

FEDERAL CIRCUIT COURT OF AUSTRALIA

STIRLING & THORPE

[2020] FCCA 3002

Catchwords:

FAMILY LAW – Financial orders – property – maintenance – enforcement.

Legislation:

Family Law Act 1975 (Cth), ss.4, 72, 74, 75, 77, 77A, 79A, 80, 82, 90AA, 90AB, 90AC, 90AD, 90MT, 105, 106A, 114

Federal Circuit Court Rules 2001 (Cth) rr.25B.07, 25B.09, 25B.13, 25B.2

Cases cited:

In the Marriage of Walters & Walters (1986) FLC 91-733

Collins & Collins (1977) FLC 90-286

Hickey v Hickey & Attorney-General of the Commonwealth (Intervener) (2003) FLC 93-143

In the Marriage of Mallet [1984] HCA 21

Mullane v Mullane (1983) 158 CLR 436

Stanford v Stanford (2012) 47 Fam LR 481

Marlowe-Dawson v Dawson (No.2) (2014) 53 Fam LR 568

Hunt v. Hunt (2006) 36 Fam LR 64

Sunbird Plaza Pty Ltd v Maloney (1988) 166 CLR 245

Andar Transport Pty Ltd v Brambles Ltd (2004) 217 CLR 424

Turner Manufacturing Co Pty Ltd v Senes [1964] NSW 692; *Permanent Trustee Co of New South Wales Ltd v Hinks* (1934) 34 SR (NSW) 130

Applicant: MS STIRLING

Respondent: MR THORPE

File Number: SYC 6078 of 2014

Judgment of: Judge Kemp

Hearing date: 17 September 2020

Date of Last Submission: 17 September 2020

Delivered at: Sydney

Delivered on: 11 November 2020

REPRESENTATION

Counsel for the Applicant:	Mr O'Reilly
Solicitors for the Applicant:	Solari & Stock
Counsel for the Respondent:	Ms Jeliba
Solicitors for the Respondent:	Pearson Emmerson Myer

THE COURT ORDERS THAT:

- (1) Pursuant to Rule 25B.13(d) of the *Federal Circuit Court Rules 2001* (“**the Rules**”), the respondent husband, forthwith, make all payments due and owing under order 36 of the orders of the Family Court of Australia made on 5 December 2014 as varied by the orders made in this Court on 15 February 2019 (together described as “**the final orders**”).
- (2) Pursuant to Rule 25B.13(a) of the Rules, a declaration be made that the husband owes the wife a sum to be determined upon the filing of an affidavit by the wife deposing to the sums outstanding pursuant to order 36 with such affidavit to be filed and served within 14 days of today’s date.
- (3) If the husband disputes the sums deposed to by the wife in order 2, above, he is to file and serve any responsive affidavit material within 7 days of the wife’s compliance with order 2.
- (4) The husband’s Response to the wife’s Application in a Case filed on 31 March 2020, is, otherwise, dismissed.
- (5) The wife’s costs of her Application in a Case filed on 20 March 2020 be reserved.

- (6) The wife to provide to the husband, within 14 days of today's date, a schedule outlining her costs including her solicitor and counsel's fees.
- (7) The matter be listed for callover on **1 March 2021 at 11.30am** for the purposes of allocating a date in respect of the Court's determination of the sum referred to in 2, above together with the determination of any reserved costs.
- (8) Leave is granted to the parties to file with my Associate executed Consent Orders/Terms of Settlement 3 business days prior to the adjourned date and if, appropriate, orders can be made in Chambers, the above adjourned date may be, administratively, vacated.

IT IS NOTED that publication of this judgment under the pseudonym *Stirling & Thorpe* is approved pursuant to s.121(9)(g) of the *Family Law Act 1975* (Cth).

**FEDERAL CIRCUIT COURT
OF AUSTRALIA
AT SYDNEY**

SYC 6078 of 2014

MS STIRLING
Applicant

And

MR THORPE
Respondent

REASONS FOR JUDGMENT

Introduction

1. This applicant wife (“**the wife**”) filed an Application in a Case on 20 March 2020 seeking enforcement of certain of the final orders (not being the parenting orders) made by consent on 5 December 2014 (“**the 5 December 2014 orders**”), as set out in paragraph 2 below and as varied by further consent orders made on 15 February 2019 (“**the 15 February 2019 orders**”), as set out in paragraph 3 below, (together described as “**the final orders**”) in terms of the following proposed orders:

- (1) That pursuant to Rule 25B.13(d) of the Federal Circuit Court Rules 2001 (“**the Rules**”), the respondent husband (“**the husband**”) forthwith, make payments in accordance with order 36 of the final orders (“**order 36**”), and the husband shall indemnify the wife and keep the wife indemnified in relation to all payments pursuant to order 36, including mortgage repayments, strata levies (such strata levies are to include all quarterly strata levies but not the capital works special levy or other special capital works levies (“**sinking fund**” levies), council rates and water rates.*

- (2) *That pursuant to Rule 25B.13(a) of the Rules, a declaration be made the husband owes the wife the sum outstanding as at the date of any orders made by this Honourable Court, pursuant to order 36.*
- (3) *That pursuant to Rule 25B.13(b) of the Rules, the husband reimburse the wife any monies paid in relation to order 36, within 7 days.*
- (4) *That pursuant to Rule 22.01 of the Rules, that the husband pay interest on the outstanding amount payable pursuant to order 36 as at the date the orders are made.*
- (5) *That the husband pay for the wife's costs incidental to this Application, including the wife's solicitor and counsel fees.*

5.1 For the purpose of this order, leave be granted for the wife to provide the husband, within 7 days, a schedule outlining the wife's solicitor and counsel's fees for the hearing and for the husband to pay for the wife's solicitor and counsel's fees within 7 days of receipt of the schedule.

- (6) *That in the event the Court determines that the categorisation of order 36 is a maintenance order pursuant to section 72 of the Family Law Act 1975 (“**the Act**”), then the Court list the matter for hearing of the wife's Application under section 82(4) of the Act and direction be made for each party to file and serve their respective trial affidavits and Applications.*

2. Relevantly, the 5 December 2014 orders and notations (see Exhibit “Court 1” – excluding the parenting orders set out in paragraphs 1-21 thereof) were made in the Family Court of Australia following the filing of an application for consent orders on 26/29 September 2014 and after the filing of an affidavit by the husband affirmed on 14 November 2014, together with a letter from the wife dated 13 November 2014 agreeing with the husband in advance as to the matters set out in his affidavit (Exhibit “Court 2”) which responded to a requisition raised by Registrar Chayna on 7 October 2014, and which provided as follows:

Property

22. *On or about December 2014 or an alternate date as otherwise agreed between the parties, the parties shall do all things necessary to execute all documents necessary to place the property known and situate at B Street, Suburb C, in the state of New South Wales, folio identifier ... (“**the B Street, Suburb C property**”) on the market for sale by private treaty at a price agreed in writing between the parties, and shall cause the property to be sold as follows:*

22.1 *Sign all authorities and execute all documents necessary to list the property for sale with an agent as agreed between the parties, or in the absence of agreement, D Real Estate, Suburb C (“**the agent**”); ·*

22.2 *sign all authorities and execute all documents necessary to instruct a solicitor to act on the sale;*

22.3 *the parties shall be responsible for giving joint instructions to the selling agent and the solicitors acting on the sale;*

22.4 *neither party will, without the express written consent of the other, cause any other agency agreement to be effected or binding on the parties;*

22.5 *neither party will encumber or otherwise deal with the property without the prior written consent of the other;*

22.6 *if the parties cannot agree on a sale price, the sale price will be determined by a valuer appointed by the parties, or failing agreement, by a valuer appointed by the President of the New South Wales Institute of Valuers on the written request of either party, and the parties shall share the costs of the Valuer equally;*

22.7 *in the event that the property is not sold within 60 days of being listed for sale, the property is to be sold at auction following an auction program recommended by the agent. In the event a prospective purchaser makes a bid on the property prior to the proposed date for auction, the parties*

may agree on a price and to sell to such a purchaser in writing. In the event the parties are unable to agree on a price then the property shall proceed to auction;

22.8 the parties or either of them may lawfully bid at the auction;

22.9 a reserve price shall be fixed by written agreement between the parties and failing agreement within 14 days of the auction date being set, the reserve price will be determined by a valuer, (other than the auctioneer) appointed by the parties, or failing agreement, by a valuer appointed by the President of the New South Wales Institute of Valuers upon the written request of either party, and the parties shall share the costs of the valuer equally.

22.10 The parties agree to provide access to the property at all reasonable times to prospective purchasers and the agent, or his or her representative;

22.11 The parties agree to maintain the property in reasonable condition and repair pending completion of the sale; and

22.12 In the event that the reserve price for the property is not reached at auction on the first auction date., the parties may then negotiate with the highest bidder or any other bidder present at the auction or any other interested party in an effort to sell the property at a price not more than 10% below the reserve price. If a contract for the sale of the property is not exchanged at a price of not more than 10% below the reserve selling price within 14 days of the day of the auction, the parties agree to forthwith re-list the property for further auction program for sale by another Real Estate Agent as nominated by the President of the Real Estate Services Council or his/her nominee in the same manner as required by these orders.

23. Upon the settlement of the sale of the B Street, Suburb C property, the proceeds of sale be disbursed in the following manner and priority:

23.1 *In payment of any amount necessary to discharge the mortgage to ANZ Mortgage number ... secured by the title of the B Street, Suburb C property in the amount of approximately \$1,057,041,62 (balance as at March 2014);*

23.2 *In payment of all legal costs and disbursements, agent's commissions, costs of marketing, and expenses of the sale;*

23.3 *In payment of costs incurred, if any, in relation to the determination of value of selling price by the President of the Real Estate Institute of New South Wales or his/her nominee;*

23.4 *In payment and adjustment of all outstanding council and water rates and other utilities;*

23.5-23.6 – These are blank

23.7 *The balance to be divided between the parties as follows:*

(a) *the sum of \$430,000.00 to the wife, **conditional upon the husband providing a continuing contribution to mortgage payments as envisaged below in order 36.***
[emphasis added here]

(b) *the balance remaining to the husband.*

24. *That pending the settlement of the sale of the B Street, Suburb C property, the husband shall be solely liable for and shall indemnify the wife as to all costs of maintaining the property including:*

(a) *interest-only mortgage payments;*

(b) *any repairs and improvements to the property in preparation for sale as agreed between the parties;*

(c) *the cost of a cleaner in the amount of \$75.00 per week until such time as the wife and children vacate the B Street, Suburb C property;*

(d) such other sum as otherwise agreed between the parties.

25. *That from the date of these orders until 31 October 2014 the husband shall be solely liable for and pay to the wife the sum of \$8,325.00 per month (or calculated pro rata for any period of less than one month) which provides for day to day expenses such as family medical, dental, clothing, groceries, transport, utilities, insurances, childcare, children's activities and the sum of \$243.00 per month, being funds that are to be deposited into the family savings account.*

26. *That within seven (7) days from the date of these orders the parties shall do all acts and things to ensure that the entirety of the funds held in the parties' joint account with ANZ Bank (BSB ... Account number ...99) are transferred to the husband for his sole benefit and to the exclusion of the wife and the parties shall do all acts and things and sign all documents necessary to close that account.*

Spousal Maintenance

27. *That from 1 November 2014 until 31 December 2020 and subject to the wife's income falling in the range below the amount of \$75,000.00 gross per annum, and subject to the husband's income remaining at an amount above \$300,000.00 gross per annum the husband shall pay to the wife by way of interim spousal maintenance, monthly in advance on the first day of each month, the sum of \$2,680.00 per month, such sum to be increased annually on 1 September with the first increase to occur on 1 September 2015 in accordance with variations in the consumer price index for Sydney all groups, in addition to including the wife on the policy for family cover private medical health insurance which he shall pay and be solely liable.*

(a) That in addition to the provisions contained in order 27, from 1 November 2014 until the wife and children vacate the B Street, Suburb C property, the husband shall pay to the Wife an additional sum of \$500.00 per month (and/or

calculated pro rata for part thereof) with the first payment to occur on 1 November 2014 and each month thereafter on the 1st day of the month.

Change in wife's income

28. *That, in the event that during any period prior to December 2020, the wife's income exceeds the amount of \$95,000.00 gross per annum, the spousal maintenance payments envisaged above in order 27 shall cease.*
29. *That, in the event that during any period prior to December 2020, the wife's income falls within the range of \$85,000.00 to \$94,999.00 gross per annum, the spousal maintenance payments envisaged above in order 27 shall decrease to an amount equivalent to 60% of the payments outlined in order 27.*
30. *That, in the event that during any period prior to December 2020, the wife's income falls within the range of \$75,000.00 to \$84,999.00 gross per annum, the spousal maintenance payments envisaged above in order 28 shall decrease to an amount equivalent to 80% of the payments outlined in order 27.*

Change in husband's income

31. *That, in the event that during any period prior to December 2020, the husband's income falls in the range of \$250,000.00 to \$299,999.00 gross per annum, the husband shall pay an amount equivalent to 90% of the spousal maintenance payments envisaged above in order 27.*
32. *That, in the event that during any period prior to December 2020, the husband's income falls in the range of \$200,000.00 to \$249,999.00 gross per annum, the husband shall pay an amount equivalent to 80% of the spousal maintenance payments envisaged above in order 27.*
33. *That, in the event that during any period prior to December 2020, the husband's income falls in the range of \$150,000.00 to \$199,999.00 gross per annum, the husband shall pay an*

amount equivalent to 70% of the spousal maintenance payments envisaged above in order 27.

34. *That, in the event that during any period prior to December 2020, the husband's income falls in the range of \$100,000.00 to \$149,999.00 gross per annum, the husband. shall pay an amount equivalent to 60% of the spousal maintenance payments envisaged above in order 27.*

35. *That, in the event that during any period prior to December 2020, the husband's income falls in the range below \$100,000.00 gross per annum, the husband shall pay an amount equivalent to 50% of the spousal maintenance payments envisaged above in order 27.*

Mortgage payments by the husband and special contribution by the wife

36. *From the date of these orders as and when the wife purchases a new property, notwithstanding the income received by the wife, the husband shall do all things and sign all necessary documents to be listed as a guarantor for a mortgage held by the wife in relation to the new property purchased in her sole name, and the husband shall pay periodic sums which represent 100% of the contributions to a mortgage loan amount not exceeding \$500,000.00 (which sum shall include stamp duty and the wife's moving costs) and which are to be no less than the minimum required by the relevant financial institution and shall be payable by the husband until such time as the loan is paid out in full and the mortgage discharged. The husband shall pay and is to be solely liable for and, shall indemnify the wife as to strata levies, council rates and water rates and will pay these expenses as and when they fall due until such time as the loan is paid out in full and the mortgage discharged.*

37. *From the spousal maintenance payments received by the wife pursuant to orders 27 above, the wife shall attend to the payment of \$100.00 per month to the parties' joint Self-Managed Superannuation Fund and the wife shall do all things*

and sign all documents necessary to roll over any available superannuation held in her E Super Fund annually on or about the month [of] August each year to the parties' joint self-managed superannuation fund.

Household contents

38. *As at the date of these orders each of the parties shall retain ownership of the items which they individually owned at the commencement of cohabitation and each party shall do all things necessary to ensure that those items are delivered to the relevant party if they are in the possession of any item or items belonging to the other party.*

39. *As at the date of these orders the balance of effects presently situated in the B Street, Suburb C property shall be divided between the parties by agreement and each party shall do all things necessary to facilitate that division. All items of property that are subject to use by the parties' children shall be retained by the wife to the exclusion of the husband and the parties acknowledge that the funds which are to be transferred to the husband as envisaged by order 26 are for the primary purpose of the husband furnishing his new residence.*

40. *As between the husband and wife, and subject to the above and below orders, and in particular orders 38, 39 in relation to the contents of the B Street, Suburb C property, and orders 42 & 43, at the date of these orders the husband and wife shall each respectively retain all interest in and entitlement to:*

40.1 All personal property now in his/her respective possession or control.

40.2 Shares, debentures, units in unit trusts, bank, building society or credit union accounts standing in his/her sole name respectively.

40.3 All interest in life insurance policies and superannuation funds standing in his/her sole name respectively.

40.4 All motor vehicles held in his/her sole name respectively.

41. *From the date of these orders until October 2030 the husband shall do all acts and things and sign all documents necessary to ensure that he maintains his current level of income protection insurance, life insurance and trauma insurance.*
42. *From the date of these orders until settlement of the sale of the B Street, Suburb C property the husband shall pay the lease payments on the Motor Vehicle 1 registration number ... held in the husband's name. The husband shall also pay the residual owing on the lease upon its expiry, and on settlement of the sale of the B Street, Suburb C property, the parties shall do all acts and things and sign all documents necessary to transfer to the wife the whole of the husband's rights, title and interest in the Motor Vehicle 1 vehicle, at the husband's cost, and after which time the wife shall retain sole ownership of the vehicle to the exclusion of the husband. Pending the transfer to the wife, all costs of registration, servicing, Green slip and any parking fines associated with the Motor Vehicle 1 vehicle shall be the sole responsibility of the wife and the wife shall indemnify the husband as to same.*
43. *Simultaneous to the transfer of the husband's rights, title and interest in the Motor Vehicle 1 vehicle to the wife, the wife shall do all things and sign all documents necessary to transfer to the husband the whole of her rights, title and interest in the Motor Vehicle 2 registration number ... to the husband. Pending the transfer to the husband, all costs of registration, servicing, Green slip and any parking fines associated with the Motor Vehicle 2 shall be the sole responsibility of the husband and the husband shall indemnify the wife as to same.*

The husband's bonus

44. *That the parties agree that the husband shall retain to the exclusion of the wife his monetary bonus from his employer and for the purposes of clarity this bonus refers to the bonus receivable by the husband as described in the letter from his employer dated 14 December 2012 which is estimated to have a value in the range of \$300,000.00 - \$700,000.00. The*

husband shall also retain to the exclusion of the wife any future bonuses from any other entity.

Superannuation

45. *Unless otherwise agreed between the parties, at the date of these Orders the parties agree that the property at F Street, Suburb G in the state of New South Wales shall remain the sole parcel of real estate of the parties' self managed superannuation fund Thorpe Pty Ltd" ACN ... ("SMSF") until such time as the mortgage held over that property is paid in full. At such time as the property is unencumbered, the parties agree that within 30 days from the date of the payment of the closing balance on the associated mortgage, the parties shall do all things necessary and execute all documents necessary to place the property known and situate at F Street, Suburb G, in the state of New South Wales, folio identifier ... ("**the F Street, Suburb G property**") on the market for sale by private treaty at a price agreed in writing between the parties, and shall cause the property to be sold as follows:*

45.1 *sign all authorities and execute all documents necessary to list the property for sale with an agent as agreed between the parties, or in the absence of agreement, D Real Estate, Suburb C ("**the agent**");*

45.2 *sign all authorities and execute any documents necessary to instruct a solicitor to act on the sale;*

45.3 *the parties shall be responsible for giving joint instructions to the selling agent and the solicitors acting on the sale;*

45.4 *neither party will, without the express written consent of the other, cause any other agency agreement to be effected or binding on the parties;*

45.5 *neither party will encumber or otherwise deal with the property without the prior written consent of the other;*

45.6 if the parties cannot agree on a sale price, the sale price will be determined by a valuer appointed by the parties or failing agreement by a valuer appointed by the President of the New South Wales Institute of Valuers on the written request of either party and the parties shall share the costs of the valuer equally.

45.7 In the event that the property is not sold within 60 days of being listed for sale the property is to be sold at auction following an auction program recommended by the agent. In the event a prospective purchaser makes a bid on the property prior to the proposed date for auction, the parties may agree on a price and to sell to such a purchaser in writing. In the event the parties are unable to agree on a price then the property shall proceed to auction.

45.8 the parties or either of them may lawfully bid at the auction;

45.9 a reserve price shall be fixed by written agreement between the parties and failing agreement within 14 days of the auction date being set, the reserve price will be determined by a valuer, (other than the auctioneer) appointed by the parties, or failing agreement, by a valuer appointed by the President of the New South Wales Institute of Valuers upon the written request of either party, and the parties shall share the costs of the Valuer equally.

45.10 the parties agree to provide access to the property at all reasonable times to prospective purchasers and the agent, or his or her representative;

45.11 the parties agree to maintain the property in reasonable condition and repair pending completion of the sale; and

45.12 in the event that the reserve price for the property is not reached at auction on the first auction date, the

parties may then negotiate with the highest bidder or any other bidder present at the auction or any other interested party in an effort to sell the property at a price not more than 10% below the reserve price. If a contract for the sale of the property is not exchanged at a price of not more than 10% below the reserve selling price within 14 days of the day of the auction, the parties agree to forthwith re-list the property for further auction program for sale by another Real Estate Agent as nominated by the President of the Real Estate Services Council or his/her nominee in the same manner as required by these orders.

46. *Upon the settlement of the sale of the F Street, Suburb G property, the proceeds of sale be disbursed in the following manner and priority:*

46.1 *In payment of all legal costs and disbursements, agent's commissions, costs of marketing, and expenses of the sale;*

46.2 *In payment of costs incurred, if any, in relation to the determination of value of selling price by the President of the Real Estate Institute of New South Wales or his/her nominee;*

46.3 *In payment and adjustment of all outstanding council and water rates and other utilities;*

46.4 *The parties do all such acts and things and sign all documents necessary, including but not limited to the signing of trustee minutes, rollover requests and related documents, that may be necessary to rollover or transfer the entitlement of the wife in the parties' SMSF to another complying superannuation fund of the wife's choosing.*

46.5 *In the event that the wife's entitlement is less than an amount equivalent to 40% of the total net assets of the SMSF, the following orders 47 - 52 shall apply.*

47. *That, in accordance with paragraph 90MT(1)(b) of the Family Law Act 1975:*

- (a) *The wife or the wife's administrators, executors, beneficiaries, heirs or assigns is entitled to be paid the specified percentage out of the husband's interest in the Thorpe Pty Ltd Superannuation Fund;*
 - (b) *The husband's entitlement (or entitlement of such other person to whom a payment may be made out of the husband's interest) in the SMSF is correspondingly reduced by force of this order; and*
 - (c) *The percentage specified for the purposes of this order is a percentage that equates to, combined with the entitlements received by the wife pursuant to order 46 above, 40% of the total net assets of the SMSF.*
48. *That the Trustees of the Thorpe Pty Ltd Superannuation Fund (“**the trustees**”) shall do all such acts and things and sign all such documents as may be necessary to:*
- (i) *Calculate, in accordance with the requirements of the Act, the entitlement awarded to the wife in the immediately preceding clause of this order; and*
 - (ii) *Pay the entitlement whenever the trustee makes a splittable payment from the husband's interest in the Thorpe Pty Ltd Superannuation Fund.*
49. *That this clause has effect from the operative time and the operative time is the beginning of the day on the date of the settlement of the sale of the F Street, Suburb G property as envisaged in order 46.*
50. *That, after service of the payment split notice in accordance with the Superannuation Industry (Supervision) Regulations 1994 (“**the SIS Regulations**”) the husband shall do all such things and sign all such documents as may be necessary, including but not limited to exercising the wife's request in accordance with the SIS Regulations, for the payment of the wife's interest by way of a lump sum entitlement in accordance with the SIS Regulations, for the payment of the wife's interest in the Thorpe Pty Ltd Superannuation Fund.*

51. There was no paragraph 51 in the document.

52. *It is noted:*

(a) *The value of a non-member spouse interest is calculated in accordance with the SIS Regulations; and*

(b) *Any payments from the husband's superannuation interest in the Thorpe Pty Ltd Superannuation Fund made after the trustee has created a new interest in the wife's name in a Superannuation Fund as directed by her are not splittable payments in accordance with the requirements of the Family Law (Superannuation) Regulations 2001.*

53. *The husband and wife do all acts and things and give all consents and execute all documents and writings necessary to give effect to the orders in the time periods prescribed.*

54. *That in the event that either party refuses or neglects to execute any deed, document or instrument necessary to give effect to these orders, the Registrar of the Court be appointed pursuant to Section 106A of the Act to execute such deed, document or instrument in the name of the said party and do all acts and things necessary to give validity and operation to the deed, document or instrument upon the Registrar being provided with verification of such refusal or failure by way of affidavit.*

3. Relevantly, the 15 February 2019 orders and notations in this Court were made following the parties reaching an agreement after the wife had filed a Contravention Application on 14 December 2018 and an Application in a Case seeking various enforcement orders (including a variation to order 36) and then an Amended Application in a Case filed on 1 February 2019 which also sought, inter alia, a declaration with respect to a Binding Child Support Agreement dated 26 September 2014 and which provided as follows:

Notations

- (1) *The parties consent to the making of the following orders and to those orders being of the same force and validity as if they had been made after a hearing by the Court.*
- (2) *Omitted*
- (3) *Since the date of the 5 December 2014 orders, the parties have agreed to a change in the 5 December 2014 orders.*
- (4) *The parties entered into a Binding Child Support Agreement on around 26 September 2014 (“**Binding Child Support Agreement**”). The parties have not terminated that agreement and do not propose to enter into a new Binding Child Support Agreement at this stage. The parties do however wish to record that there is an agreement between them as follows in respect of child support:*
- (5) *That pursuant to clause 5(a) of the Binding Child Support Agreement, the husband shall pay the wife an amount of \$100.00 per child per year for shoes that are deemed appropriate by the children’s school for daily wear, such sum to be paid on 1 September each year commencing on 1 September 2019 and it is agreed by the parties that this is the maximum amount the husband will pay for school shoes in any year.*
- (6) *That pursuant to clause 5(b) of the Binding Child Support Agreement, the husband shall pay to the wife an amount of \$1,000.00 per child per year in respect of extra-curricular activity costs undertaken by the children and such sum shall be paid in full on 1 September annually, commencing 1 September 2019, and it is agreed by the parties that the husband will discharge his obligations pursuant to clause 5(b) if this payment is made.*
- (7) *The parties have agreed on a without admissions basis that the husband will pay to the wife the sum set out in order 4 on account of the special strata levies outstanding to the date of these orders and also the extra-curricular activity costs incurred by the wife for the benefit of the children prior to the date of these orders.*

Orders

(8) *That order 27 of the 5 December 2014 orders be varied as follows:*

(a) *the reference to “31 December 2020” be replaced with “31 December 2019”.*

(9) *That orders 28-35 of the 5 December 2014 orders be varied as follows:*

(a) *the reference to “December 2020” to be replaced with “December 2019”.*

(10) *That order 36 of the 5 December 2014 orders be varied as follows:*

(a) *the reference to “strata levies” be replaced with “strata levies” (such strata levies are to include all quarterly strata levies but not the capital special works levy or other special work levy).*

(11) *The husband pay to the wife or as the wife directs in writing a sum of \$15,000.00, such sum to be payable in equal monthly instalments over a 6 month period from the date of the making of these orders, each payment to be made on or before the 15th of each month commencing 15 March 2019.*

(12) *All applications pending between the parties in Family Court of Australia proceedings SYC 6078/2014 are otherwise withdrawn and dismissed.*

(13) *That, without admission, the husband shall hereby release and indemnify the wife from all actions, proceedings, claims, demands, costs and expenses whatsoever and howsoever arising from any loan from the husband’s parents to the husband.*

(14) *Each of the parties pay their own costs of or incidental to these proceedings.*

4. There was no specification in the orders referred to in paragraph 3, above to the jurisdictional basis relied upon for the making of those orders. The Court notes here that the pathway for an order pursuant to s.79 to be altered is via s.79A whereas an order pursuant to s.74 is amenable to variation pursuant to s.83 of the Act. The tests for each are different.

5. The husband filed his Response on 31 March 2020 which sought that the wife's application be dismissed with costs.
6. The matter came before the Court on 1 April 2020, being the first return date of the wife's said Application in a Case and the following orders and notations were made:

- (1) *By consent, orders and notations [as set out in paragraph 7 below] be made with orders 8, 9 and 10 to come into effect following the Court's ruling on the matters outlined in orders 3 and 4, below.*
- (2) *The parties' opportunity to ask for oral submissions is reserved.*
- (3) *Within 7 days of today's date, the husband is to provide to Chambers and serve upon the wife's legal representatives, any notice of objection in respect to identified paragraphs of the wife's affidavit.*
- (4) *Within 7 days of today's date, the wife is to provide to Chambers and serve upon the husband's legal representatives, any notice of objection in respect to identified paragraphs of the husband's affidavit.*

Notations:

- (5) *It raised with the parties section 82(4) of the Act as to whether there are any special circumstances if the Court was to find that order 36 was a maintenance order. That issue may require other evidence and the testing of that evidence.*

7. The consent orders and notations, referred to in paragraph 6 above, were to the following effect:

- (1) *Omitted*

Notations

- (2) *That the parties commenced cohabitation on or about 2000, married in 2002 and separated on a final basis in December 2013.*
- (3) *That the final orders were made by the Court, by the consent of the parties, finally determining all financial matters between them.*

- (4) *That order 36 is expressed as follows: [As set out in paragraph 2, above].*
- (5) *That in 2019 the wife remarried.*
- (6) *That the parties are in dispute as to the categorisation of the obligations for payment described in order 36, the husband asserting they are in the nature of spousal maintenance which order ceased to have effect upon the wife's remarriage whilst the wife asserts they are payments in the nature of an alteration of property interests.*
- (7) *The Court notes the wife asserts that she has filed a Hardship Application with the Bank and has been granted a three (3) month moratorium on repayments which is due to expire on 26 June 2020.*

Orders

- (8) *That within 14 days the wife provide to Chambers and serve upon the husband's legal representatives written submissions (of no more than 10 pages) in support of her argument.*
 - (9) *That within 14 days of receipt of written submissions by the wife, the husband provide to Chambers and serve upon the wife's legal representatives written submissions (of no more than 15 pages) in support of his argument.*
 - (10) *That within 7 days of receipt of the husband's written submissions, the wife file and serve any submissions in reply (of no more than 5 pages).*
- 8. On 8 April 2020, Mr Longworth of Counsel forwarded to Chambers, the husband's objections to the wife's affidavit material.
 - 9. On 14 April 2020, the wife's solicitors forwarded to Chambers, the wife's objections to the husband's affidavit material.
 - 10. On 28 May 2020, the Court provided by email, its rulings as to the parties' abovementioned objections.

Background facts

11. The following are the, substantially, agreed background facts:
- (a) The wife was born in 1971 and she is, currently, 49 years of age.
 - (b) The husband was born in 1964 and he is, currently, 56 years of age.
 - (c) The parties married in 2002, separated in December 2013 and a divorce order was granted by this Court on 11 January 2016.
 - (d) There were 2 children from the marriage, namely:
 - (a) X, (“X”) born in 2004, currently, 15 years of age; and
 - (b) Y, (“Y”) born in 2008, currently, 12 years of age.
 - (e) In 2014, the wife purchased a property at H Street, Suburb J, NSW (“**the H Street, Suburb J property**”) for the purchase price of \$890,000.00.~
 - (f) In late 2014, the wife sold the B Street, Suburb C property for the sale price of \$1,730,000.00.
 - (g) In 2019, the wife married Mr K.
 - (h) The husband is presently employed as a Professional.
 - (i) The husband is a director of Thorpe Pty Ltd.
 - (j) The wife is a public servant, currently, employed by the Employer L. She commenced in this role in 2019.

The evidence

12. The wife, in her affidavit sworn on 20 March 2020 and filed on 23 March 2020, subject to objections taken, deposed to the following:
- (a) The husband had failed to pay the mortgage repayments due on 10 January 2020 (\$1,928.64), 10 February 2020 (\$1,935.38) and 10 March 2020 (\$1,817.50) in respect of the H Street, Suburb J property. The next mortgage payment was due on 10 April 2020.

The husband had overdrawn the parties' joint bank account by \$941.46, which is the account that the mortgage is drawn from.

- (b) On 18 March 2020, during a telephone call with the ANZ Bank ("ANZ"), she was advised that a default notice had been sent to her in the post but that she had not yet received the letter at the time of swearing her affidavit, but sought leave to tender it once received (see paragraph 13(c) below).
- (c) The following outgoings were also overdue, which the husband has indicated that he will not pay:
 - (i) Strata Levies: Due 29 February 2020 for \$2,500.00;
 - (ii) Council rates: Due 29 February 2020 for \$281.00; and
 - (iii) Water rates: Due 8 January 2020 for \$177.12.
- (d) On 5 December 2014, the parties entered into the final orders. The relevant parts of the final orders for her Application are:
 - (i) Order 23.7(a); as set out in paragraph 2, above.
 - (ii) Order 27; as set out in paragraph 2, above.
 - (iii) Order 36; as set out in paragraph 2, above.
- (e) On 15 February 2019, the parties entered into consent orders, which, inter-alia, varied order 36 as set out in paragraph 3, above.
- (f) On 17 January 2020, the husband had advised that he would not be paying the mortgage repayments or any other payments as he was required to, pursuant to order 36 and sent her a text message which stated the following:

[The wife], when I found out you were getting married early last year, I asked my lawyer to review and advise what this meant in terms of the agreement. My lawyers advice is that all Maintenance payments cease at the date of your marriage, with Maintenance payments being in accordance with the Act or law. I am sure your lawyer gave you the same advice. My advice is that all periodic payments are

deemed Maintenance payments and as such the mortgage and all associated items stated in Clause 36 cease as at the date of your marriage. That is the advice from my lawyer which was very clear and firm. Not sure if you had advice but I am following my legal view.

- (g) She was aware that upon her remarriage, her spousal maintenance payments outlined in order 27 of the final orders would cease.
- (h) On 26 September 2014, the parties had filed an Application for Consent Orders which provided for an effective division of the net asset pool as to 60% to the wife and 40% to the husband.
- (i) That if one has regard to the Application for the Consent Orders as a basis for the making of orders, it is apparent that the most significant item under “Property” was the B Street, Suburb C property being the parties’ former matrimonial home shown at point 41 at a value of \$1.7 million. This would be off-set by the mortgage liability then shown at point 50 of \$1,057,028.32, being an equity of \$642,971.68. Point 58 discloses combined gross assets of \$1,766,668.00; combined gross liabilities of \$1,088,365.00 and, accordingly, a combined net worth of \$678,303.00. Point 72 sets out the effect of the orders sought and makes clear that the sale proceeds were divided as to \$430,000.00 to the wife and \$212,972.00 to the husband, totalling \$642,972.00. Point 62 showed the wife’s superannuation interest as \$38,509.00 and that of the husband as \$168,807.00. This, too, was ‘divided’ by way of a superannuation splitting order such that the wife was to receive \$86,926.00 and the husband \$124,389.00. When one then reviews Part H it is clear that the effect of the orders was as follows:

Point		Wife	Husband
74	Division of Net Property	\$439,663.00	\$229,172.00
75	Division of Superannuation	\$86,926.00	\$124,389.00
	TOTAL	\$526,589.00	\$353,561.00
	Percentage	60%	40%

- (j) At the time of the 5 December 2014 orders, the parties had updated the Court with further disclosure of the following assets and liabilities, as referred to in terms of the information provided by the parties to the Registrar on or about 13 November 2014:

Ownership		Description	Agreed value
ASSETS			
1	Wife	The B Street, Suburb C property which had sold on 30 October 2014 after the filing of the parties' application referred to in (h) above	1,730,000.00
2	Wife	Motor Vehicle 2	10,000.00
3	Husband	Motor Vehicle 1	30,000.00
4	Joint	Furniture	10,000.00
5	Wife	CBA account #...78	4,000.00
6	Wife	CBA account #...99	1,000.00
7	Wife	CBA account #...05	700.00
8	Joint	ANZ Savings #...99	7,200.00
Total			1,792,900.00
LIABILITIES			
9	Joint	ANZ Mortgage of B Street, Suburb C	1,057,028.00
10	Joint	Estimated agent's commission and legal fees	37,500.00
11	Wife	CBA Visa	1,400.00

12	Husband	ANZ Mastercard	6,000.00
13	Husband	Motor vehicle lease – Motor Vehicle 1	23,937.00
Total			1,125,865.00
SUPERANNUATION			
Member		Name of fund	wife's value
14	Husband	Thorpe Pty Limited	168,807.00
15	Husband	M Super Fund	2,016.00
16	Wife	Thorpe Pty Limited	38,509.00
18	Wife	E Super Fund	4,000.00
Total			213,332.00
Net Total Assets (including superannuation)			880,367.00

- (k) Of the net total assets of \$880,367.00 the wife was to then receive total net assets and superannuation of \$556,226.00 which represented 63.18% and the husband was to receive \$324,141.00 which represented 36.82%.
- (l) At the time that the Application for Consent Orders was filed, the husband's anticipated bonus in 2016 was in the range of \$300,000.00 to \$700,000.00 gross as described by the parties as a financial resource available to the husband. The Family Court was, subsequently, provided with a letter dated 14 December 2012 from the husband's employer which indicated that the anticipated bonus was in the order of \$200,000.00 to \$600,000.00, as referred to in paragraph 14(n), below.
- (m) The husband's bonus was not included as property when the calculation for the percentage division was effected. The exclusion of the husband's bonus in the calculable pool was also

reflected at order 44 of the final orders, where it was provided for the husband to retain his bonus, to the exclusion of the wife. The husband's bonus was earned during the parties' marriage but was not paid until after the parties separated.

- (n) On 14 November 2014, the husband affirmed an affidavit in support of the making of the final orders. At paragraph 33, he deposed as follows:

The orders provide that I will continue to provide financial support to [the wife] by way of maintenance until 31 December 2020. The date 31 December 2020 represents a date when [the wife] will have completed her degree and is a point at which both of our children will be at high school so that [the wife] may once again undertake full-time paid employment. In this period I will pay any amount of the amount of \$618.46 to [the wife] per week (increasing each year in accordance with the CPI), and varying in the event [the wife's] income increases and/or my income decreases. I have also agreed to make the mortgage repayments for [the wife's] new property, strata levies, rates and water rates until the mortgage is repaid, and the cost of private health cover for [the wife] [the Court notes the highlighted words were read as submission only.]

The Registrar of the Family Court of Australia was provided with a copy of the front page of the Contract for the purchase by the wife of the H Street, Suburb J property. Accordingly, it was clear that the wife had an equitable interest in the H Street, Suburb J property as at the date of the 5 December 2014 orders, if not a legal interest, if settlement of that purchase had occurred prior to that date.

- (o) On 22 January 2020, the wife caused her solicitor to write to the husband, outlining why the husband was liable to continue meeting the payments under order 36, and requesting that he resume making these payments.
- (p) On 31 January 2020, the husband sent the wife's solicitor correspondence, outlining why he asserted that he was not liable to continue to meet the payments under order 36.

- (q) On 3 February 2020, the wife caused her solicitor to respond to the husband, again, reaffirming her position but also providing the husband with evidence as to the negotiations that had occurred.
 - (r) The wife has incurred significant legal fees in seeking that the husband meet his obligation to pay the mortgage and other expenses, in accordance with the final orders. Her legal fees were in the vicinity of \$7,321.60.
 - (s) The husband, to the best of the wife's knowledge and belief, receives an annual income from his employment of, approximately, \$500,000.00, based on a notice of his taxable income that was received by the Child Support Agency (see paragraph 13(d), below).
 - (t) The wife, currently, earns \$74,288.00 per annum from her employment.
13. The wife, in her affidavit sworn and filed on 31 March 2020, subject to objections taken, deposed to the following:
- (a) As at the date of swearing her affidavit, the amounts outstanding were as follows:
 - (i) Mortgage repayment due 10 January 2020: \$1,928.64;
 - (ii) Mortgage repayment due 10 February 2020: \$1 ,935.38;
 - (iii) Mortgage repayment due 10 March 2020: \$1,817.50;
 - (iv) Strata Levies due 29 February 2020: \$2,500;
 - (v) Council rates due 29 February 2020: \$281;
 - (vi) Water rates due 8 January 2020: \$177.12.

Total: \$8,639.64
 - (b) The total of \$8,639.64 did not include late fees, which the wife believed to be in the order of \$40.00.
 - (c) The wife included a copy of a letter received from Gadens Lawyers, dated 11 March 2020, enclosing a Notice of Default

from ANZ also dated 11 March 2020 which specified a default in respect of arrears as at that date of \$3,863.99. The Default Notice also provided a payout under the mortgage from ANZ of \$505,744.42 as at 11 March 2020.

- (d) The wife received notice from the Child Support Agency on 19 September 2018 of the husband's taxable income for 2017 of \$560,566.00.
 - (e) On 4 July 2018, the wife caused her solicitor to write to the husband, to obtain financial disclosure documents and, on 26 July 2018, the husband sent correspondence stating that he did not have to provide disclosure.
 - (f) On 29 September 2018, the wife's solicitor sent a response, again, noting the husband's obligations for disclosure. The husband did not provide disclosure.
 - (g) On 31 March 2020, a further request was made by the wife's solicitor for the husband's financial disclosure.
14. The husband, in his affidavit affirmed and filed on 31 March 2020, subject to objections taken, deposed to the following:
- (a) The structure of the final orders provided that orders 1 to 21 were parenting orders. There is a heading "Property". Order 22 addressed the sale of the B Street, Suburb C property. Order 23 addressed the distribution of the net proceeds of sale of the B Street, Suburb C property. Order 24 provided that the husband would pay certain sums pending settlement of the sale of the B Street, Suburb C property and indemnify the wife in relation to those expenses. Order 25 provided that the husband would pay an amount by way of support to the wife until 31 October 2014, noting that the sum paid for support was uncharacterised as to whether it was for spousal maintenance or child support and the date by which the support was to be paid had been superseded by the date the final orders were made. Order 26 related to a joint bank account. There was then a heading "Spousal Maintenance" under which orders 27 to 35 set out the rate of "interim spousal maintenance" (see characterisation in order 27) to be paid to the

wife and various mechanisms for the rate at which this periodic support was provided to be varied, based on fluctuations in his income and also the income of the wife.

- (b) There is then a heading “Mortgage payments by the husband and special contribution by the wife”. Order 36 is under that heading and imposes an obligation on him to “from the date of these orders and as and when the wife purchases a new property, notwithstanding the income received by the wife”, to “pay periodic sums which represent 100% of the contributions to a mortgage loan amount not exceeding \$500,000.00 (which sum shall include stamp duty and the wife’s moving costs) and which are to be no less than the minimum required by the relevant financial institution and shall be payable by the husband until such time as the loan is paid out in full and the mortgage discharged.” The husband has stopped paying any amounts due under this order as the wife has remarried.
- (c) Order 36, further, requires that the husband pay “strata levies, council rates and water rates and will pay these expenses as and when they fall due until such time as the loan is paid out in full and the mortgage discharged.” This aspect of order 36 was varied by the orders set out in paragraph 3, above. The husband has also ceased to pay these amounts as the wife has remarried.
- (d) Order 27 obliged the wife to make payments to the parties’ joint self-managed superannuation from the spousal maintenance payments received by her pursuant to order 27.
- (e) There is then a heading “Household Contents” and orders 38 and 39 thereunder relate to the division of household items and personalty. Orders 40 to 43 relate to the division of other property.
- (f) There is then a heading “The husband’s bonus” and order 44 thereunder provides that the husband retains his monetary bonus from his employer.
- (g) There is then a heading “Superannuation” and orders 45 to 50 with a notation in 52 relate to the parties’ self-managed superannuation fund.

- (h) Orders 53 and 54 are described as “machinery provisions”.
- (i) The husband agreed that the final orders reflected a division as set out in paragraph 12(k), above.
- (j) The effect of the property orders, while set out in Part I of the Application for Consent Orders, was as follows:
 - (i) The net assets that the wife retained pursuant to the settlement was \$439,663.00 (which contained \$430,000 from the net proceeds of sale of the B Street, Suburb C property).
 - (ii) The net assets that the husband received pursuant to the settlement was not \$229,172.00 as stated at Part I but \$221,972.00. This was an error in calculation of the total evident upon a review of the Application. The net assets that he retained contained an amount of \$221,972.00 received from the net proceeds of sale of the B Street, Suburb C property.
- (k) The amount of the mortgage repayments that he was obliged to pay pursuant to order 36 was not included in the calculation of the effect of the final orders. The funds he used to pay the mortgage following the date of the final orders were not in existence at the date of the final orders.
- (l) The parties agreed to an amendment to the final orders in July 2016, although they did not confirm this agreement in the form of any variation to the orders. This amendment was noted in a letter from SCP Lawyers & Consultants dated 14 July 2016 which confirmed the nature of their “side agreement” regarding the superannuation. The side agreement was, to the effect, that the wife would receive 45% of the parties’ self-managed superannuation fund, rather than the 40% as set out in the final orders. The parties implemented the terms of this side agreement and the effect of their settlement, taking into account this agreement, was that the wife received approximately 63% of the parties’ net assets, including superannuation, noting paragraph 14(i), above.

- (m) As at the date the parties made application to the Family Court for the 5 December 2014 orders to be made by consent, the husband did not have any certainty regarding the quantum of any bonus he was to receive, noting that it was contingent upon his performance obligations being satisfied. The husband did not include his bonus as property but included it as a “financial resource” at Item 66. The letter from the husband’s employer, as referred to in his affidavit affirmed on 14 November 2014, referring to his bonus stated that he may receive a bonus of between \$200,000.00 and \$600,000.00 (not the \$300,000.00 to \$700,000.00 referred to in order 44 of the final orders). The husband said that while the bonus was not included in the calculation of the overall effect of the final orders, it was disclosed to the Court and order 44 confirmed that it would be retained by him upon receipt. The husband said that he, ultimately, did receive a bonus of approximately \$300,000.00 in total across the 2016 to 2018 financial years, in respect of which he needed to pay income tax. The husband said that he utilised this bonus to make the payments he was obliged to pay under the terms of the final orders. The Court notes that there was no issue in the husband’s evidence as to the husband asserting that he had to borrow to fund the payments contemplated by order 36. The husband said that his bonus was not an amount paid annually but represented the total arising from his, approximately, 20 years of employment and that there was no certainty with respect to his receipt of any further bonus sums. In that regard, the Court accepts that the Family Court did what it had to do which was to take into account the husband’s financial resource (which he had the potential to access) in determining how to deal with the parties’ existing property and superannuation interests (see *In the Marriage of Walters & Walters* (1986) FLC 91-733 (Lindenmayer J)).
- (n) The husband said that it was always his intention that the obligations he assumed under order 36 were by way of support for the wife and order 36 obliged him to assist the wife only if she purchased a new property. If she had not done so then order 36 did not require him to make any payments.

- (o) The wife purchased the H Street, Suburb J property in late 2014 and he paid the mortgage instalments, strata fees and council and water rates as he was required to do from the date of the wife's purchase. He ceased making these payments following the wife's remarriage in 2019 as he was then of the view that his obligation to provide these payments ceased following that marriage.
- (p) The husband estimated that the total costs of his compliance with order 36 was, approximately, \$155,000.00 in the period from the end of 2014 until the end of 2019, made up as follows:
 - (i) \$2,000.00 per month by way of mortgage repayment, being a total of, approximately, \$125,000.00;
 - (ii) \$4,000.00 per year by way of strata fees, being a total of, approximately, \$20,000.00;
 - (iii) \$1,400.00 per year by way of council rates, being a total of, approximately, \$7,000.00; and
 - (iv) \$600.00 per year by way of water rates, being a total of, approximately, \$3,000.00.
- (q) His affidavit affirmed on 14 November 2014 was provided following a requisition issued by the Family Court for more information to enable it to determine whether the proposed consent orders were just and equitable. The husband confirmed the terms of the support he would provide to the wife in that affidavit and noted the he did not specify that such support would end in the event of the wife's remarriage.
- (r) The husband denied that he had breached the final orders. He referred to an application by the wife filed on 1 February 2019 with respect to some money amounts that the wife considered he was obliged to pay pursuant to the final orders. The husband said that there was some ambiguity in the amounts that were to be covered by the final orders and that the wife's application was resolved by consent in terms of the 15 February 2019 orders, as set out in paragraph 3 above, which varied the 5 December 2014 orders and provided greater certainty as to the amounts he was

required to pay by way of support to the wife. There were no costs orders made with respect to that application.

- (s) The 15 February 2019 orders were negotiated when the husband said he was not aware of the wife's plan to remarry. One of the variations agreed, by consent, was that the period in which the order, provided that maintenance would be paid on a periodic basis as set out in orders 27-35 of the 5 December 2019 orders would be amended from 31 December 2020 to 31 December 2019. This amendment was made at orders 1 and 2 of the 15 February 2019 orders. This, he said, was "offered" by the wife as part of the deal reflected in the 15 February 2019 orders, in circumstances where the husband now believed that the wife knew she would be married in 2019 and that his obligation to pay her "maintenance" would cease in that month, in any event, and that her intention to remarry was not disclosed to him during the parties' negotiations. The husband said that his letter of 31 January 2020 to the wife's lawyers stated:

I have received your letter dated 22 January and do not agree with your view of the orders. I have no obligation to continue to make payments to [the wife] pursuant to Clause 36. My view is that your letter dated 4th July 2018 asking for a settlement was sent on the basis that your client decided she would re-marry. Your letter requested all maintenance items to be settled as you knew that these items would cease to be paid for by me following her re-marriage. Those items included the mortgage and ancillary items. · Your client did not disclose in those negotiations that she was shortly to remarry, which in my view amounted to non-disclosure of a material matter.

During those negotiations your client's counsel stated that your client would be commencing work in late 2019 and that I would be "let off" with spousal maintenance payments for 1 year if I paid other amounts. Your client was fully aware she was getting re-married in 2019, as far back as July 2018 and knew full well that spousal maintenance would cease anyway. There was an attempt to gain leverage

in the negotiation through addressing the outstanding spousal maintenance payments as part of the negotiation when your counsel must have known they would cease regardless of the deal we struck.

The obligation in clause 36 is that I “shall pay periodic sums which represent 100% of the contributions to a mortgage loan amount not exceeding \$500,000 ...”

The points made in your letter of 22 January 2020 are not accepted.

I respond as follows:

1. It is not the case that order 36 was provided to your complete to provide “a complete lump-sum property settlement” as you have stated in your letter. The effect of the property orders sought is set out in the Application for Consent Orders which we both signed and which was submitted to the Court when the Orders were made. On page 22 and 23 of that Application, which set out the effect of the Orders, there is no reference to these future mortgage repayments as forming part of the property settlement. The future mortgage payments were not taken into account in determining the percentage outcome of the settlement at item 67. That is because they did not form part of the property settlement.

2. The heading used on Order 36 is not determinative in terms of the characterisation of the clause. In any event the heading does not indicate one way or the other. To the extent the heading is relevant, the words "mortgage payments by the husband" are more suggestive of a maintenance order than a property settlement order.

3. In your letter you have referred to the wording of clause 37 ("From the spousal maintenance payments received by the wife pursuant to orders 27 above ...). The reference to spousal maintenance payments to order 27 is not intended to definitively capture all spousal

maintenance payments. Clause 37 obliges your client to make contributions to the self-managed superannuation fund. It is only possible for these to be made by your client from the amount she receives by way of periodic support per order 27 and that is why that reference is limited in the way it has been. Your client could not use the mortgage payments in order 36 to make those contributions to superannuation and it would have been non-sensical to refer to order 36 in this clause.

4. I understand the job of any property settlement order is to divide the existing legal and equitable entitlements. Order 36 is not altering our existing legal or equitable elements. It is an order that I pay an unknown amount in future. The income or property which I would use to make these payments did not exist at the time of the orders and the Court had no jurisdiction to address it in the property settlement orders.

5. The amount payable is uncertain. It would fluctuate based on interest and duration of the mortgage; if your client sold the property it would also stop. It is expressly stated to be an obligation "notwithstanding the income received by the wife" which is a factor that is relevant to the periodic maintenance obligations in order 27, and that is because this is also a maintenance order. It can only be characterised as a periodic maintenance order with the effect that it terminates upon remarriage. If your client sold the property she has no entitlement to claim the amounts I would otherwise be due to pay against the mortgage.

I suggest you client revisit her contravention application. If she files such an application and I am required to obtain legal representation to address your contentions then I will use this letter in support of an application that my costs are covered by your client.

Your client specifically told my children to deny any knowledge of their mother getting re-married and this has

caused psychological damage to my children due to your client's behaviour.

Again, I confirm that I will comply with my legal advice. It should be noted that I had blocked emails from your company due to previous threatening and bullying behaviour from your company which led to me making a complaint to the NSW Law Society.

- (t) That there were other points contained within the wife's affidavit material which were incorrect but which he did not address. However, the husband stated that he had not overdrawn the parties' joint bank account by \$941.46 as the wife and he did not have a joint bank account and, further, that while the wife stated that he earns \$500,000.00 per annum this was incorrect as his salary was \$396,000.00, inclusive of superannuation.
15. The parties are not, relevantly, in dispute about a number of the factual matters which the Court accepts are as set out in paragraphs 12 to 14 above.
16. The parties were not cross-examined and the Court deals with the matter on the papers and on the parties' written and oral submissions.
17. The following documents were tendered in evidence:

Exhibit No	Document	Tendered by
Court 1	Orders made on 5 December 2014	Court
Court 2	Letter from N Law Firm to the Family Court dated 13 November 2014	Court

18. On 11 June 2020, the wife forwarded her written submissions prepared by Mr O'Reilly of Counsel.
19. On 24 June 2020, the husband forwarded his written submissions prepared by Mr Longworth of Counsel.

20. On 3 July 2020, the wife forwarded her written submissions in reply prepared by Mr O'Reilly of Counsel.
21. On 9 July 2020, the husband's legal representatives requested the opportunity to provide oral submissions. The Court had some difficulty in finding a date to suit the availability of Counsel. The matter was then listed on 17 September 2020. Mr O'Reilly of Counsel was available for the wife. Mr Longworth of Counsel was not available and Ms Jeliba of Counsel appeared for the husband, on that occasion.
22. On 17 September 2020, the wife sought further orders as follows:
 - (a) *That the Court deal with all outstanding matters at the time of determination of the wife's application in a case filed on 23 March 2020.*
 - (b) *That in the event that the Court determines that paragraphs 5 to 14 and 16 to 17 of the wife's submissions in reply are not in response to the husband's submissions that those paragraphs be not read.*
23. In any event, on 17 September 2020, the husband provided in Court, further written submissions in response to the wife's written submissions in reply. Mr O'Reilly provided oral submissions in response and confirmed that no further written submissions were required. The Court reserved its decision.

The Law

24. The power of the Court to enforce an order is found in s.105 of the Act which states:

"Subject to this Part, to the regulations and to the applicable Rules of Court, all decrees made under this Act may be enforced by any court having jurisdiction under this Act."
25. A "Decree" is defined in s.4 of the Act to mean any decree, judgment or order.
26. Part 25B of the Rules addresses enforcement of financial orders and obligations as found in Division 25B.2. Rule 25B.07 provides that an

obligation to pay money is an enforceable obligation under that Division. Rule 25B.13 then sets out the general enforcement powers of the Court as follows:

The Court may make any of the following orders:

- (a) an order declaring the total amount owing under an obligation;*
- (b) an order that the total amount owing must be paid in full or by instalments and when the amount must be paid;*
- (ba) an order for payment under rule 25B.09;*
- (c) an order for enforcement (see rule 25B.11);*
- (d) an order in aid of the enforcement of an obligation;*
- (e) an order to prevent the dissipation or wasting of property;*
- (f) an order for costs;*
- (g) an order staying the enforcement of an obligation (including an enforcement order);*
- (h) an order requiring the payer to attend an enforcement hearing;*
- (i) an order requiring a party to give further information or evidence;*
- (j) an order that a payer must file a financial statement;*
- (k) an order that a payer must produce documents for inspection by the Court;*
- (l) an order dismissing an application;*
- (m) an order varying, suspending or discharging an enforcement order.*

Note: For the collection of child support, the Court has general powers set out in section 111B of the Registration Act.

27. Section 79 of the Act provides:

(1) *In property settlement proceedings, the court may make such order as it considers appropriate:*

(a) *in the case of proceedings with respect to the property of the parties to the marriage or either of them—altering the interests of the parties to the marriage in the property; or*

(b) *in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage—altering the interests of the bankruptcy trustee in the vested bankruptcy property; including:*

(c) *an order for a settlement of property in substitution for any interest in the property; and*

(d) *an order requiring:*

(i) *either or both of the parties to the marriage; or*

(ii) *the relevant bankruptcy trustee (if any);*

to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.

28. Section 79(2) of the Act provides that:

The Court shall not make an order under this section unless it is satisfied that, in all of the circumstances, it is just and equitable to make the order.

29. The Court notes that its power is to make one property order which may consist of various parts (see *Hickey v Hickey & Attorney-General of the Commonwealth (Intervener)* (2003) FLC 93-143).

30. Section 4 of the Act defines “Property” as meaning:

(a) *in relation to the parties to a marriage or either of them - means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion; or*

(b) *in relation to the parties of a de facto relationship or either of them - means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.*

31. The Court accepts the wife's submission that the Act has not set out a catalogue of what constitutes property. The section requires a broad interpretation as per *In the Marriage of Mallet* [1984] HCA 21; (1984) 156 CLR 605, where the High Court of Australia stated:

It is not surprising that given this diversity of opinions the Parliament did not require the power conferred by Section 79 to be exercised in accordance with fixed rules. On the contrary, it has conferred on the Court a very wide discretion to make such Orders as it thinks fit when it is satisfied that it is just and equitable that an Order should be made (see sub-ss.1 and 2 of s.79) although there are some broad principles to which the Court is required to give effect, and some circumstances which it is required to take into account. A principle which the Court is expressly required to apply, so far as practicable, is that it will make such Orders as will finally determine the financial relationship between the parties to a marriage and avoid further proceedings between them: s.81.

32. In the marriage of *Collins & Collins* (1977) FLC 90-286, the Full Court of the Family Court of Australia held that s.79 of the Act should be given a wide and generous interpretation to allow the Act to function effectively. The Court stated that:

"It would, therefore, seem to us implicit in s 79(1) that the court is empowered to make an order in any form that it thinks is appropriate in the way of readjusting the property of the parties up to and including the point of extinguishing the interests of one or both of the parties in all of their property, if, in all the circumstances, it is just and equitable to do so and provided the matters referred to in ss 75(2) and 79(4) of the Act are taken into account in deciding upon the order to be made. We are of the view that the intention of s 79 is to enable the court not only to make orders altering the interests of the parties in particular items of

property but also to take into account all the property of the parties and make an order in any form that it considers will best meet the justice and equity of the case. This includes, of course, an order for the payment of a lump sum which, having already been given the power by s 79(1), the court may in any case exercise under s 80(a)."

33. In *Mullane v Mullane* (1983) 158 CLR 436, the High Court of Australia held that an order for an alteration of property interests (property settlement), necessarily involves an alteration of a party's legal or equitable interests in property whereas a maintenance order does not. The Court stated:

"In our opinion, therefore, s 79 on its proper construction refers only to orders which work an alteration of the legal or equitable interests in the property of the parties or either of them."

34. The principles set out by the High Court of Australia in *Stanford v Stanford* (2012) 47 Fam LR 481 were considered in *Marlowe-Dawson v Dawson (No.2)* (2014) 53 Fam LR 568 where Justice Kent reviewed the definition of the term "property" and stated the following:

[47] The definition of the term "property" importantly delineates the limits of the power under s 79. Section 4(1)(a) of the Act defines the term "property" as follows:

*"in relation to the parties to a marriage or either of them — means property to which those parties **are**, or that party is, as the case may be, **entitled**, whether in possession or reversion... (Emphasis added)*

*[48] In Stanford (supra) the plurality of the High Court observed at [1] of their judgment, reading s 79(1)(a) with the definition of "property" in s 4(1), that s79 "provides for a court exercising jurisdiction under the Act to make an order altering the interests of parties to a marriage in property to which one or both of those parties **is or are entitled**." (Emphasis added). It was in that context that the plurality then expressed (at [37])*

*the necessity to begin “by identifying, according to ordinary common law and equitable principles, the **existing** legal and equitable interests of the parties in the property.” (Emphasis in original).*

[49] Whilst “property” may denote the right of a person or an object itself (Pacific Film Laboratories Pty Ltd v Commissioner of Taxation (1970) 121 CLR 154 at 168 per Windeyer J) self-evidently the definition in s4 by its terms renders the conclusion that the party must have a present entitlement to such right or object for that right or object to constitute “property” within the meaning of the Act.

[50] The distinction between a presently existing entitlement, on the one hand, and a future and/or contingent and/or potential interest on the other, is the point of reconciliation of the authorities as to what has, or has not, been held to be “property” within the meaning of the Act and which may be subject to the Court’s jurisdiction to alter the interests of the parties in “property”.

35. The Court accepts that for its jurisdiction under s.79 to operate, there must be existing property, however, that does not mean that future property or liabilities or financial resources cannot be dealt with in terms of effecting a s.79 order in relation to the then existing property. The Court notes, however, that, at the time of the 5 December 2014 orders, the wife’s then current interest in the H Street, Suburb J property had been disclosed to the Court. The Court is of the view, therefore, that order 36 is within power and has been made as part of its exercise of jurisdiction under s.79 of the Act (see also further below and, in particular, paragraph 73).
36. The provisions for property orders and spousal maintenance orders are each contained in Part VIII of the Act.
37. Section 80 of the Act provides the general powers of the Court in exercising its powers under Part VIII of the Act which includes ss.79

(alteration of property interests) and 74 (which includes spousal maintenance). Section 80(1) of the Act provides:

The court, in exercising its powers under this Part, may do any or all of the following:

- (a) order payment of a lump sum, whether in one amount or by instalments;*
- (b) order payment of a weekly, monthly, yearly or other periodic sum;*
- (ba) order that a specified transfer or settlement of property be made by way of maintenance for a party to a marriage;*
- (c) order that payment of any sum ordered to be paid be wholly or partly secured in such manner as the court directs;*
- (d) order that any necessary deed or instrument be executed and that such documents of title be produced, or such other things be done as are necessary to enable an order to be carried out effectively or to provide security for the due performance of an order;*
- (e) appoint or remove trustees;*
- (f) order that payments be made direct to a party to the marriage, to a trustee to be appointed or into court or to a public authority for the benefit of a party to the marriage;*
- (g) Omitted*
- (h) make a permanent order, an order pending the disposal of proceedings or an order for a fixed term or for a life or during joint lives or until further order;*
- (i) impose terms and conditions;*
- (j) make an order by consent;*
- (k) make any other order (whether or not of the same nature as those mentioned in the preceding paragraphs of this section), which it thinks it is necessary to make to do justice; and*

(l) *subject to this Act and the applicable Rules of Court, make an order under this Part at any time before or after the making of a decree under another Part.*

38. The wife submits that, in this case, particular relevance is attached to s.80(a), (c), (j), & (k), as set out above. The Court accepts that submission.

39. The Court also accepts that some orders, such as a lump sum payment order, can be made under either s.74 or s.79 of the Act but not simultaneously under both heads of power. As the Full Court of the Family Court of Australia said in *Collins & Collins* (1977) FLC 90-286:

“In our view any claim for lump sum payment by one party to another must be based either on s 72 when it would be a claim for maintenance or upon s 79 when it would be a claim for an alteration of the interests of the parties in property which in all the circumstances would be just and equitable. There is no general discretion under Part VIII in the court otherwise than in direct relation to s 72 and/or s 79.”

40. The Court accepts that an order to be validly made must be made reliant upon an underlying source of power. It is therefore necessary to identify the power under which a particular order is made.

41. Section 74 of the Act provides that in proceedings with respect to the maintenance of a party to a marriage, the Court may make such order as it considers proper for the provision of maintenance in accordance with this Part.

42. Section 72 of the Act provides that a party to a marriage is liable to maintain the other party to the extent that the first mentioned party is reasonably able to do so, if, and only if, that other party is unable to support herself or himself adequately whether:

(a) *By reason of having the care and control of a child of the marriage who has not attained the age of 18 years;*

(b) *By reason of age or physical or mental incapacity for appropriate gainful employment; or*

(c) For any other adequate reason;

having regard to any relevant matter referred to in s.75(2) of the Act.

43. Section 75(2) specifies in subparagraphs (a) to (q) therein the specific matters to be taken into account by the Court.
44. The Court accepts that maintenance usually requires the payment of a sum of money to a person either regularly being known as periodic maintenance or in a lump sum known as lump sum maintenance. (see ‘Family Law’ 6th Edition, Dr Anthony Dickey QC at 27.80). Further, the Court accepts that maintenance may also involve the provision of goods and services where that provision may also have a monetary value. In *Mullane v Mullane* (1983) 158 CLR 436, the High Court noted that a maintenance order may even provide a spouse with a right of exclusive occupation of the former matrimonial home. In that regard, the Court notes that such a right may attract a monetary value.
45. The Court accepts that orders under s.74 of the Act can only be made if need on the part of an applicant is first established under s.72, whereas an order under s.79 of the Act can be made whenever the Court is satisfied that it is just and equitable in the circumstances to make that order.
46. Relevantly, in the interaction between property orders and spousal maintenance orders, s.77A of the Act provides, as follows:

Specification in orders of payments etc. for spouse maintenance purposes

(1) Where:

- (a) a court makes an order under this Act (whether or not the order is made in proceedings in relation to the maintenance of a party to a marriage, is made by consent or varies an earlier order), and the order has the effect of requiring:*
 - (i) payment of a lump sum, whether in one amount or by instalments; or*

- (ii) *the transfer or settlement of property; and*
- (b) *the purpose, or one of the purposes, of the payment, transfer or settlement is to make provision for the maintenance of a party to a marriage;*

the court shall:

- (c) *express the order to be an order to which this section applies; and*
 - (d) *specify the portion of the payment, or the value of the portion of the property, attributable to the provision of maintenance for the party.*

(2) *Where:*

- (a) *a court makes an order of a kind referred to in paragraph (1)(a); and*

(b) *the order:*

- (i) *is not expressed to be an order to which this section applies; or*
 - (ii) *is expressed to be an order to which this section applies, but does not comply with paragraph (1)(d);*

any payment, transfer or settlement of a kind referred to in paragraph (1)(a), that the order has the effect of requiring, shall be taken not to make provision for the maintenance of a party to the relevant marriage.

- 47. The Court accepts that orders for both spousal maintenance and property are self-evidently financial in nature and can, therefore, carry similar characteristics. As in this case, at times it may be difficult to distinguish the source of power and hence the nature of a particular order.
- 48. The wife submitted that, the parties intended that the final orders would provide for the husband to be substituted for the wife in relation to any

indebtedness she might have in respect of the purchase of her new property, being the H Street, Suburb J property. The wife maintained that order 36 could have been made pursuant to s.90AE(1)(b) of the Act which provides for an order directed to a creditor of one party to a marriage to substitute the other party, or both parties, to the marriage for that party in relation to the debt owed to the creditor. In that regard, s.90AE of the Act needs to be read in conjunction with certain of the sections which precede it in Part VIIIAA of the Act, being ss.90AA, 90AB, 90AC and 90AD. Those sections are to the following effect, as set out below.

49. Section 90AA of the Act - Object of this Part

The object of this Part is to allow the Court, in relation to the property of a party to a marriage, to:

- (a) *make an order under section 79 or 114; or*
- (b) *grant an injunction under section 114; ;*

that is directed to, or alters the rights, liabilities or property interests of a third party.

50. Section 90AB of the Act - Definitions

In this Part:

marriage includes a void marriage.

third party, in relation to a marriage, means a person who is not a party to the marriage.

51. Section 90AC of the Act - This Part overrides other laws, trust deeds etc.

(1) This Part has effect despite anything to the contrary in any of the following (whether made before or after the commencement of this Part):

- (a) *any other law (whether written or unwritten) of the Commonwealth, a State or Territory;*
- (b) *anything in a trust deed or other instrument.*

- (2) *Without limiting subsection (1), nothing done in compliance with this Part by a third party in relation to a marriage is to be treated as resulting in a contravention of a law or instrument referred to in subsection (1).*

52. Section 90AD of the Act - Extended meaning of matrimonial cause and property

- (1) *For the purposes of this Part, a debt owed by a party to a marriage is to be treated as property for the purposes of paragraph (ca) of the definition of matrimonial cause in section 4.*
- (2) *For the purposes of paragraph 114(1)(e), property includes a debt owed by a party to a marriage.*

...

53. Section 90AE of the Act - Court may make an order under section 79 binding a third party - states:

- (1) *In proceedings under section 79, the court may make any of the following orders:*
- (a) *an order directed to a creditor of the parties to the marriage to substitute one party for both parties in relation to the debt owed to the creditor;*
- (b) *an order directed to a creditor of one party to a marriage to substitute the other party, or both parties, to the marriage for that party in relation to the debt owed to the creditor;*
- (c) *an order directed to a creditor of the parties to the marriage that the parties be liable for a different proportion of the debt owed to the creditor than the proportion the parties are liable to before the order is made;*
- (d) *an order directed to a director of a company or to a company to register a transfer of shares from one party to the marriage to the other party.*

- (2) *In proceedings under section 79, the court may make any other order that:*
- (a) *directs a third party to do a thing in relation to the property of a party to the marriage; or*
 - (b) *alters the rights, liabilities or property interests of a third party in relation to the marriage.*
- (3) *The court may only make an order under subsection (1) or (2) if:*
- (a) *the making of the order is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage; and*
 - (b) *if the order concerns a debt of a party to the marriage—it is not foreseeable at the time that the order is made that to make the order would result in the debt not being paid in full; and*
 - (c) *the third party has been accorded procedural fairness in relation to the making of the order; and*
 - (d) *the court is satisfied that, in all the circumstances, it is just and equitable to make the order; and*
 - (e) *the court is satisfied that the order takes into account the matters mentioned in subsection (4).*
- (4) *The matters are as follows:*
- (a) *the taxation effect (if any) of the order on the parties to the marriage;*
 - (b) *the taxation effect (if any) of the order on the third party;*
 - (c) *the social security effect (if any) of the order on the parties to the marriage;*

- (d) *the third party's administrative costs in relation to the order;*
- (e) *if the order concerns a debt of a party to the marriage—the capacity of a party to the marriage to repay the debt after the order is made;*
- (f) *the economic, legal or other capacity of the third party to comply with the order;*
- (g) *if, as a result of the third party being accorded procedural fairness in relation to the making of the order, the third party raises any other matters—those matters;*
- (h) *any other matter that the court considers relevant.*

54. In *Hunt v Hunt* (2006) 36 Fam LR 64, the Family Court of Australia considered the operation and validity of Part VIIIAA of the Act. In that decision, O’Ryan J stated:

[113] When s.90AE(2) is read in conjunction with s.90AE(3), s.79 and Part VIIIAA generally, it is clear that what is contemplated is not some arbitrary invasion of the rights of a third party but an alternation of those rights where they are sufficiently connected to the division of the property between parties to a marriage.

His Honour concluded that:

[121] I am of the opinion that s.90AE(2) and s.90AF(2) are laws with respect to marriage, divorce or matrimonial causes, or at least incidental thereto, given that they are to be made in the case of s.90AE, in proceedings under s.79 for division of property orders, which orders are “central” to the marriage power and in the case of s.90AF, in proceedings under s.114, which confers power on the Court to grant injunctions, but only in proceedings of the kind referred to in para (e) of the definition of “matrimonial cause” in s.4(1). This creates a sufficient

connection with each of the marriage, divorce and matrimonial causes powers.

[122] The scheme of Part VIIIAA and the relevant impugned provisions is such as to ensure that the capacity of the court to make orders which affect third parties is carefully constrained and remains sufficiently connected to the marriage, divorce or matrimonial cause powers which support it.

55. The Court is of the view that the form of the final orders does not seek to bind third parties but, rather, seeks to impose an obligation on the husband to pay the wife's liabilities to third parties and imposes upon him a separate liability to any lender by way of being a guarantor (see order 36) for the mortgage taken out by the wife in respect of the purchase of a new property by her acquired in her sole name to which she would be the principal debtor. The husband was, upon the wife purchasing her new property, obliged to pay the periodic sums which represent 100% of the contributions to the mortgage loan amount. That obligation was not, however, substituting the husband for the wife in so far as the third party creditor was concerned namely, the mortgagee or any statutory rate levying body.
56. Further, the Court accepts the submissions of the husband in relation to the husband's obligations under order 36 to be listed as a guarantor imposed on him an obligation, subject to any qualifications made in the particular guarantee instrument, by way of contract to answer for the debt, default or miscarriage of another (being the wife, herein) who is, or is contemplated to be, or to become, liable to the person to whom the guarantee is given (see *Sunbird Plaza Pty Ltd v Maloney* (1988) 166 CLR 245 at 254). Guarantees and indemnities are both obligations, the function of each being to protect a person against loss suffered through entering into a transaction with a third party (see *Andar Transport Pty Ltd v Brambles Ltd* (2004) 217 CLR 424). A guarantee is a promise to answer for a third party's obligation and hence is a contractual obligation required to be performed only if that third party does not perform his or her obligation. A guarantee involves, in fact, not one but 2 distinct liabilities, the first being the liability of the debtor to the creditor, which forms the subject-matter of the guarantee and the

second being the liability of the guarantor to the creditor (see *Turner Manufacturing Co Pty Ltd v Senes* [1964] NSW 692; *Permanent Trustee Co of New South Wales Ltd v Hinks* (1934) 34 SR (NSW) 130), which is required to be performed only if the debtor does not perform his or her obligations.

57. The Court accepts that at the time the final orders were made there was no evidence before the Family Court to effect compliance by that Court with any of the matter set out in s.90AE(4) of the Act, as referred to above. While the H Street, Suburb J property had been purchased by an exchange of contracts at that time, there was no identification of any proposed mortgagee on title to which the husband would be obligated by way of guarantee or otherwise.

58. The husband submits that order 36 is, in effect, a maintenance order which would be affected by s.82 of the Act, which provides as follows:

Cessation of spousal maintenance orders

- (1) *An order with respect to the maintenance of a party to a marriage ceases to have effect upon the death of the party.*
- (2) *Subject to subsection (3), an order with respect to the maintenance of a party to a marriage ceases to have effect upon the death of the person liable to make payments under the order.*
- (3) *Subsection (2) does not apply in relation to an order made before the date of commencement of section 38 of the Family Law Amendment Act 1983 if the order is expressed to continue in force throughout the life of the person for whose benefit the order was made or for a period that had not expired at the time of the death of the person liable to make payments under the order and, in that case, the order is binding upon the legal personal representative of the deceased person.*
- (4) *An order with respect to the maintenance of a party to a marriage ceases to have effect upon the re-marriage of the party unless in special circumstances a court having jurisdiction under this Act otherwise orders.*
- (5) *Omitted.*

- (6) *Where a re-marriage referred to in subsection (4) takes place, it is the duty of the person for whose benefit the order was made to inform without delay the person liable to make payments under the order of the date of the re-marriage.*
- (7) *Any moneys paid in respect of a period after the event referred to in subsection (4) may be recovered in a court having jurisdiction under this Act.*
- (8) *Nothing in this section affects the recovery of arrears due under an order at the time when the order ceased to have effect.*

59. The husband stated, in his written submissions, that:

- (a) As a part of the wife's written submissions, she included in a proposed minute of order document (referred to in paragraph 1, above) the same relief as she identified in her original Application in a Case, save for the following:
 - (a) Paragraph 1 has been expanded beyond 'enforcement' to incorporate a variety of indemnities different to, and wider than, the indemnities contained in order 36.
 - (b) Paragraph 6 has been added referring to "... the wife's application under section 82(4) of the Family Law Act".
- (b) In relation to the incorporation of indemnities, there was no power in Rule 25B.13(d) to support this, noting that what the wife appears to be seeking is not "enforcement" but a variation to order 36. It is noted that no part of the submissions on behalf of the wife addressed this issue of variation. As such, were the Court to accede to the wife's principal application for enforcement, it should not make the further provisions, as sought by her.
- (c) In relation to paragraph 6 in the wife's minute of order, she has not made any application pursuant to s.82(4) of the Act. If the Court were to dismiss the wife's principal application for enforcement, it is a matter for her whether she then files a different Application. It is, again, noted that no part of the submissions on behalf of the wife addressed this aspect of the orders sought by her.

- (d) The threshold question is whether there is an order amenable to being enforced. Tied up with that is whether the Court has the jurisdiction or power to do what the wife seeks. The husband contends the Court does not.
60. In terms of the above, the Court notes that its task, here, is to determine whether order 36 should be enforced and not to vary or add to that order.

Issues

61. Accordingly, the issue, in this matter, relates to the enforcement of order 36. The controversy is as to the nature or categorisation of the obligations created by that order. The wife asserts that the obligations for payment contained in that order are payments of property pursuant to s.79 of the Act. The husband asserts the obligations were in the nature of spousal maintenance pursuant to s.74 of the Act.
62. The event which ignited the controversy was the marriage of the wife in 2019. If, as the husband asserts, the obligations created in order 36 were spousal maintenance, then by operation of s.82(4) of the Act, that order (and any other order of that nature in the final orders) ceased to have effect, unless in the special circumstances of the matter a court having jurisdiction under the Act, otherwise, orders. This view is conceded by the wife.

Was order 36 an order for spouse maintenance or was it a property order? Or was it something else?

63. The wife submitted that order 36 given the absence of a reference to s.72 of the Act, was a property alteration order pursuant to s.79 of the Act noting s.77A of the Act. The terms of order 36 do not comply with s.77A of the Act as there was no expression that that order was one to which the section applies and there was no specification within the order as to what portion of the payment or the value of the portion of the property attributable to the provision of maintenance was for the wife. In those circumstances, any payment, transfer or settlement which has the effect of requiring a payment or transfer or settlement of property in terms of s.77A(1) shall be taken not to make provision for

the maintenance of a party. However, it must be noted that order 36 did not, specifically, provide for any payment of a lump sum whether in one amount or by instalments or for the transfer or settlement of any specific property to attract the application of s.77A, in any event. Accordingly, the Court accepts that there is simply no reference to any part of the final orders being impacted upon by the provisions of s.77A of the Act.

64. The Court also accepts that it is notable that order 37 of the final orders specifically refers to the spousal maintenance payments received by the wife pursuant to order 27 above. There is no reference to order 36 as contemplating spousal maintenance payments.
65. The Court accepts that the spousal maintenance orders found at order 27 are impacted upon by the husband's and the wife's changing incomes. It is notable, therefore, that order 36 includes the words "notwithstanding the income received by the wife". The Court accepts that this is an important and distinguishable feature which differentiates order 36 from the spousal maintenance orders within the final orders. Further, this is also the case, notwithstanding that the Court does not accept the wife's submission that the words "notwithstanding the income received by the wife", would prevent the Court from making any finding that the wife was a person who was unable to support herself and, accordingly, prevented the Court from making that order pursuant to s.72 of the Act, given that for a spousal maintenance order, the wife, must satisfy "the gateway requirements" that she was unable to support herself adequately. In that regard, the Court accepts the husband's submission that income is but one factor to which the Court could have regard to by reference to s.75(2) of the Act. The Court would not be prevented from finding that a party could not, adequately, support himself/herself simply because it could not ascertain the income of such a party.
66. In that regard, the Court accepts that order 27 has a clear start and end date and the reference in it to the order being by way of interim spouse maintenance is a clear reference to s.72 of the Act and the power to make a maintenance order under s.74 of the Act. Order 27 can be differentiated from order 36 in that there is a clear calculated payment to the wife and orders 28 to 35 provide a clear and concise direction to

the parties as to what is to occur in the event that the husband's income shall reduce and/or the wife's income increases. There is no head of power expressed in order 36 and, accordingly, pursuant to s.77A of the Act, if that section was to apply, order 36 could not be taken to make provision for the maintenance of a party to the marriage.

67. The husband submitted that there was a third possibility, namely that order 36 provided for payments which were neither property nor spousal maintenance and were, therefore, made without a valid power. In those circumstances, the husband maintained that the wife's enforcement application should be dismissed.
68. The Court accepts that when one has regard to the terms of order 36, it is expressed to operate from the date of the orders and applies as and when the wife purchases a new property. The Court accepts that the Family Court of Australia was, at that time, making one order under s.79 of the Act. Accordingly, the order is explicitly conditional upon the wife, at some unknown future date, acquiring a new property and implicitly conditional upon her obtaining a mortgage to so do. If the wife did not purchase a new property or if she did purchase a new property but did not require a mortgage to do so, then no obligation upon the husband would arise. If the wife did purchase a new property and obtained a mortgage to do so, then the husband was required to do all things and sign all necessary documents to be listed as a guarantor for any mortgage held by the wife in relation to the new property. The husband was obliged to pay periodic sums which represented 100% of the contributions to a mortgage loan amount not exceeding \$500,000.00 at a rate of no less than the minimum required by the relevant financial institution providing the mortgage. The Court accepts that the husband's obligation is not referable to a particular fixed amount but merely to a cap upon the way in which the husband's obligation might be calculated. For example, as the husband submitted, the mortgage loan amount might have only been \$200,000.00, in which case the husband's obligation would have been the minimum required by the financial institution for that borrowing. The Court notes, in that regard, that order 36 does not appear to place an upper limit upon the amount borrowed by the wife but merely an upper limit upon the amount to which the husband was obligated to contribute towards that borrowing.

69. The husband is obligated to pay contributions to the mortgage loan amount until such time as the loan is paid out in full and the mortgage discharged. Order 36 does not actually require the husband to pay out the loan in full, nor to make any payment(s) directly to the wife, merely to pay the minimum required contributions until that event occurs. Order 36 also requires the husband to pay strata levies, council rates and water rates as and when they fall due until such time as the loan is paid out in full and the mortgage is discharged. The Court does not accept that it was incumbent on the Family Court of Australia to have before it specific particulars of the liabilities to be quantified by order 36 before it could make the 5 December 2014 orders.
70. Mr Longworth submitted that it was not inconceivable that a future intervening event may occur whereby the principal loan secured by any mortgage was repaid by a third party or even by the wife, herself. For example, he contended that if the house was sufficiently damaged such that an insurance claim was successfully made, it would be a common requirement of any mortgage that the insurance payment be, firstly, directed towards repayment of the loan secured by the mortgage. The obligations pursuant to order 36 would then cease, regardless of how much the husband had paid to that point. The Court notes, however, that it is not unusual for lenders to require that they be noted on any insurance policy in terms of their interests as mortgagee. There is no evidence before the Court as to any insurance position, in any event.
71. Similarly, as Mr Longworth contended, if the wife was to sell her property, any bank loan would be paid out on settlement and the wife would receive the balance of the proceeds of sale. Any obligations on the husband pursuant to order 36 would cease. The Court notes that order 36 does not require, in such circumstances, any ongoing obligation on the husband to enter into any fresh arrangement regarding the purchase of a future property where similar terms to order 36 would, otherwise, apply. The order effected a “one off” financial assistance to the wife in the circumstances set out in the provisions thereof.
72. The Court notes and, it goes without saying, that if there are circumstances which arise after the date of any property order which would impact on the enforcement of that order, then recourse could be

had to s.79A of the Act if, relevantly, applicable to those circumstances. No specific matter was raised on 15 February 2019 when, in fact, apart from varying the 5 December 2014 orders as set out in paragraph 3 above those orders were, otherwise, confirmed, noting that the husband had substantially performed them, at that time.

73. As the husband deposes, in the 5 years since the 5 December 2014 orders were made, he has provided about \$155,000.00 in honouring his commitment pursuant to order 36. In the circumstances, while the husband submitted that if he received only net non-super assets of \$221,972.00, it would be difficult to categorise the order 36 payments as property because that would mean if the husband paid out the principal and interest over the life of the mortgage, he would have received a negative distribution and if the wife had bought a property, the husband would never have been required to pay any money under order 36, that submission ignores the impact of the husband's receipt of his bonus as a financial resource which order 44 provided that he would retain to the exclusion of the wife.
74. The Court accepts, therefore, that when one examines order 36 which requires the husband to pay periodic sums representing 100% of the contributions to a mortgage loan amount, not exceeding \$500,000.00 and having regard to the parties' then existing legal and equitable interests in property, those sums were likely to be paid out of the husband's future income stream including his receipt of any anticipated bonus payments. While the obligations pursuant to order 36 are prospective in nature they do have a connection to the parties' property and superannuation interests in existence at the time of the 5 December 2014 orders. Order 23 of the 5 December 2014 orders which refers to the distribution of the balance of the proceeds of sale of the B Street, Suburb C property provides for the payment of \$430,000.00 to the wife, conditional upon the husband providing a continuing contribution to any mortgage payments, as envisaged in order 36.
75. The Court accepts that when the application for the making of the 5 December 2014 orders was made in September 2014, the wife's new property, being the H Street, Suburb J property, had not then been disclosed. Subsequently, a requisition was raised by the Registrar and, it would appear, that the H Street, Suburb J property then acquired on

27 September 2014 was disclosed to the Family Court of Australia, prior to the making of the 5 December 2014 orders (see Exhibit “Court 2”).

76. While Mr Longworth and Ms Jeliba submitted that there were a number of uncertainties in terms of the implementation of order 36 at the time that order was made, including whether the wife would complete the contract by which she acquired the H Street, Suburb J property, whether she needed to borrow money secured by a mortgage to purchase it, the amount borrowed, the rate of interest on any borrowings from time to time, whether the repayments were ‘principal & interest’ or ‘interest only’, the terms of any mortgage and whether the loan secured by any mortgage could be paid out at any early date and the circumstances surrounding whether that property was sold at a future date, that does not mean that an order could not be made which could now be enforced, given the parties had acted in compliance with that order, thereby establishing the parameters of the factual matters upon which any enforcement application is based. Further, the Court notes that the husband has, in effect, the potential, subject to his own financial circumstances, to effect a payment out of the wife’s mortgage liability and to potentially take a transfer, by way of subrogation of the ANZ’s secured interest, as the mortgagee of the H Street, Suburb J property. In those circumstances, the husband would have the ability to potentially recover the sum so secured on any sale of the H Street, Suburb J property.

Conclusion

77. The Court is of the view that order 36 is part of a property order made under s.79 of the Act and is not a maintenance order and, therefore, is unaffected by the wife’s marriage in terms of s.82 of the Act and is, otherwise, enforceable in its terms.
78. The Court will make the directions and orders, as set out at the commencement of these reasons, to enable it to determine the amount of money, currently, owed by the husband in respect of his obligations under order 36, noting that he ceased payments under that order reliant upon advice that his obligations had been determined through the impact of s.82 of the Act. If the wife has made any of those payments then the husband would be liable to repay her those sums. This issue

would need updated affidavit evidence to be filed and served prior to the next Court date.

79. Section 117 of the Act sets out that each party shall bear his or her own costs subject to the considerations in sub-section two.
80. Both parties sought the costs of their competing applications. Any order for costs must also be determined in light of the substantive judgment and the relative success or failure of the parties. This is, naturally, something that can only be addressed after judgment is delivered. The Court will make the directions and orders in relation to costs as set out at the commencement of these reasons.
81. In light of the Court's decision, the parties may be able to reach further agreement and, accordingly, leave is granted to file terms and if orders can be made by consent, the adjourned date may be, administratively, vacated, without the need for further hearing time.

I certify that the preceding eighty-one (81) paragraphs are a true copy of the reasons for judgment of Judge Kemp

Associate:

Date: 11 November 2020