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THE CORPORATIONS ACT AND FAMILY LAW

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1. ABOUT THE SPEAKER

Paul Fildes was previously the head of Middletons' (now K & L Gates) Family Law Practice Group. His group merged with Taussig Cherrie & Associates in October 2010, forming Taussig Cherrie Fildes.

Paul is an Accredited Family Law Specialist and has been practising in family law since 1983. He has completed a Post Graduate Diploma in Family Law. Paul has been ranked as one of Victoria's "pre-eminent" family lawyers by Doyle's Guide for Melbourne 2018.

Paul specializes in large-scale family property litigation, international relocation cases, complex Financial Agreements, de facto property disputes and tax-effective settlements.

Paul is a presenter of *Case Watch* on the Television Education Network which produces educational presentations and material for lawyers. He has published a number of papers and comments on current family law issues. Paul also presents numerous seminars and webinars to various professional bodies on a wide variety of family law issues, with an emphasis on complex financial matters.

He is a qualified Family Law arbitrator and mediator and is also a trained collaborative lawyer.

Paul is a Fellow of the International Academy of Family Lawyers (IAFL) and was a former Chair and Executive member of the Family Law Section of the Law Institute of Victoria. He was previously the Victorian Solicitor Representative of the Family Law Section of the Law Council of Australia, and a former Chair of the FLS National Biennial Family Law Conference. Paul was on the Board at Relationships Australia (Vic) between 1990 and 2000.

2. INTRODUCTION

The landscape for family lawyers has changed significantly during the past 20 years or so. Anecdotally, more and more people are self-employed rather than being secured in a safe job for life typically working for one company or organisation hoping to progress through the ranks and being promoted to a point where it constitutes a successful career upon retirement.

Some successful and intelligent people who are self-employed may either turn an idea into a business or alternatively grow their existing business to a point where the family accountant recommends a web of entities either for asset protection or tax minimisation which is arguably more complex than what is necessary or understood, but typically involves trusts but almost inevitably involves an incorporated entity as the operating entity of the business simply because such companies have limited liability.

Whilst the *Family Law Act* does provide practitioners with very wide in personam powers as against parties and enables, for example, the setting aside of certain transactions, the Family Court's powers to deal with matters under corporations law are often overlooked. When we contemplate bringing in third parties into our typical husband and wife proceedings, we often turn our minds to the concept of accrued jurisdiction in order to enliven any power we seek to exercise as against a third party.

There are certain steps that practitioners know could be taken to state courts, but it is our preference not to do so, rather hoping that it may be done as part of the same proceeding, so we return to the concept of accrued jurisdiction which in turn leads to debate about what represents the "same justiciable controversy".

However, it is important to remember that as a practitioner you do not have to rely upon the accrued jurisdiction argument. The Family Court (as distinct from the Federal Circuit Court) has original jurisdiction with respect to all civil matters under the *Corporations Act*, so the sameness of the controversy disappears because jurisdiction is there being original and available to be exercised. The fact that jurisdiction is available to be exercised in the Family Court doesn't of course mean that you have to exercise it in that jurisdiction. One may invoke Corporations Act powers in the state courts, however, if it is part of a family law dispute, it is generally advantageous to bring the proceedings under the one roof, both by reason of cost reduction, and the fact that proceedings in the

Family Court are protected from publicity, whereas those proceedings in the state court are not afforded the same protection. Family Law Practitioners are also typically more comfortable in their own jurisdiction where the rules, judges and culture are more familiar to them, and hopefully the likely range of outcomes!

The *Corporations Act* 2001 (Cth) ("**Corporations Act**") conferred jurisdiction on the Family Court and invested the Family Court with jurisdiction in relation to civil matters under the Corporations Act and to transfer Corporations Act proceedings between State Supreme Courts and the Federal and Family Court.

The enactment of the Corporations Act as a single federal act intended to apply in a uniform manner throughout Australia. Civil matters arising under the Corporations Act may be conferred on state courts pursuant to section 71 of the Constitution[1] of the Commonwealth.

Prior to the commencement of Part VIIIAA of the *Family Law Act* 1975 on 17 December 2004, the High Court decision of ***Ascot Investments Pty Ltd v Harper***[2] provided limitations on the ability of the Family Court to make orders affecting third parties. The High Court determined that although the Family Court may grant an injunction directed to a third party, it could not do so if its effect would be to deprive a third party of an existing right, or to impose a duty which the third party would not otherwise be liable to perform.

Before making orders in proceedings against third parties (including interlocutory orders) it was necessary for the court, as a court of limited jurisdiction, to be satisfied that it had jurisdiction to make the orders sought in the proceedings against the third party, and that it was appropriate to exercise that jurisdiction by making orders on the facts of the case as then known to it.

The only circumstance in which the court could proceed to make an order against a third party was when it was considered necessary to make "holding" orders to maintain the status quo pending a determination of whether the Court had jurisdiction.

The court's ability to make orders affecting third parties has now been considerably enlarged by the introduction of Pt VIIIAA and Pt VIIIAB of the Family Law Act.

[1] *Commonwealth of Australia Constitution Act* (Constitution)
[2] (1981) FLC 91-000

3. APPLYING THE LAW

In applying the law to a particular case, matters to be considered include:

- Is there a common substratum of facts?
- Does the non-federal claim relate to the same property (land, company, business etc.) which is the subject of the family law proceedings?
- Are some or all of the parties in both claims identical? If the court exercises accrued jurisdiction will all the parties in the non-federal claim be involved in the family law proceedings?
- Who are the parties to the non-federal claim? What are their relationships?
- What laws attach to the rights and liabilities of the parties' conduct and relationships?
- Are the issues in both claims the same? E.g. the main issue may be a dispute about contributions to changes. If so, is the evidence likely to be the same in both proceedings?
- Can the non-federal claim be severed from the family law claim?
- Does the Family Court have the power to grant appropriate remedies in respect of the "attached" claims?

The court will try to exercise accrued jurisdiction if doing so will allow parties to avoid two sets of proceedings and two sets of costs in two separate courts.

In some circumstances, it may be preferable and less risky for the federal claim to be cross-vested to the state Supreme Court than to rely upon accrued jurisdiction.

In ***Noll & Noll & Anor*** (2013) FLC93-529, the Full Court considered an appeal from the decision of Le Powar Trench J following refusal to determine the husband's application for the court to exercise accrued jurisdiction to determine the husband's cross-claim for damages against the wife's solicitors at the same time as it determined the wife's claim against the husband relating to the financial agreement between the husband and the wife.

The Full Court confirmed that:

1. In order to attract accrued jurisdiction a non-federal claim must arise out of the same sub-stratum of facts as the federal claim; and
2. It must form a single justiciable controversy.

4. JURISDICTION

A. JURISDICTION - CONSTITUTION

The Commonwealth's power to legislate in respect to "marriage[3]", "divorce and matrimonial causes[4]" is derived from section 51of the Constitution. Since the enactment the High Court of Australia has considered the definition and scope of marriage numerous occasions. The Family Law Act[5] created the Family Court of Australia which is the superior court on record however, as the court is created by legislation and its jurisdiction is limited to the power which is bestowed through the Family Law Act.

The courts reach has extended since conception. Emery J ***In the marriage of Vergis***[6] said:

> *As to the contempt provisions it must be remembered that the Family Court is not a court of Common Law or a Court of Equity as are the Supreme Courts of the States with inherent jurisdiction. The Family Court is a creature of statute and has no powers other than those given to it by statute.*

If the Family Court has inherent powers has been considered by the High Court of Australia in numerous cases and a number of authorities do indicate that the Family Court does have some inherent power. In ***Re Ross-Jones and Marinovich; Ex parte Green***[7] stated:

> *The provisions of s.114, which are precisely limited as they are, no doubt to ensure that they do not exceed constitutional power, cannot be extended by resort to the so-called inherent jurisdiction. Such inherent jurisdiction as the Family Court may have could not go beyond protecting its function as a court constituted with the limited jurisdiction afforded by the Act.*

Section 33 of the Family Law Act is an exercise of the incidental power conferred by section 51(xxxix) Constitution. It provides the Family Court with jurisdiction to federal matters which are not specifically within the Family Law Act. However, this only relates to matters which

[3] *Constitution* section 51(xxi)
[4] *Constitution* section 51(xxii)
[5] *Family Law Act 1975* section 21
[6] (1977) FLC 90-275, 36
[7] (1984) HCA 82, 20

are related to those listed in the Family Law Act as discussed by Gibbs CJ in ***R v Ross - Jones; Ex parte Beaumont***[8]:

> *"It cannot be intended to mean, and would not be constitutionally valid if it did mean, that if the jurisdiction of the court is unsuccessfully invoked, it nevertheless has jurisdiction in associated matters."*

Therefore, the associated jurisdiction of the Family Court is only enlivened if the court already has jurisdiction.

B. JURISDICTION – FAMILY COURT OVER FAMILY COMPANIES

When considering the jurisdiction of the Family Court over companies there are at least four basis to have regard to namely:

- The court's jurisdiction to deal with the company by orders directed to the parties' in personam.
- The court's jurisdiction to deal with the company under the *Family Law Act (1975)* (e.g. under Pt VIIIAA, section 114 or section 106B).
- The court's jurisdiction to deal with the company under the *Corporations Act (2001),* and;
- The court's exercise of accrued jurisdiction. E.g. **Lawson v Lawson and Wallmans** (1999) FLC92-874; **Wade-Ferell and Wade-Ferell and Read** (2001) FLC93-069.

The interplay of the *Corporations Act* and property settlements under the *Family Law Act* typically occurs with private proprietary companies limited by shares. Where the company is wholly owned and controlled by the husband and wife or by one defacto spouse, then the reach of the Family Court's powers between the parties is sufficient in most instances to regulate and direct the parties' operation of the company and to adjust the parties' proprietal interests in the family company.

Where third parties have an interest in a family company, the original jurisdiction of the Family Court under the *Family Law Act* had been limited prior to the introduction of Pt VIIAA of the act. Pt VIIAB extends the operation of Pt VIIAA in relations to parties to a de facto relationship (see section90TA).

[8] (1979) 141 CLR 504; 4 Fam LR 598 at 601; FLC 90-606 at 78, 102

Prior to the introduction of Pt VIIA and Pt VIIAB of the *Family Law Act* the provisions of the *Corporations Act* were more effective than the *Family Law Act* to regulate parties to family law proceedings involving the company and third parties.

5. CORPORATE STRUCTURES

The most common business structures are:

- **Sole trader**
  - the simplest structure;
  - inexpensive to set up as there are few legal and tax formalities;
  - a person operating as a sole trader is responsible for all aspects of the business including any debts the business incurs.
- **Partnership**
  - two or more people or entities who do business as partners or receive income jointly;
  - control or management of the business is shared;
  - a partnership is not a separate legal entity so the partners are liable for all debts and obligations of the business;
  - a formal partnership agreement is common but not essential;
  - the interest in a partnership is property. The extent of that interest will depend upon the value of the partnership, and the terms of the partnership agreement (*Best and Best* (1993) FLC 90-326 p76,514 and *B and B* (No 2) (2000) FLC 93-031).
- **Joint Venture**
  - two or more people or entities who join to do business together for a particular purpose, usually a single project, rather than an ongoing business.
  - there will usually be a joint venture agreement.
- **Trust**
  - a trustee holds property or assets for the benefit of others known as beneficiaries.
  - the trustee is responsible for its operation.
  - the trustee can be a company.
  - a trust requires a formal deed, as well as the completion of yearly administrative tasks.
- **Incorporated Entity: Company**
  - has a separate legal existence from its officeholders and shareholders – it can incur debt, sue and be sued.

There are at least five stakeholders, whose rights and roles are usually defined concerns in the constitution of a company, namely:

- directors
- board of directors
- shareholders
- members in general meeting
- the company

❖ **Shareholder**

  - a member of a company is often called a shareholder;
  - if a company with share capital issues shares, they must keep a record of the shares issued (share register);
  - the share register must also show if the member has any shares that are not beneficially held. Beneficially held means that the owner of the shares gets the direct benefit from the shares.
  - shares held by a person as trustee, nominee or on account of another person are non-beneficially held. If the holder of the shares is a trustee or executor, the shares should show as not being beneficially held. This requirement does not apply to a listed company.

❖ **Unitholder**

  - a unit holders agreement or unit holders deed will set out the owner's rights and responsibilities;
  - the trustee is often a company;
  - the units correspond to an interest in trust property;
  - unit trusts cannot derive a profit;
  - at the end of each financial year, any profit is distributed to the unit holders proportionate to the amount of units held;
  - the units are easily transferrable;

The treatment of third parties within family law jurisdiction has been an area of difficulty; practically and constitutionally. However, it is imperative that the reach of these business structures and legal entities do not fall outside of the jurisdictional reach of the courts, particularly, when the assets of the marriage (or de-facto relationship) are held through these vessels.

Third parties cannot initiate proceedings under the Family Law Act as they do not fit within the definition of "matrimonial cause." However, third parties can join existing proceedings by application under section 92 of the Family Law Act.

Deane J in ***Mallet v Mallet***[9] said:

> *Where a family company has been treated by the parties to a marriage as no more than a convenient vehicle for their own commercial activities and investments, it may be quite unjust and inappropriate to treat the corporate structure as having any significance beyond the costs and expenses which would be involved in its removal.*

[9] (1984) FLC 91-507, 79,129

6. RELEVANCE OF AGREEMENTS AND WHAT WEIGHT THE COURT WILL GIVE THEM

Section 90AC of the Family Law Act is a far-reaching provision. It provides the Court with power to alter the rights, liabilities or property interests of a third party despite anything to the contrary in a trust deed or any other instrument.

In the recent case of ***Harris & Dewell & Anor***[10] delivered 25 May 2018, the Full Court of the Family Court of Australia considered an appeal from a judgement of Justice Rees. Strickland, Murphy and Johnston JJ said:

> On 4 November 2016, Rees J made orders for settlement of property consequent upon the breakdown of a 24 year relationship between Mr Harris ("the husband") and Ms Dewell ("the wife"). The proceedings before her Honour were dominated by the wife's assertion that, for the purposes of s 79 of the Family Law Act 1975 (Cth), the property of the husband should be held to include units in the E Unit Trust ("EUT")
>
> In mid-1981, some five years prior to the commencement of the relationship, the EUT was established. The beneficial interest in the trust was divided into 60 units. The husband's father was the sole unit holder and the husband, and his father were the sole shareholders in the corporate trustee. The husband was never a unit holder and ceased acting as a director of the corporate trustee in 2011.
>
> The wife asserted that the unit trust was the husband's "puppet" or "alter ego" and sought that the assets owned by the trust be defined as property within the meaning of the Family Law Act and be included in the pool of assets available for division between the parties.
>
> The husband argued that the trust is a third party to the matrimonial litigation; its independent existence should be protected as such and that the reach of s 79 does not extend to interfering with its substantive rights. The husband's father, Mr Harris Snr ("the father"), was a party to the proceedings. He was also a party to the appeal
>
> **The Primary Judge's Conclusions**
>
> A finding that the units in the EUT were not property of the husband for s 79 purposes resulted in a finding that the interests in property of the parties or either of them has a

[10] [2018] Fam CAFC 94

total value of $24,578,992. The amount of the parties' superannuation was $3,152,035.

Her Honour found the parties' liabilities to be $10,945,825. It was not suggested that those liabilities should be borne other than equally. The consequence was that her Honour found, at [253], that the parties' net assets and superannuation interests totalled $16,785,202.

The Legal Structure of the EUT and the Ostensible Control of It

The EUT was established by deed in mid-1981. F Pty Ltd ("FPL") was its trustee at inception, as it was at the date of trial. FPL was incorporated in mid-1981. The establishment of the trust predated the parties' relationship by some five years; the parties commenced cohabitation in 1986 and married in mid-1991.

The beneficial interest in the EUT fund was divided into 60 units. Initially, 30 units were held by the father and the remaining 30 between two third parties irrelevant to the proceedings and this appeal. By 2001, each of them had sold their units to the father. Since that time, the father has been the sole unit holder The husband had never been a unit holder.

The report of the single expert accountant in evidence before her Honour recorded by reference to an ASIC extract dated 7 July 2016, that the husband and the father were the sole shareholders in FPL; the husband holding two ordinary shares and the father holding four ordinary shares. Ordinary shares hold voting rights. The single expert recorded:

> *Contrary to ASIC records it is asserted that the shares held by the Husband are held on a non-beneficial basis, in trust for [the father]. [The company's accountants] assert that [in mid-] 1999 … (a former shareholder and director), transferred his shareholding to the Husband, to be held in trust for [the father].*

The father holds 67 per cent of FPL's ordinary shares and the husband 33 per cent.

On 3 February 2016 a solicitor, Mr V, replaced the father as the sole director of FPL. The single expert accountant recorded:

> *At the valuation date [30 June 2015], [the father] was the sole director. The Husband ceased acting as a director on 11 April 2011. As per a letter dated 16 August 2012 from [the company's accountants] to the Husband, it is asserted*

> *that the Husband remains a director and shareholder of the company, on the basis that the Memorandum and Articles of Association of the company require a minimum of two directors and individual shareholders. This advice is contrary to the number of directors of the company at the valuation date.*

Senior counsel for the wife asserted that the provisions of the *Corporations Act 2001* (Cth) relating to shadow directors may have application. That issue was not raised before her Honour.

The ostensible picture of control of the trust thus presented is of ultimate control vesting in the father by reason of his sole unit holding and his control of the voting rights in the trustee, FPL.

A partial summary of the findings made by her Honour can be found at p 100 to 108 as follows:

> *100. Nonetheless, it is clear that the husband has exercised control over the [EUT]. The husband conceded, and it is clear on the evidence, that he has engaged in various dealings on behalf of the [EUT], has directed agents on behalf of the [EUT], and has had the benefit of the use of assets owned by the [EUT] as security for his own personal borrowings. The circumstances of these dealings are set out in detail later in these reasons. The husband has continued to exercise this control over the [EUT] despite having resigned as a director of [FPL] in 2011.*
>
> *101. The husband concedes that there has been an intermingling of his funds with the funds of the [EUT].*
>
> *…*
>
> *108. The extent to which the husband has treated the [EUT] and its assets as his own has emerged in the course of the trial.*

In addressed dealings with a valuable piece of real property ("Property P"). Her Honour found at [143] that:

> *… the husband caused one lot of [Property P] to be acquired in the name of [FPL] using funds in the sum of $1,251,818.50 provided by the husband. By virtue of his provision of the purchase money, absent any agreement to the contrary, the husband was the beneficial owner of the property.*

Her Honour went on to find that Property P was never included in the accounts of the EUT as property of FPL. In addition, despite the husband not being a director of FPL, he executed the contract and other relevant documents on its behalf. Her Honour concluded that there was "no evidence" that the transaction was ever discussed with the father. Indeed, when cross-examined, the father said he believed that Property P was the private property of the husband (at [147]).

Her Honour then said:

> *158. I am satisfied that the husband has, since at least 2002, treated the [EUT] as if it were his own. He has done so, initially, with the actual or tacit agreement of [the father]. Since about 2011, commencing with the purchase of [Property P], there is no evidence that [the father] has been aware of any of the transactions that the husband conducted with, or on behalf of, the [EUT].*
>
> *159. The husband will, on the death of his father, inherit the [EUT] units. In the meantime, he treats them, for all purposes, as his own.*

A telling example of what the wife contends to be the husband's attempt to obscure the control over the trust and its property which he in fact was exercising, and his failure to distinguish between his own property and that of the trust, can be found in her Honour's findings that solemn declarations made by the husband were all untrue:

- *A document signed in 2010 in support of a loan application to the ANZ Bank declaring that the husband owned units in the EUT (at [50], [90], [204]–[208];*
- *An application for finance in which the husband included in his statement of assets real estate in Queensland valued at $7 million and a mortgage liability of $2 million over that real estate, despite the fact that "[t]he husband did not own real estate in Queensland to that value but [EUT] did" (at [133]); and*
- *In July 2011 a Statutory Declaration by the husband declaring that he and the father were beneficiaries of the EUT (at [47]–[48], [91] and [142]).*

Having made extensive findings as to the husband's control of FPL and the EUT including the examples just cited, her Honour found:

> *105. I am not satisfied that, whilst [the father] remains the owner of the [EUT], the husband has some "lawful right to benefit from the assets of the trust".*

106. Despite the control exhibited by the husband in respect of the dealings of the [EUT], I am not satisfied that the [EUT] is an alter ego or device used by the husband for his sole benefit.

107. I find that [the father] is the legal and beneficial owner of the units in the [EUT].

What Principles Emerge from the Authorities?

It was not contended before the primary judge nor argued during the appeal that the EUT was a sham.

The arguments in respect of the EUT required examination of a number of earlier decisions of the Family Court and of decisions of the High Court, including *Ascot Investments Pty Ltd v Harper* and *Kennon v Spry*[11].

The decisions of the Full Court in *Ashton and Ashton*[12] and *Davidson and Davidson*[13] were decided after *Ascot* and each was the subject of an unsuccessful application for special leave to appeal to the High Court.

The often-cited passage from the judgment of Gibbs J, as the former Chief Justice then was, in *Ascot* bears repeating (*Ascot* at 354–355):

The position is, I think, different if the alleged rights, powers or privileges of the third party are only a sham and have been brought into being, in appearance rather than reality, as a device to assist one party to evade his or her obligations under the Act. Sham transactions may always be disregarded. Similarly, if a company is completely controlled by one party to a marriage, so that in reality an order against the company is an order against the party, the fact that in form the order appears to affect the rights of the company may not necessarily invalidate it.

Except in the case of shams, and companies that are mere puppets of a party to the marriage, the Family Court must take the property of a party to the marriage as it finds it. The Family Court cannot ignore the interests of third parties in the property, nor the existence of conditions or covenants that limit the rights of the party who owns it. To take two obvious examples, the Family Court could not

[11] (2008) 238 CLR 366 ("*Kennon*")
[12] (1986) FLC 91-777 ("Ashton")
[13] (1991) FLC 92-197 ("*Davidson*")

> *compel a husband to assign to his wife a lease without obtaining the necessary consent of the lessor and could not order the transfer to a wife of land owned by a husband free of mortgage, when in fact the land was mortgaged to a third party. Thus, in the present case, the Court must deal with the husband's shares in Ascot Investments as they in fact are, that is, as shares in a company whose Memorandum and Articles contain a restriction on transfer.*

In *Ashton* it was conceded throughout that the husband was in full control of the assets of the trust, and he was applying them and income from them as he wished and for his own benefit. However, central to the decision in *Ashton* that the assets of the trust should be treated as property of the husband for s 79 purposes is the fact that, by reason of positions held within the trust structure, the husband, via the powers vested in him by the trust deed, was able to effect the distribution of trust assets to himself should he so choose. The Full Court said this (at 75,653):

> *… having regard to the powers and discretion which the husband has and having regard to what has in fact taken place, for the purposes of sec. 79, the husband's power of appointment, and all the attributes it carries with it, amounts to de facto ownership of the property of the trust. His Honour's order that he should appoint himself trustee so as to make a requisite payment was not contrary to the trust deed on its proper construction, nor did it require the husband to deal with property which was not his own …*

Similarly, in *Davidson*, the Court found that the primary judge had not erred in finding that the assets of the trust were the "de facto property" of the husband:

> *… by virtue of his control of [the trustee company], thereby enabling him to have recourse to those assets to satisfy the lump sum payment [ordered by the primary judge]* [78,365]

Common to both *Ashton* and *Davidson* is the capacity of a party to the marriage (the husband in each case) to use existing powers pursuant to the trust deed, or through the trustee company, so as to effect the lawful distribution of property to himself. That is, despite the structure not being ostensibly indicative of a party holding an interest in property, the powers available to that party could affect their receipt of a beneficial interest in trust property.

The same underlying premise is apparent in other Full Court authorities that have upheld findings that the property of a trust can be treated as property of a party to the marriage for s 79 purposes.

Conclusion

Strickland, Murphy and Johnston JJ concluded at 66 to 73 that:

> *In concluding that the EUT was not property of the husband and that "[t]he [father], albeit he is 99 years of age, continues to maintain his legal and beneficial interest in the [EUT]" (at [103]) her Honour quoted, at [102] what was said by Finn J in Stephens and Stephens[14]:*
>
> > *… I accept that no earlier authority in this court has gone so far as to hold that control alone without some lawful right to benefit from the assets of the trust, is sufficient to permit the assets of the trust to be treated as property of the party who has that control …*
>
> *It should be accepted that the principles emerging from the High Court and from the decisions of this Court to which reference has been made permit of a finding that property ostensibly that of a trust can be treated as property of a party for s 79 purposes where evidence establishes that the person or entity in whom the trust deed vests effective control is the "puppet" or "creature" of that party. The metaphor is used to connote a situation where the person or entity with control (the "puppet") does nothing without the party (the "puppet master") controlling or directing that person or entity.*
>
> *Control is not sufficient of itself. What is required is control over a person or entity who, by reason of the powers contained in the trust deed can obtain, or effect the obtaining of, a beneficial interest in the property of the trust. In our respectful view, it is in that sense, that Finn J speaks of "some lawful right to benefit from the assets of the trust".*
>
> *Mr Richardson SC on behalf of the wife characterised the EUT as "the puppet" and the husband as "the puppet master". Yet, if the principles emerging from the authorities are to avail the wife, it was necessary for the evidence to establish that the father was the puppet and the husband was the "puppet master". It is the father who,*

14 (2007) FLC 93-336 at 81,767–81,768

by reason of the powers contained in the trust deed and his position as the sole unit holder, can obtain, or effect the obtaining of, a beneficial interest in the property of the trust.

Mr Cummings SC for the father is correct when he asserts that there was no evidence from which any such finding could have been made by the primary judge. Mr Cummings SC is also correct in asserting that no proposition to that effect was ever put to the father.

The husband did not have powers vested in him, or in any entity which he controlled or would do his bidding, that permitted of that result for him. The evidence was certainly to the effect that the current director of the trustee FPL (who, despite the caveat noted by the single expert appears to have been assumed to be the company's sole director) would likely do the husband's bidding. However, the trustee does not have ultimate control over the vesting of trust property. That ultimate control has at all times rested with, and currently rests with, the father.

Within the EUT structure, the father not only has ultimate control over the distribution of trust property, but he is also the EUT's sole unit holder and, as a consequence, he is the only person entitled to benefit from distributions and, conversely, the only person who can be affected adversely by actions contrary to the interests of the trust's beneficiaries. The father was entitled to give the husband "the run of the trust". The father was entitled to permit the husband to deal with trust property and there is no evidence that he did not consent to him so doing.

In our opinion, her Honour was, with respect, correct in rejecting the wife's argument that the units in the EUT should be regarded as property of the husband for the purposes of s 79 of the Family Law Act.

7. STRATEGIES FOR DEALING WITH DIRECTORS IN HIGH CONFLICT

Wind up Applications

Section 461 of the Corporations Act enables a company to be wound up on application of a shareholder, creditor (such as a spouse (including a de facto spouse) who has a loan account) or the company. The circumstances for winding up include:

(a) the company is insolvent
(b) the directors act in their own interests
(c) conduct is oppressive, unfairly prejudicial or discriminatory
(d) on just and equitable grounds including:
   i. a breakdown in the mutual trust and confidence of the shareholders;
   ii. deadlock or disagreement in the management of the company;
   iii. fraud, misconduct or oppression in the conduct and management of the company's affairs;
   iv. failure of the substratum.

A spouse/de facto party who has loaned funds to the company may issue a statutory notice of demand for payment pursuant to s 459E of the Corporations Act as a precursor to winding up the company. A spouse/de facto party ought to weigh up the commercial ramifications of persisting with a demand for payment of the loan account, wary of the implications of ***Kowaliw and Kowaliw***[15].

The principle established in *Kowaliw v Kowaliw* is, in the words of Justice Baker:

> *Financial loss incurred by the parties in the course of the marriage ... should be shared by them (although not necessarily equally) except in the following circumstances:*
>
> *i. where one of the parties has embarked upon a course of conduct designed to reduce or minimise the effective value or worth of matrimonial assets; or*
>
> *ii. where one of the parties has acted recklessly, negligently or wantonly with matrimonial assets, the overall effect of which has reduced or minimised their value.*

[15] (1981) FLC 91-092

One should be wary of transactions in property settlement proceedings involving the parties and a company. A party may be a "related entity of the company" pursuant to s 588FE(4) of the Corporations Act. If the company is being wound up, then any transaction between the company and a party within four years of the relation back period is voidable. A liquidator may recover from the related entity as a debt due to the company an amount equal to a liability of the related entity which is discharged by an insolvent transaction of the company which is voidable under s 588FE (refer to s 588FH(2)). Unlike s 123(6) of the Bankruptcy Act 1966, there are no protective provisions in the Corporations Act specifically designed to quarantine such transactions entered into pursuant to the terms of a financial agreement pursuant to Pt VIIIA of the Family Law Act. In such a case, the party must rely on the defence provision of s 588H of the Corporations Act and satisfy the court:[16]

- the transaction is not an unfair loan to the company
- the party (and a reasonable person) had no reasonable grounds at the time for suspecting the company was insolvent, and
- the party provided valuable consideration or has acted to their detriment.

See: *Weir and Weir* (1993) FLC 92-338; *Re Dalkeith Investments Pty Ltd* (1985) 3 ACLC 74; *Re Hanamoa Pty Ltd* (1982) 7 ACLR 30; *Re Bresgin Pty Ltd* (1991) 4 ACSR 45.

Directors in Conflict

The *Corporations Act* sets out the following statutory duties of directors:

- *Section 180*: a director must exercise their powers and discharge their duties with the degree of care and diligence.
- Section 181: a director must exercise their powers and discharge their duties in good faith in the best interest of the corporation and for a proper purpose.
- Section 182: a director must not improperly use their position to gain an advantage for themselves or someone else or cause detriment to the corporation.
- Section 184: a person who obtains information because they are, or have been a director, must not improperly use the information to gain an advantage for themselves or someone else or cause detriment to the corporation.

Consider a recent unreported case scenario where a disagreement between two directors in a closely held company escalates and begins to impact upon operations of the business.

[16] *CCH 41-332 winding up*

Director B (the wife) has decided to take a more active role in the company. Director A (the husband) has always represented the main operator of the business and majority shareholder. The business has been the livelihood of the parties and forms a substantial part of the asset pool. Therefore, understandably it is crucial that the wealth of the business is maintained. Director A held 10 shares whilst Director B held 1 share. It was Director A's intention to remove Director B as she was negatively affecting the operation and morale of the business. How could this be achieved?

The removal of a Company Director is governed by Section 203C of the Corporations Act. As the company was registered in 1995, the replaceable rule provision does not apply, so the power lies in the Articles of Association of the company: "*The company may by resolution remove any director before the expiration of his period of office, and may by resolution appoint another person in his stead."*

Governing Director

If Director A was Governing Director, he may remove Director B personally and appoint someone else in her stead. However, there was no evidence to support the claim that Director A had been appointed Governing Director.

Chairman of Directors

It was then considered whether Director A was Chairman, whereupon a resolution could be passed at a directors' meeting and there would be no need for a meeting of members. At the directors meeting the chairman has the casting vote. However, once again there was no evidence to support that Director A was the Chairman.

Furthermore, there was no agreement to appoint Director A as either Governing Director or Chairman of Directors. The absence of a person having a casting vote, and thus the meeting being deadlocked could be overcome by calling a general meeting. As a director, Director A is permitted to call a general meeting of the members. This could be achieved by convening a general meeting of the company, specifying the place, the day and hour of the meeting. Notice had to be given to comply.

The solution appeared simple Director A was to call a general meeting at the registered office with Director B present. However, for the general meeting to be valid, there must be quorum of at least two members. Therefore, Director B had to attend the General Meeting so she could be removed as director. If she did not attend, the meeting would automatically be adjourned to the following week at the same time.

Two General Meetings were called and, unsurprisingly, Director B did not attend either. The minority shareholder, Director B was paralysing the decision making of the company and Director A.

Simultaneously, the wife filed an Application in a Case seeking orders to the effect (among other things) that the husband in his capacity as Director and/or Shareholder be restrained from:

- calling or holding a shareholder's meeting;
- calling or holding a director's meeting; and
- undertaking any such action which would diminish or dilute the wife's legal capacity within the company.

Subsequently, the Husband filed a Response to an Application in a Case. He was advised that the Family Court would unlikely remove the wife as Director and Shareholder at an Interim hearing, therefore the husband sought the following orders:

- the wife's application be dismissed;
- the wife withdraw from active employment from the business;
- the wife be restrained from intervening in the day to day operations of the business specifically including she be restrained from communication with business bankers, contractors and emailing staff in contradiction to emails sent by the Husband.

At Interim hearing Judge McNab was not impressed by the efforts of the wife and saw that her recent involvement was causing unnecessary strain on the operations of the business. An Interim Order was made by his Honour with accompanying strong words of guidance to the wife that she cease interfering; "The Husband shall have full day to day management of the business and the Wife not interfere with that management in her capacity as director of the company of otherwise."

Fortunately, the matter received an early trial date, whereby on the third day of trail the parties reached orders by consent. They provided that the wife would resign as Director within seven days and maintain her shareholding until she received final payment of the property settlement.

If the matter had not received an expedited trial date, an available avenue was to make an application to the Supreme Court or Federal Court under section 249G and 1319 of the Corporations Act to convene a meeting and prescribe quorum. An accompanying Affidavit would be required outlining the circumstance and how the majority was being frustrated by

the minority. The likely response from the Supreme or Federal Court would have been to transfer the matter to the Family Court as they have jurisdiction to hear the matter under section 58AA of the Family Law Act. Ultimately, waiting until the trial date and in meantime the operations of the business were being compromised and Director A, majority shareholder also paralysed by the power of the minority.

In ***Chalet Nominees (1999) Pty Ltd v Murray***[17] the directors present and consequently if there was quorum and a valid meeting to pass a resolution was discussed. Le Miere J concluded:

> *The major rationale of having a quorum is to avoid decisions being taken at a meeting by a small minority which may emerge to be objectionable to the vast majority of members. A tactic of quorum-busting, that is causing a quorum to be prevented from meeting, has been used in deliberative bodies by minorities seeking to block the adoption of some measure they oppose. There are many companies with only two shareholders, and then life can become difficult where one shareholder ceases to co-operate. If one shareholder refuses to attend meetings, it would appear that the other is unable to hold a valid meeting and is therefore unable to pass resolutions necessary to conduct business*[18].

The Court of Appeal in ***Re Opera Photographic Ltd***[19] stated:

> *It is sufficient to state that the courts will not allow a minority of shareholders to so obstruct the wishes of the majority.*

Mancini v Mancini[20]

The parties had separated in 1996 and finalised their family property dispute in March 1999. Despite their separation they continued to function as directors of the Wesco Group Pty Ltd. Both were actively involved in the company's affairs. The consent orders stated that:

> *"The applicant and respondent do all things necessary and execute all such documents in accordance with the Corporations Law and Memorandum and Articles of Association…..to ensure that its day to day operations are maintained and its goodwill and assets are protected and preserved."*

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[17] [2012] WASC 147
[18] [2012] WASC 147,14, 33
[19] [1989] 1 WLR 634
[20] [1999] NSWSC 799

Mrs Mancini alleged that a Default Notice was served on Mr Mancini on 9 June 1999. The notice stated that Mr Mancini was required to rectify breaches of the consent orders. The evidence of the Minutes of the Meetings of the Wesco Group held on 29 June 1999 indicated that the persons present were Mrs Mancini and Mr Azzopardi who was an employee of the Wesco Group.

Mrs Mancini was shown twice in the list of those present, first by her own name and secondly as "*John Peter Mancini by his attorney Valda Lynne Mancini*".

At that meeting it decided that Mr Azzopardi would be appointed director and Mr Mancini be removed as director and that his signature be removed from all bank records. The company secretary was directed to notify bankers and to file a change of office holders form with ASIC. Mrs Mancini held that she was present at the meeting in two capacities once as herself and one as Mr Mancini's solicitor.

The onus of proof lied with Mr Mancini.

Ground 1: No Service of Default Notice on Defendant

Mrs Mancini presented as an unreliable witness who concealed matters of which she had knowledge about and her evidence was wrong about the time and manner of the preparation of the default notice.

Mrs Mancini's evidence was also corroborated with Mr Azzopardi and two other employees of the Wesco Group.

Mr Mancini's evidence was that the default notice was never served upon him and his evidence was found to carry more weight than that of Mrs Mancini.

Ground 2: No Notice of directors meeting

It was evident from Mr Mancini's evidence that no notice of a director's meeting was served upon him. He attended upon the business premises most days and therefore it can be implied that Mrs Mancini deliberately refrained from informing Mr Mancini about the meeting as she was taking the position that she could act on his behalf as solicitor.

Ground 3: Form of Notice of Default

It was submitted by Mr Mancini's counsel that any notice of default must clearly outline the default under the agreement in the Consent Orders and that it must be clear that action will

be taken if the defaults are not cured. It was submitted that the notice was defected as it did not effectively do this.

Ground 4: No authorisation for delegation

Clause 11 provided for action to preserve the consent orders and rectify any default. This authority is far narrower than the purposes Ms Mancini used it for. The purpose of the clause was namely to execute documents and make payments in the general running of the business. Additionally, there was no suggestion that the removal of Mr Mancini of director would resolve any of those defaults and therefore was outside the scope of her power.

Ground 5: in capacity of an attorney under power to act as a director

> *"30. The office of a director is a personal responsibility, and can only be discharged by the person who holds the office. If there is any exception, it must be found in the constitution of the company and in some authorisation there found to act by an alternate or other substitute or delegate. The office of a director is not a property right capable of being exercised by an attorney or other substitute or delegate of the person holding the office; many rights as shareholders can be distinguished in this respect because they are rights of property."*

The Arties of the companies enables a director with the approval of another director to appoint a subsequent director. However, those procedures were not followed.

Ground 6: lack of quorum

The Articles of Association stipulate that quorum is the meeting of two directors. This requirement is not reached by one director wearing two hats.

Ground 7: Lack of Good faith in exercising power

The purpose to which Mrs Mancini endeavoured to rectify the defaults of Mr Mancini was not undertaken in good faith and was a fraud of the power conferred in the consent orders. There was a lack of connection between the rectification of defaults and the act of removing Mr Mancini as director.

Ground 8: Lack of power to remove director

The Constitution of the companies provided that "*any person so appointed shall hold office until removal by resolution of the company*". Therefore, no corresponding power is conferred on the directors.

Ground 9: the defaults did not occur as claimed

The majority of the defaults that Ms Mancini initially relied upon were not relied upon in proceedings. Ultimately, it was held that the defaults did not equate to the removal of Mr Mancini as director.

Mr Mancini's cross application was successful, and the wife was removed as a Director with costs.

8. WHAT ARE THE COURT'S POWERS OVER CORPORATIONS

The Family Court has the power to:

1. set aside transactions pursuant to s 106B of the Family Law Act.[21]

2. to make orders directly in relation to property in ante-nuptial or post-nuptial settlements made in relation to the marriage pursuant to s 85A of the Family Law Act.

3. if there are other assets available for distribution between the parties, to establish that a party has a financial resource represented by the third party's property.

4. to find that a third party is the alter-ego of a party to the proceedings.

5. to find that the third party is a sham brought into being in appearance rather than reality as a device to assist one party to evade his or her obligations under the Family Law Act.

6. to find that the third party is the puppet of a party to the marriage/de facto relationship (that is, the company is completely controlled by one party to a marriage/de facto relationship) so in reality an order against the company is an order against the party.

7. to grant injunctive relief.[22]

8. to make orders against the third party if the third party is in effect, an accomplice of a party to a marriage/de facto relationship whose actions are designed to assist one spouse and disadvantage the other.[23]

9. to make a declaration pursuant to s 78 of the Family Law Act that the spouse be declared the equitable owner of certain property held by the company.[24]

Section 1337C(1) of the Corporations Act provides that, "*jurisdiction is conferred on the Family Court with respect to civil matters arising under the Corporations legislation*."

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[21] *Ferrall and McTaggart (Trustees for the Sapphire Trust) & Ors* v *Blyton* (2000) FLC 93-054
[22] *Yunghanns & Ors* v *Yunghanns & Ors; Yunghanns* (1999) FLC 92-836;
Blueseas Investments Pty Ltd v *Mitchell & McGillivray* (1999) FLC 92-856;
Ferrall and McTaggart (supra)
[23] *Ascot Investments v Harper* 76,062 and *Howard and Howard* (1982) FLC 91-279, 77,595
[24] *Moran and Moran* (1995) FLC 92-559

Corporations Act 2001 – Sect 233

Orders the Court can make

1) The Court can make any order under this section that it considers appropriate in relation to the company, including an order:

a) that the company be wound up;

b) that the company's existing constitution be modified or repealed;

c) regulating the conduct of the company's affairs in the future;

d) for the purchase of any shares by any member or person to whom a share in the company has been transmitted by will or by operation of law;

e) for the purchase of shares with an appropriate reduction of the company's share capital;

f) for the company to institute, prosecute, defend or discontinue specified proceedings;

g) authorising a member, or a person to whom a share in the company has been transmitted by will or by operation of law, to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company;

h) appointing a receiver or a receiver and manager of any or all of the company's property;

i) restraining a person from engaging in specified conduct or from doing a specified act;

j) requiring a person to do a specified act.

…

Restraining orders

The Family Court's powers to make orders restraining action by a corporation are far reaching. The Family Court has the power to:

- restrict the transfer of shares;
- restrain a company from taking action against a party to a marriage;
- restrain a party from exercising their voting rights as a director and shareholder of a company;
- grant an injunction restraining a creditor from commencing proceedings against a spouse party to recover a debt.

The court may only make an order or grant an injunction under subsection (1) or (2) if:

a) the making of the order, or the granting of the injunction, is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and

b) if the order or injunction concerns a debt of a party to the marriage--it is not foreseeable at the time that the order is made, or the injunction granted, that to make the order or grant the injunction would result in the debt not being paid in full; and

c) the third party has been accorded procedural fairness in relation to the making of the order or injunction; and

d) for an injunction or order under subsection 114(1)--the court is satisfied that, in all the circumstances, it is proper to make the order or grant the injunction; and

e) for an injunction under subsection 114(3)--the court is satisfied that, in all the circumstances, it is just or convenient to grant the injunction; an

f) the court is satisfied that the order or injunction takes into account the matters mentioned in subsection (4).

Family Law Act 1975 – Sec 90AF

Court may make an order or injunction under s114 binding a third party.

1) In proceedings under s114 the court may:

a) make an order restraining a person from repossessing property of a party to a marriage; or

b) grant an injunction restraining a person from commencing legal proceedings against a party to a marriage.

2) In proceedings under s114 the may make any other order, or grant any other injunction that:

a) directs a third party to do a thing in relation to the property of a party to the marriage; or

b) alters the rights, liabilities or property interests of a third party in relation to the marriage.

In ***Lindley & Lindley***[25] Justice Cronin made orders restraining the husband from drawing on or withdrawing funds from any bank account held by the various companies. The wife required to authorise and approve any cheques, payments or transfers of monies made by the D Group. Justice Cronin held that:

> *On any view Mr Lindley is out of control. There are allegations of drugs and alcohol abuse. There are allegations of violence and intervention by police. I have been told by Mr N that the husband was hospitalised as a result of his own health. [5]*

[25] *[2017] FamCA 1092*

This is a company with significant assets, and it needs to be under control. The wife is now taking steps to protect her assets as well as other people who are obviously affected by the organisation's potential demise. [6]

The proposed order is that until further order Mr Lindley be restrained from drawing or withdrawing funds from any bank account held by a number of the companies with the National Australia Bank. I accept that is the first step in getting control of the situation to avoid significant sums of money being not only spent without explanation, but potentially wasted. The second order proposed is that until further order the wife authorise and approve any cheques to be drawn out of the D Group's accounts. The difficulty with that order is its enforceability. [7]

The power for the court to make either of the two orders lies in s 114 (3) of the Family Law Act, which gives the court an extraordinarily wide power to make such orders in a matrimonial cause as it considers both proper and just and convenient. It is an asset protection order. To ensure that the group's bank cooperates, the power in s 90AF(2)(a) is being used to direct the bank to do whatever is necessary to give effect to the two orders. [8]

Section 90AF also requires the court before making an order to take into account a number of matters. Those matters are the taxation effect of the order or injunction on the parties. In this case the asset protection orders will have no taxation effect because there is no transfer of property. There is no social security effect in this case. The bank's administrative costs in this case will be minimal because of the fact that it is simply ensuring that the signatory is effectively under the control of the wife. [10]

The National Australia Bank is aware of the problem because the wife previously sought a reconciliation of an account, and the bank provided that but, at least as at the last hearing, was unable to explain how money had been drawn from the account which required joint signatories. This order may assist the bank in the implementation of its own contractual obligations. [11]

The third issue is that the injunction must not affect the capacity of a party to repay a debt after the injunction is granted. In a commercial operation there will be creditors. It seems to me that on the basis that the wife is protecting her own interests as well as those of the group, I can presume that she would, with the assistance of Mr N, ensure that all of the creditors of the company are properly protected as well. On that basis it is appropriate to make the orders under s 90AF. [12]

In ***Lake & Brand***[26] Justice Macmillan made orders restraining I Pty Ltd as trustee for the I Unit Trust (formerly the second named respondent in the proceedings) pursuant to 90AF(2) from instituting any proceeding to recover any debt it alleges is owed to it by the wife either severally or jointly with the husband and I Pty Ltd as trustee for the Brand Unit Trust was injuncted from endeavouring to prove any debt allegedly due to it from the wife either severally or jointly with the husband in the event of receivership and/or liquidation.

In determining the wife's application for injunctive relief, Justice Macmillan held at 200 to 204:

> *I am satisfied that throughout these proceedings the husband and his family have gone to significant lengths to remove property, to which the wife may have had an entitlement or which might form part of the parties' property for the purposes of these proceedings, from the reach of orders of this Court thereby defeating the wife's claim.. In those circumstances and given their last minute withdrawal from the proceedings I accept that they may well intend to pursue other legal avenues in order to achieve the same result.*
>
> *Section 90AF(3) sets out the conditions that must be satisfied before the court makes an order. They include that the court must be satisfied that the injunction is reasonably necessary or reasonably appropriate and adapted to effect a division of property between the parties to the marriage. I am satisfied that in this case it is reasonably necessary and appropriate in circumstance where if the order is not made and further proceedings were to be instituted by I Pty Ltd, and those proceedings were to be successful, the orders of this Court pursuant to s 79 of the Family Law Act would, in circumstances where the husband had declared himself bankrupt leaving the wife to meet any liability, be rendered nugatory, denuding the wife of the fruits of these proceedings. Even if proceedings instituted by I Pty Ltd did not succeed, the wife would be put to the no doubt significant cost and the stress of further proceedings in circumstances where I Pty Ltd was a party to these proceedings and, in my view for tactical reasons, chose to withdraw.*
>
> *The court must also be satisfied that the third party against whom the orders are sought has been afforded procedural fairness. Counsel for the wife referred me to the decision of the High Court in ACN 078 272 867 Pty Limited (In liquidation) (Formerly Advance Finances Pty Limited) v Deputy Commissioner of Taxation; Binetter v Deputy Commissioner of Taxation [2011] HCA 46. Although this case was in relation to*

[26] [2016] FamCA 375

whether companies should have been given an opportunity to be heard before winding up orders were made, the Court referred to those companies having been given an opportunity to be heard and whether the opportunity to be heard could have made a difference to the outcome.

There is in my view no doubt in this case that I have been afforded procedural fairness. Although I Pty Ltd withdrew as a party to the proceedings before the final hearing commenced and before the wife indicated that she would be seeking an order in these terms, both the husband who was in Court throughout the hearing and his sister who was present in Court for the purposes of giving her evidence are directors of the company. Both the husband and his sister were asked in cross-examination about whether they would consent to an order in the terms sought by the wife and the husband's sister was invited to discuss the matter with her father, who is also a director of I Pty Ltd. Although all three said they would not consent to the order they did not take any steps to oppose the order, and I am satisfied that they are familiar with the court processes and would have sought to intervene to oppose the order had they wanted to do so.

In circumstances where I am not satisfied on the balance of probabilities that there is a debt to I Pty Ltd but that I am satisfied that either the husband in his capacity as a director of the company and/or the other directors may well be considering taking proceedings in order to circumvent any orders this Court might make, I am satisfied that it is proper and both just and convenient to make the order the wife seeks. In my view there is no taxation or social security effect of the proposed order that I Pty Ltd must take into account pursuant to s 90AF(3)(f.)

In **C Pty Ltd & Ors and PGW as liquidators of S Pty Ltd** (in liq) [2011] FamCAFC231 there were two applications for leave filed where the appellants argued that the trial judge was in error in finding that guarantee proceedings concerning monies paid by a guarantor to discharge a loan to the NAB were a "matrimonial cause" within section 4(1)(f) of the *Family Law Act* in circumstances where the trial judge found that both the section 79 proceedings and the winding up proceedings were matrimonial causes and the guarantee proceedings were related to them and in those circumstances there was no doubt that the Family Court had jurisdiction to hear the winding up proceedings pursuant to the power vested in it under section 1337C of the *Corporations Act 2001 (Cth)*.

The trial judge found that the “remoteness” of the guarantee proceedings from the section 79 proceedings was dependant upon the meaning of the phrase “in relation to” in section 4(1)(f) of the *Family Law Act*. The Full Court was satisfied that the necessary connection was established and the trial judge was correct in finding that the guarantee proceedings were a “matrimonial cause” and that the Family Court had jurisdiction to hear the proceedings.

The Full Court considered that the trial judge erred in holding in the alternative that the guarantee proceedings were a civil matter arising under the *Corporations Act 2001* and within the jurisdiction of the Family Court, where the guarantee proceedings arose under general law and not a civil matter arising under the *Corporations Act 2001.*

The Full Court found however, that the trial judge was correct in holding in the further alternative that the guarantee proceedings were within the Family Court’s accrued jurisdiction; where the winding up proceedings have not been completed and they therefore satisfied the need for there to be a family law claim as part of the justiciable controversy.

In summary the Full Court was satisfied that the trial judge was correct in exercising his discretion to exercise the jurisdiction where it was beyond doubt that the trial judge correctly applied the criteria for the exercise of jurisdiction.

Compulsion Powers

Section 90AE(1)(d) of the Family Law Act provides the Family Court power to make orders requiring a director of a company to register a transfer or shares or assets in that company from one party to a marriage to another party.

Section 90AE(2) of the Family Law Act provides the Family Court power to direct a third party to do a thing in relation to the property of a party of the marriage, or alter the rights, liabilities or property interests of a third party in relation to the marriage.

In ***Surridge & Surridge***[27], Murphy, Aldridge & Kent JJ made orders compelling the parties do as follows with respect to the company:

1. *That the parties forthwith do all acts and things and sign all documents to cause the following things to occur with respect to the company B Pty Ltd:*

   a) *The 2013 and 2014 statements of financial position to be amended so as to consolidate into one loan account in the joint names of the parties all*

[27] (2017) FLC 93-757

advances and loan accounts of the parties reported in the statements of financial position;

b) *Dividends then to be declared to each of the parties fully franked for each of the following financial years...;*

   (i) *That on the dividends being declared and the 2015 financial statements and tax return prepared and lodged the company to be struck off the company register conducted by ASIC;*

c) *The 2015 financial statements to be prepared so as to:*

   (i) *Write off the office equipment;*

   (ii) *Write off the loan to C Pty Ltd;*

   (iii) *Write off the loan to D Pty Ltd.*

2. *That each of the parties shall pay one half of the costs of implementation of these orders including accounting and ASIC fees.*

Transfer of shares

Provision for the registration of the transfer of shares is contained in section 1072F of the Corporations Act.

Corporations Act 2001 – Sect 1072F

Registration of transfers

1) *A person transferring shares remains the holder of the shares until the transfer if registered and the name of the person to whom they are being transferred is entered in the register of members in respect of the shares.*

2) *The directors are not required to register a transfer of shares in the company unless:*

   a) *the transfer and any share certificate have been lodged at the company's registered office; and*
   b) *any fee payable on registration of the transfer has been paid; and*
   c) *the directors have been given any further information they reasonably require to establish the right of the person transferring the shares to make the transfer.*

3) *The directors may refuse to register a transfer of shares in the company if:*
   a) *the shares are not fully –paid; or*
   b) *the company has a lien on the shares.*

Remedies

Remedies for refusal to register a transfer of shares are set out in section 1071F of the Corporations Act

Corporations Act 2001 – Sect 1071F

Remedy for refusal to register transfer or transmission

1) *If a relevant authority in relation to a company:*
   a) *refuses or fails to register; or*
   b) *refuses or fails to give its consent or approval to the registration of;*

   A transfer or transmission of securities of the company, the transferee or transmittee may apply to the Court for an order under this section.

2) *If the Court is satisfied on the application the refusal or failure was without just cause, the Court may:*

   a) *order that the transfer or transmission be registered; or*
   b) *make such other order as it thinks just and equitable, including:*
      i. *in the case of a transfer or transmission of shares – an order providing for the purchase of the shares by a specific member of the company or by the company; and*
      ii. *in the case of a purchase by the company – an order providing for the reduction accordingly of the capital of the company.*

   …

The discretion of the directors to refuse registration of a transfer of shares was discussed by the High Court in *Ascot Investments v Harper* wherein Justice Gibbs stated:

> *"...the directors are bound to exercise their discretion bona fide in what they consider to be in the interests of the company, and not for any collateral purpose, but subject to that qualification their discretion is absolute and uncontrolled.[28]"*

Section 90AE(1)(d) of the Family Law Act provides that in proceedings under s 79 the court may make an order directed to a director of a company or to a company to register a transfer of shares from one party to the marriage to the other party.

It would appear to deal with the circumstances in *Ascot Investments v Harper* and thus would prevent a party escaping an obligation to transfer property legitimately the subject of an order under s 79 to the other party to the marriage because of the refusal of a director of the company or the company itself to register the transfer. By reason of s 90AC it is irrelevant that it may override the articles of a company, the general law, or a state law.[29]

Disclosure

The Family Law Rules[30] bestow a general duty on the parties of full and frank disclosure of all information relevant to the case. A party is required to provide full and frank disclosure to their financial circumstance including "*any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity[31]*" and "*the party's other financial resources[32]*". The obligations on the parties to disclose documents is limited by relevance to an issue in the case and that the document, pursuant to rule 13.07(a):

> *"is or has been in the possession, or under the control, of the party disclosing the document"*

In ***Masoud & Masoud***[33] the Full Court considered the meaning of possession and control:

> *The obligation to disclose in family law proceedings is governed by Chapter 13 of the* Family Law Rules 2004 *(Cth) ("the Rules").* Rule 13.01 *of the Rules imposes a general duty to give "full and frank disclosure of all information relevant to the case, in a timely manner", whilst r 13.07 narrows the scope of the duty to "each document that is or has been in the possession, or under the*

[28] [1981] HCA 1, 349, 12
[29] *H & H* [2006] FAMCA 167, 72
[30] Family Law Rules 2004 rule 13.01
[31] Family Law Rules 2004 rule 13.04(1)(d)
[32] Family Law Rules 2004 rule 13.01 (1)(c)
[33] (2016) FLC 93-689

> *control of the party disclosing the document; and is relevant to an issue in the case"*[34]*.*
>
> *The meaning of "possession and control" has been considered extensively. For a document to be within the power of a party, the party must be in actual possession of it or must have an immediate indefeasible right at the time of discovery to demand possession from the person who has physical possession of it: see Lonrho Ltd v Shell Petroleum Co Ltd (No 1)* [1980] 1 WLR 627. *In Schweitzer & Schweitzer* [2012] FamCA 445*, O'Reilly J held at [45] that "possession" as contemplated by r 13.07 "means not mere physical possession (custody) but "possession" within the accepted meaning being "the legal right to possession": see in B v B, per Dunn J at 805; 807". Further, her Honour stated at [50] that a beneficiary of a discretionary trust "has no interest in the corpus, but only the right to require due administration of the trusts, and...is entitled to access to the financial documents of the trustees only for the purpose of ascertaining that there is due administration." In the present case, therefore, the husband has no access to the financial documents of the trustees beyond that required to ascertain there is due administration. It cannot be said that he has the requisite "control" of the trust deed that would warrant its disclosure.*[35]

Therefore, the Full Court held the bench mark was "*the legal right to possession",* and sections 198F and s 290 of the Corporations Act gives the right to directors to access the books of the company (other than financial records). This right extends to 7 years beyond when the individual ceased being a director.

[34] (2016) FLC 93-689, 19
[35] (2016) FLC 93-689, 20

Corporations Act 2001 – Sect 198F

Right of access to company books

1) A director of a company may inspect the books of the company (other that its financial records) at all reasonable times for the purposes of a legal proceeding:

a) to which the person is a party; or

b) that the person proposes in good faith to bring; or

c) that the person has reason to believe will be brought against them.

2) A person who has ceased to be a director of a company may inspect the books of the company (including its financial records) at all reasonable times for the purposes of a legal proceeding:

a) ...

***This right continues for 7 years after the person ceased to be a director of the company**.*

3) A person authorised to inspect books under this section for the purposes of a legal proceeding may make copies of the books for the purposes of those proceedings.

4) A company must allow a person to exercise their rights to inspect or take copies of the books under this section.

5) This section does not limit any right of access to company books that a person has apart from this section.

Corporations Act 2001 – Sect 290

Director Access (including to financial records)

1) A director of a company, registered scheme or disclosing entity has a right of access to the financial records at all reasonable times.

2) On application by a director, the Court may authorise a person to inspect the financial records on the director's behalf.

3) A person authorised to inspect records may make copies of the records unless the Court orders otherwise.

4) The Court may make any other order it considers appropriate, including either or both of the following:

a) an order limiting the use that a person who inspects the records may make of information obtained during the inspection;

b) an order limiting the right of a person who inspects the records to make copies in accordance with subsection (3).

In ***Hardcastle v Advanced Mining Technologies Pty Ltd***[36] Emmett J stated:

> *...the proceeding must be a proceeding to which the former director is a party or believes might be brought against him or her or which he or she proposes to bring in his or her capacity as a director of the company. It would be curious if a person who, fortuitously, happened to have been a director of a company in the past would be entitled to access to books of the company that might be material to proceedings brought by that former director or which might be brought against the former director in a capacity totally unconnected with the capacity of the former director as a director. I do not express any firm or final view on that question at this stage because it does not arise in the application before me. Section 1303 authorises intervention by the Court where a person in contravention of the law refuses to permit inspection*[37]*.*

In ***Rigby & Kingston (No 2)***[38] the husband and wife were married in 1991 and separated in 2015. The husband's assets were extremely modest. By contrast the wife was a woman of substantial means and she estimated her personal wealth to be in the order of $11,000,000. The husband sought orders compelling the wife to provide full and frank disclosure in respect of the Kingston Group.

The wife was a director of the corporations within the Kingston Group as were her two brothers. The wife was a minority shareholder in some of the corporations. The wife was a trustee of the trusts within the Kingston Group as were her two brothers and where there was a corporate trustee they were all directors. The wife was one of a number of beneficiaries in the discretionary trusts within the Kingston Group. The wife's two brothers objected to the production of the documents sought by the husband.

The wife maintained that she had and would continue to comply with her obligations of disclosure. She annexed to her affidavit a list of documents that have been disclosed by her to date in the proceedings.

Accordingly, the husband bore the onus of establishing that the wife had not fulfilled her obligations of disclosure. Specifically, that there were other documents that were or had been in her possession or control and that the documents were relevant to an issue in the case.

[36] [2001] FCA 1846
[37] [2001] FCA 1846, 25
[38] [2017] FamCA 953

Carew J held at 34 or 37 that:

> *"Sections 198F and 290 of the Corporations Act provide directors with a statutory right of access to books and financial records of a company however, the weight of authority suggests that a director's access is limited to circumstances where the access is for a purpose directly related to the interests of the company or where a director is defending a claim made against him/her by the company.*
>
> *The wife is one of three directors in the companies within the Kingston Group and one of three trustees in the trusts including the Kingston Testamentary Trust. There is no evidence that the corporate entities or trusts are the alter ego of the wife.*
>
> ***In my view the documents sought by the husband are not in the wife's possession or under her control in the relevant sense****.*
>
> *Accordingly, I propose to dismiss the husband's application against the wife in relation to further and better disclosure."*

In ***Schweitzer & Scheitzer***[39] the wife sought interim and procedural orders specifically in relation to disclosure of documents pertaining to two trusts; Schweitzer Investment Trust and Scheitzer Family Trust ("Trusts"). The wife sought financial accounts, bank statements and copies of minutes of resolution. The husband resisted disclosure namely that the documents were not relevant to the wife's claim. The husband was a director of both the companies that were corporate trustees of the trusts. Additionally, the husband was a primary beneficiary of the Investment Trust and a secondary beneficiary of the Family Trust. The appointor of each trust was the husband's father however, the husband was not a shareholder of each of the corporate trustees.

It was submitted on behalf of the wife that the trust documents requested by the wife should be disclosed by the Husband because:

> *a) as a director of the corporate trustees, he is entitled, pursuant to s 290 of the Corporations Act 2001 (Cth) to the financial records of the companies.*
>
> *b) as a beneficiary of the trusts, he is entitled to access to the financial documents in order to ascertain whether the Trusts are being properly administered.*

Justice O'Reilly held at p 15 that:

[39] [2012] FamCA 445

> *Having heard argument, I am satisfied for the purpose of* Rule 13.07(a) *that the documents sought by the wife are not and cannot be "in the possession" of nor "under the control" of the husband, in his personal capacity, and are not, on the facts of the case insofar as are established, "in the possession" of nor "under the control" of the husband in his capacity as a director of the corporate entities who are the trustees of the two trusts nor in his capacity as a beneficiary.*

And at p 40:

> *Under the Family Law Rules 2004, the duty of disclosure applies to "all cases". The process of disclosure however, by Rules 13.08, 13.10, 13.12 and 13.13, is that all documents disclosed must be produced for inspection and copying, unless one of the grounds identified obtains. The process of disclosure thus is that once there is disclosure there is mandatory production for inspection and the provision of copies of the disclosed documents, unless the specific grounds for objection obtain (there being no residual discretion, unlike in the Family Law Regulations, regs 83-88, under consideration in Barro (No 2)).*

O'Reilly J concluded at p 54 and 55 that:

> *In my view, legally, it is a correct contention that the disclosure the wife seeks must be directed to the corporate trustees by the proper officer of each.*
>
> *The husband is one of two directors of one of the entities, and one of three directors of the other entity. He is a shareholder in neither. Objectively, there is no evidence to suggest that either entity is the husband's alter ego.*

Foreign Corporations

The Family Court has power to reach foreign corporations. In *Gould and Gould; Swire Investments Ltd*[40] , the Full Court dismissed a challenge to its authority by the respondent foreign corporations and held:[41]

- while the general doctrine of common law is that in the absence of a submission to the jurisdiction by a defendant, civil jurisdiction is territorial[42]**.** Section 31(2) of the Family Law Act provides the Family Court with an extra-territorial jurisdiction both as

[40] (1993) FLC 92-434 at pp 80,432–80,433
[41] *CCH 41-040] Family Court jurisdiction over family companies pursuant to the Family Law Act*
[42] refer to *Gosper & Ors* v *Sawyer & Anor* (1985) 160 CLR 548 at pp 564–565

regards "persons" and "things" in broad, general language. The words "subject to such restrictions and conditions" in s 31(2) should not be read as empowering the Regulations or the Rules to exclude the jurisdiction otherwise given to the court by the statute

- service may be effected upon the company's principal place of business or its principal office in the state or territory where a company does not have a registered office in the state of the filing registry
- the *Foreign Corporations (Application of Laws) Act 1989* is choice of law legislation. While s 7 of this legislation provides that any question relating to the rights and liabilities of members of foreign corporations and its shareholders or the existence, nature and extent of any interest in a foreign corporation may only be determined by the law of the place of incorporation of that foreign corporations and not by Australian law, it in no way detracts from the jurisdiction of the Family Court to make orders under s 106B of the Family Law Act or otherwise.

9. THIRD PARTIES AND PROPERTY PROCEEDINGS

Family Law Rules 6.02 Necessary Parties

> *(1) A person whose rights may be directly affected by an issue in a case, and whose participation as a party is necessary for the court to determine all issues in dispute in the case, must be included as a party to the case.*

The objective of the rule is if the intervener's substantive rights would be affected by the orders sought in proceedings and their participation maybe necessary for the court to determine the fact in issue[43].

Rule 6.02(2) of the Family Law Rules provide for categories of persons who may intervene in the Family Law proceedings without the Court's permission. Namely, a creditor to the party's whose interests may be affected, Attorney General or an individual who is relevant to the welfare of the child. Once proceedings have begun a party may add another party by amending their application or response to add the name of that party.[44] An accompanying Affidavit must be filed outlining fact which support the addition of this party to proceedings, then this material is served on that party[45].

Prior to the insertion of Part VIIIAA of the *Family Law Act* 1975 (Cth) the power of the Family Courts to bind third parties was governed by the High Court decision in *Ascot Investments Pty Ltd v Harper* (1981). The courts power was subordinate to their power to bind parties to a marriage. As a result the court would make orders on parties to the marriage personally not in their capacity as a director or trustee.

The introduction of Part VIIIAA of the Family Law Act in 2004 extended the courts reach to bind third parties. The section provides the court with power in relation to the property of a party to a marriage to make an order or grant an injunction that is directed to or alters the rights, liabilities or property interests of a third party. Section 90AB provides a definition of a third party as "*in relation to a marriage, means a person who is not a party to the marriage*". The Family Law Act expressly provides for the Family Court to vary and diminish the rights of third parties (including corporations) subject to conditions set out in s 90AE and 90AF.

The Explanatory Memorandum that accompanied the Bill contained the following:

[43] *Hankinson v De Vries* (2013) 50 Fam LR 79; [2013] FamCA 455; BC20135543
[44] Rule 6.03 of the Family Law Rules
[45] Rule 6.03 of the Family Law Rules

145. Section 90AE provides that when making an order altering the property interests of the parties to a marriage the court has power to make an order binding a third party.

146. This is intended to cover a range of possible interests that a party to the marriage may have, including ownership of life insurance products that offer benefits similar to superannuation. IT will also mean, for example, that lending institutions can be bound by court orders that make one of the parties liable for a debt.

147. The range of orders is intended to be broad and includes substitution of the party liable for a debt, adjusting the proportion of debt that each party is liable for or ordering the transfer of shares between the parties to a marriage.

148. The provision is intended to apply only to the procedural rights of a third party it is not intended to extinguish or modify the underlying substantive property rights of the parties. The order can only be made if it is reasonably necessary or appropriate to affect the division of property between the parties and the third party must be provided procedural fairness. The order also cannot be made if is it unlikely that the result of the order would be a debt not being paid in full.

Rule 6.02 of the Family Law Rules 2004

Necessary parties

1) *A person whose rights may be directly affected by an issue in a case, and whose participation as a party is necessary for the court to determine all issues in* dispute in the case, must be included as a party to the case.

Example: If a party seeks an order of a kind mentioned in section 90AE or 90AF of the Act, a third party who will be bound by the order must be joined as a respondent to the case.

In **H & H**[46] the constitutional validity of s 90AE(2) and 90AF(2) was considered. The wife commenced proceedings to set aside transfers of shares in a company from executors of an estate to her husband. The Second and Third Respondent challenged the application on its Constitutional validity. Do Courts acting under the jurisdiction of the Family Law Act have the power to alter the rights or property of third parties to the marriage?

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[46] [2006] FamCA 167

It was submitted by the respondent that insofar as s 90AE(2)(a) and s 90AF(2)(a) purport to permit the Court to alter the substantive rights, liabilities or property interests of a third party corporation to act other than to reflect in its statutory registers the legal entitlements of member to exercise their rights as members; they are not valid laws of the Commonwealth because such orders are not, and cannot be, with respect to "marriage" , or with respect to "divorce" or "matrimonial causes", within the meaning of s51(xxi) and s51(xxii) of the Constitution. Whether the law is within the marriage power depends on whether the connection between the law and the marriage is sufficiently close to enable the court to say that the law is with respect to marriage. It was submitted that a law which permits the alteration of unqualified substantive property rights of a third party where there is no alter ego of sham assertion is not a law with respect to marriage, divorce or matrimonial causes. [18]

His Honour stated that:

Section 90AE confers certain powers to make orders under s 79 binding third parties. The power is discretionary and there is no obligation to make any of the orders identified in the section. The discretion given by s 90AE(1) and s90AE(2) must however, be exercised by reference to the matters set out in s 90AE(3) and s 90AE(4). The discretion is therefore broad but is not unfettered. The third party must be accorded procedural fairness in relation to the making of an order under s 90AE. Further, the court must always make orders that are just and equitable. [71]

The effect of s 90AE(3) is to prescribe circumstances which must exist before the Court can exercise its discretion to make an order under s 90AE(1) or s 90AE(2). It sets out preconditions to the exercise of power. So, if the court were satisfied that the conditions in s 90AE(3)(c), (d) and (e) were met, and that for the purposes of s 90AE(3)(a), the making of the order were either "reasonably necessary" or was "reasonably appropriate and adapted, to effect" what s 79(1) is directed to achieving, namely, a division of property between spouses, the court can then make an order. [73]

The matters in s 90AE(3) include the matters in s 90AE(4) and relevantly include the economic, legal or other capacity of the third party to comply with the order ...and if as a result of the third party being accorded procedural fairness, it raises any other matters, the court must take into account those matters (see s 90AE(4)(g)).[74]

To the extent that the laws of a State would apply to interfere with the exercise of power under s 90AE(1) or s 90AE(2), s 90AC has the effect of excluding the operation of those laws and, if s 90AE(1) and s 90AE(2) are a valid law, by reason of that exclusion s 109 of the Constitution makes the State laws inoperative[47].[75]

Conclusion

Justice O'Ryan found at [121 to 124] that:

I am of the opinion that s 90AE(2) and s 90AF(2) are laws with respect to marriage, divorce or matrimonial causes, or at least incidental thereto, given that they are to be made in the case of s 90AE, in proceedings under s 79 for division of property orders, which orders are "central" to the marriage power and in the case of s 90AF, in proceedings under s 114, which confers power on the Court to grant injunctions, but only in proceedings of the kind referred to in para (e) of the definition of "matrimonial cause" in s 4(1). This creates a sufficient connection with each of the marriage, divorce and matrimonial causes powers.

The scheme of Part VIIIAA and the relevant impugned provisions is such as to ensure that the capacity of the court to make orders which affect third parties is carefully constrained and remains sufficiently connected to the marriage, divorce or matrimonial cause powers which support it.

I am of the opinion that s 106B of the *Family Law Act* is a valid law of the Commonwealth.

I am also of the opinion that s 90AE(2) and s 90AF(2) of the *Family Law Act* are valid laws of the Commonwealth.

In ***State of Victoria v Sutton***[48] McHugh J articulated the appropriate principle as follows:

The rules of natural justice require that, before a court makes an order that may affect the rights or interests of a person, that person should be given an opportunity to contest the making of that order. Because that is so, it is the invariable practice of

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[47] *P v P (supra) at p 607 per Mason CJ. Deane, Toohey and Gaudron JJ.; Western Australia v The Commonwealth (The Native Title Case) [1995] HCA 47; (1995) 183 CLR 373 at pp 464-468 per Mason CJ., Brennan. Deane. Toohey. Gaudron and McHugh JJ.; Botany Municipal Council v Federal Airports Authority [1992] HCA 52; (1992) 175 CLR 453 at pp 464-466; Bayside City Council v Telstra Corporation Ltd [2004] HCA 19; (2004) 216 CLR 595 at pp 627-629 per Gleeson CJ., Gummow, Kirby and Heydon JJ*

[48] [1998] HCA 56; 195 CLR 291

> *the courts to require such a person to be joined as a party if there is an **arguable possibility** that he or she may be affected by the making of the order. (emphasis added)*[49]

In ***Hancock Family Memorial Foundation Ltd v Fieldhouse [No 3]***[50], Le Miere J helpfully referred to relevant authorities and articulated, in precise terms, why it is necessary for a party seeking to join a third party to litigation to establish an unarguable case, in the following terms:

> *The applicant on a joinder application must show that there is an arguable case sufficient to resist the entry of summary judgment by the parties sought to be joined: Universal Music Australia Pty Ltd v Cooper [2004] FCA 78 [6] (Tamberlin J). The test is that stated by Barwick CJ at 128 - 129 in General Steel Industries Inc v Commissioner for Railways (NSW) [1964] HCA 69; (1964) 112 CLR 125: Universal Music Australia Pty Ltd v Cooper [7] (Tamberlin J); Review Australia Pty Ltd v Red Berry Enterprises Pty Ltd [2003] FCA 1009 [5] (Heerey J). It would be futile to order that a person be joined as a defendant if the material before the court disclosed that if the person, having been joined as a defendant, applied for summary judgment the application would succeed.*[51]

Liquidator

A liquidator may make application to the court for directions under s 479(3) of the Corporations Act. A liquidator may also bring or defend any legal proceeding in the name and on behalf of the company under s 477 of the Corporations Act.

[49] [1998] HCA 56; 195 CLR 291 paragraph 77
[50] [2010] WASC 223
[51] [2010] WASC 223, 9

10. CASE STUDY: FAMILY FARM TRADING INSOLVENT AS PARTIES FAIL TO REACH AGREEMENT

X Pty Ltd (Administrator Appointed) & Milstead and Anor [2015] FamCAFC 50

At trial the husband was 60 years of age. The wife was 53 years of age. The parties met between September 1999 and January 2000 and separated on 5 March 2010. There were no children of their relationship.

In about 2005, X Pty Ltd and the husband established a partnership to operate a farming enterprise. There was no written partnership agreement, but a substantial part, if not all income earned by the husband, was paid into the accounts of the partnership.

A substantial part of the reasons of the primary judge concerned the property division between the husband and the wife, and his Honour only briefly considered the question of orders being made that affected X Pty Ltd. The Notice of Appeal only asserted errors by the primary judge in relation to that issue.

X Pty Ltd was not in administration at the time of the trial. The primary judge recorded that the evidence had closed on 16 August 2013, with final written submissions provided in October 2013. His Honour further recorded that Mr J had placed the company into voluntary administration in December 2013, whilst judgment was reserved.

In January 2014, the husband filed an interlocutory application seeking the following order:

> *That until further order the appointment of Mr [I], Registered Liquidator No. […] and partner in the firm […] as External Administrator be stayed.*

Relevantly, in relation to the issue of whether his Honour had jurisdiction to make the orders now the subject of the appeal, his Honour said this at [157]:

> *Issues of my jurisdiction to make the orders sought by the applicant were raised on 17 January with the result being that an undertaking was received from the administrator not to dispose of or encumber the assets of [X Pty Ltd]/the trust. No other application to re-open the proceedings was otherwise before me. I do note however that the administrator has particular duties and obligations in respect of essentially the same assets and liabilities dealt with in this litigation. It seems that the administrator also has further and separate liabilities to consider. In those circumstances there will be an order giving leave for the administrator of [X Pty Ltd] as delegated trustee of the [Trust] to apply in respect of the implementation of my orders.*

Grounds of Appeal

X Pty Ltd advanced the following grounds of appeal in the Notice of Appeal filed 17 March 2014:

1. The First Respondent to the appeal, being the Applicant in the proceeding before his Honour Judge McGuire, did not seek the leave of the Family Court of Australia or the Federal Court of Australia to proceed with the proceeding against the Appellant company during the administration of the company contrary to section 440D of the Corporations Act.

2. The Federal Circuit Court of Australia did not have jurisdiction to make Orders concerning or affecting the administration of the Appellant company's administration under Part 5.3A of the Corporations Act.

3. The Orders against the company give the First Respondent a priority over other unsecured creditors contrary to section 556 of the Corporations Act.

4. The Orders concerning the property of the Appellant company were contrary to section 437D(2) of the Corporations Act.

X Pty Ltd sought the following orders on appeal:

1. That the appeal be allowed.

2. That leave be granted for the proceedings to be proceeded with under section 440D of the Corporations Act (subject to the following orders).

3. That the amount the Appellant is ordered to pay the First Respondent, treated as an unsecured debt.

4. There be no order in relation to any of the Appellant's property.

Relevant Statutory Framework

440D Stay of Proceedings

1. During the administration of a company, a proceeding in a court against the company or in relation to any of its property cannot be begun or proceeded with, except:

(a) with the administrator's written consent; or

(b) with the leave of the Court and in accordance with such terms (if any) as the Court imposes.

To the extent that s 440D(1)(b) above refers to the Court, s 58AA of the Corporations Act provides that the Family Court of Australia may be such a Court.

X Pty Ltd also relied on ss 556 and 437D(2) of the Corporations Act in asserting that the orders made by his Honour were made in error. Relevantly, s 437(D)(2) of the Corporations Act provides as follows:

437D Only administrator can deal with company's property

1. This section applies where:

(a) a company under administration purports to enter into; or

(b) a person purports to enter into, on behalf of a company under administration;

A transaction or dealing affecting property of the company.

2. The transaction or dealing is void unless:

(a) the administrator entered into it on the company's behalf; or

(b) the administrator consented to it in writing before it was entered into; or

(c) it was entered into under an order of the Court.

Section 556 of the Corporations Act provides that when a company is wound up, certain payments, including those of external administration, and certain debts are paid in priority over any other unsecured debt. The section provides for the order of payments for such debts.

The issue, on appeal, was whether the proceedings before the trial judge were proceeded with within the meaning of s 440D of the Corporations Act after X Pty Ltd was placed in voluntary administration.

In considering this question the Full Court applied the principles of statutory interpretation and referenced the object of Part 5.3A of the Corporations Act, being the Part of that Act where s 440D appears. The object of that Part as set out in s 435A is relevantly expressed as being to provide for the business, property and affairs of an insolvent company to be administered in a way that maximises the chances of the company continuing in existence or, if that is not possible, in a way that results in a better return for the company's creditors.

The Full Court then considered the legislative history of s 440D before saying at [41]:

> *It can therefore be seen that the purpose for the initial enactment of what is now s 440D of the Corporations Act was to, so far as possible, and insofar as the company was not the moving party, freeze the financial circumstances of the company in question, to permit the administrator to devise a plan of action for the future of the company in conformity with the statutory objects of s 435A. The legislature did so by prohibiting proceedings or enforcement being commenced, and by statutorily staying any extant proceedings or enforcement process. Given that purpose, it would be anomalous if s 440D permitted the adjudication upon extant proceedings, either against the company or in relation to its property, to nonetheless conclude by judgment during the moratorium period. That is because a judgment may create rights and liabilities which otherwise do not exist either at law or in equity, or adjust rights.*
>
> *The judgment in question is a good example of that, in that it created a liability on the part of X Pty Ltd which did not exist prior to judgment, and further required [real property belonging to X Pty Ltd] to be sold to satisfy the debt just created if it was not paid within 60 days.*

The Full Court ultimately found that the trial judge should not have proceeded to deliver judgment and make the orders and therefore allowed the appeal, set aside the trial judge's orders and remitted the matter for rehearing.

11. Other References

- Geoff Dickson QC and Albert Dinelli, *'Corporations Law: the elephant in the [Family Court] room',* paper delivered to the Law Council of Australia, Family Law Section, October 2016.
- Susan Pearson, '*Corporations Act Powers in Family Law Matters'*, paper delivered to the Second Annual Melbourne Family Law Conference, 9 March 2017.
- Australian Securities and Investments Commission (ASIC).
- *Family Court Bulletin* Issue 16, July 2015
- CCH References; Australian Family Law & Practice Premium Commentary [2-875], [41-040]