

Third party property in family law cases

By Paul Brereton SC

Introduction

On 17 December 2004 changes to the *Family Law Act 1975* will commence which confer on the court power to bind third parties in financial proceedings.

In the explanatory memorandum, the following was said:

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.

An outline of the amendments

The amendments are to be found in a new Part VIII^{AA}, entitled 'Orders and injunctions binding third parties'. Section 90^{AA} provides that the object of the part is to allow the court, in relation to the property of a party to a marriage, to make an order under s79 or s114, or grant an injunction under s114, that is directed to, or orders the rights, liabilities or property interests, of a third party. 'Third party' is defined, by s90^{AB}, to mean a person who is not a party to the marriage. By s90^{AC}, 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^{AA}; and nothing done in compliance with Part VIII^A by a third party is to be treated as resulting in a contravention of any such law or instrument.

Section 90^{AD} 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 s114(1)(e).

By s90^{AE}, 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 s79, 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 s90^A(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) if 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; and 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.

The Act contains some illustrations. For example, 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.

...the amendments apply to all marriages, including those dissolved or annulled before commencement date, unless there is an existing order or s87 agreement in relation to the property of the marriage which has not been set aside or revoked.

Division 3 deals with orders and injunctions under s114. Section 90AF provides that in proceedings under s114, 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.¹

Again, there are some limiting mechanisms, in s90AF(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) if 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 s114(1) – the court is satisfied that, in all the circumstances, it is proper to make the order or grant the injunction; and
- (e) for an injunction granted under s114(3) – the court is satisfied that, in all the circumstances, it is just or convenient to grant the injunction; and
- (f) 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.

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 A A.

The expenses of the third party are addressed by s90AJ, which has the effect that if the court has made an order or granted an injunction in accordance with Part VIII A A 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 may 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.

Section 90AK provides that the court must not make an order or grant an injunction under Part VIII A A 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.

Application

Thus the amendments apply to all marriages, including those dissolved or annulled before commencement date, unless there is an existing order or s87 agreement in relation to the property of the marriage which has not been set aside or revoked.

The Bill was considered by the Senate Legal and Constitutional Legislation Committee, which reported in August 2003. The committee reported that no submission or witness opposed the policy underlying the amendments, but significant concerns were raised about its operation, particularly the exposure of credit providers to credit risk, the potential for unintended adverse effects of other legislation, the implementation costs for business, departmental consultation, and the definition of 'shares'.

Strong concerns were expressed by the Australian Bankers Association, and by the Investments and Financial Services Association, as to the court's power to bind third parties in relation to debt products and risks. Concern was expressed 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'.² It was suggested that other third parties - other debtors and guarantors who were jointly and severally liable for the parties' debt, and incoming parties in derivative contracts - may also be disadvantaged. The ABA pointed to the 'erosion of the value of a bank's substantive right of property in debt', and argued that this reduced the bank's ability to recoup the debt from parties whom the bank had originally determined were credit worthy, and deprived the bank for recourse to one of the parties either fully or proportionally and increased the exposure of the bank to credit risk.

These concerns largely resulted in the introduction of the provisions, now contained in s90AE(3) and s90AF(3), which endeavour to provide some protection for third parties.

The Family Court is not without power to bind third parties, even absent the proposed Part VIII A A. However, particularly in the context of s114, limitations on its ability to do so have been imposed by the decision of the High Court of Australia in *Ascot Investments Pty Ltd v Harper*.³ There, the High Court held that though the 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. Gibbs J, as he then was, said in a well known passage:-

The authorities to which I have referred [namely, *Sanders v Sanders*,⁴ *Antonarkis v Dely*,⁵ *R v Ross Jones; ex parte Beaumont*,⁶ and *R v Dovey, ex parte Ross*,⁷] established 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 ss80 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.

Thus the view has been adopted that the court cannot make an order which would adversely affect the rights of a third party. But the 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. The new Part VIII A A evinces a plain intention to empower the Family Court to vary and possibly reduce the rights of third parties. The explanatory memorandum perhaps 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.

To an extent, the court has always had power to bind third parties, particularly by injunction on an interlocutory basis.⁸ More direct incursions on the rights of third parties were authorised by s85, now s106B.

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. Section 106B is an example of how that can affect third parties. The full court has held that (former) s85 is constitutional, notwithstanding the direct encroachment on the rights of third parties.⁹

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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, s78(3) provided that such a declaration was binding on the parties to a marriage but not on any other person.¹⁰ However, s78(3) was repealed by the *Law and Justice Legislation Amendment Act 1988*, s39, in respect of proceedings instituted after its commencement. The explanatory memorandum at that time stated that the repeal of s78(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 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 s92, 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 s78(3), there is nothing in the wording of the Act to prevent declarations being made under s78 which bind third parties. In *Warby & Warby*,¹² the full court, in the course of considering the availability of accrued jurisdiction, adverted to this point in the following terms:

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*,¹³ makes clear that this is within the constitutional power of the Commonwealth Parliament insofar as s85 (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, although the issue has never been resolved by the High Court, the constitutionality of s106B seems well accepted, despite involving interference with third party rights. The



Family Court building, Goulburn Street, Sydney.
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extension of s78 to bind third parties has been recognised, and no convincing argument has been mounted that it is unconstitutional. Indeed, if it is constitutionally permissible, pursuant to s106B and in aid of or ancillary to proceedings under s79, for the conveyance of property by a party to a third party to be set aside so as to bind the third party, then it is difficult to see any basis for thinking that it would be any less constitutional, pursuant to s78 and in aid of or ancillary to proceedings under s79, a declaration could not be made that property held by a third party was the beneficial property of a party. Insofar as s78 authorises such a declaration, it is a law with respect to matrimonial causes, just as is s106B, and a proceeding for such a declaration, like a proceeding under s85, is within par (f) of the definition of 'matrimonial cause'. There are many s79 cases in which it becomes necessary to determine

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if property held by a third party is beneficially property of a party. In such a case there is no reason why, if, in the context of a dispute between husband and wife as to property, an issue arises as to whether the parties or either of them have a beneficial interest in property legally owned by a third party, the court cannot resolve that issue. Frequently it must, and it does. That does not deny the matter the quality of being a matrimonial cause. In such proceedings the court may, under s78, make a declaration which determines that issue.¹⁴ If the third party intervenes to place its position before the court, that does not deprive the proceeding of the quality of a matrimonial cause. And just because the result can be made binding on the third party similarly does not mean that the proceedings lose the quality of being a matrimonial cause.

The drafters of Part VIII A A have been astute to limit the jurisdiction to orders binding third parties to proceedings under s79, and proceedings under s114. In other words, there must first be on foot proceedings between the parties to a marriage for relief under s79 and/or s114. Those proceedings are a matrimonial cause. The new powers might be justified as being laws with respect to matters incidental to matrimonial causes.

On the other hand, until now, s106B (and before s85) and s78 have authorised orders declaratory of existing rights, or which restore existing rights after a transaction which would defeat a claim. The new provisions go much further, in authorising the variation of existing rights. While s106B is part of the court's armourarium to protect its undoubted matrimonial causes jurisdiction against attempts to defeat it, the new provisions would have a far wider reaching effect. On the one hand, it is certainly arguable that a law which confers power on a court in a matrimonial cause to grant relief against a third party can be characterised as a law 'with respect to matrimonial causes'. On the other hand, however, 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. 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.

The practical implications of Part VIII A A are extensive, and will, it may be anticipated, provoke a constitutional challenge sooner rather than later. It can 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 phases - will take a strict view of defending their legal position. Third parties will become the rule rather than the exception in s79 proceedings.

Conclusion

The Family Court has always had some jurisdiction, under s78, (former) s85 (now s106B), and s114, to bind third parties. The powers so far conferred have not so interfered with third party rights as to take them outside the bounds of matters reasonably incidental to matrimonial causes. The New Part VIII A A goes much further, because it authorises discretionary interference with the rights and powers of a third party. It certainly should not be assumed that the new provisions would survive a constitutional challenge, though they may.

¹ Section 90AF(2).

² Commonwealth, *Parliamentary Debates*, Senate, Senate Legal and Constitutional Affairs Committee, 22 July 2003, L&C 19 (Mr Ian Gilbert, Director, Retail Policy, Australian Bankers Association).

³ (1981) 148 CLR 337; 33 ALR 631; 6 Fam LR 591; FLC ¶91-000.

⁴ (1967) 116 CLR 366.

⁵ (1976) 1 Fam LR 11, 334; FLC ¶90-063.

⁶ TBI.

⁷ (1979) 5 Fam LR 1; FLC ¶90-616.

⁸ See *Sanders v Sanders* (1967) 116 CLR 366; *Antonarkis v Dely* (1976) 1 Fam LR 11, 334; FLC ¶90-063 (in which the court upheld the power under *Matrimonial Causes Act 1959*, s124 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 (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).

⁹ *Gould & Gould* (1993) 17 Fam LR 156; FLC ¶92-434.

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

¹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 10 November 1988, p2840.

¹² (2002) FLC ¶93-091 (Nicholson CJ, Finn and Strickland JJ).

¹³ (1993) FLC ¶92-434.

¹⁴ *Moran & Moran* (1995) 18 Fam LR 534; FLC ¶92-559.
