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THIRD PARTY ORDERS AND INJUNCTIONS

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Part VIII A A of the Family Law Act 1975

Third Party Orders and Injunctions

The new Part VIII A A of the *Family Law Act 1975* ("the Act") came into effect on 17 December 2004. Put simply, subject to certain limitations, Part VIII A A now enables the Family Court and Federal Magistrates Court to make orders or injunctions which are binding upon third parties and which affect the rights and interests of third parties.

The Explanatory Memorandum to the Bill which introduced the new Part VIII A A stated in relation to certain sections of Part VIII A A that:

"The provision is intended to apply only to the procedural rights of the third party, it is not intended to extinguish or modify the underlying substantive rights of third parties."

The specific legislative provisions of Part VIII A A go further than this description would suggest. The object of Part VIII A A is described in section 90 A A as being to allow the Court to make an order or grant an injunction "*in relation to the property of a party to a marriage*" that is "*directed to, or alters the rights, liabilities or property interests of a third party*". Arguably, the specific powers under the Act go even further than this.

Irrespective of whether the Court interprets the third party provisions in a limited or an expansive manner, there is no question that the powers of a Court exercising jurisdiction under the Act to make orders or grant injunctions affecting third parties are much wider than they were prior to 17 December 2004.

This paper will examine the relevant provisions of Part VIII A A of the Act and the practical considerations for family lawyers. It will also consider the principles which are beginning to emerge from cases in relation to the third party provisions.

Third parties defined

The definition of a third party appears in section 90 A B of the Act. A third party is now defined broadly as "*a person who is not a party to the marriage*". By virtue of the *Acts Interpretation Act 1901*, a person includes a body politic or corporate.

Third parties who may be most impacted by the provisions include:

- Individuals, including friends or relatives of the parties;
- Banks and other financial institutions;
- Creditors to a party of the marriage or both of them;
- Guarantors;
- Companies;
- Trustees and Appointors of trusts; and
- Executors of deceased estates.

The Explanatory Memorandum to the amending legislation confirmed that the broad definition was intended to "*include individuals including friends or relatives of the parties to the marriage, businesses and financial institutions*".

Recent cases have dealt with third parties including:

- The adult son and daughter of the parties and a family company in which the husband allegedly divested himself of a 10% shareholding: *Custodio and Pinto & Ors (2006) FLC 93-279*.
- Companies and the executors of a deceased estate: *Marriage of Hunt FamCA Unreported SYF5009/03 (14 March 2006)*
- The husband's father and mother and associated companies: *R & R and Ors [2006] FamCA 808 (23 August 2006)*
- A company in liquidation and the liquidator: *R & R and Ors [2006] FamCA 808 (23 August 2006)*
- Unrelated third party creditors: *AS & GW & AH [2006] FamCA 432 (3 May 2006)*
- Trustees of discretionary trusts of which the husband was a beneficiary: *K & K and Ors [2005] FamCA 997 (21 September 2005)*

These cases will be examined in more detail later in this paper.

The position of third parties prior to 17 December 2004

Prior to the introduction of the third party provisions, the leading case on the position of third parties in family law matters was the case of *Ascot Investments Pty Ltd v Harper (1981) FLC 91-000*.

That case is an example of the Court's reluctance to intrude upon the rights of a third party. The High Court held that the Act did not allow "*an order to be made if its effect was to*

deprive a third party of an existing right or to impose upon a third party a duty to which the party would not otherwise be liable to perform".

Exceptions to this general proposition applied if the transaction was a "sham transaction" designed to avoid an obligation under the Act, or if the third party was an entity controlled by a party to the marriage.

This position did not prevent the Family Court from making orders for the division of property which had the consequence of reducing the assets of a party to the marriage and therefore the chances of an unsecured creditor recovering a liability from that party.

In *Ascot Investments*, Justice Gibbs made the following pertinent observation in relation to the Court's approach to third parties:

"It would be unreasonable to impute to the parliament an intention to give power to the Family Court to extinguish the rights and enlarge the obligations of third parties in the absence of clear unambiguous words".

Part VIII A A

Part VIII A A introduced the "clear unambiguous words" which were absent at the time that Justice Gibbs delivered his judgment in *Ascot Investments*.

As noted earlier, the object of Part VIII A A is to enable the Family Court to make orders and grant injunctions directed to third parties or altering the rights, liabilities or property interests of third parties.

The important specific legislative powers, which are contained in ss 90AE and 90AF of the Act, are discussed in some detail below.

s 90AE(1) and s 90AE(2) - Third parties and s 79 orders

Section 90AE is concerned with property orders under s 79. It sets out the types of orders that the Court may make under s 79 to bind a third party.

Section 90AE(1) now enables a Court make the following types of orders under s 79:

- Orders directing creditors to substitute the parties to a marriage in relation to a debt owed to a third party creditor. For example, the Court can direct the third

party creditor to make a husband solely liable for the debt of his wife, or to make the husband solely liable for a joint debt of the parties: ss 90AE(1) (a) and (b).

- Orders directing third party creditors to alter the proportions of a debt for which the parties are liable. For example, a husband and wife might be jointly and severally liable for a debt. The Court can direct a creditor to change this liability so that the husband and wife are each liable for 50% of the debt, or so that the wife is liable for 80% and the husband liable for 20% of the debt: s 90AE(1)(c).
- Orders directing a third party company or a third party who is a director of a company to register a transfer of shares from one party of the marriage to the other: s 90AE(1)(d).

The powers contained within ss 90AE(1)(a), (b) and (c) relate specifically to third party creditors. The introduction of these provisions attracted understandable expressions of concern from banks and financial institutions. The Australian Bankers Association ("ABA") and the Investment and Financial Services Association Ltd ("IFSA") each made strong submissions to the Senate Legal and Constitutional Committee expressing concern about the impact of s 90AE as well as the other provisions of Part VIIIAA.

Their concerns included:

- The increased risk and exposure to creditors which could result from substitutions of borrowers.
- The potential for the Court to usurp a creditor's assessment of a borrower's creditworthiness.
- The potential for an order under the Act to deprive a creditor of recourse to one of the original borrowers, either wholly or partially.
- The potential for a borrower being substituted in circumstances where a creditor might not have been willing to offer credit to that party on the same terms as it did to the original borrower.

The ABA and IFSA both expressed concern that the description of the changes in the Explanatory Memorandum appeared to be far removed from the actual legislative provisions.

The power of the Court under s 90AE(1)(d) to direct a company to register a transfer of shares has also attracted the attention of commentators. The primary concern relates to the removal of a board's discretion to accept or reject a proposed transfer of shares in a private proprietary company. In his paper entitled "Third Parties in Family Court Proceedings - Proposed Legislation Changes", September 2003, Jeremy St John SC of the Victorian Bar observes that s 90AE(1)(d) "*potentially supervenes entirely the fiduciary discretion of independent directors in considering proposed transfers of shares*". An order under Part VIII AA may force a board to register a transfer of shares which would otherwise be regarded as contrary to the best interests of the company. It is certainly conceivable that a spouse or former spouse receiving a transfer of shares pursuant to these provisions may cause headaches for the board.

In addition to the specific powers in s 90AE(1), s 90AE(2) provides the Court with a broader power to make an order under s 79 that:

- a) directs a third party to do a thing in relation to the property of a party to a marriage; or
- b) alters the rights, liabilities or property interests of a third party in relation to the marriage.

The powers contained in s 90AE(2) are wide and non specific. The wording of s 90AE(2)(b) does not require that an order be in relation to the property of the marriage, but merely "in relation to the marriage". This goes further than the object of Part VIII AA set out in s 90AA.

s 90AF(1) and s 90AF(2) - Third parties and injunctive orders

Section 90AF is concerned with injunctive orders under s 114. It sets out the types of injunctive orders that the Court may make under s 114 to bind a third party.

Section 90AF(1) provides that a Court may make an order under s 114 restraining a third party from repossessing property of a party to the marriage or an order restraining a third party from commencing legal proceedings against a party to the marriage.

Again, s 90AF(1) is very powerful. Not surprisingly, the ABA and the IFSA both expressed concerns in relation to these sections.

Section 90AF(2) mirrors s 90AE(2). It is a broad provision that enables the Court to make wide ranging injunctive orders under s 114 that are binding on third parties, including orders that direct a third party to do "a thing in relation to the property of a party to the marriage" or orders that alter the rights, liabilities or property interests of a third party "in relation to the marriage".

Primacy of Part VIII A A

The powers under Part VIII A A are enhanced by s 90AC, which purports to give the provisions of Part VIII A A primacy over all other Australian laws or any provision in a trust deed or instrument. It provides that a third party acting in compliance with Part VIII A A is not to be regarded as having contravened any such law or instrument.

The limitations on orders under Part VIII A A

Part VIII A A includes certain express limitations on the power of the Court to make orders affecting the rights of third parties. These limitations include the following:

- The making of the order or injunction must be reasonably necessary or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage: ss 90AE(3)(a) and 90AF(3)(a).
- If the order or injunction concerns a debt of a party to the marriage, it must not be foreseeable "at the time the order is made" that the order would result in the debt not being paid in full: ss 90AE(3)(b) and 90AF(3)(b).
- The third party must have been accorded procedural fairness in relation to the making of the order: ss 90AE(3)(c) and 90AF(3)(c).
- In the case of a s 79 order, the Court must be satisfied that it is just and equitable to make the order - ss 90AE(3)(d);
- In the case of a s 114 order or injunction,
 - The Court must be satisfied that it is proper to make the order or grant the injunction - ss 90AF(3)(d); and
 - the Court must be satisfied that in all the circumstances it is "just or convenient" to grant the injunction: ss 90AF(3)(e).

In the case of both orders under s 79 and orders or injunctions under s 114 which affect the interests of a third party, the Court "must take into account" the following matters:

- the taxation effect of the order or injunction on the parties to the marriage and the third party: ss 90AE(4)(a) and (b) and 90AF(4)(a) and (b);
- the social security effect of order or injunction on the parties to the marriage (but not specifically to the third party): ss 90AE(4)(c) and 90AF(4)(c);
- the third party's administrative costs: ss 90AE(4)(d) and 90AF(4)(d);
- if the order concerns a debt of a party to the marriage, the capacity of the party to repay that debt after the order is made or the injunction is granted: ss 90AE(4)(e) and 90AF(4)(e);
- the economic, legal or other capacity of the third party to comply with the order or injunction: ss 90AE(4)(f) and 90AF(4)(f);
- any other matters raised by the third party: ss 90AE(4)(g) and 90AF(4)(g); and
- any other matter that the court considers relevant: ss 90AE(4)(h) and 90AF(4)(h).

Another important limitation on the power of the Court to make an order or grant an injunction under Part VIII A is found in s 90AK(1). This section provides that the Court must not make an order or grant an injunction which would "result in the acquisition of property from a person otherwise than on just terms" and would be invalid because of paragraph 51(xxxi) of the Constitution. Whilst the section is a further limitation on the power of the Court, it is also perhaps a reflection of the breadth of powers granted by Part VIII A. There is a clear implication from this section that Part VIII A enables orders to be made under the Act which will result in property being "acquired" from a third party.

The practical implications

Family lawyers should be aware of the practical implications of Part VIII A for their clients. There are many categories of cases which could potentially attract the provisions of Part

VIII A A. Depending upon which party a lawyer is representing, the new provisions can be either useful or dangerous.

The application of the third party provisions is conceivably very wide. They must however be considered in the context of the express limitations contained in the legislation. The Court's interpretation of these limitations will be particularly important. One would not expect that the requirement that an order must be reasonably practical or reasonably necessary to effect a division of property between the parties will be an easy threshold to overcome in many situations. Similarly, the requirement that it must not be foreseeable at the time of the order that the order would result in a debt not being paid in full will be important, particularly in the context of the Court's powers to substitute parties in relation to that debt or grant injunctions in relation to enforcement of debts.

As judicial interpretations of these provisions emerge, the position of parties to the marriage and third parties will become clearer. The reported cases to date deal largely with matters at the interlocutory stage, and have not included any detailed guidance as to how the Court will interpret the limitations in relation to final orders.

Interests in companies

The new provisions could apply in various ways to cases where one or both parties to a marriage have an interest in a company, be it a family company or a company with unrelated shareholders.

The provisions of Part VIII A A can be used in the following ways:

- To obtain an order compelling a third party company to register a transfer of shares in that company from one party of the marriage to the other.
- To obtain an order restraining the third party company from entering into transactions that would impact upon the value of party's share in a company.
- To obtain orders substituting or differently apportioning the debts owed to a company by a party or parties to the marriage.
- Perhaps, in limited circumstances, to obtain orders requiring a company to transfer property of the company to a spouse. One would expect that this type of order would only be made if the party to the marriage had effective control of the company assets.

- To obtain an order restraining a third party company from commencing legal proceedings against a party to the marriage.
- To obtain an order restraining a third party company from seeking to recover property from a party to the marriage. For example, if a party to the marriage has no interest in the company but has had the use of company assets during the marriage, they might seek to prevent those assets from being recovered by the company upon the breakdown of the marriage.

Creditors

The application of Part VIII A A to creditors is particularly important. The provisions can apply to any third party creditor, including banks and financial institutions, trade creditors, family companies or relatives who have advanced funds to a party of the marriage.

A party can seek the following types of orders in relation to creditors under Part VIII A A:

- Orders substituting the parties liable for a debt owed to a third party creditor or altering the apportionment of such a debt between the parties to the marriage. For example, liabilities pursuant to a mortgage, personal loan or credit card could be shifted entirely or in part between the parties to a marriage.
- Orders restraining enforcement action by a third party creditor pending the resolution of a family law matter. For example, a bank could be restrained from exercising a power of sale under a mortgage.

Trust structures

Trust structures are not uncommon in family law matters. Prior to the introduction of Part VIII A A many cases have examined the issue of whether property held in a trust, particularly in a discretionary trust, should be treated as matrimonial property.

This paper will not examine that issue in detail, save to refer to the general principle that if a party is found to have control of the assets of a discretionary trust, the Court has been willing to treat the assets of the trust as property of that party for the purpose of s 79 proceedings. The Court examines the level of control that a party has over the trust before making a finding as to whether the assets should be regarded as the property of one or both of the

parties (see, for example, *Kelly and Kelly (No 2) (1981) FLC 91-108* and *Goodwin and Goodwin Alpe (1991) FLC 92-192*).

Prior to the new Part VIII A A, the Court has treated assets of a trust in the following ways:

1. The property of the trust could be regarded as property of a party or the parties to the marriage. If this approach was adopted, the property of the trust was available for distribution between the parties (see *Kelly and Kelly No 2 (1981) FLC 91-108*, see also however *BP and KS (2003) FLC 93-157*).
2. The property of the trust could be regarded as a financial resource of one or both of the parties to the marriage (see, for example, *Webster and Webster [1998] FLC 92-832*). In such cases, the property of the trust would usually not be available for division between the parties, but could be taken into account when the Court determined the appropriate division of other property held outside of the trust.
3. The potential interest of a party in the property of the trust could be regarded as neither property or a financial resource, but a mere expectation. In these circumstances, the trust assets would not be taken into account in a significant way.

The impact of Part VIII A A could be significant in each of these scenarios:

1. In the case where the assets of a trust are treated as property, the orders available to a Court are wider. They can make orders compelling a third party trustee directly to "do things" in relation to that property, such as transferring the property of a trust to the other spouse. The Court can grant injunctions directly against a third party trustee.
2. In the case where the assets of the trust are found only to be a financial resource, the impact could be more significant. Subject to the express limitations in Part VIII A A, the Court could potentially make orders in relation to those assets. It is arguable that s 90AE(2)(a) would not apply, because the order would not relate to "property of a party to the marriage". However, s 90AE(2)(b) enables a Court to make an order under s 79 which alters the property interests of a third party "in relation to the marriage". There is no specific requirement in this subsection that the order relate to the property of the parties to the marriage. It would appear that the Court has the power to make orders directing a third party trustee to "do things" or make injunctions

in relation to the assets of a trust notwithstanding that those assets are not regarded as property of a party to the marriage, but merely a financial resource. These provisions could be particularly useful in cases where there are minimal assets outside the trust available for distribution between the parties.

3. The issue in relation to a "mere expectation" is similar to that in relation to a financial resource. Can the Court make orders or injunctions that are binding on a third party trustee when the only interest that a party to the marriage has in relation to the assets of a trust is that of a mere expectation? This very issue came before Her Honour Justice Morgan in the context of an application to amend an Application for Final Orders in the case of *K and K Ors (2005) FamCA 997*. Justice Morgan was not required to make a final determination, but did conclude that the wife had an arguable case under Part VIII AA.

The consequences of Part VIII AA in relation to discretionary trusts will potentially be significant. The new Part VIII AA appears to provide the Court with the legislative power to depart from long established principles of the law of trusts. Whether the Court chooses to depart from these principles is another question entirely.

Joint interests in real properties

It is not unusual for a party to a marriage to hold an interest in real property jointly with a third party, such as a sibling, relative or business partner. The new Part VIII AA enables the Court to make orders in relation to that property which would affect the interests of a third party.

In *K and K and Ors (2005)* at p22, Justice Morgan cited the commentary of Anthony Dickey QC (2005 79ALJ 483) and made the following observation:

A useful example of the conundrum posed by the above provision is provided by Anthony Dickey QC (2005 79ALJ 483). He asked whether a wife might properly seek an order for the transfer of the whole interest in a former matrimonial home of which the husband and his brother are joint owners. Section 90AE(2)(b) provides that in proceedings under section 79 the Court may make an order which alters the rights, liabilities or property interests of third parties. However, the provision concludes with the words "in relation to a marriage". If this means that

the alteration of third parties' rights must pertain to the marriage then the Court could make such an order. Dickey suggests that this is because this would be an alteration of third-party property interests in relation to the marriage. Section 90AE(2)(b) suggests such a wide power.

Sham Transactions and Part VIII A A

The Family Court has long had the power to set aside transactions entered into by or on behalf of a party with the intention to defeat an order of the Court or which is likely to do so. That power is found in s 106B(1) of the Act:

In proceedings under this Act, the court may set aside or restrain the making of an instrument of disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.

Under s 106B(3), the court must have regard to the interests of a bona fide purchaser or other interested person and any orders must protect such persons. There is no similar protection found in Part VIII A A in relation to orders effecting third parties.

Section 106B(1) requires that there is an existing or anticipated order at the time that the transaction takes place, not merely an anticipated claim. It is not sufficient if it is anticipated that there would be a claim. Since the introduction of Part VIII A A, in the event that this requirement or other requirements under s 106B cannot be met, a party may have the option of seeking an order against the property third party using the new third party provisions. One would imagine that Court will still be reluctant to infringe upon the rights of a bona fide third party.

Section 78 declarations

Section 78 of the Act enables the Court to make a declaration in relation to the title or rights that a party of a marriage may have in respect of property. This section could possibly be used by parties to a marriage to protect particular items of property against claims made by third parties.

The case of *Hendler and Hendler (1992) FLC 92-321* is an example of the use of a s 78 declaration prior to the introduction of Part VIII A A. The wife sought a declaration that funds gifted by the husband to his brother were in fact the property of the husband and the wife.

The trial judge made such a declaration, but on appeal the Full Court found that the trial judge ought not have made the declaration. At the time, the Court had no power to make a determination in relation to the property of a third party.

Prior to 1988, s 78(3) specifically provided that declarations and orders as to property rights made under s 78 were binding on the parties but not on any other person. This provision was repealed in 1988, but the jurisdiction of the Court to make orders affecting third parties was still questionable prior to the introduction of Part VIII A A.

Part VIII A A now extends the Court's powers to make orders and injunctions that are binding on third parties, and one would expect that *Hendler and Hendler* could be decided differently today.

Procedural Fairness

The Court is only able to make orders affecting a third party under Part VIII A A if that third party has been accorded procedural fairness. A party seeking orders under s 90A E or s 90A F will be required to provide adequate notice to the third party affected by the orders sought.

Joinder of third parties

Rule 6.02(1) of the *Family Law Rules 2004* ("the Rules") confirms that if a party seeks an order affecting a third party under s 90A E or 90A F that third party is a necessary party to the proceedings. The Rules seem to indicate that a third party against whom orders are sought will become a party without the necessity of a specific application to join that third party to the proceedings.

In practice, third parties are usually joined by being named as respondents on an Application or an Amended Application.

Costs of third parties

The general rule that parties bear their own costs in family law matters, found in s 117(1) of the Act, applies equally to third parties.

However, s 90A J provides that if an order or injunction is made under Part VIII A A and a third party incurs expenses as a result of the order or injunction "*the Court may make such order as it considers just for the payment of the reasonable expenses of the third party incurred as a necessary result of the order or injunction*". Expenses resulting from an order or injunction would not include legal costs in relation to the order or injunction.

This does not prevent a third party, or either of the parties, asking the Court to exercise its discretion to order costs against a party in appropriate cases.

Disclosure from third parties

Division 13 of the Rules places onerous obligations upon parties to a proceeding to provide full and frank disclosure.

The application of Division 13 to a third party is limited by Rule 13.02(2), which provides:

"This division does not apply to a party to a property case who is not a party to the marriage to which the application relates, except to the extent that the party's financial circumstances are relevant to the issues in dispute"

It may be that the question of whether a third party's financial circumstances are relevant cannot be answered until such time as the documentation is provided. If a third party is resistant to providing documents, a subpoena or Notice of Non Party Production of Documents may be used. Alternatively, a party might apply to the Court for specific orders for discovery from a third party.

The emerging case law

Cases are beginning to emerge which deal with the third party provisions under Part VIII AA. In the decisions to date, the Court has recognised that the powers in Part VIII AA go well beyond enabling Courts to deal with the "procedural rights" of a third party. The decisions confirm that the powers conferred by Part VIII AA are wide powers, but do not yet provide any clear indication of how far the Court might take those powers.

Marriage of Hunt FamCA Unreported SYF5099/03 (14 March 2006)

In the *Marriage of Hunt*, the third party provisions of the Act were tested.

The matter involved a somewhat complex factual scenario. The husband was the owner of shares in a company known as Primo Meats with two other shareholders, A and P. A died after proceedings had been commenced by the wife in the Family Court under s 79. The Articles of Primo Meats provided, not unusually, that upon the death of a shareholder the shares of the deceased must be offered to the remaining shareholders at a value prescribed in the Articles. A's will purported to bequeath all of his shares to P. The wife alleged that the

shares ought not be transferred to P pursuant to A's will without first being offered to all shareholders in accordance with the Articles.

After A's death, the husband and P signed a resolution which effectively required the shares of the company to be transferred to P. The shares were in fact transferred to A's estate. The husband and P alleged that this was an administrative error. They, the executors of the deceased estate and various companies associated with the deceased commenced proceedings in the Supreme Court of New South Wales seeking to correct the register of the company and transfer the shares to P.

The wife filed various applications in relation to the transactions. She argued that the resolution between the husband and P should be set aside pursuant to s 106B. She also sought orders pursuant to the third party provisions of the Act restraining the husband, P and the executors of A's estate from taking any further steps in the Supreme Court proceedings pending the resolution of the Family Court proceedings.

The wife's application for orders restraining the third parties from taking any further steps in the Supreme Court proceedings was successful. An order was made restraining the husband and the third parties from taking any steps in the Supreme Court proceedings, except steps to adjourn or discontinue the proceedings or to have the proceedings transferred to the Family Court.

The husband's solicitors objected to the jurisdiction of the Family Court to make those orders on the basis that the powers under section 90AE(2) and 90AF(2) were unconstitutional. They also argued that s 106B powers were unconstitutional. They argued that the powers lacked the necessary connection with the marriage and matrimonial causes power under the Constitution.

Justice O'Ryan rejected the argument. At paragraph 99 of his judgment he said:

In conclusion, just as with the power under s 51 (xvii) to make laws with respect to bankruptcy and insolvency, it is within the legislative power of the Commonwealth to make laws under paras (xxi) and (xxii) with respect to the consequences, not just for parties to a marriage, but also for those with whom they are in a relationship and the rights, duties and obligations of a third party.

The third parties made an application to the High Court for special leave to appeal challenging the constitutional validity of s 106B and the Part VIII A provisions. The High Court refused the application for special leave to appeal.

For the time being, the third party provisions contained in Part VIII A have been found to be laws that are within the Commonwealth's power under the Constitution.

K and K and Ors (2005) FamCA 997 (21 September 2005)

The matter of *K and K* came before Justice Morgan in the context of an application by the wife to amend her Application for Final Orders.

The wife sought to amend her application to seek orders under Part VIII A affecting the rights of third parties.

The husband was a beneficiary under a number of discretionary trusts. The wife sought to join the trustees of those trusts as parties to the proceedings and sought orders requiring those trustees to make capital contributions to the husband.

Justice Morgan was required, for the purpose of the interlocutory application, to determine whether the wife's application was "doomed to failure".

It was common ground between the husband and the wife that the husband's interest in the trust was that of a beneficiary. His only interest was that of a "mere expectancy". The existing case law would suggest that the mere expectancy would not be regarded as property or a financial resource for the purpose of s 79 proceedings.

Justice Morgan identified in her judgment that if the Court were to make the orders sought by the wife it would fetter the discretion of the trustee, which would be contrary to general equitable principles. The wife's Counsel conceded that this was the case, but argued that the powers contained in s 90AE(2) provided the Court with the power to do just that.

Justice Morgan examined the legislation. She identified the inconsistency between the Explanatory Memorandum and the objects of Part VIII A as described by section 90AA. She also identified the internal inconsistency between the objects of Part VIII A, which suggest

that orders must be "*in relation to property of a party to the marriage*", and the provisions of s 90AE(2)(b) which provide that an order must be "*in relation to a marriage*".

Ultimately, Justice Morgan determined that the wife had an arguable case and that her application was not obviously futile or doomed to fail. In those circumstances, she allowed the amendment of the wife's application.

Whilst Justice Morgan determined that the wife had an arguable case, it is a significant leap to presume that the Court will make orders of the type sought by the wife. Whilst the Court might have the power to make such orders, the Court would need to be satisfied that it is reasonably necessary and appropriate to do so and would also need to be satisfied that the other limitations prescribed by the legislation are overcome.

R and R and Ors (2006) FamCA 808 (23 August 2006)

The third parties in *R and R* included the husband's parents and associated companies, the husband's company (in liquidation) and the liquidator of that company.

At first instance, Justice Rowlands made a number of orders pursuant to Part VIII AA. The orders included:

- orders requiring the husband's company (in liquidation) and the liquidator of that company to execute a Deed assigning to the wife any entitlements owed to it by the husband's parents or companies associated with the husband's parents;
- orders restraining the husband's company in liquidation, the liquidator and the husband's parents and entities associated with them from commencing or pursuing any further claims against the husband, the wife or the husband's company in liquidation arising from assertions of insolvent trading;
- orders setting aside transactions pursuant to s 106B;
- orders pursuant to s 90AE(1)(b) requiring the company in liquidation to substitute the husband in place of the wife in relation to any debts owed to that company by the wife pursuant to any loan accounts or in respect of any alleged insolvent trading.

The matter came before the Full Court on the question of security for costs in relation to an appeal against the orders of Justice Rowlands. The grounds of the appeal included that the powers under section 90AE do not extend to the type of orders made in the case and that Rowlands J did not take into account the factors and limitations prescribed by Part VIII AA. The grounds of appeal for the liquidator asserted that an order restraining the liquidator from

carrying out its statutory obligations under the *Corporations Act 2001* went beyond the powers contained in Part VIIIAA.

The Full Court dismissed the wife's applications for security for costs against the third parties. The Full Court found that the matters raised in the appeal appeared to be "matters of some substance, and indeed some public importance".

AS & GW & AH (2006) FamCA 432 (3 May 2006)

In *AS & GW & AH*, the wife brought an Application in a Case seeking orders to restrain various third party creditors from commencing or continuing with bankruptcy proceedings against her. The third party creditors had each obtained judgments against the wife in the Supreme Court for the payment of debts.

The wife was not disputing the existence of the debts to the third parties. It was common ground between the parties that the debts were debts of the wife's alone and that the wife would not be seeking an order from the Family Court that the debts should be shared by the husband. She would, of course, be asking the Court to take the debts "into account" for the purpose of the s 79 proceedings.

In these circumstances, Justice Boland refused to make an order under Part VIIIAA to restrain the third party creditors from seeking to enforce the judgments they had obtained against the wife. Justice Boland said at paragraphs 52 to 54 of her judgment:

GW and AH, who are complete strangers to the litigation in this Court, have a judgment of the Supreme Court of New South Wales which has not been stayed. The stay application has been taken to the level of an application to the High Court of Australia and has been refused. They are entitled to the fruits of their judgment. There is nothing in the wife's material to support a contention that this debt, even part of it, should be sheeted home to the husband in the s 79 proceedings. I am satisfied, therefore, that the wife's application should be dismissed.

The wife appealed Justice Boland's decision. The Full Court dismissed the appeal. They found that Justice Boland made no error.

Justice Kay noted that the Court has a clearly expressed power under Part VIII A A to make orders restraining a third party from commencing legal proceedings against a party to a marriage, but that those powers may only be exercised if the criteria set out in ss 90AF (3) and (4) are met. At paragraph 12, Justice Kay said:

For the reasons clearly expressed by her Honour in par 52, it would be almost impossible to argue that it was proper for an injunction to be made that would restrain the respondents to the application and the respondents to this appeal from enjoying the fruits of their judgment regularly obtained, in circumstances that really have nothing to do with the proceedings that are pending before this Court or the relationship between the husband and the wife, nothing in any direct sense."

The Full Court confirmed that the power of the Court to make orders under Part VIII A A was discretionary.

Conclusion

The powers conferred upon the Family Court by Part VIII A A are significant. The third party provisions can be used as machinery provisions to assist the Court to deal with sham transactions and to unravel assets and liabilities from corporate structures. The use of the provisions may well extend beyond mere machinery orders to more substantive orders and injunctions impacting upon the rights of third parties. The Court's interpretation of the limitations contained in the legislation will determine just how significant the impact of Part VIII A A may be for third parties.

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