

Ex's and Creditors – The Relationship Between Family Law and Commercial Transactions

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Luke T. Fermanis
Barrister

1. The purpose of this paper is to discuss and analyse the relationship between parties to proceedings under the *Family Law Act 1975* (Cth) (“**the Act**”) and commercial transactions.
2. It is beyond the scope of this paper (and the allotted time) to discuss:
 - a. Development of the Family Law between when the High Court delivered judgment in *Ascot Investments Pty Ltd v Harper* and when Part VIII AA was enacted;
 - b. Loans from friends and family to a party to the proceedings under the Act;
 - c. Common law, equity and statute in relation to contract law;
 - d. Equity – priorities and postponing conduct;
 - e. Bankruptcy.
3. In this paper, where I mention the term “Court”, I am referring to the Family Court of Australia and the Rules of Australia. I will otherwise specify which court where necessary.
4. Where I refer to Family Law proceedings or jurisdiction, I refer to the Family Court of Australia and the Rules of Australia or a state Supreme

Court exercising federal jurisdiction. To be abundantly clear, I am not referring to the care and protection jurisdiction or the *parens patriae* jurisdiction of the state Supreme Courts.

5. Clearly, there is a threshold question to be asked – ‘Am I a creditor?’ In some instances, the threshold question may be: ‘Am I a person whose interests would be affected by the making of an order under either sections 79 or 90SM of the Act?’
6. This paper is intended for educational and information purposes only and is not intended to be relied upon partly or solely as advice.

Some Law

7. Section 79(10)(a) and (b) of the Act states the following:

The following are entitled to become a party to proceedings in which an application is made for an order under this section [Section 79] by a party to marriage (the subject marriage):

(a) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the order was made;

...

(b) any other person whose interests would be affected by the making of the order.

8. Section 90SM(10)(a) and (e) of the Act is in identical terms to section 79(10)(a) and (b) of the Act.

9. Part VIII AA of the Act gives the Court power to make orders, which bind third parties in circumstances where the order relates to property of a party (or parties). Importantly, the order must be in exercise of the Court's power in respect of **sections 79 or 114** (injunctions) of the Act.

10. Section 90AE of the Act gives the Court very wide powers in relation to affecting the rights of creditors. I have reproduced a copy of the section at the end of this paper. It is important that the Court must be careful to ensure that a third party's rights are not adversely impacted as a result of orders being made by the Court adjusting the property interest between the warring parties.

11. The Court, in invoking section 90AE the Act, can do the following:

- (a) an order 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) an order directed to a creditor of one party to a marriage to substitute the other party, or both parties, to the marriage for that party in relation to the debt owed to the creditor;*
- (c) an order 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;*
- (d) 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 party.*

12. You will see that the power under section 90AE is limited to making certain orders with respect to debt and the transfer of shares.

13. Section 90AE(3) and (4) outline those considerations that the Court must have in determining what order (if any) to make in respect of section 90AE of the Act and by extension, section 79.

14. Section 90AF (which I have reproduced at the end of this paper) gives the Court the power to make certain types of restraining orders under section 114 of the Act to bind a third party. 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.

15. The Court must have regard to those considerations in section 90AF(3) and (4).

16. However, the Court's power to grant an injunction is limited by section 90AK, which I like to call "the Castle" section:

(1) The court must not make an order or grant an injunction in accordance with this Part if the order or injunction would:

(a) result in the acquisition of property from a person otherwise than on just terms; and

(b) be invalid because of paragraph 51(xxxi) of the Constitution.

(2) In this section:

"acquisition of property" has the same meaning as in paragraph 51(xxxi) of the Constitution.

"just terms" has the same meaning as in paragraph 51(xxxi) of the Constitution.

As you can appreciate, the above section is all about the vibe.

17. Watts J in the Family Court decision of *Allan and Allan and Ors* [2009] FamCA 553 at paragraphs 117 to 124 said the following:

Just terms

117. Section 90AK of the Act provides any acquisition of property rights must be on just terms.

118. Secured commercial lenders (and more generally, related but bona fide secured lenders) stand head and shoulders above unsecured creditors. Secured creditors have interest in property. There is generally no question that these property rights have to be quarantined before determining what assets of the parties can be divided. This is to be contrasted with the rights of unsecured creditors (see *Coleman J* at paragraph 96-101 of *Trustee of the property of G Lemnos, a bankrupt and Lemnos and Lemnos*(2009) FLC 93-394; *Biltoff and Biltoff* (1995) FLC 93-614). Sometimes adjustments of property are made without removing all unsecured debts from the asset pool prior to dividing the asset pool between the parties. The *pari passu* principle as enshrined in s 108 of the Bankruptcy Act, does not apply to the division between unsecured creditors and the parties in these circumstances (see *Thrackay and Ryan JJ in Lemnos* at paragraph 262 - 264, 271) and the Family Law Act requires a just and equitable division of property as between spouses and unsecured creditors. No such approach is relevant to a circumstance as exists in this case where orders are sought which affect property rights of bona fide secured commercial lenders.

119. It needs to be recognised that a commercial lender who has a first mortgage has a power to sell a property without court order. That is a very important right and if it is being acquired, it has to be acquired on just terms. The mortgagee needs to be put into an equivalent position after the first mortgage on a particular property is taken away or if rights are taken away for a limited period, it would have to be done in circumstances where the mortgagee was at no risk of being disadvantaged in any way. Otherwise property rights are being taken away from the third party on other than just terms.

120. I find it is not appropriate for the mortgagee to lose their registered security and queue up behind others who are owed yet

to be determined totals and aggregates after the sale of other properties at unknown times and in an unknown order, over which the mortgagee has no control in respect of the sale. I have no evidence as to whether there are any unknown unregistered mortgagees which would complicate the exercise even further.

121. *The wife's application to restrain the mortgagees from entering into possession of or selling or otherwise dealing with properties over which they have registered securities (even though it is expressed until further order) has the effect of depriving a third party of the advantages that that security gives them.*

122. *Section 90AK of the Act means that you cannot take property from a third party, except on just terms, and you cannot take the property interests which is the hypothecation represented by a registered mortgage without giving something back which fully compensates for what has been taken away.*

123. *As mentioned in the context of the discussion about s 90AF(3)(b) of the Act, once the injunctive order is made the market may move and interest may accumulate and there is no guarantee that the mortgagee's position once lost will ever be able to be regained again.*

124. *Although there is a promise of repayment by the liquidation of assets, the mortgagee loses control over the sale of the security that they once had and a repayment to them is out of their control. If a repayment does happen, it will be at a time which is indeterminate. The granting of an injunction would take away, potentially forever, property rights that a third party has and it is not open as a matter of power in the circumstances of this case for the wife to seek an order which would have that effect.*

18. Section 90TA of the Act extends the operation of sections 90AE and 90AF to include de facto relationships.

19. For the purposes of a party relying on Part VIII AA of the Act, it is important to note that any order made pursuant to Section 90AE(2)(b)

(and for that matter Section 90AF(2)(b)), **must be for the purpose of effecting a division of property** between the parties and **not for the purpose of increasing the property of the parties**. (See *B Pty Ltd & Ors & K & Anor* (2008) FLC 93-380 at paragraph 63).

20. Sections 78 and 90SL of the Act gives the Court jurisdiction to make a declaration in favour of a third party which affects the property rights of parties to a marriage.

Accrued Jurisdiction

21. One cannot engage in a discussion about third parties without addressing the accrued jurisdiction of the Court.

22. The Full Court of the Family Court in the decision of *Warby and Warby* (2002) FLC 93-091 listed certain matters that the Court ought to consider when determining whether the Court should exercise discretion:

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

23. Importantly, there **must** be a single justiciable controversy **not** an issue.

24. Anecdotally, the typical cases in the Family Law jurisdiction which would attract the Court's accrued jurisdiction is where there is an assertion that a party to the proceedings has an equitable interest in real property in circumstances where the legal title is held by a third party or an assertion that a party to the proceedings holds real property (or some proportion) on trust for a third party.

25. In the Full Court of the Family Court decision of *Noll & Noll & Anor* (2013) FLC 93-529, the Court dismissed an appeal brought by the Husband against the trial Judge's refusal to exercise accrued jurisdiction to determine:

- a. A claim which the husband sought to bring against a firm of solicitors, Law Firm A, as part of proceedings between the husband and the wife relating to a financial agreement, and
- b. Dismissed an application to have the firm of solicitors joined as parties to the proceedings and, to the extent that the firm was already a party, discharge the firm as party.

26. The Full Court in *Noll* determined that the "federal matter" was the Wife's claim in relation to the financial agreement and would include the property settlement proceedings which would follow if the agreement is held to be non-binding or set aside, while the matter sought to be "attached" is the husband's claim against the solicitors.

27. What the Court ultimately decided in dismissing the Husband's appeal was that the determination of the federal claim does not require the determination of the claim sought to be attached.

28. In the Family Court decision of *Ruane & Bachmann-Ruane and Ors (Accrued jurisdiction)* [2012] FamCA 369, Murphy J permitted an application to join the wife's former solicitors who drafted a financial agreement which was set aside. The cause of action against the

solicitors was that of negligence. The Full Court in *Noll* was reluctant to comment on the correctness of the decision in *Ruane*.

29. In certain circumstances, the Court can grant leave to a person to intervene in the proceedings (other than divorce or validity of marriage proceedings) pursuant to section 92 of the Act.

Am I a creditor?

30. In the decision of *Rothwells Ltd v Nommack (No 100) Pty Ltd* (1988) 13 ACLR 421 at 422, McPherson J defined debt as a liquidated sum in money presently due, owing and payable by one person, called the debtor, to another person called the creditor.

31. It is tempting for one party to say that whilst the creditor is owed money by the other party, that debt is not matrimonial debt. Section 90AD of the Act states the following:

*(1) For the purposes of this 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 section 4.*

*(2) For the purposes of paragraph 114(1)(e), **property** includes a debt owed by a party to a marriage.*

32. The above section will also assist in dealing with the other argument, "I didn't know therefore it is not matrimonial debt". Well before the Act was amended to include Section 90AE (and Section 90TA), the Full Court of the Family Court in the decision of *Johnson and Johnson* [1999] FamCA 369 said:

20.5 In our view the fact that the wife was or was not involved in the tax avoidance process which may lead to the imposition of penalties was only one consideration that his Honour needed to

weigh up when determining liability for the penalties as between the parties. The benefits indirectly gained by the wife in having the pool of assets otherwise increased as a result of the availability of funds which would have otherwise been paid out in tax also have to be considered.

33. The Full Court of the Family Court in *Commissioner of Taxation & Worsnop & Anor* [2009] FamCAFC 4 held at paragraph 70:

Knowledge of the debtor spouse's tax avoidance is a factor relevant to the exercise of discretion, as the Full Court in Johnson (supra), in respect of penalties, stated. In our view, though as we said a short time ago, the question of innocence or ignorance in a spouse of the other spouse's tax avoidance may carry more weight in respect of penalties, we see no reason why that question might not also be relevant to the issue of unpaid prime tax, even if the "innocent spouse" has received benefit from the failure to pay tax. It might be that "knowledge" would be almost irrelevant, where net assets, sufficient to meet reasonable claims under s 79, remained after payment of any debt for prime tax, but "knowledge" might come into much sharper focus where liabilities exceeded assets.

34. Whilst the decisions in *Johnson* and *Worsnop* dealt with matters of taxation, it is submitted that the same principals apply when arguing against the proposition, "I didn't know therefore it is not matrimonial debt".

35. If a party to the proceedings owes your client money and that money is due and payable, then he or she or it is a creditor.

36. It is uncontroversial that even if a creditor has not intervened in proceedings, the Court still has the power to order that the debt be discharged (*Zdravkovic v Zdravkovic* (1982) FLC 91-220). Central to all

of this is the principle that the Court must have evidence of dates and that creditors must be given notice of orders that might have an adverse impact on the interests as creditors. I should add that this assumes that either or both parties have been full and frank in relation to their financial circumstances having regard to their obligations under the Federal Circuit Rules 2001 (Cth) or the Family Law Rules 2004 (Cth).

Will my rights be affected by the making of an order?

37. It is not uncommon for trade credit agreements (and guarantees) to contain clauses that charge the guarantor's real property or grant an unregistered mortgage in favour of the creditor. Some creditors lodge a caveat as soon as practicable.

38. Accepting the proposition that your client's charging clause is valid or that the contractual obligation to execute a mortgage over the relevant parcel of land is valid, there may be valid reasons why your client would narrow the issue to whether your client has a security interest in that land.

39. In the Supreme Court of New South Wales decision of *Crane Distribution Limited v Minnicelli* [2013] NSWSC 1611, the Plaintiff relied upon an agreement and a guarantee in seeking:

- a. declarations to the effect that the plaintiff is entitled to a charge over parcels of land at Pyrmont and Balmain; and
- b. an order for specific performance by the first defendant of a contractual obligation to execute a mortgage over that land, allowing for the existence of a prior encumbrance in favour of a third party on the title to the land at Balmain.

40. It was alluded to in the proceedings that quantification of the sum outstanding to the Plaintiff would be dealt with in separate proceedings.

41. If your trade creditor client faced similar circumstances to those in *Minnicelli* and parties to the proceedings had obtained orders under the Act dividing the matrimonial pool of assets in accordance with section 79, without notice to your client, it is quite clear that your client's interest (subject to the nature of the division) would likely be affected by the making of an order.
42. Consider party A and party B, both of whom are engaged in property proceedings in the Family Law jurisdiction. It turns out that party A has neglected to make the mortgage payments to the Bank in respect of the former matrimonial home for quite some time. The Bank has issued valid notices pursuant to section 57(2)(b) of the *Real Property Act 1900* (NSW) and is ready to take possession. It is open to either party A or B to bring an application for an injunction pursuant to Section 90AF of the Act. However, one must consider Section 90AK of the Act. Similarly, consider a secured trade creditor who has issued valid notices pursuant to Section 111(2)(b) of the *Conveyancing Act 1919* (NSW).
43. Party A is a director and shareholder of C Pty Ltd. C Pty Ltd is the trustee of the A Family Trust. C Pty Ltd is the owner of certain real property, which it has charged to secure all present and future monies owing to Trade Creditor Ltd. Somehow, Trade Creditor Ltd finds out that party A is a party to Family Law proceedings and that party B is taking steps to obtain an order requiring C Pty Ltd to resign as trustee of the A Family Trust and for C Pty Ltd to transfer real property to party B.
44. What about the *Personal Property Securities Act 2009* (Cth)? To date, I cannot find a case in the Family Law jurisdiction where the PPSA has reared its head.
45. Assume the following situation, party A agrees to transfer party B a boat, called "Second Life", with an agreed value of \$50,000 as part of a

financial settlement. Party A failed to disclose that he had used the good ship Second Life as security for some trade debts and the fact he was liable for those trade debts. The lawyer for party B neglected to perform a search on the PPS Registry to ascertain whether party A had granted a security interest in the Second Life to anyone. The Court, relying on the representations of parties A and B and being none the wiser, makes the following orders:

- a. Party A shall do all things and sign all documents transferring his right, title and interest in the Second Life to Party B; and
- b. Upon said transfer herein, Party B be declared at law and in equity to be the owner of the Second Life.

46. Whilst this is a basic example, it exemplifies a well-trodden path in the Family Law jurisdiction.

The next step?

47. In my experience, it is often the case that a creditor is unaware that Family Law proceedings are on foot. In fact, what tends to happen is that a creditor or their legal representative receives a telephone call or a letter of demand seeking the immediate withdrawal of the caveat lodged over one party's interest in real property because the parties have just settled and filed consent orders with the Court. One would think that when first receiving instructions from a client in respect of property proceedings that it would be prudent to conduct a real property search in respect of the parties.

48. Whilst I have assured you that I would deal with equity in this paper, the following needs consideration:

- a. On 1 July 2008, your trade creditor client lodges a caveat in respect of party A's interest in real property arising from a

charging clause in a credit agreement (or guarantee) which was entered into on the same date;

- b. On 1 July 2010, party A owes your client \$20,000 (exclusive of costs and interest);
- c. On 1 July 2012, party A and B enter into consent orders settling their Family Law dispute, which results in party A transferring the entirety of his right, title and interest in the subject real property to party B. Assume that the Court has made the order.

49. Despite what party B thinks (and because we are in NSW), your trade creditor's interest in the property has priority to party B's interest in the property. The trade creditor **has not** engaged in any postponing conduct.

50. There are instances whereby a creditor may not have lodged a caveat over the debtor's interest in real property.

51. The debtor party, of course, has a duty of full and frank disclosure in relation to his or her financial circumstances.

52. As highlighted above, it is not uncommon for transfers of personal property to take place between the parties in an effort to finalise the financial dealings between the parties having regard to section 81 of the Act.

53. Depending on when your client (or you) find out that your client's debtor is a party to proceedings under the Act, there are (subject to certain qualifications) as to what steps are available.

After the time proceedings have commenced

54. You will note that I have emphasised the word “after”. As a trade creditor or interested party, you cannot (and would not) commence proceedings in the Family Law jurisdiction. Why would you?

55. We know that subsections 79 (10) and 90SM (10) of the Act authorise creditors of the party to a case who may not be out to recover his or her debt if an order is made under sections 79 or 90SM or a person whose interests would be affected by an order under sections 79 or 90SM to become a party to the case.

56. Rule 6.06(2) of the Family Law Rules 2004 (Cth) states the following:

(2) The person intervening must file:

(a) a Notice of Intervention by Person Entitled to Intervene;

and

(b) an affidavit:

(i) stating the facts relied on in support of the intervention; and

(ii) attaching a schedule setting out the orders sought.

57. Seems simple enough? The above procedure is only available in the Family Court of Australia. In saying that, I have found some decisions of the Federal Magistrates Court whereby the Court took no exception to the fact that a liquidator filed a Notice of Intervention with an affidavit in support. It is more likely than not that your client, if he or she or it goes down this path, will end up in the Federal Circuit Court of Australia. Rule 11.03 of the *Federal Circuit Court of Australia Rules 2001* (Cth) states the following:

(1) A person may apply to the Court to be included as a party to a proceeding.

(2) Unless the Court otherwise orders, the application must be supported by an affidavit stating:

(a) the person's interest in the proceeding or any matter in dispute between the person and a party in the proceeding; and

(b) the orders (if any) that the person will seek if included as a party.

(3) The person must serve a copy of the application and affidavit on each party in the proceeding.

(4) An order for inclusion of the party may be on limited terms.

58. What if there is a dispute involving the contract? The Family Court of Australia decision in *Baxter and Brown and Anor* [2011] FamCA 100 considered that such disputes fall within the provisions of section 90AE of the Act. The Wife, in those proceedings, sought to set aside a guarantee and mortgage that she gave to Westpac. The Wife ran a claim on the basis that the bank had engaged in unconscionable conduct as well as having engaged in misleading and deceptive conduct pursuant to the provisions of the *Trade Practices Act 1974* (Cth). The Wife was unsuccessful.

59. What if your client is a liquidator and his or her or their interests will be affected by the making of an order under sections 79 or 90SM of the Act? The short answer is it depends upon why the liquidator wants to become involved. Assume the following facts:

- a. The Husband was the sole director and member of Shonk Pty Ltd;
- b. Shonk Pty Ltd had paid up capital of \$2;
- c. Judge a book by its cover, Shonk Pty Ltd carried on the business of property development and funding a lavish lifestyle for the Husband and his spouse;
- d. Unfortunately for the creditors of Shonk Pty Ltd, the second arm of Shonk's business meant that there was a snowball's chance in hell that they would ever get paid. Worse still, none of Shonk's

creditors obtained personal guarantees from the Husband because he was a good, trustworthy bloke;

e. Ultimately, a liquidator is appointed to Shonk Pty Ltd.

60. The fact that the liquidator may have a claim, for example, for insolvent trading pursuant to section 588G of the *Corporations Act 2001* (Cth) does not necessarily mean that the director spouse has a debt owing to the liquidator – unless the claim has crystallised by way of a judgment from a court of competent jurisdiction.

61. However, the director spouse may owe money to the liquidator, by virtue of a loan account held by the company at a time prior to its liquidation.

62. Chapter 25 of the *Family Law Rules 2004* (Cth) facilitates applications under the *Corporations Act 2001* (Cth). Applications under the *Corporations Act 2001* (Cth) can be transferred to the Family Court of Australia. The Federal Circuit Court of Australia cannot determine such applications.

63. Consider the following scenarios:

a. If you act for a creditor of a company being a party to Family Law proceedings and your client has served the company with a creditor's statutory demand notice and the company has failed to comply with that notice. There is nothing to prevent your client from applying to the Family Court of Australia to wind up the company under section 459P of the *Corporations Act 2001* (Cth);

b. You act for a person who asserts that he or she holds a certain number of shares in a company being a party to Family Law proceedings, but the register of the company does not reflect your client's assertion. Your client can bring an application under

section 175 of the *Corporations Act 2001* (Cth) to correct the register;

c. You act for a minority shareholder (who is not a party to the relevant Family Law proceedings) in a company that is a party to Family Law proceedings:

- i. One of the parties to the proceedings seeks orders that would affect the powers of a person to exercise the rights to vote in the company; or
- ii. Upon closer scrutiny, it turns out that the conduct of the company's affairs is oppressive to your client;

It is open to your client to commence proceedings under sections 232 and 233 of the *Corporations Act 2001* (Cth) in the Family Court of Australia.

64. Section 138E of the *Competition and Consumer Act 2010* (Cth) permits the Federal Court to transfer certain civil proceedings to the Family Court of Australia. I have produced section 138E at the conclusion of this paper.

After final orders are made

65. It is more likely than not that your client will have no idea that Family Law proceedings involving your client's customer are on foot. As I said earlier, the likely scenario that your client will be alerted by a telephone call or a letter of demand from a solicitor acting for either your client's customer or that customer's spouse demanding the removal of a caveat. If you act for a liquidator, you will most likely find out when the director spouse says that he or she has no money because he or she was cleaned out in Family Law proceedings.

66. It is important to remember that your client must be a person whose interests are affected at the time the orders are made.

67. There is no legal basis to bring an application pursuant to section 92 of the Act or by filing a Notice of Intervention as it is not possible to intervene in proceedings that have concluded and are no longer on foot. (*Vitzdamm-Jones v Vitzdamm-Jones* [1981] HCA 8; (1981) 148 CLR 383 at 415 and 416)

68. Your client can rely on section 79A(1)(a) of the Act:

Where, on application by a person affected by an order made by a court under section 79 in property settlement proceedings, the court is satisfied that:

(a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance

...

the court may, in its discretion, vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside.

69. Further, consider Section 79A(4) which states:

(4) For the purposes of this section, a creditor of a party to the proceedings in which the order under section 79 was made is taken to be a person whose interests are affected by the order if the creditor may not be able to recover his or her debt because the order has been made.

70. Section 106B of the Act is the clawback provision in the Family Law jurisdiction. Subsections (1) and (4AA) state the following:

(1) In proceedings under this Act, the court may set aside or restrain the making of an instrument or disposition by or on behalf of, or by direction or in the interest of, a party, which is made or proposed to be made to defeat an existing or anticipated order in those proceedings or which, irrespective of intention, is likely to defeat any such order.

(4AA) An application may be made to the court for an order under this section by:

(a) a party to the proceedings; or

(b) a creditor of a party to the proceedings if the creditor may not be able to recover his or her debt if the instrument or disposition were made; or

(c) any other person whose interests would be affected by the making of the instrument or disposition.

71. There are limitations, of course. Subsection (3) requires that the Court must have regard for the interests of and shall make any order proper for the protections of, a bona fide purchaser or other person interested.

72. Section 90UM(1)(b) of the Act allows a Court to set aside a binding financial agreement if it is satisfied that:

(b) a party to the agreement entered into the agreement:

(i) for the purpose, or for purposes that included the purpose, of defrauding or defeating a creditor or creditors of the party; or

(ii) with reckless disregard of the interests of a creditor or creditors of the party; or...

Costs

73. Section 117 of the Act contains the costs provisions in the Family Law jurisdiction. I have reproduced below the relevant provisions:

(1) Subject to subsection (2), subsection 70NFB(1) and sections 117AA, 117AC and 118, each party to proceedings under this Act shall bear his or her own costs.

(2) If, in proceedings under this Act, the court is of opinion that there are circumstances that justify it in doing so, the court may, subject to subsections (2A), (4), (4A) and (5) and the applicable Rules of Court, make such order as to costs and security for costs, whether by way of interlocutory order or otherwise, as the court considers just.

(2A) In considering what order (if any) should be made under subsection (2), the court shall have regard to:

(a) the financial circumstances of each of the parties to the proceedings;

(b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;

(c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;

(d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;

(e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;

- (f) whether either party to the proceedings has made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and*
- (g) such other matters as the court considers relevant.*

74. Should not costs follow the event if your client is successful?

75. Mortgagees and trade creditors typically have indemnity cost provisions in their respective agreements. One would think (and hope) that logic dictates they would obtain those costs as a matter of course. I need not go through the law on agreements as to costs.

76. Section 90AJ of the Act states the following:

(1) Subsection (2) applies if:

- (a) the court has made an order or granted an injunction in accordance with this Part in relation to a marriage; and*
- (b) a third party in relation to the marriage has incurred expense as a necessary result of the order or injunction.*

(2) 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.

(3) In deciding whether to make an order under subsection (2), 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.

(4) *The regulations may provide, in situations where the court has not made an order under subsection (2):*

(a) 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; and

(b) if such fees are charged--that each of the parties to the marriage is separately liable to pay the third party an amount equal to half of those fees; and

(c) for conferring jurisdiction on a particular court or courts in relation to the collection or recovery of such fees.

77. One would query the phrase “considers just”. In the Federal Magistrates Court of Australia decision of *Ms Maley v [R] Pty Ltd* [2009] FMCAfam 588, Brown FM at paragraph 75 said the following:

Accordingly, section 90AJ(2) picks up the terminology of section 117(2), in the sense that the court may make the order for the payment of a third parties’ expenses as it considers it “just”. In my view, this power must be considered in the overall context of Part VIII A A as a whole, which enjoins the court to avoid the imposition of expense onto third parties, who are not otherwise concerned with the division of property between the spouses involved in the substantive proceedings.

78. There is no guarantee that a successful third party will obtain a costs order. In saying that, costs in the state jurisdiction are discretionary as well!

Appendix

FAMILY LAW ACT 1975 - SECT 90AE

Court may make an order under section 79 binding a third party

(1) In proceedings under section 79, the court may make any of the following orders:

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

(c) an order 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;

(d) 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 party.

(2) In proceedings under section 79, the court may make any other order that:

(a) directs a third party to do a thing 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.

(3) The court may only make an order under subsection (1) or (2) 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 matters mentioned in subsection (4).

(4) The matters are as follows:

(a) the taxation effect (if any) of the order on the parties to the marriage;

(b) the taxation effect (if any) of the order on the third party;

(c) the social security effect (if any) of the order on the parties to the marriage;

(d) the third party's administrative costs in relation to the order;

(e) 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;

Note: See paragraph (3)(b) for requirements for making the order in these circumstances.

Example: 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.

(f) the economic, legal or other capacity of the third party to comply with the order;

Example: 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. If the court does so, the order will have effect despite those terms (see section 90AC).

(g) 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--those matters;

Note: See paragraph (3)(c) for the requirement to accord procedural fairness to the third party.

(h) any other matter that the court considers relevant.

FAMILY LAW ACT 1975 - SECT 90AF

Court may make an order or injunction under section 114 binding a third party

(1) In proceedings under section 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.

(2) In proceedings under section 114, the court may make any other order, or grant any other injunction that:

- (a) directs a third party to do a thing 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.

(3) The court may only make an order or grant an injunction under subsection (1) or (2) 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 subsection 114(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 under subsection 114(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 the matters mentioned in subsection (4).

(4) The matters are as follows:

(a) the taxation effect (if any) of the order or injunction on the parties to the marriage;

(b) the taxation effect (if any) of the order or injunction on the third party;

(c) the social security effect (if any) of the order or injunction on the parties to the marriage;

(d) the third party's administrative costs in relation to the order or injunction;

(e) if the order or injunction 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 or the injunction is granted;

Note: See paragraph (3)(b) for requirements for making the order or granting the injunction in these circumstances.

Example: 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.

(f) the economic, legal or other capacity of the third party to comply with the order or injunction;

Example: The legal capacity of the third party to comply with the order or injunction 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 or grant the injunction despite the terms of the trust deed. If the court does so, the order or injunction will have effect despite those terms (see section 90AC).

(g) 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;

Note: See paragraph (3)(c) for the requirement to accord procedural fairness to the third party.

(h) any other matter that the court considers relevant.

COMPETITION AND CONSUMER ACT 2010 - SECT 138E

Transfer of proceedings to Family Court

(1) If:

(a) a civil proceeding is pending in the Federal Court; and

(b) a matter for determination in the proceeding arises under this Part or the Australian Consumer Law, other than under:

(i) Division 3 of Part 3-1 of the Australian Consumer Law;

or

(ii) Part 3-5 of the Australian Consumer Law;

the Federal Court may, on the application of a party to the proceeding or of its own motion, transfer the proceeding to the Family Court.

(2) Subject to subsection (3), if a proceeding is transferred to the Family Court under subsection (1):

(a) the Family Court has jurisdiction to hear and determine the proceeding; and

(b) the Family Court also has jurisdiction to hear and determine matters not otherwise within its jurisdiction (whether because of paragraph (a) or otherwise):

(i) that are associated with matters arising in the proceeding; or

(ii) that, apart from subsection 32(1) of the *Federal Court of Australia Act 1976* , the Federal Court would have had jurisdiction to hear and determine in the proceeding; and

(c) the Family Court may, in and in relation to the proceeding:

- (i) grant such remedies; and
- (ii) make orders of such kinds; and
- (iii) issue, and direct the issue of, writs of such kinds;

as the Federal Court could have granted, made, issued or directed the issue of, in and in relation to the proceeding; and

(d) remedies, orders and writs granted, made or issued by the Family Court in and in relation to the proceeding have effect, and may be enforced by the Family Court, as if they had been granted, made or issued by the Federal Court; and

(e) appeals lie from judgments of the Family Court given in and in relation to the proceeding as if the judgments were judgments of the Federal Court constituted by a single Judge of that Court, and do not otherwise lie; and

(f) subject to paragraphs (a) to (e) of this subsection, this Act, the regulations, the *Federal Court of Australia Act 1976* , the Rules of Court made under that Act, and other laws of the Commonwealth, apply in and in relation to the proceeding as if:

(i) a reference to the Federal Court (other than in the expression ***the Court or a Judge***) included a reference to the Family Court; and

(ii) a reference to a Judge of the Federal Court (other than in the expression ***the Court or a Judge***) included a reference to a Family Court Judge; and

(iii) a reference to the expression ***the Court or a Judge*** when used in relation to the Federal Court included a reference to a Family Court Judge sitting in Chambers; and

(iv) a reference to a Registrar of the Federal Court included a reference to a Registrar of the Family Court; and

(v) any other necessary changes were made.

(3) If any difficulty arises in the application of paragraphs (2)(c), (d) and (f) in or in relation to a particular proceeding, the Family Court may, on the application of a party to the proceeding or of its own motion, give such directions, and make such orders, as it considers appropriate to resolve the difficulty.

(4) An appeal does not lie from a decision of the Federal Court in relation to the transfer of a proceeding under this Act to the Family Court.