RE ROSS-JONES; EX PARTE GREEN.

THE HIGH COURT AND THE THIRD PARTY JURISDICTION OF THE FAMILY COURT

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I. INTRODUCTION

The Family Court was established in 1975 by the Family Law Act[1] with the aim of centralising, to the extent that it was constitutionally feasible, litigation concerning the family on the breakdown of a marriage, within the one specialist forum. The property provisions of the Act aim to enable the Court to reallocate the assets of the parties in accordance with what is just and equitable (section 79(1) and (2)) without undue regard to the legal title to those assets.

It is common for the parties' property to have become intermingled with that of a third party. Often there have been loans from parents and not infrequently the parties have arranged for the legal ownership of what would otherwise be marital assets by a family company or a family trust. To fulfil its charter the Court must be able to exercise a jurisdiction which does not stop with the parties to the marriage but which extends to the necessary extent to such third parties. The Family Court is however a creature of federal statute and must function within the constraints of the Constitution. The High Court has habitually looked to the marriage power (section 51 (xxi)) and the matrimonial causes power (section 51 (xxii)) as determining the scope of the federal power in the family jurisdiction. It has traditionally been believed that these powers substantially confine the proper jurisdiction of the Family Court to matters affecting only the parties to the marriage. The

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1 Family Law Act 1975 (Cth). The Magistrates Courts also exercise jurisdiction but for convenience only the Family Court is referred to here.

High Court by its decision in *Ascot Investments Pty Ltd* v. *Harper and Harper*[2] reinforced this belief but despite that case the Family Court has been able to recover an impressive jurisdiction in relation to third parties. The Family Court's efforts have however met with a new and serious setback in the decision of the Full Bench of the High Court in *Re Ross-Jones J., Marinovich and Marinovich; ex parte Green.*[3] It is the purpose of this article to examine that decision and to consider its implications for the third party jurisdiction of the Family Court.

II. THE BACKGROUND TO GREEN'S CASE

1. Restrictions Imposed by the High Court in ***Ascot Investments*** **v.** ***Harper***

In this celebrated case the wife had obtained maintenance and property orders four years previously. The husband had substantial assets but they were organised into a family company, Ascot Investments, of which he was the controlling director along with four others, all members of his family. The original orders in favour of Mrs Harper had been secured against a transfer by the husband of his shares in Ascot Ltd. Mr Harper had been repeatedly gaoled for contempt rather than honour his legal obligations to his wife. More than $100,000 of arrears was owing when Mrs Harper sought to realise the security. To that end she applied for two orders, both of which she received, from the Family Court. The first order was that the husband's shares in Ascot Investments be transferred to her. This order was uncontroversial. Even on a traditional view of Family Court jurisdiction the husband's shares could be transferred to the wife.[4] The second order she required was contentious. According to the articles and memorandum of association of the company all the directors of Ascot Investments were required to sign a transfer of shares and they were entitled to refuse to register any transfer without giving reasons. Mrs Harper did not approach the directors to register the transfer as she felt this would be futile. Instead she asked that the Court order the company to register the transfer. The Full Court held that it had jurisdiction under section 114(3) to make this order, pointing out that the orders were directed to the husband's assets, that is, his shares in the company. The Family Court announced that as a matter of principle the legal rights of the wife in this situation had to be protected and that the husband could not flout the orders of the Court by shielding behind the corporate facade.

From this decision the husband appealed successfully to the Full Bench of the High Court. The High Court's decision was draconic. The majority held that the Family Court, essentially, was obliged to deal with the property of the parties to the marriage as it found it. If it should be held by a company

2 (1981) FLC 91-000.
3 (1984) FLC 91-555.
4 For a full discussion of this and other aspects see Dorothy Kovacs, "The Family Court and the Family Company: The Destruction of a Shelter from Financial Obligations on Divorce" (1983) 57 *L Inst J* 563.

then the rights and obligations of the company were fixed under the general law. Specifically the company's directors were empowered under the articles of association of Ascot Investments to refuse to register a transfer of shares peremptorily. That was a legal right which the Family Court could not override.

The High Court doctrine appeared to end any hopes of any general jurisdiction in the Family Court to deal with family companies so as to protect the interests of the family. The High Court did however suggest that there might be exceptional circumstances (which were not present on the facts of *Ascot Investments* v. *Harper)* in which a company could be subjected to an order of the Family Court. This could occur:

(i) where the company was a sham, that is, where it had been brought into existence to enable a party to evade obligations under the Family Law Act; or

(ii) where the company, although short of being a sham, was in reality a mere puppet of a party to the marriage.

These exceptions did not, however, avail Mrs Harper and the High Court's decision threatened to foreclose any prospect for the development by the Family Court of a jurisdiction to deal with third parties so as to effectively protect the needs of the family.

2. Recovery by the Family Court since ***Ascot Investments*** **v.** ***Harper*** *of Jurisdiction to make Interim Orders against Third Parties*

The Family Court has since *Ascot Investments* v. *Harper* been able to reconstruct a substantial jurisdiction to make orders of an interim nature. The order in *Ascot* would have led to a permanent restructuring of the family company. The Court took the view that the *Ascot* ruling could be confined to the making of permanent orders and that the Court need not be so constrained when it makes an order of only temporary duration. The Full Court of the Family Court has subsequently retrieved significant powers to make interim orders against third parties which by now have included creditors, family companies and family trusts (*Buckeridge,*[5] *Harris,*[6] *Stowe,*[7] *Aldred,*[8] *Gillies,*[9] *Smith and Saywell,*[10] *Barro,*[11] and *Howard*[12]). These have variously been prevented for a time from dealing with their own assets or from enforcing rights in the State courts. The Court has usually asserted its jurisdiction where it has been demonstrated that the third party has some "special connection" with the parties to the marriage. Parents who have loaned money to married children and companies which legally own the

5 *Buckeridge and Buckeridge (No. 2)* (1982) FLC 91-114.
6 *Harris and Harris; re Banaco Pty Ltd (No. 2)* (1981) FLC 91-100.
7 *Stowe and Stowe* (1981) FLC 91-027.
8 *Aldred and Aldred* (1984) FLC 91-510.
9 *Gillies and Gillies* (1981) FLC 91-054.
10 *Smith and Saywell* (1980) FLC 90-856.
11 *Barro and Barro* (1983) FLC 91-300.
12 *Howard and Howard* (1982) FLC 91-257.

family's assets are those most frequently affected.[13] Indeed the Court has in recent times taken an expanding view of its powers in matters of procedure involving third parties in such aspects as intervention and discovery of documents and the question of liability for costs.[14] The principal source of this jurisdiction under the Act is section 114(3) whereby the Court may make interlocutory injunctions in support of other orders. Such injunctions are in turn referable to the matrimonial cause in section 4(1)(f), thereby forming part of the exclusive jurisdiction of the Family Court.

3. Restraint in the Third Party Jurisdiction: Self-Imposed Limits to Interim Orders

The growth in the jurisdiction to make interim orders against third parties since *Ascot Investments* v. *Harper* has not proceeded unchecked. Third parties who have no "special connection" with the family or who, despite a familial connection, have dealt with the parties at arm's length have consistently been regarded by the Court as beyond the proper scope of its reach. Sometimes it has held that it lacked jurisdiction to make even interim orders against such parties. On other occasions the Court has said that even though it may have jurisdiction, it would be an improper use of its discretion to enjoin a party who may be termed "an innocent bystander". By this doctrine the Court has avoided casting its net so widely as to jeopardise the position of banks, mortgagees and other secured creditors who deal with the parties to a marriage.

Thus in *Rieck and Rieck*[15] Nygh J. dismissed an application by the wife to restrain a company from proceeding in the Supreme Court in relation to a charge executed by the husband over the matrimonial home. The charge secured a trading debt transacted with the company at arm's length. The company had no other relationship with the parties. Nygh J. held that he had no jurisdiction to make interim orders against the creditor company in the circumstances. The charge had exhausted the parties' equity in the home.

The Full Court responded similarly in *Prince and Prince*[16] where the third party, General Credits Australia Limited, had issued proceedings in the Queensland Supreme Court in relation to an alleged contract of guarantee with the husband. The amount claimed was $9 millon, although the husband denied this liability as a matter of law. The wife had commenced section 79 proceedings in the Family Court. The husband and General Credits both asked that the Family Court stay its own proceedings until the Supreme Court had resolved the matter of the loan. Alternatively they requested that the Family Court itself determine the issue of the loan in the course of the

13 For an extreme case see *Wallace and Wallace* (1984) FLC 91-553 where the wife's father was deprived of part of his one third registered interest in the home. It is this writer's view that this decision ought not to be followed, in that it makes unwarranted use of s.33 Family Law Act and moreover infringes the rule in *Ascot* against altering third parties' legal rights.

14 See *Buckeridge*, note 5 *supra*; *Barro*, note 11 *supra*; and *Landell-Jones and Landell-Jones* (1983) FLC 91-346.

15 (1981) FLC 91-067.

16 (1984) FLC 91-501.

proceedings between the husband and wife. The Full Court resolved in relation to the second alternative that even were the Family Court to have jurisdiction to determine the contracts dispute between the husband and General Credits (which it doubted) it would be an improper use of its discretion to do so. A majority determined further that the Family Court should stay its own proceedings until the State issue was resolved by the Supreme Court.

The position of the Full Court in *Prince* is in line with its previous decision in *Beaumont and Beaumont*[17] where it refused the wife's request to restrain a third party (there the husband's accountants) from paying over to the Income Tax Department money held by the third party in its capacity as liquidators of the husband's business.

Prince and *Beaumont* are reinforced by the Full Court's decision in *Pockran and Crewes; Pockran.*[18] This is a case which might conceivably have been determined according to the "special connection" line of decisions, rather than in accordance with the "innocent bystander" cases. The creditor in that case was the husband's father who might just as easily have been sacrificed to the needs of the wife as the husband's father in *Af Petersens and Af Petersens*[19] and the husband's mother in *Gillies and Gillies.*[20] Mr Pockran senior was, however, accorded the status of an "innocent bystander" or arm's length creditor. This was because he had not only taken the trouble to secure a mortgage in relation to money he loaned the parties, in view of the husband's well-proven tendency to fall into debt, but he had also obtained a Supreme Court judgment against the wife in respect of $14,000 still owing under the mortgage. The wife was jointly liable with the husband under the mortgage. The husband had recently emerged from bankruptcy and had no assets. The wife failed to pay, so the husband's father sought to bankrupt her as well. When the wife applied to Cook J. in the Family Court, he acceded to her request to restrain Mr Pockran senior from proceeding in bankruptcy in relation to her obligation under the Supreme Court order. Cook J. was sympathetic to the needs of the wife and the child of the marriage who had endured the husband's recurring history of debt, and he awarded her the home free of any indebtedness to the father. The effect of Mr Justice Cook's order was to deprive the father of his rights to the money. The husband and his father (who had intervened) appealed successfully to the Full Court which vacated the orders of Cook J. The Court indeed went further than the "discretion" approach favoured in *Beaumont* to prevent undue prejudice to the third party's rights, and held in *Pockran* that the parties' net equity in the home could only be calculated after the liability to the father was deducted. The wife could not be awarded under section 79 more property than the parties actually had.

The degree of priority accorded to the parent in *Pockran* might be

17 (1983) FLC 91-321.
18 (1983) FLC 91-311.
19 (1981) FLC 91-095.
20 Note 9 *supra.*

regarded as unusual had the husband's father been in the position of many parents who have no real intention to enter into legal relations with their married children. However the result can be accounted for, it is submitted, by the fact that the liability to the father took the form of a Supreme Court judgment debt. For the Family Court to deny a creditor his right to enforce a final judgment of the Supreme Court would have been highly controversial. The Family Court has frequently prevented a party from pursuing a Supreme Court action but it has never prevented the enforcement of a Supreme Court judgment once it has been duly obtained. Given the very sensitive issue of comity underlying the proceedings in *Pockran,* the Full Court's response must unquestionably be regarded as appropriate. It should be said, however, that the wife might have secured priority over the father's rights had she acted rather earlier and asked the Family Court to prevent his State action before it proceeded to judgment. The third party jurisdiction may be a wide one but it is not unlimited.

The *Pockran* decision clearly affirms the determination of the Full Court not to act against third parties who are in the position of arm's length creditors to the parties to the marriage. The result in *Pockran* is confirmed by Mr Justice Lindenmayer's decision in *Wagner and Wagner.*[21]

Like Mr Pockran Senior, the creditor in *Green's* case was a parent who had become a judgment creditor of a party to the marriage. Like Mr Pockran senior, Mrs Green sought to bankrupt her daughter's spouse to enforce the judgment she had obtained. The outcome of *Green's* case, had it been allowed to proceed to a hearing in the Family Court, would have almost certainly been similar to that in *Pockran;* yet six of the seven judges in *Green* failed to allude to *Pockran* and indeed to *Beaumont* or to *Prince* at all. Had the High Court only taken the trouble to review the Family Court authorities a great deal of difficulty might have been avoided. Let us now examine the circumstances in *Re Ross-Jones; ex parte Green.*

III. GREEN'S CASE

1. The Facts

In 1981 the husband, Dr Marinovich, by deed acknowledged that he was indebted to the wife's mother, Mrs Green, in the sum of nearly $300,000 and undertook to repay that sum with interest by instalments. By the time the Marinovichs' marriage was dissolved in February 1983 he had not repaid most of this sum. He filed an application under section 79 of the Family Law Act in February 1983 whereby he sought orders that Mrs Marinovich

21 (1984) FLC 91-518. The father in *Wagner and Wagner* was accorded the status of a stranger in relation to a mortgage securing a loan he had made to the parties. Lindenmayer J. refused to restrain the father from enforcing the mortgage as he had undertaken no special responsibility towards the parties. The learned Judge went too far, however, in this writer's view, in declaring that there was no wider jurisdiction in relation to interim than to permanent orders against third parties. Several Full Court authorities bound Lindenmayer J. to the contrary view.

indemnify him against his liability to Mrs Green. In substance he claimed that the loan moneys had been applied to the overall family situation including the transacting of business for the wife's parents. In December 1983 Mrs Green entered judgment against him in the Supreme Court in the sum of around $337,000 and when this judgment remained unsatisfied, Mrs Green commenced enforcement proceedings, including the issuing of a bankruptcy notice out of the Federal Court in January 1984.

Dr Marinovich had sought to halt Mrs Green's progress by an application in the Family Court in December 1983 for orders restraining Mrs Green from enforcing her Supreme Court judgment pending the hearing of his application under section 79. In that application he claimed that it was just and equitable that he be indemnified by the wife in respect of the judgment debt. Indeed he asserted that part of the judgment debt (some $36,000) represented money which the wife had claimed was owing to her by the husband and which she had unilaterally assigned to her mother. To this extent at least Dr Marinovich claimed that Mrs Green's judgment debt was held by her upon resulting trust for the wife.

It is the husband's application of December 1983 for interim restraining orders which is the subject of the High Court's decision in *Green.* That application came on for hearing before Ross-Jones J. on January 19, 1984. Counsel sought time to prepare argument on the matter of the jurisdiction of the Family Court and Ross-Jones J. fixed an early date in April 1984 to hear submissions on jurisdiction. His Honour then made interim orders restraining Mrs Green from enforcing her Supreme Court judgment pending further order of the Court.

2. The Most Probable Outcome in the Family Court

We have already noted the remarkable similarities between the circumstances in *Green* and those in *Pockran.* In one feature they differ however, and that is that while the dispute concerning the parental debt arose in *Pockran* in the context of proceedings in relation to the matrimonial home, Dr Marinovich's application related only to the indemnity transaction associated with the loan from his mother-in-law. Yet we saw that Mrs Pockran and her child were denied relief by the Family Court despite their very real need. Given that result and given the Full Court's declared views in *Prince* and in *Beaumont,* it is difficult to believe that Ross-Jones J. would for a moment have entertained Dr Marinovich's application against his mother-in-law, particularly as the doctor appears to have been in no position of hardship at all. However Ross-Jones J. was never given the opportunity to state his own views in the matter. Mrs Green applied directly to the High Court for prohibition and certiorari against His Honour. An order *nisi* for prohibition was upheld by six members of the Full Bench with surprising and lamentable alacrity. Murphy J. joined with the majority thereby abandoning his well-entrenched practice of upholding the jurisdiction of the Family Court in the face of adversity. Deane J. alone declined to make absolute the order *nisi* for prohibition in favour of Mrs Green. Deane J.,

quite rightly it is submitted, felt that no particular harm would be done if Ross-Jones J. were permitted to express his understanding of the Family Court's view and indeed the High Court might benefit from hearing it. After all, were Ross-Jones J. to get matters wrong, the plenitude of the appeal process was there to set things aright. In the event the prohibition order upheld by the Full Bench had precisely the effect that Deane J. had feared. The High Court quite overlooked matters of "significance . . . not apparent to the members of this [the High] Court whose practical experience in family law matters is ordinarily, at best, limited"[22] and the Full Bench was deprived "of the benefit of the views of the members of the Full Court . . . on the particular case".[23]

3. The Ruling of the High Court in Relation to the Family Court's Jurisdiction over Third Parties

We are not concerned here to examine those substantial portions of the judgments in *Green's* case which are concerned with issues other than that of third party jurisdiction, for example, the matters of accrued jurisdiction and the law relating to the use of the writ of prohibition. There were five separate judgments delivered by the Full Bench: Mason J. simply concurred with Gibbs C.J., and Wilson and Dawson JJ. delivered a joint judgment. We have noted that Deane J. alone would have discharged the order *nisi* prohibiting Ross-Jones J. from determining even the matter of his own jurisdiction to hear Dr Marinovich's application for an interim order restraining Mrs Green from proceeding in relation to her judgment debt. Deane J. felt that prohibition would not lie in the circumstances, and indeed that the Family Court would have jurisdiction in the case if only because it was alleged that the prosecutrix held part of her judgment debt on resulting trust for the wife. The majority, however, was emphatic that the Family Court had no jurisdiction to make even interim orders against the third party. *Ascot Investments* v. *Harper* was said to be conclusive of the matter: the Family Court could not detract from the rights of Mrs Green under the general law to enforce her judgment debt given that she was not a puppet of either of the parties to the marriage and given that it was nowhere suggested that the relevant loan transactions were shams.

By what reasoning did the Full Bench find that the Family Court had no jurisdiction to make even an interim order against Mrs Green? The usual process by which the Court is found to have jurisdiction is to determine whether and if so which matrimonial cause (section 4(1)) is involved in the proceedings sought to be brought in the Court. A finding that a proceeding is a matrimonial cause entails the consequence that the Family Court has exclusive jurisdiction in the matter (sections 8, 31(1)(a) and 39). The matrimonial cause traditionally invoked where proceedings involve third parties is section 4(1)(f) which alone makes no requirement that the

22 Note 3 *supra*, 79,500.
23 *Ibid.*

proceedings be between the parties. However in our case, section 4(1)(f) would require that the proceedings against the third party be a proceeding in relation to the property proceedings under section 4(1)(ca) between the husband and wife (here the husband's section 79 application). Six members of the Full Bench found that no relevant relationship was made out between Dr Marinovich's injunction application against his mother-in-law in relation to the enforcement of her loan and his section 79 proceedings against his wife for an indemnity in respect of that loan. Consistently with the High Court's earlier decision in *Perlman* v. *Perlman*[24] the Full Bench in *Green* read the requirement of nexus strictly. Indeed Gibbs C.J. (with whom Mason J. agreed) appeared to have taken an even sterner approach to the nexus requirement in *Green* than he had in *Perlman,* for in *Perlman* Gibbs C.J. had suggested that an appropriate relationship might exist if the order sought in the third party proceedings would reverse or vary the effect of the order made in the proceedings between the parties to the marriage. His Honour indeed conceded that if Dr Marinovich were to succeed in staying Mrs Green's action, the practical effect might be to enable the Family Court to order Mrs Marinovich to assume the liability for the debt so that His Honour's own test of nexus might well have been satisfied. However Gibbs C.J. described his position in *Perlman* as "not . . . exhaustive".[25] In common with Brennan, Wilson and Dawson JJ., Gibbs C.J. insisted that it was not sufficient to establish the appropriate relationship that the practical outcome between the parties might be altered by the making of an order against a third party.

In Their Honours' view Dr Marinovich's injunction proceedings were "in relation to" the applications by Mrs Green in the Supreme Court and in the Federal Court, but they bore no appropriate relationship with his Family Court proceedings against his wife. Accordingly section 4(1)(f) was not made out, and it followed in Their Honours' view, that the Family Court had no jurisdiction to prevent Mrs Green from enforcing her judgment.

Clearly it was open to the Full Bench to find that the relationship requirement in section 4(1)(f) was not made out in the circumstances in *Green's* case. However there are, in this writer's view, a number of suppositions associated with that finding which may be unsound. The majority appears to be responding, it is submitted, to the quite groundless fear that by arresting Mrs Green's progress for a time, the Family Court would arrogate unto itself the entire task of deciding the question of the husband's liability to Mrs Green and the extent of that liability, thereby taking on the role of the Supreme Court as well indeed as the bankruptcy jurisdiction of the Federal Court. Gibbs C.J. for example dismisses "the extravagant notion that the Family Court could entertain proceedings for the issue of a writ of *fieri facias* to enforce a judgment of a Supreme Court, or

24 (1984) FLC 91-500.
25 Note 3 *supra*, 79,485.

bankruptcy proceedings against a husband or wife".[26] Wilson, Dawson and Brennan JJ. expressed similar reservations. Yet the Family Court has never seen its role thus and if that somewhat preposterous assertion requires an answer it has already been denied strenuously by the Court in *Prince and Prince.* Indeed the Court was invited in the proceedings which were the subject of the High Court's order for prohibition, only to halt Mrs Green's progress until after the indemnity issue was resolved by the Family Court as between the parties to the marriage.

Further, the High Court is itself guilty of perpetuating in *Green* a common error which it had been at pains to expose in the context of enforcement of maintenance agreements in *Perlman and Perlman,* that is, the assumption that unless a proceeding may be referred to the definition of matrimonial causes in section 4(1) the Court has no jurisdiction over that proceeding at all. Section 4(1) in combination with section 8 confers on the Court exclusive jurisdiction in matrimonial causes but it is simply incorrect to say that if a matter is not a matrimonial cause the Court cannot hear it at all. The Court may exercise jurisdiction conferred on it by any valid federal law (section 31(1)(d)) and it is arguable that the third party proceedings could be heard by the Court directly under section 114(3) even if the usual coupling of section 114(3) with section 4(1)(f) does not take place in the circumstances. The High Court should have considered the possibility that section 114(3) independently conferred jurisdiction on the Family Court. The Full Bench erred in failing to do so on the assumption that if the Court did not have exclusive jurisdiction under section 4(1)(f) then it had no jurisdiction at all.

This is not to say that section 114(3) was ignored by the High Court. It was considered however, only in the special context of the case law of the Full Court which has invoked section 114(3) to make interim orders against third parties since *Ascot Investments* v. *Harper.* The Full Bench majority, wishing to put an end it seems to that line of cases, stated that there was no wider jurisdiction to make interim injunctions than to make permanent orders. They held that the only extension of jurisdiction of this nature which could be envisaged was for the purpose of maintaining the status quo for a short time until the Court could determine for itself whether it had jurisdiction in a matter sought to be brought before it.

We shall canvass later the substantive matters associated with the extent of the Court's jurisdiction to make interim orders against third parties. For the moment, even were one to accept the very restrictive role for interim orders contemplated by the Full Bench in *Green* it is difficult to see why there was any need to interfere with the course taken by Ross-Jones J. His Honour had after all, made interim orders against Mrs Green which were to operate for a number of weeks until an early fixed date. His Honour would then hear submissions of counsel as to his own jurisdiction and then rule on that matter. Effectively His Honour was following precisely the course said by the Full Bench to be permissible even on the narrowest view of the majority's

26 *Id.*, 79,486.

position. Moreover Deane J. was undoubtedly right in his view that there was time enough to order prohibition after Ross-Jones J. resolved to hear the husband's application against Mrs Green (in the unlikely event that he decided to do so).

A majority of the Full Bench in *Green's* case (Gibbs C.J., Mason, Dawson and Wilson JJ.) held that section 114(3) orders could not be made against third parties on an interim basis in circumstances beyond those applicable to permanent orders. Effectively *Ascot Investments* v. *Harper* was to define the limits of all third party proceedings. "The Court has no wider jurisdiction to grant an interlocutory injunction than to grant a permanent injunction".[27]

That is a determination with potentially devastating consequences for the third party family jurisdiction. It appears to reverse years of careful decision-making by the Family Court. Unfortunately we may have reverted to the position in *Page and Page*[28] when the Court was unable, even as an interim measure, to prevent the husband from exploiting his position as a director of the family company so as to bring about the eviction of his family from the home. The fortuitous circumstance that the parties had transferred the legal ownership of the matrimonial home to the husband's company proved to be a disaster for the wife and children which the Family Court was powerless to avert. That consequence has been avoided in recent years by bold and necessary decisions of the Full Court. It is not a consequence to which the Court will give in lightly and nor should it.

IV. AFTER GREEN'S CASE

1. The State of the Precedents

We noted earlier that despite the restrictions imposed by the High Court in the *Ascot* case the Family Court had devised an impressive range of interim orders against third parties. *Harris and Harris; re Banaco Pty Ltd*[29] and *Gillies and Gillies*[30] were among the early Full Court decisions which restricted the *Ascot* doctrine to the making of permanent orders. There were many others, including *Buckeridge*, *Smith*, *Howard* and *Stowe*[31] where interim orders had been made against a third party although we have also seen that in an appropriate case such relief was withheld (see *Pockran*, *Rieck*, *Prince* and *Beaumont*).[32] A thorough review of this substantial case law might have been expected from the Full Bench before it undertook to destroy it. However of all these decisions only *Harris* and *Gillies* appear to have caught the attention of the majority judges. The others were for the main part not discussed except that Deane J. as we noted in his commendable dissenting judgment was alert to the wisdom to be gotten from the Family Court in

27 *Id*., 79,488 *per* Gibbs C.J.
28 (1978) FLC 90-525.
29 Note 6 *supra*.
30 Note 9 *supra*.
31 See notes 5-12 *supra*.
32 See notes 15-18 *supra*.

Pockran's case.

Let us turn to the majority's view of the Full Court's decisions in *Gillies* and in *Harris*. Gibbs C.J., Mason, Wilson and Dawson JJ. disapproved of both decisions insofar as they had purported to confine *Ascot Investments* v. *Harper* to permanent orders. Of the two, *Harris* is the more controversial decision in that the interim order was made there against a third party, a family company, which was not the alter ego of a party to the marriage at all, but which was legally and factually controlled by the husband's mother. Like many family companies which own the matrimonial home the company in *Harris* was taking steps to evict the wife and children, but the wife was able to obtain from the Family Court interim orders which were ostensibly in aid of maintenance orders already made against the husband. The Full Court approved the making of interlocutory injunctions against the company until alternative accommodation was supplied for the applicant wife and children. The orders were justified by the Family Court on the grounds that the company had a special connection with the parties to the marriage. The reasoning in *Harris* was in turn adopted in *Howard* and in *Stowe*. In *Green's* case, however, Gibbs C.J. and Mason J. expressly denied that a finding that there was a special connection between the parties to the marriage and the third party in any way enlarged the jurisdiction of the Family Court. (The Family Court of course would not view this circumstance as enlarging its jurisdiction but merely as a basis for exercising its discretion to make the orders sought). When one looks closely at the *ratio decidendi* of *Green's* case, however, one finds (and this writer disagrees with much of the headnote in the C.C.H. report) that while a majority disapproves of *Harris* on the matter of its interpretation of *Ascot,* on the subject of the "special connection" only two judges have specifically overruled the Full Court decision. Effectively then, while it must be conceded that the status of the "special connection" line of cases is now shrouded in doubt, it is arguable that *Harris* has not, at least to this extent, been overruled expressly by a majority of the Full Bench in *Green's* case. To the hopeful it may seem then that *Harris and Harris; re Banaco* in some form lives on.

What of *Gillies and Gillies?* In that case the Full Court had upheld interim restraining orders preventing the husband's mother from pursuing a Supreme Court action whereby she alleged a trust in her favour in respect of the matrimonial home. The wife had initiated Family Court proceedings under section 79 in relation to the home and the mother had intervened in those section 79 proceedings. The Family Court made the orders against the mother so that her State claim would not pre-empt the Court's jurisdiction. The fact that Mrs Gillies senior might find her own State proceeding prejudiced by the Family Court order was held to be a matter only for the discretion of the Family Court. Like *Harris, Gillies* resembles *Green* in the parental involvement in a Family Court matter. However, there is a critical difference in that the spouse in *Gillies* took action against her mother-in-law rather earlier than did Dr Marinovich. The former acted quickly so that

Supreme Court proceedings could be prevented before they were able to be heard. Dr Marinovich, however, waited until Mrs Green's action had proceeded to final judgment in the Supreme Court before invoking the aid of the Family Court. Third party considerations to one side, even the general equitable doctrine of laches would decree that Dr Marinovich's application for an injunction should be refused.

Be that as it may, *Gillies* was accorded a somewhat different status by the Full Bench in *Green* than was *Harris.* Far from purporting to overrule *Gillies,* Gibbs C.J. and Mason J. went to pains to distinguish it from the case in hand principally on the ground that the third party in *Gillies* had herself instituted proceedings in the Family Court in addition to her Supreme Court action, so that the Court was able to restrain the latter proceeding so as to prevent abuse of its own process.[33]

The state of the authorities of the Full Court of the Family Court is arguably that none of the decisions which confine the *Ascot* case to permanent orders and enlarge the jurisdiction to make interim orders has expressly been overruled by a majority of the Full Bench in *Green.* Despite the abundant criticism directed at the interim injunction extensions and at the "special connection" cases by the High Court we are left at the end of the day with a third party jurisdiction which although badly shaken, is oddly enough, from the aspect of *stare decisis,* to some degree intact. Let us see what can be salvaged.

2. Living with Green's Case: Stratagems for Salvaging the Third Party Jurisdiction

Despite the predominantly bad tidings, there are in *Green's* case some straws for the Family Court to clutch as it confronts inevitable third party problems in the future. For example, five members of the Full Bench specifically approved the practice of relying upon section 4(1)(f) (which already has the imprimatur of the High Court in the third party custody jurisdiction) in the context of third party property proceedings. From this it presumably follows that that provision will have some meaningful role to play in the future to which Their Honours would be sympathetic. Certainly it seems unduly pessimistic at this stage to attribute to *Green's* case the destruction of the Family Court's jurisdiction to make interim orders against third parties in like manner as the loss of power to make permanent orders after *Ascot Investments* v. *Harper.*

To the extent, however, that the decision in *Green's* case is destructive of the third party jurisdiction of the Family Court, it is this writer's view that it may be possible to minimise the damage by indicating some fairly unusual features of that case by reference to which it may be confined.

(a) Confining Green's Case

Parental loans are by no means an uncommon subject of Family Court

33 See note 3 *supra,* 79,487 *per* Gibbs C.J.

litigation.[34] However in all the reported cases in which such loans feature, they have arisen in the context of litigation between the parties concerning other matrimonial assets, most commonly the home. By contrast, in *Green,* the loan to the husband by the wife's mother occupied the entire canvass of the litigation, not only between Dr Marinovich and Mrs Green but also the section 79 proceedings between the husband and wife. This feature of the case was stressed in the judgments. Gibbs C.J., for example, commented that as the only relief that Dr Marinovich sought was against Mrs Green it was misleading to even refer to the section 79 proceedings by the title "In the Marriage of Dr and Mrs Marinovich".[35] It is, in this writer's submission, appropriate to confine much of what transpired in *Green* to the unusual case where there is no other matrimonial property dispute between the husband and wife than that involving the third party's rights. It is that circumstance in *Green,* it is submitted, which may allow us to agree on the special facts of that case with the conclusion of the majority of the Full Bench, that the third party proceeding there was not one in relation to a proceeding between the husband and the wife. In such a case it is entirely appropriate that the litigation be confined to the State courts. Where however the dispute involving the third party is only one facet of the wider property litigation between the spouses, it is argued that *Green's* case is not applicable.

(b) The Survival of Family Court Precedents

We have noted that the Full Bench in *Green's* case did not approve of those decisions of the Full Court of the Family Court in which interim orders were said to be outside the limits of the third party jurisdiction as decreed by the High Court in *Ascot Investments* v. *Harper.* We have observed, however, that on closer inspection none of those decisions has actually been overruled by a majority in *Green.* Arguably then, these precedents survive in the process of *stare decisis* to the extent that their extinction is not demanded by the *ratio decidendi* of *Green.* A majority of the Full Bench[36] held that the Family Court could not achieve by an interim order that which, since *Ascot,* was beyond its reach by permanent orders. When we examine this requirement in the context of the facts in *Green* it is fair to say that Dr Marinovich was, in reality, seeking from the Family Court orders which would ultimately extinguish the rights of Mrs Green under her judgment debt. The interim order which the husband sought initially could therefore be regarded as only the first in a series of steps, which he hoped would result ultimately in the extinction of the rights of the third party under the general law. In that light it may be said that he was utilising an interim order to achieve results which were in substance permanent. The Full Court had already refused to allow this in *Pockran's* case. It may be appropriate

34 *E.g.* see *Anderson and Anderson* (1981) FLC 91-104; and the cases referred to in notes 9, 18 and 19 *supra.*

35 Note 3 *supra,* 79,484.

36 Gibbs C.J., Mason, Wilson and Dawson JJ. (Deane, Brennan and Murphy JJ. did not allude to this aspect.)

therefore to distinguish *Green's* case on this basis from such precedents as the Full Court decisions in *Buckeridge* and in *Smith and Saywell,* where pending the ventilation of the parties' property claims, family companies whose directors included strangers were restrained by interlocutory order from pursuing Supreme Court actions in the Family Court so as to keep the property intact. Distinguishable also would be cases like *Stowe,* where the family company was prevented from subdividing and selling real estate pending the hearing of section 79 proceedings in relation to all the matrimonial assets of the parties. The third party proceedings in these cases were in a genuine sense only a step in the central dispute which concerned the totality of the parties' assets and were not proceedings for their own sake. It is arguable, therefore, that on this view of *Green's* case such orders might still be open to the Family Court. Indeed it would seem to follow from this interpretation that the decision least likely to survive *Green* on its facts is *Gillies* insofar as the wife in that case, in restraining the husband's mother from asserting a trust in relation to the home, was ultimately seeking to extinguish the third party's Supreme Court claim. Yet we have seen that the Full Bench declined to rule upon the correctness or otherwise of *Gillies.*

Be that as it may, it is submitted that Full Court precedents which have not been overruled by *Green's* case may in the future continue to support a third party jurisdiction which is in fact wider than that contemplated in *Ascot Investments* v. *Harper* provided that the real objective is not, as it was in *Green's* case, to ultimately extinguish the rights of the third party under the general law.

(c) Exploitation of the "Ross" Injunction

The High Court decided in *Re Dovey; ex parte Ross*[37] that it was permissible to make an order against a party to the marriage in that party's capacity as director of a company, notwithstanding that the order has the incidental effect of preventing the company itself from dealing with its assets. The *Ross* injunction is clearly a powerful device where the only directors of a company are the parties to the marriage, particularly as it has been upheld in relation to both temporary and permanent orders by the High Court in the *Ascot* decision. *Green's* case in no way impugns the standing of *Ross* and indeed it may be predicted that we shall see the *Ross* injunction used extravagantly in the future, perhaps to require parties to the marriage to use any effective control they may have to procure others such as outside directors, to take certain steps, for example to desist from evicting the wife and children from the family home where it is owned by the company.

(d) The Doctrine of Effective Control

Since *Ascot Investments* v. *Harper* it has been clear that the Family Court is generally unable to make permanent orders against third parties which alter their legal rights and obligations. Where assets are legally owned by

37 (1979) FLC 90-525.

third parties the Court has devised a technique which, while not enabling it to directly transfer an asset owned by a family company or trust, nevertheless allows such assets to be reflected in orders which the Court may properly make against a party to the marriage. This technique is one which is already well developed in respect of other forms of property (such as unvested superannuation rights or other assets held in discretionary trusts) in respect of which the Family Court has been unable to assume direct jurisdiction.[38] The approach taken by the Court in these circumstances is to concede that such property may not be directly made the subject of an order for maintenance or property reallocation. However, in the course of making orders with respect to property which is unquestionably distributable by the Court, the benefits derived from a party's position in a family company have been "taken into account" as a "financial resource" of a party under section 75(2)(b). It has been realised in decisions like *Stowe and Stowe, Tiley and Tiley,*[39] *Kelly and Kelly,*[40] *Yates and Yates*[41] and *Martiniello and Martiniello*[42] that although assets may be technically owned by a company, a party to the marriage may have *effective control* of the company itself. That effective control may, for the purposes of determining that party's "financial resources", transcend the legal control situation. Arguably this was the case in *Ascot Investments* v. *Harper* and indeed in his dissenting judgment, Murphy J. felt that the effective control exercised by Mr Harper was the real ground upon which the Family Court's jurisdiction should be affirmed. In *Martiniello* the Full Court was prepared to grant an interlocutory injunction to restrain the husband from dealing with the balance in a bank account to which a third party was possibly entitled. The husband's "power of control" was adequate to confer jurisdiction. In *Tiley* the Full Court of the Family Court ordered the husband to pay to the wife an amount which took into account a loan owing to the husband by the company. The loan was an amount which, in the view of the Court, the husband could be expected to call in by exercising his effective control as managing director. In *Stowe* the Full Court went even further and was prepared to freeze company assets worth in excess of $6 million on an interim basis. The Full Court in *Stowe* reasoned that these assets might, when property proceedings took place in the future, be required to *satisfy* any order which the Court might make against the husband. *Green's* case does not affect the doctrine of effective control. We may expect to see it used extensively in the future.

V. THE FUTURE

We have seen that the Family Court in a number of decisions after the

38 This technique has been used extensively in the superannuation cases *e.g. Crapp* v. *Crapp* (1979) FLC 90-615.
39 (1980) FLC 90-898.
40 *Kelly and Kelly (No. 2)* (1981) FLC 91-108.
41 *Yates and Yates (No. 2)* (1982) FLC 91-228.
42 (1981) FLC 91-050.

debacle in *Ascot Investments* v. *Harper* was able to construct a jurisdiction to make interim orders against third parties. We have noted that the decisions appeared to strike a very careful balance between third parties with a "special connection" with the marriage on the one hand, and those on the other who were in the position of dealing at arm's length with the parties. Given that the latter were, it has been argued, well protected by the Family Court's own case law, the decision in *Green* can only serve to benefit the former. The protection of such interested third parties from interim orders of the Family Court is both unnecessary and undesirable, and the High Court is guilty, it is submitted, of lending its aid to legal fictions which may be commercially sound enough but which should have little place in the special circumstances of the family jurisdiction. The Family Court's task will undoubtedly be made more difficult in the future by the Full Bench decision in *Green's* case. However, this is not to say that the Family Court will find itself powerless to deal with third parties. How will the third party jurisdiction develop in the future?

We have already noted that some important mechanisms which have been employed by the Family Court to deal with third parties are not in any way affected by the High Court's decision in *Green.* The *Ross* injunction and the doctrine of effective control are intact and will continue to be extremely useful. In addition this writer has suggested ways in which *Green's* case may be confined so that the damage may be minimised. There are, moreover, stratagems which already exist in third party jurisprudence which have been underutilised until now because the Family Court was able in the past to manage without them. The setbacks of *Green's* case may stimulate their use in the future. One such technique comes from the High Court's decision in *Ascot* where the majority stated exceptions to their ruling where a company could be termed a sham or a puppet of a party to the marriage. The High Court conceived these notions very restrictively in *Ascot* but it is suggested that in the future, where a third party is closely associated with the husband or the wife, these exceptions may be exploited creatively to extend jurisdiction in relation to both interim and permanent orders. To this end the notion of the puppet, it is suggested, can be particularly helpful.

Sections 85 and 85A of the Family Law Act also offer solutions to problems. Section 85 has always been with us, although it was amended in the Family Law Amendment Act 1983 (Cth) so as to extend its scope. That section enables the Court to prevent or to set aside any disposition or transaction including a disposition of property to a third party where its effect is to defeat an order of the Court. There is no requirement that the transaction was entered into with the intention to defeat an order. The section has in the past been hamstrung with narrow wording and restrictive interpretation by the Court but there are recent indications, especially the Full Court's decision in *Heath and Heath*[43] that the Court will be less

43 *Heath and Heath (No. 2)* (1984) FLC 91-517.

reluctant to use it in the future. In *Heath* the Court went so far as to set aside a mortgage causing the Westpac bank to lose its security for a substantial loan. The husband had created the mortgage in circumstances where the bank ought to have realised the wife's order was jeopardised, and the Court held that as between the bank and the wife the former rather than the latter should be the loser. In *Green* Dr Marinovich had intended to apply to the Family Court under section 85 to set aside the assignment by the wife of $36,000 to her mother, but as this sum had become merged into the Supreme Court judgment it was clearly too late to set this disposition aside and it is unthinkable that section 85 could be invoked to set aside the judgment itself. The suggestion that it might met with an appropriately cool response in the Full Bench. In future cases, provided of course that matters have not been permitted to proceed to judgment, it is likely that section 85 will be invoked liberally to recover property from third parties.

Section 85A is a new provision inserted by the 1983 Amendment Act. It enables the Court to make orders directly in relation to property which has been transferred into what may be termed an ante-nuptial or post-nuptial settlement made in relation to the marriage. This new provision clearly contemplates that in the relevant circumstances third parties such as trustees will be made the direct subject of orders of the Family Court. Potentially the section confers extremely wide powers if the Court is so minded to use it. If it does, then it is likely that the High Court will again have the opportunity to impede the third party jurisdiction of the Court. *Green's* case suggests that when that occurs we may expect the worst.

VI. AFTERTHOUGHTS ON THE FAMILY LAW AMENDMENT ACT 1983

The Family Law Act was extensively amended in 1983 more in hope than in confidence. Experience of the High Court's lack of sensitivity for the objectives of the legislation was not wanting after the decimation of the property jurisdiction by the Full Bench in *Russell* v. *Russell*[44] but there was some hope offered by more recent judgments in *Re Dovey; ex parte Ross*[45] and in *Gazzo's* case.[46] Section 4 (1)(ca)(i) was added to the Act in 1983 to attempt to bridge the hiatus in Family Court property jurisdiction in cases where there was a need to initiate proceedings during the time between separation and filing for principal relief, and in cases where no principal relief is to be sought despite the marriage being over. That provision is constitutionally very unsafe when it is read against a background of the *Marriage Act Case*[47] and *Russell's* case. Moreover, the Full Bench has declared in *Green* that it is not about to embrace a liberal interpretation of

44 *Russell* v. *Russell*; *Farrelly* v. *Farrelly* (1976) FLC 90-039.
45 Note 37 *supra.*
46 *Gazzo* v. *Comptroller of Stamps* (1981) FLC 91-101. (See the minority judgments of Mason and Murphy JJ. relating to the ability to base property legislation on the marriage power.)
47 *Attorney-General (Vic.)* v. *Commonwealth* (1962) 107 CLR 529.

the constitutional bases of the family jurisdiction, so the striking down of section 4(1)(ca)(i) seems imminent and the status of many orders which have already proceeded under section 4(1)(ca)(i) is therefore in jeopardy. This writer has already suggested that section 85A is also at risk, and the amendments to section 79 which contemplate that the Court may hear property proceedings after the death of a party to a marriage may also face challenges. The Full Bench in *Green*, moreover, indicated that forays into "State jurisdiction" were not to be supported by section 33 of the Act, the accrued jurisdiction provision. The fate of some of these 1983 amendments may not, it seems, be a happy one.

VII. CONCLUSION

We have documented the first fall from grace of the Family Court's jurisdiction in relation to third parties when the High Court decided *Ascot Investments* v. *Harper*. We saw that the Family Court nevertheless proceeded after that decision to salvage an impressive and essential jurisdiction to make at least interim orders against third parties. The High Court appears to have been determined to destroy this too in deciding *Re Ross-Jones; ex parte Green*. This writer has attempted to discuss those aspects of the decision in *Green* which pertain to the third party jurisdiction and to assess its effects. An attempt has been made to suggest ways in which *Green* might be read so as to minimise the damage which has been caused. We have also looked at mechanisms other than the interim injunction which may be helpful in the future in dealing with third party problems in the Family Court.

The family jurisdiction is a special one with unique requirements. The Family Court however, is obliged to function in circumstances of great difficulty much of which can be overcome only be constitutional amendment. In that climate it is most unfortunate that the High Court has thus far pressed property litigation between parties to a marriage within the constraints of general law concepts, which in truth ought to have only secondary status in family litigation. The decision in *Green* demonstrates only too clearly that the High Court is not about to alter its habits and that in the matter of third party jurisdiction the Family Court cannot look forward to an easy time in the future.