FAMILY LAW PROPERTY Division ofassets Family Law Act 1975 (Cth) APPLICANT: Ms Ledarn RESPONDENT: Mr Ledarn FILENUMBER: MLC 6423 of 2010 DATE DELIVERED: 14 October 2014 PLACE DELIVERED: Melbourne PLACE HEARD: Melbourne JUDGMENT OF: Cronin J HEARING DATE: By way of written submissions REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Geddes QC SOLICITOR FOR THE APPLICANT: Taussig Cherrie Fildes COUNSEL FOR THE RESPONDENT: Mr Mawson QC with Mr O'Shannessy SOLICITOR FOR THE RESPONDENT: Aughtersons ORDERS (1) That alloutstanding applications are adjourned to Friday 17 October 2014 at 9.00am forthe purposes of determining the draftingissues as between the parties. (2) That the drafting of the disputed minutes be prepared in terms of thereasons given this day. IT IS NOTED that publication of this judgment by this Court underthe pseudonym Ledarn & Ledarn has been approved by the Chief Justicepursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT MELBOURNE FILE NUMBER:MLC 6423 of 2010 Ms Ledarn Applicant And Mr Ledarn Respondent REASONS FOR JUDGMENT Arisingout of orders made by the Court on 1 November 2013, the husband and the wifehave requested specific determinations aboutfour things. To understand howthese issues remain alive and can be determined, an explanation of thebackground is necessary. Asa result of the way the parties litigated, the orders made on 1 November 2013contained the following provisions: Thatthe wife retain to the exclusion of the husband, the business known as the[Ledarn] Group. Thatthe husband and wife sign all necessary documents to give effect to theseorders. Thatthe assets of the parties as defined in paragraph 115 of the reasons forjudgment this day be divided as to the husband 57.4percentage and as to thewife, 42.6 percentage. Thatthe parties draw the minutes necessary to give effect to these orders. Notwithstandingthe aspirations of everyone for a quick resolution, it has taken almost a yearfor the parties to reach a positionwhere there is agreement save for fourmatters upon which written submissions have been filed. It is based upon thosesubmissionsthat I am making the determination. Beforedoing so, but taking into account the orders at the commencement of thesereasons, there are a small number of matters thatrequire attention in respectof the draft that was sent electronically to the Court at 4.22 pm on 19September 2014. They are asfollows: (a)

Paragraph33 refers to s 104A. It is probably meant to be s 106A and the wording needs tocoincide with the section as (for example) a transfer of land may not berecognised by the relevant LandTitles Office; (b) Paragraph33 should also have some sort of provision so that the registrar knows the basisupon which the default determinationis to be made because otherwise, the matterneeds to be heard as an application in open court; (c) Paragraph19 (leaving aside the determination further below) requires chattels to bereturned to the husband within 14 or 60 daysbut there could be an inconsistencybetween the time in the order and the requirement to locate in (a), (e), (g) and(i). Does thatparagraph mean that after the 14/60 days, if not located in thattime, the husband forgoes the interest? (d) Further inparagraph 19 (h) does that mean that notwithstanding the motor vehicle is in thepossession of Ms Q Ledarn (Q),the wife can and will provide itwithin the 14/60 days? (e) Further,paragraph 19 (j) refers to any interest in the Ledarn XSuperannuation Fund. Is this a reference to thehusbands member accountbecause paragraph 24 then requires the wife to transfer her in that fund. What(if anything) is tohappen to the interest of Q? Section 90MS limits the typesof orders that the Court can make to splitting orders. It is unclear, but it maybe obvious to the parties, wherethe power lies to make the orders as drafted inparagraphs 19 (j) and 24. Paragraph 25 is a very clear example of the exerciseofthe power in relation to the other superannuation fund and there appears nodifficulty there. Iturn then to the four issues which are: (a) There is amortgage to be discharged on PP Property. The wife wants 2 years to do it whilstthe husband wants it done in 60 days; (b) There is anagreement in relation to the return of chattels and the wife wants themdelivered in 14 days whilst the husband wants60 days; (c) There is adispute over a Toyota motor vehicle and each party wishes to keep it; (d) There is adispute about whether or not loans in the various entities which are called theDivision 7A loans (a reference to Division7A in the Income Tax AssessmentAct 1936 (Cth)) should be the responsibility of the wife or divided on thepercentages mentioned in paragraph 2 above. Notwithstandingthe impasse, the four determinations must be made on the basis of thejurisdiction and power of the Court to makethe orders sought in the light ofthe evidence presented by the parties. In this case, I have the additionaladvantage of receivingsignificant written submissions from counsel includingsenior counsel for both parties. THE MORTGAGE ON PP

PROPERTY Counselfor the husband submitted that the determination of the asset pool had beenknown since November 2013 and the wife had hadsince then to prepare and makearrangements for the restructuring of her finances. Counselfor the wife submitted that the wife did not have the capacity to borrow todischarge the loan in addition to all of the othercommitments proposed underthe orders. She proposed to pay the mortgage out from the sale of a realproperty which is where she currentlyresides. That residence however wasdescribed as a substantial lifestyle property and there was noguarantee of a salewithin a short period. The wifes proposal was thatshe would provide a second mortgage favouring the husband over her residenceandshe would repay or cause to be paid all principal and interest repayments on theloan encumbering PP Property pending the dischargeof the mortgage. Itcan be seen that the only issue of prejudice to the husband here lies in thefact that his residence would remain encumbered forup to 2 years becauseotherwise, there is no expense or cost to him. The husbands position isthat he says that the wife hashad sufficient time to get her financial house inorder. I accept that there has been a complicated process to reach this pointandthat the husband is clearly right that the wife has had much more time thanthat which has elapsed since the judgment in November2013. Having said that,there is no evidence that the husband relies upon other than his desire to moveon with his life. NothingI have seen suggests that this is pressing orprejudicial to the interests of the husband. Anyorder altering the interests of the parties must (because of s 79(2)) be justand equitable. In my view, making the husband waitup to two years to obtain anunencumbered property is still within the bounds of reasonableness taking intoaccount the durationof the relationship during which all of these assets wereacquired and the respective futures of the parties which were contemplatedbythe reasons delivered last November. The forcing of an immediate discharge bythe wife would potentially also bring down theintention of the determinationmade last November. I accept the wifes position therefore on the basisthat it is just andequitable to both parties. THE TOYOTA MOTOR VEHICLE Thisdispute is simply about who gets a vehicle. AsI understand the evidence, the vehicle actually belongs to the F Group throughone of the entities. Thehusbands position was that it had been in his possession since separationand that it had no special attributes. He submittedthat there would be a cashadjustment so the wife was not

prejudiced. Thewifes position was that it was valued in the F Group and it had uniquefeatures because it was a valuable research anddevelopment vehicle. The wifecomplained that whilst the husband had possession, that was because he hadsimply unilaterally takenit. Froma legal perspective, the legal and equitable interest appears to lie with thecorporate entity. As I understand the evidence,the vehicle was valued as suchas the property of the entity and the value is reflected in the assets list thatappears at paragraph115 of the reasons for judgment from November 2013. Eventhough the company was (or is to be) joined as a party to the proceedings forthe convenience of the parties, it is still anissue of whether it is just andequitable to make an order at all in respect of that property. I would bealtering the interestsof the entity rather than that of the husband and/or wifeif I made the order sought by the husband. Inmy view, as the vehicle was valued as part of the assets of the group and evenallowing for an adjustment being offered by thehusband, it would not be justand equitable to remove the vehicle from the company and give it to the husband.The wifes positionshould therefore be accepted. THE TIMING OF THE ADJUSTMENTS In respect of two paragraphs of the proposed minutes of commonorders, the parties disputed whether the changeovershould occur in 14days or 60 days. Thereis a sense of irony here where almost a year has gone by during which theparties have haggled over the best way for them tobenefit from the settlement.They are reminded that I indicated that I wanted a quick resolution and that hasnot occurred. Theyare also reminded that the purpose of the Novemberdetermination was to allow them to come up with the most efficacious solutiontothe division of their assets. Thewife observed that the time has elapsed and she wanted to finalise things yetshe wanted delays in the area of the discharge ofthe mortgage. Thehusbands position was that there were a number of vehicles involved inthe changeover and it was too cumbersome to do itall in 60 days. Ittakes little imagination to understand that I am empathetic to the husband inrespect of this issue having regard to the positionthat the wife has taken inrespect of other things. Thereis no science involved in this part of the exercise. In my view, discretionshould favour the husband. He has the task of gatheringtogether the vehiclesand on that basis, a further delay is hardly unfair. I am also conscious thatthe questions I earlier raisedmay require redrafting or further submissions andthat may also give the husband the

time in any event. Inmy view, it is just and equitable that the husbands position be adoptedon this point. THE DIVISION 7A LOANS Thehusband seeks that the Division 7A loans be the responsibility ofthe wife and in turn, the wife seeks that theybe divided in the sameproportions as I set out in the November 2013 orders. The consequence of theorder proposed by the wife wouldhave significant taxation ramificationsdepending upon what each party did after the order was made. Theloans were referred to in the evidence in the trial. The valuer, Mr K, reportedthe details of the relevant loans based on informationprovided to him by theaccountant for the businesses. He summarised the loans as relating to thehouseboat, two properties at TownM, personal expenditure and money spent on theproperty at Town K. He made specific reference to the relevant entities throughwhichthese loans had been created in the books of account. The amounts involvedwere significant. Importantly, these loans were referredto as having beenrecorded in the wifes name and I have inferred that was so because of thehusbands bankruptcy duringthe marriage at a time when there was a largeamount of money owed to the Australian Taxation Office. Theloans did not affect the valuation because they were reflected inbook entries. Theevidence of the wifes accountant who had been the business accountant,was that if the Court made the order as sought bythe wife under which she wouldretain the corporate structure, there would be no taxation consequences becausethe relevant entitywould remain under the wifes control. He had givenevidence that if the husbands position was accepted, transfers ofproperty out of the private company would result in a deemed dividend. Thewife maintained throughout the trial (and indeed opened her case accordingly)that she wanted to retain the business and I madethe determination that shecould do so. As part of her proposed orders, the wife agreed that she wouldindemnify the husband againstany liability arising from the particular entitythat Mr K had referred to as being one of the entities that had made theloans. Itwas submitted by the husband that the first time the wife had altered herposition was after the November determination when shesought the adjustment ofthe loans on the proportional basis to which I have referred. It was submittedthat despite everything thathad been said and done in the trial, this positionhad not been mentioned. Itwas therefore submitted that it would not be just and equitable to compel thehusband to take a portion of a loan. There was (andit appears remains)significant dispute

about what the correct figures would be anyway as thefigures that were used in the trialrelated to the financial year ended 2012 andthere has been significant movement since then. Itwas submitted by the husband and I agree, it is not clear what would happen ifthe orders she proposed were made. The impact ofsuch an alteration of the loansmay be different for each party depending upon their capacity to absorb theloans and/or pay anytax. Thesubmission on behalf of the wife began by stating that the loan balancestotalled approximately $5.8 million. It was submittedthat the loan balancesexisted well before the trial and arose over the financial years between 2006/7and 2008/9 and were used forthe acquisition of the properties as I havementioned. It was then submitted that these were liabilities of the parties andas such,should form part of the assets and liabilities foradjustment. For the reasons that follow, I reject that. Itwas submitted that it was not appropriate to include the loan balances as anasset in one entity and exclude them as a liabilityin another entity. The wifereferred to the fact that at the date of the trial, the taxation returns hadbeen lodged up until the2011/12 financial year and as a consequence,only the tax attributable to the repayment of the Division 7A LoanBalances upto 30 June 2012 were included in the Asset Pool. I find thatperplexing because of the way in which the wife conducted hercase. Moreimportantly, I have made findings about the assets that were to be divided. Inrelation to taxation liabilities, I said the following in my reasons: (t)he wife hasthe dominant legal control of the major corporate bodies. She has the dominantrole in each of those entities. Thateffects the equity that theparties have in their various assets because, if the assets were againrestructured in favour of the husband, there would be significant tax. So too,if there are assets to betransferred to the parties individually, taxconsequences will be significant. It may be that satisfying the orders Ipropose will require sales of real properties and even the business itself. Each or anyof those steps may have tax consequences (paragraph 27) (myemphasis). I discerned in paragraph 67 that taxation was alive issue but that was in the context of paragraph 27 of my reasons above. In paragraph106, I said: It seems to me that the only solution to that problemis that I determine the entitlements of the parties on a percentage basis ofanoverall finding of their total assets and to the extent that the parties cannotquickly come up with a solution as to how thatoutcome is achieved bearing inmind that I shall make an order that

the wife be entitled to retain the businessthrough its structure,the various assets will be sold and no doubt, that willtrigger the various taxation implications for the parties. In paragraph 117I returned to the opportunity to ensure that the best taxation outcome wasachieved for each party by saying: It was the position of seniorcounsel for the husband and I suspect supported by the wife that when ultimatelya decision is madeabout how the assets should be divided, the respectiveaccountants should be given an opportunity to work out a way of doing it mosttax-effectively. Having regard to the delay in delivery of these reasons, thereare clearly mortgages that have moved as well asthe crystallization of taxationliabilities. Further adjustments may need to be made for what the parties havedrawn in excess oftheir existing entitlements under orders. At paragraph 119in the last sentence, I said: I again therefore propose to give theparties an opportunity to address the division of the assets in the mostefficacious way. At paragraph169, I referred to the most efficacious way of dividing the assets was bypercentages. Inthe excerpts just mentioned, it can be seen that I was dividing a known set ofassets that would only alter if there were consequencesarising from a sale. Thewifes position now is that it would be just and equitable to alter theloan accounts according tothe percentages. That approach would not accord withwhat I said in paragraphs 27, 106, and 119 because I had already determinedwhatwas just and equitable and had given the parties an opportunity simply to dividethe assets in the most efficacious way withthe wife retaining the business. Ihave not heard anything that would suggest that the wifes approach isefficacious. I amnot satisfied that the wifes approach is just andequitable. As a side issue, I have also considered the question of whether the loans areproperty at all for the purposes of being altered unders 79 of the Act. Theassets referred to in my reasons were, in reality, the equity in the entities.It was not suggested in the proceedingsthat the loans were an asset or aliability of the parties as individuals and I have not mentioned them inparagraph 115 of the reasons.The property in the entities lies in the value tothe shareholders and in this case, the wife retains the entitlements and byvirtueof the November determination, that will remain. Whatnow seems to be contemplated (because the outcome of any proposed order remainsunclear) is a liability that might arise if thedeemed dividend was assessed. Icannot accept that there would be any other reason why the loan balances

wouldnow be divided ifit were not for the purposes of dealing with the tax issue. The wife was aware of the possibility of the liability arising becauseshe hadthe expert evidence and had offered the indemnity to the husband as part of hercase on the basis that she retained the entity. Thus,I accept the husbands submission that this is a new position orproposal. I certify that the preceding Thirty Nine (39)paragraphs are a true copy of the reasons for judgment of the Honourable JusticeCronindelivered on 14 October 2014. Associate: Date: 14 October 2014 AustLII:Copyright Policy|Disclaimers|Privacy Policy|Feedback URL: http://www.austlii.edu.au/au/cases/cth/FamCA/2014/866.html