THIRD PARTIES: INVITED GUESTS OR GATE CRASHERS?

The Honourable Justice Paul L G Brereton RFD
Paper delivered to the 13th National Family Law Conference
Adelaide, South Australia, 6 – 11 April 2008

Introduction

The jurisdictional bases on which third parties – by which is meant parties other than the spouses of a marriage – may be entertained in financial proceedings in the Family Court, may be classified as follows:

- The conventional (pre-Part VIIIAA) jurisdiction of the Family Court in matrimonial causes;
- Jurisdiction conferred by other Acts;
- The associated jurisdiction under (CTH) *Family Law Act* 1975, s 33;
- The accrued jurisdiction; and
- *Family Law Act*, Part VIIIAA.

Procedurally, third parties may become involved in proceedings in the Family Court by:

- Being joined as a respondent;
- Applying for leave to intervene, or initiating an application; and
- Transfer from another Court, typically a State Supreme Court or the Federal Court.

If unwelcome, the proceedings may be transferred by the Family Court to another Court (a State Supreme Court, or the Federal Court).

The pre Part VIIIAA third party property jurisdiction

The Family Court was not without power to bind third parties before *Family Law* Act, Part VIIIAA. Although the general notion of a matrimonial cause is a proceeding between husband and wife, the reality of modern life is that the financial affairs of husbands and wives include and involve family companies and family trusts, and are intertwined with the financial and property interests of other family members, "outsiders", and creditors. The interests of third parties who have commercial or personal relationships with one or more of the spouses are often liable to be affected by the resolution of the matrimonial dispute. This is so in relation to relatives and

family companies closely connected with one or both of the spouses; and also to arms-length third parties such as creditors.

It has always been the case that the Family Court can make orders which have an indirect effect on a third party, and in some circumstances orders directly against third parties. The Court has always, to some extent, had power to bind third parties, particularly by injunction on an interlocutory basis.[1] More direct incursions on the rights of third parties were authorised by (former) s 85, now s 106B.

The jurisdiction to make orders which affect the rights of third parties was established even before the *Family Law Act*. In *Sanders v Sanders*,[2] an order had been made under (CTH) *Matrimonial Causes Act* 1959, s 124 (the almost identical predecessor of *Family Law Act*, s 114(3)), for the transfer by the husband to the wife of a leasehold property which comprised the former matrimonial home. After the order was made, but before the transfer was effected, the house, which was insured, was destroyed by fire. The wife sought an interlocutory injunction to restrain the insurance company from paying out the insurance moneys to the husband or any other person. The High Court upheld the grant of the injunction. Barwick CJ, with whom McTiernan and Windeyer JJ agreed, said:[3]

> That power may be exercised to maintain an existing situation until the Court can decide what should be done upon the substantive application for maintenance, even though its exercise involves third parties, and the rights of any such party or parties in relation to one or both of the parties to the matrimonial cause, or in relation to the property of one or both of those parties.

However, particularly in the context of s 114, limitations on the Court's power to affect third parties were imposed by the decision of the High Court of Australia in *Ascot Investments Pty Ltd v Harper*.[4] There, the High Court held that, though the Family Court may grant an injunction directed to a third party, or which may indirectly affect the position of a third party, it cannot do so if its effect would be to deprive a third party of an existing right, or to impose on a third party a duty which the third party would not otherwise be liable to perform – except in the case of shams and puppets. Gibbs J, as he then was, said in a well-known passage:[5]

---

[1] See *Sanders v Sanders* (1967) 116 CLR 366; *Antonarkis v Delly* (1976) 10 ALR 251; (1976) 1 Fam LR 11,334; (1976) FLC ¶90-063 (in which the Court upheld the power under (CTH) *Matrimonial Causes Act* 1959, s 124, to grant injunctions against third parties and said that the power extended to the granting of permanent injunctions; a wife obtained an order against her mother-in-law and the husband's step-brother to vacate the matrimonial home); *R v Dovey; ex parte Ross* (1979) 141 CLR 526; (1979) 5 Fam LR 1; (1979) FLC ¶90-616 (in which the Court held that an injunction may be granted to restrain a party from using his influence or control over a company which owned the matrimonial home to evict the wife).

[2] (1967) 116 CLR 366

[3] (1967) 116 CLR 366, 372

[4] (1981) 148 CLR 337; (1981) 33 ALR 631; (1981) 6 Fam LR 591; (1981) FLC ¶91-000

[5] (1981) 148 CLR 337, 354; (1981) 33 ALR 631, 643; (1981) 6 Fam LR 591, 601; (1981) FLC ¶91-000, 76,061

> The authorities to which I have referred [namely, *Sanders v Sanders*,[6] *Antonarkis v Delly*,[7] *R v Ross Jones*; *ex parte Beaumont*,[8] and *R v Dovey, ex parte Ross*[9]] establish that in some circumstances the Family Court has power to make an order or injunction which is directed to a third party or which will indirectly affect the position of a third party. They do not establish that any such order may be made if its effect 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 ss 80 and 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.

Section 78(1) expressly authorises the Court, in proceedings between the parties to a marriage with respect to existing title or rights in respect of property, to declare the title or rights, if any, that a party has in respect of property. On its face, this is not limited to the rights of each party *vis-à-vis* the other, but embraces the rights of one party *vis-à-vis* a third party. Section 78(2) then authorises consequential orders to give effect to the declaration. Formerly, s 78(3) provided that such a declaration was binding on the parties to a marriage but not on any other person.[10] However, s 78(3) was repealed by the (CTH) *Law and Justice Legislation Amendment Act* 1988, s 39, in respect of proceedings instituted after its commencement. The Explanatory Memorandum at that time stated that the repeal of s 78(3) would enable the Court, in appropriate cases, to make orders that are binding on third parties as well as the parties to a marriage. The then Attorney General, Mr Bowen, repeated those observations in his second reading speech,[11] adding:

> Many Family Law property disputes involve adjudication of the rights of the parties to a marriage as between themselves and third parties, such as banks. As the Act presently stands, third parties may intervene in proceedings under the Act pursuant to section 92, but may not be bound by any order of the court as a consequence of sub-section 78(3). The present lack of power to make binding determinations about the existence and extent of the rights and liabilities of third parties can be frustrating for both the court and the parties as well as adding to the expense of proceedings. For example even if a court concludes that particular property does not belong to either party to the marriage but to a third party, the court cannot, because of sub-section 78(3), make any declaration or order in favour of the third party.

Since the repeal of s 78(3), there is nothing in the wording of the Act to prevent declarations being made under s 78 which bind third parties. In *Warby & Warby*,[12]

---

[6] (1967) 116 CLR 366

[7] (1976) 10 ALR 251; (1976) 1 Fam LR 11,334; (1976) FLC ¶90-063

[8] (1979) 141 CLR 504; (1979) 23 ALR 179; (1979) 4 Fam LR 598; (1979) FLC ¶90-606

[9] (1979) 141 CLR 526; (1979) 5 Fam LR 1; (1979) FLC ¶90-616

[10] *Balnaves & Balnaves* (1988) 12 Fam LR 488; (1988) FLC ¶91-952

[11] *Representatives Hansard,* 10 November 1988, p2840

[12] [2001] FamCA 1469; (2001) 166 FLR 319; (2001) 28 Fam LR 443; (2002) FLC ¶93-091 (Nicholson CJ, Finn and Strickland JJ)

the Full Court, in the course of considering the availability of accrued jurisdiction, adverted to this point in the following terms (at [87]):[13]

> [87] Seventhly, there is the issue of the Family Court of Australia's capacity to adjudicate and make orders with respect to third parties. The wife's submissions conceded that orders may in limited circumstances affect the rights of third parties and that is clearly correct. Section 78 of the *Family Law Act* confers the power to make a declaration with respect to existing title or rights. Since the amendment of the Act in 1988, the provision is not expressly confined to the property of the parties to the marriage or either of them and there is no authority which says that such a declaration may not bind a third party. Relevantly too, the *ratio decidendi* of *Gould & Gould*; *Swire Investments Ltd* (1993) FLC ¶92-434, makes clear that this is within the constitutional power of the Commonwealth Parliament insofar as s.85 (as it then was) of the *Family Law Act* is concerned and, by way of *obiter dicta*, such validity should be assumed with respect to the exercise of other powers conferred by Part VIII of that Act.

Thus, the Family Court could, pursuant to ss 78, 106B and 114, at least to some extent already bind third parties. However, it had no power to alter third party rights (save that it could, under s 106B, set aside dispositions to third parties which defeated claims under the Act).

The accrued jurisdiction of the Family Court[14]

With the demise of that part of the cross-vesting scheme that purported to confer on the Federal and Family Courts the jurisdiction of the State Supreme Courts, the accrued jurisdiction of Federal Courts has assumed renewed significance. In the past, there was some controversy as to whether the Family Court had an "accrued jurisdiction", and if so the extent of that jurisdiction. For the reasons that follow, in my opinion it is not seriously arguable that it does not.

When a Federal law confers jurisdiction on a court in respect of a "matter" arising under the Constitution or a Federal statute, the jurisdiction so conferred extends to authorise determination of the whole "matter". It has long been established that a *matter* is a "justiciable controversy", the determination of which may involve both Federal and State law.[15] The accrual of State jurisdiction to the High Court, so that it could determine non-federal parts of a "matter" arising under the Constitution or a Federal law has been recognised for many years.[16] This means that once the jurisdiction of the High Court is attracted by reason of the matter arising under a

---

[13] [2001] FamCA 1469, [87]; (2001) 166 FLR 319, 356; (2001) 28 Fam LR 443, 477; (2002) FLC ¶93-091, 88,792

[14] The following section is based upon *Valceski v Valceski* [2007] NSWSC 440; (2007) 210 FLR 387; (2007) 36 Fam LR 620; (2007) FLC ¶93-312

[15] *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457; *Fencott v Muller* (1983) 152 CLR 570, 606; (1983) 57 ALJR 317, 331; *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 278; (1983) 57 ALJR 731, 735; *Smith & Smith (No 2)* (1985) 10 Fam LR 283, 288-289; (1985) FLC ¶91-604, 79,893-79,894

[16] *R v Bevan; Ex parte Elias & Gordon* (1942) 66 CLR 452

Federal law, the Court is clothed with full authority essential for the complete adjudication of the "matter", and not merely the federal aspect of it. Subsequently, it was recognised that other courts exercising federal jurisdiction also had accrued jurisdiction (sometimes called dependent, collateral, ancillary, attached, or pendent jurisdiction). In respect of the Federal Court, this was first recognised in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd*[17], and further considered in *Fencott v Muller*[18] and *Stack v Coast Securities (No 9) Pty Ltd*.[19]

Thus, when a Federal court is invested with federal jurisdiction, it is also invested with the power to determine non-federal aspects of a justiciable controversy which involves the exercise of its federal jurisdiction, provided that the non-federal aspects of the controversy form an integral part of the same controversy.[20] The scope of the "matter" in respect of which a Federal court has jurisdiction is described by the ambit of the justiciable controversy. There is but a single matter, and the non-federal claims are within the accrued jurisdiction, where the different claims arise out of "common transactions and facts" or "a common substratum of facts",[21] notwithstanding that the facts upon which the claims depend "do not wholly coincide";[22] or where different claims are so related that the determination of one is essential to the determination of the other;[23] or where, if the proceedings were tried in different courts, there could be conflicting findings made on one or more issues common to the two proceedings.[24] However, it must always be borne in mind that the ultimate question is not the existence of each of the several suggested indicia, but whether there is in substance a single justiciable controversy. In *Stack v Coast Securities*, it was put in the following terms:[25]

> In this, as in other cases, the recurrent problem is to identify what it is that falls within the Federal Court's accrued jurisdiction. The majority judgment in *Fencott v Muller* provides assistance in reaching an answer: What is and what is not part of the one controversy depends on what the parties have done, the relationships between or among them and the laws which attach rights or liabilities to their conduct and relationship. The scope of a controversy which constitutes a matter is not ascertained merely by reference to the proceedings which a party may institute, but may be illuminated by the conduct of those proceedings and especially by the pleadings in which the issues in controversy are defined and the claims for relief are set out. But in the end, it is a matter of impression and of practical judgment whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter.

---

[17] (1981) 148 CLR 457

[18] (1983) 152 CLR 570

[19] (1983) 154 CLR 261

[20] *Stack v Coast Securities*

[21] *Philip Morris*, 512 (Mason J)

[22] *Fencott v Muller*, 607 (Mason, Murphy, Brennan and Deane JJ); *Re Wakim; ex parte McNally* [1999] HCA 27, [141]; (1999) 198 CLR 511, 586 (Gummow and Hayne JJ)

[23] *Philip Morris*, 512 (Mason J)

[24] *Re Wakim*, 586 [141]

[25] (1983) 154 CLR 261, 294

The accrued jurisdiction of Federal courts was revisited by the High Court in *Re Wakim; ex parte McNally*[26], the case in which the cross-vesting of State jurisdiction to Federal courts was held constitutionally invalid. Gummow and Hayne JJ said that it must now be regarded as established that the jurisdiction of a Federal court having jurisdiction in a matter arising under a law made by the Commonwealth Parliament was not "restricted to the determination of the federal claim or cause of action in the proceedings, but extends beyond that to the litigious or justiciable controversy between parties, of which the federal claim or cause of action forms a part".[27] After referring to the passage in *Stack v Coast Securities* cited above (at 369), their Honours continued that the question was whether there was, in the circumstances, a single justiciable controversy – because, if there was, the Federal Court had jurisdiction in the whole matter (notwithstanding that parts of it involved claims for damages at common law for negligence). The identification of the justiciable controversy was not to be determined only by the consideration of there being separate proceedings and different parties in the one court. The central task was to identify the justiciable controversy, which would ordinarily require close attention to the pleadings and the factual basis of each claim.[28] In and since *Re Wakim*, an expansive view of the accrued jurisdiction has prevailed.[29]

Although some doubt has been expressed as to whether the Family Court has accrued jurisdiction, there is no sound basis for such doubt. The statements of principle in *Stack v Coast Securities* and *Re Wakim*, referred to above, do not depend on any special characteristic of the Federal Court. The essential principle is that when a Federal court is invested with jurisdiction in respect of a "matter" that arises under a Federal law, then it has jurisdiction in respect of the whole "matter" – that is to say, the whole justiciable controversy – even though some aspects depend on State and not Federal law. That principle applies just as readily to the Family Court as it does to the Federal Court.

Before cross-vesting, the accrued jurisdiction of the Family Court was considered in a number of cases.[30] Although some judges (Fogarty J and Strauss J) expressed doubt, and there was no binding Full Court decision, the balance of authority favoured the view that the Family Court had accrued jurisdiction.[31]

In my respectful view, the doubts expressed as to the existence of accrued jurisdiction in the Family Court are not sustainable. In *Smith v Smith (No 3)*,[32] which was said by some to be inconsistent with the existence of accrued jurisdiction in the Family Court, the High Court considered whether the Family Court had accrued

---

[26] [1999] HCA 27; (1999) 198 CLR 511

[27] *Re Wakim* [1999] HCA 27, [135]; (1999) 198 CLR 511, 583-584

[28] *Re Wakim* [1999] HCA 27, [139], (1999) 198 CLR 511, 585

[29] See, for example, *Cheers v Entercorp Finance Pty Ltd* [1999] FCA 1475

[30] See *Lye & Lye* (1983) 8 Fam LR 999; (1983) FLC ¶91-324, 78,211 (Elliott J); *Prince & Prince* (1984) 9 Fam LR 481; (1984) FLC ¶91-501, 79,078, 79,086 (Evatt CJ, Pawley and Fogarty JJ); *McKay & McKay* (1984) 9 Fam LR 850; (1984) FLC ¶91-573, 79,629, 79,639 (Nygh, Strauss and Fogarty JJ); *Smith & Smith (No 2),* 79,891-79,898, 79,902 (Evatt CJ, Pawley and Fogarty JJ); *Ireland & Ireland*; *Collier* (1986) 11 Fam LR 104; (1986) FLC ¶91-731, 75,313 (Lindenmayer J)

[31] *Ireland & Ireland*; *Collier,* 75,313 (Lindenmayer J)

[32] (1986) 161 CLR 217; (1986) FLC ¶91-732

jurisdiction to approve a release under (NSW) *Family Provision Act* 1982, s 31, and held that it did not, because the question of such approval was quite distinct and severable from that of the approval of a s 87 maintenance agreement; that question was not part of the same "matter" as an application for approval of a maintenance agreement contained in the same deed under *Family Law Act*, s 87; and the power to approve it was expressly conferred only on the Supreme Court of New South Wales. However, the case does not suggest that the Family Court did not otherwise have accrued jurisdiction: as explained by the High Court in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*,[33] its point was that the approval of the Supreme Court was made a condition precedent to the efficacy of an agreement, and an application for such an approval was not a justiciable controversy, but a condition precedent to a binding contract which could not be satisfied by an approval of any court other than the Supreme Court. *Smith v Smith (No 3)* is not inconsistent with the Family Court having accrued jurisdiction.

Another matter which caused doubt as to whether the Family Court had accrued jurisdiction, was the thought that the decision of the High Court in *R v Ross-Jones; ex parte Beaumont*[34] was inconsistent with the notion that the Family Court had accrued jurisdiction.[35] But *R v Ross-Jones* was concerned simply with the extent to which the Family Court could exercise jurisdiction in respect of partnerships (under the (NSW) *Partnership Act* 1892 or in equity), and the question of accrued jurisdiction did not arise – unsurprisingly, as *R v Ross-Jones* was decided two years before *Philip Morris*, which first addressed the notion of accrued jurisdiction in Federal courts other than the High Court. *R v Ross-Jones* is therefore not a reason to doubt that the Family Court has accrued jurisdiction.

Next, it was suggested that while accrued jurisdiction is consistent with the broad jurisdiction vested in the Federal Court of Australia, it is not consistent with the limited and specialised jurisdiction of the Family Court.[36] This is not an adequate distinction. Each of the Federal Court and the Family Court depend for their jurisdiction on laws of the Parliament which vest in them jurisdiction in respect of specified classes of "matters". The accrual of jurisdiction depends upon the scope of the justiciable controversy which constitutes the matter in respect of which jurisdiction is invoked. It can make no difference in the application of that principle whether a Court is invested with jurisdiction in respect of matters arising under only one law (such as the *Family Law Act*), or under multiple laws (such as the (CTH) *Bankruptcy Act* 1966, the (CTH) *Copyright Act* 1968 and the (CTH) *Trade Practices Act* 1974). In this respect it is essential to note that the Family Court is given jurisdiction in *matters* arising under the *Family Law Act,* in respect of which matrimonial causes are instituted – as distinct from simply being given jurisdiction in *matrimonial causes*: s 31(1)(a). With respect to those – including Strauss J – who have suggested otherwise, the suggestion that the meaning of "matter" is affected by the context in which it appears is wrong. The context is that of a Commonwealth Act conferring jurisdiction on a Federal court, using a term which in that context is taken from the Constitution, is well-known, is the subject of extensive judicial consideration in the High Court, and is well understood.

[33] [2001] HCA 1, [59], [138]; (2001) 204 CLR 559, 588, 612

[34] (1979) 141 CLR 504; (1979) FLC ¶90-606

[35] See *Prince & Prince,* 79,086; *Smith & Smith (No 2)*

[36] See *McKay & McKay*, 79,629-79,634; *Smith & Smith (No 2)*, 79,908-79,909

It has been used repeatedly by the Commonwealth Parliament in statutes to confer jurisdiction on Federal courts. Its meaning is plain and well-established – a "justiciable controversy". To think that Parliament meant something different in using that term in the *Family Law Act* is just not tenable.

Finally, some doubts about accrued jurisdiction were founded on (former) *Family Law Act*, s 78(3) – but since its repeal, that can no longer provide any cause for reservation. But even when it survived, it governed only the exercise of power under s 78, and not otherwise. It did not have the consequence that an order made in the accrued jurisdiction would not bind a properly joined third party.

It has also been suggested that, if the Family Court has an accrued jurisdiction, it is a narrow one. With respect, it is difficult to understand what this means. The scope of the accrued jurisdiction depends upon the scope of the single justiciable controversy. If the same substratum of facts gives rise to a wide range of disputes, some federal and some not, they are all within the accrued jurisdiction.

Since *Re Wakim*, the question whether the Family Court has accrued jurisdiction has been resolved in the affirmative. The issue was considered by Lindenmayer J in *Lawson & Lawson; Wallmans*,[37] in which his Honour was content to accept that the Court had an accrued jurisdiction, but found in the circumstances no relevant common substratum of fact. In *Wade-Ferrell & Wade-Ferrell; Read*,[38] the Full Court said that it was certainly at least arguable that the Court had accrued jurisdiction, although the question was left open. In *C & C; C (Accrued Jurisdiction)*,[39] the husband and wife commenced to cohabit in 1974, married in 1979, and separated in 1994. From about 1976, they lived on a property of which the registered proprietors were the husband and the third party as joint tenants. Neither of the spouses nor the third party had any other property of significance. The wife, claiming a beneficial interest in the property, applied for orders that the property be sold and that from the proceeds the third party receive one-fifth, and the remaining four-fifths be divided 65% to the wife and 35% to the husband. In response, the husband sought orders that he and the wife each receive 40% of the net proceeds, and the third party 20%. The third party sought orders that he receive 50% of the proceeds, plus a further sum representing a debt owed to him by the husband, and that the remainder be paid to the husband and the wife. The husband supported the wife's claim to a beneficial interest in the property and maintained that there was an agreement between himself, the wife and the third party to that effect; the third party denied any such agreement and asserted that at all times he and the husband were the sole legal and beneficial owners. In holding that these issues could be resolved in the accrued jurisdiction of the Family Court, Jerrard J reasoned as follows. *First*, as the third party on any account had at least a 20% beneficial interest in the property and on his account a 50% beneficial interest, in determining the matrimonial cause between the husband and the wife, the Court was obliged to enter into the question of the extent to which each of them had a beneficial interest in the property, and accordingly the extent to which the third party had such an interest. *Secondly* – given that the husband's only asset of value was his interest in the property, the wife's only asset of

[37] [1999] FamCA 1635; (1999) FLC ¶92-874

[38] [2001] FamCA 138; (2001) 27 Fam LR 484; (2001) FLC ¶93-069

[39] [2001] FamCA 459; (2001) 28 Fam LR 253; (2001) FLC ¶93-076

value was her claimed interest in the property, and the third party's only asset of value was his claimed interest in the property – that there was one justiciable controversy between those three people, namely who it was who had the beneficial ownership of the property and in what proportions; that the claims of the husband and wife that they had 80% of the beneficial interest between them had a common sub-stratum of fact with the third party's claim that he had at all times a 50% interest; and, moreover, that it was necessary to establish what were the beneficial interests in the property in order to determine what property there was for division between the husband and the wife, so it could be said that it was necessary to determine the non-federal dispute (between the husband and the wife on the one hand, and the third party on the other) in determining the federal dispute (being the matrimonial cause between the husband and the wife as to division of their property). On the authority of *Re Wakim* and *Stack v Coast Securities*, the non-federal claim therefore fell within the accrued jurisdiction of the Court. *Thirdly*, insofar as the existence and exercise of accrued jurisdiction was concerned, there was no reason for distinguishing the Federal Family Court from any other Federal court. In my respectful view, that reasoning is compelling and correct.

In *Warby*, the Full Family Court held that the Family Court had an accrued jurisdiction. The matter came before the Full Court by way of a case stated which directly raised the question whether the Family Court had an accrued jurisdiction and if so its extent and the circumstances in which it should be exercised. In about 1982, the wife had purchased a property with her father as tenants-in-common. The wife and her father made contributions to the purchase price, in amounts which were disputed by the husband, and there was a mortgage to a bank. Subsequently, in about 1984 or 1985, the husband and the wife commenced cohabitation in the property. In the late 1980s, the wife's father paid a sum of money to the bank which discharged the mortgage. At about the same time, there was an agreement entered into (a) according to the wife, between the wife and the wife's father for repayment to him of the sum paid to discharge the mortgage, or (b) according to the husband, between the parties and the wife's father for repayment to him of an amount by periodic payments to extinguish his equity in the property. The parties were married in 1989, and in about 1992 the repayments pursuant to the agreement were completed. The husband asserted, and the wife denied, that he assisted the wife in making them. The husband also claimed to have made various improvements to the property, and to have contributed his earnings from employment towards the mortgage and in reduction of the debt to the wife's father pursuant to the agreement, which the wife also denied. The parties separated in about 1994 and the marriage was dissolved in 1998. The wife's father and the wife remained the registered proprietors as tenants-in-common. The husband sought a declaration that the wife's father held his interest in the property upon trust for the husband and/or wife, or alternatively subject to an equitable charge in their favour, or alternatively recovery of the amounts paid to discharge the mortgage and under the agreement. He also sought orders pursuant to s 79 against the wife. He filed an interlocutory application seeking an order joining the wife's father (and, somewhat curiously, but presumably to flag the basis for the application) a declaration that such proceedings were within the accrued jurisdiction of the Court. Upon the case stated, the Full Court held:

- That the Family Court's jurisdiction is not restricted to the determination of the family law claim but (by way of accrued jurisdiction) extends beyond to the whole litigious and justiciable controversy of which the family law claim forms part – including those parts of it that arise under or are governed by State law, common law or equity, and whether between the parties to a marriage or between a spouse (or spouses) and a third party.

- That relevant to whether the Family Court would exercise the Court's accrued jurisdiction were what the parties had done, the relationships between or among them, the laws which attach rights or liabilities to their conduct and relationships, whether the claims are part of a single justiciable question (and in determining that question, whether the claims are "attached" and not "severable" or "disparate"), whether the claims are non-severable from a matrimonial cause and arise out of a common substratum of facts, and whether the Court has the power to grant appropriate remedies in respect of the "attached" claims.

- The accrued jurisdiction extends to the determination of an issue against a third party which refuses to take part in the proceedings, if it has proper notice and has been afforded a proper opportunity to be heard.

In concluding that the Family Court may exercise accrued jurisdiction to determine the non-federal aspects of a justiciable controversy of which a matrimonial claim forms part, the Court reasoned as follows. *First*, there was no constitutional basis for not applying to the Family Court the High Court's analysis in *Phillip Morris* of how and why the Federal Court had and may exercise accrued jurisdiction. *Secondly,* the applicability of *Phillip Morris*, *Fencott v Muller* and *Stack v Coast Securities* to "federal courts" – a category which necessarily includes the Family Court – was expressly recognised in *Re Wakim*, and suggested in *Smith v Smith (No 3)*. Previous decisions that the Family Court did not have accrued jurisdiction were based on the factual claim failing to attract the jurisdiction, rather than that the jurisdiction was not available. *Thirdly*, as both the Federal Court and the Family Court were creatures of statute and courts of limited jurisdiction, the fact that the Family Court's jurisdiction was more specialised than that of the Federal Court did not provide a basis for doubting the availability of accrued jurisdiction in the Family Court. *Fourthly*, the current conferral of jurisdiction by s 31 of the *Family Law Act* in "matters arising" under the Act "in respect of which matrimonial causes are instituted or continued" is distinguishable from the earlier conferral of jurisdiction in "matrimonial causes" only. *Fifthly*, the circumstance that the Family Court's powers and remedies were limited had led to a blurring of the distinction between the *existence* of accrued jurisdiction and the *power to grant a remedy* if accrued jurisdiction is exercised. The lack of power to grant an appropriate remedy does not demonstrate a lack of jurisdiction, but is relevant to whether the available accrued jurisdiction should, as a matter of discretion, be invoked. *Sixthly*, in any event, ss 80 and 34 of the Act conferred power to grant all kinds of remedies.

Warby accepted the view – first espoused by Barwick CJ in *Philip Morris* (at 475) – that the exercise of accrued jurisdiction is discretionary, and the Court went to some length to specify factors relevant as to when that discretion should be exercised. In this respect, one of the relevant factors mentioned by the Full Court in *Warby* was the

availability of appropriate remedies. However, if a court has jurisdiction (by way of accrued jurisdiction) in a non-federal aspect of a matter, that carries with it the power to grant the appropriate remedies given by State law in that matter; one does not have to find the remedy within the *Family Law Act*. In *Australian Securities and Investments Commission v Edensor Nominees*, the High Court considered the jurisdiction and power of the Federal Court, when properly seised of a matter, to grant additional relief between the same parties that was available under a State law that gave jurisdiction to a State court. Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ (Kirby J dissenting) held that (CTH) *Judiciary Act* 1903, s 79 – which provides that the laws of each State or Territory, including those relating to procedure, evidence, and the competency of witnesses, should be binding on all courts exercising federal jurisdiction in that State or Territory, in all cases to which they are applicable – picked up provisions of a law of the State so as to empower the Federal Court to make orders under those provisions; it is clear from their Honours' reasoning (especially at [54]-[55]) that this included the common law of a State. And even if the power to grant appropriate remedies had to be found in the Court's own governing statute, *Family Law Act*, s 34, confers ample power to grant all appropriate remedies in a matter in which the Court has jurisdiction.

In *Re Wakim*, Gummow and Hayne JJ cast doubt on the existence of any discretion to decline to exercise accrued jurisdiction. That is consistent with the general duty of courts to exercise jurisdiction when it is regularly invoked.[40] However, in *Johnson Tiles Pty Ltd* v *Esso Australia Ltd*,[41] the Full Federal Court (French J, with whom Beaumont and Finkelstein JJ agreed), in a passage with which the Full Family Court expressed agreement in *Bishop & Bishop*,[42] accepted that the Court had a discretion to decline to exercise accrued jurisdiction, but explained:[43]

> [90] … As Lindell comments in Lee and Winterton at 221, the existence of a duty to exercise jurisdiction does not preclude the existence of exceptions based on the availability of a more appropriate alternative court as it does not deprive a litigant of access to a court altogether. While *Voth* and *Oceanic Sun Line* were concerned with the exercise of jurisdiction by an Australian domestic court in the case where a foreign court would also have jurisdiction, the propositions for which *Voth* is now authority grow out of the general principle recognised in both cases that a court having jurisdiction has an obligation to exercise it. The circumstances in which it may decline that obligation are exceptional. That is also consistent with the approach taken by Barwick CJ in the passage already cited from his judgment in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd.*
>
> [91] The application of the discretion in relation to accrued jurisdiction is complicated by a functional overlap, apparent from the cases, between definition of the content of the jurisdiction and the discretion whether to exercise it. The joint judgment of Mason, Brennan and Deane JJ in *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261 at 294, discussed the approach to the definition of accrued jurisdiction enunciated in *Fencott v*

40 See, for example, *Oceanic Sun Line Special Shipping Co Ltd v Fay* (1988) 165 CLR 197

41 [2000] FCA 1572; (2000) 104 FCR 564

42 [2003] FamCA 240, [28]; (2003) 30 Fam LR 108, 115-117; (2003) FLC ¶93-144, 78,404-78,406

43 [2000] FCA 1572, [90]-[92]; (2000) 104 FCR 564, 600-601

Muller at 608. That approach involved the application of 'impression and practical judgment' in deciding whether a federal and non-federal claim are within the ambit of the one controversy or matter before the Court. The joint judgment in *Stack* commented (at 294):

> "Barwick CJ in *Philip Morris* had expressed a similar idea, stating that the exercise of the accrued jurisdiction "is discretionary and not mandatory". In expressing this opinion, Barwick CJ expressly acknowledged that the Federal Court had a discretion to allow the non-federal claim to be determined in a State court."

Their Honours seemed to treat the evaluative assessment of the scope of the accrued jurisdiction in a particular case as overlapping with the determination whether it should or should not be exercised in that case. This appearance is reinforced by the subsequent proposition, in the joint judgment, that in exercising the discretion the Federal Court will have regard to the considerations mentioned in *Fencott v Muller*. The latter case had to do with the scope of the accrued jurisdiction.

[92] The discretionary character of the accrued jurisdiction was the subject of observation by Gummow and Hayne JJ in *Re Wakim; Ex parte McNally* when they noted the alignment of the processes for defining the accrued jurisdiction and for deciding whether or not to exercise it which had emerged from the joint judgment in *Stack*. Their Honours said (at 588):

> "It is not clear what principles or criteria would inform the exercise of a discretion of this kind. It may be that the better view is that the references to "discretion" are not intended to convey more than that difficult questions of fact and degree will arise in such issues – questions about which reasonable minds may well differ. It is, however, not necessary to decide what is meant by the references to discretion in this context."

As a matter of logic, it is an evaluative rather than discretionary approach which must be applied in determining the content of the Court's accrued jurisdiction. No doubt there is a functional, as distinct from conceptual, convergence as assessment of the scope of the jurisdiction will involve consideration of matters of convenience particularly when deciding whether the federal claim is to be regarded as a substantial part of the controversy – *Fencott v Muller* at 609 quoted above. But as a matter of language the process of definition of the content of the jurisdiction logically precedes the discretion about whether to exercise the jurisdiction properly defined. And in my opinion that is how this Court, consistently with the language used by the High Court should continue to treat discretion. In doing so, it would be bound to take the functional approach indicated in the judgments of the High Court to which reference has been made.

In *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*, in the context of whether there was a discretion to refuse to entertain the State claim, Gleeson CJ, Gaudron and Gummow JJ, with whom Hayne and Callinan JJ generally agreed, said, in a passage also cited by the Full Family Court in *Bishop*:[44]

---

[44] [2001] HCA 1, [52]; (2001) 204 CLR 559, 585-586

> [52] ... First, while there are various claims, in these cases there is but one 'matter' in the constitutional sense and the court in question either does or does not have jurisdiction in respect of it. Moreover, in *Re Wakim*, Gummow and Hayne JJ (with whom Gleeson CJ and Gaudron J agreed generally) 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, *forum non conveniens* and the like aside, jurisdiction conferred upon a court is to be exercised.

Kirby J said:[45]

> [218] … As Gleeson CJ, Gaudron and Gummow JJ point out, reference to 'accrued jurisdiction' in a case where federal jurisdiction is attracted because of the identity of a party may distract attention from the central question, which is to identify the relevant 'matter': the controversy which is to be quelled. As their Honours say, ordinarily, questions of abuse of process, *forum non conveniens* and the like aside, jurisdiction conferred upon a court is to be exercised. References to 'accrued jurisdiction' being 'discretionary' are apt to mislead.

Nonetheless, in *Bishop*, the Full Family Court concluded:[46]

> [31] The cases frequently seen in this Court are more likely to require the determination of "State" issues involving third parties than issues between the parties themselves. Sections 78, 79 and 114 of the *Family Law Act* provide the Court with a very wide jurisdiction to determine property disputes between parties to a marriage arising out of their marital relationship. There is rarely need to approach the matter by adopting any additional jurisdiction to resolve such disputes. Frequently however, as in this case, the extent of the parties' wealth and the pool of assets and financial resources, net of liabilities, cannot be ascertained without determination of disputes involving third parties.
>
> …
>
> [33] 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 exercise it when dealing with 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 a very important and necessary part of the Court's powers.

It is in any event difficult to conceive of proper grounds for declining to exercise jurisdiction in respect of part of a single justiciable controversy. As Barwick CJ added in *Philip Morris*:[47]

> But, I would add that there would need to be very good reasons why a court which could resolve the whole matter should refuse or fail to do so. Generally speaking, one would expect that a court, once its federal jurisdiction is excited or attracted, would proceed to resolve the whole matter in relation to which federal jurisdiction had been attracted.

---

[45] [2001] HCA 1, [218]; (2001) 204 CLR 559, 638-639
[46] [2003] FamCA 240, [42]; (2003) 30 Fam LR 108, 118; (2003) FLC ¶93-144, 78,407
[47] (1981) 148 CLR 457, 475-476

In *Bishop*, the Full Family Court, applying *Warby*, allowed an appeal from a primary judge's discretionary refusal to exercise accrued jurisdiction:[48]

> [35] As indicated by that Full Court, the Family Court of Australia has accrued jurisdiction. The issues to be determined as to whether or not it is appropriate to exercise the jurisdiction generally would involve the consideration of six issues listed above. We read her Honour's reasons for judgment as having paid considerable attention to the fourth and fifth of the issues to be determined, but having neglected to consider properly and evaluate issues one, two, three and six, all of which are appropriate to bring to bear in determining whether or not to allow the joinder of parties to enable the accrued jurisdiction claims to go forth.
>
> [36] In this case there can be no doubt that the financial affairs of the husband and the wife are and have been intimately interwoven into the financial affairs of the parties sought to be joined. It is impossible to determine the issues as to the parties' financial affairs without unravelling them.
>
> [37] 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 s 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 tests laid down in *Warby*, these matters should be borne in mind by judges who are called upon to exercise the jurisdiction.
>
> [38] In cases where all that is sought is the joinder of parties, particularly where there is no opposition to it, a judge hearing an application for joinder should be very slow to refuse it. When it comes to the making of final orders different considerations obviously apply, as by that time it will be much clearer as to which issues need to be determined to make appropriate orders under s 79. The reason and purpose for making orders involving third parties should nevertheless be kept firmly in mind.

Accordingly, the Family Court has accrued jurisdiction, just as does the Federal Court and the High Court, to determine the whole of a justiciable controversy, even though some aspects of it may involve State and not Federal law. So long as the controversy arises under the *Family Law Act*, it need not be limited to it. Once seized of jurisdiction in respect of a *matter* arising under the *Family Law Act* – pursuant to *Family Law Act* s 31(1)(a) – the jurisdiction of the Court extends to the whole of the *matter*, that is to say, the justiciable controversy, even though its determination requires the application of State law. While there may be a discretion to decline to exercise accrued jurisdiction, it will be an exceptional case in which that discretion can properly be exercised so that the whole of a justiciable controversy is not resolved in the one court.

That reasoning led me to conclude, in *Valceski v Valceski*,[49] that the Family Court would have accrued jurisdiction to hear the equitable claims:[50]

---

[48] [2003] FamCA 240, [35]-[38]; (2003) 30 Fam LR 108, 119-120; (2003) FLC ¶93-144, 78,408-78,409

[60] The equity suit and the matrimonial proceedings share a common substratum of facts, notwithstanding that the underlying facts of each do not wholly coincide – in that while the matrimonial proceedings involve wider and additional issues, the facts that underlie the equity suit are a subset of those that underlie the matrimonial proceedings. The issues of the validity of the February 2004 deed and transfer, and the beneficial interests in McArthur Parade as between Bobby on the one hand and Mick (and possibly Angelina) on the other, are common to both proceedings. Those issues would arise in the s 79 proceedings even if they were not directly raised by order 3 sought in the Wife's Amended Application: their resolution is an essential step in the first stage of the s 79 exercise. *C & C*, *Wade-Ferrell*, *Warby* and *Bishop* show that where it is necessary in the exercise of its s 79 jurisdiction for the Family Court to decide whether property is that of a party to the marriage or of a third party, the Court may in its accrued jurisdiction determine that issue so as to bind that third party. In this case the position is all the stronger, because Betty's claim in the matrimonial proceedings for a declaration under s 78 is the mirror image of the relief claimed by Mick and Angelina in the equity suit. It is obvious on the face of the declaration sought in par 3 of her Amended Application that it is the antithesis of what Mick and Angelina seek in the Supreme Court. Betty's s 78 claim in the Family Court shares an identical substratum with Mick and Angelina's claim in the equity suit.

[61] Further, the two proceedings are also related in the sense that the determination of one is essential to the determination of the other: the ascertainment of the beneficial interests in McArthur Parade as between Bobby on the one hand and Mick (and possibly Angelina) on the other is the ultimate issue in the equity suit; and it is also an essential aspect of determining the pool of divisible property, and thus the resolution of the matrimonial proceedings, and has to be determined before the matrimonial proceedings can be resolved. The Family Court cannot identify and value the property available for division without first establishing the extent of Bobby's beneficial interest in McArthur Parade, and the factual and legal considerations relevant to that issue are those which Mick and Angelina seek to agitate in the equity suit. The fact that the extent of Bobby's beneficial interest in McArthur Parade is common to both proceedings is more than the coincidence of one factual element. It is *the ultimate issue* in the Supreme Court Proceedings; and it is a fundamental element of the first step in the Family Court Proceedings. Determination of the extent of Bobby's beneficial interest in McArthur Parade is fundamental to the determination of the Betty's claim for property adjustment against Bobby, because it is essential to the identification and valuation of the property of the matrimonial parties for division.

[62] If the two proceedings were tried in different courts, there could be conflicting findings made on one or more issues common to the two proceedings: the Supreme Court *could* find (as Mick and Angelina, and presumably Bobby, contend in the equity suit) that the February 2004 deed and transfer are void and that Bobby has no more than a 50% beneficial interest in McArthur Parade, whereas the Family Court *could* find (as Betty contends in the matrimonial proceedings) that the deed and Transfer are valid

---

[49] [2007] NSWSC 440; (2007) 210 FLR 387; (2007) 36 Fam LR 620; (2007) FLC ¶93-312

[50] [2007] NSWSC 440, [60]-[65]; (2007) 210 FLR 387, 409-410; (2007) 36 Fam LR 620, 641-643; (2007) FLC ¶93-312, 81,371-81,372

and that Bobby is beneficially entitled to the whole of McArthur Parade. While the risk of inconsistent findings is reduced in the present case - because, with Betty and Bobby being parties in both proceedings, its determination in one proceeding would probably result in an issue estoppel in the other - that does not deny that the same issues arise in both proceedings.

[63] Thus, while the proceedings in the Family Court involve far more extensive issues (including, for example, parenting issues, as well as contributions other than financial and to property other than McArthur Parade), the issues in the equity suit are a subset of those in the matrimonial proceedings; they are substantially identical to one element of the matrimonial proceedings (the claim for a s 78 declaration); Mick and Angelina's claim in respect of McArthur Parade must be resolved in order to ascertain the pool of property available for division between the matrimonial parties; and if the proceedings were in two separate courts there could be inconsistent findings, but for the potential operation of issue estoppels.

[64] In *Warby*, the Full Family Court said:

> 93. In the present case there is a single property that is central to the parties' controversy. The Family Court cannot determine and settle the property of the parties without determining the relative beneficial interests of the parties to the marriage and the wife's father in the property. It is not to the point that a State court could make orders as to the dispute between the parties to the marriage and the wife's father, and that the Family Court of Australia could then determine the Family Law dispute between the parties to the marriage. It is enough to say that even taking the narrow view of accrued jurisdiction represented by Wilson J's judgment in *Phillip Morris*, in this case "the federal question could not be resolved without the determination of the non federal question". The Family Court of Australia must ascertain as a first step the property pool of the parties available for distribution.

[65] That statement is equally apposite here. The claim in the equity suit forms part of the justiciable controversy in respect of which the matrimonial proceedings have been brought. Accordingly, there is but one justiciable controversy; and the Family Court has accrued jurisdiction in respect of so much of that controversy as does not fall within its ordinary jurisdiction.

Part VIIIAA

It is now more than three years since the provisions of new Part VIIIAA[51], which conferred on the Court power to bind third parties in financial and injunctive proceedings, commenced on 17 December 2004. In a paper presented at this conference four years ago,[52] I said:

---

[51] Introduced by (CTH) *Family Law Amendment Act* 2003, assented to 17 December 2003.

[52] 11th National Family Law Conference, Gold Coast, October 2004

> The powers of the Family Court have always been capable of directly or indirectly affecting third parties, and, at least in limited circumstances, the Court has always been able to make orders binding parties other than the spouses. However, such powers as the Court has hitherto had to bind third parties – for example under s.78, (former) s.85 (now s.106B), and s.114 - have been reasonably incidental to the matrimonial cause between husband and wife. New Part VIIIAA goes much further, because it authorises discretionary interference with the rights and powers of third parties. It has the potential to have a considerable impact on practice, and greatly increase the involvement of third parties in property litigation in the Family Court.

I concluded:

> The Family Court already has power, to some extent, under s.78, (former) s.85 (now s.106B), and s.114, to bind third parties. The powers hitherto conferred have not so interfered with third party rights as to take them outside the constitutional bounds of matters reasonably incidental to matrimonial causes. New Part VIIIAA goes much further, because it authorises discretionary interference with the rights and powers of third parties. The constitutional validity of Part VIIIAA is questionable, and it should not be assumed that the new provisions would survive a constitutional challenge, though they may.
>
> It is likely to have wide-ranging impact on the conduct of property proceedings, and result in the proliferation of suits involving third parties, particularly in respect of applications for substitution in respect of debts, and the acquisition of minority interests. However, a cautious approach from the Court can be anticipated in the first instance, and at least until the constitutional question is resolved, practitioners are likely to continue to try to avoid invoking Part VIIIAA when there is another, less controversial, remedy available.

In large measure, I have been proved wrong. So far, Part VIIIAA has survived constitutional challenge. But it has not yet been truly tested in the High Court. There has not been a proliferation of suits involving third parties – whether in respect of applications for substitution in respect of debts, the acquisition of minority interests, or otherwise. But that may be attributable to professional reluctance to embrace the novel opportunities which Part VIIIAA affords in those areas. But it seems that I was right to anticipate that practitioners would try to avoid invoking Part VIIIAA when another, less controversial, remedy was available.

Four years later, it is timely to review the place of third parties in family law proceedings. This paper reviews:

- the provisions of Part VIIIAA, and implications of Part VIIIAA for practitioners;
- the question of its constitutional validity;
- the cases so far under Part VIIIAA, which will be my focus.

The Provisions of Part VIIIAA

The essential intent of Part VIIIAA was explained in the Explanatory Memorandum which accompanied the *Family Law Amendment Bill* 2003, in the following terms:

> **General outline**
>
> In line with the Government's ongoing reform agenda in Family Law, this Bill makes a range of amendments to the *Family Law Act* 1975 (the Act). In particular the Bill makes a range of reforms to clarify those provisions of the Act dealing with property and financial interests.
>
> Of particular importance are the provisions in the bill that provide clear power for courts exercising jurisdiction under the Act to make orders binding on third parties when dealing with property settlement proceedings under the Act. The provisions make it clear that within defined limits courts will have power to make orders binding on persons such as creditors to one party to a marriage and companies to do certain things.
>
> …
>
> **Allow for orders and injunctions to be binding on third parties**
>
> Schedule 6 of the Bill provides for the Family Court to be given power to bind third parties in order to give effect to property settlements. This will apply for any creditor of a party to a marriage irrespective of whether the creditor is a friend, relative or financial institution. Procedural rights will be given to third parties to ensure that the changes do not affect the underlying substantive property rights of the creditor.

The relevant amendments are to be found in Schedule 6, which inserts, after s 90, the new Part VIIIAA, entitled "Orders and Injunctions binding Third Parties". The Explanatory Memorandum states that Schedule 6 amends the Act to give the Court power to bind third parties in order to give effect to property settlements, observing that at present (ie, in 2003) the Court may be unable to direct a third party to act in order to give effect to property settlements. The amendments allow a court to make orders generally that direct a third party to do something in relation to the property of a party to the marriage or that alter the rights, liabilities or property interests of a third party in relation to a marriage. They allow the Court to make an order that would, for example, have the effect of altering the terms of a contract between the parties to a marriage and a creditor. For example, a court could order that one of the spouses was no longer liable to the creditor for a joint debt, while the other spouse was liable for the whole debt. (The potential for extensive invocation of this provision is self-evident). Further, the Court could order directors to register a transfer of shares, or restrain a company from taking action against a party to a marriage. The Explanatory Memorandum points out that the amendments only allow the Court to make such orders in limited circumstances; that a court cannot simply cancel the debts of the parties; and that third parties must be accorded procedural fairness – primarily meaning that they must be notified and be given a right to be heard before any order is made against their interests.

Section 90AA provides that the object of Part VIIIAA is to allow the Court, when it is either making orders altering property interests in respect of the parties to a marriage under s 79, or making an order or injunction under s 114 (which authorises orders or injunctions relating to the personal protection of a party to the marriage, restraining a party from particular actions, protection of the marital relationship, personal property of the party to a marriage, or the use or occupancy of the matrimonial home), to make an order under s 79 or s 114, or grant an injunction under s 114, that is directed to, or alters the rights, liabilities or property interests of, a third party.

Section 90AB provides a definition of "marriage" – which is taken to include void marriages; and "third party", which is defined to mean a person who is not a party to the marriage – and therefore includes individuals (including friends or relatives of the parties to the marriage, businesses, and financial institutions).

By s 90AC, the new part is given effect despite anything to the contrary in any other law, whether written or unwritten, of the Commonwealth, a State or Territory, or anything in a trust deed or other instrument, whether made before or after the commencement of the Part VIIIAA; and nothing done in compliance with Part VIIIA by a third party is to be treated as resulting in a contravention of any such law or instrument. Section 90AC thus makes it clear that in the event of inconsistency with other instruments or laws, Part VIIIAA overrides any other law of the Commonwealth or a State or Territory, or any trust deed or other instrument, even where it is made after the commencement of Part VIIIAA. Further, when complying with Part VIIIAA, a third party will not be taken to contravene any other law or instrument.

Section 90AD provides that, for the purposes of the part, a debt owed by a party to a marriage is to be treated as property for the purposes of paragraph (ca) of the definition of "matrimonial cause" in s 4, and for the purposes of s 114(1)(e). Thus, s 90AD has the effect that a *debt owed by a party to a marriage* is to be treated as *property* for the purposes of the definition of "matrimonial cause", which relates to proceedings between parties to a marriage with respect to the *property* of parties to the marriage. Thus, to bring "debt adjustment" proceedings within the definition of "matrimonial cause", Parliament defined black to include white: a debt of the parties – that is, a liability – is to be treated as property – that is, an asset. Similar provision is also made in respect of injunctions in relation to the property of a party, for the purposes of s 114(1)(e). But this is only for the purpose of attracting the definition of "matrimonial cause".

What orders can be made in s 79 proceedings. Division 2 deals with orders under s 79. By s 90AE, the Court is empowered to make orders:

(a) directed to a creditor of the parties to the marriage, to substitute one party for both parties in relation to the debt owed to the creditor;

(b) directed to a creditor of one party to a marriage, to substitute the other or both parties in relation to that debt;

(c) directed to a creditor of the parties to the marriage, that the parties be liable for a different proportion of the debt owed to the creditor than the proportion the parties are liable to before the order is made; and

(d) 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.

The Court is further empowered, in proceedings under s 79, to make any other order that:

(a) directs a third party to do anything in relation to the property of a party to the marriage, or

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

Some limitations are imposed by s 90A(3), 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 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.

In keeping with modern drafting practice, the Act contains some "examples", although they are so mundane as to be of little utility. Thus, as to the requirement that the capacity of a party to the marriage to repay the debt after the order is made be taken to account, the example is given that the capacity of a party to the marriage to repay the debt would be affected by that party's ability to repay the debt without undue hardship. As to the economic, legal or other capacity of the third party to comply with

the order, the example given is that the legal capacity of the third party to comply with the order could be affected by the terms of a trust deed; however, after taking the third party's legal capacity into account, the Court may make the order despite the terms of the trust deed and if it does so, the order will have effect despite those terms.

Thus, s 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 – and although the Explanatory Memorandum suggests that s 90AE is 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.

What orders can be made in s 114 proceedings. Division 3 deals with orders and injunctions under s 114. Section 90AF corresponds with s 90AE, and provides that in proceedings under s 114, the Court may:

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

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

(c) make any other order or grant any other injunction that directs a third party to do a thing in relation to the property of a party to the marriage, or alters the rights, liabilities or property interest of a third party in relation to the marriage.[53]

Again, limitations are imposed by s 90AF(3), which provides that the Court may only make an order or grant an injunction of the type described if:

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

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

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

(d) for an injunction or order under s 114(1) – the Court is satisfied that, in all the circumstances, it is proper to make the order or grant the injunction; and, for an injunction granted under s 114(3) – the Court is

[53] Section 90AF(2)

satisfied that, in all the circumstances, it is just or convenient to grant the injunction; and

(e) the Court is satisfied that the order or injunction takes into account its taxation effect (if any) on the parties to the marriage and on the third party; its social security effect (if any) on the parties to the marriage; the third party's administrative costs in relation to the order or injunction; if the order or injunction concerns a debt, the capacity of a party to the marriage to repay the debt after the order is made or the injunction is granted; the economic, legal or other capacity of the third party to comply with the order or injunction; if, as a result of the third party being accorded procedural fairness in relation to the making of the order or the granting of the injunction, the third party raises any other matters – those matters; and any other matter that the Court considers relevant.

Substantially the same examples as are mentioned in s 90AE in respect of proceedings under s 79 are repeated in s 90AF in respect of proceedings under s 114.

Thus s 90AF provides that the Court has discretion to make an order or grant an injunction binding a third party when making an order or injunction under s 114 – and, once again, although the Explanatory Memorandum suggests that s 90AF is 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 contains no such limitation.

Other aspects. Division 4 deals with other matters. Section 90AG deals with orders and injunctions binding on trustees, and provides that if an order or injunction binds a person in the capacity of trustee in relation to property, then the order or injunction is also binding (by force of the section) on any person who subsequently becomes the trustee. Thus its effect is that successive trustees will be bound by orders or injunctions made under Part VIIIAA.

Section 90AH is entitled "Protection for a Third Party", and provides that a third party is not liable for loss or damage suffered by any person because of things done (or not done) by the third party in good faith in reliance on an order or injunction made or granted by a court in accordance with Part VIIIAA. In this way, it provides third parties with protection from liability for loss or damage suffered by any other person, where the third party is acting in good faith in reliance on a court order or injunction under Part VIIIAA.

Service of documents on a third party is covered by s 90AI, which provides that if a document is required or permitted to be served for the purposes of the part on a third party, it may be served in any of the ways in which a document may be served under the applicable rules of court, in addition to any other method of service permitted by law. Its effect is that documents should be served in accordance with applicable rules of court or other method of service permitted by law.

The expenses of the third party are addressed by s 90AJ, which has the effect that if the Court has made an order or granted an injunction in accordance with Part VIIIAA and a third party has incurred expense as a necessary result, the Court may make such order as it considers just for the payment of the reasonable expenses of the third party incurred as a necessary result of the order or injunction. In deciding whether to do so, and subject to what the Court considers just, the Court must take into account the principle that the parties to the marriage should bear the reasonable expenses of the third party equally. Regulations are authorised to provide, in situations where the Court has not made an order, for the charging by the third party of reasonable fees to cover the reasonable expenses of the third party incurred as a necessary result of the order or injunction; if such fees are charged, that each of the parties to the marriage is separately liable to pay to the third party an amount equal to half of those fees; and for conferring jurisdiction on a particular court or courts in relation to the collection or recovery of such fees. This does not appear to cover legal costs of opposing an application, as opposed to the costs of compliance with an order once made.

Section 90AK provides that the Court must not make an order or grant an injunction under Part VIIIAA if the order or injunction would result in the acquisition of property from a person other than on just terms, and be invalid because of paragraph 51(xxxi) of the Constitution.

Part 2 of Schedule 6 of the Amending Act provides that, in general, the amendments apply to all marriages, including those that were dissolved before commencement, but not to a marriage if a s 79 order or a s 87 agreement is in force in relation to the marriage at the commencement time, unless such s 79 order is set aside under s 79A(1), or the approval of the s 87 agreement is revoked under s 87(8), in which case the amendments apply from the time the order is set aside or the approval is revoked. Thus the amendments apply to all marriages, including those dissolved or annulled before the commencement date, unless there is an existing order or s 87 agreement in relation to the property of the marriage which has not been set aside or revoked.

The utility of Part VIIIAA orders. Possible uses of Part VIIIAA orders – some of them expressly envisaged by the legislation and some not – include the following:

- Under s 79, an order directed to a creditor, altering liability for a debt, by substituting one spouse for both as debtor, or substituting the other spouse or both for one as debtor, or making the spouse liable for different proportions of the debt;
- Under s 79, an order varying the terms of repayment of a debt;
- Under s 79, 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;

- Under s 79, in the context of family trusts, orders which fix a vesting date, or convert a discretionary trust into a fixed trust, or require the trustee to exercise its discretion in a particular manner, or add a beneficiary, or require a distribution to a spouse who upon divorce ceased to be a beneficiary;

- Under s 79, requiring a consent to be given to a transfer of property;

- Under s 79, requiring the compulsory acquisition of a minority interest by a third party majority shareholder, similar to the type of relief which can be granted for oppression under (CTH) *Corporations Act* 2001, s 233.

- Under s 114, an order restraining a mortgagee from taking proceedings for possession of the home – particularly on an interlocutory basis, pending finalisation of the s 79 proceedings;

- Under s 114, an injunction restraining a creditor from commencing proceedings against a spouse to recover a debt – again, particularly on an interlocutory basis pending finalisation of the s 79 proceedings.

Practical implications. The practical implications of Part VIIIAA for third parties are extensive.

Credit providers will be exposed to credit risk, and there will be implementation and compliance costs. The Court's power to bind third parties in relation to debt products and risks has led to concerns at "the potential for the court to substitute its commercial judgment for the commercial judgment of the bank and to leave the bank exposed involuntarily to a credit risk".[54] Other third parties – co-debtors and guarantors who are jointly and severally liable for the debt – may also be disadvantaged. The Australian Bankers Association has pointed to the "erosion of the value of a bank's substantive right of property in debt", and argued that the amendments reduce a bank's ability to recoup the debt from parties whom the bank had originally determined were creditworthy, and may deprive the bank of recourse to one of the parties either fully or proportionally, and increase the exposure of the bank to credit risk.[55] Creditors of all types will be liable to be restrained from recovering their debts until matrimonial property proceedings are resolved, or limited to recovering them from one of two joint debtors.

The Senate Legal and Constitutional Legislation Committee reported on the bill in August 2003, recommending that it proceed, subject, relevantly, to the deferring of the operation of new Part VIIIAA for twelve months, and the following:

> 3. Binding of Third Parties to Orders and Injunctions: the term "shares" be defined to include a legal or beneficial interest held in the capacity of trustee or otherwise in the share of the capital of a company.

[54] *Senate Legal and Constitutional Committee Official Hansard* 22 July 2003, p L&C19

[55] Submission by Australian Bankers' Association to the Senate Legal and Constitutional Legislation Committee, 14 July 2003, p 3

It was the concerns outlined above, which were expressed to the Committee, that produced the provisions, now contained in s 90AE(3) and s 90AF(3), which endeavour to provide some protection for third parties.

Those concerns – the substance of which remains entirely valid – show that financial institutions will not readily accept that such orders should, as a matter of discretion, be made. The considerations and limitations imposed by the legislation provide them with a good basis for arguing their position. It can be anticipated that where such orders are sought, financial institutions will, at least initially, routinely oppose them.

On the other hand, it is frequently the case that a spouse remains exposed to a financier on a personal guarantee for a debt associated with property that the other will retain, and wishes not only to have an indemnity, but also to be released from the debt. It might have been expected that in many cases where there is joint debt, the jurisdiction would have been invoked by a party seeking an order that the other alone be responsible for the debt, given the frequency with which orders are sought that one party indemnify the other in respect of liability under a mortgage over the home. Notice to the relevant third party is required, however, and it may be anticipated that financial institutions generally – and particularly in the early stages – will take a strict view of defending their legal position.

Corporations may be liable to have restrictions on transferability of shares overridden, and even to being compelled to purchase the interests of a minority shareholder. Trustees of family trusts may be liable to have the terms of the trust varied or overridden. However, the third party so affected will be protected from liability for anything done pursuant to a Part VIIIAA order, even if it is in contravention of the articles or the trust deed.

Defences by third parties. The legislation imposes as a condition of any Part VIIIAA order a requirement that the third party be accorded procedural fairness. Thus when any such order is sought, it is necessary for the third party to be given notice and an opportunity to be heard. Ordinarily that will involve joining the third party as a respondent in the proceedings.

Once joined, the third party may oppose the relief sought, essentially by reliance upon the factors referred to in s 90AE and s 90AF. In particular, arguments might be advanced:

(a) that the proposed order exceeds what is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; or

(b) that making the order might result in the creditor’s debt not being paid in full; or

(c) that it is not just and equitable to make the order.

If any of those matters is established, then the Court cannot make the order. Further, a third party might advance, as discretionary considerations:

(d) that the order would have an adverse taxation effect on the third party;

(e) that the third party's administrative costs in relation to the order would be disproportionate;

(f) that the third party does not have the economic, legal or other capacity to comply with the order.

While those matters do not prevent an order being made, the Court is required to take them into account and weigh them in the balance.

Finally, it might be argued that the order would effect an acquisition of property of the third party on less than "just terms" – which presumably means fair market value – and could be made only if accompanied by fair compensation to the third party.

What is "just and equitable" or "proper" or "just and convenient"? According to the Explanatory Memorandum, the Part VIIIAA powers are intended to cover a range of possible interests that a party to the marriage may have, including ownership of life insurance products which offer benefits similar to superannuation. They will have the consequence that lending institutions can be bound by court orders that make one of the parties liable for particular debts. The range of orders is intentionally broad and includes substitution of the party liable for a debt, adjusting the proportion of a debt that each party is liable for or ordering the transfer of shares between the parties to the marriage. The Explanatory Memorandum asserts that the provision is 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. However, the plain words of the sections deny this proposition. But an order can only be made if it is reasonably necessary or appropriate to effect the division of property between the parties, and the third party must be accorded procedural fairness. The order cannot be made if it is unlikely that the result of the order would be a debt not being paid in full.

Within those limitations, when will the Court make such orders? The early cautious approach may become more adventurous with the passage of time, but orders of the type expressly contemplated by the legislation are the least adventurous and the most likely to be made.

The words "just and equitable" in s 90AE, and "proper" and "just and convenient" in s 90AF respectively, are taken from the parent sections, s 79 and s 114. It may be doubted that they add much of significance to the other considerations specified in s 90AE and s 90AF. The more of those considerations as are satisfied, the more likely it is that the Court will make an order. If the words "just and equitable" have any role, they may mean that intervention will be more likely where the creditor is closely connected with the respondent spouse, or has somehow intermeddled in or taken advantage of the marriage breakdown, or where the creditor has acted with disregard to the interest of the applicant spouse, or where the debt is in substance (and/or will in future) be associated with property of one of the spouses only.

Intervention will obviously also be more likely where its effect is only "procedural" and will not in substance deprive the creditor of its debt or security.

Ramifications for valuation of minority interests. An interesting question arises as to the impact on the valuation of minority interests in proprietary companies and similar entities of the possibility that restrictions on transferability can be overridden under Part VIIIAA.

On the one hand, if Part VIIIAA is intended to provide only procedural benefits, and not to affect the substance of matters, then it might be surprising if it authorised an approach to valuation which would result in higher values being attached to minority interests because the apparent limitations on their transferability could be overridden. This view would urge that interest were to be valued apart from the possibility of a Part VIIIAA remedy, and then the remedy applied on the basis of the value so reached.

The opposing view is that, if such limitations are to be overridden, it would be unrealistic to value the interest on the basis that it could not readily be transferred or realised, when in fact under Part VIIIAA it not only could but also would be in the instant case. Such a valuation would in effect proceed on a fictitious basis and because the transaction valued on that basis would be worth less than its true value given the application of Part VIIIAA, at least one party would enjoy a windfall.

The constitutional question

The founders would be astounded at many constitutional developments since 1900: they would be not a little surprised that the High Court says that UK citizens, subjects of the Queen, in Australia, can be deported as aliens. But the thought that a power with respect to matrimonial causes authorised laws providing for the discretionary alteration of rights of strangers to the marriage just because they had dealt with a person who became party to a matrimonial cause would amaze them indeed.

The passage from *Ascot Investments* which has been cited above supports the view that the Family Court cannot make an order which would adversely alter the rights of a third party. But that decision of the High Court was founded, not on constitutional limitations, but on construction of the Act, and the intention to be imputed to Parliament. Part VIIIAA evinces a plain intention to empower the Family Court to at least vary the rights, and reduce those rights, of third parties. The Explanatory Memorandum, in expressing the view that only procedural and not substantive rights are intended to be affected, understates the position. The new Part, if constitutional, plainly empowers the court to vary and diminish the rights of third parties. There is no lack of clear and unambiguous words to do so. Any attack on their constitutional validity will have to go beyond *Ascot Investments*, to argue that s 90AE and s 90AF are not laws with respect to marriage, divorce, or matrimonial causes, or incidental thereto.

Two cases so far have considered the question.

In *Stephens & Stephens*,[56] although the constitutional point was not argued, Strickland J reviewed Part VIIIAA, observing that despite the wide terms of s 90AE(2), *first,* the object of the Part referred to altering the rights, liabilities or proper interests of a third party *in relation to the property of a party of the marriage*, and that the construction of s 90AE(2) that promoted that object was to the effect that s 90AE(2)(b) applied only where the rights, liabilities or property interests are *in relation to the property of a party to the marriage*, which would also be consistent with the requirement that s 90AE only apply in s 79 proceedings. *Secondly*, if the phrase "in relation to the marriage" at the conclusion of the paragraph governed "the rights, liabilities or property interests of the third party" then they limit the reach of the paragraph, though this was not free from ambiguity as those words might relate only to the identification of the third party. *Thirdly*, there was apparent conflict between the Explanatory Memorandum and the words of the Act as to whether the provisions were substantive or procedural. His Honour said:[57]

> [151] It is of course not entirely necessary for me to decide this issue, and I did not have the benefit of any extensive argument from any party to assist me, but in my view Section 90AE(2)(b) does not allow for the property interests of third parties to be altered without there being some connection to the parties of the marriage and the marital relationship, and/or to their property beyond the fact that it can only be applied in Section 79 proceedings. It seems to me that that is the purpose of Section 90AE(3)(a) and maybe even Section 90AE(3)(d).

His Honour concluded that, having regard to limitations found within Part VIIIAA, and in particular the requirement that there be proceedings under s 79, the need to comply with ss 90AE(3)(a) and (d), and the just terms provision in s 90AK, s 90AE(2) was constitutionally valid. So – despite the contrary suggestion of at least one commentator – was s 90AC, which defined the rights of one party to the marriage against a third party, which was incidental to or reasonably necessary for dealing with the mutual rights and obligations of the parties to the marriage. But it was difficult to see the necessary connection between s 90AH and the marriage or matrimonial causes powers to support its validity, although that did not have to be determined for the purposes of the case.

The point was argued in *Hunt & Hunt*.[58] After a thorough review of the relevant constitutional law, O'Ryan J upheld the constitutional validity of ss 90AE(2) and 90AF(2), on the footing that they were laws with respect to marriage, divorce or matrimonial causes, or at least incidental thereto – given that they are to be made in the case of s 90AE, in proceedings under s 79 for division of property orders, which orders are "central" to the marriage power, and in the case of s 90AF, in proceedings under s 114, which confers power on the Court to grant injunctions, but only in proceedings of the kind referred to in paragraph (e) of the definition of "*matrimonial cause*" in s 4(1) – which created a sufficient connection with each of the marriage,

---

[56] [2005] FamCA 1181

[57] [2005] FamCA 1181, [151]

[58] [2006] FamCA 167; (2006) 208 FLR 1; (2006) 36 Fam LR 64

divorce and matrimonial causes powers; and the scheme of Part VIIIAA and the relevant provisions was such as to ensure that the capacity of the Court to make orders which affect third parties was carefully constrained and remained sufficiently connected to the marriage, divorce or matrimonial cause powers which support it.

Part VIIIAA in action – the cases so far

In *K & K*,[59] Morgan J allowed a wife leave to amend her application for final property orders to join as respondents the controllers of several discretionary trusts of which the husband was a beneficiary, and to seek against them orders pursuant to Part VIIIAA that they be compelled to use their powers to cause the trustees to make capital distributions to the husband (so as to enlarge the divisible pool of property). Her Honour accepted that, absent Part VIIIAA, an application for an order to compel a trustee to exercise its discretion in a particular way would be doomed to fail. The respondents argued that the provisions of Part VIIIAA were machinery only and were not intended to override well-established equitable principle, whereas the wife argued that her application was within the words of s 90AE(2)(a) – an order directing a third party (the trustee) to do something (exercise its power to vest capital) in relation to the property of a party to the marriage (the husband), and/or s 90AE(2)(b) – an order altering the rights of a third party in relation to the marriage. Her Honour observed that the limitation in s 90AE(2)(b) imposed by the words "in relation the marriage" may mean no more than that the alteration must relate or pertain to the marriage, and suggested a substantive power to alter third party interests; but that the requirement of s 90AE(3)(a) that the order be "reasonably necessary, or reasonably appropriate and adapted, to effect a division of property" suggested that the Part was only to provide machinery to facilitate a division otherwise determined. Her Honour also noted the obvious tension between the Explanatory Memorandum (which protested that s 90AE was intended to apply only to procedural rights, and was not intended to extinguish or modify substantive property rights of third parties), and the plain words of the section which suggest that that is precisely what is authorised. Her Honour concluded that the wife's case was sufficiently arguable to justify allowing her leave to amend.

While I entirely agree that the issue is arguable, ultimately it is difficult to see how the order sought could be within s 90AE(2)(a), because in the context of a discretionary trust, the trust property is not property of a beneficiary, and the requirement that the order be "in relation to the property of a party to the marriage" would not be satisfied. And I think the better view is that the words in s 90AE(2)(b), "in relation to the marriage", govern the words "rights, liabilities or property interests of a third party", and require that there be a nexus between the third party's rights etc and the marriage. At first sight it is not easy to see how the discretion of a trustee to vest capital in a beneficiary is a right "in relation to" the marriage of the beneficiary.

Reference has already been made to *Stephens & Stephens*, in which the wife contended that s 90AE(2) empowered the Court to make orders directing the husband personally and in his capacity as trustee of certain trusts, and another

[59] [2005] FamCA 997; (2005) 34 Fam LR 266; (2005) FLC ¶93-237

trustee, to effect a payment to the wife from the assets of the trusts to give effect to the orders of the Court. Strickland J observed that it was not apparent how the assets of the trusts could be said to be "the property of a party to the marriage".

Ultimately, his Honour concluded that s 90AE was not available in the case before him, because potential beneficiaries had not been given notice, so an order could not be made because of s 90AE(3)(c), and there was no evidence of the taxation consequences, so an order could not be made because of s 90AE(4). As the wife succeeded on other grounds, the judgment in the Full Court appeal contains no relevant comment.[60]

In *Samootin v Wagner*,[61] the Full Court dismissed the wife's appeal from Boland J's refusal to allow her to join her former solicitor for the purposes of restraining the solicitor from enforcing against her a debt which she acknowledged was due but wanted taken into account in the s 79 proceedings. Kay J, with whom Bryant CJ and Coleman J agreed, said (at [12]):[62]

> [12]…it would be almost impossible to argue that it was proper for an injunction to be made that would restrain the respondents to the application and the respondents to this Appeal from enjoying the fruits of the judgment regularly obtained, in circumstances that really have nothing to do with the proceedings pending before this Court or the relationship between the Husband and Wife, nothing in any direct sense.

In *R & R*,[63] the Full Court made an order for security for costs against the appellant husband in an appeal from a judgment of Rowlands J, who had made a range of orders in third party proceedings, including an order restraining various associates of the husband from commencing or continuing further proceedings against the husband or the wife, and, pursuant to s 90AE(1)(b), substituting the husband for the wife in respect of certain alleged indebtedness of the wife. However, an order for security against the third party appellants was refused. The Full Court observed that the appellants' pre-argument statement asserted that s 90AE did not extend to such a case, and that the trial judge had undertaken no analysis of the section nor taken into account any of the specified factors.

In *Christie & Christie*,[64] Cronin J, on the application of the wife, restrained the husband's brother, and several corporations said to be controlled by that brother, from prosecuting proceedings he had instituted in the Supreme Court of Victoria against the husband and the wife. In the substantive proceedings, the wife sought, purportedly pursuant to s 90AE, an order that neither she nor the husband owe any moneys to the brother and his corporations. His Honour first reviewed the authorities on anti-suit injunctions,[65] observing in effect that it might well have been open to grant the injunctive relief sought on that basis without resort to Part VIIIAA. Then

---

[60] *Stephens & Stephens and Ors* [2007] FamCA 680

[61] [2006] FamCA 432; (2006) FLC ¶93-265

[62] [2006] FamCA 432, [12], (2006) FLC ¶93-265, 80,512

[63] [2006] FamCA 808

[64] [2007] FamCA 125; (2007) 208 FLR 302; (2007) 37 Fam LR 181

[65] Including *H & H* [2005] FamCA 849 (O'Ryan J), and on appeal [2007] FamCA 55

turning to Part VIIIAA, his Honour held that while s 90AF(1)(b) spoke of an injunction restraining a person from *commencing* legal proceedings against a party to a marriage, it extended to *continuing* the proceedings, and that even if it did not, then the more ample power under s 90AF(2)(a) did so. Distinguishing *Samootin v Wagner,* his Honour observed that the claims were disputed and had not yet been established by judgment, and were interwoven with the commercial and personal transactions of the parties. His Honour expressed the view that it would be "reasonably necessary" to make an order if otherwise the property proceedings would be thwarted; in this respect his Honour referred to *W & W*,[66] in which Bennett J granted a very limited injunction restraining a bankruptcy trustee who was about to evict the wife and two children from the home that the wife wished to retain and was endeavouring to raise finance to do so, the injunction being "reasonably necessary" to effect a division of property between the parties because the property proceedings would otherwise be thwarted.

However, caution is required here because the condition is not that an order be "reasonably necessary" *simpliciter*, but that it be "reasonably necessary … to effect a division of property between the parties". His Honour added that the alternative requirement that the order be "reasonably appropriate and adapted" [to effect a division of property] meant "convenient". With respect I think more than mere convenience is required: this condition is part of the constitutional underpinning of Part VIIIAA, and bespeaks a relevant nexus between the order and the division of property; moreover, convenience is separately considered under s 90AF(3)(e). As to the other conditions, his Honour found that it was proper, and just and convenient, to make the order, because the third parties were closely related to the parties, and had been aware of and participated in the matrimonial proceedings before instituting their own elsewhere. His Honour therefore granted an injunction under Part VIIIAA.

It is, however, difficult to see how the substantive order sought – to the effect that neither the wife nor the husband owe any moneys to the brother and his corporations – could ever be supported under Part VIIIAA, because, if made, it would result in the debt not being paid in full, and such an order is prohibited by s 90AE(3)(b).

In *Knight & Alesi*,[67] *ex parte* orders were made freezing assets in the hands of the wife's mother, which had apparently been transferred to her by the wife. The Court approached the matter under s 90AF, but the orders could have been independently supported in any event by s 106B and s 114(3).

In *Sterling & Sterling*,[68] a property was owned by the husband and wife as joint tenants as to 45%, the wife's brother and his partner as to another 45%, and another couple as to 10%, all as tenants-in-common. The wife sought interim relief to compel the husband to join in refinancing, or alternatively a partial property order; the husband sought an order requiring all the co-owners to sell the property. Such an order could have been made, in the accrued jurisdiction, pursuant to (NSW) *Conveyancing Act* 1919, s 66G, but Part VIIIAA was also relied upon. The wife argued that an interim order could not be made under Part VIIIAA. Loughnan JR

[66] [2006] FamCA 163

[67] [2007] FamCA 156; (2007) 37 Fam LR 245

[68] [2008] FamCA 119

concluded that either of ss 90AE and 90AF would support an interim order for sale by a third party, although it might be expected that the power would be rarely exercised, and on the facts preferred to make an (interim) order that the husband transfer his interest to the wife.

In *Watkins & Needham*,[69] Johnson JR granted a third party, who had a claim against the husband for damages for breach of contract and had obtained a Mareva injunction in the Supreme Court of New South Wales, leave to intervene in matrimonial proceedings and then stayed them pending the determination of the Supreme Court proceedings, subject to the third party providing security for the wife's costs. In opposition to the stay, the wife argued that Part VIIIAA manifested an intention that cases such as *Bailey & Bailey*,[70] *Biltoft & Biltoft*[71] and *Prince & Prince*[72] no longer apply, and that disputes between one spouse and the other's creditors or contingent creditors should be heard in the Family Court. Johnson JR was unpersuaded that Part VIIIAA had wrought so radical a change, or that in the context of that case it would be appropriate for the third party proceedings to be heard in the Family Court, because an orderly determination of the s 79 proceedings required the prior determination of the third party's claim against the husband.

State Supreme Courts: matrimonial jurisdiction and transfer[73]

The jurisdiction of the Family Court in matrimonial causes is no longer exclusive; the State Supreme Courts have, since the (CTH) *Jurisdiction of Courts (Cross-vesting) Act* 1987 ("the Commonwealth Cross-vesting Act"), all the jurisdiction of the Family Court of Australia in matrimonial causes (subject to a limitation which is irrelevant for present purposes in respect of proceedings under *Family Law Act*, s 60G).

Originally, under *Family Law Act*, s 39, matrimonial causes could be instituted in the Supreme Court of a State or Territory as well as in the Family Court of Australia,[74] and the Supreme Courts were invested with federal jurisdiction with respect to matrimonial causes.[75] However, provision was made for the Governor-General to fix by proclamation a date from which matrimonial causes and other proceedings referred to in s 39(5) may not be instituted in or transferred to the Supreme Court of a State or Territory.[76] A proclamation dated 27 May 1976,[77] fixed 1 June 1976 as the date on and after which proceedings of certain classes may not be instituted in, *inter alia*, the Supreme Court of New South Wales, so as effectively to make the jurisdiction of the Family Court in matrimonial causes exclusive from that date, except in relation to causes already pending or related to those already pending. A further

[69] [2007] FamCA 412
[70] (1989) 13 Fam LR 652
[71] (1995) 19 Fam LR 82
[72] (1984) 9 Fam LR 481
[73] The following section is based on *Young v Lalic* [2006] NSWSC 18; (2006) 197 FLR 27.
[74] *Family Law Act*, s 39(1)
[75] *Family Law Act*, s 39(5)
[76] *Family Law Act*, s 40(3)
[77] Published in *Gazette* 1976, No S86, 1 June 1976

proclamation dated 23 November 1983,[78] fixed 25 November 1983 as the date on and after which proceedings that are the matrimonial causes referred to in s 39(5)(a) or (b), or proceedings referred to in s 39(5)(c), (d) or (e), may not be instituted in, *inter alia*, the Supreme Court of New South Wales. Its effect was to ensure that the Supreme Courts were divested of any jurisdiction they may have (probably unintentionally) acquired in relation to matrimonial causes within those paragraphs of the definition of "matrimonial cause" which had been added since the first proclamation, and thus might not have been covered by the first proclamation.[79] That brought to an end the jurisdiction of the Supreme Court in matrimonial causes, until the commencement in 1998 of the cross-vesting scheme created by the various *Jurisdiction of Courts (Cross-vesting) Acts* of 1997 of the various States and the Commonwealth ("the Cross-vesting Acts").

The Commonwealth Cross-vesting Act, s 4(1), invests all State Supreme Courts with jurisdiction with respect to civil matters with respect to which the Family Court of Australia has jurisdiction (subject to a limitation in respect of "special federal matters", of which the only relevant instance is that created by *Family Law Act*, s 60G). This re-investing of State Supreme Courts with jurisdiction superseded the removal of jurisdiction by the proclamations of 1976 and 1983 pursuant to *Family Law Act*, s 40(3).

In *Mulhall v Hartnell*,[80] Young J, as his Honour the Chief Judge then was, held that the Supreme Court had jurisdiction in respect of the custody of a child in proceedings which, though they had been instituted before the commencement of the Commonwealth Cross-vesting Act, came to be heard after its commencement. *Family Law Act*, s 63A, which was included in Pt VII by the (CTH) *Family Law Amendment Act* 1987, made it mandatory to proceed under that Part for an order for custody. His Honour accepted that s 63A had the effect that the jurisdiction of the Supreme Court to deal with parental rights and responsibilities in respect of ex-nuptial children was *prima facie* excluded, but observed that the Commonwealth Cross-vesting Act, which had since come into force, reinvested the Supreme Court with jurisdiction in cases in which, because of the Family Court's exclusive jurisdiction, it would not otherwise have had jurisdiction.

The Commonwealth Cross-vesting Act has the same effect in respect of matters that were removed from the jurisdiction of the Supreme Courts not by s 63A but by the proclamations made pursuant to *Family Law Act*, s 40(3). This is illustrated by the circumstance that in *Sapir v Sapir (No 2)*[81] – in which proceedings for property adjustment under *Family Law Act*, s 79 had been transferred to the Supreme Court – Young J also, in exercise of cross-vested jurisdiction, pronounced a decree nisi for dissolution of marriage.

It is a misconception that before cross-vested jurisdiction can be exercised, the proceedings must first be "cross-vested" pursuant to some application or order of either Court. The Supreme Courts are simply invested, by the Commonwealth Cross-

[78] Published in *Gazette* 1983, No S288, 24 November 1983

[79] See *Perlman v Perlman* (1984) 155 CLR 474 (per Gibbs CJ)

[80] (1988) 91 FLR 240; (1988) 12 Fam LR 361; (1988) FLC ¶91-947

[81] (1989) 13 Fam LR 362; (1989) FLC ¶92–047

vesting Act, with the jurisdiction of the Family Court, notwithstanding the previous exclusivity of the jurisdiction of that Court. The invocation of the cross-vested jurisdiction in inappropriate matters is controlled by the power to transfer, contained in s 5 of the Commonwealth Cross-vesting Act, so that if a party commences family law proceedings in the Supreme Court when the Family Court is clearly the appropriate forum, the Supreme Court – although it has jurisdiction to entertain and determine the proceedings – may transfer them to the Family Court.

This position is unaffected by the decision of the High Court in *Re Wakim; ex parte McNally*, in which the High Court held that the Commonwealth Cross-vesting Act, s 9, which purported to confer State jurisdiction on Federal courts (and an equivalent provision in the (CTH) *Corporations Act* 1989), was invalid. That decision struck down the cross-vesting scheme only in so far as it purported to vest State jurisdiction in Federal courts, including the Family Court, but not in so far as it invested State courts with federal jurisdiction. The Commonwealth Cross-vesting Act (and the Commonwealth *Corporations Act*) purported to confer on each of the Federal Court, the Family Court and the Supreme Courts of the Territories, the jurisdiction conferred on such court by the Commonwealth Cross-vesting Act, and by any State Cross-vesting Act. Each State Cross-vesting Act purported to confer on the Federal Court, the Family Court, the Supreme Court of other States and Territories, and the State Family Court of another State, original and appellate jurisdiction with respect to State matters (other than criminal proceedings). State matters were defined as matters in which the Supreme Court of the State had jurisdiction otherwise than by reason of a law of the Commonwealth or of another State. The respective Corporation Acts made similar provision.

The leading judgment in the High Court was that of Gummow and Hayne JJ, with whom Gleeson CJ and Gaudron J concurred. Their Honours held that the effect of the Commonwealth Cross-vesting Act and the Commonwealth *Corporations Act* was to attempt to confer jurisdiction in State matters on the Federal (and Family) Courts. Their Honours said that while it may be that the parliament of a State could pass a law that provides, in effect, that the courts of another polity (such as another State, or the Commonwealth), within or outside the federation, would have jurisdiction over certain kinds of matter, that law will be of no effect unless the courts of that other polity give it effect. That, in turn, directs attention to what the law of that other polity provides. What gives courts the authority to decide a matter, is the law of the polity of the courts concerned, and not some attempted conferral of jurisdiction on those courts by the legislature of another polity. From the proposition that the Commonwealth Parliament may not confer original jurisdiction on the High Court except in relation to a "matter" – because s 76 of the Commonwealth Constitution is the exclusive source of power to confer original jurisdiction on the High Court – it followed that the jurisdiction that may be conferred on a Federal court under s 77 of the Commonwealth Constitution was similarly limited to the heads identified in ss 75 and 76, and *no other polity* could confer jurisdiction on a Federal court. Ultimately, their Honours concluded,[82] the Commonwealth legislation that purported to confer State jurisdiction on Federal courts was invalid – although some of the proceedings

[82] *Re Wakim* [1999] HCA 27, [127]; (1999) 198 CLR 511, 582

before the Court in *Re Wakim* were held to be within the jurisdiction of the Federal Court on the basis of its accrued jurisdiction.[83]

McHugh J, with whom Callinan J concurred, also held that the Commonwealth *Corporations Act* and the State *Corporations Act*, and the Commonwealth Cross Vesting Act and the State Cross Vesting Act, were invalid in so far as they purported to confer on the Federal Court jurisdiction to exercise State judicial power.[84]

Neither in *Re Wakim*, nor in *Gould v Brown*, which preceded it, was it held – or even suggested – that the cross-vesting legislation was invalid or beyond power, *in so far as it conferred federal jurisdiction on State courts*. Each judgment expressly limited the holding to the operation of the Commonwealth Cross-vesting Act in purporting to confer State jurisdiction on Federal courts. The reasoning, as explained above, is unique to the conferral of jurisdiction on Commonwealth, not State, courts. Plainly, the Commonwealth has power to invest State Courts with federal jurisdiction.[85] The Commonwealth Cross-vesting Act purports to do so, and to that extent has not been held invalid. Accordingly, jurisdiction in matters with respect to which the Family Court has jurisdiction under the *Family Law Act* is cross-vested, still, in all the State Supreme Courts. All that has been struck down is the conferral of State jurisdiction on Federal Courts, including the Family Court. This means that the jurisdiction of the Family Court remains – as it has been since 1988 – non-exclusive, to the extent that pursuant to the Commonwealth Cross-vesting Act its jurisdiction is also vested in the State Supreme Courts. It follows that the State Supreme Courts continue to enjoy all the jurisdiction of the Family Court of Australia in matrimonial causes. One consequence of the exercise by a Supreme Court of cross-vested jurisdiction, however, is that any appeal from its judgment lies to the Full Court of the Family Court, and not to the Court of Appeal of the Supreme Court.

The importance of this is that, since the demise of the cross-vesting of State jurisdiction on Federal courts, only the State Supreme Courts have plenary jurisdiction to deal with all matters, matrimonial and other. Often, the accrued jurisdiction of the Family Court will permit it do 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.

In *Benlair Pty Ltd v Terrigal Grosvenor Lodge Pty Ltd*,[86] Nicholas J considered an application to transfer proceedings from the New South Wales Supreme Court to the Family Court under the State Cross-Vesting Act, s 5(1). Benlair's sole director and shareholder was Mrs Klumper. Her husband Mr Klumper had been a director of Terrigal Lodge, and its current directors were his children of a previous marriage, who – together with a trustee for the children of his marriage to Mrs Klumper – were the shareholders. Mr Klumper had, on 2 April 2003, commenced proceedings for

---

[83] *Re Wakim* [1999] HCA 27, [134]-[150]; (1999) 198 CLR 511, 583-588

[84] *Re Wakim,* [1999] HCA 27, [33], [50]; (1999) 198 CLR 511, 548, 554

[85] Commonwealth Constitution, ss 71, 77 (iii)

[86] [2006] NSWSC 339

financial adjustment against Mrs Klumper in the Family Court. Benlair commenced the Supreme Court proceedings on 23 December 2005, claiming a declaration that Terrigal Lodge held certain land on trust for, or subject to an equitable charge in favour of, Benlair. By a response filed in the Family Court proceedings on 10 March 2006, Mrs Klumper joined Terrigal Lodge, Mr Klumper's children, and two other companies. Benlair was not a party to the Family Court proceedings, although Mrs Klumper proposed to join it as a party should the Supreme Court proceeding be transferred to the Family Court. Accordingly, the Supreme Court proceeding was neither one between the parties to a marriage, nor one between a party to a marriage and a third party (although it might be said that it was practically that, because the plaintiff was the wife's "alter ego", she being its sole shareholder and director).

Benlair argued that there was a substantial commonality of issues in both sets of proceedings, and that having regard to the interests of justice they should all appropriately be dealt with by the Family Court. Terrigal Lodge submitted that the Supreme Court proceeding concerned only Benlair's claim for equitable relief against it, to which the *Family Law Act* had no application and in respect of which the Family Court had no jurisdiction. Nicholas J held that it was not in the interests of justice to transfer the proceeding from a court, the jurisdiction of which was not in doubt, to a court whose jurisdiction was arguable and uncertain, and which, if jurisdiction were found to be lacking, would have to return it to the Supreme Court:

> [56] The defendant has argued that the Family Court has no jurisdiction to determine the proceeding. The plaintiff submitted that there is jurisdiction, but if there is a dispute it should be left to the Family Court to decide. Presumably, if the Family Court found that it had no jurisdiction to deal with the plaintiff's claims it would remit the proceeding back to this Court.
>
> [57] As the matter presently stands, I find it highly likely that if the proceeding is transferred a contested issue of jurisdiction will be raised for determination. Although I express no view as to the probable outcome, at present I am unpersuaded of the Family Court's jurisdiction to determine the proceeding. I find it difficult to accept that this Court would readily conclude that it was in the interests of justice to transfer a proceeding from a court whose jurisdiction was agreed to one whose jurisdiction would be challenged and would have to be decided.
>
> [58] 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.

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. An illustration is provided by *Paris King Investments Pty Ltd v Rayhill*.[87] The husband and the wife had separated and were engaged in proceedings in the Family Court. Children of the wife's previous marriage, and a company in which they claimed to hold, or be beneficially entitled to shares, and of which their mother was a director, initiated proceedings in the Supreme Court for equitable relief, claiming that they were beneficially entitled to property acquired by their mother in her own name or applied for her own benefit, allegedly in breach of trusts said to have been originally established by her and their father, or in breach of her director's duties, and that the husband had aided, abetted, counselled or procured those breaches. The Supreme Court proceedings were transferred to the Family Court, to proceed with the matrimonial proceedings, but eventually the husband took an objection to jurisdiction. O'Ryan J held that the Family Court did not have jurisdiction to entertain the transferred proceedings, on the basis that they were neither proceedings under the (CTH) *Corporations Act* 2001, nor fell within the accrued jurisdiction of the Family Court, and alternatively that even if the Court had jurisdiction, it would have been appropriate to transfer them to the Supreme Court.[88] Eventually, all proceedings, *including the matrimonial proceedings*, were transferred to the Supreme Court, as the Court which unquestionably had jurisdiction.

But this view is not universally held. For example, in *Samuels & Shaw*,[89] Boland J declined an application that the whole of the proceedings be transferred to the Supreme Court (where related proceedings were pending):

> [155] It has been the common understanding of the parties that on completion of the proceedings in Equity Division of the Supreme Court that the wife's application for final orders for property settlement and spousal maintenance should be listed in this Court for hearing.
>
> [156] Mr P seeks the transfer of the proceedings in this Court to the Supreme Court. I decline to make such an order on a number of bases. First, proceedings under s 79 are proceedings regularly dealt with in this Court and subject of considerable experience by trial Judges who are appointed to this Court by "reason of their training, experience and personality ....to deal with matters of family law" (s 22(2)). Secondly, the wife is not only seeking property orders dealing with physical property, she also seeks splitting orders, under Part VIIIB of the Act, of the husband's superannuation interests. This Court, through its rules and superannuation information form approved by the Principal Registrar, is in a unique position to have before it all the relevant information concerning the husband's superannuation interests, and to make appropriate flagging or splitting orders. Finally, the wife seeks spousal maintenance, again an application regularly dealt with in this Court and generally not the subject of proceedings in the Supreme Court even under the *Property Relationships Act 1984* (NSW) where different criteria for the awarding of spousal maintenance are relevant to those applicable under the Act.

But 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

---

[87] [2006] NSWSC 403

[88] *Rayhill & Rayhill; Lewis* (Family Court of Australia, O'Ryan J, 8 March 2005, unreported)

[89] [2007] FamCA 833

instituted elsewhere, will often be the appropriate course, for the reasons explained in *Valceski*. In that case, once the Supreme Court was satisfied that the Family Court had (accrued) jurisdiction to hear the equitable claim, it was transferred to the Family Court, so that all issues could be heard together. The defendants in the Supreme Court proceedings were estranged husband and wife. Consequent upon the breakdown of their marriage, the wife had instituted proceedings between them in the Family Court, for parenting orders and financial adjustment. The property the subject of those proceedings included their former matrimonial home, of which the husband had become the sole registered proprietor, as a result of a transfer pursuant to a deed between his father the first plaintiff, the husband and the wife, whereby the father agreed to transfer to the husband all the father's right, title and interest in the property, of which the husband and his father were previously registered proprietors as joint tenants, in consideration of which the wife agreed that she would continue to acknowledge the contributions made to the home by the father and would treat the husband as beneficially owning only a just and equitable share of the home proportionate to his actual contributions. In the Supreme Court proceedings, the father and his wife claimed orders setting aside the deed and transfer to the husband – on the grounds of *non est factum*, misrepresentation, mistake, unconscionability, undue influence and (NSW) *Contracts Review Act* 1980 – and a declaration as to the equitable interests of the various parties in the property, arising from their respective contributions to the purchase price and improvements. The wife sought an order that the equity suit be transferred to the Family Court, to be consolidated with the matrimonial proceedings.

The Supreme Court concluded that, while the matrimonial dispute was a more extensive one, which would cover considerably more ground, than the dispute in the equity suit – including children's matters, and property in addition to the former matrimonial home – so that, unless the exceptional course of determining a separate question were adopted in the Family Court, the father and his wife would be involved in a much larger piece of litigation than would be the case if the equity suit were to remain in the Supreme Court, nonetheless the natural forum for the equity suit in the context was the Family Court, for three main reasons. *First*, the factual context of both proceedings significantly overlapped: there would be much duplication of evidence, and some of issues for determination, which would be avoided by both proceedings being determined by the one court. *Secondly*, for practical purposes, only the Family Court could resolve the whole controversy: the s 78 application (by which the wife was seeking, in the Family Court proceedings, a declaration that the father and his wife had no legal or equitable interest in the former matrimonial home) would remain part of the matrimonial proceedings and would be litigated in the Family Court, whether or not the equity suit was transferred to the Family Court; the Supreme Court could not compel the parties to litigate the matrimonial proceeding before it, and no party has proposed that the matrimonial proceeding be transferred to it; whereas it would be open to the Family Court to ensure that all issues were litigated in that Court, by restraining the prosecution of the equity proceedings in the Supreme Court. *Thirdly*, the equity suit arose in the context of the breakdown of the marriage: the occasion for the dispute which underlay the equity suit was the breakdown of that marriage, which triggered the matrimonial proceedings. Where strangers to a marriage use the occasion of its demise to assert a right against the

property of one or other (or both) of the spouses, they cannot reasonably complain if they become entwined in the matrimonial dispute.

Conclusion

Life in the late first decade of the 21st century is more complicated than it was 30 years ago, and this includes married life. Family companies and trusts, and personal and commercial relationships with relatives and strangers, are inextricably woven up with family life and relationships. Not uncommonly, when a marriage breaks down, relationships with outsiders are also fragile and often fail. A legal system should aim to facilitate a just, inexpensive and quick resolution of all the issues thrown up by the marriage breakdown as practicable in an orderly way. Usually, that should involve managing litigation so as to avoid overlaps and duplication and the risk of inconsistent results. Usually, it will be preferable if all issues can be resolved in one court, even if not at the one time, though that is not invariably so. The accrued jurisdiction, and Part VIIIAA, give increasing scope for all issues to be resolved in the Family Court, and because the third-party disputes will usually be a subset of the matrimonial dispute, in such a case the Family Court is the appropriate forum. But where its jurisdiction is disputable, or where the third party dispute is the dominant feature, it may be appropriate for the whole of the dispute to be heard and determined in the Supreme Court, or for the matrimonial claim to await the determination of the third party dispute.