'We Prize Not to the Worth'[1] – *Some thoughts on the Valuation of Property under the Family Law Act*

Frank Bates*

I

In 1892, Oscar Wilde defined a cynic as 'A man who knows the price of everything and the value of nothing.'[2] In these times, Wilde might have recast his definition, in accord with contemporary thought as being 'A person who knows the value of everything, but has forgotten the price of most things.' The interrelationship between price and value touches, as always it has, on many, if not all, areas of human activity from the apparently trivial to the apparently profound and primal. Hence, it would be strange had Australian family law as it relates to matters involving property and finance had escaped as, indeed, it has not!

In the first group, though *prima facie* concerned with a seemingly trivial aspect of human activity, though of not inconsiderable illustrative value, lie forms of payment for sporting success. Much depends on the context in which that payment is received — 'context' meaning the medium and situation in which the reward is received, as well as the amount, which may depend on wholly subjective factors. Thus, for instance, the experience of the English writer Michael Parkinson is graphically illustrative and is being described *in extenso*.[3]

During the 1950s (it had been long abandoned when I played there), the practice had arisen in Yorkshire club cricket of taking up collections on behalf of players, especially those designated as amateurs, who had scored

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1 The Friar in *Much Ado About Nothing* Act IV sc I:

> ... for so it falls out
> That what we have we prize not to the worth
> Whiles we enjoy it, but being lacked and lost,
> Why then we rack the value.

2 Lord Darlington in *Lady Windemere's Fan* Act III.

3 Michael Parkinson, *Cricket* Mad (1969) 27.

50 runs or taken 5 wickets. Hence, it was a source of great pride amongst these players to achieve a 'good' collection. This meant that, not only had they achieved the performance which justified the collection's itself being taken up, they, additionally, represented a tangible value judgement of the quality of that performance and one which, in today's terms, is readily assessable. Hence, Parkinson, on scoring his first 50 for Barnsley CC was somewhat discomforted to find that his performance had been assessed as being worth fourteen and sevenpence half pence made up entirely in halfpennies, two brass buttons, one blue tiddleywink and a badge which told him that he was now a member of the Flash Gordon Fan Club. There could, he thought, be no more cruel a reminder of what paying customers actually considered one's performance to have been worth.

Occasionally, it is not a third party who is required to make the valuation, but the protagonist. Not all that long ago, I was spared, quite narrowly, a permanent change of domicile to what Hamlet called '[T]hat undiscovered country from whose bourn from which no traveller returns'[4] (a point made by writers since classical times).[5] After avoiding that enforced change of domicile (it could in no wise be described as a *domicile of choice*),[6] I found to my abject horror, that I had valued my own life as being worth one old rugby jumper (appropriately rescued from the household wash)[7] and two bottles of what were known in earlier licensing legislation as 'spirituous liquors'[8] and which I had said in a telephone conversation to an academic colleague in another discipline and another University, '...with which I would not rot your liver.'

All of this notwithstanding, the notion of valuation is important as regards distribution of property under s 79 of the *Family Law Act* 1975 (Cth). That, of course, is inevitable given the decision of the Full Court of the Family Court of Australia in *In the Marriage of Pastrikos*.[9] There the Court,[10] stated that, under the provision, the Court was required to undertake a dual exercise.[11] The first part of which was, '...to determine the nature and, so far as possible, value of the property of the parties in issue. Usually the whole of the property of the parties will be relevant.'[12] That is the part of the exercise with which this article is concerned; although the Court subsumed the assessment of each party's contribution to those assets. Although subsequent decisions have suggested that rigid

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4 Shakespeare, *Hamlet* Act III sc i.

5 See Catullus, *Carmina* sc iii.

6 See, for example, P E Nygh and M Davies, *Conflict of Laws in Australia* (7th ed, 2002) 256 *ff.*

7 This latter gave rise to a discussion with a colleague as to whether the fact that I was the only person who had worn the rugby jumper, increased its value, reduced its value, or was value neutral. Not wholly surprisingly, that discussion proved inconclusive.

8 Now referred to in s 4 *Liquor Act* 1982 (NSW) as 'spirits' and helpfully defined as including '...any liquor prescribed as spirits.'

9 (1980) FLC 90-897.

10 Evatt CJ, Pawley SJ and Yuill J.

11 (1980) FLC 90-897, 75 653.

12 The second part involved the Court proceeding to consider the financial resources, means and needs of the parties and the other matters set out in s75 (2) of the Act.

adherence to the *Pastrikos* formula might not be necessarily fatal on appeal, observance was, at least to be desired.[13]

II

Against this more than a little extraordinary background, it would not have been surprising had a not similarly extraordinary case not arisen: *AJW v JMW* [14] which involved property proceedings between a husband and wife who had married in 1980 and separated in 1995. The parties' net assets were found to be $1 670 710, which had been largely derived from the husband's initial contributions and from inheritances received by him.[15] During the course of the hearing, the value to be attributed to the husband's minority shareholding in a company (C Pty Ltd) came to be in serious issue between the parties. Accountants gave evidence on behalf of each of the parties.

There appeared to be two major issues involved in the case as reported; first, the difference between the use of the term 'value to owner' to describe the objective of the valuation methodology, and second, the approach which accountants/valuers are advised to take when it is necessary to base assessments of value on a number of assumptions, some, or all, of which were unlikely to be established at the trial.

The shareholders of the relevant company, which had been incorporated in 1972, were the husband and his two brothers, each holding 100 ordinary shares. There were also 100 redeemable preference shares held by the husband's mother, but these did not participate in capital. The husband's mother was a permanent governing director and the husband and his brother, S, were also directors. The company's principal activity was investment and it held shares in related companies (B Pty Ltd, Co Pty Ltd, B1 Pty Ltd and JKH Pty Ltd). Those four companies were all investment 'vehicles' of which the husband and brother S were the directors.

The issues had been presented by the accountants as being between a 'fair market value' adopted by the husband's accountant and 'value to the owner' adopted by the wife's accountant. In response, Warnick J strongly expressed the view that their debate was, '...beset by a degree of confusion, largely due to the terminology used, and a failure to adopt definitions appropriately in the field of property division in family law.'[16] Having said this, the judge then turned his attention to a report prepared by the

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[13] See *In the Marriage of Fane-Thompson* (1981) FLC 91-053 and *In the Marriage of Ferraro* (1993) FLC 92-335; more recently, *Hickey and A-G (Cth)* (2003) FLC 93-143.

[14] (2002) FLC 93-103.

[15] For comment on the relevance of inheritances, see the decision of the Full Court of the Family Court of Australia in *Figgins v Figgins* (2002) FLC 93-122. For comment, see F Bates, 'Exceptional Contributions' by a Spouse in Australian Family Property Law — A Road Mistaken?' [2003] *International Family Law* 176.

[16] (2002) FLC 93-103, 88 972.

wife's accountant. This report included a heading, 'approach to valuation'. Warnick J then expressed the view that that part of the report was not a statement of any *methodology*, but rather, of an *objective*. Thus, he went on, the term 'value to the owner', as used by that accountant described both an *objective* and one of the consequences of pursuing that objective, that being the assessment of worth of special benefits to a shareholder.

In making that point, Warnick J adopted the view that had been expressed by the Full Court in the earlier case of *In the Marriage of Harrison*[17] (this was not wholly surprising as Warnick J had been a member of that Court).[18] There, it had been said that '[t]he value to be ascribed to the shares in a family company must be a realistic one, based upon the worth of the shares to the party himself or herself.' Warnick J then went on to state that that principle was appropriate whether there were 'special benefits' or not; however, were there such benefits they must be valued in terms of achieving the objectives.[19] Warnick J further emphasised that the use of the term 'value to the owners' in family property cases should not be dependent on the existence of special benefits but rather, as descriptive of the objective of the valuation exercise.

If that were not sufficiently confusing of itself, Warnick J continued by commenting that further confusion had been caused by the wife's accountant's report which indicated, first, that the *methodology* used by him could not truly be so described, but was, in reality, a *discounted cash flow method.*

In addition, though, the wife's accountant appeared to have considered 'value to the owners' conceptually, that is, as opposed to the *concept* of 'fair market value'. That much, at least, is readily comprehensible: something, shares or not, may be far more valuable to an owner, for whatsoever reason, than the price (that distinction again...)[20] which might be obtained on the open market.

Though, whatsoever merit the wife's accountant's distinction may have in ordinary discussion, it was rejected by Warnick J in *AJW*. The judge stated that the *objective* in cases such as the present was to assess the value to the owner and the notion of absence of market value for so choosing consistent with the description initially propounded by the wife's accountant. The fact that one accountant appeared to be thoroughly confused was not, as Warnick J then pointed out, the whole story as the husband's accountant seemed to have been drawn into the confusion.[21]

That witness, having rejected the assertion that the husband had received economic benefits which would not enhance the value of the shares to a purchaser, then sought to reject the *concept* of value to the owner as being of any significance. Warnick J regarded that as being a logical step if

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[17] (1996) FLC 92-682, 83 087.
[18] The others being Ellis and Baker JJ.
[19] (2002) FLC 93-103, 88 972.
[20] Above n 2.
[21] (2002) FLC 93-103, 88 973.

the wife's accountant's definition had been exhaustive (or, indeed, readily accessible to this writer at least) and was solely a definition of *methodology*, the husband's accountant's was a further step along the erroneous path created by the wife's accountant; the more so, as the judge sought again to explain, the notion of 'value to the owner' remained the *objective* of the exercise, whether there were special benefits or not. All of that, described by the judge as 'the compounded error,' had led the husband's accountant to argue that, since 'the value to owner' notion was not applicable, one was required to examine the 'fair market value' of the various holdings. Hence, Warnick J considered that, insofar as the husband's accountant had stated his *objective* as being the ascertainment of 'fair market value', he had proceeded still further down a wrong path.[22]

Justice Warnick then stated that the selection of 'fair market value' as the *objective* in cases of this nature created its own confusion. Justice Warnick then referred to his own earlier decision in *Ramsay v Ramsay.* [23] In *AJW,* Warnick J interpreted that case as saying that, '...where there is a market for shares, evidence of market value may *well be one and the same as "value to* the owner". But where there is no market, it is something of a 'non-sequitur' to seek to ascertain "market value."'[24]

In view of what had been argued and judicially stated in *AJW,* it is worth noting a further distinction drawn by Warnick J in *Ramsay.* First, the judge referred[25] to the *dictum* of Baker J in a still earlier case that the purpose of the valuation was to ascertain the value of the shares to the shareholding party, '...not their commercial value or their value to a hypothetical purchaser.'[26] That would appear, to this writer, both sensible and instantly comprehensible. However, another test or yardstick was then thrown into, as one might say, the exchange. Justice Warnick, in *Ramsay,* had noted that it had also been stated that the value must be *realistic,* as if it were synonymous with Baker J's description and perceived simply as convenient shorthand. However, in *Ramsay,* Warnick J went on to say that it seemed

> ...arguable however that what is *realistic* (taken literally) may not be the same as *the value to the shareholder.* The latter is often not the value that can be achieved on sale and often takes account of a number of assumptions about the receipt of benefits (often not attaching to the shareholding 'per se'). Thus, it has a strong 'notional' aspect, in contrast to the reality of the market. It seems arguable that the *concept of 'realistic' value to the shareholder* ought [to] include a recognition of what can be achieved on sale. Alternatively, such recognition ought [to] be granted some other place in the decision-making process.

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[22] Ibid.
[23] (1997) FLC 92-742.
[24] (2002) FLC 93-103, 88 973.
[25] (1997) FLC 92-742, 83 997.
[26] *In the Marriage of Turnbull; Turnbull JR, Bald Hills Pty Ltd, Allan Waters Pty Ltd and Apropos Pty Ltd (Interveners)* (1991) FLC 92-258 at 78 738.

Having confused the issue still further, a return to *AJW* does not, unfortunately, assist in the resolution of very much. Although the judge regarded the husband's accountant as having misstated his aim, the methodology which he had used could not, in fact, provide a result which represented the value to the owner, nor that that result could not equate market value — if there was a market.[27]

It followed, the judge continued, that the *mischoice*[28] of 'fair market value' as the objective of the valuation might lead the valuer to adopt a methodology which might suit the situation where there actually is a market, but which might not wholly suit that circumstance where there is no market. 'So, for example,' the judge said, 'there may be an impetus to deduct realisation costs, as if shares were going to be sold when in fact, because there is no market they are not, and can not.'

However, that did not appear to be the end of the confusion, in that the husband's accountant, according to Warnick J had sought to define a 'fair market value' as that at which a willing seller and a willing buyer both informed of the relevant facts about the various entities could reasonably conduct a transaction with neither person acting under compulsion to do so or anxious to buy or sell. However, elsewhere in his report, that accountant referred to the fact that there was really no market for the shares in question.

That contradiction appears hard to evade, but the husband's accountant sought to do so by saying that the absence of market was not of particular significance because the concept of 'fair market valuation' usually dealt with hypothetical vendors and purchasers rather than any actual purchaser.

Justice Warnick admitted that that observation was correct, but went on to remark that it was,

> ...one thing to have a hypothetical vendor (though the 'hypothesis' is really only that the known owner may sell, not as to the identity of the owner) and a hypothetical purchaser, where there is *in fact a market* (for it is assumed an actual purchaser can be found); but it is quite another thing to speak of a hypothetical purchaser *where there is no market.*[29]

The judge then commented that questions were raised regarding the relevance (and, hence, admissibility)[30] of such evidence, when a hypothesis could not be connected to the reality in the case. 'Under these confusions,' he said, 'the debate was really about nothing.' Having made that central point, Warnick J then turned his attention briefly to the relative submissions of the accountants. Thus, the wife's accountant had also, the

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[27] (2002) FLC 93-103, 88 973.
[28] Author's emphasis.
[29] (2002) FLC 93-103, 88 973.
[30] See *Evidence Act* 1995 (Cth) ss 55 and 56.

judge stated, attempted to achieve 'value to the owner [sic]', but had misdescribed the *objective* as a *methodology* and had used a definition which was not especially suited to the use of the term in family property cases. The issue of such suitability will be considered in relation to a context more central to family life than minority shareholdings — that is, the family home.[31] It followed from all of this, Warnick J considered, that the apparent conflict between the accountants was, '...really a dispute about objectives, not methodologies, and upon which considerable time was spent, was an illusion.'[32]

Putting aside the illusory debate about concepts, objectives and methodologies, the judge then found that both valuers had used methodologies, which, at their core, had the assessment of net tangible assets. Having said that, Warnick J then stated that the wife's accountant, in cross-examination, had conceded that there were no financial benefits which had been received by the husband which did not derive from the shareholding *per se* and, hence, could not be passed to a hypothetical purchaser.[33] An even more fundamental difficulty with the approach used by that accountant was that he had assumed that the husband would be in a position to realise his shareholding on his mother's death. Justice Warnick was especially unimpressed with that situation and said that:

> The mere possibility of the husband realising the net asset backed value of his shareholding at the relevant time is a poor basis for a valuation which takes that possibility as a certainty and then simply values the shareholdings, as if the pro rata of the companies' assets is a vested, though deferred, realisable benefit.[34]

Clients, he continued, must be confused by the gulf between them and, frequently, the valuations were undermined, because the facts established differed from those assumed by the accountant.

Justice Warnick took the opinion that the difficulties might be resolved if the parameters which were to form the basis of the valuation were established by a jointly engaged accountant who, he thought, would not be under the same pressures to present an opposite view to that of the other accountant.[35] This may well have some merit, though the machinery presently exists for that and more, to be done.[36]

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[31] Below n 38 *ff.*
[32] (2002) FLC 93-103, 88 973.
[33] Ibid 88 974.
[34] Ibid.
[35] Ibid 88 975.
[36] Below n 60 *ff.*

III

AJW v JWW is an especially disturbing case, not merely because the judge had difficulty with the objectives and methodologies employed by the two accountants — that is, after all, to a degree inevitable — but because the accountants seemed to have similar difficulties. There is one issue where value to the owner might, in one sense at least, be more readily established — that is, the value of the former matrimonial home. This is even taking into appropriate account the words of the American poet Edwin Arlington Robinson:

> We tell you, tapping on our brows,
> The story as it should be –
> As if the story of a house
> Were told, or ever could be;
> We'll have no kindly veil between
> His visions and those we have seen –
> As if we guessed what hers have been,
> Or what they are or would be[37]

However, as is seen from the decision of the Full Court of the Family Court of Australia in *Phillips and Phillips* that may not be so.[38] There, the wife had sought to retain and remain in the former matrimonial home. The trial judge was unable to resolve differences between two valuers of the property and thus, proposed orders for the division of the parties' property which assumed that the matrimonial home was valued in accordance with the view of the husband's valuer. However, because the trial judge was unable to devise orders with which the wife was satisfied — that is by transferring to the husband most of the parties' assets other than the home — he ordered that the home be sold. A major ground of the wife's appeal was the trial judge's treatment of the valuation of the house.[39] The Full Court [40] allowed the appeal, but on other grounds.

After having discussed [41] prior case law, [42] the Full Court stated the law in these terms: 'If a trial judge is unable to accept the opinion of value given by the parties' experts what he/she cannot do is simply take the mean or average of the two opinions.'[43] In addition, they went on, a trial judge could not approach the matter on the basis that there is any obligation to

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[37] Edward Arlington Robinson, *Eros Turannos* (1916).
[38] (2002) FLC 93-104.
[39] The other involved the trial judge's treatment of the s75 (2) factors.
[40] Finn, Kay and O'Ryan JJ.
[41] (2002) FLC 93-104, 88 982 *ff.*
[42] *Commonwealth v Milledge* (1953) 90 CLR 157; *In the Marriage of Lenehan* (1987) FLC 91-814; *Georgeson and Georgeson* (1995) FLC 92-618; *Elsey v Elsey* (1997) FLC 92-727; *In the Marriage of Gamer* (1988) FLC 91-932; *In the Marriage of Boriello* (1989) FLC 92-049; *Little and Little* (1990) FLC 92-147; *Smith and Smith* (1991) FLC 92-261.
[43] (2002) FLC 93-104, 88 983.

prefer one opinion over the other, but, in those circumstances, then she/he may determine a value having regard to the evidence and the application of proper principle. However, they continued, the ability of a trial judge to reach a separate opinion as to value depends on the evidence and after considerations such as the type of property being valued and the appropriate method of valuation. This is, of course, quite central to the discussion and will be discussed in general terms later in the article.[44] Thus, it followed that if trial judges are of the opinion that they cannot undertake this task, it is then within their discretion to require that further evidence be given addressing the issue or, in appropriate cases, ordering a sale of the relevant item of property. They also expressed the view that, if such was the case, the trial judge should give reasons why she or he is unable to reach a separate opinion of value where the opinions of the parties' values have been rejected. This is clearly appropriate and in accord with other areas of family law and its adjudicative process.

In *Phillips*, the parties had been unable to agree on the value of the relevant property. The valuers had used, according to the Full Court, a method known as '...the comparable sales method of valuation', with, in the Court's later phrase, '...all the uncertainties and subjective opinion that that this approach entails.' The trial judge had refused to accept the opinions of either valuer and the Full Court noted that the trial judge had not attempted to arrive at a separate value — a process which had been made rather more difficult because of the absence of evidence.[45] It further appeared that the evidence of either valuer failed to reveal the processes of reasoning by which they had arrived at the separate values; nor was there a joint statement where the areas of disagreement were set out or why either view was preferable. Both would have provided valuable assistance to the trial judge. Finally, the wife's valuer had made neither oral nor written submissions regarding the manner in which the trial judge could have approached the matter.

Nonetheless the Full Court held that no error could be established and dismissed the appeal on those grounds.[46]

IV

Where all of the above is taken, either separately or together, into account, it is suggested that *AJW v JMW* and *Phillips* are most disconcerting cases. Their immediate characteristic is that they add to, rather than in any way

[44] Below n 50 *ff.*

[45] (2002) FLC 93-104, 88 984.

[46] The Full Court took the view that, to order a sale of a former matrimonial home in circumstances where the wife and children have lived in it since separation and continued to do, fell outside the, '...generous ambit within which reasonable disagreement is possible,' to which Brennan J had referred in *Norbis v Norbis* (1986) 161CLR 513, 540. It was necessary to assess the practical effect as to entitlement when considering what was just and equitable; see *JEL and DDF* (2001) FLC 93-075, 88 332 (Holden and Guest JJ).

resolve, existing confusion. Indeed, for an especially graphic instance, the Australian writers Jansen and Exner[47] have, *inter alia*, clearly expressed the notion of 'value to a party' which seemed to have caused so much difficulty in the *AJW* case. They write that:

> ...In determining the value to the party, the expert accountant will first need to determine the proportional value of the interest according to traditional valuation methodologies (such as capitalisation of future maintainable earnings or net asset backing basis). The discount to be applied to this value to reflect the value to the party, and also the fact that the interest is a minority interest, will then need to be selected having had regard to the time value of money (if the asset is unlikely to be able to be converted into cash for some time), restrictions on transfer, control by other parties in the present or future, and the growth (if any) of the underlying assets of the interest.[48]

They also comment that any such resulting value will generally be regarded as property rather than as a financial resource.[49] More germane for the purposes of this discussion, is that Jordan and Exner seem to have no difficulty in regarding 'value to a party' as a *valuation concept*, without making any necessary confusion with *methodology*, as seemed continually to be done throughout *AJW*. However, in a recent article,[50] Delbridge-Bailey has explored the matter in some detail and has concluded that, over a period of nearly twenty years, the concept of 'value to the owner' appears still to be undergoing necessary refinement and that the Family Court has not said all that there is to say on the various approaches which may be applicable.[51]

In *Phillips*, the Full Court had been critical of the methods used by both valuers (that is, the comparable sales method of valuation).[52] Jansen and Exner note that it entails an analysis of recent market transactions and the application of that information to the property to be valued.[53] It is one of the three basic methods used by valuers — the others being the so-called 'summation method' which involves, *inter alia*, a comparison of sales with similar properties, and various investment analysis methods, all of which seem to involve the characteristics criticised in *Phillips*.

It is, perhaps, unfortunate that Jansen and Exner and the other writers on financial matters in Freckleton and Selby's collection have not sought to address the tensions which can arise between the processes of valuation

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47 B Jansen and J Exner, 'Accounting Issues in Family Law' in Ian Freckleton and Hugh Selby (eds), *Expert Evidence in Family Law* (1999) 5.

48 Ibid 15.

49 For comment on this distinction, see Anthony Dickey, *Family Law* (4th ed, 2002) 613 *ff*.

50 Suzanne Delbridge-Bailey, 'Application of the 'Value to the Owner' Approach in Business Valuation: the Importance of the Decision in Wall and Wall' (2003) 17 (1) *Australian Family Lawyer* 26.

51 Ibid 34.

52 Above n 45.

53 Above n 47, 84.

and the law — *JW* and *Phillips* tells us that they do, if, in the ultimate, not a great deal more.

There are general problems which attach to the manner in which a valuer has acquired the knowledge which forms the basis of her or his opinion as to the value of a particular commodity or property and which are necessarily involved in any discussion of both *AJW* and *Phillips*. Thus, Megarry J in *English Exporters (London) Ltd v Eldonwall Ltd* stated that

> ...As an expert witness, the valuer is entitled to express his opinion about matters within his field of competence. In building up his opinions about values, he will no doubt have learned much from transactions in which he has himself been engaged, and of which he could give first-hand evidence. But he will also have learned much from many other sources, including much of which he could give no first-hand evidence. Textbooks, journals, reports or auctions and other dealings, and information obtained from his professional brethren and others, some related to particular transactions and some more general and indefinite, will all have contributed their share. Doubtless much, or most, of this will be accurate, though some will not; and even what is accurate so far as it goes may be incomplete, in that nothing may have been said of some special element which affects values. Nevertheless, the opinion that the expert expresses is none the worse because it is in part derived from the matters of which he could give no direct evidence. Even if some of the extraneous information which he acquires in this way is inaccurate or incomplete, the errors and omissions will often tend to cancel each other out; and the valuer, after all, is an expert in this field, so that the less reliable the knowledge that he has about the details of some reported transaction, the more his experience will tell him that he should be ready to make some discount from the weight that he gives it in contributing to his overall sense of values. Some aberrant transactions may stand so far out of line that he will give them little or no weight. [54]

Inevitably, the *Eldonwall* case was not a matter concerning a matrimonial home, but with a tenancy of business premises. One must, I feel, be a little careful in transplanting decisions which factually may be light years away from family law issues as the expectations and sought for outcomes involved may be wholly different. Yet, Freckelton suggests that Megarry J's *dictum* represents the present attitude of the Courts, because it allows the witness to rely on the training and skills which have rendered her or him an expert.[55] However, Freckelton was at pains to point out that problems arise when the expert seeks to rely on more specific pieces of information or to place special reliance on material which may not be before the Court. Stripping away much of the verbiage which attaches to *AJW* and *Phillips*, one wonders whether that is not a comment which deals directly with the matters which arose in those cases.

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[54] [1973] Ch 415, 420.

[55] Ian Freckelton, *The Trial of the Expert: A Study of Expert Evidence and Forensic Experts* (1987) 93.

All of this is further emphasised in context of the present discussion by Jansen and Exner who state[56] that, currently, there is neither a specific professional organisation[57] which provides an accounting expert with technical support or standards of behaviour in family law nor is there a universally agreed set of valuation techniques either at a macro or micro level. In the end, these writers take the view that accounting experts should be skilled in various cognate areas such as financial valuations, valuation methodologies, income tax, capital gains tax and related financial management issues. Jansen and Exner note that those talents could be developed by consulting the available texts on valuation issues. 'However, as always,' they end, 'there is no substitute for experience.'[58] Put another way, we do not seem to have come very far since Megarry J's comments in the *Eldonwall* decision.[59]

In *AJW*, it will be remembered that Warnick J made some suggestions regarding the ways in which assistance might be provided to trial judges in the area.[60] However, some existing provisions could, if appropriately used, go some considerable distance towards meeting some of the issues raised by Warnick J in that case. First, Order 30A rule 3 (1) of the *Family Law Rules* enables the Court

> ...at any stage on application by a party or of its own motion; (a) appoint an expert as court expert to inquire into and report on any issue of fact or opinion, other than an issue involving questions of law and construction, arising in the proceedings; and (b) give directions to extend or supplement, or otherwise in reaction to, any such inquiry or report.[61]

There are further provisions in Order 30A that deal with matters such as reports,[62] limitation of expert evidence[63] and conference of experts.[64] Whether the merits of these provisions, the present writer has strong anecdotal evidence that they are rarely used.

In addition to Order 30A, which would appear to be of direct relevance to the object of discussion, s102B of the *Family Law Act* 1975 (Cth) itself, as introduced in 1995 and amended in 1999, provides that '...the Court may, in accordance with the applicable Rules of Court, get an assessor to help it in the hearing and determination of the proceedings, or any part

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[56] Above n 47, 5.
[57] Ibid 6.
[58] Ibid 6.
[59] Above n 54.
[60] Above n 35.
[61] 'Expert' is described in O30A r 1 as meaning, '...a person who has such knowledge or experience of, or in connection with a question arising in proceedings that his or her opinion would be admissible in evidence, but does not include a family or child counselor or a welfare officer.'
[62] Rule 4.
[63] Rule 8.
[64] Rule 9.

of them or any matter arising under them.'

The relevant Rules of Court are found in Order 30B of the *Family Law Rules*. Rule 1(1), in effect, reiterates the legislative provision, but r 1(2) states that the Court, having called on an assessor, is not bound by any opinion or finding of that assessor. Rule 2 of 030B goes on to state that 'a hearing with an assessor is to be conducted as the Court directs.'[65] That last rule would seem to be an attempt to deal with some of the evidentiary problems that seemed to have caused the Court difficulty in *AJW*. The use of appropriately qualified and experienced assessors might, once again, deal with the problems to which Warnick J referred in *AJW*.

It may be that, in consequence of a recent practice direction of the Family Court, a less unsatisfactory situation may begin to arise. This direction, which took effect on 1 August 2003, emphasised that an expert is not an advocate for a party, but owes an obligation to the Court to assist it impartially. The guidelines also indicate what reports should contain, including the need to give reasons for each opinion expressed.

In addition the guidelines provide, in detail, for experts' conferences, which should seek to provide the Court with a joint statement specifying the matters agreed and not agreed, as well reasons in the case of the latter. Finally, the guidelines indicate that a court may at any stage of proceedings, on the application of a party or of its own motion, direct that expert evidence be given by a court-appointed expert. Although it seems that this is routinely done in matters involving children, the guidelines indicate that the Court may do so in finance and property cases where appropriate — such as, for instance, where the issues are not complex and the parties' assets are limited.

By way of preliminary conclusion, it does seem as though there is something of a failure of communication, not merely between valuer and lawyer, but between valuer and valuer. From the standpoint of the legal system, as well as involved parties, it is highly desirable that the matter be rectified from both sides: *prima facie*, it might be helpful were the processes used in valuation less opaque than they seem now to be and, on the other hand, that the law be seen to be using apparently useful processes which are presently available but underutilised.

The cases discussed in this paper cannot, either at first sight or on closer examination, be properly described as happy. Apart from any *inter* or *intra* disciplinary tension or, even breakdown, the issues of subjectivism and contextualisation which were present in the *reductio ad absurdum* examples with which this paper began are by no means entirely absent from the recent reported case law which much of the remainder seeks to analyse. Put another way, the *reductio ad absurdum* instances may not be quite so absurd as they might initially have appeared.

However, we must look to the future. After a Judges' meeting in July 2000, the Chief Justice of the Family Court of Australia announced that,

[65] 0rder 30B r 3 deals with the remuneration of assessors.

in accord with the wishes of the judges, a project to revise the Rules of Court and the associated forms would be begun by the Court. There were four major deficiencies in the existing Rules: first, that the passage of time since the original Rules had come into force, together with numerous piecemeal amendments over that considerable period of time, had led to the Rules being outdated, badly structured, incomprehensible to the lay person and, generally, in need of revision. Second, that there were too many forms, some of which were outdated. Third, that there was a need to provide for electronic filing and for rules and forms which were relevant and electronically compatible. Finally, that there was a desire to view the Rules as a complete code which encompassed all of the Court's practice, procedure and case management principles written in easily understood language. Hence, particularly, it was sought to ensure that the Rules became a complete code which encompassed the philosophy of the Court together with case management and that they include a statement of purpose to which the Court may refer in the event of a conflict or a gap within the law.

More specifically, in Part 15.5 of the draft *Family Law Rules 2004*, the issue of expert evidence is addressed. The purpose of the Part is described in the following terms:

> ... to
> (a) ensure that parties obtain expert evidence only in relation to a significant issue in dispute;
> (b) restrict expert evidence to that which is necessary to resolve or determine a case;
> (c) require that wherever practicable, expert evidence is given on an issue by a single expert agreed to by the parties or appointed by the court;
> (d) avoid unnecessary costs arising from the appointment of more than one expert;
> (e) enable a party to apply for permission to tender a report or adduce evidence from an expert witness appointed by that party, where this is necessary in the interests of justice.[66]

It will be apparent that the very aims of the rules themselves are couched in less than satisfactory terms; thus, in 15.41(c) of the draft rules, the phrase 'whenever practicable' is used. It is far from certain what that means. In addition, the writer has anecdotal evidence that O'Ryan J, upon the release of a discussion paper issued at a preliminary stage of the reform process, had stated extra judicially that the intention was that the single expert rule found in draft rule 15.41 (c) would be applicable only in 'straight forward' property case. When taken together with 'whenever practicable' initial confusion seems inevitable.

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[66] Draft *Family Law Rules* 15.41.

Indeed, in their totality, the rules contain little guidance as to when 15.41 (c) will be applied. This leaves it open for significant discrepancies to arise between individual judges and, as they do not apply to the Federal Magistrates' Service, the opportunity for further discrepancies arises.

These are immediate causes for concern. Even in a matter which does not apparently involve large amounts of property (or money) there may be complex issues relating to valuation which, in turn, may result in one party or another seeking to call further evidence, which she or he may do with the permission of the Court.[67] That, in turn, may increase costs, which in turn may favour a wealthier party.

These proposals have also attracted the ire of the President of the Law Council of Australia, Bob Gotterson QC who, in a recent media release emphatically stated that:

> the proposals counter fundamental principles of the law of evidence. Giving judges powers to exclude relevant expert evidence and to appoint a single expert would damage public confidence in the courts.[68]

Further, it was said that expert advice and assistance was essential to the process of settlement of cases. Especially as, presently, approximately 94 per cent of all contested applications in the Family Court of Australia are settled.

Another issue, which is readily apparent from the cases discussed in the paper, is that apparently experienced accountants and valuers may lack training and experience in matters relating to the operation of the *Family Law Act*. It may also be that, on occasion, the existing situation provides for a system of checks and balances which does not seem to exist in relation to the projected system. The reality is that prediction on both individual and institutional instances is especially difficult and the situation discussed in this paper is no different. Put another way, it may very well be that the same kind of cases may arise under the new rules, but with a different administrative scenario.

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[67] Ibid 15.48.

[68] Quoted in CCH, *Australian Family Law – Family Law Views* (Issue 452, 2003) 2.