



## Counsel Family Lawyers

### Family Law Case Update #2: Property

Caroline Counsel

Counsel Family Lawyers

#### ***Sitwell & Sitwell [2014] FamCAFC 5***

*Coram:* Chief Justice Bryant, Justices Thackeray & Walters

*Registry:* Full Court - Sydney

Appeal from *Sydney Family Court - Justice Johnston*

#### Facts

- The wife had filed an application requesting the Court restrain the husband from publishing information related to property settlement proceedings in which they are involved in the Family Court of Australia.
- The parties were married in June 1979 and separated in October 2009 and commenced property proceedings. One of the issues in the primary proceedings was the sale of GE Services, a business carried on in partnership by the husband and wife.
- The husband wanted to acquire the wife's interest in the business, but the wife sold it instead to TG Pty Ltd a company controlled by the wife and three of the parties' sons.

*6. The husband has strong feelings about the sale of GE Services. In an email sent to his son on 15 October 2013, he wrote that "I will not rest until that sale is reversed or I die". On the same day, he emailed the wife in the following terms:*

*Unless I receive an irrevocable undertaking by 2:30 pm today to reverse the sale to [TG Pty Ltd] forthwith, I will put to the media & Government in Australia & overseas, in particular the Baroness in the UK, all that has occurred. You are advised & influenced by very foolish persons. That said, you are responsible for your cruel actions & attitude [sic] over the last 3 long years & I regret that the accounting is coming in a very public way.*

*7. On 17 October 2013, the husband indicated in an email that "if agreement for me to regain [GE Services] is not reached then the public campaign will commence prior to Monday's Court Hearing [being a court hearing that was listed for 21 October 2013]".*



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- The matter had been listed to deal with a costs applications, but at the time the wife sought an injunction in an Application in a Case seeking the husband be prohibited from publishing any information.
- The Orders sought by the Wife were in the following terms:
  1. *That, pursuant to [s. 114\(3\)](#) of the [Family Law Act 1975](#) (Cth). it be ordered that the respondent be restrained from publishing to any person, corporation or other entities, by any means whatsoever, any account of, or information with respect to, allegation made in, statement made or deposed in or for the purposes of, or other detail of any kind whatsoever, of any part of the proceedings which identifies, or might reasonably result in identification of:
    - a. *the parties to the proceedings, or either of them;*
    - b. *a member of the families of the parties;*
    - c. *the deponent of any affidavit sworn or affirmed in the proceedings;*
    - d. *any person who has given evidence in the proceedings;*
    - e. *pursuant to [s121\(3\)\(vi\)](#) of the Act, the identity of any religious faith, organisation or church of which the parties are, or either of them is, have, or has, ever been a member or adherent, or any practice, teaching, pronouncement, or tenet of faith, alleged practice, teaching, pronouncement, or tenet of faith of such faith, organisation or church, or the identity of any leader, officer, elder, teacher or member thereof.**
- The Trial Judge concluded at [11] and [12]:

*In my view, therefore, when one considers on the one hand, the serious imposition on the husband which would flow from restraint in the terms sought against, on the other hand, the protections for the wife which are provided by [FLA] [s 121](#) and the general law, the balance in my view falls against making such an injunction.*

### Appeal Grounds (Issues)

- Trial Judge erred in the application of ss.114 and 121 of the FLA and erred in the exercise of his discretion

### Reasons and Decision of Full Court of the Family Court

- The Court considered various earlier decisions of the Full Court and Family Court and concluded generally the Family Court should not enforce the provisions of section 121 and should only do so in exceptional circumstances.

*Gibb & Gibb and Re Schwarzkopff comprise authority for the proposition that an injunction merely restating the effect of FLA [s 121](#) is unnecessary and undesirable. Such an injunction should only be granted in special circumstances. para [65]*



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*Clearly, each case must be considered on its merits, but there can be no doubt that the mere fact that the proposed publication of material is likely to contravene FLA [s 121](#) is insufficient to justify the granting of an injunction to prevent the publication of that material. In our opinion, evidence to the effect that the material to be published is likely to impact upon the welfare or best interests of children may be sufficient to demonstrate "special circumstances". Similarly, evidence to the effect that the material to be published contains scandalous disparagement of courts or judicial officers which is likely to impair their authority, or serious and baseless attacks on the integrity or impartiality of courts or judicial officers, may also be sufficient to demonstrate "special circumstances", particularly if it is apparent that the good sense of the community may not amount to a sufficient safeguard against such disparagement. It is unnecessary to provide further examples. The category of circumstances which might fairly be described as "special", whether individually or in combination with other circumstances, is not closed. [65]*

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### **CONTACT US**

**CAROLINE COUNSEL FAMILY LAWYERS**

**(03) 9320 3900**

**ccounsel@ccfamlaw.com.au**