

FAMILY LAW INTERIM PROPERTY ORDERS Where the husband made an interim application for the sale of two jointly owned properties to fund legal fees Where the wife's application for final orders seeks that she retain all the marital assets Where the wife has an arguable claim Where the wife has made substantial financial contributions Where the wife alleges the husband committed acts of waste and financial misconduct Where the net asset pool is yet to be defined Where granting the orders sought by the husband would render the wife's application nugatory Husband's application dismissed. Family Law Act 1975 (Cth) s 79 Strahan & Strahan (2011) FLC93-466 Zschokke & Zschokke [1996] FamCA 79; (1996) FLC 92-693 APPLICANT: Mr Millerd RESPONDENT: Ms Millerd FILE NUMBER: SYC 2489 of 2012 DATE DELIVERED: 27 October 2014 PLACE DELIVERED: Sydney PLACE HEARD: Sydney JUDGMENT OF: Rees J HEARING DATE: 17 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Jackson SOLICITOR FOR THE APPLICANT: Shead Lawyers COUNSEL FOR THE RESPONDENT: Mr Campton SC SOLICITOR FOR THE RESPONDENT: Broun Abrahams Burreket ORDERS IT IS ORDERED (1) That the Application in a Case filed by Mr Millerd (the husband) on 17 July 2014 seeking interim property settlement be dismissed. IT IS NOTED that publication of this judgment by this Court under the pseudonym Millerd & Millerd 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 2489 of 2012 Mr Millerd Applicant And Ms Millerd Respondent REASONS FOR JUDGMENT Mr Millerd (the husband) and Ms Millerd (the wife) married and commenced co-habitation in 1993. They have three children aged 17 years, 15 years and 12 years. They separated in February 2012 when the wife and the children left the former matrimonial home in Suburb E and the husband remained in the home. The wife and the children then lived with the wife's mother. The application before the Court is the husband's application seeking a sale of two properties. One property is the former matrimonial home in which the husband now lives with his new partner and her daughter. The second property, on L Street, Sydney (L Street) is owned by a company in which the parties are equal shareholders but the husband is the sole director. The husband's application is for interim property pursuant to s 79 of the Family Law Act 1975 (Cth) (the Act). He asks the Court to order the sale of

both properties and the distribution of part of the proceeds, firstly to pay the mortgage over the former matrimonial home (which he asserts is also secured over L Street) and then to pay \$100,000 to each of the parties to be used for legal fees. The wife opposes the application in circumstances where it is her case that the husband has committed waste and acts of financial misconduct. The husband is a financial professional and has a masters degree. The wife says, and it does not appear to be disputed, that the husband handled their financial affairs. The proceedings are conducted as an interim determination on the documents and it is not possible to resolve, in those circumstances, many of the issues in dispute.

BRIEF FINANCIAL HISTORY

In order to place their respective submissions in context, it is necessary to understand the financial history of the marriage, in so far as can be done in an interim hearing. In 1994 the wife's father died, leaving a substantial estate. The wife was entitled to receive her inheritance when she turned 35 years of age. In mid-1994 the parties purchased a property at Suburb U for \$140,000 using a mortgage of \$112,000 and the balance from the wife's savings (the U property). The wife's mother guaranteed the mortgage. In late 1994 they purchased a property in Suburb F for \$558,000 (the F property). The wife's mother gave them \$308,500 towards the purchase price. The balance was borrowed. In May 1995 the wife's mother gave them a further \$35,000 to use for renovations. In 1995 the parties sold the U property for \$146,000. In 2003 the husband was made redundant from his employment. He received a redundancy package which the wife asserts was \$128,474. It is the wife's case that only \$82,957 went into the parties' joint accounts. The wife's mother lent the parties \$110,000 so they could make mortgage payments. That money was repaid from the wife's inheritance. In 2004, the husband incorporated a company, X Pty Limited. The parties are equal shareholders and the husband is the sole director. He also registered the name Z Company. The husband and Mr W were directors of the company. The husband is a consultant in the health services industry. The husband also incorporated V Company of which he is a 75 per cent shareholder. V Company was incorporated in Dubai. In addition, he has a shareholding in N Limited UK (N Limited). The wife says the shareholding is 20 percent. On 20 October 2005 the wife received \$1,000,112.40 from her inheritance. \$870,911 was used to retire debt. In May 2006 the wife was given an apartment in K Road, Suburb U by her

grandmother(U apartment). InFebruary 2007 the wife sold the U apartment, receiving a net amount of \$287,174.The sum of \$80,000 from the sale money was divertedto repay a loan drawn downby the husband secured over the F property, without, the wife says, herknowledge. Thewife then purchased an apartment in Suburb R for \$995,000 (the Rproperty). The balance of the purchase money wasborrowed. She was thesole registered proprietor. InApril 2007, the wife received \$930,000 from her inheritance. InAugust 2007 the wife received a further \$130,000 from her inheritance. InDecember 2007 the parties purchased the former matrimonial home for \$1,275,000.The wifes inheritance was used for the deposit.It is the wifescase that she was unaware that the balance of the purchase price was borrowed. Thewife received a further \$2,966,473 from her inheritance in December 2007.The total amount received was \$5,026,585 InDecember 2009, X Pty Ltd purchased L Street for approximately \$1,600,000. Thefunds came from the wifes inheritance. Thewife did not consent to thepurchase. It is her case that she specifically told the husband that theproperty was too expensive andthat he was not to use her inheritance to buy it.That position appears to be conceded by the husband. Inan email to the wife dated 23 November 2011, the husband says that he missed theauction and later spoke to the agent who toldhim the property had been passedin. The husband says he impulsively signed the documents. TheCommonwealth Bank (CBA) was not prepared to lend X Pty Ltd themoney to purchase L Street. The husband says in hisemail to the wife thatAt that time I was snookered and had to use the offset funds. Theoffset funds were the moneyfrom the wifes inheritance. The husband sayshe believed he spoke with the wife at the time but cannot say she agreed orunderstoodthe implications. InSeptember 2010 the parties sold the F property for \$2.6 million. It is thewifes case that she believed that the propertywas unencumbered howeverthere was a mortgage to the CBA of \$243,350 which was discharged on settlement. Theproceeds of the F property were used by the husband to purchase, through X PtyLtd, shares in T Corporation for \$1.8 million.The wife gives evidence that TCorporation is a private Singapore based company. Thehusband, in his affidavit sworn 17 July 2014 says (the wife) was involvedin this consideration and decision making process. Thewife may have been involved but says she did not agree. Annexed tothe wifes affidavit sworn 14 October 2014is an email from

the husband to the wife dated 23 November 2011. In the email he refers to discussing the investment with the wife and trying to gain her approval. The email makes it clear that, at least a part of the transaction, the purchase of 800,000 shares for \$170,000 was conducted without the wife's knowledge. The husband says that the shares are now worth \$400,000. On 23 February 2012 the wife and the children moved out of the former matrimonial home. The present financial position of the parties is as follows: The husband lives in the former matrimonial home with his new partner and her daughter. She is employed but there is no evidence of her income or assets. The husband's income from his business is, according to his Financial Statement sworn 17 July 2014, \$2,000 per week or \$104,000 per annum. The wife and the children live with her mother. The wife receives the rent from the R property of \$812 per week. The rent from L Street is \$10,068.21 per month which is paid into the X Pty Ltd Bank account. The mortgage payments for the various loans are \$13,828 per week. The balance outstanding under the mortgages is \$1,864,562. The wife values the former matrimonial home at \$1,650,000 and the R property at \$1,250,000. The husband values the former matrimonial home at \$2,000,000 and the R property at \$1,450,000. L Street is agreed to be valued at \$1,900,000. Those are not the only items of property to be considered. The wife in the final proceedings wishes to retain all of the assets. The wife contributed her inheritance of \$5,026,585 together with the proceeds of sale of the U apartment of, she says, \$367,174 (being the net proceeds together with the amount used to repay the \$80,000 draw down) to an asset pool which the husband says is now worth considerably less than her contributions. She argues, in support of that application, that the husband has committed waste in applying \$1.8 million of the parties' funds to the purchase of the T Corporation shares which are now worth \$400,000. Further the wife says that, without her knowledge, the husband obtained loans from the CBA, secured over jointly owned assets, to fund electronic trading and to lend money to his brother Mr M. It is the wife's case that the husband used some of those funds to lend money to N Limited. The R property is now security for three Low Document loans with CBA and a Viridian Line of Credit. The wife says those transactions took place without her knowledge or consent. In relation to the former matrimonial home, the wife's case is that she believed that the purchase was funded from her inheritance. She did not complete any loan

application with the CBA. She did not speak to anyone at the CBA about a loan. She did not sign a letter of offer relating to the loan. She did not sign a mortgage authority. She did not sign the mortgage. It is the wife's case that the husband used money from the former matrimonial home loan to invest in N Limited, to invest in Z Company and that he sent some of the money off-shore. She was unaware of these transactions. The wife says that when the F property was sold, the CBA released the F property as security for outstanding loans and, instead, took security over the R property. The wife says that she did not speak to anyone at CBA about this transaction or authorise the transaction. She did not sign any documents. The wife is about to institute proceedings in the Supreme Court of NSW against the CBA in relation to the advances made, she claims, without her knowledge. The wife has issued subpoenas and has engaged a forensic accountant to undertake a tracing exercise in order to better understand the financial transactions that the husband has completed. That report is not yet available. The wife will seek leave to rely on the report as an adversarial experts report. Having regard to all of those matters, it cannot be said that the wife's claim to be entitled to all of the assets of the marriage is not arguable. The net asset pool is not yet defined. The wife alleges that the husband has lent \$137,029 from joint funds to N Limited, that he has lent \$90,000 to Mr W and that he has invested \$520,000 in Z Company and V Company. Those allegations are untested. The husband in his Financial Statement sworn 17 July 2014 lists his assets as including: T Corporation \$180,126 V Company (75 per cent of shares) \$1 N Limited (UK Company) (20 per cent of shares) \$50,000 S Pty Limited (49 per cent of shares) \$49 V International Pty. Ltd. (100 per cent of shares) \$1. In the notes to the Financial Statement he records that 50 per cent of Z Company was transferred in December 2011 to other 50% equity holder in exchange for 50 per cent equity in V (International) Pty Ltd. It is not possible to ascertain from the document whether this is the same entity as V International Pty Ltd. There is likely to be an issue about the value of both Z Company and at least one of the V companies. In his Curriculum Vitae which the wife said she received in 2007, the husband said: For the last 8 years, developed consulting business ([Z Company]) and an information technology business ([V International Pty Ltd]) with turnover in excess of \$3.25m per annum. Of V International Pty Ltd, the husband said that the business had secured

the exclusive worldwide rights (excluding USA and Canada) to a services management system and that he had established a joint venture in the Middle East. The husband said that the system has been implemented in 25 health services providers in the Middle East and at Y Hospital. In 2012, the husband says that the turnover of that business alone was \$3.25 million. In those circumstances his estimate of value of \$1 may attract some scrutiny. Thus the husband's application falls to be considered in circumstances where there is no certainty as to the final quantum of the asset pool and where the wife has an application on foot that she receives the whole pool. The application of the husband is couched as an interim property settlement. THE LAW It is not disputed that the principles which give guidance to such an application are those set out in the decision of the Full Court in Strahan & Strahan (2011) FLC 93-466 (Strahan). It is not disputed that an order for interim property settlement can be made where it is in the interests of justice and appropriate to do so. However, the Full Court in Strahan, at 85,634, cited with approval the decision of an earlier Full Court in Zschokke & Zschokke [1996] FamCA 79; (1996) FLC 92-693 where the Court held: [i]t would seem an essential part of such an order that the advance of funds be a matter which the trial Judge must take into account, or at least have regard to, in the determination of the final property settlement (emphasis added). At 83,220 the Full Court said: it must ... be an integral part of any order under s 80(1)(h) for an advance of funds from the party in possession of the bulk of the party's assets [sic] to the other party, that such advance can then be taken into account in the property settlement, that is, it must be capable of satisfying part of the other party's entitlement (emphasis added). At 83,221 the Full Court again identified as a matter for consideration whether [the applicant] will ultimately be entitled to sufficient funds by way of property settlement to meet a requirement ... that the amount [under the] order could be taken into account in the eventual property settlement order. At 85,646 the Full Court in Strahan said: 136. As to the third matter identified at 79,930 by the Full Court in Harris, in discussion before us it was described as the adjustment issue or claw-back issue. It was submitted by senior counsel for the Wife that it is relevant to consider whether an order would give the applicant more than they would be indubitably entitled to on a final hearing or alternatively would it give them so much that it could not be adjusted on a final hearing? As we have observed the Full Court in

Zschokke at 83,220-221 stressed the importance of consideration of the adjustment issue if the power in s 80(1)(h) of the Act is being exercised. We accept the submission and observe that this matter is relevant because the discretion conferred by the power in s 79 is to make such order as the Court considers appropriate provided it is just and equitable to make the order in circumstances where the power will not be exhausted by the interim order. As Bryant CJ and Coleman J observed in *Gabel v Yardley* at [69] and [72] the interim order must be capable of variation or reversal without resort to s 79A of the Act or appeal. As Finn J said at [126] the interim order must be capable of alteration at any time prior to, or as part of, the final exercise of the s 79 power. And at 85,646, paragraph 137: 137. Once a court proceeds to exercise the power in s 79 of the Act, being in the substantive phase, a court is required to undertake consideration of the matters in s 79(4) including by reference to s 79(4)(e) the matters in s 75(2) so far as they are relevant. However consideration of such matters may be brief and if it is established that it seems likely to the Court that ... the applicant ... will be likely to receive by way of property settlement a sum sufficient to cover the advance, that would seem to be sufficient to enable the order sought to be made: *Zschokke*; *Polletti and Polletti per Nygh J* and *Wenz v Archer*. As senior counsel for the Wife submitted, provided scope can be found within the assets of the parties for an order of the size sought ... then that should be the end of the matter. In other words, in such circumstances the applicant would only be receiving what he or she was entitled to receive when the power was exhausted. Counsel for the husband was unable to refer to any passage from *Strahan* which supported his contention that, in circumstances where the Court could not be satisfied that any order made by way of interim property settlement could be clawed back, to use the language adopted in *Strahan*, an interim property settlement order could be made. I cannot be satisfied that any order for the payment of money to the husband, which he will then disburse to pay his legal fees, can be clawed back. If the two properties at Suburb E and L Street are sold in accordance with his application, then that order can never be reversed so as to give effect to the wife's application that she retains those properties. The net asset pool is not capable of being ascertained. The wife's waste argument has not been determined. It cannot be assumed, even on the brief consideration mandated in *Strahan*, that the husband will be entitled to the amount he seeks.

Of more significance, however, is the fact that to grant the husband's application by way of interim orders would render the wife's application nugatory. The husband's application will be dismissed. I certify that the preceding sixty-eight (68) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Rees delivered on 27 October 2014. Associate: Date: 27 October 2014

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