

FAMILY LAW PROPERTY interim application to join company to proceedings where the husband seeks orders that the wife return to him certain objects of value where the wife is a US citizen where the wife contributed significant capital to the company where the husband is a sole director of the company where the company owes the wife money where it is ordered that the company is joined to the proceedings where the husband is prevented from pursuing similar proceedings in the Supreme Court. Family Law Act 1975 (Cth) APPLICANT: Ms Southwell FIRST RESPONDENT: Mr Fadley SECOND RESPONDENT: W Pty Limited (ACN ...) FILE NUMBER: SYC 2196 of 2014 DATE DELIVERED: 17 October 2014 PLACE DELIVERED: Sydney PLACE HEARD: Sydney JUDGMENT OF: Stevenson J HEARING DATE: 3 September 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Sirtes SC SOLICITOR FOR THE APPLICANT: Swaab Attorneys COUNSEL FOR THE FIRST RESPONDENT: Mr White SOLICITOR FOR THE FIRST RESPONDENT: Hudson Law Pty Limited COUNSEL FOR THE SECOND RESPONDENT: Mr White SOLICITOR FOR THE SECOND RESPONDENT: Hudson Law Pty Limited ORDERS (1) That W Pty Ltd (ACN ...) be joined as a party to these proceedings. (2) That the husband and W Pty Ltd be restrained by injunction from prosecuting proceedings No ... in the Supreme Court of NSW against the wife pending the final determination of all proceedings in SYC 2196/2014 in the Family Court of Australia at Sydney. (3) That the wife within 14 days file and serve an affidavit which sets out precisely which items listed in paragraph 2 of the husband's Response to an Application in a Case filed 2 September 2014 are currently in her possession and control and the full extent of her knowledge of the whereabouts of the remaining items. IT IS NOTED that publication of this judgment by this Court under the pseudonym Southwell & Fadley and Anor has been approved by the Chief Justice pursuant to s 121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT SYDNEY FILE NUMBER: SYC 2196 of 2014 Mr Southwell Applicant And Mr Fadley First Respondent And W Pty Limited (ACN ...) Second Respondent REASONS FOR JUDGMENT The Proceedings These proceedings concern settlement of property between Mr Fadley and Ms Southwell. They were parties to a de facto relationship which subsisted between 1999/2000 and October 2012. On 22 July 2014, the de facto wife (the wife) filed an Application in a Case, by which she sought inter alia

orders as follows: ... That [W] Pty Ltd ACN ... be joined as a party to these proceedings. That the applicant and [W Pty Ltd] be restrained by injunction from prosecuting proceedings no ... in the Supreme Court of NSW against the respondent pending the final determination of all proceedings in SYC 2196/2014 in the Family Court of Australia at Sydney. That the applicant and [W Pty Ltd] sign all documents and do all things reasonably necessary to effect a stay of the proceedings ... in the Supreme Court of NSW pending the final determination in proceedings in SYC 2196/2014 in the Family Court of Australia at Sydney. By his Response, the de facto husband (the husband) sought a dismissal of the wife's Application in a Case. In the alternative, he sought orders to the following effect: That the wife return certain listed items said to be the property of the company [W Pty Ltd]. That [W Pty Ltd] be permitted to continue to prosecute its claim in the Supreme Court of NSW. That the wife file and serve within 14 days an affidavit which sets out the circumstances whereby any listed items are no longer in her possession or control. That the wife identify any amendments, variations or additions which she has made to any physical or electronic files of [W Pty Ltd] since 24 January 2014. Background The wife was born in 1953 in the United States and is currently aged 60 years. The husband was born in 1958 and is presently aged 56 years. The wife is a citizen of the United States and travels to Australia on a regular basis by way of a tourist visa. She is neither a citizen nor a permanent resident of Australia. The wife contended that she had assets of approximately \$15,000,257 at the commencement of the relationship and earned an income of US \$7,986,445 in the tax year ending 2000. She maintained that the husband had assets of little value at the start of the de facto relationship. In January 2002, the parties purchased a business in partnership with Mr G. This consisted of a Type A collectables business known as Business Band and a media business called Business C. Mr G purchased his share of the business via a company known as D Pty Ltd. The name Business B was changed to Business E in February 2002. The purchase price for the business was \$500,000, which was contributed equally by the wife and D Pty Ltd. Apparently the husband made no contribution to the purchase money. In August 2002, the wife purchased in the joint names of the parties an apartment at Property F, which is situated at G Street, Suburb H. The purchase price was \$4,000,000, which consisted of the wife's funds of \$1,312,122 and a mortgage

advance of \$2,800,000 from the National Australia Bank. At the time of the purchase of this apartment, the wife opened a joint account with the husband for the purpose of paying mortgage and utility costs in respect of the property. The wife maintained that she transferred funds from her United States account to meet mortgage repayments, outgoings in respect of the apartment and the living expenses of the parties. She claimed that the husband made no contribution to these costs. According to the wife, the husband was responsible for the day to day operations of the business and received remuneration from its income after 30 June 2006. She received a payment of \$40,000 from the business only as an overseas consultant in 2006 and 2007. The wife commutes between Australia and the United States on a monthly basis. The wife maintained that she contributed capital to the business in a total amount of \$580,000 between 23 January 2002 and 22 June 2005. This amount was half of the necessary start up capital with the balance being paid by D Pty Ltd. In March 2004, the wife paid \$300,000 to acquire the interest of Mr G in the business. Until this time, the wife and the husband each held a 25 percent interest in the partnership and the remaining 50 per cent was held by D Pty Ltd. On 25 May 2004, the wife established a line of credit secured over the Property F apartment in an amount of \$200,000. In August 2004, she increased the amount to \$900,000 by transferring a sum of \$710,227 from her United States account to the National Australia Bank mortgage facility. The wife again increased the amount to \$1.450 million on 22 June 2007. She claimed that she did so because the husband exceeded the previous limit of \$900,000. On 1 July 2005, the parties caused the incorporation of the company, W Pty Ltd. The wife and the husband held 75 per cent and 25 per cent of the shareholding respectively and they each were directors. The wife maintained that the husband's management of the business began to cause her concern from about 2008. In particular, she claimed that he incurred extravagant expenses; failed to pay vendors and retained for his own benefit Type A collectables purchased by W Pty Ltd. In March 2008, the company was unable to pay the sum of \$1,318,995 to a vendor. The wife refinanced the mortgage on the Property F apartment and reduced the line of credit to \$100,000. Two weeks later she again refinanced the mortgage to an amount of \$3,500,000 and transferred total sums of approximately \$770,000 to an unpaid vendor. In June 2010, the wife resigned as a director of W Pty

Ltd. In June 2011, she transferred her 75 per cent shareholding in the company to the husband. In January 2012, the wife sold the Property F apartment. She claimed that she received no funds from this sale after discharge of the mortgage, line of credit and a US margin loan account. The wife claimed that the husband was uncontactable between 26 February 2012 and 17 May 2013 and again between the end of July 2013 and March 2014. On his own evidence, the husband had no involvement with the company between August 2013 and February 2014. In December 2013, the wife attended the company's office premises. She claimed that she went through everything at the office to evaluate the company's assets and determine how best to vacate the office. The wife alleged further that she discovered certain boxes in the office which contained approximately \$2 million worth of Type A collectable material. On the husband's admission, the company owes the wife approximately \$1 million. The wife proceeded to pack the contents of the office, some of which she caused to be delivered to the husband. She placed the Type A collectable material worth approximately \$2,000,000 in a safe location. A number of documents are currently held by the wife's solicitors at their office (exhibit 40 to the wife's affidavit). On 11 April 2014, the husband commenced the present proceedings. On 30 June 2014, he caused the company to file a Statement of Claim in the Supreme Court of NSW, by which he sought certain relief against the wife.

Consideration (1) Joinder of W Pty Ltd to these proceedings The husband is the sole shareholder and director of the company, W Pty Ltd. It is thus unarguable that the husband has full control of the company and that it is his alter ego. The husband's own evidence was that the company owes a debt in the order of \$1,000,000 to the wife. The husband did not appear to dispute the wife's contention that she injected large amounts of money into the businesses conducted by the company. The wife contends that the husband used funds which she made available to the company to acquire Type A collectables for his own benefit and to meet his personal expenses. Prima facie, therefore, it appears that there has been substantial intermingling of funds of the husband, the wife and the company. These issues inevitably will be explored in the proceedings for alteration of property interests between the husband and the wife in this jurisdiction. Another issue in these proceedings will be the value of the husband's shareholding in W Pty Ltd. Part of that exercise will be a determination

whether various Type A collectables material is beneficially owned by the husband or the company. One possible component of the outcome of these proceedings may be an order that the husband transfer part or all of his shareholding in the company to the wife. For all of these reasons, it seems to me to be appropriate that W Pty Ltd be joined as a respondent to these proceedings. (2) Restraint on the husband and W Pty Ltd prosecuting proceedings against the wife in the Supreme Court of NSW

In the Supreme Court of NSW proceedings the company seeks, by way of substantive relief, orders that the wife return various items to the company or provide an explanation as to their present whereabouts. The company also seeks against the wife damages in the future. In these proceedings, the husband seeks orders for the return to him of various items described as collectables and personal items and payment to him of a cash sum of \$920,000. The wife's dealings with the business, after the parties' separation, is an issue which legitimately can be considered in the context of the contributions of the parties in these proceedings. It thus seems to me that the substance of the company's claim for damages against the wife will be dealt with as an integral part of the resolution of the dispute in this jurisdiction. The company's claim in the Supreme Court of NSW for orders that the wife return certain chattels to the company can be dealt with in this jurisdiction. That course is certainly open to both the husband and the company after its joinder as a respondent. In my view, the husband should never have caused the company to initiate proceedings against the wife in the Supreme Court of NSW. I consider that there should now be an injunction to restrain the company from continuing to prosecute its claim in the Supreme Court of NSW. There is, in practical terms, a duplication of proceedings. The reality at all times has been that there is a dispute between the husband and the wife. Additionally, the business appears not to have traded since the husband ceased involvement and the wife closed the office in December 2013. The husband offered no evidence as to any plan to resume business operations by the company in a constructive manner. In summary, it seems to me that the relief sought by W Pty Ltd in the Supreme Court proceedings can be pursued in this jurisdiction once the company is joined as a party. I will restrain the company and the husband from prosecuting litigation against the wife in the Supreme Court so as to avoid a duplication of proceedings. (3) Return of items The wife disputed that she has possession of certain

items listed in the husband's Response to her Application in a Case. It seems to me to be pointless that there be an order which requires the wife to return items which are not in her possession or control. I will order that the wife file and serve an affidavit which sets out precisely which items are in her possession or control and provide as much information as possible as to the whereabouts of the remaining items. I certify that the preceding thirty five (35) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Stevenson delivered on 17 October 2014. Associate:
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