beneficiaries[3] of the Spry Trust were defined in the 1981 Instrument as the children of Dr Spry's father and their spouses, the grandchildren of Dr Spry's father and their spouses, and the Attorney-General as parens patriae.

The 1981 Instrument gave the trustee the power to apply income and capital to the benefit of any of the beneficiaries of the Spry Trust at the trustee's discretion. It also conferred upon Dr Spry (as settlor) a power to vary the terms of the Spry Trust at any time but not in such a manner as to increase in any way his rights under this trust to the beneficial enjoyment of the fund.

On 4 March 1983, Dr Spry (as settlor and trustee) and his wife (as additional trustee) executed an instrument ("1983 Instrument") which varied the 1981 Instrument. By the 1983 Instrument, Dr Spry

* Barrister, John Toohey Chambers, Perth.

[1] Spry I, *Equitable Remedies* (8th ed, Lawbook Co, 2007).

[2] See *Stephens v Stephens* [2009] FamCAFC 240 at [367] and [381] per May, Boland and O'Ryan JJ quoting Coleman J at first instance in *Stephens v Stephens* (2009) 41 Fam LR 288; [2009] FamCA 156 at [59].

[3] This is actually an incorrect use of legal terminology – a matter remarked upon in *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [125] per Gummow and Hayne JJ (see also French CJ at [46] and [49]). The correct terminology is "eligible object of benefaction of the [Spry] Trust". That said, "beneficiaries" is a convenient shorthand.

ceased to be a beneficiary of the Spry Trust and Mrs Spry was appointed to be trustee of the Spry Trust on Dr Spry's death or resignation, though this appointment was made revocable by Dr Spry (as settlor) at any time.

On 7 December 1998, Dr Spry executed an instrument ("1998 Instrument") which further varied the 1981 Instrument. The 1998 Instrument provided that upon Dr Spry's death or resignation as trustee, two of his daughters would become joint trustees of the Spry Trust. It also provided that if Dr Spry ceased to be the trustee, no payment could be made out of the fund of the Spry Trust during Dr Spry's lifetime without Dr Spry's written consent. This instrument also varied the power of variation contained in the 1981 Instrument such that the power of variation could only be exercised by the settlor (ie Dr Spry) during his lifetime or by his will, and any exercise of the power of variation might be either revocable or irrevocable.

Particularly important, however, was the fact that the 1998 Instrument varied the 1981 Instrument so that no power or discretion to distribute any capital of the fund could be exercised in favour of either Dr Spry or his wife. The 1998 Instrument expressed that variation to be irrevocable.

On 18 January 2002, Dr Spry executed four instruments creating trusts named after each of his four daughters ("Daughters' Trusts"). Each of these trust instruments was structured as follows:

(a) Dr Spry was the trustee.
(b) The beneficiaries were defined as the named daughter, her children, grandchildren, sisters, nieces, nephews and their spouses.
(c) Dr Spry and the named daughter were empowered to appoint and remove trustees from time to time.
(d) Dr Spry and the named daughter were empowered to amend any provision of the trust instrument.
(e) Dr Spry was excluded absolutely from any interest in or benefit from the trust fund.
(f) The named daughter would become an additional trustee upon attaining 32 years of age.

Then, on 18 January 2002, Dr Spry executed a further instrument ("2002 Disposition Instrument") whereby he applied all the income and capital of the Spry Trust in quarter shares to the trustees of each of the Daughters' Trusts. He also varied the 1981 Instrument so as to provide for each quarter share to be so held.

In April 2002, Mrs Spry filed an application in the Family Court of Australia seeking orders for property settlement and maintenance. A second amended version of that application also sought orders under s 106B of the *Family Law Act* setting aside the 1998 Instrument, each of the instruments creating the Daughters' Trusts and the 2002 Disposition Instrument.

On 20 May 2002 Mr Kennon, a solicitor, became a further trustee along with Dr Spry in respect of each of the Daughters' Trusts.

At first instance, the trial judge made orders under s 106B of the *Family Law Act* setting aside both the 1998 Instrument and the 2002 Disposition Instrument.[4] Having set aside those instruments, the trial judge held that Dr Spry was entitled to $5.1 million of the total net value of the parties' asset pool of $9.8 million, and Mrs Spry was entitled to $4.7 million. On that basis, and taking into account property already held by or attributed to the wife, the trial judge ordered Dr Spry to pay Mrs Spry $2.1 million. An appeal to the Full Court of the Family Court was dismissed.[5] It was, however, common ground between the parties on appeal that the asset pool was $9.5 million rather than $9.8 million.

THE ISSUES

In the High Court, the central question was whether, prior to the 1998 Instrument, Dr Spry, or Mrs Spry, or both of them, had interests in relation to the assets of the Spry Trust that could answer

[4] See *Stephens v Stephens* [2005] FamCA 1181 per Strickland J.

[5] See *Stephens v Stephens* (2007) 212 FLR 362; 38 Fam LR 149; [2007] FLC 93-336; [2007] FamCA 680 per Bryant CJ, Finn and Warnick JJ.

the description of "property of the parties to the marriage" within the meaning of s 79(1) of the *Family Law Act*.[6] This is the issue with which this article is principally concerned.

The s 79 property issue arose because in the High Court neither Dr Spry, nor the trustees of the Daughters' Trusts, nor the daughters themselves,[7] challenged the orders under s 106B of the *Family Law Act* setting aside the 1998 Instrument and the 2002 Disposition Instrument. Instead, those parties contended as follows. First, Dr Spry had no beneficial interest in the assets the subject of the Spry Trust because the 1983 Instrument excluded Dr Spry as a beneficiary of the Spry Trust and the 1983 Instrument could not be varied or cancelled.[8] Second, the trustee of the Spry Trust could not be compelled or empowered by the Family Court to confer on Dr Spry beneficial rights to the assets of the Spry Trust.[9] Third, the property held by a person as trustee of a discretionary trust is not "property" to which s 79 applies because this section only looks to an entitlement which is beneficial in nature.[10]

WHY THE DEFINITION OF "PROPERTY" IS IMPORTANT

The ability to access, or the likelihood of receipt of, money the subject of trusts has long been regarded as a "financial resource" for the purposes of s 75(2)(b) of the *Family Law Act*.[11] It is interesting to note in this regard that the majority judgments in *Kennon v Spry* do not make any decision about the categorisation of Mrs Spry's interest in the assets of the Spry Trust as a financial resource.[12]

By virtue of s 79(4)(e) – which picks up the s 75(2) factors – the existence of trust money is clearly relevant to an alteration of property interests under s 79 in any event. However, whether or not money the subject of family trusts is "property" is of the utmost importance for at least two reasons. First, case law on the proper exercise of the discretion conferred by s 79 requires identification of the "property" of the parties to the marriage, or either of them.[13] Findings as to the identity and value of this property are part of the first step of the "four step process" identified in cases such as *Re Hickey* (2003) 30 Fam LR 355; [2003] FLC 93-143 at 78,386; [2003] FamCA 395. This part of the first step is often referred to as "determining the asset pool".[14]

More fundamentally, however, while the existence of a "financial resource" may well influence the extent to which the court makes orders under s 79 in respect of other "property" properly so called,[15] a "financial resource" cannot be the subject of orders under s 79. The discretion exercised in making property settlement orders takes account of the existence of a financial resource (such as rights under a discretionary trust) but orders under s 79 cannot be made in respect of a financial resource any more than can such orders be made in respect of a s 75(2) factor such as future earning capacity.

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[6] See *Kennon v Spry* (2008) 238 CLR 366 at 387, [51]; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 per French CJ.

[7] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [114] per Gummow and Hayne JJ for a convenient summary of the "camps".

[8] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [41], paras 1 and 2 per French CJ.

[9] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [41], para 3 per French CJ .

[10] See *Kennon v Spry* (2008) 238 CLR 366 at 372; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 per Mr Jackson QC arguendo in reply.

[11] See *Stephens v Stephens* [2009] FamCAFC 240 at [67]-[68] per May, Boland and O'Ryan JJ.

[12] See *Leader v Martin-Leader* (No 2) [2009] FamCA 979 at [43] per Dawe J.

[13] See *Barker v Barker* (2007) 36 Fam LR 650; [2007] FamCA 13.

[14] See *Spoke v Spoke (No 2)* [2009] FamCA 40 at [151]-[152]. Indeed, the term "asset pool" was used in *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 itself at [115] and [130] per Gummow and Hayne JJ.

[15] See *In Marriage of Yates (No 2)* (1982) FLC 91-228.

SECTION 79 OF THE FAMILY LAW ACT

Section 79(1)(a) of the *Family Law Act* provides:

> In property settlement proceedings, the court may make such order as it considers appropriate in the case of proceedings with respect to the property of the parties to the marriage or either of them – altering the interests of the parties to the marriage in the property.

By virtue of s 4(2) of the *Family Law Act*, the phrase "the parties to the marriage" in s 79(1) includes a reference to a person who was a party to a marriage which has been terminated by a divorce at a time before the court makes orders under s 79(1).[16]

The word "property" as it is used in s 79 is subject to s 4(1) of the *Family Law Act* which provides:

> **property**, in relation to the parties to a marriage or either of them – means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.

The word "property" as it appears in s 79 of the *Family Law Act* has been construed by reference to its ancestry in matrimonial causes statutes and has been given a wide meaning.[17] In *In Marriage of Duff* (1977) 29 FLR 46; 15 ALR 476 at 484; 3 Fam LR 11,211; [1977] FLC 90-217 the Full Family Court said:

> The word has also been comprehensively defined in statutes both State and Imperial relating to married women's property. We do not propose to instance those definitions here, but in *Jones v Skinner* (1835) 5 LJ Ch [87 at] 90 … Langdale MR said: "Property is the most comprehensive of all terms which can be used inasmuch as it is indicative and descriptive of every possible interest which the party can have". This is a definition which commends itself to us as being descriptive of the nature of the concept of "property" to which it is intended that the *Family Law Act 1975* should relate and over which the Family Court of Australia should have jurisdiction to intervene when disputes arise in relation to the property of spouses as between themselves or when the court is asked to exercise the powers conferred upon it under Pt VIII or its injunctive powers under s 114 so far as they are expressed to relate to a property of the party to a marriage.

As wide as the word "property" is, at least when used in the context of s 79(1)(a) of the *Family Law Act*, the word does have limits. If a party to a marriage is the trustee of a charitable trust or executor of the will of a friend or client, the party's mere legal title to the assets of the trust would not render such assets "property" for the purposes of s 79(1)(a).[18] Further, in *In Marriage of Kelly (No 2)* (1981) 7 Fam LR 762; [1981] FLC 91-108 the Full Family Court did not think the word "property" was wide enough to cover the assets of a trust in which the relevant party to the marriage was neither settlor nor appointor nor beneficiary and over which he or she had no control.[19]

None of the propositions stated in the previous paragraph are remarkable. The crucial question is whether the judgments of French CJ and Gummow and Hayne JJ go beyond what was described by counsel for the trustees of the Daughters' Trusts in the subsequent litigation as "equitable orthodoxy".[20]

THE HIGH COURT JUDGMENTS

Broadly speaking, the parties in the High Court were Mr Kennon (as trustee of the Daughters' Trusts) and Dr Spry as (respectively) the first and second appellants. Mrs Spry was the first respondent. The daughters of the marriage were the second respondents – albeit their counsel adopted the submissions

[16] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [94] per Gummow and Hayne JJ.

[17] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [54] per French CJ.

[18] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [69] per French CJ.

[19] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [55] per French CJ and [92] per Gummow and Hayne JJ.

[20] See *Stephens v Stephens* [2009] FamCAFC 240 at [120] per May, Boland and O'Ryan JJ.

of counsel for Dr Spry. As noted above, there was no challenge in the High Court to the orders under s 106B of the *Family Law Act* setting aside the 1998 Instrument and the 2002 Disposition Instrument. Instead, the appellants and the second respondents in effect contended that the assets of the Spry Trust could not be made the subject of orders for property settlement in favour of Mrs Spry under s 79 of the *Family Law Act*. By a majority, the High Court rejected that contention.

There were four judgments delivered in the High Court in *Kennon v Spry*: a separate judgment by French CJ, a joint judgment by Gummow and Hayne JJ, and separate judgments by Heydon J and Kiefel J. As will be seen, Kiefel J's judgment does not consider the issues addressed in this article.

The four judgments in this case may be summarised in point form as follows.

French CJ (majority)

French CJ noted[21] a contention on behalf of Dr Spry, based on *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 at 354; 55 ALJR 233; 33 ALR 631; 5 ACLR 328; 6 Fam LR 591; [1981] FLC 91-000; [1981] HCA 1 per Gibbs J, that the Family Court must take the property of a party to the marriage as it finds it and cannot ignore the existence of conditions or covenants limiting the rights of the party who owns the property. The Chief Justice held, however, that "in the unusual circumstances of this case", and leaving aside the 1998 Instrument and the 2002 Disposition Instrument (both of which had been set aside under s 106B by the trial judge), the assets of the Spry Trust could be made the subject of orders under s 79 of the *Family Law Act* because those assets constituted "property of the parties to the marriage" within the meaning of that section.

The "unusual circumstances" to which French CJ referred were as follows:[22]

(a) Dr Spry was the only person entitled in possession to the assets of the Spry Trust.
(b) No object of the Spry Trust had any fixed or vested entitlement.
(c) Dr Spry was, after execution of the 1983 Instrument, left in possession of the assets of the Spry Trust, with the legal title to them, and to the income which they generated, unless and until Dr Spry should decide to apply any of the capital or income to any of the continuing beneficiaries.
(d) Dr Spry was not obliged to distribute to anyone.
(e) The default distribution gave male beneficiaries other than Dr Spry no more than a contingent remainder. None had a vested interest subject to divestiture.
(f) Dr Spry was the sole trustee of a discretionary family trust and the person with the only interest in its assets as well as the holder of a power, inter alia, to appoint them entirely to Mrs Spry.
(g) The "true character" of the Spry Trust was a vehicle for Dr and Mrs Spry and their children to enjoy assets.

On the basis of those "unusual circumstances", French CJ then proceeded to hold that the assets of the Spry Trust constituted "property of the parties to the marriage" within the meaning of s 79 of the *Family Law Act* for the following reasons:[23]

(a) Mrs Spry, along with the other beneficiaries of the Spry Trust, had the right to compel the trustee to consider whether or not to make a distribution to him or her. Such a right is an equitable chose in action.
(b) Mrs Spry, along with the other beneficiaries of the Spry Trust, had the right to due administration of the Spry Trust. Such a right is an equitable chose in action.
(c) The word "property" in s 79 is to be read as part of the collocation "property of the parties to the marriage".
(d) The word "property" in s 79 is to be read widely and conformably with the purposes of the *Family Law Act*.

[21] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [61] per French CJ.

[22] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [59], [60] and [62] per French CJ.

[23] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [62]-[80] per French CJ.

(e) Where property is held by a party to a marriage under a non-exhaustive discretionary trust[24] with an open class of beneficiaries and there is no obligation to apply the assets or income of the trust to anyone, and where this property has been acquired by or through the efforts of that party or his or her spouse, whether before or during the marriage, the property does not necessarily lose its character as "property of the parties to the marriage" just because the party has declared a trust of which he or she is trustee and can, under the terms of that trust, give the property away to other family or extended family members at his or her discretion.

(f) The relevant "property" for the purposes of s 79 was:
- the assets of the Spry Trust;
- Dr Spry's power as the trustee of the Spry Trust to appoint the whole of the assets of that trust to Mrs Spry – the exercise of which power would have involved no breach of duty by Dr Spry to the other beneficiaries; and
- Mrs Spry's equitable right to due consideration as to whether the trustee of the Spry Trust should apply income and/or capital to her as an eligible object of benefaction.

(g) Dr Spry's power as the trustee of the Spry Trust to appoint the whole of the assets of that trust to Mrs Spry, though it may not be "property" according to the general law, was capable of being treated for the purposes of the *Family Law Act* as a species of property held by Dr Spry as a party to the marriage – albeit subject to a fiduciary duty to consider all beneficiaries.

(h) Dr Spry's power and Mrs Spry's equitable right to due consideration were capable of providing a basis for the orders made by the trial judge.

French CJ, unlike Heydon and Kiefel JJ, did not consider the application of s 85A of the *Family Law Act* to the Spry Trust. He did, however, make a passing comment about the relationship between ss 79 and 85A, namely that these two sections were not mutually exclusive.[25]

Gummow and Hayne JJ (majority)

Gummow and Hayne JJ, after identifying the competing "camps" into which the parties before the High Court fell, noted the contention made on behalf of Dr Spry and the parties in his camp, that the trial judge, having set aside the 1998 Instrument and the 2002 Disposition Instrument, had acted on a wrong principle by treating the assets of the Spry Trust as part of the "asset pool". They said, in respect of that contention:[26]

> The reasoning is said to be flawed because it contains as a necessary step the erroneous proposition that the husband could in law apply the assets of the Trust to or for himself. The falsity of that proposition may be accepted. But as will appear in these reasons that is not determinative of success in the appeals to this Court.

Gummow and Hayne JJ held that, leaving aside the 1998 Instrument and the 2002 Disposition Instrument, s 79 of the *Family Law Act* had effective application to the assets of the Spry Trust for the following reasons:[27]

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[24] In *Re Richstar Enterprises Pty Ltd; Australian Securities and Investments Commission v Carey (No 6)* (2006) 153 FCR 509; 63 ATR 524; 233 ALR 475; 58 ACSR 141; 24 ACLC 730; [2006] FCA 814, French J (then of the Federal Court) said at 516 [21]: "On the other hand a discretionary trust is called 'non-exhaustive' when the trustee has a discretion to distribute any part or perhaps none of the income of the trust as he thinks fit. Similar classifications would apply according to the basis upon which the corpus of a trust is distributed. The beneficiaries may form a defined and closed class of persons. Alternatively, the class may be open. By way of example of the latter case, a discretionary trust intended primarily to benefit a family may nevertheless name as beneficiaries not only its living members, but also relatives born or yet to be born into the extended family, charities and other classes of entity. The naming of these species of discretionary trusts, like the term 'discretionary trust' itself, is a matter of taxonomical convenience rather than expository of principle." See also *Simmons v Simmons* (2008) 232 FLR 73; 40 Fam LR 520; [2008] FamCA 1088 at [59]-[61] per Watt J.

[25] *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [82].

[26] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [115]-[116] per Gummow and Hayne JJ.

[27] *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [125]-[130] and [136]-[140] per Gummow and Hayne JJ.

(a) Mrs Spry, along with the other beneficiaries of the Spry Trust, had the right to compel the trustee to perform a fiduciary duty to consider whether or not to make a distribution to him or her.

(b) Mrs Spry, along with the other beneficiaries of the Spry Trust, had the right to due administration of the Spry Trust.

(c) During the marriage, Dr Spry as the trustee of the Spry Trust had the power to appoint the whole of the assets of the Spry Trust to Mrs Spry.

(d) The erroneous conclusion reached by the trial judge that Dr Spry could have applied the whole or part of the Spry Trust fund to or for *his* own benefit was inconclusive of the outcome.

(e) The rights and the power just referred to, taken in combination, constituted "property of the parties to the marriage or either of them" for the purposes of s 79(1).

(f) It was accordingly open to the trial judge to formulate orders on the basis that the "asset pool" included the assets of the Spry Trust. To proceed on that basis properly reflected what was "the property of the parties to the marriage or either of them".

(g) The order of the trial judge requiring Dr Spry to pay Mrs Spry $2.1 million "does not earmark any particular asset of [Dr Spry] and oblige him to apply it in satisfaction of that order. Nor was there any mandatory order of the nature considered in *Ascot Investments Pty Ltd v Harper* [(1981) 148 CLR 337 at 354] which extinguished the rights or enlarged the obligations of third parties".

(h) In deciding what orders should be made under s 79, the value of that property was properly taken into account. Wrongly attributing its value to Dr Spry was irrelevant to the ultimate orders made.

(i) If Dr Spry wished to satisfy his obligation to pay Mrs Spry $2.1 million by recourse to the assets of the Spry Trust then it was open to Dr Spry to approach the court[28] for an appropriate order to assist him in doing so.

(j) It would be for the court[29] to determine whether, putting aside the interests of the children of the marriage, it was just and equitable to make the order having regard to the interests of any third parties who may also fall within the defined class of beneficiaries.

(k) It was unnecessary to determine whether and in what circumstances Mrs Spry might apply for orders that Dr Spry satisfy his obligation to pay Mrs Spry $2.1 million by recourse to the assets of the Spry Trust.

The propositions set out in paragraphs (g), (i), (j) and (k) proved to be very important in the subsequent litigation between the parties.[30] This raises the interesting question[31] whether s 79 orders can be made without "earmarking assets".

Gummow and Hayne JJ did not consider the application of s 85A of the *Family Law Act* to the Spry Trust. They did, however, deal with the inter-relationship between ss 79 and 85A, indicating that they were not mutually exclusive.[32]

Heydon J (minority)

Heydon J formulated the issue thus:[33]

> The question in the appeals is whether the Family Court of Australia had power to make the orders it did under s 79(1) …. That depends on whether, in the language of s 79(1): (a) the proceedings were "proceedings with respect to the property of the parties to the marriage or either of them"; and (b) the orders could be described as "altering the interests of the parties to the marriage in the property".

[28] Presumably the Family Court rather than a Supreme Court as the usual Equity Court. Note the submission recorded in *Stephens v Stephens* [2009] FamCAFC 240 at [113] that such an application would be made under the *Trustee Act 1958* (Vic) but could be made to the Family Court by virtue of s 78B of the *Judiciary Act 1903* (Cth).

[29] *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 at 354.

[30] See below, under the heading "The Subsequent Spry Litigation: Stephens v Stephens".

[31] Which is considered below, under the heading "The Subsequent Spry Litigation: Stephens v Stephens".

[32] See the summary below of Kiefel J's judgment.

[33] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [144] per Heydon J.

Heydon J noted[34] an argument by counsel for Dr Spry and the trustees of the Daughters' Trusts that neither Dr Spry nor Mrs Spry had any "property" in the assets of the Spry Trust for the purposes of s 79. He accepted that argument.

Summarising harshly, Heydon J held as follows:

(a) The objects of a discretionary trust do not have "property" in the assets of the trust in the sense in which "property" is understood in the general law or in the way in which that word is used in a number of important statutes.[35]

(b) The word "property" as used in s 79 should not be given an extended meaning.[36]

(c) Even if, contrary to the foregoing, Mrs Spry did have "property" rights (eg by virtue of her position as an eligible object of benefaction under the Spry Trust having a right to compel the trustee to duly administer the Spry Trust) within the meaning of s 79, the orders sought by Mrs Spry were directed to gaining access to the assets of the Spry Trust (as opposed to access to the "property right" just described) and Mrs Spry had no property in those assets. As such, the "asset orders" sought by Mrs Spry did not meet the description "proceedings with respect to the property of the parties to the marriage or either of them".[37]

(d) The definition of "property" in s 4(1) does not contemplate entitlements to property as trustee.[38]

(e) The Family Court, in making orders under s 79, cannot ignore the existence of trust obligations which limit the rights of a party who owns the property and holds the office of trustee.[39]

Heydon J also considered, albeit in summary form, the application of s 85A of the *Family Law Act* to the Spry Trust. His Honour rejected the application of that section.[40]

Kiefel J (minority)

The judgment of Kiefel J was based on s 85A of the *Family Law Act*. That section provides:

> (1) The court may, in proceedings under this Act, make such order as the court considers just and equitable with respect to the application, for the benefit of all or any of the parties to, and the children of, the marriage, of the whole or part of property dealt with by ante-nuptial or post-nuptial settlements made in relation to the marriage.
>
> (2) In considering what order (if any) should be made under subsection (1), the court shall take into account the matters referred to in subsection 79(4) so far as they are relevant.
>
> (3) A court cannot make an order under this section in respect of matters that are included in a financial agreement.

Mrs Spry relied on s 85A for the first time in the High Court – the section was not relied on before the trial judge or the Full Court.[41] For that reason Heydon J was not prepared to permit Mrs Spry to rely on s 85A in the High Court. That said, Heydon J's judgment[42] suggests he thought

[34] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [151] per Heydon J.

[35] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [160]-[162] per Heydon J.

[36] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [163] per Heydon J.

[37] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [164] per Heydon J.

[38] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [175] per Heydon J.

[39] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [175] per Heydon J.

[40] See the summary below of Kiefel J's judgment.

[41] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [180] per Heydon J.

[42] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [186] per Heydon J.

the s 85A point in any event lacked merit. In view of their conclusions on s 79, French CJ[43] and Gummow and Hayne JJ[44] found it unnecessary to deal with s 85A. Gummow and Hayne JJ did, however, note that the existence of s 85A was not a reason to "read down" s 79.[45] French CJ seemed inclined to the same view as to the relationship between ss 79 and 85A.[46]

Kiefel J, on the other hand, was prepared to allow Mrs Spry to rely on s 85A, notwithstanding that Mrs Spry did not do so in the courts below. She did so on the basis that the trial judge had found all the facts relevant to the application of s 85A, and because there seemed to be a general misapprehension about the scope of s 85A. By using s 85A of the *Family Law Act*, Kiefel J avoided the need to grapple with the applicability of s 79 to assets the subject of a discretionary trust. In other words, even if the assets of the Spry Trust were immune from orders under s 79, those assets could be made available for the benefit of Mrs Spry because they were "property dealt with by [an] ante-nuptial or post-nuptial [settlement] made in relation to the marriage" within the meaning of s 85A.

Although Kiefel J's judgment does not address the issues the subject of this article, her judgment is nonetheless of present relevance. If[47] s 85A of the *Family Law Act* provides a statutory means of accessing trust assets, then any practical concerns about a more narrow approach to s 79 as per Heydon J's judgment are overcome.

KENNON V SPRY: AN EXTENSION OF REACH OF S 79?

The above analysis of the judgments of French CJ and Gummow and Hayne JJ shows that these justices approached the question of "what is property for s 79 purposes?" by reference to the rights and duties created by the documents constituting the Spry Trust. They did not, at least in so many words, use the concept of "control" as an analytical device. That said, the focus on rights and duties fits neatly into such an analysis. Indeed, in the subsequent case of *Choate v Choate* [2009] FamCA 525, Coleman J said at [173]:

> Unlike the position which applied in Kennon v Spry …, whilst the husband is a discretionary beneficiary of the trusts, he does not have the legal or other capacity to control the exercise of the trustee's discretion. As such, whilst the husband is entitled to proper administration of the trusts and due consideration by the trustee, he has no "property" in the trusts as such.

It was by reference to the concept of "control" that a number of cases in the Full Family Court[48] had established that in certain circumstances assets held by a trustee can be treated as the property of a party to the marriage. Some of those cases were discussed by French CJ in *Kennon v Spry*.[49] Indeed, the Chief Justice noted that, consistently with those decisions, if the 1983 Instrument had not been executed (such that Dr Spry remained an eligible object of benefaction), then the assets of the Spry Trust "would properly have been regarded as his property as a party to the marriage for the purposes

[43] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [82] per French CJ.

[44] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [141] per Gummow and Hayne JJ.

[45] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [133]-[134] per Gummow and Hayne JJ.

[46] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [82] per French CJ.

[47] This is a "big if" because only Kiefel J found s 85A to be applicable, Heydon J found the section inapplicable and French CJ, Gummow and Hayne JJ did not address the s 85A point.

[48] Collected in *Stephens v Stephens* [2009] FamCAFC 240 at [37] per May, Boland and O'Ryan JJ.

[49] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [55]-[57] per French CJ.

of [section] 79".[50] Such an approach is entirely consistent with the view that the holder of a general power of appointment of income and capital is, for practical purposes, very close to being the owner of the property the subject of the power.[51]

After the execution of the 1983 Instrument, however, Dr Spry was no longer able to appoint to himself any income or capital from the Spry Trust fund. Dr Spry could potentially make such appointments to a large number of persons (including Mrs Spry and the daughters) but he could not make such an appointment to himself. The extension of the reach of s 79 wrought by *Kennon v Spry* is the fact that Dr Spry had the power to appoint the whole of the Spry Trust fund to Mrs Spry, and when combined with the other features typical in trust instruments such as those considered in the Full Family Court cases referred to in the previous paragraph, this rendered the Spry Trust fund "property of the parties to the marriage or either of them" within the meaning of s 79(1). As Watt J said in the subsequent case of *Simmons v Simmons* (2008) 232 FLR 73; 40 Fam LR 520; [2008] FamCA 1088 at [117]-[118]:

> The decision of the majority of the High Court in *Spry* establishes an important principle when considering the interests of those who seek relief under section 79 of the Act based on the rights that accrue to a beneficiary of a discretionary trust where ownership of the trust property is vested in a party to the marriage, albeit as trustee.
>
> In *Spry*, the husband's legal ownership of the assets as sole trustee and the wife's interest as a beneficiary of the trust were found to have provided a proper basis for orders made by the trial Judge that required the husband to pay to the wife a substantial sum in circumstances where the source of payment of such an amount was the trust assets. In so holding, French CJ acknowledged … that any order made in such circumstances would have to take into account the interests of other beneficiaries.

That said, the extension of the reach of s 79 is consistent with previous High Court authority on s 79. In *Simmons v Simmons* it was contended that a husband's interest in trust assets was incapable of alteration and thus could not form part of an order made under s 79. In considering that submission Watt J quoted[52] from the judgment of Mason ACJ, Wilson, Brennan, Deane and Dawson JJ in *Mullane v Mullane* (1983) 158 CLR 436 at 445; 57 ALJR 207; 45 ALR 291; 8 Fam LR 777; [1983] FLC 91-303; [1983] HCA 4:

> In our opinion, section 79 on its proper construction refers only to orders which work an alteration of the legal or equitable interests in the property of the parties or either of them … It does not exclude every interest which is not assignable or transferable …

THE SUBSEQUENT SPRY LITIGATION: STEPHENS V STEPHENS

It should be noted that, despite being ordered to pay $2.1 million to Mrs Spry, it was largely common ground at trial that Dr Spry had only $1.79 million worth of beneficially held assets in his own name, but that the assets held in the Daughters' Trusts (which assets were in effect transferred back to the Spry Trust as a result of the orders under s 106B setting aside the 1998 Instrument and the 2002 Disposition Instrument) were worth $4.76 million.[53] Despite the inability of Dr Spry to pay $2.1 million without topping up his $1.79 million worth of assets out of the assets of the Daughters' Trusts and Spry Trust worth $4.76 million, there was no order made by the High Court which earmarked those trust assets. The nearest the High Court came to approving such an order was in upholding an order made by the trial judge that "[e]ach party do all such acts and things and sign such documents as may be necessary to give effect to the terms of this order"[54] – which included an order that Dr Spry pay Mrs Spry $2.1 million.

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[50] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [63] per French CJ.

[51] See *Tatham v Huxtable* (1950) 81 CLR 639 at 646-647 per Latham CJ, 649-650 per Fullagar J and 653-654 per Kitto J.

[52] See *Simmons v Simmons* (2008) 232 FLR 73; 40 Fam LR 520; [2008] FamCA 1088 at [77] per Watt J.

[53] See *Kennon v Spry* (2008) 238 CLR 366; 251 ALR 257; 83 ALJR 145; 40 Fam LR 1; [2008] FLC 93-388; [2008] HCA 56 at [32] per French CJ.

[54] See *Stephens v Stephens* [2009] FamCAFC 240 at [72] per May, Boland and O'Ryan JJ quoting the orders made by Strickland J at trial. The relevant orders are order 4 (payment of $2.1 million) and order 8 (do all such acts, etc).

After the High Court handed down its decision there was further litigation between the parties. The litigation took the form of an enforcement application. Broadly speaking, the parties were Mrs Spry (as applicant), Dr Spry (as first respondent) and Dr Spry as trustee of the Spry Trust (as second respondent). The enforcement application was determined by Coleman J at first instance in favour of Mrs Spry.[55] Dr Spry appealed Coleman J's decision to the Full Court of the Family Court of Australia.[56]

Dr Spry refused either to access the assets held subject to the Spry Trust or to make an application as trustee of Spry Trust for court approval to access the $4.76 million worth of assets held in that trust, so as to be able to pay $2.1 million to Mrs Spry. That prompted Mrs Spry to file an enforcement application. By the time the enforcement application was filed Dr Spry came to be in possession of some $4.42 million in cash. The $4.42 million in cash was placed in a solicitor's trust account pending orders of the Family Court. Dr Spry consented to an order that $1.038 million be paid out of that account to Mrs Spry. The Full Court accepted that the balance of the funds held in the solicitor's trust account was derived from the Spry Trust.[57]

At the hearing before Coleman J, Dr Spry stated "that given his personal assets were exhausted he did not propose to take any steps to satisfy the balance of the entitlement of [Mrs Spry] even though this could lead to his bankruptcy".[58] Dr Spry also said he did not propose to make an application to the court of the type envisaged by Gummow and Hayne JJ which would sanction or excuse what would otherwise be a breach of trust.[59]

Coleman J made orders the effect of which was that the balance of the $2.1 million due to Mrs Spry under the orders made at trial in *Kennon v Spry* be paid out of the fund in the solicitor's trust account. A ground of appeal to the Full Court was that no order could be made attaching to the assets of the Spry Trust.[60] In support of this ground of appeal it was contended that for Dr Spry to access funds from the Spry Trust to pay to Mrs Spry in discharge of the personal order that Dr Spry pay Mrs Spry $2.1 million "would be a gross and transparent breach of trust" which Coleman J had no power to direct.[61]

The Full Court rejected that ground of appeal. The court noted that, in the High Court, French CJ was of the view that, in the event it was necessary, an order could be made attaching to the assets of the Spry Trust as part of a s 79 order. According to the Full Court, the judgment of Gummow and Hayne JJ stated that an application to the court could be made either as part of the s 79 proceedings or in subsequent enforcement proceedings. The Full Court concluded that the orders made by Coleman J were clearly in accordance with the judgment of Gummow and Hayne JJ.[62] Accordingly, the Full Court held that Coleman J had jurisdiction to make an order attaching to the assets of the Spry Trust.[63]

CONCLUSION

There was no treatment by the High Court judgments in *Kennon v Spry* of the Spry Trust being a "puppet" or "alter ego" of Dr Spry.[64] And there was certainly no finding that the Spry Trust was a

[55] See *Stephens v Stephens* (2009) 41 Fam LR 288; [2009] FamCA 156.

[56] See *Stephens v Stephens* [2009] FamCAFC 240. ("Stephens" was the pseudonym for "Spry" that was authorised by the Full Court pursuant to s 121(9)(g) of the *Family Law Act*.)

[57] See *Stephens v Stephens* [2009] FamCAFC 240 at [333] per May, Boland and O'Ryan JJ.

[58] See *Stephens v Stephens* [2009] FamCAFC 240 at [344] per May, Boland and O'Ryan JJ.

[59] See *Stephens v Stephens* [2009] FamCAFC 240 at [343] and [345] per May, Boland and O'Ryan JJ.

[60] See *Stephens v Stephens* [2009] FamCAFC 240 at [340] per May, Boland and O'Ryan JJ.

[61] See *Stephens v Stephens* [2009] FamCAFC 240 at [342] per May, Boland and O'Ryan JJ.

[62] See *Stephens v Stephens* [2009] FamCAFC 240 at [356] per May, Boland and O'Ryan JJ.

[63] See *Stephens v Stephens* [2009] FamCAFC 240 at [357] per May, Boland and O'Ryan JJ.

[64] A legal structure (eg a trust), although not a sham, may, nonetheless, be a puppet of a person or the alter ego of that person, by virtue of the degree of control the person exercises over the structure. See *In Marriage of Gould* (1993) 17 Fam LR 156; 115 FLR 371 at 383; [1993] FLC 92-434 per Fogarty J (with whom Nicholson CJ and Finn J agreed).

sham. Ultimately, the only way that the orders upheld by the High Court in *Kennon v Spry* and the subsequent orders of the Full Family Court in *Stephens v Stephens* [2009] FamCAFC 240 may be sustained are by reference to the phrase "property of the parties to the marriage or either of them" in s 79(1)(a) of the *Family Law Act*.

Important to the conclusion of French CJ on the scope of the phrase "property of the parties to the marriage or either of them" was the finding of "unusual circumstances" concerning the rights and duties with respect to the assets of the Spry Trust created by the 1981 Instrument and the 1983 Instrument. With great respect, aside from the fact that by the execution of the 1983 Instrument Dr Spry excluded himself from the class of beneficial objects of the Spry Trust, the circumstances remarked upon by His Honour were entirely commonplace in the context of discretionary trusts.[65] As Lord Walker of Gestingthorpe remarked[66] in *Schmidt v Rosewood Trust Ltd* [2003] UKPC 26 at [1], being an Isle of Man appeal concerning a "tax haven trust":

> It has become common for wealthy individuals in many parts of the world (including countries which have no indigenous law of trusts) to place funds at their disposition into trusts (often with a network of underlying companies) regulated by the law of, and managed by trustees resident in, territories with which the settlor (who may be also a beneficiary) has no substantial connection. These territories (sometimes called tax havens) are chosen not for their geographical convenience (indeed face to face meetings between the settlor and his trustees are often very inconvenient) but because they are supposed to offer special advantages in terms of confidentiality and protection from fiscal demands (and, sometimes from problems under the insolvency laws, or laws restricting freedom of testamentary disposition, in the country of the settlor's domicile). *The trusts and powers contained in a settlement established in such circumstances may give no reliable indication of who will in the event benefit from the settlement. Typically it will contain very wide discretions exercisable by the trustees (sometimes only with the consent of a so-called protector) in favour of a widely-defined class of beneficiaries*. The exercise of those discretions may depend on the settlor's wishes as confidentially imparted to the trustees and the protector. As a further cloak against transparency, the identity of the true settlor or settlors may be concealed behind some corporate figurehead. [emphasis added]

The reasoning of French CJ, albeit in respect of the phrase "property of the parties to the marriage or either of them", involves a control analysis, at least in part.[67] Such an analysis of "property" sits uncomfortably with the approach which has been taken by judges (including French CJ) in other statutory contexts. As Logan J (dissenting) remarked in *Minister for Immigration and Citizenship v Hart* (2009) 179 FCR 212; [2009] FCAFC 112 at [118]:

> Notions of the effective control of a discretionary trust such as described by French J (as the Chief Justice then was) in *Re Richstar Enterprises Pty Ltd; ASIC v Carey (No 6)* [[2006] FCA 814; (2006) 153 FCR 509 at 520-521, [36] and [37]] are foreign to the definition of "ownership interest" as it stands. … I note further that, in *Re Richstar Enterprises*, after a wide ranging survey of authority, including *Gartside's case* [*Gartside v Inland Revenue Commissioners* [1968] AC 553], French J (at [37]) described such a position no higher than "something approaching … the ownership of the trust property".

According to Gummow and Hayne JJ, it was open to the trial judge to formulate orders on the basis that the parties' asset pool included the assets of the Spry Trust, and that to proceed on that basis properly reflected what was the "property of the parties to the marriage or either of them". The two justices also remarked that the orders of the trial judge did not encompass "any mandatory order of the nature considered in *Ascot Investments Pty Ltd v Harper* [(1981) 148 CLR 337] which extinguished the rights or enlarged the obligations of third parties." With great respect, however, their reference to the availability of an application to the court for an appropriate order permitting Dr Spry to have access to the assets of the Spry Trust in effect contemplates an order of the nature condemned in *Ascot Investments Pty Ltd v Harper*.

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[65] See *Thurlstone (Aust) Pty Ltd v Andco Nominees Pty Ltd* [1997] NSWSC 517.

[66] On behalf of a Board comprising Lord Nicholls of Birkenhead, Lord Hope of Craighead, Lord Hutton, Lord Hobhouse of Woodborough and Lord Walker of Gestingthorpe.

[67] Cf footnote 65 above.

The question has arisen whether the interest of a bankrupt as a beneficiary in property held subject to a discretionary trust forms part of the "asset pool" administered by the bankrupt's trustee in bankruptcy pursuant to the *Bankruptcy Act 1966* (Cth). Cases under that statute suggest that such an interest does *not* form part of the "asset pool".[68]

When one compares the wording of the relevant provisions of the *Bankruptcy Act* with the relevant provisions of the *Family Law Act* – and in particular the expression the "property of the parties to the marriage or either of them" – it is difficult to see why assets held subject to a discretionary trust do not form part of the "asset pool" for bankruptcy purposes but do form part of the "asset pool" for matrimonial property settlement purposes. The dissenting judgment of Heydon J in *Kennon v Spry* avoids such an outcome. The judgments of French CJ and Gummow and Hayne JJ in *Kennon v Spry* must be regarded as an extension of the law.

[68] See *Dwyer v Ross* (1992) 34 FCR 463 at 466-467 per Davies J. Note also *Re Burton; Wily v Burton* [1994] FCA 1146; (1994) 126 ALR 557 at 560 (lines 10-20) per Davies J. Note further the reference by Gibbs J (then a judge of the Federal Court of Bankruptcy) to "beneficial interest" in *Re Buckle; Ex parte Ogilvie* (1969) 15 FLR 460 at 466; [1970] ALR 717 at 721 (lines 45-55), being a passage quoted with approval by Gray J (with whom Bleby J agreed) in *Cirillo v Citicorp Australia Ltd* [2004] SASC 293 at [78].