

The 'Value to Owner' standard of value in matrimonial disputes



A recent case in the Federal Circuit and Family Court of Australia provides further guidance to forensic accountants and family lawyers on the 'Value to Owner' standard of value.

Numerous judgements have opined that 'Value to Owner' (VTO) may be more appropriate than 'Fair Market Value' (FMV) when assessing the value of business interests in matrimonial disputes.

Despite this, it remains unclear exactly how VTO differs from FMV (which assumes, inter alia, a hypothetical purchaser acting at arm's length in an open and unrestricted market).

In this regard, the judgment in *Gare & Farlow [2023] FedCFam C2F 109* helpfully reiterates that (underlining added);

"The 'value to owner' approach to valuation is intended to capture the reality of the situation by bringing to account any special or additional economic benefit which is conferred upon the business owner by his or her control of the shareholding. It is intended to include within the value, any commercial, financial or other advantage which accrues to the owner which might not necessarily be available to any hypothetical third party purchaser" [Scott & Scott (2006) FamCA 1379].¹

¹ *Gare & Farlow [2023] FedCFam C2F 109* at 180

Arguably the most common example of where VTO exceeds FMV arises when valuing minority interests in family businesses (which may not be saleable on the open market to unrelated third parties, but may have material VTO).

Gare provides forensic accountants and family lawyers with another relatively straightforward example.

In *Gare*, the wife owned and operated a profitable business from premises owned by the wife's father. The business had operated from the premises for approximately 20 years, but without a written lease agreement being in place.

Valuation evidence was adduced indicating the value of the business on a FMV basis (without a lease in place) was nominal, whereas its value on a VTO basis (assuming a standard industry lease was in place) was in excess of \$400,000.

In *Gare*, the Court determined that the appropriate standard of value was VTO for various reasons including the following;

- *"In the absence of a written commercial lease, the business is not saleable on a going concern basis to a third party purchaser and cannot be valued on that basis".*
- *"The business has in the past and continues to deliver significant financial and other benefits to the wife".*
- *"A unique benefit to the owner of the ongoing business is the security of the tenancy on favourable terms notwithstanding the absence of a written lease".*
- *"A further significant benefit to the wife is the very real likelihood that her landlord father would act in his daughter's best interests should she ever decide to sell the business. There is evidence that there is a market for businesses and if a standard industry lease were in place, the wife could expect to realise in excess of \$400,000".* ²

Takeaways

Whilst in the majority of cases there will be no monetary difference between VTO and FMV, it is important for forensic accountants to consider the nuances between VTO and FMV when performing valuations for matrimonial disputes.

About the Author

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² Ibid at 188