

PART VIII AA OF THE *FAMILY LAW ACT* UPDATE: ORDERS AND INJUNCTIONS BINDING THIRD PARTIES¹

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Introduction

The (CTH) *Family Law Amendment Act* 2003 received assent on 17 December 2003. New provisions, introducing a new matrimonial cause – “third party proceedings to set aside a financial agreement” – and amending Part VIIIA to authorise applications by creditors to set aside financial agreements which defraud or defeat creditors – commenced on assent. Amendments relating to the operation of financial agreements, parenting plans and the compliance regime, and providing for the use of audio visual links, changes to management structure, and other miscellaneous amendments, commenced on 14 January 2004. The provisions of new Part VIII AA, which confer on the court power to bind third parties in financial and injunctive proceedings, commenced on 17 December 2004. So far as the author is aware, there have not yet been any judicial decisions on Part VIII AA. Practitioners seem keen to avoid invoking it if they can, preferring to rely on well-established means of affecting third parties where possible. This approach is a prudent and sensible one.

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 VIII AA 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.

This paper first reviews the existing third party property jurisdiction under the (CTH) *Family Law Act* 1975 (other than the accrued jurisdiction), then explains the

¹ Based on a paper initially presented at the 11th National Family Law Conference, Gold Coast, October 2004.

provisions of new Part VIII AA, then considers the implications of Part VIII AA for practitioners, and finally addresses the question of its constitutional validity.

The pre Part VIII AA third party property jurisdiction

The Family Court is not without power to bind third parties, even absent Part VIII AA. 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 may often be liable to be affected by the resolution of the matrimonial dispute. This is so in relation to both relatives and family companies closely connected with one or both of the spouses; and 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 may make 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.² More direct incursions on the rights of third parties were authorised by 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*³, an order had been made under (CHT) *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

² See *Sanders v Sanders* (1967) 116 CLR 366; *Antonarkis v Delly* (1976) 1 Fam LR 11, 334; 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) 5 Fam LR 1; 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).

³ (1967) 116 CLR 366

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, said⁴:-

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 have been imposed by the decision of the High Court of Australia in *Ascot Investments Pty Ltd v Harper*.⁵ 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 passage⁶:-

The authorities to which I have referred [namely, *Sanders v Sanders*,⁷ *Antonarkis v Delly*,⁸ *R v Ross Jones; ex parte Beaumont*,⁹ and *R v Dovey, ex parte Ross*,¹⁰] 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.

⁴ (1967) 116 CLR 366, 372

⁵ (1981) 148 CLR 337; 33 ALR 631; 6 Fam LR 591; FLC ¶91-000.

⁶ (1981) 148 CLR 337, 354.

⁷ (1967) 116 CLR 366.

⁸ (1976) 1 Fam LR 11, 334; FLC ¶90-063.

⁹ (1979) 141 CLR 504; 23 ALR 179; 4 Fam LR 598; FLC ¶90-606.

¹⁰ (1979) 141 CLR 526; 23 ALR 531; 5 Fam LR 1; FLC ¶90-616.

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 a vis* the other, but embraces the rights of one party *vis a 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.¹¹ 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 Lionel F Bowen, repeated those observations in his second reading speech,¹² 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*,¹³ the Full Court, in the course of considering the availability of accrued jurisdiction, adverted to this point in the following terms (at [87]):-

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

¹¹ *Balnaves & Balnaves* (1988) 12 Fam LR 488; FLC ¶91-952.

¹² *Representatives Hansard*, 10 November 1988, p2840.

¹³ [2001] FamCA 1469; (2001) 166 FLR 319; (2001) 28 Fam LR 443; (2002) FLC ¶93-091 (Nicholson CJ, Finn and Strickland JJ).

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*,¹⁴ 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 can, 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 defeat claims under the Act).

Part VIII A A

The essential intent of Part VIII A A 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 VIII A A, entitled "Orders and Injunctions binding Third Parties". The

¹⁴ [1993] FamCA 126; (1993) FLC ¶92-434.

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 the court may be unable to direct a third party to act in order to give effect to property settlements. The amendments are said to 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 will 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, it is said, 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, it is said that 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 will only allow the court to make such orders in limited circumstances; that a court could not 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 VIII AA 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).

The exposure of third parties to the “overriding” power

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 VIII A A; and nothing done in compliance with Part VIII A A 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 VIII A A is to override 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 VIII A A. Further, when complying with Part VIII A A, 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 matrimonial cause (ca), 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” in paragraph (ca) of the definition of that term, 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.

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.¹⁵

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

¹⁵ Section 90AF(2).

- (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 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) of any person who subsequently becomes the trustee. Thus its effect is that successive trustees will be bound by orders or injunctions made under Part VIII A.

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 VIII AA. 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 VIII AA.

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 VIII AA 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 VIII AA 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 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.

Constitutional validity

The likely popularity of these provisions may be anticipated to provoke a constitutional challenge sooner rather than later.

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. New Part VIII AA 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. These amendments, if constitutional, plainly empower 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.

There is no absolute constitutional objection to orders being made under the *Family Law Act* which affect or bind third parties, so long as the proceedings in which they are made are a matrimonial cause. The power to legislate with respect to

“matrimonial causes” includes matters incidental thereto. The general notion of a matrimonial cause is a proceeding between husband and wife. While there may be interveners, they are not the objects of the suit against whom relief is claimed. However, s 106B is an example of how third parties can be bound by an adverse order in a matrimonial cause. The Full Court has held that (former) s 85 is constitutional, notwithstanding the direct encroachment on the rights of third parties.¹⁶ Thus it has been accepted that s 78 and s 106B (and previously s 85) have authorised orders declaratory of existing rights, or which restore pre-existing rights after a transaction which would defeat a claim, so as to bind third parties.

But the new provisions go much further, in authorising the discretionary variation of existing rights. While s 106B is part of the court’s armamentarium to protect its undoubted matrimonial causes jurisdiction against attempts to defeat it, the new provisions will have much wider effect. A law conferring on a divorce court power to alter the rights of third parties in this way might well be thought to exceed the bounds of what is reasonably incidental to legislation with respect to matrimonial causes, and thus to be constitutionally invalid.

On the other hand, the drafters of Part VIII A have been astute to limit the jurisdiction to make orders binding third parties to *in proceedings under s 79*, and *in proceedings under s 114*. In other words, there must first be on foot proceedings between the parties to a marriage for relief under s 79 and/or s 114. Those proceedings are, undoubtedly, a matrimonial cause. It will be argued that ss 90AE and 90AF are laws with respect to matters incidental to matrimonial causes, and it is certainly arguable, but far from clear, that a law which confers power on a court in a matrimonial cause to grant discretionary relief of the type authorised by s 90AE and s 90AF against a third party can be characterised as a law “with respect to matrimonial causes”.

¹⁶ *Gould & Gould* (1993) 17 Fam LR 156; FLC ¶92-434.

The utility of Part VIII AA orders

Possible uses of Part VIII AA orders – some of them expressly envisaged by the legislation and some not – include the following:-

- Under s79, 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 VIII AA 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".¹⁷ 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. 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 VIII AA 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.

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

¹⁷ *Senate Legal and Constitutional Committee Official Hansard* 22 July 2003, p L&C19.

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 to be released from the debt. It can therefore be expected that in many cases where there is joint debt, the jurisdiction will be 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, orders of the type envisaged are likely to be sought, if not in every property case, then in a very high proportion of them. Notice to the relevant third party will be required, 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. Third parties may well become the rule, rather than the exception, in s 79 proceedings.

Corporations will 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 VIII AA 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 VIII AA order a requirement that the third party be accorded procedural fairness. Thus when any such order is sought, it will be 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 new 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 section 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 only available guidance at this stage is in the legislation and the explanatory memorandum. A cautious approach can be anticipated in the early days of the legislation, which will become more adventurous with the passage of time. Initially, 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 VIII AA.

On the one hand, if Part VIII AA 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 VIII AA 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 VIII AA it not only could but 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 VIII AA, at least one party would enjoy a windfall.

Conclusion

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 VIII AA goes much further, because it authorises discretionary interference with the rights and powers of third parties. The constitutional validity of Part VIII AA 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 VIII AA when there is another, less controversial, remedy available.