

## THE JURISDICTION OF THE FAMILY COURT WITH RESPECT TO FAMILY COMPANIES

Recent developments in family law are proving to be a source of some anxiety amongst commercial lawyers. The Family Court has on a number of occasions made orders binding family companies in a manner which may have been unforeseen when those companies were formed. It is proposed to examine the current scope of the jurisdiction of the Family Court to make orders affecting family companies and to suggest directions which the law may take in the future.

### 1 Defining the Problems

There are two aspects to this question. The first relates to the extent of the constitutional power of the Commonwealth Parliament to confer jurisdiction on the Family Court with respect to companies. This really raises the question of the extent to which the Court *can* make such orders. The second aspect, assuming that the problem of constitutional power can be resolved, is the matter of policy. To what extent *should* the Family Court have the ability to make orders affecting family companies? There are currently no definitive answers to these problems. They arise in the following contexts:

#### (a) *Constitutional power*

The Family Court of Australia is created under federal legislation: the Family Law Act 1975 (Cth). This Act is seen<sup>1</sup> as an exercise by the Federal Parliament of principally two sources of power in the Australian Constitution, the marriage power<sup>2</sup> and the matrimonial causes power.<sup>3</sup> Those powers are traditionally regarded as supporting a jurisdiction particularly in the context of property matters, which is essentially confined to the parties to a marriage.<sup>4</sup> The general competence of the Commonwealth to legislate under placita 21 and 22 is accordingly called into question whenever a third party is involved and a company is clearly not a party to the marriage.<sup>5</sup>

The constitutional doubt has also been expressed rather more generally in these terms by one High Court judge:<sup>6</sup> "In a newly dressed-up version of the doctrine of reserved powers of the States it is argued that the [Commonwealth] Parliament's legislative powers (and statutory powers such as those of the Family Court) are to be read so as not to interfere with the general law, particularly of property".<sup>7</sup> His Honour was

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1 *Russell v Russell; Farrelly v Farrelly* (1976) 9 ALR 103 (hereinafter referred to as *Russell v Russell*).

2 Commonwealth of Australia Constitution 1901 s 51 pl (xxi).

3 *Ibid* s 51 pl (xxii).

4 *Russell v Russell*, *supra* n 1.

5 However, *Antonarkis v Delly* (1976) 10 ALR 251 and *Sanders v Sanders* (1967) 116 CLR 366 permitted the making of orders against third parties under the Matrimonial Causes Act 1959 (Cth).

6 Murphy J in *Ascot Investments Pty Ltd v Harper and Another* (1981) 33 ALR 631 (referred to hereafter as *Ascot Investments v Harper*).

7 At 648.

referring to the now well entrenched view<sup>8</sup> that property matters generally, including matters relating to family companies, (which are created under State Companies Acts) are among the most jealously guarded "State rights".

(b) *Formulating a policy*

It is fair to say that none of the cases to date have grappled with the need to formulate policies to mediate in the conflict between two sets of principles. Company law respects the separate legal identity of the company. Family law on the other hand aims to serve the special needs of the family as a social institution. The Family Court decisions have avoided articulating general solutions to this conflict. Rather they represent a series of grabs at jurisdiction by the Court which are related in the judgments to one or another aspect of the facts in hand. The High Court has cautioned that this process must be restrained<sup>9</sup> but has left unanswered basic questions concerning the extent of the Family Court's power.

Problems arise with family companies because they are usually set up to further the financial interests of the family (eg tax avoidance) when the marriage is functioning well. Marital assets are transferred to the company. Frequently even the matrimonial home is owned by the company and leased by the husband and wife. When the marriage breaks down, however, the corporate structure can be exploited by a respondent who wishes to avoid obligations to others in the family by taking the position that he (or she) owns nothing, because the company owns it all. Frequently a party who has a controlling interest in the company may use that control to cause the family to be evicted from the home on the pretext that the company requires that asset for some commercial venture. These circumstances clearly create considerable temptation for the Family Court to tear away the corporate veil and the Court has yielded to that temptation in some substantial measure. The corporate lawyer views these developments with alarm, particularly as the suggestion is now often made that it may be professional negligence for a lawyer to set up a family company without advising the respective parties of the implications for their property rights should the marriage break down.

## 2 The Statutory Basis Of Family Court Jurisdiction

Applications in respect of companies arise under the Family Law Act in the context of injunctions. Frequently the wife, for example, seeks an injunction restraining the husband from using his controlling powers as company director to her detriment. Alternatively the company may be dealing with assets so as to put them beyond the applicant's reach, or it may have commenced winding up proceedings in the Supreme Court which could result in assets being distributed so as to defeat a maintenance or property claim. In that event injunctions may be sought directly against the company.

The injunction powers conferred on the Family Court contemplate two forms of injunction. The first, under s 114(1), is awarded for its own

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<sup>8</sup> See the High Court decision in *A-G for Victoria v The Commonwealth* (1961) 107 CLR 529 (the "*Marriage Act case*").

<sup>9</sup> In *Ascot Investments v Harper*, supra n 6.

sake, without any need for other proceedings. The second is granted under s 114(3). The s 114(3) injunction can only be made in aid of some other order. Characteristically it is granted in conjunction with a maintenance or property order, restraining dealing with a specific item of property against which the substantive order is secured.

The other significant section is s 4(1), the definition section, insofar as it defines a “matrimonial cause”. The constitutional validity of s 4(1) as presently drafted is attested to in High Court decisions.<sup>10</sup> The Family Law Act confers on the Family Court jurisdiction in matrimonial causes<sup>11</sup> so that any substantive provision in the Act is ultimately related back to s 4(1). The relevant definition provision would appear to be s 4(1)(e).<sup>12</sup> This injunction “matrimonial cause” has two features. Section 4(1)(e) requires that:

- (i) the proceedings be between the parties to the marriage; and
- (ii) the order must be made in circumstances arising out of the marital relationship.

Both of these requirements suggest that s 4(1)(e) is an unpropitious basis for a jurisdiction relating to companies. They are never a party to the marriage. Nor are they necessarily regarded as a circumstance arising out of the marital relationship. Moreover, s 114(1) specifically incorporates s 4(1)(e) as a basis for that type of injunction.

However, another definition provision has emerged as the important matrimonial cause relating to injunctions against companies. Section 4(1)(f) refers to proceedings which are in relation to other proceedings.<sup>13</sup> Enforcement proceedings are taken under s 4(1)(f) because they relate to previous substantive proceedings. It has also become the practice to refer s 114(3) injunctions to s 4(1)(f) as these too relate to other proceedings. The unique utility of s 4(1)(f) lies in the fact that it does not specifically require that the proceedings be between the parties to the marriage. This omission can be traced to the amendments to the Act consequent upon *Russell's case*. Sections 4(1)(a) to 4(1)(e) inclusive were redrafted so as to incorporate the requirement that the proceedings, *inter alia*, be between the parties to the marriage. Section 4(1)(f) on the other hand was thought to be automatically cured by amending the preceding subsections because it was a dependent provision. The subsequent history of s 4(1)(f) has put paid to this belief, as jurisdiction extending to third parties has been based on this provision, not only with respect to injunctions<sup>14</sup> but also in relation to custody orders.<sup>15</sup> Accordingly, s 4(1)(f) is regarded as constituting, in large part, the basis for the Family Court's jurisdiction with respect to companies.

10 Eg *Russell v Russell* supra n 1; *Vitzdamm-Jones v Vitzdamm-Jones*; *St Clair v Nicholson & Ors* (1981) 33 ALR 537.

11 In s 39. This is exclusive jurisdiction under s 8 of the Family Law Act 1975 (Cth).

12 S 4(1) 'matrimonial cause' means "(e) proceedings between the parties to a marriage for an order or injunction in circumstances arising out of the marital relationship."

13 S 4(1) 'matrimonial cause' means "(f) any other proceedings (including proceedings with respect to the enforcement of a decree ...) in relation to concurrent, pending or completed proceedings of a kind referred to in any of paragraphs (a) to (e) ..."

14 See *infra* at 167.

15 See *Dowal v Murray* (1978) 22 ALR 577; *In the Marriage of Robertson* (1977) 15 ALR 145; *Vitzdamm-Jones v Vitzdamm-Jones* supra n 10; *In the Marriage of E* (1979) 36 FLR 21.

We have noted the salient statutory provisions. How have they been interpreted in the Family Court?

### 3 The Decisions

#### (a) *The traditional view*

The Family Court appeared to be adhering to a conservative view of its own jurisdiction with respect to companies late in 1978. The traditional exposition of the Court's role was expressed in the judgment of Tonge J *In the marriage of Page*.<sup>16</sup> In that case the couple were in the last days of their married life in the matrimonial home. The house was leased by the parties from B Ltd, a family company of which the husband was one of several controlling directors. B Ltd was anxious to evict the wife. She was at this stage unable to invoke the property jurisdiction of the Family Court as that required a prior application for principal relief.<sup>17</sup> Accordingly, the wife sought three injunctions from the Family Court. The first of these was to restrain the husband from selling his shares in B Ltd so as to divest himself of any link with the company. This injunction was granted. It related to the husband's shares. These were his own property. The second injunction sought by the wife was refused. She wished to restrain the husband from using his powers as a director of B Ltd to bring about her eviction. Tonge J declined this order on the traditional basis that the court would not interfere in the exercise by a director of his fiduciary obligations to the company. The third order sought by Mrs Page was also refused. This was an order to restrain B Ltd directly from evicting her. She had hoped to persuade Tonge J to recognize the husband's controlling hand behind the actions of the company. Tonge J responded that he would not "tweak the corporate veil, let alone lift it".

The eviction of Mrs Page was in the result beyond the power of the Court to prevent. However, the tendency which family companies appear to develop to turn wives and children out of their homes was certain to evoke a more positive judicial response.

#### (b) *Injunctions against directors: inventiveness in the High Court*

That response came initially from the Full Court of the High Court in *R v Dovey; Ex parte Ross*<sup>18</sup> where the temptation to intervene was great indeed. In *Ross* the only shareholders in the family company were the husband and wife. Only the husband's shares carried voting rights at a general meeting of shareholders. A meeting was to be called at which it was proposed to evict the wife from the home which was owned by the company. In prohibition proceedings against Dovey J the Full Court expressed the view that Dovey J was able to grant Mrs Ross the second injunction which had unsuccessfully been sought by Mrs Page. This was an order against the husband in his capacity as company director restraining him personally from using his voting rights so as to bring about the eviction of the wife. The High Court stressed that the order could be made against the husband because he was the other party to the marriage, albeit in his capacity as director. No order was being made

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16 (1978) 35 FLR 101.

17 S 4(1)(ca). For dissolution proceedings twelve months' separation must be established (s 48).

18 (1979) 141 CLR 526.

against the company itself. The Court recognized that by restricting the director it was *incidentally* affecting the ability of the company to deal with its assets. However, all three judges were prepared to tolerate such an incidental encroachment on the company's rights. Moreover, Mrs Ross, unlike Mrs Page, had also acquired a maintenance order against the husband. Barwick CJ felt that precedents of the High Court<sup>19</sup> enabled this injunction to be made under s 114(3) in support of the maintenance order. The majority judges, Gibbs and Mason JJ agreed, but held that in addition to s 114(3) the injunction against the husband in his capacity as director could be supported under s 114(1) insofar as it was directed to the other party to the marriage and was in circumstances arising out of the marital relationship. Section 114(1), they observed, was particularly apt where the order related to the matrimonial home, owing to the specific reference to the home in s 114(1).

(c) *Liberality in the Family Court*

The High Court had signalled its willingness to tolerate Family Court orders which incidentally affected family companies. The *Ross* injunction has an excellent pedigree. It has been granted since on a number of occasions<sup>20</sup> and was upheld by the Full Bench of the High Court in *Ascot Investments v Harper* which in other respects restricts the jurisdiction of the Family Court with respect to family companies.<sup>21</sup>

However, it was only a short jump from incidental effects to direct orders against companies. Nygh J took the jump in *Harris and Harris*<sup>22</sup> in a decision which restrained a company from evicting the wife from the home and also from pursuing a Supreme Court action for possession against the wife. Nygh J's orders were not *Ross* injunctions, ie they were not directed to the husband as director. Indeed, a *Ross* injunction would have proved quite ineffectual in the circumstances in *Harris* because neither the husband nor the wife had an interest in the company, the legal and factual control of which was vested in the husband's mother. The company, however, was the husband's chief source of funds. It supplied his home, paid his bills, provided his car and his cash. The injunctions therefore were made against an entirely separate entity to the parties to the marriage. Nygh J conceded that he could not proceed under s 114(1) and he distinguished *Ross* on the ground that the other party to the marriage in that case was the other party to the injunction proceedings. The learned judge decided, however, that as Mrs Harris was also seeking maintenance the injunctions against the company could be supported under s 114(3) as being in aid of the maintenance order. To house the wife would assist in maintaining her. Nygh J held that s 114(3) could be referred to s 4(1)(f) rather than s 4(1)(e) and the former subsection did not require the proceedings to be between the parties to the marriage. In his Honour's view the direct incursion on a third party's rights did not deprive the court of jurisdiction with respect to the company. This was merely a matter which, in an appropriate case, might cause the judge to exercise his discretion in favour of withholding the injunction rather than granting it. Accordingly, Nygh J granted the

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19 Ie *Antonarkis v Delly, Sanders v Sanders*, see supra n 5.

20 In *Tiley and Tiley* (1980) FLC 90-898; *Stowe and Stowe* (1981) FLC 91-027.

21 See infra at 168, 169.

22 *Harris and Harris* (1980) FLC 90-812.

injunctions on an interim basis until the husband provided suitable alternative accommodation or made appropriate maintenance provision.

The *Harris* injunctions represent an enthusiastic view of Family Court jurisdiction. Lifting the veil does not disclose the other party to the marriage at all. Certainly they are not justifiable on the grounds of the High Court decision in *Ross*.

There are two further Family Court decisions prior to the High Court ruling in the *Ascot* case which exceed *Ross*. The other party to the marriage is a director of the company in both cases but the injunctions granted in *Smith v Saywell*<sup>23</sup> and *Buckeridge and Buckeridge*<sup>24</sup> are not confined to the other party as director. In both cases there are other directors involved and in both cases injunctions are granted directly against the company on an interim basis. Both judgments adopt Nygh J's use of s 114(3) in *Harris* as the ground for the injunctions granted, relating this in turn to s 4(1)(f).

Barblett J in *Buckeridge* and Marshall and Watson JJ in the Full Court of the Family Court in *Smith v Saywell* were prepared to grant injunctions to restrain companies from pursuing Supreme Court proceedings which might have resulted in property being diverted from the applicant. Interim orders were made to operate until the substantive maintenance or property issue could be heard. Both cases actually extend the operation of s 114(3) by holding that this type of injunction may be granted, as an interim order until the substantive hearing could take place in the future for an order for maintenance or property. They exploit a controversial device first approved in dicta in *Sieling's case* in 1979<sup>25</sup> whereby the Court will freeze dealings with assets by injunction in order to preserve its future jurisdiction. These two decisions apply this device against companies which are holding assets which may be the subject of future proceedings between the parties to the marriage.

The tendency to heresy was therefore well entrenched when the Full Court's decision in *Ascot Investments v Harper*<sup>26</sup> became the subject of an appeal to the Full Bench of the High Court. The facts in the *Ascot* case were temptation enough for a Family Court to protect a party's rights at the expense of traditional principles. The wife had obtained maintenance and property orders four years previously. The husband was a wealthy man but his assets were organized into a family company of which he was the controlling director along with four others, mostly members of his family. The original orders in favour of Mrs Harper had been secured against a transfer by the husband of his shares in *Ascot Ltd*. Mr Harper had been repeatedly gaoled for contempt rather than honour his legal obligations to his wife. More than \$100,000 of arrears was owing when Mrs Harper sought to realize the security. To that end she applied for two orders both of which she obtained from the Full Court. The first order was that the husband's shares in *Ascot Ltd* be transferred to her. This order was uncontroversial. Even on a traditional view of Family Court jurisdiction the husband's shares could be transferred to the wife.<sup>27</sup> The second order she required was contentious.

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23 *Smith v Saywell* (1980) 47 FLR 267.

24 *Buckeridge and Buckeridge* (1981) FLC 91-005.

25 *In the Marriage of Sieling* (1979) 35 FLR 458; 24 ALR 357.

26 *Ascot Investments v Harper* (1981), supra n 6.

27 See *In the Marriage of Page*, supra n 16.

According to the articles and memorandum of association of the company, all the directors of Ascot Ltd were required to sign a transfer of shares and they were entitled to refuse to register any transfer without giving reasons. Mrs Harper did not approach the directors to register the transfer as she felt this would be futile. Instead she asked that the Court order the company to register the transfer. The Full Court held that it had jurisdiction under s 114(3) to make this order, pointing out that the orders were directed to the husband's assets, ie his shares in the company. The Family Court announced that, as a matter of principle, the legal rights of the wife in this situation had to be protected and that the husband could not flout the orders of the Court by shielding himself behind the corporate façade.

The injunctions made in *Ascot Investments v Harper* go further than those previously granted by a Family Court in two important respects:

- (i) The other directors were personally enjoined to take the steps necessary to register the transfer to the wife, and
- (ii) The injunction would have the effect of permanently altering the state of the register. A permanent injunction which would alter the structure of the company raises fundamental policy questions concerning the jurisdiction of the Family Court.

The company appealed to the High Court.<sup>28</sup>

(d) *Restraint in the High Court*

The case clearly raises the general issue of the constitutional competence of the Family Court to make orders with respect to third parties.

However, the Full Bench of the High Court sidestepped this issue by holding that the relevant provisions of the Family Law Act did not, on their construction, intend to apply against third parties so as to alter their rights.<sup>29</sup> The previous High Court decisions under the Matrimonial Causes Act were held to have permitted the making of an order against a third party which had a formal application to that party but which did not cause any substantial encroachment on that party's rights.<sup>30</sup> The Family Court, essentially, was obliged to deal with the property of the parties to the marriage as it found it. If it should be held by a company, then the rights and obligations of the company were fixed under the general law. Specifically, the company's directors were empowered under the articles of association of Ascot Ltd to refuse to register a transfer of shares preemptorily. That was a legal right which the Family Court could not override.

The High Court doctrine appeared to end any hopes of any general jurisdiction in the Family Court to deal with family companies so as to protect the interests of the family. However, the High Court went on to indicate special circumstances (none of which they regarded as prevailing in the *Ascot* case) in which orders might be made against a company:

- (i) The *Ross* injunction was always available: ie an order directed to the other party to the marriage in his capacity as director.<sup>31</sup>

<sup>28</sup> *Ascot Investments v Harper* (1981) supra n 6.

<sup>29</sup> Gibbs J (with whom Stephen, Aickin and Wilson JJ agreed) at 643-644 and Barwick CJ at 633.

<sup>30</sup> Gibbs J at 641-642.

<sup>31</sup> Gibbs J at 642 and 645.

- (ii) The directors could be subjected to State proceedings on ordinary company principles if it could be demonstrated that they had exercised their powers *mala fide*, not in the interests of the company.<sup>32</sup>
- (iii) The Family Court could make orders against a company which was in fact a sham, and had been brought into existence to enable a party to evade obligations under the Family Law Act. In that situation the Family Court could lift the corporate veil.<sup>33</sup>
- (iv) A company which, although short of being a sham, was in reality the mere puppet of the other party to the marriage could also be the subject of a Family Court injunction.<sup>34</sup> The evidence in the *Ascot* case certainly suggests that whatever the formal situation, *Ascot Ltd* was really an umbrella for the husband's assets; he was the only person who appeared to benefit by the arrangement. The High Court, however, took the view that the directors all had real powers and the children who were possible beneficiaries had real interests. Accordingly, the majority judges concluded that *Ascot Ltd* was not the puppet of Mr Harper.

Mrs Harper did not benefit by the exceptions set out in the majority judgments. Be that as it may, it is submitted that these exceptions, and in particular the exception relating to the puppet of the other party to the marriage, offer considerable scope for expanding the Family Court's jurisdiction in respect of family companies in the future. Moreover, important extensions to that jurisdiction have already been made by the Family Court itself since *Ascot Investments v Harper*, by the very legitimate device of confining the High Court ruling to the facts of *Ascot* which related to permanent injunctions. It is entirely reasonable to expect that interim injunctions may be awarded far more liberally than permanent ones, which will forever alter the structure or assets holdings of a family company.

(e) *The aftermath of Ascot: restoration of jurisdiction to make interim orders*

The High Court judgments in *Ascot* made no reference to injunctions already granted against companies by the Family Court in cases such as *Harris and Harris*<sup>35</sup>, *Smith v Saywell*<sup>36</sup> and *Buckeridge and Buckeridge*.<sup>37</sup> A timid court might have been prepared to regard these as impliedly overruled. However, the Full Court of the Family Court rapidly established in a number of decisions after *Ascot* that the High Court ruling was to be confined to permanent injunctions. A generous jurisdiction to grant interim orders against family companies was asserted in cases including *Harris and Harris*<sup>38</sup> (controversial though this case may be) and *Buckeridge and Buckeridge*<sup>39</sup> when both cases went on

32 Gibbs J at 639.

33 Gibbs J at 644.

34 Gibbs J at 644-645, also Barwick J at 635.

35 *Supra* n 22.

36 *Supra* n 23.

37 *Supra* n 24.

38 *Harris and Harris: Re Banaco Pty Ltd (No 2)* (1981) FLC 91-100.

39 *Buckeridge v Buckeridge (No 2)*, (1981) FLC 91-114.



appeal to the Full Court.<sup>40</sup> This extended jurisdiction has been characterized by a number of developments since the High Court's restrictive decision.

First, the *Sieling* injunction (ie one granted against a party to freeze dealings with property which is the subject of future Family Court proceedings between the parties to the marriage)<sup>41</sup> has been extended so as to apply against a family company.<sup>42</sup> A second adventurous trend associated with interim orders against family companies is a greater willingness on the part of some Family Court judges to devise procedures for suing third parties. While it was once felt that the absence of any specific power to join third parties in the Family Law Act was prohibitive,<sup>43</sup> recently Elliott J in *Anderson and Anderson; Brewer and Dawson*<sup>44</sup> and Simpson J in *Buckeridge and Buckeridge (No 2)* indicated that s 38 cures this omission by incorporation of the High Court Rules. Moreover both judges were of the view that intervention under s 92 was not always required to confer standing on a third party, despite the Full Court's earlier decision to this effect in *Harris and Harris; Re Banaco Pty Ltd.*<sup>45</sup>

These developments may now be viewed as establishing a very substantial jurisdiction in the Family Court to grant interim injunctions against family companies.

#### 4 The Current Position

##### (a) *Two sets of principles*

The current situation would appear to be that when a permanent order is sought against a family company that order will need to fall within the High Court ruling in *Ascot Investments v Harper*. That is to say, there must be no alteration of rights and duties as defined under the general law relating to companies. The exceptions to this rule are companies which are shams or puppets of a party to the marriage. In these latter cases the court may lift the veil to disclose the true ownership of the company's assets. A liberal use by the Family Court of the 'puppet' concept is not unforeseeable in the future. This may lead to the recovery of a substantial jurisdiction, even with respect to permanent injunctions. Additionally a *Ross* injunction may issue as a permanent order against the other party to the marriage who is a director.

What principles will determine the extent of the Court's jurisdiction to grant interim injunctions? It is difficult to enumerate these definitely but a number of salient requirements have been suggested from time to time in Family Court decisions. It is suggested that some combination of these will form the basis of an extensive jurisdiction to make interlocutory orders affecting family companies. The following criteria occur in recent jurisprudence:

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40 These appeals were reported early in 1982. A liberal jurisdiction in respect of interim orders was already emerging in cases immediately after *Ascot* early in 1981 eg *Stowe and Stowe* (1981) FLC 91-027; *Rieck and Rieck* (1981) FLC 91-067. Also *Gillies and Gillies* (1981) FLC 91-054, *Martiniello and Martiniello* (1981) FLC 91-050 and *Anderson and Anderson; Brewer and Dawson* (1981) FLC 91-110, all of which are cases involving third parties which are not companies.

41 See supra at 168.

42 Eg *Buckeridge and Buckeridge (No 2)*, supra n 39; *Stowe v Stowe*, supra n 40.

43 Eg *In the Marriage of Paxton* (1980) 45 FLR 298; *In the Marriage of Page* (1978) 35 FLR 101.

44 (1981) FLC 91-110.

45 (1980) FLC 90-906.

- (1) The company must be given the opportunity to be heard.<sup>46</sup> If it wishes to be heard there is authority to the effect that the procedure in s 92 is mandatory<sup>47</sup>, ie leave to intervene must be obtained. The status of this requirement may be in some doubt in the light of recent criticism from the bench.<sup>48</sup> The effect of intervening is to confer on the company the same rights and obligations as a party to the proceedings, including liability to discovery.<sup>49</sup> Where a company does not intervene it may be possible to join it as a party due to s 38 of the Family Law Act.<sup>50</sup> This question has not yet been resolved in the cases.
- (2) It has been suggested<sup>51</sup> that the Family Court has a greater jurisdiction in respect of a matrimonial home which is owned by a company than in relation to other company assets.
- (3) Orders may be made which affect a company's formal rights provided that they do not detract from its substantial rights. This occurred in *Sanders v Sanders*<sup>52</sup> where the High Court approved an order which directed an insurance company to refrain from paying out policy moneys to which one of the parties was entitled under a fire insurance policy. The property which had burnt down was the subject of proceedings pending between the parties. Under the order the company was required to withhold payment until the matter of entitlement to the property was resolved. The decision has been interpreted as turning on the fact that the insurance company suffered no detriment as a result of being required not to pay out money under the order.<sup>53</sup>
- (4) It is now established that an interim injunction lies against the other party to the marriage in his capacity as a company director (ie a *Ross* injunction) notwithstanding the incidental effects this may have on the company itself.<sup>54</sup>
- (5) A *Ross* injunction may be obtained both for its own sake under s 114(1) and in support of some other order under s 114(3).<sup>55</sup> An order made directly against a company can only be obtained under s 114(3) however, ie it must be associated with some other proceedings.<sup>56</sup> In *Smith v Saywell* this was expressed as a requirement that an injunction against a company must be a step taken in the exercise by the Family Court of its jurisdiction between the parties to the marriage,

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46 *In the Marriage of Page*, supra n 43; *Harris and Harris*, supra n 22.

47 *Harris and Harris: Re Banaco Pty Ltd* (1980) FLC 90-906.

48 See supra at 171.

49 See *Buckeridge and Buckeridge (No 2)*, supra n 39; s 92(3). In *Ascot* the High Court made it clear that s 92(3) refers to procedural and not substantive rights or obligations: eg a company could not be required to maintain the wife.

50 See supra nn 44 and 45. S 38(2) attracts the High Court Rules.

51 By Gibbs and Mason JJ in *R v Dovey*, supra n 18; by Nygh J in *Harris and Harris*, supra n 38; and generally in regard to third parties by Fogarty J in *Gillies v Gillies*, supra n 40.

52 (1967) 116 CLR 366.

53 By Tonge J in *Page v Page* (1978) 35 FLR 101 and by Gibbs J in *Ascot Investments v Harper* (1981) 33 ALR 631, 640-641.

54 *R v Dovey; Ex Parte Ross*, supra n 18.

55 *Ibid* per Gibbs and Mason JJ.

56 See supra n 13.

and not one made in isolation for its own sake. Expressed as a constitutional requirement, this is a need for the action involving the third party to conform to the concept of a matrimonial cause in s 4(1)(f). The Full Court in *Buckeridge and Buckeridge (No 2)* and Elliott J in *Anderson and Anderson*<sup>57</sup> stressed that the proceeding involving the third party must be one which is nevertheless a proceeding in relation to the substantive action between the parties to the marriage.

- (6) A distinct set of requirements may be emerging in relation to that category of interlocutory injunctions emanating from *In the marriage of Sieling*<sup>58</sup>, ie the “freezing” order. Injunctions are available to freeze dealings with property held in a family company so as to preserve the ability of the Court to make future orders with respect to that property provided that:
- (i) There must be some probability of success for the applicant for the injunction in the ultimate trial of the issue between the parties.<sup>59</sup>
  - (ii) There must be a real risk that the order ultimately to be made will not be met unless the injunction is granted.<sup>60</sup>
  - (iii) It may be necessary for the applicant for the injunction to demonstrate some special interest in the particular property which is the subject of the interlocutory injunction application.<sup>61</sup>
  - (iv) The property which is the subject of the application must be shown to be under the effective control of the respondent to the injunction application even though it is legally owned by the company.<sup>62</sup>
- (7) The Full Court of the Family Court has upheld interlocutory injunctions made against companies controlled by individuals other than the parties to the marriage. The nexus with the matrimonial proceedings required to retain the marital character of such proceedings has been stated as a requirement that the company should have some special connection with the parties,<sup>63</sup> as distinct from being an “innocent bystander” dealing *bona fide* at arms’ length in some commercial

57 See supra n 44.

58 See supra at 171.

59 *Stowe and Stowe*, supra n 20; *Buckeridge and Buckeridge (No 2)* supra n 39. The applicant’s inability to establish a prospect of success in the ultimate property action caused Nygh J to refuse an interim order freezing dealing with assets in *Rieck and Rieck*, supra n 40.

60 *Stowe and Stowe*, supra n 40; *Buckeridge and Buckeridge (No 2)* supra n 39. Cf *Martiniello*, supra n 40, where the order was refused on the grounds that the respondent husband did not appear to be applying the property (a balance in a bank account) to defeat the wife’s claim.

61 In *Stowe*, supra n 20, the wife had a “special interest” in that she managed and resided on the grazing property which was the subject of the order. Cf the wife in *Martiniello*, supra n 40, was denied an order because she had no “special interest” in the husband’s bank balance. The status of this requirement is somewhat unclear however. It was not repeated in *Rieck* or in *Buckeridge (No 2)*, supra n 39.

62 *Stowe and Stowe; Buckeridge and Buckeridge (No 2)* supra n 39.

63 Eg in *Harris and Harris: Re Banaco Pty Ltd (No 2)*, supra n 38.

dealing.<sup>64</sup> In *Harris*<sup>65</sup> on appeal the Full Court upheld Nygh J's orders against the husband's mother's company because the company had voluntarily assumed an obligation to support the husband and his family. Moreover, the benefits supplied to the husband during the marriage were a significant financial resource to be taken into account.

- (8) No order has yet been made in favour of a family company against a party to the marriage. *Wray and Wray*<sup>66</sup> and *Af Petersens and Af Petersens*<sup>67</sup> indicate that this cannot be done even on an interim basis as there is no jurisdiction to make the ultimate order in favour of third parties at the final hearing of the issue under the Act.
- (9) A court deciding whether to make an interim order against a company will apply the general law as to interlocutory injunctions as expressed in the House of Lords decision in *American Cyanamid v Ethicon*.<sup>68</sup> This requires that in deciding whether to exercise its discretion to grant the injunction the court must determine that:
- (i) the applicant has an arguable case in the future trial of the substantive issue; and
  - (ii) that the balance of convenience lies in favour of granting the injunction rather than withholding it.<sup>69</sup>

(b) *A new doctrine*

We have documented the emergence of two sets of principles in the cases applying to interim and permanent injunctions respectively. In both situations the Family Court's ability to make the order requested has been regarded as being dependent on the extent to which there is jurisdiction in respect of a company (which is a third party), or in respect of property owned by a company (which is property not belonging to a party to the marriage).

A technique is being explored in the most recent decisions of the Family Court which appears to circumvent that traditional enquiry. This technique is one which is already well developed in respect of other forms of property (such as unvested superannuation rights or other assets held in discretionary trusts) in respect of which the Family Court has been unable to assume direct jurisdiction. The approach taken by the Court in these circumstances is to concede that such property may not be directly made the subject of an order for maintenance or property reallocation by the Court.<sup>70</sup> However, in the course of making orders with respect to property which is unquestionably distributable by the Court, such other assets have been "taken into account" as a "financial resource" of a party under s 75(2)(b). The wife has frequently been

64 Nygh J introduced the "innocent bystander" concept in *Rieck and Rieck*, supra n 40. It was adopted by the Full Court in *Harris and Harris: Re Banaco Pty Ltd (No 2)*, supra n 38.

65 (1981) FLC 91-100.

66 (1981) FLC 91-059.

67 (1981) FLC 91-095.

68 *American Cyanamid Co v Ethicon Ltd* [1975] AC 396.

69 Applied in *Smith v Saywell*, supra n 23; *Stowe and Stowe*, supra n 20; *Buckeridge and Buckeridge (No 2)*, supra n 39.

70 Eg *In the Marriage of Crapp* (1979) 35 FLR 153; 24 ALR 671.

awarded a greater share of the matrimonial home because of the husband's unvested superannuation entitlement being counted among his "financial resources".<sup>71</sup> It has been realized in such recent decisions as *Stowe and Stowe*, *Tiley and Tiley*,<sup>72</sup> *Kelly and Kelly (No 2)*,<sup>73</sup> *Buckeridge and Buckeridge (No 2)* and *Martiniello and Martiniello* that although assets may be technically owned by a company a party to the marriage may have factual control of those assets. That factual control may, for the purposes of determining that party's "financial resources", transcend the legal control situation. Arguably this was the case in *Ascot Investments v Harper* and indeed in his dissenting judgment, Murphy J felt that the factual control exercised by Mr Harper was the real ground upon which the Family Court's jurisdiction should be affirmed. In *Martiniello* the Full Court was prepared to grant an interlocutory injunction to restrain the husband from dealing with the balance in a bank account to which a third party was possibly entitled. The husband's "power of control" was adequate to confer jurisdiction. In *Tiley v Tiley* the Full Court of the Family Court ordered the husband to pay to the wife an amount which took into account a loan owing to the husband by the company which the court could expect him to call in by exercising his factual control as managing director.

In *Stowe and Stowe* the Full Court went even further and was prepared to freeze company assets worth in excess of \$6 million on an interim basis. The Full Court in *Stowe* reasoned that these assets might, when property proceedings took place in the future, be required to *satisfy* any order which the court might make against the husband. The *Stowe* order contemplates that the husband would be ordered to pay over a lump sum to the wife and that such a lump sum would be calculated by reference to his factual control over family companies. This factual control would be regarded as a financial resource of the husband. Similarly in *Kelly and Kelly (No 2)* the Full Court upheld an order that the husband pay the wife a lump sum by way of property settlement which largely reflected his factual control over assets held in family companies and trusts of which some of the directors and trustees were strangers to the marriage. These orders take advantage of earlier Family Court doctrine to the effect that a property order expressed as a lump sum payment was not required to be charged against any specific item of property.<sup>74</sup>

The concept of "factual control" which is central to the new approach has yet to be defined: nevertheless, it is clear that the order originating in *Stowe v Stowe* has significant virtues. On its face, it makes no mention of the family company and being a direction for payment of a lump sum it avoids any reference to assets owned by the company. It contemplates only that these assets are a financial resource of the other party to the marriage out of which the order can be satisfied. In the result, many of the problems encountered in relation to orders directed to companies or to company assets are avoided. However, it still remains to be determined what is to be done in the event that a respondent like Mr Harper refuses to comply with a lump sum order such as that contemplated in *Stowe*. It may be that the same battles that have been

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71 *Ibid.*

72 (1980) FLC 90-898.

73 (1981) FLC 91-108.

74 *In the Marriage of Collins* (1977) 30 FLR 93.

fought over the question of Family Court jurisdiction to make orders may simply be transferred to the new battleground of enforcement. Happily those battles are for another day.

## 5 Reforming the Law

### *Constitutional Power and Future Policy*

The majority High Court judges in *Ascot Investments v Harper* were invited to rule that a provision in the Family Law Act which purported to create a jurisdiction in respect of family companies would be unconstitutional.<sup>75</sup> Faced with a number of decisions which had already authorized orders against third parties<sup>76</sup> the High Court was not anxious to give a ruling in these terms. However, the Court sidestepped the constitutional issue by determining that the relevant provisions did not on their construction intend to operate so as to detract from the general law rights and obligations of family companies. The difficulties of a definitive ruling as to constitutional competence were thus avoided by the Full Bench opting for the easier undertaking of statutory interpretation. As a consequence it is open to a future High Court to affirm the jurisdiction of the Family Court with respect to companies if it wishes to do so. Indeed, the majority decision in *Ascot* itself proceeds on the basis that there is constitutional competence at least to the extent of conceding to the court a jurisdiction in respect of companies which are 'puppets' or 'shams'. It is therefore too late in the day to deny the existence of federal power on the subject. It remains, however, to define its origin and extent.

It is beyond this writer's present ambitions to indicate the extent to which the Family Court ought to be able to apply special principles to family companies for the necessary protection of the members of the family. The impotence of the Court to assist Mrs Harper is not an acceptable situation. However, attempts so far to formulate coherent policies have been swallowed in the quicksand of constitutional doubts. It is submitted that these doubts may be put to rest provided that we abandon the practice, now well entrenched in the decisions, of viewing family legislation as an exercise of one or other of the marriage power or the matrimonial causes power in the Constitution, or else as being invalid. It is time to extend our view of family law so that the existence of other powers in the Constitution is acknowledged. There exists, for example, specific federal power in respect of corporations in pl (xx) of the Constitution which has already been the subject of extensive Commonwealth legislation.<sup>77</sup> Moreover, the incidental power in pl (xxxix) which is currently withering on the family law vine could be revitalized with a little effort. The enactment of the Trade Practices Act 1974 by the Federal Parliament affirms that Commonwealth Acts can be based on a combination of specific heads of constitutional power.<sup>78</sup> The Family Law Act must, it is submitted, be regarded in the same way. When that happens the Court, or better still the Federal Parliament, can commence

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75 The wife argued that the Family Court had power to bind companies under s 80(d) and (k) and s 114(3) Family Law Act 1975 (Cth).

76 See supra n 5.

77 The Trade Practices Act (Cth), (s 51 pl (xx)).

78 S 6 of the Trade Practices Act specifically indicates a variety of constitutional powers of the Federal Parliament to which the legislation is referable. They are the powers with respect to corporations, trade and commerce, postal services, banking, insurance, external affairs and dealings with the Commonwealth as well as the Territories power.

the now urgent task of formulating a policy as to the nature and extent of the jurisdiction which the Family Court unquestionably requires with respect to family companies.

## 6 Conclusion

This writer has argued that there is no need to adopt a restrictive view of the power of the Commonwealth Parliament to legislate with respect to family companies. It follows that the Family Court may possess a substantial jurisdiction to protect the interests of the family where a company is involved. It remains, however, to formulate consistent policies as to the nature and extent of this jurisdiction, particularly insofar as it intrudes into special immunities created for companies by commercial law principles. When decisions as to policy have been made the Court itself, or preferably in the interests of clarity and consistency in the law, the Parliament<sup>79</sup> can articulate coherent principles to be applied in the future.

In the interim it is clear that some considerable jurisdiction has already been exercised by the Family Court. While the Full Bench of the High Court has insisted that the general legal rights and immunities of family companies are to be respected, the High Court doctrine in the *Ascot* case has been confined to the making of permanent injunctions. Even so it is foreseeable that there will be considerable growth in jurisdiction by future Family Courts exploiting the exceptions expressed by the High Court in respect of companies which are shams or puppets of a party to the marriage.

In the case, however, of interlocutory injunctions a very much more liberal Family Court jurisdiction exists. While there is not yet a consistently articulated doctrine concerning interlocutory injunctions a number of principles appear to be emerging in the cases and these have been examined.

In addition to a trend to broaden the Family Court's jurisdiction in the matter of interlocutory injunctions in respect of companies, a new technique has recently emerged in that Court. That technique is to regard the effective control of a family company by a party to a marriage as a "financial resource" of that party. The order that follows may avoid the problem associated with directly making an order against the company or company assets by being expressed as a direction that the respondent pay a lump sum to the applicant. While it has been observed that this technique is not without difficulties it may be regarded as an indication that the jurisdiction of the Family Court with respect to family companies is not about to shrink notwithstanding the strictures of a hesitant High Court. Nor should it.

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<sup>79</sup> Eg by amending the Family Law Act.