# IN MIXED COMPANY: CORPORATIONS IN FAMILY LAW

The Hon Justice Paul Brereton, AM, RFD

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## Introduction

When I began to turn my mind to a topic for this paper, I wondered how best to tie my current judicial experience with the interests of family lawyers. Recently, in family law circles, I have spoken a couple of times on one obvious connection, being trends and issues in Adoption Law in New South Wales, where there has been an exponential increase, unique in Australia, in the use of adoption as a permanency solution for children in out-of-home care. But while the role of Adoptions List Judge has allowed me to continue to engage in that area of the law that concerns the welfare of children - which in my view is second in importance only to that which deals with the liberty of citizens - my principal area of judicial responsibility is as the Corporations List judge. And while to some it might seem that so-called black-letter corporations law is about as far removed from the territory of matrimonial law as one can get, it occurred to me that as in that jurisdiction I have not infrequently encountered family law issues, their inter-relationship would provide a suitable subject. Indeed, only a few months ago, I transferred to the Family Court a *Corporations Act* oppression suit that was related to matrimonial property proceedings pending in the Family Court; and because it provides a useful illustration of the way in which these issues arise and may be resolved, we will return to it later. And in the other direction, I will in a fortnight's time be hearing – not for the first time - a s 79 matrimonial property application, which has been transferred from the Family Court. Moreover, not least because of the widespread use of so-called family companies, many issues in corporations law have implications for families, and for family lawyers.

For present purposes, it is convenient to describe three classes of corporation.

The first relevant class comprises what might be called public companies, in which shares are freely transferable, and which are ordinarily listed on the Australian Stock Exchange. Typically, a spouse will have only a relatively small minority shareholding in such a corporation, and no real influence over its direction, let alone any controlling interest. In the family law setting, usually the only issue will be valuation of the shareholding, and that will typically be a straightforward exercise, the value being ascertainable from the share market.

The second relevant class is the family company, in which all the shares are held by one or both of the parties to the marriage. Such companies are frequently used as trustees of family discretionary trusts, and of self-managed superannuation funds, or to operate family businesses or hold family investments. Although it may not always have been so, it is now accepted that where there is no other shareholder than the spouses, such a company is an *alter ego* of the spouses.[1] In any event, as the totality of shareholding is property of the parties, there is no obstacle to dealing with the whole of the shareholding in matrimonial property proceedings.

The third relevant class of corporations – and the one which poses the most interesting issues from the perspective of one interested in both matrimonial and corporations law, and is more likely to give rise to cross-jurisdictional issues – is the closely-held company in which one or both spouses has a substantial less than 100% shareholding – in other words, where there are shareholders other than the parties to the marriage. Those other shareholders may be other family members, including children of the spouses, or they may be commercial associates. This class includes those corporations which are sometimes referred to as "quasi-partnerships", in which a shareholder spouse and the other shareholders participate in the pursuit of their common commercial interests through the operation of a business, or investment in property.

In such companies, questions of valuation are more complicated, because there is often no market for the shares, and there are usually legal and practical restrictions on their transferability. Thus value is usually determined on an assets-based or earnings-based

[1] *In the Marriage of Foda* (1997) 21 Fam LR 653; FLC ¶92–753.

approach. In the latter – despite the efforts of accountants to shroud the exercise in the mystery of a dark science - the fundamental questions are usually (1) what is the level of maintainable earnings (which involves normalization and adjustment of historical earnings to project consistent future earnings), and (2) what is the appropriate capitalization or discount rate (to reflect the rate of return which an investor would expect, commensurate with the risk of the investment). A further question may be whether there are assets surplus to the business of the company, to be added to the value of future maintainable earnings. Issues of discounts for minority interests, and premiums for control, may also arise.

In the context of matrimonial property disputes, it is not unknown for the other shareholders in such a company to align with a shareholder spouse, and the risk or fact of that alignment can create cross-jurisdictional issues.

**Outline**

Against that background, in this paper I propose to discuss:

- The Corporations-related jurisdiction of the Family Courts;
- Remedies under the Corporations Act;
- Choice of court and transfer of proceedings.

**Corporations jurisdiction and the Family Courts**

Fundamentally there are two types of capital in a company: equity, represented by shares; and debt, represented by loans. Both shares, and credit loan accounts, are property, amenable to s 79. Moreover, for the purposes of s 90AE, debit loan accounts are also deemed to be property, and are susceptible to adjustment in s 79 proceedings. Where all the shares in a company are held by one – or both – spouses, there is usually little difficulty in dealing with the company in matrimonial property proceedings. The company is an *alter ego* of a party, or the parties, to the marriage.[2]

[2] *In the Marriage of Foda* (1997) 21 Fam LR 653; FLC ¶92–753.

Beyond that, however, there are a number of jurisdictional bases on which the Family Courts – by which I mean, except where an exception is indicated, Courts exercising jurisdiction under the (CTH) *Family Law Act 1975,* including the Family Court of Western Australia - may deal with corporations.

*Nuptial settlement?*

An argument has in the past been advanced, by Peter Nygh writing extra-judicially, that the articles of association of a proprietary company coupled with the allotment of shares to shareholders who were exclusively members of a family might constitute a nuptial settlement within *Family Law Act,* s 85A.[3] This would embrace not only a company in which the spouses are the only shareholders, but one in which children of the marriage are also shareholders. The argument, so far as I am aware, has never been never judicially endorsed, and it was treated with some scepticism by McLelland J in *MJH Pty Ltd v Hannes*.[4] Because of the other powers now available to Family Courts in respect of third parties, it may never have to be resolved.

*Part VIIIAA*

The previously existing powers of the Family Court to make orders affecting or binding corporations were amplified with the introduction of Part VIIIAA, Division 2 of which deals with orders under s 79. Section 90AE provides that when making an order altering the property interests of the parties to a marriage, the court has power to make an order binding a third party, albeit subject to the limitations imposed by s 90AE(3).[5]

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[3] Nygh P, "Section 85A : Is it of much use?", (1986) 1 AJFL 10 at 22-3.

[4] (1990) 14 Fam LR 231.

[5] Which provides that the court may only make any such order if:-
(a) the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and
(b) where the order concerns a debt of a party to the marriage, it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and
(c) the third party has been accorded procedural fairness in relation to the making of the order; and
(d) the court is satisfied that, in all the circumstances, it is just and equitable to make the order; and
(e) the court is satisfied that the order takes into account the taxation effect (if any) of the order on the parties to the marriage and on the third party; the social security effect (if any) of the order on the parties to the marriage; the third party's administrative costs in relation to the order; if the order concerns a debt of a party to the marriage, the capacity of a party to the marriage to repay the debt after the order is made; the economic, legal or other capacity of the third party to comply with the order; if, as a result of the

Although the Explanatory Memorandum suggested that s 90AE was intended to apply only to the procedural rights of the third party and not to extinguish or modify the underlying substantive property rights of the third parties, the section itself does not contain any such limitation. By s 90AE, the court is specifically empowered to make a range of orders, which relevantly include:-

(a) an order directed to a director of a company or to a company, to register a transfer of shares from one party to the marriage to the other;

(b) an order that directs a third party to do anything in relation to the property of a party to the marriage.

Possible uses of such orders in the corporations context include:-

- an order directed to a director of a company or to a company, to register a transfer of shares from one party to the marriage to the other – notwithstanding that the corporate constitution does not permit it, or permits the company to decline to register any transfer – or otherwise overriding restrictions on the transferability of shares. This effectively addresses the situation which was found to be beyond power in *Ascot Investments Pty Ltd v Harper*.[6] In a matrimonial cause, this probably provides a more flexible and readily available remedy than the corresponding provisions of the Corporations Act, which allow a party to a transfer or proposed transfer of shares to apply for review of a refusal to register a transfer.

- an order requiring the compulsory acquisition of a minority interest by a third party majority shareholder. Such an order is "an order that directs a third party to do anything in relation to the property of a party to the marriage", within s 90AE(2). It would be analogous to the type of relief which is often granted for oppression under *Corporations Act*, s 233. It might be considered that such relief

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third party being accorded procedural fairness in relation to the making of the order, the third party raises any other matters, then those matters; and any other matter that the court considers relevant.

[6] (1981) 148 CLR 337; 33 ALR 631; 6 Fam LR 591; FLC ¶91–000.

would not lightly be granted, given its substantive impact on the third party; but subject to procedural fairness and the other constraints imposed by s 90AE(3), there appears to be no jurisdictional reason why it could not be made.

*Transactions to defeat claims*

Another important power related to corporations to be found in the *Family Law Act* is in s 106B, which provides that In proceedings under the Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.

While a transfer by a spouse to a third party of shares in a company, other than for fair consideration, would plainly be within s 106B, there are more imaginative means of endeavouring to achieve a similar effect which, at least once upon a time, were less clearly so. One that was once in favour was procuring an allotment of additional shares to a third party, on the basis that this was not a disposition *by or on behalf of or in the interest of* a party.

In *In the Marriage of Turnbull*,[7] Baker J held that where a transaction which involved an allotment of shares in a family company was a sham, being designed to substantially diminish the value of a party's shares in the company, and hence reduce that party's overall net worth in anticipation of an application under s 79, the transaction could be set aside under the then s 85 – the predecessor of s 106B. In s 106B, "disposition" is now specifically defined to include, amongst other things, the issue of shares.[8] Thus an allotment of shares is a disposition for the purposes of s 106B. That definition was introduced, it would seem, in response to the views once in circulation that an allotment was a convenient way in which claims could be defeated without exposure to s 106B.

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[7] (1990) 15 Fam LR 81; (1991) FLC ¶92–258.

[8] See paragraph (b) of the definition of "Disposition" in subs (5), effective from 3 August 2005.

Of course, to be liable to be set aside, it is insufficient that there merely be an allotment; it must be “by or on behalf of or in the interest of” a party. At the same time, it is obvious that, as one of the few legal acts that a corporation cannot perform is marriage, an issue of shares by a company will never strictly be by or on behalf of a party to the marriage. However, the express inclusion of allotments in the definition must be allowed to do some work. In the *Official Trustee in Bankruptcy v Sola*,[9] Murray J said that the terms by "by or on behalf of" or "by direction" or "in the interest of" in then s 85, required that the husband, a party to the marriage, either be the disponor, or exercise at least some element of control or influence over the disposition. In my view, it is strongly arguable that where a spouse’s shareholding is diluted by an allotment of shares to others, that works an effective transfer of value from the spouse shareholder to the allottee, and at least if the spouse has some element of control or influence over the transaction, it will be a disposition by or on behalf of or in the interest of that spouse.

In *Ferrall v Blyton, Attorney General of the Commonwealth Intervener*,[10] Mr Blyton – who had separated from his wife - and his accountant had put in place some elaborate arrangements by which shares were allotted in the husbands’ companies, which operated radio stations in southern New South Wales, to associates of the accountant, relevantly Mr Ferrall. Somewhat to the husband’s chagrin, the accountant and his associates later declined to restore the husband to his controlling position and maintained that they were beneficially entitled to the allotted shares and with them to control of the radio stations. Mr Blyton then brought his own application under s 106B to set aside, and the third parties’ contention that it should be summarily dismissed as unarguable was rejected by O'Ryan J. Mr Ferrall appealed, but O’Ryan J’s decision was upheld by the Full Court constituted by Nicholson CJ, and Lindenmayer and Kay JJ. The Full Court said: "It is, we think, obvious from his Honour's judgment that each of the issues is reasonably arguable”.[11] The application for leave to appeal from the dismissal of the summary dismissal application therefore failed.

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[9] (1986) 13 FLR 557.

[10] [2000] FamCA 1442, (2000) 27 FLR 178.

[11] [2000] FamCA 1442, (2000) 27 FLR 178 at [102].

*Corporations Act jurisdiction*

The powers to make orders affecting or binding corporations to which I have so far referred arise in matrimonial jurisdiction of the Family Courts, under the *Family Law Act*. I now turn to what is in my view its important, and sometimes underappreciated, jurisdiction under the *Corporations Act.* By s 1337C(1), jurisdiction is conferred on the Family Court of Australia – concurrently with the Supreme Courts and the Federal Court - with respect to civil matters arising under the corporations legislation. As I recently had occasion to observe in the context of an application for transfer of proceedings to the Family Court, "It needs to be recognised that by reason of *Corporations Act*, s 1337C, the Family Court of Australia is a corporations court".[12] This extends to the Family Court of Western Australia, because by s 1337C(2), jurisdiction is conferred on each State Family Court with respect to civil matters arising under the Corporations legislation, and by (3) that jurisdiction is not limited by any limits to which any other jurisdiction of the State Family Court may be subject.

It is important to appreciate that by that provision, the Family Court has a plenary jurisdiction in matters arising under the Corporations Act, with the full suite of remedies available under that Act, equivalent to that of the Supreme Courts and the Federal Court. That is what I mean when I say that the Family Court is a corporations court, just as the Supreme Courts and the Federal Court. The Family Court's jurisdiction does not depend on any connection with a marriage or a matrimonial proceeding, or even the existence of any matrimonial proceeding. Jurisdictionally, there is no reason why a creditor of Mandurah Muppets Pty Ltd, to use a fictitious local example, could not file a winding up application in the Family Court, and unless application were made for its transfer, under the cross-vesting provisions of the Corporations Act, to another "more appropriate" court, the Family Court would be bound to hear and determine the application.

While one obvious use of the Family Court's corporations jurisdiction is where there are corporations law issues associated with matrimonial proceedings, that was not the sole

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[12] Application to FamCWA?

intention that informed this grant of jurisdiction. As with the Court's jurisdiction under the (CTH) *Bankruptcy Act 1966,* and the (CTH) *Administrative Decisions (Judicial Review) Act,* it was initially conferred with the aspiration that it would give the Family Court a more diverse jurisdiction - and its judges a more diverse diet.

**Corporations law remedies**

Although the equivalent of some corporations law remedies may be obtained by resort to s 90AE and s 114 of the *Family Law Act*, there are many remedies which are available only under the *Corporations Act*. And even where concurrent remedies are available, the fact that the Corporations Act provides a remedy may bear on the grant of discretionary relief under the Family Law Act. Some of the remedies which may be relevant include:

*Compensation for breach of director's duties*

Directors owe statutory duties to the corporation to:

- exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a corporation in the corporation's circumstances; and occupied the office held by, and had the same responsibilities within the corporation as, the director or officer (s 180);

- exercise their powers and discharge their duties in good faith in the best interests of the corporation; and for a proper purpose (s 181); and

- not improperly use their position to gain an advantage for themselves or someone else; or cause detriment to the corporation (s 182); and

- not improperly use information which they have obtained because they are, or have been, a director or other officer or employee of a corporation, to gain an advantage for themselves or someone else; or cause detriment to the corporation (s 183).

While they have limited practical application in sole shareholder companies, these duties apply in the context of family companies as they do in public companies, although the nature of the company is a relevant circumstance of the corporation when evaluating the duty of care in s 180. The sanctions for their contravention include compensation, under s 1317H. Particularly in the context of family companies, these duties are often given little attention, although this will only matter if the other spouse is also a shareholder, and even then, as compensation payable by a spouse director is likely to come out of the matrimonial pool, this may be of limited advantage. But there may well be scope for argument that, by analogy with compensation for domestic assault, it ought to come out of the delinquent director's share.[13] On the other hand, compensation payable by a delinquent non-spouse director or accessory would augment the divisible pool. Because the Corporations Act visits accessorial liability on those who aid, abet, counsel or procure, or are knowingly concerned in a contravention, the matrimonial pool could be augmented by compensation payable by an adviser or associate of a spouse director.

*Winding up*

A member of a company may apply for a winding up order, resulting in the appointment of a liquidator, the realisation of assets, the payment of liabilities and the distribution of the surplus (if any is left after the liquidator's remuneration) to the members. Whereas creditors typically apply for winding up orders on the ground of insolvency, members usually apply on the "just and equitable" ground. Common instances of the just and equitable ground include where management is deadlocked, where the substratum has failed, and where in the context of a closely held company of the quasi-partnership kind there was a premise of underlying personal trust and confidence between the members, and that both would be involved in management, that trust has been lost and one has been excluded. Those grounds may often arise on marriage breakdown, especially in a company in which husband and wife are equal shareholders and directors.

[13] See *Marsh & Marsh* (1993) 17 Fam LR 289; (1994) FLC ¶92-443.

Sometimes, particularly in the case of a company that merely holds assets, winding up can provide a convenient means for converting company assets into assets in the hands of the parties.  But be careful.  Such applications make creditors nervous, and often trigger events of default under security documentation – and in a family company, the security for company borrowings often includes the matrimonial home.

*Oppression*

An alternative to winding up is the wide-ranging discretionary remedy for oppression under ss 232 and 233, which enable a member of a company to apply for relief if the conduct of a company's affairs, or an actual or proposed act or omission by or on behalf of a company, or a resolution or proposed resolution, is either contrary to the interests of the members as a whole, or oppressive, unfairly prejudicial to, or unfairly discriminatory against, a member or members, whether in that capacity or in any other capacity.

On such an application, the Court can make any order that it considers appropriate in relation to the company, including an order that the company be wound up; that the company's existing constitution be modified or repealed; regulating the conduct of the company's affairs in the future; for the purchase of any shares by any member, or by the company (with an appropriate reduction of the company's share capital); for the company to institute, prosecute, defend or discontinue specified proceedings; or authorising a member to institute, prosecute, defend or discontinue specified proceedings in the name and on behalf of the company; appointing a receiver or a receiver and manager of any or all of the company's property; restraining a person from engaging in specified conduct or from doing a specified act; or requiring a person to do a specified act.

Common examples of oppression include the dilution of shareholdings by the allotment of additional shares, and exclusion from management in closely-held companies. A compulsory purchase order, requiring the majority to buy the shares of the oppressed member at valuation, is the most common remedy. This remedy provides a means for a shareholder in such a company to liquidate his or her shareholding, at valuation, unaffected by the oppressive conduct.

Under s 237, the Court may grant leave to a member to bring or defend proceedings on behalf of or in the name of the company, where the company will itself not do so. As we will see, this has obvious utility where a spouse who controls a company fails to bring or defend proceedings, to the potential detriment of the matrimonial pool.

*Rectification of the register*

It is of course not unknown for the name of a director and or shareholder mysteriously to disappear from the record after marriage breakdown. While it may well be possible to invoke s 114 to remedy this, the Corporations Act also provides remedies. Under s 175, a person aggrieved may apply to the Court to have a register kept by the company corrected. And under s 1422(4)(b), the Court may make an order directing the rectification of any register kept by ASIC. As bankers and other financiers typically rely on the ASIC register, this can be important.

The Corporations Act also provides means by which a shareholder can obtain access to company documents for a proper purpose.

**Choice of Court**

While the transfer of matrimonial jurisdiction to State Supreme Courts is governed by the (CTH) *Jurisdiction of Courts (Cross-vesting Act),* the transfer of proceedings under the Corporations Act between courts is govern by specific provisions of the Corporations Act[14] – which are similar, but not identical, to those of the Cross-vesting Act. In both cases, the essential question on a transfer application is, which is the "more appropriate court". This typically involves a search for the "natural forum", or the jurisdiction with which the parties and their dispute has the closer connection. Where one court clearly has jurisdiction and the other's claim to jurisdiction is more tenuous, or depends only on cross-vested jurisdiction, that clearly points to the former as more appropriate.

Thus I have previously argued[15] that, as it is manifestly preferable to litigate in a court which unquestionably has jurisdiction to deal with the whole of the issues, rather than in one which cannot – or even arguably cannot – deal with all the issues, and as the Supreme Court has general equitable jurisdiction and cross-vested jurisdiction under the Family Law Act, common sense dictates that, unless the equitable claim is clearly

[14] *Corporations Act,* s 1337H.

[15] "Third Parties: Invited Guests or Gate Crashers?", 13th National Family Law Conference, Adelaide, South Australia, 6 – 11 April 2008, (2008) 22 AJFL 197

within the accrued jurisdiction (as will often be the case), then the proceeding should be litigated in the Supreme Court, which alone has complete incontestable jurisdiction. This is because, since the demise of the cross-vesting of state jurisdiction on Federal courts, only the state Supreme Courts have complete jurisdiction to deal with all matters, matrimonial and other. Often, the accrued jurisdiction of the Family Court will permit it to deal with all aspects of a matter. But where there are severable non-federal aspects of a dispute that do not fall within the accrued jurisdiction, only the Supreme Court can entertain the whole dispute. Moreover, arguments about jurisdiction can be avoided by invoking the jurisdiction of the Supreme Court, which unquestionably has jurisdiction, when the jurisdiction of the Family Court might be arguable. As Nicholas J said in *Benlair Pty Ltd v Terrigal Grosvenor Lodge Pty Ltd*[16] - an application to transfer proceedings to the Family Court:

> Accordingly, in my opinion considerations of the interests of justice preclude the finding that it is more appropriate that the proceeding be determined by the Family Court. It is presently in an appropriate court, the jurisdiction of which is not in doubt. It cannot be in the interests of justice to transfer the proceeding to a court whose jurisdiction is arguable and uncertain, and which, if jurisdiction is found to be lacking, will remit it back to this Court. To make a transfer order in these circumstances would be inconsistent with the statutory purpose to ensure that proceedings are always dealt with by the most appropriate court. In my opinion the proceeding may be tried more suitably for the interests of the parties to it and the ends of justice in this Court rather than the Family Court.

Thus where there is doubt as to the jurisdiction of the Family Court to resolve all aspects of a dispute, the appropriate course may be to institute the proceedings – including the matrimonial proceedings – in the Supreme Court, or to transfer the matrimonial cause to the Supreme Court. On the other hand, where there is no doubt as to the jurisdiction of the Family Court to resolve all issues, the institution of all proceedings in that Court, or their transfer to it if they are instituted elsewhere, will often be the appropriate course, for the reasons I explained in *Valceski v Valceski*[17] - essentially, that the matrimonial dispute is the overarching dispute, and the other claims subsets of it.

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[16] [2006] NSWSC 339.

[17] (2007) 70 NSWLR 36; (2007) 210 FLR 387; (2007) 36 Fam LR 620; (2007) FLC ¶93-312; [2007] NSWSC 440.

However, in the context of Corporations Act matters, there is no doubt as to the jurisdiction of the Family Court, which has the same jurisdiction as the Supreme Courts (and the Federal Court). Thus questions of which is the "more appropriate court" cannot be disposed of on that basis. There is nothing more appropriate jurisdictionally about the Supreme Court or the Federal Court for a corporations matter, though it might be argued that one or other of them was "more appropriate" for reasons of specialization. Indeed, where only matrimonial and corporations issues are concerned, it might well be said that the more appropriate forum is prima facie the Family Court, which has jurisdiction (without reliance on cross-vesting) in both; whereas the Supreme Courts have jurisdiction in matrimonial matters only by reason of cross-vesting.

Of course, jurisdictional foundation is not the only factor to be considered: others include where the issues arose, where the parties reside, to a lesser extent where the witnesses reside, and the systems of law that will apply. Issues of convenience – including expedition – are also relevant.

*Tykade v PJL Group*

These – and the potential utility of Corporations law remedies in the matrimonial context – are illustrated by the case to which I first referred, *Tykade v PJL Group* (which goes by another name in the Family Court). This was an application for transfer to the Family Court which succeeded - despite my initial observation that, at least before me, harbouring as I do a predisposition to seize rather than relinquish jurisdiction in family law matters, such an application did not appear propitious.[18]

The husband and the wife, who had separated, were engaged in matrimonial property proceedings, initiated in the Local Court, transferred to the Circuit Court, and ultimately to the Family Court at Parramatta. Their divisible property comprised a home in which there was equity of less than $100,000, and their shareholding in Tykade Mechanical Pty Limited, of which the wife was the sole director and the majority and controlling shareholder holding 10 A class, 10 B class and 10 F class shares, while the husband held one share, and other family members held the others.

[18] *In the matter of PJL Group Pty Limited* [2018] NSWSC 756.

Tykade in turn held 25.33 per cent of the shares in another company PJL Group Pty Limited, which was also indebted to Tykade on loan account. Thus the shareholdings of the parties in Tykade - because its shareholding in PJL was substantial and valuable - were likely to comprise the overwhelming proportion of the property available for division under *Family Law Act,* s 79.

PJL had originally been a partnership business conducted by the husband and two associates. It was incorporated in mid-2011 with shareholdings of 33.33 per cent each to Tykade, and companies of the other two directors. Subsequently shares were issued to some employees and to a vendor of a business to the company by way of consideration for the acquisition of that business, with the result that the interests of Tykade, and the other two original shareholders were each reduced to just in excess of 25 per cent each.

When the business of the PJL partnership was transferred to the company, loan accounts were created in the company for each of the transferor entities, initially in the order of $3.8 million each, reflecting a value of the business on transfer in the order of $11.4 million. Those loan accounts were later reduced to something in the order of $1.35 million each, by a transaction which was said on behalf of PJL to have corrected the incorrect inclusion of the value of goodwill in the original allocation – an interesting proposition.

In the Family Court proceedings, a single expert had been engaged to value the interests of the parties to the matrimonial proceedings in Tykade. That necessarily involved the valuation of Tykade's interests in PJL. That valuation process had been protracted. Subpoenas had been issued out of the Family Court for production of documents relevant to the valuation process, and an application on behalf of PJL to set aside one of those subpoenas was unsuccessful. Documents had been produced pursuant to those subpoenas to the Family Court.

On 12 December 2017, the docket judge made directions for trial, with the intent that if the matter was ready in April 2018 it might be allocated a four day hearing, of which there were reasonable prospects before the end of 2018; however, due to outstanding

issues relating to the instructions to be given to the valuer, it was dubious that the matter would be ready to take a date for hearing.

Meanwhile, on 14 November 2017, Tykade - no doubt at the instance of the wife, who appeared to be in a difficult financial position - issued and served a creditor's statutory demand on PJL for so much of its loan account as was clearly not in dispute. On 29 November 2017, PJL and Tykade entered into a deed of settlement in respect of that demand pursuant to which Tykade was on 14 December 2017 paid a sum of $807,430, some of which was paid to the wife and some of which was paid to the husband by way of partial property settlement, but the bulk of which was deposited into a trust account, pending the outcome of the Family Court proceedings.

Before that payment was made, on 5 December 2017 PJL announced a non-renounceable rights offer issue of shares at a price of $6.33 per share. On behalf of Tykade the wife expressed concern that this was an undervalue of the shares, that if Tykade did not accept it, its interests would be diluted, but that if it were permitted to offset the loan account to the extent of the price payable that would mitigate any prejudice. That suggestion was accepted, and so Tykade accepted that rights issue, paid for it by deduction from its loan account, and the proportionate shareholdings in PJL did not change, as all the shareholders accepted the offer.

But then on 17 December 2017, the other two original shareholders in PJL each demanded repayment of their loan accounts of in excess of $800,000 from PJL. PJL said that it was unable to pay those demands without raising more funds. Ostensibly to address that situation, on 21 December 2017 it announced a second non-renounceable rights issue, again at a price of $6.33 per share, for 267,196 shares. If Tykade did not accept that offer, its interest in PJL would be diluted from 25.33 per cent to 18.22 per cent – which has particular significance because, with a shareholding in excess of 25 per cent, Tykade could block a special resolution but, if its shareholding fell below 25 per cent, it could not. Alternatively, if Tykade were to accept the offer so as to maintain the level of its shareholding, it would have to pay $425,000, which would almost exhaust the amount of $554,000 currently deposited in the trust account. Once again, Tykade expressed concern that $6.33 per share was a considerable undervalue.

When confronted, four days before Christmas Day, with this second non-renounceable rights offer, the wife found that the docket judge was on leave, and that access to the Family Court in vacation for the purposes of injunctive relief was not nearly so convenient as to the Supreme Court of New South Wales Corporations List. So, avowedly because of the greater convenience of approaching the Supreme Court in vacation, she caused Tykade, by originating process filed 3 January 2018, to commence an oppression suit in that Court, and in particular to obtain injunctive relief to restrain the proposed share issue. In its originating process Tykade specifically sought by way of interlocutory relief, not only the interlocutory injunction to which I have referred, but also an order that the proceedings be transferred to the Family Court, to be heard with the family law proceedings. That was made returnable with an abridgement for time for service on 5 January 2018, when the vacation judge granted an interlocutory injunction by consent restraining PJL from issuing any new shares until 15 February 2018. That injunction was subsequently extended consensually.

The oppression suit was in relatively narrow compass; unlike many, it did not rely on a diverse range of alleged oppressive conduct over a protracted period of time, but essentially attacked the reduction in Tykade's loan account, and the proposed second non-renounceable rights issue. As to the share issue, the questions in dispute appeared to be the motivation for the issue - namely, whether the company had a bona fide need for additional capital, or whether it was in truth motivated by a scheme to minimise the value of assets available in the matrimonial proceedings; and whether the proposed issue was at a proper value or a significant undervalue. So, in essence, the issues were the motivation for the share offer, and the valuation of the share offer.

The wife subsequently applied in the family law proceedings for leave to join PJL as a respondent (Tykade already being a party), to seek relief against PJL pursuant *Family Law Act*, s 106B, to set aside or restrain the proposed second rights issue.

*The transfer application*

In connection with the transfer of Corporations proceedings, *Corporations Act,* s 1337H, provides that, in connection with a proceeding with respect to a civil matter arising under the corporations legislation which is pending in a Supreme Court, then if it appears to

the transferor court that, having regard to the interests of justice, it is more appropriate for the relevant proceeding or an application in it to be determined by another court that has jurisdiction in the matters for determination in the relevant proceedings or application, then the transferor court may transfer the relevant proceedings or application to that other court. *Corporations Act*, s 1337L states that, in deciding whether to transfer under s 1337 a proceedings or application, the Court must have regard to the principal place of business of any body corporate concerned, the place or places where the events that are the subject of proceedings or application took place, and the other courts that have jurisdiction to deal with the proceedings or application.

So far as concerns the place of business of PJL and the place of the events, there was no material difference between Sydney and Parramatta.

As I have already discussed, the Family Court is, for the purposes of s 1337H(2), "another court that has jurisdiction in the matters for determination in the relevant proceedings". Although theoretically the Federal Court of Australia would have had jurisdiction to deal with the proceedings, the only court that it was necessary to have regard to as a matter of practicality was the Family Court of Australia. I thought that while both courts had all the requisite jurisdiction to deal with the whole of the matters in issue, it was not without significance that the Family Court of Australia had that jurisdiction without reliance on any cross-vesting of jurisdiction, whereas the Supreme Court had that jurisdiction in respect of family law matters only by reliance on the cross-vesting of jurisdiction. Moreover, so far as the s 106B aspect of the claim was concerned, I doubted that the Supreme Court could exercise jurisdiction in respect of the s 106B claim alone, without exercising jurisdiction in the whole of the s 79 case - because s 106B can only be invoked "in proceedings under this Act", being the *Family Law Act* 1975. In other words, s 106B does not provide a stand-alone cause of action; it has to be invoked "in proceedings under" the *Family Law Act*. Accordingly, the scope for the Supreme Court to deal with the s 106B aspect of the family law claim as a discrete *Family Law Act* issue, in conjunction with the oppression suit, was dubious.

If the wife were granted leave to amend in the matrimonial proceedings, then there would be on foot in the Family Court a proceeding seeking to restrain the proposed

rights issue under s 106B, and concurrently in the Supreme Court a proceeding seeking to do so under *Corporations Act,* s 232, in respect of which there would be many common factors, and it would be manifestly undesirable that a s 106B claim and a s 232 proceeding in respect of the same share issue proceed separately in two different courts. For reasons which I have already explained, I rejected the argument that the s 106B claim was unarguable, and that the application to join PJL in the family law proceedings as a respondent to the s 106B application could therefore not succeed.

Although, subject to the question of completing the valuation of PJL, which was a prerequisite both to the Family Court proceedings and to the oppression suit, the Supreme Court could have heard the oppression suit expeditiously, probably as soon as May 2018, there was no reason to think that the valuation would be available to the Supreme Court any sooner than it would be available to the Family Court, and once available, the matrimonial as well as the oppression proceedings would be ready for hearing.

Although the hearing in the Family Court would be more extensive, more wide ranging, cover issues quite unrelated to PJL and thus potentially be more expensive for PJL than a hearing in the Supreme Court, a hearing in the Supreme Court would not resolve the s 106B issue. There would be common issues in both courts then as to valuation, and as to the motivation for the share issue. The documents to facilitate the valuation of PJL had already been produced on subpoena to the Family Court. And while transferring the proceedings in the Family Court might occasion greater expense on PJL, that was to look at only one side of the coin; the other was that it would result in less expense for the wife and Tykade than would duplex proceedings.

In summary, the Family Court had jurisdiction, without reliance on any cross-vesting of jurisdiction, to hear the whole of all aspects of the disputes presently before both courts. The Supreme Court also had jurisdiction to hear the whole of the disputes but, in respect of the s 79 application, only pursuant to the cross-vesting legislation and, in any event, no party sought to have the Family Court proceedings transferred to the Supreme Court. The Supreme Court may well not have had jurisdiction to deal with the proposed s 106B application as a discrete part of the family law dispute. That

application, though not straightforward, was not unarguable and it was unlikely that leave to amend to add it would be refused. In those circumstances there would be a most unsatisfactory situation of the same transaction being attacked in parallel in two different courts under two different statutory provisions. The valuation issues were common to the proceedings in both courts, and it was obviously desirable that be dealt with only once and in one court. The motivation issues were equally common to both proceedings. While the Supreme Court could probably deal with the oppression suit more expeditiously than the Family Court would resolve the whole of the proceedings, any hardship to PJL was largely of its or its majority shareholders own making. Accordingly, having regard to the interests of justice, it was more appropriate that the oppression suit be heard in the Family Court of Australia.

*Dervis Holdings*

An example in the other direction is provided by *Dervis Holdings Pty Limited*. As the final hearing is imminent, I must limit what I say. The case came to the Corporations List as an application by the wife (under s 237) to bring proceedings on behalf of the company - which was controlled by the husband - to set aside a creditors statutory demand which had been served by the husband's father on the company and which the company itself did not contest. The demand relied, in turn, on a default judgment obtained against the company in the Common Law Division. The wife alleged that the judgment was, in effect, a collusive one, calculated to diminish the matrimonial pool.

The wife was granted leave under s 237 to act on behalf of the company, because the company would not apply to set aside the statutory demand or the default judgment, which potentially jeopardised the matrimonial pool. Because of the common issues, arrangements were made for the Common Law proceedings – in which the wife on behalf of the company sought to have the default judgment set aside - listed with the Corporations matter. Eventually, by consent, the statutory demand, and the underlying common law division default judgment, were set aside. That left on foot the matrimonial proceedings in the Family Court; and the husband's father's debt claim against the company, which would be defended by the wife on behalf of the company. By the offer of a significantly earlier hearing date in the Corporations List than was available in the

Family Court, the parties were seduced to apply by consent to the Family Court for a transfer of the matrimonial proceedings to the Supreme Court, where they will be heard in a couple of weeks' time.

**Conclusion**

So the main points I would leave you with are:

- Corporations law is as pervasive in family law as the use of family companies.
- Although remedies are available under Family Law Act, the Family Court is a corporations court as much as the Supreme Courts and the Federal Court, and has available all the Corporations Act remedies, independent of any marriage or matrimonial cause.
- Because it has complete jurisdiction in corporations as well as matrimonial matters, without reliance on cross-vesting, it is arguably the natural forum for mixed matrimonial/corporations disputes.
- Choice of court is finely balanced, and will often come down to matters of specialisation, convenience and expedition.