

LODER

v.

AYSOM AND OTHERS

DENYLLEK PTY LTD

v.

AYSOM AND OTHERS

BERTOLI

v.

AYSOM AND OTHERS

JUDGMENT

18.2.88

MASON C.J.
BRENNAN J.
DEANE J.

LODER

v.

AYSOM AND OTHERS

DENYLLEK PTY LTD

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The proposed appeals seek to challenge the making of orders under s.85 of the Family Law Act 1975 (Cth) setting aside a deed of charge dated 13 June 1986 and certain associated guarantees and the exercise of a power of sale pursuant to the deed. The applicants submit that the determination of this issue gives rise to a question of general importance concerning the principles to be applied in setting aside transactions entered into by strangers to the marriage. However, it seems to us from the judgments in the Family Court that the interpretation of s.85 was not a critical question in the contest in that Court. The making of the orders was apparently resisted on the ground that the

deed was not entered into to defeat an anticipated order in favour of the wife in the Family Court proceedings, a question of fact. There was evidence to support the conclusion that the deed was entered into for that purpose.

The possible retrospective operation of such an order under s.85 and the need to protect the interests of third parties in the framing of such an order are questions of some importance. But we note that the Full Court has remitted the case to the trial judge for further consideration of the orders to be made against the applicants Messrs Loder and Bertoli who, having been appointed by Denyllek Pty Limited as receivers and managers of the business of Torumba Pty Ltd, purported to exercise a power of sale conferred by the deed of charge. The order setting aside the sale was complied with by the purchasers (the respondents Sid Moore Racing Pty Limited and Sydney Victor Moore) and they seek relief in some form against Messrs Loder and Bertoli. As the final orders (if any) affecting their respective interests are yet to be made, it would be premature for this Court to embark on a consideration of the orders made under s.85 before the trial

judge has finally dealt with the matters remitted to him. It would not be appropriate to grant special leave to appeal against what is, in effect, an interlocutory order when the Family Court has not yet determined whether and in what manner its jurisdiction under s.85(3) should be exercised.

The basic objection raised against the making of any order or any further order against the respective applicants is that natural justice has been denied them. That submission was strengthened by the production of the wife's originating application for the impugned orders already made. The application was directed solely to the husband and gave him alone notice that the orders sought or similar orders might be made if he did not appear. Although copies of the application were served on the applicants, they were not cited to appear as parties, presumably because it was thought that that was unnecessary for the reason that the Family Law Rules prescribe no appropriate procedure. But Mr Loder and Denyllek Pty Limited were notified that an application for the orders set out in the application was being made and Mr Bertoli was notified before the making of the order against him personally. However formidable the

procedural difficulties are or were in the way of making orders against the applicants, particularly against Mr Bertoli, the argument before the Full Court seems to have ignored those difficulties and to have focussed on the reasons why Messrs Loder and Bertoli and Denyllek Pty Limited chose not to appear formally to contest the application. That argument lost any real force once it was held, as the Full Court effectively held, that their decisions not to appear were consciously made and were based on what turned out to be a misappreciation of the substantial (not the procedural) merits of the applicant's case. As there are no orders presently extant against the personal applicants, it is not appropriate to grant special leave to them to appeal against the interlocutory orders made by the Full Court. Nor is it appropriate to grant special leave to appeal at this stage to Denyllek Pty Limited, which Nygh J. found to be the husband's alter ego.

We do not doubt that the question of the citation of persons not parties to the marriage in proceedings under s.85 of the Family Law Act and the scope and operation of s.85 are questions of general public importance. But as

those questions would seem to have been ignored by both the applicants and the respondents in the Family Court, this case is not a suitable vehicle for their consideration by this Court, at least at the present stage of the litigation.