

## CASE NOTES

### IN THE MARRIAGE OF STOWE<sup>1</sup>

*Family Law — Property settlements — Companies own matrimonial assets — Interim injunctions — Whether the position of third party shareholders is a relevant consideration — Family Law Act 1975 (Cth) s. 114*

In recent years, more and more married couples have resorted to placing assets in family companies and trusts to avoid death duties and tax liabilities. This frequently creates problems on divorce as the Family Court can deal only with the property of the parties to the marriage. In order to ensure a just and equitable settlement of property under section 79 of the Family Law Act 1975 (Cth),<sup>2</sup> the Court has had to explore its power under section 114 to prevent such assets being removed from the reach of a party to the marriage.

In *Stowe*, the matrimonial home of the parties was a property known as Bullsbrook, on which the wife managed a cattle stud. When the parties separated, she remained there with the children. Bullsbrook was owned by Devereaux Holdings Pty Ltd (Devereaux), a company in which the husband was the managing director with an annual salary of \$30,000. It was conceded that he was the guiding force of the company although he had no direct shareholding interest in it.

Ninety one percent of the shares in Devereaux were owned by Stofam Proprietary Limited (Stofam), a company incorporated by the husband as trustee for the Stowe family trust. Stofam's two issued shares were held by the husband and his solicitor. The income of the trust was held on a discretionary trust for a class which included the wife and children, but not the husband. The capital beneficiary was Stokid Pty Ltd, another company incorporated by the husband with two issued shares which were held by the husband and his solicitor. The husband claimed that he held his interest in the shares on trust for his executor for distribution in accordance with his will.

The remaining shares in Devereaux were held by Seeko Ltd (Seeko), a listed public company. Devereaux held shares in Seeko and both companies held shares in Griffin Coal Mining Ltd. To finance the purchase of these shares, Devereaux had charged its assets (presumably by way of floating charge) to the Rural and Industries Bank (the Bank). Such charge extended to Bullsbrook.

After being asked by Devereaux to leave the property, the wife applied to the Family Court of Western Australia for various orders, including maintenance for herself and the children, occupation of the matrimonial property and injunctions restraining the husband personally and as a director from dealing with the assets of Devereaux. On 4 August 1980 Anderson J. made an *ex parte* interim order which, in summary, restrained the husband

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<sup>1</sup> (1980) 6 Fam. L.R. 757; [1981] F.L.C. 91-027. Full Court of the Family Court of Australia; Evatt C.J., Murray and Gibson JJ.

<sup>2</sup> "The Act".

either personally or in his capacity as a director, shareholder or trustee from:

1. dealing with Bullsbrook or evicting the wife and children;
2. causing Devereaux to deal with Bullsbrook or any of its assets save in the ordinary course of day to day operations of the property;
3. dealing with any stock on the property save in the ordinary course of day to day operations of the property; and
4. dealing with any shares in Devereaux or Stofam.

He also granted liberty to the husband or Devereaux to apply to have the injunctions set aside, while the wife undertook to indemnify both the husband and Devereaux for any loss.

On 22 August 1980, the husband applied to have the order set aside and produced evidence of the business and financial circumstances of Devereaux to show that it was unreasonably prejudiced by the injunctions. This application was dismissed on 27 August 1980 and it was from that decision that the husband appealed to the Full Court of the Family Court of Australia. The Full Court, in a joint judgment, allowed the appeal only in so far as the injunctions did not relate to the Bullsbrook property or its stock.

As the trial judge had not specified the basis on which he had granted the injunctions, the Full Court was free to consider three grounds under section 114 for upholding them.

First, it was suggested that they could be upheld under section 114(3) as being orders in maintenance proceedings, the wife's original application having contained a claim for maintenance. The wife did not dispute that the husband had paid and would continue to pay maintenance, but argued that her maintenance needs could be partly met by her remaining on the property and managing the cattle stud. She also suggested that the court could, at an interlocutory stage, consider the possibility of securing periodic maintenance so that section 114(3) could be used to prevent the party against whom a maintenance order might be made from disposing of his assets.

The Full Court felt that these arguments were of some merit given the connection between maintenance and property orders,<sup>3</sup> a relationship recognised in the Act in sections 75(2)(n) and 79(4)(d). The Court recognised that Mrs Stowe's need for periodic maintenance would diminish with the size of the property settlement she ultimately received; and that this meant that her maintenance claim and the husband's assets were inextricably linked. Since her immediate maintenance requirements were being satisfied while her longterm needs were connected with her property settlement, the Full Court considered that the maintenance application should not be considered separately from her rights in regard to property.

The Full Court then considered the scope of section 114(1) which provides for the granting of injunctions in relation to the use or occupancy of the matrimonial home. The Court, citing the decision in *Sieling*,<sup>4</sup>

<sup>3</sup> (1980) 6 Fam. L.R. 757,767; [1981] F.L.C. 76,262.

<sup>4</sup> (1979) 24 A.L.R. 357; (1979) 4 Fam. L.R. 713; [1979] F.L.C. 90-627; (1979) 35 F.L.R. 458.

considered that orders relating to the use and occupation of the matrimonial home could incidentally preserve a party's prospective right to an order under section 79. In the Court's view, an occupation order could prevent the matrimonial home from being dealt with adversely to an applicant until the maintenance and property issues could be determined.

The High Court decision in *Re Dovey; ex parte Ross*<sup>5</sup> made it clear that the Family Court could prevent one party to the marriage from interfering with the occupation of the home by the other even if the home belonged to a company. For such proceedings were held to be within paragraph (e) of the definition of "matrimonial cause" in section 4 of the Act. Accordingly, injunctions could be directed to a party both personally and in his capacity as director or shareholder, and were not beyond power simply because third parties were affected.<sup>6</sup> Gibbs J. (as he then was) considered that the effect of any injunctions on the fiduciary duties of the party against whom the order is made, or on the creditors of the company, was not relevant to the question of jurisdiction but merely went to the exercise of the Court's discretion.

On the facts in *Stowe*, the Full Court considered that the wife had established a *prima facie* case against the husband personally to continue in occupation of the property. For both parties had been involved in the acquisition of Bullsbrook; it had been their matrimonial home and the home of the children; the wife and children still resided there and the wife managed the property. These factors were not outweighed by the fact that the parties jointly owned another property valued at \$1,000,000 which, although part of the security held by the Bank, had been offered by the husband to the wife free of all encumbrances.

The Full Court then considered the husband's position in *Devereaux*. It was conceded that he was the guiding force of *Devereaux* and he claimed that the injunctions circumscribed the performance of his fiduciary duty to the company. He alleged that plans had been made to subdivide and sell Bullsbrook, as *Devereaux* was obligated to repay \$1,250,000 to the Bank before 31 August 1980. The husband's counsel produced an affidavit from a Bank official stating that the Bank had been expecting the repayment to be financed by such a sale, as well as an affidavit from another director of *Devereaux* stressing the importance of the company being free to deal with its assets if it were to survive commercially. The husband therefore claimed that *Devereaux* would be unduly prejudiced if he were restrained in his fiduciary duty, thus affecting not only *Devereaux* but also its part owner, *Seeko*, a *public* company.

In this regard, Anderson J. made a number of findings which were not challenged on appeal. First, he found that the sale of Bullsbrook was not contemplated by the husband as a means of repaying the \$1,250,000 before 31 August 1980. Secondly, his Honour took a robust view of the position of the Bank and *Seeko*. He considered that he was entitled to assume, in the absence of evidence to the contrary, that the Bank had

<sup>5</sup> (1979) 23 A.L.R. 531; (1979) 5 Fam. L.R. 1; [1979] F.L.C. 90-616; (1979) 53 A.L.J.R. 359.

<sup>6</sup> *Sanders v. Sanders* (1967) 116 C.L.R. 366; *Antonarkis v. Delly* (1976) 10 A.L.R. 251; (1976) 1 Fam. L.R. 11,334; [1976] F.L.C. 90-063.

exercised ordinary commercial prudence in lending to Devereaux and had allowed margins between the value of the securities and the amounts advanced, so that he was not persuaded that Devereaux could not have satisfied its indebtedness other than by the sale of Bullsbrook.

Anderson J. was also of the opinion that it was extremely imprudent of a public company such as Seeko to acquire a small percentage of shares in a private company whose substantial asset was the matrimonial home of the managing director and on which his wife conducted a business. His Honour therefore felt no obligation to protect the interests of Seeko at the expense of the wife's interest in remaining on the property.

These conclusions were accepted by the Full Court in *Stowe*, so that the husband could not successfully argue that he or the company were unduly prejudiced. Further, since the company was not unduly prejudiced, it followed that the husband would not be affected in the exercise of his fiduciary duties. The Full Court therefore found that it was within the discretion of the trial judge to grant the injunctions in so far as they related to the Bullsbrook property and its stock.

Finally, the Full Court considered whether the injunctions could be upheld under section 114(1) as a means of protecting the right of the wife to apply at some future time under section 79 of the Act. That section 114(1) could be used in this way was clearly decided in *Sieling*.<sup>7</sup> The Full Court in *Stowe* also felt it was clear law that under section 79 the Court could deal directly only with the property of the parties, although any order it made need not be directed to specific property.<sup>8</sup> Section 79 orders can also provide that the order be satisfied by the transfer of property under the control of a party or by a party being ordered to exercise his controlling position in a company to deal with the company's assets in a particular way.<sup>9</sup>

However, in cases such as *Stowe*, where matrimonial assets are placed in the names of companies and trusts, a complex investigation might be necessary to determine what property can be dealt with directly by the court. The Full Court considered that an injunction preserving property might be granted until such time as a proper investigation could be conducted, if the applicant could establish to the Court at the interim hearing not only a possible relevant interest in the property, *but also* the risk that a future order under section 79 might not be met. The Full Court said it may also be relevant for the applicant to show a special interest, arising from the matrimonial relationship, in the preservation of the particular item of property. Obviously, this factor would most commonly be present in applications for occupation or preservation of the matrimonial home.

The Full Court, having concluded that the wife had made out a close relationship with Bullsbrook, also accepted the trial judge's findings that the husband in his capacity as a director intended to use his powers to dispose of Bullsbrook and its stock. Nonetheless, the wife failed to make

<sup>7</sup> *Supra* n. 4.

<sup>8</sup> *Collins and Collins* (1977) 3 Fam. L.R. 11,424; [1977] F.L.C. 90-286; *Kaljo and Kaljo* (1978) 4 Fam. L.R. 190; [1978] F.L.C. 90-445.

<sup>9</sup> *Tiley and Tiley* (1980) 6 Fam. L.R. 528; [1980] F.L.C. 90-895.

out a claim for a blanket injunction over the company's assets, as there was no evidence that the husband was likely to dissipate his other assets and therefore be unable to meet any order that might be made under section 79.

The final order of the Full Court in *Stowe* upheld the injunctions relating to the property and stock, but discharged the remainder. The husband then sought a certificate under section 95(b) of the Act certifying that an important question of law or public interest was involved, thus permitting an appeal to be made to the High Court. Such a certificate was granted by the Full Court on 20 February 1981,<sup>10</sup> and the case was argued in the High Court on 23 and 24 September 1981.<sup>11</sup>

After the Full Court decision was handed down but before the case was argued in the High Court, the High Court handed down its judgment in *Ascot Investments Pty Ltd v. Harper and Another*.<sup>12</sup> This decision related to an injunction granted by the Family Court directed to a company and its directors, ordering them to refuse to give effect to the transfer of certain shares. Gibbs J. (as he then was, and with whom Stephen, Aickin and Wilson JJ. agreed) considered that section 114 of the Act could not be used to

defeat or prejudice the rights, or nullify the powers, of third parties, or to require them to perform duties which they were not previously liable to perform. It is one thing to order a party to a marriage to do whatever is within his power to comply with an order of the court, even if what he does may have some effect on the position of third parties, but it is quite another to order third parties to do what they are not legally bound to do.<sup>13</sup>

During argument in the High Court, counsel for Mr Stowe sought to extend the above principle of *Ascot Investments* to injunctions directed to parties to the marriage either personally or in their capacity as shareholders or directors. He argued that although in *Ascot Investments* it was recognised that orders directed to parties of a marriage could indirectly affect others, the Family Court did not have jurisdiction to make orders against parties which had a real effect on the freedom of third parties. In this connection, he sought to distinguish the case of *Re Dovey*,<sup>14</sup> in which the husband was restrained in his capacity as a director and shareholder. Counsel argued that the husband in *Re Dovey* had all the voting rights in the company attached to his share, and there were no company creditors or other third parties to be affected by the injunctions. This, he contended, enabled it to be distinguished from the *Stowe* case where the husband had no interest in the company and where there was the Bank and Seeko to be considered. In essence, it was argued that the marriage power under the Constitution extended only to the definition of rights between spouses but not to the enforcement of those rights where the freedom of third parties would be seriously affected. According to this argument, section 114 would then be

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<sup>10</sup> Evatt C.J., Emery S.J., Strauss J.; *Stowe and Stowe* (No. 2) [1981] F.L.C. 91-074.

<sup>11</sup> No. 97 of 1981.

<sup>12</sup> (1981) 6 Fam. L.C. 591; [1981] F.L.C. 91-000; (1981) 55 A.L.J.R. 233.

<sup>13</sup> *Id.* 601; 76,061; 239.

<sup>14</sup> *Supra* n. 5.

confined to situations where the injunction made no real inroads into the freedom of the company or its shareholders.

The High Court reserved its decision in *Stowe*, but before judgment was handed down, the matter was settled, thus unfortunately depriving family lawyers of a definitive High Court decision as to the extent of the Family Court's injunctive powers. But until the issues raised in *Stowe* are determined by the High Court, the judgment of the Full Court of the Family Court obviously remains good authority.

If it is accepted, on the basis of *Re Dovey*, that the Family Court has a discretion to restrain a party in the exercise of his fiduciary duties, the case of *Stowe* gives some indication of how the Court will exercise its powers in this regard. It seems clear that the presence in the company of shareholders unrelated to the parties to the marriage will not deter the Court from granting an injunction if one of the parties has made out a *prima facie* case for injunctive relief. For the Full Court and the trial judge in *Stowe* in effect considered that if Seeko invested in a private company such as Devereaux, then it should bear the consequences.

For this reason, and given the rising number of businesses being run as family companies, the case is of considerable commercial importance. Anyone contemplating financial dealings with such a company, or with one which is closely connected with a marital relationship, would be well advised to consider the ramifications of this case as it is clear that the Family Court will not necessarily compromise the interest of members of the family for the financial interests of third parties.<sup>15</sup>

An interesting point also arises from a comment of Murphy J. during the hearing of the High Court appeal in *Stowe*. For it would seem from the Full Court decision that if the voting powers in Devereaux had been rearranged so that, at least on paper, the husband was no longer the guiding force of the company, the remaining directors could then have voted to evict Mrs Stowe and sell the property.

However in the course of argument in the High Court, Murphy J. suggested that other heads of constitutional power such as the corporations power<sup>16</sup> could be used to uphold the powers conferred by the Act on the Family Court.<sup>17</sup> If this is so, the Family Court may then perhaps have the jurisdiction to issue injunctions directly against companies to protect the position of parties such as Mrs Stowe. Such a possibility surely warrants investigation if the Family Court is to have truly effective powers to protect the economically vulnerable party to a marriage.

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<sup>15</sup> The Full Court of the Family Court (Evatt C.J., Watson and Joske JJ.) has subsequently taken a similar view in *Harris* App. No. 292 of 1980 9 November 1981 (as yet unreported). This case involved orders directed to companies which were effectively controlled by the husband's mother.

<sup>16</sup> Constitution s. 51 (xx).

<sup>17</sup> Page 37 of the High Court transcript.

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