PROTECTING AGAINST THE OTHER PARTY'S ACTIONS IN FAMILY LAW PROCEEDINGS

By Kristy Nunn and Felicity Wardhaugh

Kristy Nunn is a director and **Felicity Wardhaugh** is a special counsel at Mullane & Lindsay Solicitors in Newcastle.

Snapshot

- Protect yourself against a client's anger towards their ex-partner – it can lead to the client looking for someone to blame and a subsequent negligence claim against you.
- In cases involving property adjustment between de facto or married couples where one party is the sole proprietor of real estate, make sure the client is aware of the risk of their ex-partner further encumbering the property.
- Outline the options open to the client in writing and monitor the situation regularly so you can adjust the strategy if necessary.

It can be a very difficult, costly and frustrating exercise assisting a client to seek orders for the adjustment of property where significant assets such as real estate ('property') are owned solely by a former spouse or de facto partner. There are no easy answers to the fear that during the time it will take to settle the matter or obtain orders from the Family Court or the Federal Circuit Court, the ex-partner will take the opportunity to reduce the value of the property. A significant risk exists if the property has been used as security for a loan or line of credit. Your client has no legal right to communicate with the lender about the loan and no easy prospects of persuading the lender not to advance more funds to the ex-partner.

A solicitor needs to be careful to manage the client's expectations as to how best to address this fear. The likelihood of the fear becoming a reality has to be weighed against the cost of taking legal action. It is important to ensure the issue is recognised and discussed with the client to avoid the client later trying to blame the solicitor if the property is devalued.

What are the options you can discuss with the client?

A caveat is an attractive option, because it is a relatively cheap solution. However, a caveat will not prevent an increase in a line of credit or a further draw-down on an existing mortgage. In addition, a caveator must be careful to ensure that a caveatable interest exists in the property. A claim under the *Family Law Act 1975* is not itself a caveatable interest.

Barry J in *Smith & Dinci* [2011] FamCA 466 noted the difficulties with caveats and stated at [14]:

'The appropriate course always is to seek an explanation for what is happening. If necessary to seek a consequential undertaking and ultimately if that is not forthcoming, to seek orders from the court requiring disclosure or indeed if necessary an injunction restraining the disposition of property.'

Accordingly, a recognised strategy is to seek an undertaking in writing from the ex-partner that they will not further encumber the property. Unfortunately, the undertaking will not be much use, on its own, if the ex-partner does not honour it.

The difficulty with going to the next step and seeking injunctive relief is that there may be no proof that the ex-partner is actually reducing the value of the property, rather there is just a fear of the potential to do so.

In *G & T* (2004) FLC 93-176, O'Reilly J summarised the principles relevant to the granting of an injunction under s 114 of the *Family Law Act 1975* as follows:

'The purpose of interlocutory restraining orders in a case such as this is to preserve the status quo until the trial. In order to exercise its discretion the court is required to find that there is a serious issue to be tried and that the balance of convenience supports the making of an order ... Plainly, it is also a requirement that the restraints sought be reasonably necessary in the sense that if the restraining orders sought are not made there would be a real risk of the defeat of the applicant's claimed interest.'

In *Talia & Talia* [2012] FMCAfam 567 at [145] Brown FM, considering the power under s 114(3) of the *Family Law Act 1975*, thought the court must be satisfied there is a real risk that an application for property settlement will be negated if the injunction sought is not granted. He felt that it was not a sufficient basis for such an injunction that the applicant in question mistrusts the other party or feels anxious. A party is not entitled, as of right, to some form of security over any piece of property, which is subject to potential proceedings.

It therefore may be advisable to attempt to obtain an undertaking at first instance and then have the client monitor the apparent spending habits of the ex-partner to see if there is a need for an injunction. If there are any delays in resolving the matter any decision to rely upon the undertaking alone may need to be revisited.

In addition to the undertaking, asking the ex-partner to authorise the lender to release information as to the loan balance/s to you or the client will enable monitoring to take place. If the undertaking or authority is refused this will help in the quest for injunctive relief.

In a recent case of *Leith & Leith* [2014] FCCA 2394 the wife obtained orders restraining the husband from transferring funds between bank accounts and orders were directed to the lender, a Bank, to prevent the husband from using internet banking facilities.

In summary, the client may face substantial risks regarding the devaluation of property pending adjustment orders if the client is not the legal owner of property. The client will expect you to help protect them against the risk of devaluation. Just like any other legal problem, it is important to be clear to the client about their options, the costs and risks involved and to revisit the situation from time to time in case the strategy you have put into place may no longer be effective. **LSJ**