# THE JURISDICTION OF THE FAMILY COURT OVER THIRD PARTIES

*ASCOT INVESTMENTS PTY. LTD.* v. *HARPER AND ANOTHER*

The extent to which Family Court Judges can and should issue orders that determine questions of company, property and trust law is a subject of important debate in Australia at the present time. It is suggested by some that such problems immediately be referred to the jurisdiction of a Supreme Court, and by others that matters closely related to the matrimonial dispute, and the orders that need to be made in connection therewith, be dealt with at the one time by the Family Court. A number of sections in the Family Law Act 1975 (Cth.) are drafted extremely broadly and *prima facie* give to the Family Court a very wide discretion as to the orders that it can make. For example, s. 79 allows the Court in proceedings "with respect to the property of the parties to a marriage or either of them" to make "such order as it thinks fit altering the interests of the parties in the property". S. 80 (k) permits the Court to "make any other order . . . which it thinks it is necessary to make to do justice". In interpreting these sections the Courts delineate the boundaries of the Family Court's jurisdiction and determine in particular what interests are allowed to be affected by orders consequent upon the matrimonial cause.

When the property affected by, or the subject of, an order by the Family Court is not that of a party to a marriage, many difficulties arise. Tension exists between the need to ensure compliance with the rulings of the Court and the danger of interfering with the rights of third parties. The solution is clear. It is a matter of evaluating the competing interests and priorities and of drawing a line where the rights of as few as possible are adversely affected as little as possible. The precise location of that line, however, has proven predictably troublesome to pinpoint.

The problems inherent in striking the compromise that the courts are seeking are strikingly illustrated by the recent High Court decision in *Ascot Investments Pty. Ltd.* v. *Harper*.[1] In this case the extreme approaches met head on; Murphy, J. proposed that the Family Court be allowed to "make any other order which it thinks it is necessary to make to do justice",[2] while Gibbs, J. was especially concerned to prevent the Family Law Act 1975 (Cth.) from being used to extinguish

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[1] (1981) F.L.C. 91-000; (1981) 33 A.L.R. 631; (1991) 55 A.L.J.R. 233. All references will be from the F.L.C.

[2] *Id.* 76,064.

the rights, and enlarge the obligations, of third parties "in the absence of clear and unambiguous words".[3] In *Ascot Investments* the majority of the High Court has sought to circumscribe quite strictly the ability of the Family Court to affect the position of those not parties to the matrimonial dispute. The purpose of this case note is to analyse the effectiveness of this attempt and to analyse how *Ascot Investments* stands in the light of the relevant authorities.

**The Facts**

The husband had consistently failed to comply with maintenance orders, preferring even imprisonment for over a year, and the financial position of the wife, and her dependent children, had become acute. In 1976, after a *decree nisi* had been pronounced, the husband was ordered:

(a) to pay lump sum maintenance of $75,000 and
(b) to transfer to his wife, by way of security for payment of the ordered sum of maintenance, his shareholding in a "family" company (the present applicant).

The directors of the company were the husband and three adult children of the marriage. The husband refused to pay the $75,000 or to sign the transfer. In the face of this non-compliance, the Master of the Court signed the transfer in the husband's name and delivered it to the wife. The company's memorandum and articles of association gave the directors an absolute discretion, without the need to give reasons, to refuse to register any transfer of the shares. Before any refusal took place and, thus, before the directors exercised their discretion, the wife sought an order from the Family Court compelling the company and the directors to register the transfer from her husband in her name. The wife's application was based upon ss. 80(d) and (k) and 114(3) of the Family Law Act 1975 (Cth.)[4] The company was granted leave to intervene. At first instance, the wife's application was refused, but she succeeded in obtaining the order on appeal to the Full Court of the Family Court.[5] The Full Court of the High Court (Murphy, J. dissenting) allowed the company's appeal.

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[3] *Id.* 76,052.

[4] S. 80. The court, in exercising its powers under this part, may do any or all of the following:
(d) order that any necessary deed or instrument be executed and that such document of title be produced or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;
(k) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this section), which it thinks it is necessary to make to do justice . . .
S. 114(3) A court exercising jurisdiction under this Act in proceedings to which sub-section (1) applies may grant an injunction, by interlocutory order or otherwise . . . in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court thinks appropriate.

[5] (1980) F.L.C. 90-825.

**The Decision of the High Court**

Four different approaches were taken by the members of the High Court.

1. Barwick, C.J.

His Honour, the Chief Justice, conceded that the Family Court may make orders that are appropriate to render effective orders made by it within its jurisdiction but limited those auxiliary orders to ones "necessary and appropriate for the enforcement of the substantive order",[6] thus allowing the Family Court to "bind" or "indirectly or consequentially affect substantive rights of the stranger".[7] He held that the principal order of the Court had been the initial maintenance one and that the magnitude of the husband's shareholding did not allow him to treat the company as his own for the purposes of control. Therefore, the appellant and its directors could not be ordered to do something in relation to the shareholding which the husband, by dint of *his* shareholding, could not compel the appellant or its directors to do. It had been contended that the family company had become a party because of s.92 of the Family Law Act 1975 (Cth.).

(1) In proceedings other than proceedings for principal relief any person may apply for leave to intervene in the proceedings, and the court may make an order entitling that person to intervene in the proceedings.
(2) An order under this section may be made upon such conditions as the court thinks fit.
(3) Where a person intervenes in any proceedings by leave of the court he shall, unless the court otherwise orders, be deemed to be a party to the proceedings with all the rights, duties and liabilities of a party.

Barwick, C.J. held that the section did not in this case cause "any relevant accretion to the jurisdiction of the Family Court".[8] He concluded his judgment by commenting that the circumstances of this case, in which the husband's obduracy was so great that he was prepared to undergo lengthy terms of imprisonment, illustrate the inadequacy of this measure as a means of securing compliance with maintenance orders.

2. Gibbs, J.

The judgment of Gibbs J. with which Stephen, Aickin and Wilson, JJ. concurred was the leading one of *Ascot Investments*. His Honour accepted that the orders given by the Full Court of the Family Court fell within the literal meaning of words of ss. 80 and 114(3). His

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[6] *Supra* n. 1 at 76,054.
[7] *Ibid.*
[8] *Id.* 76,055.

Honour surveyed the decisions in *Sanders* v. *Sanders*;[9] *Antonarkis* v. *Delly*;[10] *Re Dovey, ex parte Ross*;[11] and *Re Ross Jones, ex parte Beaumont*[12] and concluded:

> The authorities to which I have referred establish that in some circumstances the Family Court has power to make an order or injunction which is directed to a third party or which will indirectly affect the position of a third party. They do not establish that any such order may be made if its effect will be to deprive a third party of an existing right or to impose on a third party a duty which the third party would not otherwise be liable to perform.[13]

Thus, he read down the provisions of ss. 80 and 114(3) by reference to what he regarded as Parliament's intention to protect the interests of persons who are not parties to the marriage. The exception that Gibbs, J. was prepared to contemplate was where the control of a party to the marriage is so extensive that the family company is a mere puppet. Under those circumstances it would be open to the court to issue an order directly against the third party or to affect its rights directly. He held in this case that the husband was only one of four directors so could not be said to exercise effective control, and pointed out that the proceedings may have been prematurely brought since the directors had not been given the opportunity to exercise their discretion. Like the Chief Justice, Gibbs, J. read down s. 92(3) and held that it "removes a procedural obstacle, but does not alter substantive rights and duties".[14]

3. Mason, J.

His Honour substantially agreed with Gibbs, J. but strongly contended that an essential to the bringing of an action would be that the directors had failed to exercise their discretion to register the shares properly. In the absence of this he held that the action was premature.

4. Murphy, J.

The judgment of Murphy, J. is a most interesting one. He noted the problem of prematurity and drew attention to the fact that the Full Court sought to obviate it by relying upon s. 97(3) of the Family Law Act 1975 (Cth.) which directs that the Family Court "shall proceed without undue formality and shall endeavour to ensure that the proceedings are not protracted".

He approved their opinion that to dismiss the appeal before the directors had exercised their discretion would have done no more than

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[9] (1967) 116 C.L.R. 366.
[10] (1976) F.L.C. 90-063; 51 A.L.J.R. 21. All references will be from the F.L.C.
[11] (1979) F.L.C. 90-616; (1979) 23 A.L.R. 531; (1979) 141 C.L.R. 526. All references will be to F.L.C.
[12] (1979) F.L.C. 90-606; (1979) 23 A.L.R. 179. All references will be to F.L.C.
[13] *Supra* n. 1 at 76,061.
[14] *Id.* 76,063.

to require the matter to be relitigated and thereby to have increased the costs of the parties unnecessarily. His Honour read down ss. 80 and 114(3) literally, on the basis that a number of sections in the Act "interfere with State law"[15] and with the rights of third parties. He evidenced s. 84(2) which had been used in this case by the Family Court to compel the directors to treat the transfer as though it had been executed by the unwilling husband. He also drew attention very pointedly to the words of Gibbs, J. in *Re Dovey, ex parte Ross*:

> It is impossible to suppose that the Parliament intended that a husband might place the matrimonial home beyond the jurisdiction of the Family Court simply by vesting it in a private company which he himself controls; such a result would make it impossible for the Family Court properly to perform its functions in many cases.[16]

The relevance of his remark depends on his finding that the company was, in truth, controlled by the husband in *Ascot Investments*. The difference here between Murphy, J. and the remainder of the Court is that he was prepared to entertain the possibility of the relevance of *de facto* as opposed to *de jure* control. His Honour did, however, concur with the Chief Justice in deploring the ineffectiveness of imprisonment as a punishment for failure to comply with maintenance orders.

**Analysis of the Judgments**

1. *Initial Comment*

The difference between the majority and Murphy, J. can substantially be attributed to dissimilar attitudes towards the Family Law Act 1975. The draftsman's original concept of the Act was that it would set up a whole system that would govern everything to do with "Family Law"; all ancillary services would be present with harmonious relations existing between the Family network and the State Supreme Courts. That goal has not been realized anywhere, with the qualified exception of Western Australia, because of the failure to establish state Family Courts. The Family jurisdiction from the start has been isolated and its relations strained with the Supreme Courts of the States. The inevitable result has been tension whenever demarcation disputes have come to the fore. Even the constitutional problems highlighted by *Russell* v. *Russell*[17] have never been satisfactorily settled and dangle a Damoclean sword over many important family law questions. In this case a vital loop hole has been shown to exist. If a spouse chooses to place his or her assets in a family company which he or she does not *de jure* control, the Family Court cannot gain access

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[15] *Id.* 76,065.
[16] *Supra* n. 11 at 78,192.
[17] (1976) F.L.C. 90-939.

to such assets in order to compel the payment of maintenance. This can lead to very harsh consequences, as illustrated by the facts of *Ascot Investments*. There the wife had done absolutely everything that she could have been expected to do by using the legal system available to her. The husband had spent over a year in gaol and had never paid maintenance with the result that the wife brought this final action, showing by affidavit that she had accumulated debts of $17,000 to friends and relatives. It is hard to imagine a situation in which one party could be more deserving of sympathy and the other less so. The consequences of the High Court's decision are far-reaching.

It is important to note that the spouse cannot make any kind of disposition of the kind in *Ascot Investments* if it is made "or proposed to be made to defeat an existing or anticipated order" in matrimonial disputes. S. 85 ensures this. If, however, a spouse manages to make the disposition before there is the requisite estrangement between the parties he places his assets beyond the reach of the Family Court so long as his control in the company is not *de jure* — the company must not be a "sham" or "device" or "puppet". The spirit and purpose of the Act is, thus, effectively circumvented. Faced, then, with the widespread non-payment of maintenance already, through simple non-co-operation by spouses, and the prospect of a maintenance-avoidance scheme considerably more difficult to negative by legislation than most tax-avoidance schemes, Murphy, J.'s understandable reaction was to try to give effect to the Statute by a literal reading of its provisions. The concomitant of this, however, and the fact stressed especially by Gibbs, J., is licence to the Family Jurisdiction to affect directly the rights and obligations of those not parties to the matrimonial dispute. It was concern about this aspect that led the remainder of the High Court to be chary of allowing to the Family Court any further inroads into the Supreme Court's jurisdiction.

2. *Precedent*

Gibbs, J. embarked upon an important review of cases similar to *Ascot Investments* that had discussed the question of third party rights. Clearly the matter is one of degree — the Family Court's orders can affect third parties to some extent. Gibbs, J. started from the premise that there was nothing in the words of ss. 80 and 114(3) that suggested that the Family Court was:

> . . . intended to have power to defeat or prejudice the rights or nullify the powers of third parties or to require them to perform duties which they were not previously liable to perform.[18]

With these considerations in mind he approached the case of *Sanders v. Sanders*[19] in which it was held in proceedings between a husband

[18] *Supra* n. 1 at 76,061.
[19] *Supra* n. 9.

and wife that the Supreme Court of Norfolk Island had power to grant two orders. The first was an interlocutory injunction that restrained an insurance company from paying to the husband any moneys in respect of a claim arising from damage to the matrimonial home which was owned and insured by the husband. The second was a permanent injunction restraining the company from paying to anyone other than the wife or her solicitor. Barwick, C.J. pointed out[20] that the distinction to be drawn was between maintaining an existing situation and creating new duties and obligations for the third party. However, in regard at least to the interlocutory injunction he was prepared to countenance an order:

> . . . that involves a third party and the right of a third party in relation to one or both of the parties to the matrimonial cause.[21]

Referring to *Sanders* v. *Sanders* in *Ascot Investments*[22] Gibbs, J. asserted that no new duties were placed upon the insurance company and that the order "went no further than to restrain the insurance company from paying such moneys as it had decided to pay under the policy". In this statement there seems to be a slight deviation from what the Chief Justice was ready to concede, and certainly something of a relaxation of privity of contract. An insurance policy is normally personal but in this instance the court intervened under s. 124 of the Matrimonial Causes Act 1959[23] (Cth.) to all intents and purposes the equivalent of s. 114 of the present Act. It is a small point, but the fact remains that the court was tampering with the relationship between the husband and the insurance company, and it is questionable whether it is appropriate to say that third party rights were not affected. To be sure, they paid out the same amount of money as they expected to, but it was not to the person to whom their contractual obligations were owed. Notably, the injunctions were both directed against the third party personally and so must be said to have affected it directly. The court, however, held that "rights" were not affected and that the degree of "affect" was minimal, as it undoubtedly was.

In *Antonarkis & Anor.* v. *Delly & Anor.*[24] orders were again made against third parties. A wife obtained an order against her husband, his mother and his stepbrother to vacate the matrimonial home and to have a caveat placed by the mother removed from the title to the home. The mother and the stepbrother did not comply. They argued that the Court did not have power under s. 124 of the

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[20] *Id.* 372, cited with approval in *Antonarkis, supra* n. 10 at 75,312.
[21] *Id.* 372.
[22] *Supra* n. 1 at 76,059.
[23] *Cf. Smith & Saywell* (1980) F.L.C. 90-856: "With two minor exception s. 124 of the repealed Matrimonial Causes Act 1959 is the same as s. 114(3) o the Family Law Act 1975 — the word 'appropriate' has been substituted for th word 'just' and the proceedings now covered by s. 114 (1) of the Family La Act 1975 have been excluded from the ambit of s. 114(3)".
[24] *Supra* n. 10.

Matrimonial Causes Act 1959 (Cth.) to grant an injunction that affected the rights of strangers to a matrimonial cause. The High Court approved its decision in *Sanders* v. *Sanders* saying that it held there that the wide words of s. 124 could not be limited by importing any restriction other than that the power be used to aid, enforce or protect the proper exercise of the matrimonial causes legislation. In this case, the decision of whether to issue the orders by the Supreme Court had had to be arrived at by reaching a decision as to whether the mother and the stepbrother did actually have any interest in the property, the subject of the matrimonial cause. The tenancy of the stepbrother was classified as a device to avoid enforced vacation of the matrimonial home. Barwick, C.J., Gibbs and Mason, JJ., without deciding upon it because of the mother's intervening death, cautiously pointed out that, although the judge at first instance had concluded that the mother had no interest in the premises, the order requiring the removal of the caveat did not determine the question and simply made effectual the substantive order for a settlement. Interestingly, the mother claimed to be the equitable owner of a half-share in the premises and that the husband held his legal share in trust for her and himself in equal shares. The High Court recognized the problem that the Supreme Court was being asked to determine questions tangentially related to the matrimonial cause, and commented in relation to the stepbrother that s. 124 would not normally enable determination of the question whether a stranger to a marriage has a leasehold interest in the property of which a party to the marriage is an owner.[25] *A fortiori* the court's jurisdiction to make orders determining the equitable rights to ownership of property owned by a stanger to a marriage, no device being evident, is questionable at least. Owing to the mother's death this did not fall to be finally determined.

In *Antonarkis* v. *Delly* we see the Supreme Court making a radical attempt to extend the family jurisdiction into areas which are, by no means, intimately related to "narrow" concepts of matrimonial causes. It is no longer the "vague" expression of "indirectly affecting" that is apposite but an acknowledgement that direct intervention is being attempted. The High Court in *Ascot Investments* defends the reaction of the Supreme Court in *Antonarkis,* which affirmed Barwick, C.J. in *Sanders* and quoted from Wallace, P. in *Horne* v. *Horne.*[26]

> . . . this power is limited to aiding, enforcing or protecting the proper and due exercise of the matrimonial causes jurisdiction.[27]

The scope of the court's jurisdiction is not restricted and it would seem sufficient that it is in aid of an order pursuant to the Matrimonial Causes Act 1959 for the merits of a third party's claim to what a

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[25] *Id.* 75,313.
[26] (1963) 63 S.R. (N.S.W.) 121 at 135.
[27] *Supra* n. 10 at 75,312.

party to the marriage claims to be marriage property to be determined. It is hard to see how this is not a determination of the rights and obligations of third parties. It affects them by determining whether or not they exist. Surely, there is no more fundamental way of "affecting" rights. In *Ascot Investments* Gibbs, J., however says,

> It is apparent that neither of these decisions provides authority for the view that any right or interest of a third party may be adversely affected by an order made in the exercise of the matrimonial jurisdiction.[28]

On the other hand, Barwick C.J. in *Antonarkis* v. *Delly* states,

> The wide words of s. 124 cannot be limited by importing a restriction that the order made shall not affect the position of third parties.[29]

These two statements sit uneasily together. *Prima facie* the answer is that the Court can affect the position of third parties, even by issing orders against them, but may never affect them "adversely". According to *Ascot Investments* though, there is no adverse effect if an order regulates rights adversely which it holds do not exist. Beyond this question lies to be determined in each case what amounts to the requisite "adverse affect". There is little guidance upon whether a minimal affect that is thoroughly indirect and of little import will prove determinative of the jurisdiction under the Family Law Act 1975. It seems reasonable to assume, however, that the "adverse effect" of the order would need to be substantial to render the order beyond power. The result of this is that the position of third parties may be affected indirectly but not adversely. This apparently leaves it open for the Family Court pursuant to s. 114(3) to determine any questions of company, equity or property law in order to be able to decide precisely what will be the effect of its orders upon third parties.

It can be seen, therefore, that the consequence of these two decisions is that a very significant degree of latitude has been arrogated to those acting under the Family Law Act 1975, in particular the Family Court, to determine the questions of property, equity and company law.

In *Re Dovey; ex parte Ross*[30], also considered by Gibbs, J. in *Ascot Investments,* the Family Court issued an injunction restraining the husband, until further order, from exercising his voting rights as a shareholder/director of a family company, that owned the matrimonial home, in favour of any resolution that might sell or encumber that home. An important question that arose was whether the court had jurisdiction to restrain, in effect, a third party, the company, from

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[28] *Supra* n. 1 at 76,059.
[29] *Supra* n. 10 at 75,312.
[30] *Supra* n. 11.

dealing with its property. The husband in this case held the one "A" Class share that conferred on him the right to vote at a general meeting, while the wife's "B" class share did not. The husband and wife were the only directors of the company. It is clear that the husband did "control" the company. The point made by Gibbs and Mason, JJ. was that the order was not directed to the company and did not bind it,[31] in contrast to the situation in *Antonarkis* v. *Delly* and *Sanders* v. *Sanders*. In *obiter* it was commended by Gibbs, J.:

> Even if the injunction did indirectly affect the rights of the company that would not mean that it was beyond power: see *Sanders* v. *Sanders* (1967), 116 CLR 366 and *Antonarkis* v. *Delly* (1976) FLC 90-063, 75,310 at pp. 75,311-13 which, although decisions on the Matrimonial Causes Act 1959 (Cth.) provide a guide to the meaning of the present Act.[32]

In *Ascot Investments* Gibbs, J. changed his mind about this sentence, calling it unnecessary

> since it does not appear that the rights of the company were in any way affected by the order made against the husband. However, the use of the word "rights" which is taken from the two earlier cases, was not strictly accurate.[33]

What then is a company's "right"? It cannot be to conduct its affairs without interference by the Family Court in pursuance of its jurisdiction over maintenance. Gibbs, J. did not elaborate. Arguably, he was suggesting that the company in this instance was an alter-ego of the husband so that for these purposes the husband's rights were the company's. This would account for the inapplicability of the word "rights", as previously used, in that, were the company to be said to have rights, they would have to be said to rise and fall along with the husband's. There would be no difference between them — there would be complete identity of interest. It is submitted that, as a result of *Ascot Investments, Re Dovey* should be viewed as a "sham company" case and that an order could probably have been made directly against the company because of the husband's *de jure* control.[34] The matter, however, remains unsettled because of the High Court's failure to define terms in which vagueness is inherent like "rights", "affect", "direct", "indirect" and "position". One possible reason for maintaining these terms in a state which is not exhaustively defined is flexibility.[35] This will be useful for dealing with future problems in the area, although productive of a deal of uncertainty for clients faced with indefinite precedent.

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[31] *Id.* 78,191.
[32] *Supra* n. 11 at 78,191-2.
[33] *Supra* n. 1 at 76,060.
[34] *Cf. Stowe and Stowe* (1981) F.L.C. 91-027.
[35] *Cf. Tiley's Case* (1980) F.L.C. 90-898.

The final case to which Gibbs, J. refers among these authorities is *Re Ross Jones; ex parte Beaumont*[36] in which the High Court cavilled at the possibility of appointing a receiver of a partnership between the husband and the wife and the taking of partnership accounts. It held that, if the partnership of the husband and wife is to be dissolved, it must be done in accordance with the law relating to parnerships and the Family Court's orders can only affect the interest of a husband or wife in the partnership and will not extend to the partnership assets. The case makes an interesting contrast with *Vodeniciotis and Vodeniciotis*,[37] where the Family Court entered the "criminal" jurisdiction to issue an injunction restraining a third party from committing assault upon the wife, *Re Dovey,* where the Family Court entered into company law and *Antonarkis* where the Court was called upon and did, in fact, decide questions of equitable right and entitlement to property. In *Re Ross Jones* the High Court limits the Family Court's powers to go into "foreign" areas, preferring to encourage it to refer such questions to a Supreme Court for determination. In so doing, it does define with precision at least *one* boundary of jurisdiction under the Family Law Act 1975.

In *Ascot Investments* and *Harris and Harris*[38] the frustration felt by the Family Court in being unable to secure compliance with its orders is evident. In *Harris' Case* Nygh, J. continued a "temporary" injunction under s. 114(3) to restrain family companies, controlled by the husband's mother, from evicting the husband's wife and children from the former matrimonial home which the company owned. His Honour expressly relies upon *Re Dovey*:

> where the High Court lifted the corporate veil and looked at the husband's actual control over the company.[39]

This reliance is surprising since the order in *Re Dovey* was expressly directed against the husband and not against the company. The only "lifting of the company veil" was in ascertaining the clear *de jure* control exercised by the husband but no order was actually issued by the Court against the company, the third party. His Honour embarks upon an analysis of the husband's involvement with the mother's company[40] that, if accepted by the High Court, will introduce a completely new approach to the question, and expressly weighs the hardship of the wife and her children against the considerations involved in prolonging the injunction against the company. The analysis of *Harris* v. *Harris* provides an interesting alternative to the development in the law that resulted shortly afterward in *Ascot Investments.* It will be discussed below.

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[36] *Supra* n. 12.
[37] (1979) F.L.C. 90-617.
[38] (1980) F.L.C. 90-812.
[39] *Id.* 75,123.
[40] *Infra.*

In *Ascot Investments* similar problems arose in the Family Court, with the judges clearly being influenced by the unforunate situation of the wife and the prospect of seeing a number like her. There is, however, an important finding by the Family Court that distinguishes *Ascot* from *Harris*. Frederico, J. at first instance referred to Ascot Investments Pty. Ltd. "as a family company" and continued:

> it is quite clear that the husband exercises effective control over the company.[41]

The Full Court agreed with this finding saying:

> Certainly it appears in the material that the husband exercises significant day to day control in relation to the company.[42]

The finding of the Family Court, although not expressed in this way, was that the husband *de facto* controlled the company through his three sons, who were the other directors. On this ground, the Court did what the High Court in *Re Dovey* did not do, perhaps through lack of necessity, and lifted the company veil, issuing the order against the third party. The High Court, in *Ascot,* with the exception of Murphy, J. overturned this finding,[43] preferring to confine itself to determining *de jure* rather than *de facto* control of the company. Presumably, if the High Court had been able to find that the husband did in fact "control" the company in the sense in which it uses the term, an order could have been made against either him (to have the shares registered) or against the company itself.

The Family Court was using altogether different criteria to decide upon control to those employed by the High Court. Accordingly, the judgments of the two courts proceed upon a completely different footing. It is appropriate then, to examine the basis for the dispute at this point.

3. *Control*

The dilemma faced by the Family Court in *Harris* v. *Harris* and *Ascot Investments* was in each case solved by that court by a controversial finding of control exercised by the husband.

In *Harris' Case* Nygh, J. purported to lift the corporate veil and conceded that the husband's mother was the person with absolute control over the company and that:

> the respondent husband as a matter of law and probably as a matter of fact had little or no direct actual control over how his mother manages the group.[44]

His Honour went on to explore the husband's relationship to the family companies and itemized a number of factors that he considered relevant

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[41] *Supra* n. 1 at 70,066.
[42] (1980) F.L.C. 90-825 at 75,219.
[43] *Infra.*
[44] *Supra* n. 38 at 75,123.

to the establishment of a kinship with the company sufficient to break down the barriers of the corporate veil. He noted that the husband was a substantial beneficiary of the group and had been "fed and nourished" by it, being given employment for a period, an Alfa Sud motor car to drive, rental from premises beneficially owned by the group and permission to operate a loan account with one of the companies. He summarized the position pointedly:

> The group is not a stranger in the sense of an innocent bystander; it has through Mrs. Jean Harris involved itself in the affairs of the husband and gives him active support.[45]

Confronted by a situation in which the husband does not have either *de jure* or *de facto* control over the operations of the company, Nygh, J. therefore, develops the concept of "intimate-relationship" with a third party. He shows clear evidence of the ability of the son to call upon the assets of the company and of his having been "nourished" by them. This identification of interests Nygh, J. adjudged sufficient for it to be said that, although the company's interests were not the son's, the son's were the company's. There was no relationship of control but of longstanding "parental" benefaction. The fortunes of the son depended upon the company's commitment to generosity toward him, but the company remained untouched by the son's personal vicissitudes. The experiment of Nygh, J. is an interesting one in that it represents an attempt to distill what is of relevance for this purpose from the notion of "control". It cannot be gainsaid, though, that his approach is little known to the field of corporate law and that its acceptance would mark a radical innovation by the judiciary. It must also be acknowledged that the principle enunciated by his Honour would need considerable fine tuning because there are many circumstances of generous benefaction by corporations which could not be allowed to summon with them the dangerous consequence of laying the company open to being the object of orders arising out of matrimonial disputes. The matter will, no doubt, in time be settled by the High Court.

In *Ascot Investments*, as already noted,[46] there was an interesting interchange between the Family Court at first instance and its Full Court, on the one hand, and the High Court, on the other, concerning the criteria for "control". There was evidence of extensive financial dealings conducted by the husband with the company and a significant degree of "informality" in the company's payments to the husband as director. In evidence he admitted taking money from the company whenever he wanted it and receiving for an extensive period unusually high amounts of dividends. The husband was shown to have appointed

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[45] *Ibid.*
[46] *Supra.*

as secretary a Miss McGregor, whom he arranged to have made director for a time of "his company". "The arrangements were that she would abide by the husband's directions".[47] In 1980 the company's three other directors were the husband's sons. Evidence does not appear to have been adduced in relation to their possible subservience to their father's overriding interests in the company. Theoretically, therefore, the husband was simply one of four directors and did not have a shareholding control over the company.

The courts are seldom ready to lift the corporate veil and to hold that a director's degree of control over a company is so great that the company is an agent for the controller. *Salomon* v. *Salomon & Co. Limited*[48] and *Gramaphone and Typewriter Ltd. v. Stanley*[49] demonstrated that even the fact that one person beneficially holds all of the shares in a company does not of itself make the company agent of the controller or make the company's business the business of the controller. An important factor is what function the company in fact performs and what function it was created to perform.[50] The leading case in agency is *Smith, Stone & Knight Ltd* v. *Birmingham Corporation*[51] which must prove the model for any other case which seeks to formulate criteria for identity of interests either between one company and another or between one person and a company. Atkinson, J. found six points which he deemed relevant for determining whether the subsidiary was carrying on the business as the company's or as its own. It is my submission that these could have been relevant factors, among others, for the members of the Family Court or the High Court to consider had they attempted to arrive at a workable analysis of *de facto* control. Such an analysis would have allowed the facts of *Ascot Investments* to have come within the sham/device qualification outlined by both Barwick, C.J. and Gibbs, J., thereby bridging the broadness of the gap between the majority of the Court and Murphy, J. The six points considered relevant by Atkinson, J. were: (1) Were the profits treated as the profits of the company? (2) Were the persons conducting the business appointed by the parent company? (3) Was the company the head and brain of the trading venture? (4) Did the company govern the adventure, decide what should be done and what capital should be embarked upon the venture? (5) Did the company make the profits by its skill and direction? (6) Was the company in constant and effectual control?[52]

If "husband" is read for "company/parent-company" these factors would, it is submitted, produce the basis for a useful series of questions

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[47] *Supra* n. 1 *per* Murphy, J. at 76,066.
[48] [1897] A.C. 22.
[49] [1906] 2 K.B. 89.
[50] *Cf. Peate* v. *F.C.T.* (1964) 111 C.L.R. 443 at 480.
[51] [1939] 4 All E.R. 116.
[52] *Id.* 120.

to be asked for the purpose of determining whether a company is in the *de facto*, as opposed to the *de jure* control of, for example, one of its directors.[53] Notably an application of anything resembling this test would leave the husband in *Harris* v. *Harris* still beyond the reach of the law. At least, though, the sizeable opportunity for evading maintenance payments that has been revealed by *Ascot Investments* would be considerably reduced in availability.

The approach taken, by contract, by the High Court was, with respect, conservative *par excellence*. The control that would be significant, in the words of Barwick, C.J. "would be the ability to treat the company and its affairs as his own".[54] There is no real attempt to explain when the company would have operated as the alter-ego of the husband, but the overriding consideration appears to have been the fact that he was only one of four directors and could not by dint of his shareholding compel his co-directors to act in any particular fashion. Such a failure to come to terms with the reality of the company's operation and day-to-day running surely leaves the court's decision, and along with it an important area of the law, far separated from common commercial practice. Gibbs, J. also speaks of "privileges of the third party" that are "only a sham and have been brought into being as a device",[55] and of companies that are "mere puppets of a party to a marriage". It is necessary, certainly, to make use of the concepts of the company brought into being as a "device" whether or not the husband, for example, has control of it or is merely acting in collusion with others who do control it, and the 'sham" that by means of the *de jure* control test is shown to be only an alter ego of a spouse. It is also important, however, to come to terms with a way of determining when a company is in the *de facto* control of a spouse. For this recourse must needs be made to the principles of company law and so, it is submitted, to *Smith Stone and Knight*.

4. *Prematurity*

As noted earlier,[56] both Gibbs and Mason, JJ. commented that the action may have been brought prematurely since the relief sought was an injunction to compel the directors to exercise their discretion affirmatively to register the shares before they had exercised their discretion at all. In this context, Murphy, J. showed concern that the

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[53] In *Pavlides* v. *Jensen* [1956] Ch. 565 at 577 Danckwerts, J. gives some support to a more liberal view of "control", albeit in a different situation — "I think that it must be admissible in certain cases to go behind the apparent ownership of shares in order to discover whether a company is in fact controlled by wrongdoers — as, for instance, in the case where the shares were held by mere nominees, bound to vote as the owners required them to vote". The spirit of this statement could well lead to judicial analysis of the bondage of directors to one another in their voting behaviour both in general meetings and as part of the Board.

[54] *Supra* n. 1 at 76,055.

[55] *Id.* 76,061.

[56] *Supra.*

action be dismissed simply on the ground that it had been brought too soon, because he suggested, that would result only in further litigation. Should the wife have waited until the directors had exercised their discretion to register the shares, it is doubtful whether she would have found herself in any better position. The power to refuse to register a transfer of shares is a discretionary power and must be exercised reasonably and in good faith for the company's benefit.[57] The exercise must be neither capricious nor arbitrary and must take into account relevant considerations without acting from improper motives.[58] The presumption is that the power was properly exercised.[59] The appropriate remedy is for the person aggrieved by the non-registration of the transfer to ask for rectification of the register, or, perhaps, for a declaration that he is entitled to registration. The cases show that the most actionable heads for impugning the exercise of the discretion are if it was capricious, unjust, *mala fide,* unfair or unreasonable.[60]

There is however, a hazard in challenging the exercise of the director's discretion. The courts are not enthusiastic to interfere with company directors' discretions and are more likely to injunct them, if satisfied of their misconduct, to take into account relevant considerations or to act henceforth from proper motives. In addition, there are always evidentiary difficulties in showing that the directors did in fact misuse their discretion when often, as here they do not even have to give a reason for their decision. According to the High Court in *Harlowe's Nominees Pty. Ltd.* v. *Woodside (Lakes Entrance) Oil Co. N.L.*[61]

> Directors in whom are vested the right and duty of deciding where the company's interests lie and how they are to be served may be concerned with a wide range of practical considerations and their judgment if exercised in good faith and not for irrelevant purposes is not open to review by the Court.

Helsham, J. in *Provident International Corporation* v. *International Leasing Corporation*[62] pointed out that the power must be used for the purposes for which it was conferred, but there is little authority on the purposes for which this article is habitually included in companies' memoranda and articles of association. Isaacs, J. in *Australian Metropolitan Assurance Co. Ltd* v. *Ure*[63] in a rare comment in this context, holds that a relevant reason for refusing registration

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[57] *Re Bede Steam Shipping Co. Ltd.* [1917] 1 Ch. 123; *Re Coalport China Company* [1898] 2 Ch. 404.

[58] *Re Alfred Shaw & Co. Ltd* (1896) V.L.R. 599.

[59] *Berry* v. *Tottenham Hotspur Football & Athletic Co. Ltd.* [1936] 3 All E.R. 554.

[60] *In re Gresham Life Assurance Society; Ex Parte Penney* (1872) 8 Ch. App. Cas, 446; *Re Alfred Shaw, supra* n. 59; *Re Coalport China Company, supra* n. 58.

[61] (1968) 121 C.L.R. 483 at 493.

[62] [1969] 1 N.S.W.R. 424 at 493.

[63] (1923) C.L.R. 199.

is desire to exclude a person from membership of the company through fear of damage being done to the company's reputation or its business. The courts' unwillingness to interfere with the discretion of directors save in the most extreme cases of misconduct, is everywhere apparent in their decisions. The likelihood of the wife in *Ascot Investments* actually being able to register her transfer is more than doubtful at the present time.

When the Companies Act, 1981 (yet to be proclaimed and adopted in each State) is in force, s. 186 will allow the transferee to apply to the court for an order that the transfer be registered. The court will make such order where it "is satisfied that the directors have refused or failed to register the transfer or transmission without just cause" (s. 186 (2)).[64] This section may well have been able to assist the wife in *Ascot Investments* had it been available to her.

**Conclusion**

The present state of the law is that long-term or permanent orders can be made against those not parties to a marriage

(1) if the third party such as a company is in the *de jure* control of a party to the marriage;[65]
(2) if the third party's ownership is a sham or device;[66] or
(3) if the orders will do little or no harm to the third party's interests.[67]

The High Court decision in *Ascot Investments* means that it is possible for a spouse to transfer all of his worthwhile assets into a family company and then to frustrate maintenance orders levied against him should he not be in *de jure* control of the company. This is a significant gap in the law that will, no doubt, be taken advantage of by an increasing number of spouses until either the courts or the legislature reach a solution. It is submitted that it is essential for a series of tests to determine *de facto* control of companies to be formulated and applied in such cases. Once such *de facto* control is established the corporate veil can be lifted, to use Nygh, J.'s words, and the company treated as the alter ego of the controller. Under these circumstances it will not be of any consequence that the rights of a third party are being directly affected because the third party will not in reality be a stranger to the matrimonial cause.

If the controversy provoked by the decision in *Ascot Investments* prompts the formulation of a test of *de facto* control and of the circum-

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[64] *Cf.* s. 320(2)(b), the oppression legislation, that may not apply here because a refusal to register shares is probably not the requisite course of conduct.

[65] *Re Dovey, supra* n. 11; *Ascot Investments, supra* n. 1.

[66] *Abdullah & Abdullah* (1981) F.L.C. 91-003; *Ascot Investments, supra.* n. 1.

[67] *Sanders* v. *Sanders, supra* n. 9; *Buckeridge & Buckeridge* (1981) F.L.C. 91-005.

stance when the rights of those not parties to a marriage can be directly and indirectly affected, the hardship inflicted thus far upon spouses will not have been completely in vain.

## Postscript

In December, 1981, the judgment of the Full Court of the Family Court was handed down in *Harris and Harris*.[68] Evatt, C.J., Watson, S.J. and Joske, J. held that Nygh, J's orders at first instance should be continued, and discussed and interpreted the High Court's decision in *Ascot Investments*. Evatt, C.J. and Joske, J. drew particular attention to the fact that what was being sought by the wife and opposed by the husband's mother's companies was an *interlocutory* injunction. They noted that the maintenance of the s.114(3) injunction against the husband and the third parties, the companies, "is interlocutory and not permanent, so that the companies cannot claim that their rights are extinguished or defeated". In this way, the *Sanders* v. *Sanders* interpretation of when a right is affected is reinforced. Presumably, however, the Court would acknowledge that even interlocutory orders can of themselves on occasion determine the rights of the parties, although such was not held to be the case here.

The Court admitted that it would be difficult to find anything in the Family Law Act 1975 that would empower the Court to make an order affecting the rights and interests of third parties who were strangers to the marriage. They held, though, that the dichotomy to be drawn was between "strangers" and "those in which there is an association of some kind between the third party and one of the parties to the marriage".[69] Here the dependence of the husband upon his mother's family companies, the third parties, his role as director and their provision of the matrimonial home meant that they were not "strangers to the matrimonial cause".

The third factor of the majority's decision was the assertion by Evatt, C.J. and Joske, J. that the continuation of the interlocutory injunction had not occasioned any hardship that outweighed the interest of the wife and children in temporarily retaining possession of the matrimonial home. Thus, the interlocutory nature of the s.114 injunction, the extended definition given to "parties to the matrimonial cause", and the discernment of lack of hardship caused to the "third parties" conduced cumulatively to the issuing of the order that had been sought.

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[68] As yet unreported.

[69] *Cf. Gillies and Gillies* (1981) F.L.C. 91-054 where the Full Court of the Family Court upheld an order which restrained the intervenor (the husband's mother) from continuing proceedings in the Supreme Court for a declaration that the husband held the matrimonial home in trust for her. Evatt, C.J. and Simpson, J. held that the injunction could be sustained *interalia* on the ground that it did not deprive the mother of a right or extinguish her rights, only delaying her from pursuing them at equity.

The approach of Watson, S.J. was somewhat at variance with that of his colleagues. He made the interesting point that *Ascot Investments* was decided before s.15AA of the Acts Interpretation Act 1901 (Cth.) had been enacted.[70] He held that this section enabled the previously almost dormant s.43 of the Family Law Act 1975 to be animated.[71] In particular the philosophical goals of protecting the rights of families and children were drawn attention to by his Honour for the purpose of giving them priority over property interests of third parties in this case. His Honour's approach will, if accepted, give a fluidity to the interpretation of the Family Law Act with the advantage of securing for many parties something more closely akin to justice and the disadvantage of leaving a good deal to the not always predictable discretion of the judiciary.

The reasoning of Evatt, C.J. and Simpson, J. in *Gillies and Gillies* and of the majority in *Harris and Harris* alleviates a number of problems associated with the interpretation of s.114(3) of the Family Law Act 1975. It extends the decision on *Ascot Investments* quite markedly while not obviously being in contradiction with it. It remains to be seen how the High Court will react to the narrow meaning given by the Family Court to "stranger" and the new approach that to some extent circumvents the need for the Courts to define "de facto control".

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[70] S. 15AA (1) In the interpretation of a provision of an Act, a construction which would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.

(2) Nothing in sub-section (1) shall be constructed as authorizing, in the interpretation of a provision of an Act, the consideration of any matter or document not forming part of the Act for any purpose for which that matter or document could not be considered apart from that sub-section.

[71] S. 43. The Family Court shall, in the exercise of its jurisdiction under this Act or any other Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to—

(a) the need to preserve and protect the institution of marriage as the union of a man and woman to the exclusion of all others voluntarily entered into for life;

(b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is reasonable for the care and education of dependent children;

(c) the need to protect the rights of children and to promote their welfare; and

(d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to the children of the marriage.