

STRATEGIC USE OF THIRD PARTIES IN PROPERTY PROCEEDINGS

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March 2025

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1. It can no longer be assumed that property settlement litigation is always confined to dealing with the rights and interests of spouse parties. With increasing frequency, third parties are ensnared in the spectre of family law property settlement litigation. This result is not an unexpected phenomenon. Since the creation of the Family Court of Australia in the mid-1970s, the realities of modern life have become increasingly complex and sophisticated. Spouses and de facto partners are embracing that complexity and sophistication and are engaging with the world, from a financial and legal perspective, in a similar manner. It is not uncommon to see their financial affairs involving an array of trusts, companies, partnerships, and other structures. Investments are held in tax-effective legal structures. Family finances might be intertwined with those of a business partner. High property prices in the cities have led to spouses and de facto partners purchasing property with assistance from family members, usually parents, or alternatively, living in properties for long periods for which they are not the registered proprietor.

2. This increasing sophistication of spouses and de facto partners means that, on separation, the rights and interests of legal entities other than the spouses and de facto partners are often relevant, involved or affected. These are the 'third parties'. They may be trusts, trustees, corporations, natural persons, partnerships, government departments, or sophisticated litigants such as liquidators or bankruptcy trustees. This paper is intended to explore some of the common scenarios where third parties can and do become involved in property settlement proceedings.
3. Common third party situations include:
 - a. Family members claiming an interest in real property belonging to the spouse parties or vice versa;
 - b. Creditors seeking payment from the asset pool;
 - c. Setting aside transactions to defeat claims;
 - d. Involvement of corporate entities in investments, family businesses, and asset holding;
 - e. Involvement of bankruptcy trustees or liquidators; and
 - f. Creditors seeking to set aside orders or a financial agreement.
4. Property settlement litigation predominantly occurs in the newly-created Federal Circuit and Family Court of Australia (**FCFCOA**) and the Family Court of Western Australia. Strictly speaking, the FCFCOA consists of two courts, being Division 1 and Division 2, however for reasons of simplicity, this paper will refer to the FCFCOA as one unit unless otherwise indicated.
5. The target of this paper is the 'strategic' use of third parties. Of course, a sound strategy is fundamental to all civil litigation. 'Strategy' in this context really refers to:
 - a. The ability to perceive the potential relevance of a third party to anticipated or existing litigation;
 - b. Sourcing instructions from the client about the scope and relevance of the third party;
 - c. Sourcing documents to assist the client's case whether the client is against the third party or is the third party;
 - d. Considering available claims, relief and forums and then selecting one or more which most appropriately addresses the evidence, the structure of the third party, the risk appetite of the client and also makes due allowance for the pitfalls of the case at hand and the general vicissitudes of litigation; and

- e. Articulating and formulating a case in a persuasive manner.
6. This paper is intended to present an overall picture of the relevance of third parties to property settlement proceedings, rather than descend into high levels of detail. Indeed, many matters mentioned in this paper are worthy of their own paper.

PRELIMINARY STEPS: TAKING INSTRUCTIONS AND MARSHALLING EVIDENCE

7. Planning is, of course, a fundamental step in all litigation. It permits practitioners to gain an understanding of the client's complaint, review the available evidence, consider how to marshal other evidence, determine an appropriate cause of action and, in turn, give accurate advice about the prospects of success. Planning does not mean accepting a client's instructions to immediately issue a section 106B application to set aside a share transfer that the husband has just performed. Although such bold action might appease many clients, it is often counterproductive for the client (and practitioner).
8. Naturally, the first step is to take detailed initial instructions about the relevance of the third party. It is important to take detailed instructions about:
- a. The nature and scope of the right or interest claimed or held by a third party whether that right or interest is proprietary, contractual or derives from another source - It is common to encounter proprietary interests held by family members of spouse parties, by private companies, by partnerships, and in trusts. Consider whether the interest is legal or equitable. For example, a registered interest in real property is a legal interest in land. A claim of a resulting trust by reason of contributions to purchase price is an asserted equitable interest in land.¹ If the interest is merely a part shareholding in a company, consider what rights attach to that shareholding and whether those rights are actually of any utility to your client. If the interest is one of beneficiary, consider the type of trust (e.g. discretionary trust, fixed trust, unit trust, testamentary trust) and what rights and entitlements are attached to and accrue from that interest. If the interest in question is an existing liability for which the third party seeks payment, take instructions about the source of the liability (e.g. statutory, contract).
 - b. The history of dealings with the potential interest - This step is often important in matters involving discretionary trusts. In determining whether a trust can be characterised as the

¹ See e.g. *Calverley v Green* (1984) 155 CLR 242

'alter ego' of a spouse party², it is important to take detailed instructions to understand how the trust has historically been operated, the nature and name of the trust and the trustee, the individuals involved or associated with the trust, who has made decisions for the trustee, the destination of historical distributions, the known property of the trust, the identity of default beneficiaries, and any contributions made by the parties to the trust property. Often an integral issue is whether changes have been made to the structure of the trust in the lead up to or since separation of the spouse parties.

- c. The nature of the third party entity - If the entity in question is a company, it is incumbent on practitioners to take instructions about the existence of the company's shareholders and directors as those officeholders may be the appropriate target of the litigation. Similarly, in the case of trusts, it is important to understand the identity of beneficiaries (including the various classes of potential beneficiaries), the trustee, and the appointor or guardian.
9. The second step is to marshal appropriate documents from the client or other sources. Documents can make or break a case. In disputes involving third parties, they play a far greater and pivotal role when compared to a standard parenting or property case. Initially, documents are received by a practitioner directly from his or her client. It is then important to source further evidence from other sources as is relevant to the case at hand:
- a. For trusts, obtain the original trust deed and any subsequent amending deeds. Financial statements and taxation returns for the trust can show movements in trust property over the years, the history of distributions, and any relevant loan accounts. Consider obtaining correspondence about the establishment of the trust, the acquisition or maintenance of its property, and decisions relevant to demonstrating control of the trust. Often, this correspondence can be sourced from the accountant for the trust.
 - b. For companies, consider sourcing the articles of association, company constitution, resolutions of shareholders, resolutions of directors, and any minutes of meetings. Financial statements and taxation returns for the company are also often useful.
 - c. For partnerships, the partnership agreement is usually key to determining the manner of decision making and the rights of the partners to the income and property of the partnership. Consider also obtaining correspondence about the partners' dealings with partnership property.

² See *Kennon v Spry* (2008) 238 CLR 366

10. In complex matters involving a web of companies and/or trusts, it is useful to prepare a corporate diagram. Accountants are skilled at preparing these diagrams. A well-drawn one should provide a concise summary of the relationships between entities and relevant persons involved in those entities. Its purpose is mostly conceptual; it should allow one to stand back and quickly assess the web.
11. The third step that ought to be considered at an early stage is how the claim is to be articulated. Most of the claims involving third parties will often require a degree of particularisation that cannot be achieved from an affidavit. Pleadings can fulfil this role and, whilst the FCFCOA is not a court of pleadings, they are routinely ordered and are useful for applicants and respondents alike. For applicants, pleadings assist with ensuring the evidence and alleged facts actually make out an asserted claim. For respondents, pleadings are likewise useful to understand the particular cause of action relied upon and the relief sought. For respondents in particular, an order for the applicant to file a statement of claim should be sought at an early stage as a defective statement of claim may well give a basis for summary dismissal.

PRELIMINARY STEPS: MECHANISMS FOR THE INVOLVEMENT OF THIRD PARTIES

12. Third parties may become involved in proceedings in the FCFCOA by:
 - a. Being joined as a respondent by an existing litigant;
 - b. Applying for leave to intervene in an existing proceeding;
 - c. Bringing an Initiating Application; and
 - d. A transfer from another court, typically a state Supreme Court or the Federal Court.

Joinder

13. There are essentially two situations where joinder of a third party can occur.
14. The first scenario is where the third party is named as a respondent in the Initiating Application or Response, or an amended version of those documents, before the first court date. This course is permitted by rr 3.03(1) and (2) of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth) (**Rules**).
15. The second scenario is where, after the first court date, an existing litigant, by way of application, seeks an order joining the third party. Rules 3.03(4) and (5) permit this course. The application must be made by way of Application in a Proceeding supported by an affidavit setting out the relevance of the third party to the proceeding.

16. In each of the above two scenarios, it is important to understand when a third party can and should be joined to an existing proceeding. Rule 3.01 answers this question:

3.01 Necessary parties

A person whose rights may be directly affected by an issue in a proceeding, and whose participation as a party is necessary for the court to determine all issues in dispute in the proceeding, must be included as a party to the proceeding.

17. In *Wayne v Dillon & Anor* (2008) 40 Fam LR 543 (***Wayne v Dillon***), the Full Court, with respect to the similarly-worded old rules, held:

[18] The word “necessary” in r 11.01(1) must mean something more than “useful” or “expeditious”. In my view, if there are available alternative means to joinder to the substantive proceedings, of obtaining from a third person or someone already a party what is needed to allow an applicant for joinder to establish an identified “case”, joinder is unlikely to be “necessary”.³

18. The threshold for joinder is not high. There must however be more than a mere assertion that a party is ‘necessary’ for the litigation; a factual basis is required. In *B Pty Ltd & Ors v K & Anor* [2008] FamCAFC 113 the Full Court considered that an application for joinder was analogous to an application for summary dismissal for the proposed claim:

We do not accept that it is proper to allow joinder of third parties merely upon the formulation of a paragraph in, or to be added to, an Application, on the basis that at Trial facts to support the application may be asserted and proved. Sufficient facts must be asserted to demonstrate that, if proved, the law arguably provides the relief sought.⁴

19. A similar conclusion was reached in *Wayne v Dillon*.⁵

20. The key to successfully bringing or defending a joinder application is understanding how or whether the proposed claim against the third party *directly affects* the third party’s *rights*. The text of rule 3.01 of the Rules is derived from the test proposed by Diplock LJ in *Pegang Mining Co Ltd v Choong Sam* [1969] 2 MLJ 52 at 55–56 which was later endorsed by the Full Court of the Federal Court in *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410⁶ at 524-526 (***Superleague case***). In that case, the Full Court held:

...The test involves matters of degree, and ultimately judgement, having regard to the practical realities of the case, and the nature and value of the rights and liabilities of the third party which might be directly affected. The requirement that a third party’s rights against, or liability to, any party to the proceedings be directly affected is an important qualification that recognises that many orders of a court are likely to affect other people to a greater or lesser extent...The requirement of a direct effect on rights or

³ *Wayne v Dillon & Anor* (2008) 40 Fam LR 543 at [18]

⁴ *B Pty Ltd & Ors v K & Anor* [2008] FamCAFC 113 at [52]

⁵ *Wayne v Dillon & Anor* (2008) 40 Fam LR 543 at [17]

⁶ *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, 524-526

liabilities differentiates the case where a person ought to be joined, from other cases where the effect of the order on non-parties can be characterised as only indirect or consequential.⁷

21. The *Superleague* case held that attention should be directed to the orders sought in the proceeding.⁸ It is the effect of the orders upon the third party that must be considered.
22. There are circumstances where joinder of a third party is clearly necessary. It will be necessary when your client seeks to set aside a transaction to defeat his or her property settlement claim. The rights of the third party beneficiary of the transaction will invariably be directly affected if that relief is granted. Joinder will also be required if your client seeks an injunction against an appointor of a trust to prevent him or her from utilising that power. Further, if your client seeks a declaration to the effect that a family member of the other party holds a legal interest in land on trust for the other party (or your client), that family member will of course be a necessary party.
23. There are other circumstances where the obligation to join a third party can be more difficult to determine. For example, consider a case involving a trust. If your client wishes to argue that the trust is actually the alter ego of the other spouse party, it might not be necessary to join the trustee to the proceeding if there are assets elsewhere in the pool to satisfy your client's property settlement. In that example, the client might not need to seek any relief against the trustee in respect of the trust assets and can simply rely on the factual finding that the trust assets are the other spouse's 'property'. After all, to include the assets of the trust in the pool "is a notional step in a process of reasoning, as distinct from the executive nature of a court order dealing with trust assets".⁹
24. A poorly articulated basis for joinder should be opposed at the hearing of the joinder application or be subject to an application for dejoinder or summary dismissal. In *B Pty Ltd & Ors v K & Anor* [2008] FamCAFC 113, the wife sought leave to amend her application to join six new respondents and amend the orders against others already joined. The third parties opposed the amendment, and the case ran as if it were an application for summary dismissal of the wife's proposed claim. The wife sought orders against the third parties purportedly in reliance on s 90AE of the Act. The Full Court upheld the appeal against the trial judge's order granting the wife's application and held that:

...she did not show that the power conferred by section 90AE could arguably be engaged. Any order made pursuant to section 90AE(2)(b) must be for the purpose of effecting a division of property between

⁷ Ibid, 525

⁸ *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, 525

⁹ *BP & KS* (2003) FLC 93-157 at [79]

the parties. The order that the wife proposed was for the purpose of increasing the property of the parties, by an unknown amount and on unknown principles.

It would be impossible, based upon the wife's deposition, to identify what the wife said were the facts material to a cause of action which would lead to an order that the trustees of a discretionary trust distribute to one of a group of beneficiaries. The amendment would have joined the third parties to an unformulated claim to which they would have had great difficulty responding.¹⁰

25. A similar issue arose in *Cule & Cule* [2010] FamCA 292. The wife's claim against the third parties under s 90AE did not have an evidential basis. The Court considered that "upon the evidence of both the husband and the wife, it is difficult to identify what material facts give rise to a cause of action that would lead this Court to make an order that the trustees of the discretionary trusts distribute funds as the wife would have it". The third parties were removed as parties from the proceeding with costs against the wife.

Applying to intervene in existing proceedings or bringing an application

26. Third parties are able to apply to intervene in an existing proceeding under the Act or even bring their own proceeding.
27. Section 92 of the Act permits any person to apply for leave to intervene in existing proceedings. Some categories of third parties do not require leave and can intervene as a matter of right. For example, s 79(10) permits the following persons to join existing s 79 proceedings:
- a. A creditor of an existing party if the creditor may not be able to recover his or her debt if the s 79 order were made;
 - b. A de facto partner of a person to the marriage who could or has applied for relief under ss 90SM and 90SL;
 - c. A party to a Part VIIIAB financial agreement; and
 - d. Any other person whose interests would be affected by the making of the order.
28. There is little case law about the scope of the above categories and the rights afforded to third parties once joined.
29. Rules 3.04 and 3.07 set out the methods by which persons can apply to be joined. It appears from the text of r 3.07 that it is a process reserved for those who have an automatic right to intervene. Persons covered by s 79(10) fall within this category. In these cases, a Notice of Intervention by Person Entitled to Intervene should be filed. Rule 3.04 therefore applies to

¹⁰ *B Pty Ltd & Ors v K & Anor* [2008] FamCAFC 113 at [63]-[64]

persons who lack an automatic right to be a party and therefore need to demonstrate that they are a 'necessary' party.

30. In some specific circumstances, a third party can bring its own application for relief under the Act as distinct from joining an existing proceeding:
- a. A third party who wishes to set aside an existing order pursuant to ss 79A or 90SN of the Act. The third party merely needs to demonstrate that it is a "person affected by an order".¹¹ Creditors of spouse parties are automatically taken to meet that definition.¹²
 - b. A third party creditor who wishes to set aside a financial agreement can apply to do so under ss 90K(1)(aa) and 90UM(1)(b). To set aside the agreement, the Court must be satisfied that a party to the agreement entered into it for purposes that included the purpose of defrauding or defeating a creditor or otherwise entered into it with reckless disregard of the interests of a creditor.¹³ The definition of 'matrimonial cause' has been broadened to give jurisdiction to permit this type of application.¹⁴
 - c. A third party can apply for orders setting aside an instrument or disposition which was made to defeat an existing or anticipated order or one which, irrespective of intention, is likely to defeat such an order. Section 106B of the Act gives the Court power to make such an order. Section 106B(4AA) provides that an application can be made by a party, a creditor, or another other person whose interests would be affected by the instrument or disposition. The right of a third party to bring such an action is somewhat curtailed, however. An application under s 106B cannot stand by itself but must be ancillary to proceedings on foot or completed.¹⁵

Transfers pursuant to the cross-vesting scheme

31. In 1987, the federal government and the governments of the states and territories met and created a uniform statutory scheme for the cross-vesting of civil proceedings in Australia. The scheme was intended to allow civil proceedings to be transferred from the Supreme Court of one state or territory to the Federal Court or the Supreme Court of another state or territory if certain criteria are met. The federal government and the states and territories passed legislation, identically described as the *Jurisdiction of Courts (Cross-Vesting) Act 1987*, purporting to confer

¹¹ *Family Law Act 1975* (Cth) ss 79A(1) and 90SN(1)

¹² *Family Law Act 1975* (Cth) ss 79A(4) and 90SN(7)

¹³ *Family Law Act 1975* (Cth) ss 90K(1)(aa) and 90UM(1)(b)

¹⁴ *Family Law Act 1975* (Cth) ss 4A and 4B

¹⁵ *Page and Page* (1978) FLC 90-525; *Whitaker & Whitaker* (1980) FLC 90-813

jurisdiction on the Federal and Family Courts and on the Supreme Courts of other states and territories to hear and determine matters arising under state or territory law and providing for the transfer of proceedings between those courts. The purpose of the scheme was to avoid the inconvenience, uncertainty, delay and expense associated with different state and federal jurisdictions and to ensure that one superior court could give complete relief in a proceeding and also to ensure that proceedings are heard and determined in the most appropriate court.

32. In 1999, the infamous High Court decision of *Re Wakim, Ex parte McNally* (1999) 198 CLR 511 (**Re Wakim**) struck down the scheme insofar as the state Acts purported to confer jurisdiction in state matters on the Federal and Family Courts. The decision did not affect the constitutionality of the Commonwealth Act relating to the conferral of federal jurisdiction on state courts, the conferral by the states of jurisdiction in state matters on the courts of other states and territories, and the provisions for transfer of proceedings between courts. *Re Wakim* did not affect the ability of a state court to transfer a matter to a federal court (being confined to the FCFCOA (Div 1) and the Federal Court). It also did not invalidate the use of accrued jurisdiction in the federal courts in relation to state matters. The statutes creating the scheme have since been amended to reflect *Re Wakim*.
33. In Victoria, the relevant statute is the *Jurisdiction of Courts (Cross-vesting) Act 1987 (Vic)* (**Cross Vesting Act Vic**). For the Commonwealth, the relevant statute is the *Jurisdiction of Courts (Cross-vesting) Act 1987 (Cth)*. The statutes are complex and require some time to understand.
34. Consider the example of a husband and wife who are living in a real property which is held in a trust controlled by the husband's parents. There is a corporate trustee. The spouse parties separate and the wife obtains an interim intervention order which prevents the husband from attending the home. She also brings a property settlement application against the husband in the FCFCOA. The husband's parents suddenly dislike the wife and want her to vacate 'their' property. They then bring proceedings against the wife in the County Court of Victoria seeking summary possession of the property. It may be beneficial to the wife to seek a transfer of the County Court proceeding to the FCFCOA. It is apparent from the text of the *Cross Vesting Act Vic* that the County Court does not have jurisdiction under the Act to transfer a proceeding before it; only the Supreme Court of Victoria has that jurisdiction. The Supreme Court is however given a specific power in s 8 of the *Cross Vesting Act Vic* to 'remove' a proceeding existing in another court or tribunal in Victoria to the Supreme Court. Once removed to its jurisdiction, the Supreme Court can then consider and determine the transfer application pursuant to s 5(1)(b) of the *Cross Vesting Act Vic*. The criterion for the transfer is that it is "more appropriate" that the proceeding

be determined by the FCFCOA (Div 1). Section 5(1)(b)(ii) requires the Supreme Court, as the transferring court, to have regard to a number of matters. One of the matters is the ‘interests of justice’, the meaning of which has been considered in many cases.¹⁶ The test is essentially a discretionary decision involving a balancing exercise of competing factors.

PRELIMINARY STEPS: ASSET & RIGHT PROTECTION STRATEGIES

35. In some cases, there is a risk before trial of an asset or interest held by a third party or claimed by a third party being alienated, dissipated, or dealt with in an adverse manner. A recalcitrant spouse may wish to appoint further appointors to dilute the argument that he or she has ‘control’ of a trust. Perhaps the risk is one of a dilution of a shareholding in a corporation which affects voting rights. Or perhaps the risk is a more blatant one of a spouse intending to divest himself or herself of a business or proprietary interest. In these circumstances, it is important for practitioners to act quickly to address the risk.

Caveats

36. A well-known method to prevent dealings with land is a caveat. A caveat is effectively a statutory freeze which prevents the relevant state or territory titles registrar from registering any dealings involving the land. A caveat is an inexpensive and quick method to prevent an owner from transferring or mortgaging the legal interest in land. It is a formal notice recorded on the register and remains until an inconsistent dealing is lodged for registration or it is otherwise removed.

37. In Victoria, to lodge a caveat, the caveator must have an estate or interest in land:

Any person claiming any estate or interest in land under any unregistered instrument or dealing or by devolution in law or otherwise or his agent may lodge with the Registrar a caveat in an appropriate approved form forbidding the registration of any person as transferee or proprietor of and of any instrument affecting such estate or interest either absolutely or conditionally and may, at any time, by lodging with the Registrar an instrument in an appropriate approved form, withdraw the caveat as to the whole or any part of the land.¹⁷

38. There is an abundance of case law from the state courts as to what constitutes an estate or interest in land (also known as a caveatable interest). The categories are not closed. Acceptable interests include:

¹⁶ *James Hardie & Coy Pty Ltd v Barry* (2000) 50 NSWLR 357 at [92]-[100]; *BHP Billiton Ltd v Schultz* (2004) 221 CLR 400 at [18]-[21]; *Valceski v Valceski* [2007] NSWSC 440 at [69]; *Commissioner of Taxation v Residence Riverside Proprietary Limited as Trustee for the D&J Discretionary Trust and as Trustee for the D&J Investment Trust* [2013] FCA 720 at [17]

¹⁷ *Transfer of Land Act 1958* (Vic) s 89

- a. An unregistered (i.e. equitable) mortgage¹⁸;
- b. A claim by purchaser under a contract of sale¹⁹;
- c. A lease²⁰;
- d. A profit à prendre²¹;
- e. The interest of a unit holder in a unit trust (in some circumstances)²²; and
- f. Equitable proprietary interests in land such as the interest of a beneficiary in a resulting trust.²³

39. It is also useful to understand the types of interests that do not constitute caveatable ones:

- a. A mere contractual or personal right (such as an agreement to share profits from the sale of land or a builder's contract to provide services) does not give rise to a caveatable interest unless such right is coupled with the granting of a relevant interest in the land²⁴;
- b. A pending application for a property settlement pursuant to the *Family Law Act 1975* (Cth)²⁵;
- c. Mere equities (such as a right to have a contract set aside)²⁶; and
- d. Making improvements to land absent an order for relief.²⁷

40. The attraction of the caveat stems from the fact that it provides the caveator with all the benefits of an injunction without the cost and risk of approaching a court. Those benefits make it tempting for clients and practitioners to immediately lodge a caveat without proper assessment.

41. Caveats are not without risk. It is imperative for practitioners to take instructions and then perform an assessment of the nature and scope of the asserted interest in land. It is also advisable to obtain any relevant documents regarding the asserted interest. Compensation is

¹⁸ *Avco Financial Services Ltd v White* [1977] VR 561

¹⁹ *Fernandes v Houstein* (1963) 4 FLR 355; *Kuper v Keywest Constructions Pty Ltd* (1990) 3 WAR 419; *Jessica Holdings Pty Ltd Anglican Property Trust Diocese of Sydney* (1992) 27 NSWLR 140

²⁰ *Antar v Fairchild Development Pty Ltd* [2008] NSWSC 638

²¹ *Permanent Trustee Australia Ltd v Shand* (1992) 27 NSWLR 426

²² *Costa and Duppe Properties Pty Ltd v Duppe* [1986] VR 90

²³ *Crampton v French* (1995) V Conv R 54-529; *Official Trustee in Bankruptcy v P & R Alvaro Enterprises Pty Ltd* (1992) 111 FLR 47

²⁴ *Simons v David Bengel Motors Pty Ltd* [1974] VR 585

²⁵ *Bell v Graham & Ors* [2000] VSC 142 at [19]

²⁶ *Swanston Mortgage Pty Ltd v Trepan Investments Pty Ltd* [1994] 1 VR 672; *Re Pile's Caveats* [1981] Qd R 81

²⁷ *Ex parte Goodlet & Smith Investments Pty Ltd* [1983] 2 Qd R 792

available to landowners who have sustained damage as a result of an improperly lodged caveat.²⁸ Further, indemnity cost orders are regularly awarded against caveators or their practitioners after a successful prosecution of an application to remove a caveat under s 90(3) of the *Transfer of Land Act 1958* (Vic). The case of *Pearl Lingerie Australia Pty Ltd v TGY Pty Ltd* [2012] VSC 451 is a good example of indemnity costs being awarded against a practitioner for “wilful disregard of known facts and law”.²⁹ There is also a risk of disciplinary consequences for practitioners.³⁰

Injunctions

42. A further method to prevent adverse dealings with interests involving a third party is an interlocutory injunction. It is a tried and tested feature of civil litigation and the requisite principles are well-known. The usual questions of a serious question to be tried and the balance of convenience are applicable.³¹
43. The powers for the FCFCOA to make an injunctive order are contained in ss 114(1), (2A), (2), (3) and (4) of the Act and are likewise well-known. The choice of sub-section in s 114 will depend on the circumstances at hand.
44. The use of the injunctive power in s 114 is both broadened and constrained by Part VIII A of the Act, in particular Division 3. Part VIII A is addressed in further detail below at [72]-[83]. The powers contained in Part VIII A represent a significant expansion of the FCFCOA’s jurisdiction to deal with the interests of third parties and are unfortunately underused. The Court is permitted, by virtue of s 90AF(1) and (2), to :
 - a. Make an order restraining a person from repossessing property of a party to a marriage;
 - b. Grant an injunction restraining a person from commencing legal proceedings against a party to a marriage;
 - c. Grant an injunction that directs a third party to do a thing in relation to the property of a party to the marriage; and
 - d. Grant an injunction that alters the rights, liabilities or property interests of a third party in relation to the marriage.

²⁸ *Transfer of Land Act 1958* (Vic) s 118

²⁹ *Pearl Lingerie Australia Pty Ltd v TGY Pty Ltd* [2012] VSC 451 at [28]

³⁰ *Ibid* at [30]; *Legal Services Commissioner v Kotsifas (Correction) (Legal Practice)* [2014] VCAT 1615

³¹ *Sieling and Sieling* (1979) FLC 90-627 at p 78,264; *Yunghanns & Ors v Yunghanns & Ors*; *Yunghanns* (1999) FLC 92-836; *G & T* (2004) FLC 93-176; *Mullen v De Bry* (2006) FLC 93-293l

45. Before exercising the powers in ss 90AF (when coupled with s 114), the Court must be satisfied that the prerequisites in s 90AF(3) are met.

CHOICE OF CLAIM, POWER AND JURISDICTION

46. If acting for or against a third party, one must consider whether the FCFCOA has jurisdiction, whether there is an available claim in statute, common law or equity, and whether the FCFCOA has the necessary powers to grant the relief sought by the third party.
47. There are a number of different types of claims that could be made against or by a third party:
- a. Common law, equitable and statutory claims in the FCFCOA's accrued jurisdiction;
 - b. Section 78 declarations of interests in property;
 - c. Section 79 orders for the payment of debts to creditors;
 - d. Part VIII AA orders and injunctions binding third parties;
 - e. Section 106B orders setting aside transactions to defeat claims;
 - f. Section 79A orders to set aside section 79 orders; and
 - g. Section 90K orders to set aside a financial agreement.
48. It is not within the purview of this paper to consider all of the above claims for each of them is of such complexity and nuance to deserve their own paper. The paper will however consider the following claims.

Common law, equitable and statutory claims in the FCFCOA's accrued jurisdiction

49. As creatures of statute, Divisions 1 and 2 of the FCFCOA do not possess the general or inherent jurisdiction of the High Court of Australia or the Supreme Courts of the states and territories. They derive jurisdiction from an enabling statute. For property matters, jurisdiction is conferred on the FCFCOA for, amongst other things, 'matrimonial causes'³² and 'de facto financial causes'³³. The source of the then-Family Court's powers was considered by the High Court in *DJL v The Central Authority* (2000) 201 CLR 226 where it remarked that court was:

...unable to draw upon the well of undefined powers' which were available to those courts as part of their 'inherent jurisdiction'. The Family Court is a statutory court, being a federal court created by the Parliament within the meaning of s 71 of the Constitution. A court exercising jurisdiction or powers

³² *Family Law Act 1975* (Cth) s 39(1); see also *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 25 in respect of Division 1 of the FCFCOA

³³ *Family Law Act 1975* (Cth) s 39A(1); see also *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 25 in respect of Division 1 of the FCFCOA

conferred by statute 'has powers expressly or by implication conferred by the legislation which governs it' and '[t]his is a matter of statutory construction'; it also has 'in addition such powers as are incidental and necessary to the exercise of the jurisdiction or the powers so conferred'.³⁴

50. However, once the FCFCOA's federal jurisdiction is validly invoked, its jurisdiction extends to the 'whole matter' between the parties. This jurisdiction is sometimes referred to as its 'accrued jurisdiction'. The concept of accrued jurisdiction was explained by Barwick CJ in *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 (**Philip Morris**):

It is settled doctrine in Australia that when a court which can exercise federal jurisdiction has its jurisdiction attracted in relation to a matter, that jurisdiction extends to the resolution of the whole matter. This accrued federal jurisdiction is not limited to matters incidental to that aspect of the matter which has in the first place attracted federal jurisdiction. It extends, in my opinion, to the whole matter between the parties. This accrued jurisdiction carries with it the authority to make such remedial orders as are necessary or convenient for or in consequence of that resolution. For this purpose, the court exercising federal jurisdiction may enforce rights which derive from a non-federal source. This exercise of this jurisdiction, which for want of a better term I shall call 'accrued' jurisdiction, is discretionary and not mandatory, though it will be obligatory to exercise the federal jurisdiction which has been attracted in relation to the matter.³⁵

51. Whether a non-federal issue forms an integral part of a federal issue and so justifies the exercise of accrued jurisdiction in order to settle the whole controversy, is a question of impression and degree in each case. In *Fencott v Muller* (1983) 152 CLR 570 (**Fencott v Muller**), the High Court held:

What is and what is not part of the one controversy depends on what the parties have done, the relationship between or among them and the laws which attach rights or liabilities to their conduct and relationships. The scope of a controversy which constitutes a matter is not ascertained merely by reference to the proceedings which a party may institute but may be illuminated by the conduct of those proceedings and especially by the pleadings in which the issues in controversy are defined and the claims for relief are set out. But in the end, it is a matter of impression and of practical judgement whether a non-federal claim and a federal claim joined in a proceeding are within the scope of one controversy and thus within the ambit of a matter.³⁶

52. The Full Court of the Family Court in *Warby & Warby* (2002) FLC 93-091 (**Warby**) considered *Philip Morris* and *Fencott v Muller* at length and applied those principles to the operation of the Family Court of Australia. It concluded:

[A]s a matter of law, the Family Court of Australia is not restricted to the determination of a family law claim or proceeding; it may exercise accrued jurisdiction to determine the non-federal aspects of a justiciable controversy of which the family law claim or cause of action forms a part. The factual circumstances of the case will determine whether the jurisdiction arises and whether it is appropriate to exercise the jurisdiction.³⁷

³⁴ *DJL v The Central Authority* (2000) 201 CLR 226, 240.

³⁵ *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 475

³⁶ *Fencott v Muller* (1983) 152 CLR 570, 608

³⁷ *Warby & Warby* (2002) FLC 93-091 at p 88,790

53. The Full Court went on to identify the factors to determine whether that court should exercise its accrued jurisdiction³⁸:
- 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.
54. There are many types of claims which ordinarily are determined by the state courts but which spouse parties or third parties might want to bring in the FCFCOA. One cannot however simply bring a state claim. To attract the FCFCOA’s accrued jurisdiction to hear the claim in question, the ordinary FLA claim and the state claim must be part of the same ‘matter’ or ‘single justiciable controversy’ as identified above. The factors in *Warby* above are useful to making this determination.
55. Claims or causes of actions that are regularly brought in the FCFCOA include:
- a. Resulting trust;
 - b. Constructive trusts;
 - c. Proprietary estoppel; and
 - d. Breach of contract or debt claims.
56. The above claims are often integral in determining the asset pool available for division and thus attract accrued jurisdiction with little difficulty.

Resulting trust

57. A resulting trust is a type of implied trust usually imposed in situations where contributions by two or more people to the purchase price of a property are not then reflected in the legal holding.³⁹

³⁸ *Warby & Warby* (2002) FLC 93-091 at p 88,792

³⁹ See e.g. *Calverley v Green* (1984) 155 CLR 242

Resulting trusts have traditionally been classified into two main categories: presumed resulting trusts and automatic resulting trusts. Within those two main categories, there are a number of situations in which a resulting trust can arise. Campbell J considered some of those situations in *Black Uhlands Inc v New South Wales Crime Commission*⁴⁰:

A presumption of a resulting trust can operate in, broadly, three different types of factual situation. The first is where property is conveyed at law, but the entire beneficial interest in that property is not disposed of. The second is where property has been conveyed at law, on a basis which, initially, disposes of the entire beneficial interest, but at a later time equitable obligations attaching to the property fail or are set aside. The third situation is that a presumption of resulting trust arises where one person provides the purchase price of property, which is conveyed into the name of another person.

58. The third situation referred to by Campbell J is more common and is informally termed the ‘purchase monies resulting trust’. The concept was succinctly explained by Deane J in the High Court’s decision of *Calverley v Green*:

Where a person pays the purchase price of property and causes it to be transferred to another or to another and himself jointly, the property is presumed to be held by the transferee or transferees upon trust for the person who provided the purchase money. The second can properly be seen as complementary of the first. It is: where two or more persons advance the purchase price of property in different shares, it is presumed that the person or persons to whom the legal title is transferred holds or hold the property upon resulting trust in favour of those who provided the purchase price in the shares in which they provided it.”⁴¹

59. The resulting trust exists as a presumption of equity irrespective of the parties’ intentions and is implied by law. The presumption displaces the prima facie position that the beneficial ownership of property corresponds with the legal ownership.⁴²
60. The contribution relied upon must be to the purchase price and is confined to the cost of the property and related items such as legal fees and stamp duty. Liability under a bank loan is included. Repayments towards a home loan do not give rise to a resulting trust. They may give rise to a constructive trust, but not to a resulting trust.⁴³
61. The presumption of a resulting trust is displaced by the presumption of advancement which arises in certain circumstances where equity presumes that the transfer to the recipient was intended to be a gift. The circumstances include transfers from parent to child⁴⁴, husband to wife⁴⁵, and brother to brother⁴⁶.

⁴⁰ *Black Uhlands Inc v New South Wales Crime Commission* [2002] NSWSC 1060 at [129]

⁴¹ *Calverley v Green* (1984) 155 CLR 252 per Deane J at 266.

⁴² *Currie v Hamilton* (1984) 1 NSWLR 687 per McLelland J at [690].

⁴³ See e.g. *Dinsdale bht Protective Commissioner v Arthur* [2006] NSWSC 809 per Brereton J

⁴⁴ *Dullow v Dullow* (1985) 3 NSWLR 531

⁴⁵ *Calverley v Green* (1984) 155 CLR 242; *Napier v Public Trustee (WA)* (1980) 32 ALR 153

⁴⁶ *House v Caffyn* [1922] VLR 67

62. The presumption is rebuttable by contrary facts. In other words, a court will not give effect to a presumption of a resulting trust if this is inconsistent with the true intention of the relevant persons. The evidence admissible to establish this intention comprises the acts and declarations of the parties before or at the time of the purchase, or so immediately thereafter as to constitute a part of the transaction.⁴⁷ Subsequent conduct is admissible only as evidence against the party who made them.⁴⁸

Constructive trusts

63. The constructive trust is distinct from institutional forms of trusts (e.g. express and resulting trusts). The imposition of the trust is constructive in that it is construed by the courts.⁴⁹ “Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.”⁵⁰
64. The inquiry when considering whether a constructive trust exists is whether, according to equitable principles, it would be a fraud for the party in question to deny the trust. It has been said that the trust is constructive in the sense equity construes the circumstances by explaining or interpreting them; equity does not create the trust, rather it attaches legal consequences to the circumstances.⁵¹
65. The two common types of constructive trust are the joint endeavour constructive trust and the common intention constructive trust.
66. The joint endeavour constructive trust comes from *Baumgartner v Baumgartner* (1987) 164 CLR 137 and requires a pooling of money or resources in a relationship or joint venture. In that case, the High Court accepted the principle espoused by Deane J in *Muschinski v Dodds* (1985) 160 CLR 583 that where a joint relationship or endeavour fails, equity will not permit one party to assert or retain the benefit of the property if it would be unconscionable for the party to do so.⁵²

⁴⁷ *Shephard v Cartwright* [1955] AC 431 at 445; *Charles Marshall Pty Ltd v Grimsley* (1956) 95 CLR 353 at 365; *Calverley v Green* (1984) 155 CLR 242 at 251 per Gibbs CJ, at 262 per Mason and Brennan JJ, at 269-70 per Deane J; *Muschinski v Dodds* (1985) 160 CLR 583, 590 per Gibbs CJ, at 612-13 per Deane J; *Bryson v Bryant* (1992) 29 NSWLR 188, 215.

⁴⁸ *Muschinski v Dodds* (1985) 160 CLR 583 at 590; *Bryson v Bryant* (1992) 29 NSWLR 188 at 215; *Black Uhlands Inc v New South Wales Crime Commission* [2002] NSWSC 1060 at [138] per Campbell J

⁴⁹ *Giumelli v Giumelli* (1999) 161 ALR 473 at 474.

⁵⁰ *Muschinski v Dodds* (1985) 160 CLR 583 per Deane J at 614.

⁵¹ *Giumelli & Giumelli* (1999) 196 CLR 101 at [2]

⁵² *Muschinski v Dodds* (1985) 160 CLR 583 at 620.

67. The relevant elements to establish a *Baumgartner*-type trust are⁵³:
- a. There be a joint relationship or endeavour;
 - b. In which expenditure is shared for the common benefit (i.e. a ‘pooling’ of resources) in the course of and for the purpose of which an asset is acquired;
 - c. The substratum of that joint relationship or endeavour must have been removed or the joint endeavour prematurely terminated “without attributable blame”; and
 - d. Requisite element of unconscionability - it would be unconscionable for the benefit of those monetary and non-monetary contributions to be retained by the other party to the joint endeavour.

68. The seminal Australian authority for the common intention constructive trust is the decision of Holland J in *Ogilvie v Ryan* [1976] 2 NSWLR 504.⁵⁴ In that case, the plaintiff was the son of the deceased, and the executor of the deceased’s will. The deceased during his life proposed to Ms Ryan that he would buy a house in which she could live with him provided that she cared for him for the rest of his life. If she did so, he told her, the house would be hers for as long as she lived. The deceased purchased the house and Ms Ryan lived with him and cared for him until his death. His will made no mention of Ms Ryan’s interest in the house. Holland J considered numerous English authorities and concluded that a constructive trust arose:

...an appropriate constructive trust will be declared in Equity to defeat a species of fraud, namely, that in which a defendant seeks to make an unconscionable use of his legal title by asserting it to defeat a beneficial interest in the property which he (or, as in this case, the testator for whom he is executor) has agreed to or promised; or which it was the common intention of the parties that the plaintiff should have, in return for benefits to be provided by, and in fact obtained from, the plaintiff in connection with their joint use or occupation of the property. The common ingredient of both categories is an unconscientious use of the legal title.⁵⁵

69. The constituent elements of a common intention constructive trust are:
- a. An actual or inferred common intention that the claimant will have a beneficial interest in land;
 - b. Detrimental reliance on the common intention by the claimant; and

⁵³ *Baumgartner v Baumgartner* (1987) 164 CLR 137, 148.

⁵⁴ I note that various academics hold the view that it is in fact not recognised in Australian law

⁵⁵ *Ogilvie v Ryan* [1976] 2 NSWLR 504, 518 per Holland J

- c. There is conduct by the trustee which would make it unconscionable to allow the trustee to resile from the common intention (e.g. denying the common intention and relying on its legal title).
70. The common intention of the parties may be derived from evidence of an express agreement, or it can be inferred from, for example, the making of contributions to the cost of property, or meeting expenses in maintaining it.⁵⁶ The intention need not be formed at the point of acquisition.
71. Whilst the remedy of a “constructive trust” is a flexible remedy in equity and involves a degree of discretion, “fairness” is not the criteria for the imposition of a constructive trust.⁵⁷ Finally, a constructive trust requires the same institutionalised features of express and implied trusts (e.g. certainty of intention, certainty of subject, certainty of object).⁵⁸

Part VIII AA orders and injunctions

72. Prior to 2004 there were limitations on the then-Family Court’s and the Federal Circuit Court’s powers to affect third party rights and interests. The High Court in *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337 held that, although the Family Court may grant an injunction directed to a third party 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.⁵⁹
73. In 2004, by the operation of the *Family Law Amendment Act 2003* (Cth), Part VIII AA was introduced into the Act which greatly increased the courts’ ability to affect third party rights. Division 3 of Part VIII AB of the Act later extended the operation of Part VIII AA to de facto relationships.
74. Part VIII AA is not an avenue to increase a property pool for division. It is simply a series of powers to provide a mechanism to divide up a pool that already exists.
75. The scope of the powers in this part of the Act is extensive. Section 90AC provides that Part VIII AA has effect despite anything to the contrary in:
- a. any other law (whether written or unwritten) of the Commonwealth, a State or Territory; and
 - b. anything in a trust deed or other instrument.

⁵⁶ *Allen v Snyder* [1977] 2 NSWLR 685; *Vedejs v Public Trustee (Vic)* [1985] VR 569.

⁵⁷ *Muschinski v Dodds* (1985) 160 CLR 583, 608 per Brennan J

⁵⁸ *Ibid*, 614

⁵⁹ *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337, 354 per Gibbs J

76. Sections 90AE and 90AF extend the FCFCOA's powers to make orders against a third party. The orders can be s 79 orders altering property interests or s 114 injunctive orders.
77. There are some protections for third parties as the Court can only make orders if the prerequisites in ss 90AE(3) and 90AF(3) (as appropriate) are met:
- a. Making the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties;
 - b. If the order concerns a debt of a party—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;
 - c. Procedural fairness;
 - d. Just and equitable; and
 - e. The order takes into account specified considerations.
78. The specified considerations are listed in ss 90AE(4) and 90AF(4):
- a. The taxation effect on the spouse parties and the third party;
 - b. The social security effect on the spouse parties;
 - c. The third party's administrative costs in relation to order;
 - d. The capacity of a spouse party to repay the debt if the order is made;
 - e. The economic, legal or other capacity of third party to comply; and
 - f. Any other relevant matter.
79. Third parties are entitled to apply for an order that the spouse parties meet their expenses incurred as a result of an order or injunction.⁶⁰ There is a further protection for acquisitions of property from a person to be on just terms.⁶¹
80. In *AC & Ors v VC & Anor* [2013] FamCAFC 60, the Full Court considered a discretionary trust with a vesting date of June 2064. The specified beneficiaries of the trust were the wife, husband, and their three adult children. The general beneficiaries included the husband's mother and sister, his deceased father and a corporation. The trustee was a corporation of which the husband's mother was the sole shareholder and one of two directors. The husband had resigned as appointor many years prior and there was no longer an appointor or guardian of the trust. Since

⁶⁰ *Family Law Act 1975* (Cth) s 90AJ

⁶¹ *Family Law Act 1975* (Cth) s 90AK

its creation, distributions had been made to the husband, the wife, their children, the husband's parents and the corporate beneficiary. The primary judge found that the husband and wife, as specified beneficiaries, had a "fixed and irrevocable entitlement to a share of capital upon a vesting of the trust".⁶² The primary judge also held that the entitlement of the husband and the wife in the trust was property for the purposes of s 79 of the Act. The primary judge ordered, pursuant to s 90AF, the trustee to exercise its powers pursuant to the trust deed to appoint 30 June 2010 as the vesting day for the trust and to distribute the trust fund and income between the specified beneficiaries, after payment to the husband's mother of \$338,000. The appeal was successful because the primary judge had not satisfied herself of all of the matters in 90AF(3). With respect to the order bringing forward the vesting date, the Full Court considered:

Whatever may be the outer limits of the powers in Part VIIIAA, we are satisfied the Part can be used to require a trustee (including a third party trustee) to bring forward the vesting date of a trust fund for what can be termed, the "ancillary" purposes of valuing an irrevocable entitlement to ultimately share in the trust fund, and of distributing that share to the party entitled, and that these powers can be exercised even at the expense of third party interests, provided that the requirements in ss 90AE(3) and (4) and ss 90AF(3) and (4) are met, and the order, if made under s 79, is "just and equitable", or if made under s 114, is "proper".⁶³

81. A further utility of s 90AE is the ability for a spouse party to seek to substitute the other party for that party's debt or otherwise an order that the spouse parties be liable in differing proportions to the original debt.⁶⁴ In *Commissioner of Taxation v Tomaras* [2018] HCA 62, the High Court considered the ability of the Court to make such an order against the Commonwealth, as the third party. The wife failed to pay her income tax assessment. Later, the husband and wife separated and s 79 proceedings were subsequently instituted. The Commissioner of Taxation joined the proceeding as a creditor seeking payment of the unpaid tax liability. The wife sought orders to substitute the husband for her tax liability. By way of a case stated, the Full Court held that s 90AE permitted a substitution of a tax liability even against the Commonwealth. The Commissioner's appeal to the High Court was unsuccessful.
82. The key to utilising Part VIIIAA appropriately is to ensure the relief sought properly targets the intended outcome sought by the client and is clearly articulated in the application. A further key is to ensure that there is evidence directed at compliance with the prerequisites in ss 90AE(3) and 90AF(3).
83. Some practical examples of the use of ss 90AE and 90AF are orders which:

⁶² *AC & Ors v VC & Anor* [2013] FamCAFC 60 at [30]

⁶³ *Ibid* at [85]

⁶⁴ *Family Law Act 1975* (Cth) ss 90AE(1)(a)-(c)

- a. Compel a trustee to sell a real property and distribute the sale proceeds in a certain manner;
- b. Fix a vesting date;
- c. Convert a discretionary trust into a fixed trust;
- d. Require the trustee to exercise its discretion in a particular manner;
- e. Add or remove beneficiaries or appointors;
- f. Restrain a company from taking action against a spouse party to a marriage in relation to a loan account; and
- g. Vary the terms of repayment of a debt.

Setting aside transactions to defeat orders

84. Section 106B of the Act permits the FCFCOA to set aside or restrain transactions which may frustrate the operation of the Act. Specifically, the section requires the Court to be satisfied that:
 - a. There was an instrument or disposition;
 - b. Which was made by or on behalf of or by direction or in the interest of a party; and
 - c. Which was made to defeat an existing or anticipated order in the proceedings or which, irrespective of intention, is likely to defeat any such order.
85. It is apparent from the text of the section that it is of broader compass than ss 172 and 173 of the *Property Law Act 1958* (Vic) and s 121 of the *Bankruptcy Act 1966* (Cth) which require evidence of an intention or purpose to defraud. Section 106B however can be successfully made out if the evidence demonstrates that the *likely effect* of the instrument or disposition was to defeat an existing or anticipated order.
86. There must be an instrument or disposition. An instrument is usually simple enough to identify. The word “disposition” in s 106B(1) is given its ordinary meaning to include any form of alienation and is not limited to mere assignments, sales or gifts of property.⁶⁵
87. An essential element is that the instrument or disposition must defeat (or be intended or likely to defeat) an order or an anticipated order. Defeat suggests having the immediate effect of placing the asset or interest in question beyond the reach of the aggrieved party.

⁶⁵ *Bassola & Bassola (No 1)* (1985) FLC 91-623

88. Another essential element requires the applicant to prove that either (1) an order was made at the time the instrument or disposition was entered into or (2) an order was anticipated at that time. It can be difficult to prove an anticipated order. The test is an objective one - would the order have been anticipated by a reasonable disponent at the time of the disposition considering all of the circumstances of the case.⁶⁶
89. It is also worth noting that relief under s 106B is purely discretionary, as suggested by the inclusion of 'may' in the beginning of the text. Even if all of the requirements of the section are satisfied, the Court may decline relief. There is little point in invoking s 106B to defeat or postpone, for example, a creditor if the applicant's order or anticipated order can be satisfied from other assets.⁶⁷

CONCLUSION

90. As can be seen from the above, the opportunities for third party involvement in litigation under the Act are wide and varied and are likely to only increase.
91. The key to strategic and successful litigation by or against a third party is to understand the variety of ways in which the third party can be relevant. The task for practitioners then is to package the client's case in a manner that addresses the evidence, the types of available claims, and the unique features of the FCFCOA as a forum.

⁶⁶ *Pflugradt and Pflugradt* (1981) FLC 91-052 at pp 76,429–76,430; *Abdullah & Abdullah* (1981) FLC 91-003; *Holley and Holley* (1982) FLC 91-257

⁶⁷ *ANZ Banking Group v Harper & Ors* (1988) FLC 91-938 at pp 76,782–76,783. See also *Public Trustee (SA) v Keays* (1985) FLC 91-651