

THIRD PARTIES AND PROPERTY APPLICATIONS – JURISDICTION AND INTERLOCUTORY INJUNCTIONS

Introduction

The purpose of this paper is to focus on important legal and practical aspects that practitioners should pay attention to when they have Applications for property settlement that involve third parties in the Family Court, in particular applications against third party entities.

In particular, the following matters will be examined:

- The importance of planning and preparation;
- The Family Court's jurisdiction over third party entities; and
- Obtaining urgent injunctive relief against third party entities.

Planning and Preparation

In more complex property cases involving private Companies and Trusts it is extremely important to thoroughly and properly prepare and plan your case from an early stage.

Effective planning and preparation involves the following:

1. Taking detailed property settlement instructions from your client

A complex matter may seem overwhelming at first blush. However, don't disregard the normal exercise of taking relevant and detailed instructions from your client (as you would any client) on the following matters:

- Details as to all relevant assets and liabilities;
- Details as to the relevant contributions throughout the relationship; and
- Relevant Section 75(2) factors.

In a complex matter it may well be a lot more difficult for you to have any idea as to what your client's overall possible settlement entitlements may be. However, by taking detailed instructions you will start to put the pieces of the puzzle together and then have the basis of a statement that can be expanded upon and amended and updated as the case progresses.

It is often helpful in matters where there are numerous assets held personally by the parties together with a number of Corporate and Trust entities to gain some sort of initial impression as to the size of the assets that are held outside of Corporate and Trust structures. This gives you some indication at an early stage as to whether a substantial amount of the wealth is held within entities or outside of the entities.

2. Conducting Appropriate Searches and Gathering Documents

It goes without saying that conducting full and appropriate searches (individual name searches, business name searches, company searches and property searches) is extremely

important in these more complex matters. Do the searches early and do not take your client's word as to how many Shares they hold in what companies etc

I find it helpful in matters to establish a separate file for searches and a separate file for each other entity that is involved in the matter. I usually also have a "*Master File*" on which I have a Corporate Diagram and important documents relating to each entity. For example, the Articles of Association and Trust Deeds etc.

Initially, try to gather together as many relevant documents relating to the entities that help you with your initial assessment of the situation. Obviously, once experts are exchanged then the list of documents that are required will grow substantially but as a short list the following documents should at least be obtained:

- Copies of Memorandum of Articles and Constitution of any private companies and any documentation relating to any previous amendments thereto;
- Any Trust Deeds and documentation relating to any previous amendments or variations of the Trust;
- Financial Statements and Income Tax Returns for the last three (3) completed financial years of all entities and also of the parties individually.

3. An Effective Corporate Diagram

This is essential in any complex matter or matter involving Company and Trust structures.

From instructions from your client and also from your searches (and maybe even discussions with the parties Accountant) you can start preparing an initial draft of the Corporate Diagram.

The Corporate Diagram should show the following:

- A box representing each private Company. In that box notations should include details as to the name of the Directors and Shareholders. Include the number and type of Shares held by each person and/or entity. Also, a notation as to whether the company is a trading company or acts only as a Trustee company is often helpful. Details as to any other significant offices held within the Company. In particular, if a party holds a position of a Permanent Governing Director then that should be noted.
- Each Trust should also be separately shown in the diagram. Details as to the objects, beneficiaries of the Trust together with details as to the Appointor/Principal of the Trust should also be included.
- Clear and precise arrows and notations showing inter-relationship between the various entities and parties is also helpful.

Whilst the above may seem straightforward a thorough and detailed initial preparation enables you as a practitioner to be able to quickly and properly assess and deal with urgent Applications and/or properly assess the type of Applications that should be made in relation to any third party entities in a proper manner.

In essence, in complex matters involving Trusts and Companies you need to be able to answer some of the following questions at an early stage:

- What are the proprietary interests of the Husband and Wife and where do they exist?
- If the spouse owns Shares in a private Company then what type of Shares are held and what rights attach to those Shares?
- If assets are held in the Trust, then does the Husband and/or Wife control the Trust in such a manner so that the Family Court will treat those assets effectively as assets of the Husband and Wife in their matrimonial proceedings?
- Is the Company controlled only by parties to the marriage or are there third parties involved as Directors or Shareholders?
- Are there legitimate third party beneficiary or objects of a Trust?
- You should be able to properly identify all relevant assets, including any interests in third party entities, that need to be valued for the purpose of matrimonial proceedings;
- You should hopefully be able to make an assessment as to whether any Orders need to be sought directly against entities and if so, the most appropriate method and manner to achieve such Orders.

The Family Court's Jurisdiction Against Third Parties in Property Settlement Proceedings

It is suggested that too often practitioners fail to understand or apply in practice and properly and carefully consider jurisdictional aspects of Applications that they intend to make on behalf of their clients. This is especially so when dealing with third parties, for example private Companies.

It is important to remember that the mere intervention of a third party in the Family Court does not suddenly widen the jurisdiction of the Court to make Orders (that it would not otherwise be able to make) against or in favour of such third party.

Similarly, the naming of a third party as a Respondent and the filing and serving on them of an Application (effective to join them as a party pursuant to Rule 6 of the new Family Law Rules) does not of itself provide the Court with greater powers or jurisdiction to make Orders against that third party.

As practitioners, the most common crisis we are sometimes faced with is the consideration of an urgent Application against an entity so as to preserve or protect assets of the Husband and/or Wife.

It is important that before an Application is prepared and filed in Court that as a practitioner you give consideration to some of the following matters concerning the Court's jurisdiction to make the Orders that you intend to seek against the third party entity:

1. Are Orders Against the Third Party Necessary in the Circumstances of the Case ?

If you are well prepared and have taken detailed instructions in the past then you should be able to answer this question and assess the situation before rushing off to Court. For example, you may receive instructions from a client that her Husband has used

\$20,000.00 of monies that he had a separation to purchase a house recently but that the house is registered solely in the Wife's De Facto's name.

You may immediately consider that an interlocutory asset preservation injunction should be made against the third party (the Husband's De Facto) together with a final Application for relief pursuant to Section 106B of the Family Law Act. However, let's assume in this matter that you have instructions from your client that indicate that there are other assets to the value of \$500,000.00 and that your client's entitlement is at its best case 70%.

The Application would be premature and a waste of time and money for your client. Your client simply asks the Court (as between the Husband and Wife) to treat as the Husband's property as own equitable interest in the property owned by his De Facto to the equivalent value of the money that he put into the property. Alternatively, an argument could be made that "notionally" the \$20,000.00 be added back in to the pool and counted for in any overall division of property between the parties.

The above is a simple scenario but there are many different scenarios where no action against a third party may be the appropriate course.

2. Puppets, Alter Egos and Shams

The Family Court clearly has jurisdiction to make Orders in relation to a third party entity that can be described as a sham. In *Ascot Investments Pty Ltd -v- Harper and Harper (1981) 148CLE337354*, Gibbs J said that a sham is something which has:

"Been bought into being, in appearance rather than reality, as a device to assist one party to evade his/her obligations under the Act. Sham transactions may always be disregarded".

The meaning of the term "Sham" was discussed by Lockhart J in a decision of the Full Court of the Federal Court in *Sharrment Pty Ltd -v- Official Trustee in Bankruptcy (1988) 82ALR530 at 536 – 540*. At page 537 His Honour stated:

"A sham is therefore, for the purpose of Australian Law, something that is intended to be mistaken for something else or there is not really what there purports to be. It is a spurious imitation, a counterfeit, a disguise or a false front. It is not genuine or true but something made in imitation of something or made to appear to be something which it is not. It is something which is false or deceptive".

In the course of that Judgment His Honour referred to a number of cases which consider that issue and in particular to the observations of Windeyer J in *Scott -v- Commissioner of Taxation (2) (1966) 40ALJR265 at 279* where it stated:

"On the other hand if the scheme, including the deed, was intended to be a mere façade behind which activities might be carried on which were not being really directed to the stated of purposes but to other ends, then the words of the Deed should be disregarded ... A disguise is a real thing: it may be an elaborate and carefully prepared thing, but it is nevertheless a disguise. The difficult and debatable philosophic questions of the meaning and relationship of reality, substance and form are for the purposes of our law generally resolved by asking did the parties who entered into the ostensible transaction mean it to be in truth their transaction or did they mean it to be and in fact use it as, merely a disguise, façade, a sham, a false front. All these words have been metaphorically used, concealing their real transaction ...".

In *Gould and Gould; Squire Investments Pty Ltd (1993) 17famLR156* the Full Court when discussing shams and alter egos made comment on the above statement by Gibbs J in *Ascot Investments*. The Full Court stated:

“The statement of Gibbs J in Harper’s case that sham transactions ‘may always be disregarded’ may overstate the position. In some circumstances it would be sufficient to do so ... in other circumstances proceedings under Section 85 may be necessary, for example where third parties claim to own or control the property in question”.

With respect to the Full Court the statement of Gibbs J is surely correct. In all circumstances, the Court will not give effect to third parties and can disregard and exercise jurisdiction against any third parties that are part of a conspiracy or a sham to defraud.

As practitioners, it is often very difficult for us to be aware or to have conclusive proof (especially at an early stage in proceedings) that third party entities are a sham and were brought about into existence for the sole purpose of defrauding a spouse.

In many situations, the change in Articles, Shareholding or other material changes to a corporate structure are often said to have been done for other purposes and not to defraud a spouse from any potential claim.

As practitioners, we have to tread carefully. On the face of it, a third party Company (even if suspicious and questionable changes have been made to the structure of that entity) must still be treated prima facie as legitimate third party.

In *Ferrall and McTaggart (Trustees for Sapphire Trust) and ORS -v- Blyton (2000) famCA1442* His Honour Justice Ryan was faced with what only could be fairly described as spurious and suspicious transactions that had occurred in relation to a number of entities in which the Husband had by various means divested himself of any interest in. Even during interlocutory proceedings the Husband was given immunity from prosecution and gave evidence in relation to the purported fraud.

At paragraphs 352 and 353 His Honour stated:

“In my view, there is another reason why the Application should be dismissed. In the circumstances of this case there may be an issue to be determined at the Trial, namely whether the exceptions in Ascot Investments Pty Ltd -v- Harper do apply. In this case I do not know and would not attempt to speculate about, what the evidence may ultimately reveal and what findings may be made. However, there may be an issue of fraud.”

McTaggart’s case is sometimes cited for the proposition that Section 78 can be used in certain circumstance to enlarge the jurisdiction of the Family Court to make Orders binding against third parties. The writer does not agree that that was the basis of the jurisdiction exercised in *McTaggart’s* case. His Honour was dealing with an objection by the third parties to the Family Court making property preservation Orders on an interim basis against the third parties by way of injunction. His Honour eluded to a possible power under Section 78 and made reference to similar incidental powers that can bind third parties but when exercised under the now Section 106B.

However, the above quoted passage is often not given a proper consideration when looking at the jurisdictional issue. That is, clearly on the evidence before His Honour

there was a prima facie case that one of the exceptions to the Family Court's rights to make Orders directly affecting third parties was possible. There was a serious issue to be tried. That is, that this was a sham with the intention to defraud the Wife of her property settlement. In such circumstances, until the Court made a final determination upon hearing all evidence the Court did have jurisdiction against the third parties so as to preserve the "*status quo*" until the final Trial.

It is important that practitioners realise and understand the difference between a sham and what is referred to as an alter ego or puppet. The two are markedly different.

The description of an entity as the "*alter ego*" or "*puppet*" of a person denotes something quite different to a sham. Correctly described, it is not an assertion that it is a "*counterfeit, a façade or a false front*".

Rather, it describes an actual situation although as a matter of law or practicality the actions of the other entity may be capable of and may in fact be controlled by the party in question.

For example, a party may establish a Trust over which he/she exercises control. The Trust may in turn own or control property. It may be correct to describe that Trust as the alter ego or even perhaps the puppet of that party.

It would not be correct to describe its existence or its ownership or control of property as a sham.

Typically, the alter ego situations we deal with with entities are those where no third parties are involved at all. A situation where the spouse is the sole Director or Shareholder or the only Directors and Shareholder of a private Company. Also, the alter ego situation arises in relation to a Trust where the Trustee is either the spouse or a Corporate Trustee in which only the Husband and/or Wife have an interest in. Also, typically, there are no third party adult objects or beneficiaries of the Trust

In situations where the third party entity can be correctly and clearly described as the alter ego of a party then urgent interlocutory relief, if necessary, to preserve the property of those entities can be sought by way of mandatory or prohibitive injunctions against the spouses personally pursuant to Section 114 of the *Family Law Act*.

In these situations, there would be no need to join the third party entities but to merely seek Orders against the Husband or Wife to do or not to do things in their capacity as the sole Directors of the Company or sole controller of the Trust.

If however, there are third party Directors and/or third party Shareholders and/or other parties who have an interest of any degree in the Corporate entity then care should be taken in framing an appropriate Application. If in doubt, the Application should be made against the entity rather than just the parties alone.

Also, in practical terms it would be dangerous to make an injunctive Application in personam against the spouse on the assertion by your client that an instrument or disposition will be clearly set aside or that it is a sham transaction.

Even in situations where a suspicious transfer of property (made shortly after separation) clearly at direction of the spouse, to an entity, is made then be careful not to rashly disregard the interest of the third party entity.

It is safer to make the Application (by way of urgent injunctive relief) against the third party entity, together with any necessary Section 106B Application on a final basis to properly found the jurisdiction.

3. Orders Under the Family Law Act Effecting Third Parties

It is suggested that caution must be taken in attempting to rely upon any specific Section of the Family Law Act as a ground for founding jurisdiction against a genuine and bona fide third party. As Gibbs J stated in *Ascot Investments -v- Harper*:

“They (referring to previous Family Court Authorities) do not establish that any such Order may be made will be to deprive a third party of an existing right or to impose on a third party a duty which the party would not otherwise be liable to perform. The general words of Section 80 and Section 114 must be understood in the context of the Act, which confers jurisdiction on the Family Court in matrimonial causes and associated matters and in that context 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 and unambiguous words ... there is nothing in the words of the Sections (Section 80 and Section 114) that suggests that the Family Court is intended to have the power to defeat or prejudice the rights, or nullify the powers, of third parties, or to require them to perform duties which they were not previously liable to perform. It is one thing to order a party to a marriage to whatever is within his or her power to comply with an Order of the Court, even if what he does may have some effect on the position of the third parties but it quite another to Order third parties to do what they are not legally bound to do. If the sections had been intended to prejudice the interests of third parties in this way, it would have been necessary to consider the constitutional validity”.

It is the writer’s experience that the High Court’s decision in *Ross – Jones; Ex Parte Green (1984) FLC 91-555* is often misquoted as an authority that the Family Court has in certain circumstances jurisdiction to make injunctions directly against third parties. The truth is that the actual circumstances in which the injunction was made in that matter were extremely unusual and extremely limited.

The Orders made in *Ross Jones* case were in effect a holding Order (preserving the Status Quo re property owned by a third party) until such time as the Court could urgently determine whether it had jurisdiction or not to entertain such Application.

The Court indicated in that Judgment that it was only for a very short period of time so that the jurisdiction issue could be determined on a most urgent basis.

A superior Court always has jurisdiction to determine at a first instance whether it has jurisdiction to determine a matter or not. If a circumstance arose where the Court needed to adjourn a determination of that hearing for an extremely short period, then pending that determination it appears the Court has a very limited jurisdiction to make some binding Orders against a third party.

It is the writers view that the only other substantive ground in the *Family Law Act* the provides the Court with some jurisdictional basis to make Orders that may effect third parties can be found in Section 106B. That is, when called upon to exercise it’s jurisdiction under Section 106B the Family Court is often called to make Orders that do effect third party entities.

However, the Section itself clearly provides that the instrument or disposition must be by or on behalf or at the direction of a party to the marriage and further protection is provided in the section to protect the bona fide interests of third party purchases.

Incidental Orders necessary to give effect to the powers in Section 106B may be necessary against third parties if all the elements of that section are satisfied. It is not however an “*open slather*” to make all sorts of Orders against third parties. The Court has made Orders against bona fide third parties in some cases under Section 106B but in other cases has commented strongly that such Orders should not be lightly entertained even where the elements of Section 106B are established.

Arguments have also been put forward and previous authorities have discussed the fact that Section 78 (Declaration Power) may provide a basis for jurisdiction against third party and also that the Orders under Section 80 that can be made establish some enlarged jurisdictional basis for Orders against third parties.

With respect, the writer does not agree with those authorities. As stated above, His Honour Justice Ryan’s comments in the *McTaggart’s* case do not in my opinion form a basis for any jurisdiction to be exercised pursuant to Section 78.

The jurisdiction was properly exercised on an interlocutory basis due to the prima face evidence of a sham in that matter.

Further, the single Judgment in the case of *Moran and Moran (1995) FLC 92-559* is also not authority in my opinion for any proposition that a declaration against a third party can be made. In that case, His Honour Justice Bully was careful to point out that the declaration that he made, although related to a declaration of a spouse’s interest in third party property was made only as between the Husband and Wife and not against a Third Party. Whilst the distinction is perhaps cute, it is still important.

The fact remains that there are only limited situations where the Family Court can exercise power under its Act to effect legitimate rights of third parties. The powers that are given under Section 80 are to be exercised pursuant to the jurisdiction that the Family Court has in relation to matrimonial causes and associated matters. Those sections simply do not enlarge the jurisdiction of the Family Court.

4. Accrued Jurisdiction

This is an extremely important development in the area of the Family Court’s jurisdiction over third parties. It is important that practitioners understand the basis upon which accrued jurisdiction arises and the basis upon which it is exercised. A full understanding of this will enable you to properly assess whether a Court will have jurisdiction to entertain an Application that you are considering (on an urgent basis) against third parties in the Family Court.

It is by now, in my opinion the most readily and widely available basis upon which arguments can be made to sustain and support the Family Court’s jurisdiction in certain circumstances to make Orders against third parties. This is particularly so since the striking down of certain parts of the cross vesting legislation (relating to a referral of state matters to the Federal Court) in *re Wakim Ex parte McNalley and others (1999) 198 CLR*.

The accrued jurisdiction comes about because a Federal Court when seized to determine a “*matter*”, sometimes needs to accrue jurisdiction of the states Court so as to resolve the whole matter and not just the initial Federal aspect of it.

“Accrued” jurisdiction was explained by Barwick CJ in *Philip Morris Inc –v- Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 as follows:-

“It is settled doctrine in Australia that when a Court which can exercise Federal jurisdiction has its jurisdiction attracted in relation to a matter, that jurisdiction extends to the resolution of the whole matter. This accrued Federal jurisdiction is not limited to matters incidental to that aspect of the matter which has in the first place attracted Federal jurisdiction. It extends in my opinion to the resolution of the whole matter between the parties. This accrued jurisdiction carries with it the authority to make such remedial Orders as are necessary or convenient for or as a consequence of that resolution. For this purpose the Court in exercising Federal jurisdiction enforce rights which derive from non a non federal source. This exercise of this jurisdiction which for want of a better term I shall call “accrued jurisdiction” is discretionary and not mandatory although it will be an obligatory exercise if Federal jurisdiction has been attracted in relation to the matter”.

It is suggested that the latter comments by His Honour about the discretionary nature of exercising such jurisdiction have not been followed in subsequent discussions nor do they necessarily represent good law. Once a Court is seized of jurisdiction then ordinarily the Court should exercise that Jurisdiction unless there is an abuse of process involved or alternatively issues concerning the appropriateness of the forum or otherwise are to be determined firstly.

The question of whether the Federal Court of Australia has accrued jurisdiction has been settled in the affirmative by the High Court of Australia for some time. Subsequent decisions including *Stack -v- Coast Securities (No. 9) Pty Ltd* (1983) 154 CLR and *Fencott –v- Muller* (1983) 152 CLR 570 reaffirmed this and such a view by the High Court was reinforced as recently in the case of *ASIC -v- Edensor Nominees Pty Ltd* (2001) 204 CLR.

It was not until 2002 that the Full Court of the Family Court decided to determine whether the Family Court has accrued jurisdiction. It is submitted that the authorities prior to *Warby’s* case in 2002 (as mentioned by Jerrard J in *C and C: Accrued Jurisdiction* (2001) FLC 93-076) and the above authorities firmly established some time ago that the Family Court was no different to any Federal Court and that it did always have such accrued jurisdiction.

However, in the event that there was any doubt, it was put to rest by the Full Court’s decision in *Warby and Warby* (2002) FLC 93-091.

In understanding how the accrued jurisdiction is attracted it is necessary to understand the source of power and the constitution for Federal Legislation (including the Family Law Act) and the meaning and significance of the term “matters” under both the constitutional and federal statutes including the *Family Law Act*.

In *Stacks* case, the Full Court said:-

“The source of the parliaments legislative power to create and confer jurisdiction on a Federal Court is to be found in Sections 71, 75, 76 and 77 of the constitution. The power to create Federal Courts come from Section 71 which vests the judicial power of the commonwealth in the High Court and such other Federal Courts as the parliament creates and in such other Courts it invests with Federal jurisdiction. The power to confer jurisdiction of the Federal Court comes from Section 71(1) which enables parliament to define the jurisdiction of any Federal Court with respect to any of the “matters”:

- (a) *In which the High Court has been given original jurisdiction by Section 75; and*
- (b) *With respect to which the parliament has been given power by Section 76 to confer original jurisdiction on.*”

The Family Court is a Federal Court and hence is a creature of statute. The Family Court must look to the laws of the Commonwealth to define its jurisdiction and powers.

Section 31 of the Family Law Act is the specific section that confers jurisdiction on the Family Court with respect to “matters” including “matters arising under this Act in respect of which matrimonial causes are instituted or continued under this Act”.

We are well aware of the definition of “matrimonial causes” in Section 4 of the Act but the word “matter” is not defined in the Act.

It is necessary to look at constitutional interpretation of that term together with the line of authorities in the High Court that refer to the definition of the word “matters” and its treatment.

The High Court and more recently the Family Court in *Warby* and *Warby* have affirmed that the word “matter” is not to be read down or constructed narrowly. In *Warby’s* case the Full Court stated:-

“The words “arising under this Act or under the repealed Act”(as stated in Section 31) must not be read as imposing limitations. They identify the federal core in respect of which a “matter” arises. As explained by the High Court, a non severable, non federal claim may arise as part of a matter arising under the Family Law Act. The requirement that a matrimonial cause must have been instituted in respect of a “matter” cannot be taken to mean that the matter can only consist of a “matrimonial cause”. That would be to confuse “matter” with “cause of action or claim for relief” a construction which was rejected by the High Court in the Philip Morris Case.”

The definition and effect given to the word “matter” was explained by the Full Court in *Fencott –v- Moller* in the following terms:

- *A “matter” means the subject matter for determination in a legal proceeding;*
- *A particular federal “matter” may be part only of a proceeding. In this sense a proceeding may be envisaged which a party seeks to litigate both a federal claim (or matter) and an unrelated non federal claim;*
- *A proceeding may relate to part only of what should properly be seen as the one larger matter for determination between the parties;*
- *Though the concept of “matter” may be narrower than that of a “legal proceeding” it is a term of wide impact. It is a justiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of the controversy;*
- *Generally, a matter is a justiciable controversy which must either be constituted by or must include a claim arising under the federal law but which may also include another cause of action arising another law provided it is attached to and not severable from the former claim.”*

Importantly, the Full Court in *Warby* set out the significant matters relevant as to whether the Family Court will in a particular case invoke the Court’s accrued jurisdiction. These relevant circumstances are:-

- (a) What the parties have done;
- (b) The relationships between or among them;
- (c) The laws which attach rights or liabilities to their conduct and relationships;
- (d) Whether the claims are part of a single justiciable controversy and in determining that question, whether the claims are “attached” and not “severable” or “disparate”;
- (e) Whether the claims are non severable from a matrimonial cause and arise out of a common substratum of facts; and
- (f) Whether the Court has the power to grant appropriate remedies in respect of the “attached” claims.

It is the writer’s opinion, with respect to the Full Court in *Warby’s* case that the existence of whether or not the Court has the ability to grant appropriate remedies (assuming that it as accrued jurisdiction) is not an appropriate discretionary factor in deciding whether it should exercise accrued jurisdiction once established it exists.

It is suggested that other High Court authorities do not stipulate such a condition for other Federal Courts.

The Family Court’s reluctance again to make a definitive finding about the Court’s powers to make Orders when exercising accrued jurisdiction arose again in the Full Court decision of *Bishop and Bishop (2003) FLC 93-144*. The case is helpful in that it elaborates further on the meaning of “Single Justiciable Controversy”. The Court stated:

“The purpose of exercising accrued jurisdiction is to enable the Court to deal with a single justiciable controversy. This does not mean a single justiciable issue. The present case makes it obvious that there may be many issues but one broad controversy, that being as to what part of the assets of all of the parties is subject to the making of Orders of this Court under Section 79. The reason why the jurisdiction is exercised is to enable the real issues to be determined between the parties, the underlying purpose being to do justice between them. In applying the test laid down in Warby, these matters should be born in mind by judges who are called upon to exercise the jurisdiction”.

It is suggested by the writer that talking about a discretionary nature of accrued jurisdiction is misleading. Obviously, the Court has to make a determination as to whether it has jurisdiction or not in the first instance. That determination will depend upon the facts and whether there is one single justiciable controversy in the true sense and meaning of those words. However, once a Court determines that it does have accrued jurisdiction to determine the whole of the “matter” then it is suggested that such jurisdiction should be exercised and that there is no discretion to choose not to do so.

In *ASIC -v- Ednsor Nominees* when discussing the existence of any discretion to refuse to entertain the State claim, it was stated:

“First, while there are various claims, in these cases there is but one ‘matter’ in the constitutional sense. The Court in question either does or does not have jurisdiction in respect of it. Moreover, in re: Wakim Gummo and Hayne J J expressed doubts as to what was meant by statements in some of the cases that the accrued jurisdiction was discretionary rather than mandatory. Ordinarily, questions of abuse of process,

or forum non-conviens and the like aside, jurisdiction conferred upon a Court is to be exercised”.

At page 218 His Honour Justice Kirby stated:

“... references to accrued jurisdiction being discretionary are apt to mislead”.

However, despite quoting these judgments in their own judgment, the Full Court in *Bishop* stated:

“We think some caution and a very careful examination of the facts needs to be exercised before applying the general notion that if a Court has jurisdiction it ought to exercise it when dealing with the claims involving third parties in Family Law cases. That caution having been said, if, as in this case the facts support the exercise of accrued jurisdiction the Court ought not to shy away from it. It is very important and a necessary part of the Court’s power.”

With respect to the Full Court, they are perhaps placing too much emphasis on whether the Court has power or not to grant appropriate remedies against third parties and not focusing on whether accrued jurisdiction exists or not. The question is not whether the Court should ‘exercise accrued jurisdiction’ but rather whether accrued jurisdiction (on the relevant facts) can be said to exist in relation to the Family Court’s determination of the “matter”

Likewise, the Family Court in *Warby’s* case and again in *Bishop’s* case (whilst making no authoritative determination) once again expressed some concern about the availability of appropriate remedies to grant against third parties even if accrued jurisdiction is exercised.

With respect, it is suggested that once accrued jurisdiction is established then what goes and attaches to that jurisdiction are all appropriate remedies and relief to resolve the whole of the “matter”.

Support for the above contention can be found in the recent High Court decision of *ASIC - v- Ednsor Nominees Pty Ltd*. In this case the High Court stated:

“In the present litigation, Section 79 (Judiciary Act) operated to ‘pick up’ the laws of Victoria because the Federal Court was exercising Federal jurisdiction in that State”.

Associated jurisdiction in this case involved the Federal Court exercising State powers under the Corporations Law in Victoria. It was argued in this case by Counsel opposed to ASIC that the Federal Court did not have the power to make the Orders as sought by ASIC under the Corporations Law. In the course of its Judgment the High Court stated:

“Nevertheless, it is to be remembered, particularly in the words of Brennan and Toohey JJ “characteristically an exercise of jurisdiction is attended by an exercise of power”. The claims for relief illuminate the scope of a controversy which constitutes a matter and once the Federal Court has jurisdiction to determine a controversy it has the power in the exercise of that jurisdiction to give the remedies sought”.

The High Court further stated:

“It is well established from the decisions under Section 79 of the Judiciary Act, that a State Statute may be applicable as a source of rights and remedies in the Federal

jurisdiction even though on its own terms that law identifies only the Court's of the enacting State as the Court's to provide those remedies”.

The High Court stated:

“The Federal Court, seized as it was of jurisdiction in this matter, did not lack the power to make the Orders in question ...”.

This was a clear approval by the High Court that the Federal Court in this matter once seized of accrued jurisdiction had the power to make Orders under the State law to provide the appropriate remedy.

In my opinion, there is nothing that would restrain the Family Court (once seized of accrued jurisdiction) from applying the appropriate remedy against third parties that attach to the exercise of that jurisdiction. It is clearly not a matter of discretion.

5. Other Sources of Jurisdiction of the Family Court Against Third Parties

Briefly, practitioners should not forget that there does exist other legislation that confers jurisdiction on the Family Court.

In relation to third party entities of particular importance is the jurisdiction under the *Corporations Act* and the fact that the Family Court can exercise jurisdiction under the *Corporations Act* pertaining to civil matters.

The relevant Section is Section 1337C(1) of the *Corporations Act*. As such, it is submitted that because the jurisdiction is specifically conferred on the Family Court that if the Applications which are sought against the third party arise specifically under the *Corporations Act* then nothing else needs to be established in relation to the Family Court's jurisdiction to make such Orders against third party entities.

Practitioners should also be aware of the provisions for the transfer of proceedings from the Supreme Court to the Family Court. These are set out in Section 1337J of the *Corporations Act*, namely:

1. A proceeding must be pending in the Court; and
2. It appears to the Court that any of the following three (3) grounds exist:
 - (a) The relevant proceedings arises out of or is related to another proceeding pending in the Federal Court or another State or Territory Court and it is more appropriate that the proceedings be determined by the other Court;
 - (b) It is more appropriate that the relevant proceedings be determined by the other Court having regard to:
 - (i) The relevant proceeding (or a substantial part of the relevant proceeding) would have been incapable of being instituted in the Court but for the Corporations Act and the cross-vesting legislation;
 - (ii) The extent to which the matters for determination in the relevant proceedings are not within the jurisdiction of the Court apart from the Corporations Act;
 - (iii) The interests of justice.

(c) The Federal Court or another State or Territory Court, is the most appropriate Court to determine the relevant proceeding.

Further, Section 1337L provides that in deciding whether to transfer a proceeding the Family Court (or Federal or Supreme Court) must have regard to:

1. The principal place of business of any corporation concerning the proceedings;
2. The place where the events that are the subject of the proceedings took place; and
3. The other Courts have jurisdiction to deal with the proceedings.

Practitioners should be aware of the provisions of Chapter 25 of the new Rules relating to Applications under the *Corporations Act 2001*.

Also, in limited circumstances the Court can exercise Associated Jurisdiction within the Section 33 of the *Family Law Act*. However, this is not to be confused with the accrued jurisdiction as it relates to the Family Court exercising the jurisdiction of another Federal Court (not state courts or common law) in associated matters and therefore has limited practical application to Family Court disputes involving property settlement.

Urgent Interlocutory Injunctions against third party entities for preservation of property

On a day to day basis these are the types of Applications that we as practitioners are more likely to face. They usually arise in an urgent context when information or documents come to our client's attention that require urgent action to properly protect the interests of our client pending a final determination of a property settlement.

Practical Example

Assume the following facts:

You act for the Wife. Husband and Wife married for 20 years. There is no property owned in the names of the Husband and Wife. The only property that exists is a substantial manufacturing business that is conducted through the ABC Family Trust. This is a typical discretionary Family Trust. The Trustee of the Family Trust is XYZ Pty Ltd and XYZ Pty Ltd is also the appointor under the Trust Deed. The Wife is not a shareholder or director of the Trustee company but is, along with the Husband and the adult children, beneficiaries of the Trust.

There are three other shareholders and directors of the Trustee company and these are the Husband's children from his first marriage who are all over 18 years of age. The Husband is permanent governing director of the Trustee Company. The permanent Governing Director's powers are wide and specifically allow the Husband to effectively pass resolutions upon his vote as permanent governing director.

The business that is operated through the Family Trust was recently considered to be conservatively valued at \$30 million on a bank valuation upon a recent refinancing of securities within the business.

One of the three adult children from the Husband's first marriage works actively in the business and has done so for the past 12 years. The other two children occasionally attend board meetings but they do not actively play a role in the business operations. Your client did secretarial and administrative work in the business for the last 5 years but prior to that was

mainly responsible for the care of the two children of the marriage who are aged 14 and 16. The Husband has worked extensively in the business but is now elderly (aged 70) and a lot of the day to day running of the business is conducted by his son from his previous marriage.

The client informs you that her Husband has recently said to her “*there is nothing to give to you by way of property settlement, you’re stuffed*”. The Wife’s 16 year old son told her that a meeting was recently held by the company and apparently “*Dad has retired*”. You make enquiries with the solicitors for the Husband who duly inform you that a resolution was passed some weeks ago noting that the Husband was no longer a permanent governing director and has retired a director of the Trustee Company.

Your client is aware from previous discussions with her son in law that it has always been the son in law’s plans to sell the business interest to a Japanese Consortium. Advise your client.

Practical matters to consider and attend to:

- Obviously, you have previously been well prepared and are able to quickly assess the situation and you are aware of the ramifications of what may have occurred.
- It is clear that urgent interlocutory relief needs to be sought against the Trustee Company together with Interlocutory relief against the Husband personally. It is also clear that Final Orders pursuant to Section 106B and other declaratory relief may also need to be sought in relation to the purported resolutions and retirement/ resignation of the Husband from the Trustee company.
- It is suggested that in preparing the necessary Application and supporting Affidavit the following relevant matters should be considered by you:
 - Jurisdiction- It is suggested that the Court would exercise jurisdiction against the third party entities on an interlocutory basis. Clearly, relief to be sought at the final hearing pursuant to Section 106B entitles the Court to grant such interlocutory relief so as to preserve the asset pool pending determination of that Application.

Also, declarations as to the validity or otherwise of the resolutions or Applications in relation to what the company has adopted to may also need to be made in those Applications and properly the jurisdiction could be founded under the Corporations Act. Also, it may be a case where other declaratory relief is sought that the accrued jurisdiction is relevant in relation to argument as to the treatment of the assets of the trust as assets of the Husband and Wife.

The determination of the matrimonial pool and as to what that comprises is the “*single justiciable controversy*” that must be determined. That determination involves the determination of the rights of the third parties involved in the corporate trustee and trust structure.

- Satisfying the grounds for urgent interlocutory relief for preservation of assets- Even though third parties are involved, it is important not to forget the normal principals in seeking such interlocutory relief and the requirements that you must satisfy the Court of if you are to obtain relief for your client. In such interlocutory relief, you must satisfy the Court of the following:
 - There is a serious question to be tried;
 - The balance of convenience supports the making of the Order;

- The restraints sought should be reasonably necessary in the sense that if the restraining Orders sought were not made there would be a real risk of defeat of the claimed interest; and
- The issue of the appropriateness of an undertaking as to damages.
- Relevant Authorities relating to the above applicable law include:
 - *Blue Seas Investments Pty Ltd –v- Mitchell and McGilvray (1999) FLC 92-856*;
 - *Yunghanns –v- Yunghanns (1999) FLC 92-836*;
 - *Waugh –v- Waugh (2000) FLC 93-052*.
- Obviously, in framing any interlocutory relief that you seek on behalf of your client, you need to ensure that there is a proper and appropriate final relief sought to establish the “*serious question*” to be tried. In this particular case, clearly the serious to be tried relates to the purported removal of the Husband as permanent governing director and whether the relief pursuant to Section 106B will be available to the Wife. It is important to remember that interlocutory relief does not exist in a vacuum and thought must be given to how you word and phrase final relief sought.

In particular, if relying upon the accrued jurisdiction then you need to consider appropriate remedies and relief on a final basis that may be sought against the third parties which in turn is properly drafted and formulated will assist (once the Court accepts it has accrued jurisdiction) in satisfying the serious question test.

- The balance of convenience argument should also be addressed in the Affidavit material. Clearly, in this matter the balance of convenience favours the Wife as long as the injunction sought do no more than to preserve the status quo and the value and ownership of the property within the Trust. If such injunctions were not granted then there would be a substantial prejudice to the Wife in that assets may be dissipated, sold etc so that they were not readily available for division between herself and the Husband should she ultimately be successful at the final hearing;
- An appropriate undertaking as to damages- Clearly, in a situation where your client is impecunious then reference can be made to authorities such as *Blue Seas Investments Pty Ltd –v- Mitchell and McGilvray (1999) FLC 92-856* and the more recent authority of *G and T (2004) FLC 93-176*.

In the *Blue Seas case*, the Full Court stated that there is no requirement for an undertaking as to damages, where the party seeking an injunction is impecunious or has limited means. They also refer to the well known principal that poverty should not bar a litigants access to justice. Obviously, if your party is a wealthy party then you will need to have your client provide the appropriate undertaking as to damages.

- It is important that your client’s Affidavit material address all of the above issues that are relevant and put proper evidence before the Court as to these matters. The annexing of a corporate diagram and a clear explanation of the structures that exist and the Husband’s interest in those structures would be of great assistance to the Court.
- Suggested Orders that could be drafted on an Interim basis could include the following:

- As against the company:
 - That the Respondent XYZ Pty Ltd by itself, its officers and agents be restrained an injunction issues restraining them from:
 - Distributing to any beneficiary or transferring, assigning or encumbering by mortgage or charge or dealing in any way with any real property of the ABC Discretionary Trust;
 - Distributing to any beneficiary or dealing in any way with any assets or interests (not being real property) of the ABC Discretionary Trust other than in the ordinary course of business without providing to the Wife's Solicitors 30 days notice in writing of the proposed dealing;
 - Resigning the trusteeship of the ABC Discretionary Trust;
 - Taking any further steps or actions to remove the Husband as permanent governing director or director of the company notwithstanding its purported removal of him from such office;
 - Registering or otherwise giving effect to any transfer of the shares held by the Husband in the company;
 - Taking any steps or actions:
 - To amend or further amend its Article of Association;
 - To alter or amend in any way the rights attaching to the shares issued or issuing further share therein;
 - To resign as Trustee or substitute/ appoint another trustee, amend the Trust Deed in any respect whatsoever or to add or alter the beneficiaries' name therein;
 - To resolve to wind up the company (either voluntarily or otherwise) or appoint a liquidator (provisional or otherwise);
 - From paying monies to the Husband or for his benefit by way of salary, loan or otherwise.
- As against the Husband:
 - The Husband be restrained and an injunction be issued so restraining him:
 - From taking any further steps or actions to resign or vacate his office as permanent governing director or director of XYZ Pty Ltd notwithstanding the purported removal of him therefrom;
 - From taking any steps or actions to:
 - Amend or further amend the Articles of Association of XYZ Pty Ltd and should he become aware of any intentions so to do, he shall forthwith inform the Wife's solicitors thereof in writing;

- Alter or amend in any way the rights attaching to the issued shares of XYZ Pty Ltd or issue further shares therein and should he become aware of any intention so do, he shall forthwith inform the Wife's solicitors thereof in writing;
- Remove XYZ Pty Ltd as trustee of the ABC Family Trust, amend the Trust Deed in any respect whatsoever, make any distributions of income or capital to any beneficiary or to remove or alter the beneficiaries name therein;
- To wind up XYZ Pty Ltd (either voluntarily or otherwise) or to appoint a liquidator (provision or otherwise)