



# IS A VALUATION WORTH THE COST?



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**Is a valuation worth the cost?** Its worth is entirely dependent on the valuers' understanding of the law on which it is based. Thus a valuation may not only be worthless, it may be a liability to one side or the other... and the fact is, the party to whom it is a liability may never know!

In the Family Law jurisdiction since [The Marriage of Antman](#)<sup>1</sup> in 1980 which held that

*“There is ... no fixed rule as to what is the proper method of valuation.”*

the method of valuation is subject to circumstance and His Honour said:

*“[the method of valuation] must vary not only with each type of property or commodity concerned, but also with the purpose for which they were originally acquired and the need to realise them in the shorter or longer term.”*

The potential for variable methods of valuation were demonstrated in the judgment in [The Marriage of R & E Shaw](#)<sup>2</sup> where there was argument as to whether certain paintings should be valued for sale at auction or for sale by retail through a dealer:

*“...both valuers adopted a value for the paintings based upon realisation of them, but they differed as to the appropriate method of realisation . [The Court said] the method adopted by the husband’s valuer..would be likely to lead to an earlier realisation... than that adopted by [the wife] Further the court said “...on the balance of probabilities [the husband] would wish to dispose of his art collection first...in order to meet the wife’s entitlement and maintain his own liquidity and...security.”*

The court went on to discuss the matter of the valuations representing the gross realisation value and commented that

*“...it is inappropriate not to make proper allowance...for the likely cost ... realisation.”*

Thus suggesting that the valuation, where as sale is contemplated, should take account of the costs of realisation.

By contrast there was significant discussion in the [Marriage of Antman](#) in respect to the appropriate value for certain jewellery:

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<sup>1</sup> (1980) 6 Fam (LR 560

<sup>2</sup> 12 Fam LR 806



*“[The Husband’s Valuer] adopted the replacement value as the basis of his valuation, that is to say, he valued the jewellery by reference to the current market price of their content in precious metals and jewels without taking into account the attraction which an individual item of jewellery might have to a buyer by reason of design or age. [The wife’s valuer gave] evidence of the value which the jewellery might bring on the second-hand open market, that is to say, the price which the items having regard to their composition, design and age would bring if sold to a second-hand jeweller or by public auction .. The learned trial judge preferred the [the husband’s valuation] because...”the court is concerned to determine a value not necessarily a value for sale purposes, because an item such as jewellery, a party may retain for personal reasons or use, any particular item and perhaps realise on others in a sale, either on the open market or privately. A consistent approach to take which meets these situations is a replacement value, and the court prefers to adopt the approach taken by [the husband’s valuer].*

Thus we have an argument within these two cases for values as diverse as replacement value and auction value: values which can conceivably have a ratio of 3:1 or higher in some circumstances! The appropriate value might be defined as “value to the party”.

This has been confirmed in the more recent case of *Supresencia v Powell*<sup>3</sup>, a recent unreported NSW Equity case where Berecny AM stated:

*But there also needs to be factored into the consideration by the valuer the purpose to which the parties will put the jewellery to. The plaintiff’s only asset was the jewellery. It seemed to me, that having regard to what the plaintiff’s position has been since separation that she would need to use the jewellery to support herself. Therefore, it seems to me that it is appropriate to apply the matters that the Court said need to be considered in *The Marriage of Shaw*(supra) to determine in this particular instance what is the appropriate method of valuation. In my view, the appropriate method of valuation is that used by the plaintiff’s valuer [ie value at auction].*

But perhaps even more importantly for those of you here is the unreported recent Victorian Supreme Court, Court of Appeal case of *Tayles V Davis* where the court stated:

*...both the experts assumed that the subdivided lots would be sold individually. The appropriate method to be adopted in valuing a property depends on the circumstances of each case, namely,*

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<sup>3</sup> [2002] NSWSC 773



*the nature of the property (in this case industrial land), the purpose for which it was acquired, and the need to realise the value of the property. Where the property must be sold to meet the orders of the court or otherwise, the appropriate method of valuation is its realisable value. In assessing the realisable value of the property, account should normally be taken of the costs that would need to be incurred to realise the property.<sup>4</sup>*

The particular relevancy, however, in the diversity of values is that even a Market Value does not necessarily mean what it says and you will see that this appears to be recognised in the Tayles case where His Honour referred to realisable value rather than Market Value.

The current definition of Market Value rises from the lead given in **Spencer's Case**<sup>5</sup> which, being a case concerned with resumption, held that

*"...the test of value ... is to be determined, not by enquiring what price a man desiring to sell could have actually obtained ... on a given day, ie whether there was on that day a willing buyer, but by enquiring "What would a man desiring to buy ... have had to pay ... on that day to a vendor willing to sell ... for a fair price but not desiring to sell?"*

Thus the following definitions should be considered:

**Market Value** is the estimated amount for which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion<sup>6</sup>.

**Auction Value** is the estimated amount that one would expect to achieve at a properly promoted, conducted and attended auction sale, in respect to personalty such a sale to be held on the site and with substantially all of the assets in the valuation inventory offered for sale at the one time.

**Market Value in Continuing Use** (or what used to be known as Going Concern Value or Market Value in Continuing Use) is the market value of an asset, in company with all the other assets of a business operation, assuming that asset could be sold as part of that continuing business. This value represents that part of the value of a business operation represented by the listed assets and

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<sup>4</sup> Tayles V Davis [2009] VSCA 304

<sup>5</sup> Spencer V Commonwealth of Australia (1907) 5 CLR 418

<sup>6</sup> IVS 3.1



*always assumes that the underlying business has adequate profitability to justify the holding cost of the listed assets. Note: On a GST exclusive basis)*

In the above context Market Value is defined as *the estimated amount for which the assets should exchange on the date of valuation between a willing buyer and a willing seller in an arms' length transaction after proper marketing wherein the parties had each acted knowledgeably, prudently and without compulsion.*

**Replacement Value** as contemplated in Antman is akin to **Indemnity Value** in insurance matters and seems to be defined as *the cost of replacing an existing asset with an identical or substantially similar asset of comparable age and in comparable condition together with (where applicable(not real estate) and arguably) the cost of transport, installation, commissioning and any other directly attributable costs.*

However there is another basis of value which is being argued by some Melbourne academics as a more appropriate definition when determining market value (small “m” and small “v”) and that is being called **Most Probable Price**. Medici was the first to espouse this proposition in 1953. He defined it as:

*The Most Probable Price is that selling price which is most likely to emerge from a transaction involving the subject property if it were exposed for sale in the current market for a reasonable time at terms of sale which are currently predominant for properties of the subject type<sup>7</sup>.*

*Under this regime, how are the results of a valuation of real property to be expressed? The only credible manner is in probabilistic terms. This entails the reporting of a transaction zone – a lower and an upper limit – within which the most probable price is likely to fall. There will be times when the range can be expressed as a statistical measure such as a standard deviation. At other times the lower figure may be delimited by the minimum a vendor will accept and the upper by the maximum a buyer will settle for. On other occasions it may be reflective of possible shifts in market supply and demand in response to which prices could vary.*

*These figures must not be plucked from the air, of course, as they must be fully supported and capable of being tested if they are to have any probative value.*

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<sup>7</sup> Medici, G. (1953): *Principles of Appraisal*, Iowa State College Press, Ames, pp 35-36



*Note that the definition can be amended to take on any defined problem. If, for example, a sale is required in two month's time, that can be inserted instead of —for a reasonable time. This defines the data called for in addressing the problem.*<sup>8</sup>

When considering the valuation of assets Practitioners will often commission valuations of real property as a matter of course but ignore other valuable assets, especially the fixed assets of a business. It is little known that a survey of Australia's top 100 companies shows that the split between real property and personal property assets shown on balance sheets is 64% as to 'plant and machinery' and only 36% as to real property. These figures probably overstate the quantum of real property assets when a significant percentage of companies regularly revalue these assets but generally only report plant and machinery at historical written down cost or some other theoretical accounting value.

It is not unknown for the piecemeal sale of a company's assets to realise more than the proprietor of a business might have accepted for the whole !

Before one finally selects the appropriate definition one should take into account some aspects of the application of the definition.

Valuations are calculated to be true at the date of valuation. Thus if there is a prerequisite to a valuation, that prerequisite is assumed to have happened before the date of valuation. Thus any marketing period that may be usual to achieve a certain level of value will be assumed to have occurred prior to the date of valuation.

In respect to Market Value one should be aware that there are occasions when it is appropriate to allow very long marketing periods for certain properties. This has two potential hazards: on the one hand the definition does not require the valuer to ascertain whether there is presently a buyer in the market and therefore it may not be possible to find a buyer at that level of value in less than the long marketing period mentioned; and on the other hand, the valuation may be significantly under or overstated when a buyer is found at the end of that marketing period because of a change in market circumstance over the marketing period. Now, whilst there is good law as to what *Market Value* means...

Nygh J said in [The Marriage of Hull](#)<sup>9</sup> that

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<sup>8</sup> Whipple, R.T.M (2009) *The Siren Song of Precedent*, Nonnumquam pp14-15



*“The test laid down in Spencer’s Case can only be applied where there is a ready and available market. It is of no application in a case...where such a market is lacking”.*

Thus not only may *Market Value* in this jurisdiction not meet the normal legal test of *Market Value* but the expert valuer may be required to provide two values in order to satisfy the Rules: one value allowing for a normal marketing period; and one value assuming a shorter marketing period and where the valuer has contemplated the buyers that might be standing in the market either close to or at the date of valuation.

There may also be a third value that the valuer should disclose: as a contrast, market value at auction, is normally predicated on a marketing period of around three to eight weeks, depending on the nature of the asset and specifically excluding complex or special properties: a more immediate method of sale is thus apparent. Auction is an especially important consideration because, in the words of Isaac J<sup>10</sup>

*[Market Value at Auction should not be taken to be a forced sale but the equivalent to] “...voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration”.*

The **Marriage of Shaw** set out the principles for valuation (especially of personal property but I submit for all classes of property) very clearly when the Full Court said

*“If there is a real likelihood that [the assets will] need to be realised in the short term ... then commonsense dictates adoption of a value based on realisation by some reasonably expeditious method, whereas if the likelihood is that [the assets] will be retained indefinitely by one of the parties then a more generous value, such as one based upon replacement cost or realisation by a more leisurely method may be more appropriate.*

*“In this case ... both valuers adopted a value for ... paintings ... based upon realisation ... but they differed as to the appropriate method of realisation, and we think it fair to say that the method adopted by the husband’s valuer ... (that is, by art auction) would be likely to lead to an earlier realisation ... than that adopted by [the wife’s valuer] (that is, by retail sale through an art dealer),”*

The judgement goes on to record that the valuers

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<sup>9</sup> 1983FLC91-360

<sup>10</sup> Spencer V Commonwealth of Australia (1907) 5CLR432



*“... have made no allowance for costs of sale. That appears ... to be an oversight in [their] method of valuation...”*

And so the test is there for all to see - what is the value to the party that ends up as owner of the asset? Before I address that question let me move to the third definition mentioned above, Market Value in Continuing Use.

**Market Value in Continuing Use** has a significant importance in the valuation of businesses. There are at least three reasons for this importance; firstly, the written down or book value of a company's non-current assets are often grossly mis-stated; secondly and as mentioned earlier, the worth of many businesses even on a 'future maintainable earnings' basis can often be less than the realisable piecemeal sale value of the assets; and thirdly the margin for risk applied by the business valuer, will be affected by more or less tangible and intangible but individually saleable assets.

The written down value of company assets is not a "value" in the vernacular meaning of that word as it is simply a number that results from applying a pre-determined depreciation rate (generally for taxation purposes) to those assets that a company chooses to capitalise. Most companies coming under the scrutiny of the Family Law Courts are privately owned and often where the husband and/or wife are the sole shareholders and directors. It is therefore not unusual for certain assets to be 'expensed' in order to get an immediate tax benefit or for maintenance costs to be capitalised in order to create a better balance sheet usually for borrowing purposes. Further my experience has been that company depreciation schedules rarely reflect the true state of a company's assets. Generally there are a significant number of assets that somehow have never been brought to account and similarly there are a significant number of assets that no longer exist that are still listed for depreciation.

A survey carried out by RHAS in 2005 showed that 24% of assets on the balance sheets of companies that we had valued no longer existed and almost 33% of assets found at the company premises were not on the balance sheet. Add to this the assets that have been capitalised at the residual value under a lease (rather than at market value) and one can see the danger of relying on depreciation schedules and balance sheets for definitive values of business assets.

Thus not only is the methodology of Depreciation Schedule "values" flawed but the list of assets is almost always totally unreliable.



Thus a valuation for Family Law Purposes cannot be taken to necessarily be the obvious. Market Value in Continuing Use may or may not be the appropriate value for the assets of a going concern business and market value may not satisfy the parties' needs in domestic real estate

Based on the criteria discussed in [Antman](#) and [Shaw](#) above, the valuer may need to provide a valuation on more than one basis. Often one of these bases will be significantly more attractive than others for a particular party. Under the rules the valuer has the obligation to state the alternative choices and the arguments for the range of opinion: thus on occasion a valuer may need to provide more than one valuation for the same property and explain the reasons for the differing valuations.

By understanding the alternative values available in each matter, the valuer can ensure that each case is approached from the right direction. But this is in the Practitioner's hands. Few valuers understand the law and my observation is that by default the overwhelming majority of valuations for all assets are carried out at Market Value. It is my submission that Practitioners, when instructing the expert, should be specific about the basis of value and not hesitate to request two or more bases if they believe that it is in their clients' interest.

I commenced this paper by commenting that a valuation may not only be worthless, it may be a liability. Its worthlessness will arise if under cross examination, or even on written enquiry the court finds that the valuation is not properly researched, not properly concluded or does not properly disclose the alternative views (or values). Under the Rules the court may be left without any valuation on which to rely which may then necessitate the commissioning of a new valuation with its subsequent delay and additional cost to the parties. And perhaps a more important reason is because it is the valuation of a single expert, it is generally not tested: often because neither party has enough knowledge to know that it would not pass a test.

Two cases in point from the pre "single expert" regime: The husband ran a business with a significant investment in dies. The valuer accepted the husband's list of dies and current replacement cost which the husband obtained from his supplier at the valuer's request. The valuer included the dies at cost. Acting for the wife I was able to tell her to accept the valuation as the husband's valuer had failed to allow for more than 50% of the dies that were no longer in use or for wear and fashion dictates of the remaining dies. The total value of the dies was more than 60% less than the expert's value but neither party knew enough to know that. The husband was a



tradesman who had taken over the family business and proverbially had done things they always had been done and who had no understanding of accounting or other matters.

The second case was a valuation of a nursery. We carried out our valuation for the wife which was duly shown to the other side and who responded by commissioning its own valuation. There were major discrepancies in the husband's valuation, because the husband's valuer had accepted information provided by the husband, first as to the in-house cost of manufacturing a large number of stillages, shelving and trolley units and secondly in regard to the purchase cost of some major equipment which was less than a year old. In a pre-trial conference we were able to obtain agreement from the expert to increase his valuation by more than 30%, once the real evidence was shown to him.

In both of these cases the parties had no idea that the asset valuations were wrong, but at time both sides always obtained their own valuations. Both of these valuers are still practising and may be your next Single Expert!