

FAMILY LAW Interim Property agent appointed for sale of property wife sole owner of property wife did not sign agency agreement wife wants to appoint an independent agent for the sale of the property where agent for sale of property was acting on husband's instructions who is not legal owner new agent appointed for sale of property Family Law Act 1975 (Cth) s114 APPLICANT: Mr Bratic RESPONDENT: Ms Bratic FILE NUMBER: SYC 5747 of 2013 DATE DELIVERED: 17 October 2014 PLACE DELIVERED: Parramatta PLACE HEARD: Sydney JUDGMENT OF: Hannam J HEARING DATE: 9 September 2014 REPRESENTATION SOLICITOR FOR THE APPLICANT: Hall Partners COUNSEL FOR THE RESPONDENT: Mr Jackson SOLICITOR FOR THE RESPONDENT: Tomasevic Poljack Lawyers ORDERS (1) Order 1 of Orders dated 2 June 2014 is discharged. (2) Within 14 days from the date of these Orders, the respondent wife is to do all acts as necessary to instruct the President of the Real Estate Institute of New South Wales to appoint an independent real estate agent to sell the Suburb C property, which is the property situated at and known as B Street, Suburb C, by way of private treaty. (3) The applicant husband is to cause the company D Pty Ltd trading as E Pty Ltd to pay the costs of and incidental to such appointments as and when they fall due. (4) The independent real estate agent appointed pursuant to Order 2, is to provide a valuation of the property at B Street, Suburb C, for the purposes of the sale. IT IS NOTED that publication of this judgment by this Court under the pseudonym Bratic & Bratic 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 PARRAMATTA FILE NUMBER: SYC 5747 of 2013 Mr Bratic Applicant And Ms Bratic Respondent REASONS FOR JUDGMENT INTRODUCTION Ms Bratic (the wife) and Mr Bratic (the husband) are involved in property settlement proceedings, which are yet to be fixed for trial. A central asset in the proceedings is the former matrimonial home at B Street, Suburb C (the Suburb C property), which is registered in the name of the wife. Both parties wish for this property to be sold. On 2 June 2014 the court ordered that F Real Estate (F) be appointed as the agent for sale of the Suburb C property. Subsequently the wife lost confidence in the principal of that agency and refused to sign the agency agreement. The husband seeks orders to restrain the wife from proceeding with the sale through any other agent and appointing him as trustee for the sale. He also seeks

orders in relation to funds held in a solicitors trust account from the sale of another property. The wife opposes the husband's application and seeks discharge of the order appointing F as well as seeking an additional order appointing a new agent for the sale. BACKGROUND The applicant husband was born in 1969 and is 45. The respondent wife was born in 1972 and is 42. The parties commenced living together in January 2004 and married in 2005. They separated in January 2013 after cohabitating for almost 9 years and are not yet divorced. The husband is a health professional and the wife is also a qualified professional. The parties incorporated the company D Pty Ltd in March 2006 (the company). The husband worked as a Chiropractor and the wife worked as the Manager of their joint business operated through the company trading as E Pty Ltd. The husband owned a property at G Street, Suburb H (G Street) and the building on it prior to cohabitation. The company's registered office is located at this building, and the husband currently also resides there. In 2008, the parties purchased the adjacent property at I Street, Suburb H (I Street), which is a vacant block of land. The wife is the sole registered owner of the former matrimonial home, being the Suburb C property. A loan to the parties is secured by a mortgage over the Suburb C property. The loan is also secured by a guarantee given by the wife and there was also a mortgage over I Street. Some months after separation, in November 2013 the wife engaged Mr J, who was at that stage a real estate agent employed by F in relation to the proposed sale of the Suburb C property. Mr J carried out an inspection of the property and based on this inspection F advised the wife that an asking price of offers above \$2,100,000 is our suggestion. The wife signed an exclusive agency agreement with F on 13 November 2013 for four months, until March 2014. This agreement confirmed that the property was to be offered at \$2.1 million and that the agent's opinion as to the current selling price was \$2.0 to \$2.3 million. F then commenced advertising the property and Mr J was the contact agent. Mr J was also described as the selling agent by the principal of F. Mr J dealt with the wife in relation to the property until she ceased employment with F. The date that this occurred is in dispute. On 19 February 2014 orders were made, including that the husband cause the company to pay the wife maintenance of \$1,000 per week, \$3,000 per week for mortgage repayments for the Suburb C property and \$140 per week to the wife for the payment of

rates, and building and contents insurance for the Suburb C property. Order 6 directed the parties to jointly instruct Mr K of L Valuers as a single expert to prepare a valuation report for three properties (Suburb C, G Street and I Street). Mr K valued the property at Suburb C at \$1.6 million. The wife considers Mr K's valuation no longer relevant as five months have passed since the valuation. On 24 March 2014 further orders were made with the consent of the parties. The orders gave the wife exclusive occupation of the Suburb C property, required the husband to sign a Hardship Assistance Agreement for the mortgage on I Street and ordered that the parties were not to further encumber any of the three properties. Orders were also made for the appointment of Ms M as selling agent for I Street. A further order required the wife to direct the selling agent for the Suburb C property to liaise with both parties as to the process of sale and to instruct the agent to sell the property and to market it for sale at a price recommended by that agent. There is a dispute between the parties as to whether Mr J the selling agent was still employed at this time at F. On 17 April 2014, the wife instructed Mr N, the principal of F to reduce the price on the Suburb C property to \$1.9 million. On 5 May 2014 the husband filed an application seeking the sale of I Street and the Suburb C property. On 22 May 2014 the wife signed the agency agreement to appoint Ms M as selling agent of I Street. Emails between Mr N and Mr Hall, the husband's solicitor, indicate that Mr Hall drafted a letter for Mr N to place the F letterhead and send to both parties. The letter dated 30 May 2014 in virtually the same terms as drafted by the husband's solicitor indicates that Mr N's agency agreement with the wife ended on 13 March 2014 and that the wife's original request for the property to be marketed with an asking price of \$2.1 million was in his opinion too high. Mr N also stated in the letter drafted by Mr Hall that he later refused to act on the wife's instructions to lower the asking price to \$1.9 million because the husband was of the opinion that this would make little difference. Mr N said in the letter he believed that the property should undergo a five week marketing campaign and if not sold within that time, should undergo a four week auction campaign and suggested an asking price of \$1.695 million. On 2 June 2014, orders were made for the parties to appoint F Real Estate as the agent for the sale of the Suburb C property. Since this date the husband or his solicitor only have dealt with the principal of F. The principal has not contacted the wife in relation to the sale of Suburb

C, even though he is aware that the wife is the sole registered proprietor and that the husband was not ordered on 2 June to be a trustee for sale, and that such an order had been sought by the husband. The wife continued to deal with Mr J, concerning the sale of Suburb C who, she says she still believed to be the selling agent for the property. On 16 June 2014 the principal of F met with the husband and the husband gave him a cheque for \$3,950 for the marketing campaign for the sale of Suburb C. The principal prepared and dated an Agency Agreement which he gave to the husband, which the husband forwarded to the wife via email for her signature. The wife was not involved in the preparation of the Agency Agreement and did not sign it. This agreement specified that the property would be offered for sale at over \$1.695 million and that the agent's opinion as to the current selling price was \$1.68 to \$1.725 million. On 18 June the wife's solicitor wrote to Mr J at the F address, where she was listed on the F website as a registered real estate agent. In this letter the wife notified Mr J that she wished Mr J to be appointed as the agent for three months to sell the Suburb C property under a new agency agreement with the sale price being from \$1.8 to \$1.9 million. According to Mr J she was dismissed the following day, though this is disputed by the husband. On 27 June the sale of I Street was completed and the net proceeds of \$318,828 were deposited into a solicitor's trust account. The parties are still to pay their Capital Gains tax relating to this sale. Previously, the husband filed a complaint to the Department of Fair Trading complaining about the handling of the Suburb C property by F Real Estate. Notwithstanding this complaint he now also seeks that F sell the Suburb C property. In July 2014 the wife also filed a complaint to the NSW Department of Fair Trading in relation to the handling of the sale of the Suburb C property by Mr N, the principal of F. As at 1 July 2014, the parties agreed that the amount outstanding on the loan secured by the mortgage on the Suburb C is about \$1.55 million. The wife contends that in addition, a loan and overdraft facility (also secured by a mortgage on G Street) and the wife's guarantee will also need to be repaid from the proceeds of the sale of the Suburb C property. She says that the total indebtedness is \$1.72 million, though as I understand it, this matter is indisputed.

THE ORDERS SOUGHT

On 2 July 2014 the husband filed an Application in a Case seeking orders that the wife be restrained from preventing the selling agent continuing with the sale of the Suburb C property. He

also seeks to be appointed the Trustee for sale of the property and other orders. It is essentially the husband's contention that the wife has been hindering the sale of the Suburb C property. In my view, the evidence does not support this proposition. The wife has taken a number of steps to actively advance the sale of the property and clearly wishes to obtain the maximum selling price. Her greatest difficulty is with the principal of F in whom she has lost confidence. Although this Real Estate Agency was originally her choice, it is clear that for the wife this choice was made as the Agency employed Mr J, the selling agent. It is not possible for me to determine on the available untested evidence when Mr J ceased working at F and whether there was some other means by which Mr J was able to continue to sell the Suburb C property. It appears that each of the parties interpreted the orders made on 2 June differently. The husband and his solicitor continued to deal with the principal of F and the wife dealt with Mr J. Each of these agents made different recommendations about prices, market strategy and the like. It appears, however, that although the husband had not been appointed as trustee for sale his actions were more akin to those of a trustee. The agent dealt exclusively with the husband or his solicitor rather than the wife who was the sole registered proprietor. There seems no doubt that the wife has lost confidence in the principal of F and even though the husband seeks that the Agency continue in that role, at one stage he also made a complaint himself against Mr N. The orders the husband is seeking are in the form of an injunction under s114 of the Family Law Act 1975 (Cth) (the Act), that the wife be restrained from preventing Mr N or any person nominated by him in their capacity as Agent for the sale of the Suburb C property for taking certain action including the erection of a For Sale sign or the placing of advertising for sale on a real estate website. The thrust of the husband's submissions seems to be directed at the unfairness that may flow to Mr N if another agent were to be appointed due to the work Mr N has already undertaken connected with the marketing of the Suburb C property. The husband's case outline is also couched in terms that the principal of F wished for the matter to be returned to court and that it is the principal's perception that the wife is not cooperating with the sale process. Significantly, it was ultimately conceded on the husband's behalf that there would be no prejudice to him if a new agent were to be appointed, as sought by the wife. The wife seeks to appoint an independent real estate agent to sell the Suburb

Cproperty by way of private treaty and for all costsbe paid by D Pty Ltd. It isher case that she has lost confidence that F will obtain the best sale price forSuburb C. The wifehad initially also sought an order that the valuation ofSuburb C made by Mr K, the previous valuer be updated, but in the courseofargument conceded that it was appropriate that the new independent agent shesought to sell the property also value it. Theparties also seek opposing orders in relation to the net proceeds of sale heldin the solicitors trust account followingthe sale of I Street. Althoughin his Application in a Case the husband was silent as to this issue, in oralargument he soughtan order that the entirety of the funds in the trust accountbe paid to the wife. The wife sought in her application that followingthepayment of the Capital Gains Tax debt incurred by the parties and theirrespective debts to the Commissioner of Taxation, thata sum of \$96 539 be paidto her by way of an interim payment for costs and the balance to remain in thecontrolled monies account.However, this was not pursued in the hearing where itwas put on the wifes behalf that she opposed an order that she receiveall of the funds from the sale of I Street in the trust account. Thewife also seeks orders restraining the husband from his individual capacity andcapacity as a director of the parties jointcompany, D Pty Ltd, fromdoing any act or thing that may interfere with the use and occupation of theSuburb C property by the wife.

THE LAW & DISCUSSION Sofar as the husbands case is concerned, section 114(3) of the Act providesthat a Court may grant an injunction in any case in which it appears tothe Court to be just or convenientto do so. Suchorders are generally made in circumstances where it is feared that a party maydispose of property or assets under their control,other than in the ordinarycourse of business. The effect of the orders sought in this case would be torequire the wife to continueto have the property sold by an agent in whom shehas lost confidence pursuant to a contract in which she has had no input. Incircumstanceswhere I have not found that the wife has obstructed the sale andhas to the contrary acted in a manner to maximise the sale price,and where nodetriment to the husband has been identified I do not find it just or convenientto make the orders sought. Thebalance of the orders sought by the husband were not further pursued in thecourse of argument except one in relation to the proceedsof sale from I Street.The husband sought an order that the money held in a controlled monies accountwith a solicitor followingthe sale of I Street be

directly applied to the mortgage on the Suburb C property. This order was amended in the course of proceedings and it was submitted that the wife should receive at least \$285 753 from the monies held in trust, because she was likely to be entitled to at least this amount in any final property proceedings. The wife opposed this order being made as she says the money is to be applied for the parties' future Capital Gains Tax liabilities, and also their current ATO liabilities. The wife sought orders in her response for the money to be directly applied to the payment of any Capital Gains Tax incurred by the parties in relation to the sale of I Street and then to be applied to both parties' ATO debts, and following a sum of \$96 539 to be paid to the wife by way of interim costs. However, this was not further developed in the argument. The only order being ultimately sought by both parties in the Application in a Case related to the sale of the Suburb C property. There is dispute between the parties about how the money in the trust account should be applied and in particular which loans should be paid out. This depends on various facts that need to be found and the Court was not in a position at this interim stage to make these findings to ground these further orders. These are matters that are best suited to the final property settlement hearing between the parties. For the reasons given, I propose to make the orders sought by the wife in relation to the sale of the Suburb C property. The orders that I make are as set out at the forefront of these reasons for Judgment. I certify that the preceding forty (40) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Hannam delivered on 17 October 2014. Legal Associate: Date: 16 October 2014

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