

FAMILY LAW PROPERTY SETTLEMENT INTERIM PROCEEDINGS Where the husband seeks orders for the sale of the home Where the home is the only significant asset of the parties Where the wife resides in the home with the three children Where the wife has made a substantial homemaking and financial contribution Where the quantum of the asset pool has not been established Consideration of what is just and equitable Where the sale of the home would result in no assets left for distribution in the final property settlement Application dismissed.

FAMILY LAW PROPERTY SETTLEMENT SPOUSAL MAINTENANCE Where the husband seeks to discharge orders in relation to spousal maintenance and the payment of the mortgage on the home Where the husband has substantial tax liabilities Where the husband is a high income earner Where the husband's income has reduced Consideration of the criteria for variation of spousal maintenance in s 83 of the Family Law Act 1975 (Cth) Change of circumstances Orders for the payment of the mortgage discharged Orders for payment of spousal maintenance varied. Family Law Act 1975 (Cth) ss 75, 79, 83 and 106B Strahan and Strahan (2011) FLC93-466

APPLICANT: Mr James FIRST RESPONDENT: Ms Snipper SECOND RESPONDENT THIRD RESPONDENT H & Ors trading as Company J M & Ors trading as Company C FILE NUMBER: SYC 1913 of 2012 DATE DELIVERED: 20 October 2014 PLACE DELIVERED: Sydney PLACE HEARD: Sydney JUDGMENT OF: Rees J HEARING DATE: 1 October 2014 REPRESENTATION THE APPLICANT: In Person COUNSEL FOR THE FIRST RESPONDENT: Mr Batey SOLICITOR FOR THE FIRST RESPONDENT: Harris Freidman Lawyers COUNSEL FOR THE SECOND RESPONDENT The 2nd respondent was excused SOLICITOR FOR THE SECOND RESPONDENT NSolicitors COUNSEL FOR THE THIRD RESPONDENT SOLICITOR FOR THE THIRD RESPONDENT Mr Thomas King & Wood Mallesons

ORDERS IT IS ORDERED (1) That Orders 1 and 2 of the application of Mr James (the husband) filed 18 December 2013, seeking orders for interim property distribution is dismissed. (2) That Order 5 of the Orders made on 14 June 2012 be discharged as at 13 December 2013. (3) That the husband pay interim spousal maintenance to Ms Snipper (the wife) in the sum of \$2,657 per week, payments to be made in accordance with Order 4 of these Orders. (4) That the 3rd Respondent pay to the wife such amount as the Court may determine (such determination being notified to the

3rd Respondent by service of the Court order no later than seven days before such payment is to be made) from any money otherwise payable to the husband by the 3rd Respondent by way of company drawings and, in addition, 35 percent of any money otherwise payable to the husband by way of balance of undistributed profit payments. (5) That for the purpose of Order 4 of these Orders the amount determined is \$2,657 per week or \$11,514 per month. (6) That within 14 days the husband is to provide to the solicitors for the wife the names of three suitably qualified experts to value the husband's interest in Company C and to value the shares in A Pty Limited. (7) That within 14 days the husband is to provide to the solicitors for the wife the names of three suitably qualified experts to report on the wife's reasonable remuneration. (8) Upon receipt of the names in Orders 6 and 7 of these Orders, the wife's solicitors shall, within seven days, notify the husband of her election of the single experts and the parties shall forthwith jointly instruct the single experts. (9) The costs of the single experts are to be met, in the first instance, equally by the husband and the wife. IT IS NOTED that publication of this judgment by this Court under the pseudonym James & Snipper and Ors has been approved by the Chief Justice pursuant to s121(9)(g) of the Family Law Act 1975 (Cth).

FAMILY COURT OF AUSTRALIA AT SYDNEY FILE NUMBER: SYC 1913 of 2012 Mr James Applicant And Ms Snipper First Respondent And H & Ors trading as N Solicitors Second Respondent And M & ORS trading as Company C REASONS FOR JUDGMENT Ms Snipper (the wife) and Mr James (the husband) commenced cohabitation in 1990, married in December 1994 and separated on 28 November 2011. They have three children, the youngest of whom is four years old. The children live primarily with the wife. The husband is a senior executive in Company C (the Company). The only significant asset of the parties is the former matrimonial home at Suburb J (the home) which is registered in the sole name of the wife. That property was purchased in 2010 for \$1.25 million of which \$950,000 was borrowed from the Commonwealth Bank and \$300,000 was advanced by the wife's mother. There is neither agreement nor evidence of the present value of the home. On 14 June 2012 Justice Ryan made orders in defended proceedings relating to spousal maintenance, child support and interim property settlement. Relevantly her Honour ordered: IT IS ORDERED THAT (1) That Order 1.1 of the orders dated 11 April 2012 is discharged. PENDING FURTHER ORDER (2)

That [Mr James] (the husband) pay spousal maintenance to [MsSnipper] (the wife) in the amount of \$8,000.00 per calendar month, which amount is to be paid monthly on the 12th day of each calendar month, the first such payment to be made on 13 July 2012. (3) That the wife's child support departure application in relation to the children [G] born ... 2002, [B] born ... 2004 and [R] born ... 2010 is dismissed. (4) That from each profit share and performance bonus paid by [Company C] to the husband 35% of the gross amount paid to the husband is, by way of interim spousal maintenance, to be paid to the wife. (5) That the husband pays as and when they fall due all instalments in respect of the Commonwealth Bank mortgage secured over the family home at [D Street, Suburb J]. (6) That the husband forthwith signs all necessary documents directing the responsible partners and/or the payroll manager of [Company C] to pay the amounts referred to in Orders 2, 4 and 5 above for monies payable to him directly to the wife and in relation to the mortgage, directly to the bank. (7) The Court notes the husband's undertaking that he will direct his employers to pay to the wife \$4,500.00 per month which is to be applied by her to the children's support. (8) That all outstanding applications for interim orders are dismissed.

**THE INTERIM PROCEEDINGS** On 18 December 2013 the husband filed an Application in a Case. The orders which he sought fell into three categories. The husband firstly sought orders for the sale of the home and the distribution of the whole of the proceeds of sale to him by way of interim property settlement. Secondly, the husband sought to discharge the orders in relation to spousal maintenance, including the payment of the mortgage on the home, made on 14 June 2012, as to the date upon which they stand paid. Thirdly, the husband sought procedural directions in relation to valuations in relation to which the parties were in agreement and those orders will be made by consent. Additionally, the husband sought to be released from an undertaking in relation to child maintenance. Since an assessment has issued in relation to Child Support, the undertaking in relation to child maintenance has no application and it is not necessary to release the husband from compliance. No Orders were sought against the 2nd Respondent who was excused from participation in these proceedings.

**THE HUSBAND'S APPLICATION FOR INTERIM PROPERTY SETTLEMENT** The home, where the wife and the three children live, and of which the wife is the registered proprietor, is the only substantial asset of the

parties. The husband in his interim application seeks orders that the home be sold, the mortgage discharged and the entire balance paid to the Deputy Commissioner of Taxation (the ATO) in respect of the husband's tax liability. It is noted that Ryan J found that the husband's liability to the ATO at 14 June 2012 was in excess of \$300,000. The debt now stands at almost \$900,000. The wife in her substantive application seeks to retain the home. Order 5 of the Orders which were made on 14 June 2012 required the husband to pay the instalments in respect of the Commonwealth Bank of Australia (the Bank) mortgage secured over the home as they fell due. The husband has not complied with that Order and has made no payment in relation to the mortgage since December 2013. As a result of the husband's failure to pay the mortgage payments, the mortgagee has filed an application seeking leave to issue a writ of possession and judgment against the wife in the sum of \$959,808. The wife hopes to be able to come to an agreement with the Bank that will allow her to retain the home. In support of his application for the sale of the home and the distribution of the entirety of the proceeds on his behalf, the husband relies upon the fact that the ATO has instituted proceedings against him in the Supreme Court of New South Wales and given notice that it intends to file for default judgment. The total amount claimed by the ATO as at 1 August 2014 was \$881,482. The application of the husband is an application for an order for an interim property settlement. The approach to such an application is well settled and set out in the decision of the Full Court in *Strahan and Strahan* (2011) FLC93-466. Before the Court decides to depart from the usual approach, that a property settlement is determined in a final hearing, the Court must be satisfied that it is in the interests of justice to do so. That requires a preliminary assessment, at least, of the merits of the opposing applications, pursuant to ss 79 and 75(2) of the Family Law Act 1975 (Cth) (the Act). In considering whether or not to make an order for an interim property settlement, the Court would be concerned not to make an order that could not, at the final hearing, be accommodated within the broad outcome of the final distribution of the parties' property. The final quantum of the net asset pool has not yet been established. In his Financial Statement, relied upon in these proceedings, sworn on 18 December 2013, the husband deposes to owning personal property to a value of \$27,000 and superannuation worth \$70,000. The superannuation fund is non-complying and there is no evidence

of the likely liabilities which will arise because of the non-compliance. He discloses liabilities as guarantor of the mortgage over the home in the sum of \$960,000 and a further liability, as has been referred to above, to the ATO. The husband discloses total liabilities in his Financial Statement of \$2,083,202. The wife in her Financial Statement, sworn 21 February 2014, discloses that she owns the home which she estimates to be valued at \$1.3 million. She has superannuation of \$138,401. In her Financial Statement, the wife deposes to a mortgage over the home in the sum of \$934,586.61 leaving, on her evidence, an equity in the home of approximately \$365,000. The parties commenced co-habitation in 1990 and lived in an unencumbered apartment which was owned by the wife. The husband did not have any assets at the commencement of the relationship. Until the husband gained his professional qualifications in 1993, he was essentially supported by the wife. By the time the parties married in December 1994, the husband was professionally employed. In 2000 and 2001, the wife's mother gave the wife approximately \$1.55 million. It is not disputed that the parties opened a joint bank account, the funds from the wife's mother were deposited into that account and the husband undertook to establish and manage a share investment portfolio. It is not disputed that the husband redirected the bank statements away from the home to a post office box so that they were not available to the wife. It is the wife's case that, without her knowledge, the whole of that sum was lost by the husband, not by investing in the share market, but by gambling. In the proceedings before me, the husband relied upon three affidavits sworn on 18 December 2013, 11 March 2013 and 25 September 2013. He also relied upon a Financial Statement sworn on 18 December 2013. In none of those affidavits does the husband address his contributions, pursuant to s 79 of the Act, to the acquisition, maintenance and improvement of the property of the parties, or to the welfare of the family. In relation to the issue of the wife's assertion of monies lost by gambling, the husband, in his affidavit sworn 25 September 2014, says Since January 2012 I have not gambled. I do not feel I have any need to gamble since that time. I am deeply committed to that position. Thus, in considering whether or not it is just and equitable to make any orders for interim property settlement, the only evidence before the Court is the evidence of the wife that she contributed an unencumbered apartment at the time of the marriage, that her mother contributed

\$1,155,000 in 2001 and 2002 and that when the home was acquired a further sum of \$300,000 was provided as a gift from the wife's mother. It is common ground between the parties that the wife has been the primary carer of the children and that the husband has been in fulltime employment, at least since the time of the marriage. Thus, for the purpose of this decision the wife's contributions are the unencumbered apartment at the date of co-habitation; the further contribution by her mother of \$1,550,000; the monies advanced by the wife's mother of \$300,000 for the purchase of the home, and her home making and parenting contributions. On any view, those contributions are substantial. In addition, the wife maintains a claim that the husband has committed waste by gambling away the substantial amount of money that was given to the wife by her mother. She also alleges that he gambled away significant amounts from his income and that he did not pay his tax when it fell due, despite his having received the income to which that tax was referable. The husband's contribution, on the evidence before me, is that of his earnings, to the extent that his contribution is not reduced by the allegation of waste. In considering whether there is likely to be an adjustment pursuant to s 75(2) of the Act, it is agreed between the parties that the husband has not paid child support since 12 February 2014. Whether, at the time of the final hearing, the husband will be in receipt of income, remains to be seen and will probably depend upon the attitude taken by the ATO in relation to his outstanding tax debts. It is the husband's case that, in the event that he becomes bankrupt, he will no longer be eligible to continue in his position at the Company. However, there is no evidence about the attitude of the ATO which may prefer to have the husband working in his current employment and paying off his tax liability. There is nothing to be gained for the ATO by the husband's becoming bankrupt. It could not safely be assumed that there would be any adjustment, in final proceedings, for s 75(2) factors. In the event that the Court made an order, as sought by the husband, for the sale of the home and the application of the entire net proceeds of sale to the husband's tax debt, then the wife's application for property settlement would be rendered nugatory as there would be no assets left available for distribution. In those circumstances it cannot be just and equitable to make an interim order as the husband seeks and the husband's application for interim property settlement will be dismissed. THE INVOLVEMENT OF THE

COMPANY IN THE PROCEEDINGS TheCompany is the third respondent in the substantive proceedings. Inthe interim proceedings before me, the only involvement of the Company was torespond to an order sought, in the nature of a garnishee,to enforce thehusbands obligations to pay spousal maintenance and the mortgage paymentson the home pursuant to the ordersof Justice Ryan on14 June 2012. Counselfor the Company appeared for the purpose of proposing a form of order to whichthe Company would consent in the event thatthe Court found that the Companysould pay money directly to the wife. The form of that Order was settledbetween Counsel and theCompany took no further part in the proceedings. Inthe substantive proceedings the wife seeks an order pursuant to s 106B of theAct to set aside certain transactions between the husband and the Company. Thosetransactions will be described in very generalterms because they are relevantto the husbands present contentions as to his income. Thehusband receives income from his involvement in the Company from two sources. Hereceives monthly drawings fromthe Company and quarterlydistributions of profit from a Trust (the Trust), which is acreature of the Company. Duringthe marriage, the Trust was directed to apply some of those distributions to thewife. She was not aware of this and the husbandhad the control of the moneymdistributed to the wife. The wife incurred a tax liability as a result of thedistributions to her. Thewife instituted proceedings against the Trust in the Supreme Court of New SouthWales seeking equitable compensation for lossallegedly suffered by her arisingfrom breaches of duties owed by her as a beneficiary of the Trust. The wife wasunsuccessful inthose proceedings and an order has been made that she pay costs.Costs have been assessed at \$323,498. Asa consequence of the Trusts engaging in the litigation in the SupremeCourt of New South Wales, a decision was made by theCompany to withhold incomefrom the Trust which might otherwise have been payable to the husband, or at hisdirection, and to applythat income against the costs incurred by the Companyand the Trust, of the proceedings both in the Supreme Court of New South Walesand subsequently in the Family Court of Australia. Itis the position of the Company that their entitlement to make that decisionarises from the employment agreement and that is amatter which will bedetermined ultimately at hearing. However,it is not disputed that at some time the husband ceased to receive the Trustdistributions which might

otherwise have been due to him. Thus, he asserts, his income was reduced. It is as a consequence of this asserted reduction in his income that the husband brings an application to the Court to vary the orders for spousal maintenance (including the order for the payment of the mortgage on the home) made on 14 June 2012. THE HUSBAND'S APPLICATION TO DISCHARGE SPOUSAL MAINTENANCE ORDERS (INCLUDING THE PAYMENT OF THE MORTGAGE) The orders which the husband seeks to vary are the order for payment of spousal maintenance in the sum of \$8,000 per month, the order for the payment of mortgage payments in respect of the home and the order requiring him to pay to the wife 35 per cent of the gross amount paid to him in relation to profit share and performance bonuses from his employer (the payments from the Trust referred to above). In relation to the issue of profit share and performance bonuses, since the husband is not currently receiving any sums from the Trust which fall within that category, and is not likely to do so before the final hearing of this matter, it is not necessary to consider that application. The criteria for the variation of orders for spousal maintenance is set out in s 83 of the Act which is reproduced below: FAMILY LAW ACT 1975 - SECT 83 Modification of spousal maintenance orders (1) If there is in force an order (whether made before or after the commencement of this Act) with respect to the maintenance of a party to a marriage: (a) made by the court; or (b) made by another court and registered in the first-mentioned court in accordance with the applicable Rules of Court; the court may, subject to section 111AA: (c) discharge the order if there is any just cause for so doing; (d) suspend its operation wholly or in part and either until further order or until a fixed time or the happening of some future event; (e) revive wholly or in part an order suspended under paragraph (d); or (f) subject to subsection (2), vary the order so as to increase or decrease any amount ordered to be paid or in any other manner. (1A) The court's jurisdiction under subsection (1) may be exercised: (a) in any case--in proceedings with respect to the maintenance of a party to the marriage; or (b) if there is a bankrupt party to the marriage--on the application of the bankruptcy trustee; or (c) if a party to the marriage is a debtor subject to a personal insolvency agreement--on the application of the trustee of the agreement. (2) The court shall not make an order increasing or decreasing an amount ordered to be paid by an order unless it is satisfied: (a) that, since the order was made or last varied: (i) the



circumstances of a person for whose benefit the order was made have so changed (including the person entering into a stable and continuing de facto relationship); (ii) the circumstances of the person liable to make payments under the order have so changed; or (iii) in the case of an order that operates in favour of, or is binding on, a legal personal representative--the circumstances of the estate are such; as to justify its so doing; (b) that, since the order was made, or last varied, the cost of living has changed to such an extent as to justify its so doing; (ba) in a case where the order was made by consent--that the amount ordered to be paid is not proper or adequate; (c) that material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false. (3) Subsection (2) does not prevent the court from making an order varying an order made before the date of commencement of this Act if the first-mentioned order is made for the purpose of giving effect to this Part. (4) In satisfying itself for the purposes of paragraph (2)(b), the court shall have regard to any changes that have occurred in the Consumer Price Index published by the Australian Statistician. (5) The court shall not, in considering the variation of an order, have regard to a change in the cost of living unless at least 12 months have elapsed since the order was made or was last varied having regard to a change in the cost of living. (5A) In satisfying itself for the purposes of paragraph (2)(ba), the court shall have regard to any payments, and any transfer or settlement of property, previously made by a party to the marriage, or by the bankruptcy trustee of a party to the marriage, to: (a) the other party; or (b) any other person for the benefit of the other party. (6) An order decreasing the amount of a periodic sum payable under an order or discharging an order may be expressed to be retrospective to such date as the court considers appropriate. (6A) Where, as provided by subsection (6), an order decreasing the amount of a periodic sum payable under an order is expressed to be retrospective to a specified date, any moneys paid under the second-mentioned order since the specified date, being moneys that would not have been required to be paid under the second-mentioned order as varied by the first-mentioned order, may be recovered in a court having jurisdiction under this Act. (6B) Where, as provided by subsection (6), an order discharging an order is expressed to be retrospective to a specified date, any moneys paid under the second-mentioned order since the specified date may be

recovered in a court having jurisdiction under this Act. (7) For the purposes of this section, the court shall have regard to the provisions of sections 72 and 75. (8) The discharge of an order does not affect the recovery of arrears due under the order at the time as at which the discharge takes effect. The husband relied upon ss 83(2)(a)(i) and (ii). In the reasons for judgment dated 14 June 2012, Ryan J addressed the issue of the husband's income at paragraphs 38-40, and ultimately concluded, at paragraph 40 of the judgment: The husband's average weekly income figure referred to above does not sit comfortably with his bank records and 2011 taxation return, to which greater weight is attached. His 2011 taxation return shows [Company C] income of \$609,000.00. Via a services trust, the husband directed a further 15 per cent of his income to the wife; albeit this was not received by her. The effect of this is that the husband's total remuneration package from [Company C] for the preceding year constitutes the 85 per cent declared in his taxation return, plus 15 per cent which he directed to the wife. When the husband's evidence that this year his performance and profit bonuses are likely to be lower (but not significantly) is taken into account, it is likely that his total average weekly income is at least about \$3,000.00 per week more than contained in his Financial Statement. As to the wife's submission (as outlined in her counsel's aide memoir) that his income is even higher, this calculation erroneously mixed financial and calendar years and thus produced an unsafe result. Because of the unsatisfactory manner in which the husband presented evidence in relation to his income it is no surprise that this occurred. If \$609,000 represents 85 per cent of the husband's income in the 2011 tax year, as found by Ryan J, then his total income for the financial year ended 30 June 2011 was approximately \$716,500. In evidence, before me, was a document prepared by the Company under cover of a letter dated 30 September 2014. That document discloses that the husband's annualised allocation of income from all sources for the years 2011, 2012 and 2013 was as follows: 2011 722,370 2012 728,544 2013 671,440 However, while the Company continued to attribute profit share distributions to the husband, the money was not actually paid to him but retained against the costs incurred by the Company in the litigation. It is difficult to determine when the husband stopped receiving the distributions from the Trust. By letter dated 2 May 2013, a letter was sent by the solicitors for the Company to the solicitors for the husband advising: ...(the [Company])

will give consideration at the end of May 2013 as to whether [company] payments to (the husband) should cease, so that amounts which may otherwise be paid to (the husband) may be applied to setting off the expenses that have been incurred by (the [Company]) in connection with these proceedings. On 15 August 2013, a further letter was sent advising: We are instructed that, pursuant to the terms of the ([employment]) Agreement, (the [Company]) has determined to cease making payments to (the husband) in the form of balance of profit payments for the financial year ending 30 June 2013. These payments will also be applied to meeting the legal costs being incurred by (the [Company]) in connection with the proceedings. We are instructed that the legal costs incurred to date exceed any balance of profits payments which would otherwise have been made to (the husband). We are instructed that these payments will be retained and applied to legal costs in two tranches (likely to occur in November 2013 and January 2014), and that an early part payment of balance of profits was already retained and applied to legal costs on 2 August 2013. At paragraph 19 of his affidavit sworn 18 December 2013, the husband states that in the year ended 30 June 2013 he actually received \$536,046. That sum is about \$180,500 less than the amount which Ryan J found to be the husband's income in June 2012. According to documents tendered by the Company, in the 2014 tax year, as a consequence of the Trusts retaining the husband's profit share, his income will be \$474,842. In my view, the reduction in income, since the Orders of June 2012, of some \$180,500 in the financial year ended 30 June 2013 and some \$250,000 in the financial year ended 30 June 2014, is sufficient to enliven the provisions of s 83 of the Act. Accordingly, the Orders for spousal maintenance and the payment of the mortgage on the home will be varied from 1 July 2013. The husband asks the Court to discharge the Orders of Ryan J in relation to spousal maintenance and the payment of mortgage as at the date to which they stand paid. In relation to the Order for the payment of the mortgage, the instalments at the date of the Order were \$6,516 per month. On 18 June 2012, the Bank's interest rate was reduced to 6.1 per cent. The interest charge, as shown on the mortgage statement, was reduced from \$5,078 to \$4,744. On 29 June 2012, the solicitors for the husband wrote to the solicitors for the wife asking what the minimum monthly repayment required by the Bank was. The wife's solicitors gave the figure of \$6,516 in reply. A further letter was written by

the husbands solicitors, to the effect that the Bank had confirmed that the amount required was \$5,882 per month. The husband advised that he would pay that sum and he did so until October 2012. On 10 October 2012 the wife's solicitors wrote to the husband's solicitors enclosing a letter from the Bank confirming that the Required Monthly Repayment Amount (RMRA) is \$6,516. On 11 October 2012 the husband's solicitor wrote to the wife's solicitor, pointing out that interest rates had gone down and the minimum monthly repayment had presumably been reduced. The wife was asked to contact the Bank and arrange for the RMRA to be the reduced amount. On 12 October 2012 there was a further reduction in the interest charged to \$4,698. From November 2012, the husband paid \$5,722 against the mortgage payments. On 10 December 2012 the interest charged was reduced to \$4,522. From January 2013 the husband paid \$5,625 against the mortgage payments. There were slight fluctuations in the interest charged in 2013. From August 2013, the husband paid \$5,145 against the mortgage payments until his last payment in December 2013. In those circumstances, and having regard to the fact that the husband's income diminished from 1 July 2013, it is appropriate to discharge the Order for the payment of the mortgage as at the day after the last payment was made, 13 December 2013. In relation to the provision of maintenance for the wife, the husband has not satisfied the Court that the Order should be discharged but it is accepted that the Order should be varied. The amount by which the Order will be varied will have regard to the fact that the husband will not now be paying the monthly mortgage payments. Those payments will be the wife's responsibility.

**ISSUES** The husband submits that he has no ability to pay spousal maintenance. The wife challenges the husband's claimed expenses. The husband makes a limited challenge to the wife's claimed reasonable living expenses. The husband asserts that the wife is either earning income or is capable of earning income from a company known as A Pty Limited. The wife says she has no income. In the event that an order is made for spousal maintenance, should the order direct the Company to pay directly to the wife? Should the order include an amount to be applied to arrears?

**THE HUSBANDS CAPACITY TO PAY** The documents produced by the Company indicate that the income of the husband in the financial year ended 30 June 2014 (noting that no figures are available for the current financial year) is \$474,842 or \$9,132 per week.

The husband has not filed a current Financial Statement and relies on a Financial Statement sworn 18 December 2013. He told the Court that his expenses remained the same. That is patently not true. He asserts that he pays mortgage payments of \$1,251 per week (on the home) and spousal maintenance and child support totalling \$2,885 per week. It is abundantly clear that the husband was not paying the spousal maintenance, child support or mortgage payments as at the date when the document was executed or thereafter. The husband has a liability to pay child support in accordance with the current assessment and it is conceded by the wife that the current assessment of \$2,011.25 per month or \$464.13 per week could be collected by the Child Support Agency. There is no application to vary child support. The husband asserts that he has paid more in child support than he was liable to pay. That is a matter he can take up with the Child Support Agency. For the purpose of these proceedings, the husband's child support liability is \$464 per week. The liabilities claimed by the husband are disputed by the wife. No evidence has been provided to support the claimed liabilities. It is necessary to consider them individually. Tax The husband claims that he pays \$5,921 per week in tax. In his affidavit sworn 18 December 2013, the husband says, in relation to the claim by the ATO: I have no defence to the claim and I cannot negotiate a payment regime given my current circumstances. In his affidavit sworn 25 September 2014, the husband says that he has had discussions with the ATO and that it is clear, in his view, that the ATO requires a substantial amount to be offset from the sale of the home. That is a curious position having regard to the fact that the husband does not own the home. There is no evidence that the husband is making any payments to the ATO to offset his debt. Accordingly, I do not propose, for the purpose of determining his ability to pay spousal maintenance, to take tax into account as a weekly amount, other than to leave untouched an amount that would be available for the payment of tax if the husband chose to make that payment. Whether the husband chooses to make payments to the ATO to reduce his debt is a matter that will, no doubt, be considered in the final hearing of the proceedings when the trial judge determines how the liability for outstanding tax will be allocated between the parties. Rent The husband currently pays rent of \$1,700 per week for the home at Suburb O in which he lives with his current wife, Ms Q. In his affidavit sworn 25 September 2014, he says that the cost of housing is

necessary to ensure there is an equivalent and appropriate home for the children. I assume that by equivalent he means a home equivalent to that in which the children live with the wife which he wishes to sell to pay his tax. There is no evidence to support the husband's contention that it is necessary for him to pay \$1,700 for accommodation which is suitable for himself, Ms Q and the children who spend four nights each fortnight and alternate Wednesday evenings, and half school holidays, with him. There is no evidence of the financial circumstances of Ms Q such that the Court can be satisfied that it is reasonable that he be responsible for the whole of the rent without contribution from her. In his Financial Statement the husband attributes an estimated income of \$346 per week to Ms Q. In his affidavit sworn 18 December 2013, the husband says that Ms Q undertakes contracting work sufficient to pay the mortgage on a unit she owns and to make the repayments in respect of her car. The nature of her employment is not stated. The husband says that he contributes \$591 per week to the general living expenses of Ms Q. The wife says that Ms Q purchased a unit in February 2011 for \$430,000 which is currently rented for \$1,710 per month. No documents support that contention. However, the husband has the responsibility to bring evidence of Ms Q's financial position, including her assets and liabilities and he has not done so. There is no evidence about Ms Q's ability to contribute to her support from the rental income from her unit. For the purpose of calculating the husband's available income I propose to allow rental costs of \$1,000 as reasonable.

**Credit cards** The husband has entered into payment arrangements with two creditors and pays \$335 per week in accordance with those arrangements. That expense will be allowed.

**Part N expenses** The most significant expense claimed by the husband is legal fees of \$5,123 per week. He represents himself. There is no evidence that he is currently paying legal fees. In so far as this claim refers to the profit share withheld by the Trust to pay the legal fees incurred by the Company, that income has already been disregarded and the expense cannot be included here. The husband claims to pay \$814 per week for the expenses of the children in the days they live with him in circumstances where he pays no child support. The husband claims weekly Part N expenses (excluding legal fees) of \$2,532. The husband claims that he pays \$591 per week for the support of Ms Q (not including rent). She has an income of \$346. His obligation to support Ms Q does not take precedence

over his obligation to support the wife and the children. I do not propose to take her support into account except to note that the amount which will be available to the husband as a result of the Orders proposed is insufficient to provide a reasonable level of support for Ms Q. Fixed expenses I will allow, for the purpose of this application, the husband's fixed expenses to be as follows: Rent \$1,000 Child Support \$ 464 Instalment payments to creditors \$ 335 Total \$1,799 That leaves the husband with \$7,333 per week as his disposable income. I consider that it would be reasonable to allow one third of this amount (\$2,444) for the support of the husband and Ms Q (and the children when they are with him), one third for spousal maintenance and to leave the remaining third available to the ATO if the husband so chooses.

**THE WIFE'S REASONABLE NEEDS** With the exception of a claim for child care expenses, there was no challenge to the wife's expenses. She claims mortgage payments, rates and medical insurance totalling \$1,844 per week. Although the children occupy the home and the medical insurance covers their medical expenses, it is reasonable to attribute these expenses to the wife because she pays them. The wife estimates the children's proper expenses to be \$4,007 per week and includes in this assessment the sum of \$1,128 which she attributes to the children's share of the mortgage repayments. She also includes \$300 per week for child minding. There is no application in relation to child support and the wife's claimed expenses in relation to the children are not to be taken into account here. However I am satisfied that the amount of child support that should be paid by the husband does not cover the children's expenses and for that reason I allow the whole of the housing costs as an expense of the wife. The wife deposes to having borrowed from her mother to meet hers and the children's expenses. The wife's Part N expenses for herself, excluding the costs of housing, are \$813. That figure is reasonable, particularly when the husband estimates his own Part N expenses, for himself alone, excluding legal costs, at \$1,127. The wife has established a need for spousal maintenance of \$2,657 per week.

A PTY LTD A Pty Ltd was incorporated in 2002. The shareholders are the husband as to ten shares, Mr S as to ten shares and the wife's mother as to ten shares. The wife and Mr S are Directors. The husband in his affidavit sworn 18 December 2013 says that, during the marriage, the wife did not receive a salary from A Pty Ltd but that in 2009 A Pty Ltd purchased a car for the wife's use. The husband

annexed to his affidavit bank statements showing money received by the wife from A Pty Ltd between 20 March 2009 and 8 September 2011 totalling \$117,500. The wife's evidence is that she has not received any money from A Pty Ltd since the parties separated in November 2011. The husband disputes the wife's evidence and complains that she has failed to make proper disclosure in relation to A Pty Ltd. However, the husband conceded that the Financial Statement of A Pty Ltd for the three years ended 30 June 2013 and the bank statements of A Pty Ltd for the same period had been produced on subpoena and were available for inspection. No documents from the Financial Statements or bank statements produced by A Pty Ltd were tendered by the husband in support of his assertion that the wife earned income from A Pty Ltd. The husband tendered a document from material produced on subpoena which was a record of meetings attended by the wife for A Pty Ltd between 4 July 2012 and 26 February 2014. In that period of about 22 months, the wife attended 35 meetings. If there were documents produced by A Pty Ltd which substantiated the husband's assertion that A Pty Ltd is a source of current income for the wife, then it was incumbent upon him to tender those documents. There is no evidence before me to rebut the wife's evidence that she receives no income from A Pty Ltd. Accordingly I propose to order that the husband pay spousal maintenance in the sum of \$2,657 per week. The Orders made 14 June 2012 required the husband to pay \$8,000 per month spousal maintenance to the wife and, in addition, to pay the mortgage payments then of \$6,516. The effect of these Orders is to reduce the husband's total obligation for spousal maintenance by some \$4,000 per month. HOW SHOULD SPOUSAL MAINTENANCE BE PAID? The husband's failure to pay both spousal maintenance and child support in circumstances where he has had a clear ability to pay at least some portion of those liabilities suggests that he cannot be relied upon to make those payments voluntarily into the future. In 2014, the husband has had a gross income of \$9,132 per week. He does not pay tax. What he has done with the money is unclear and unexplained by him. In the two financial years from 1 July 2012 to 30 June 2014 the husband has received over a million dollars. Again, what the husband has done with that money will no doubt be the subject of enquiry in the final hearing but the lack of explanation in his case about the disposition of those funds is sufficient for there to be a requirement that the spousal



maintenance is paid before the husband has control of the funds. An order will be made for the payment of the spousal maintenance by the Company in the terms upon which the Company has agreed. These Orders make no provision for either the quantification or the enforcement of payment of arrears. That issue will await the final hearing. SINGLE EXPERTS The husband and the wife have agreed to Orders for the appointment of a single expert to value the interest of the husband in the Company and the shares in APty Ltd. They have also agreed on the appointment of a single expert to give evidence about the wife's reasonable remuneration. Those Orders will be made. I certify that the preceding one hundred and twenty-nine (129) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Rees delivered on 20 October 2014. Associate: Date: 20 October 2014 AustLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/885.html>

