

FAMILY COURT OF AUSTRALIA

Dickinson & Packam [2021] FamCA 298

File number(s): SYC 2467 of 2021

Judgment of: **MCCLELLAND DCJ**

Date of judgment: 13 May 2021

Catchwords: **FAMILY LAW – PROPERTY – Interim – Exclusive Occupation of the former matrimonial property – Balance of convenience – Where the parties are involved in NCAT proceedings concerning the former matrimonial property in circumstances where the parties have not complied with provision for repair works to be undertaken to the property following a Deed being entered into with the Body Corporate – Orders made for the wife to be granted sole and exclusive use of the property – Orders made authorising the wife to undertake the necessary repairs.**

Legislation: *Family Law Act 1975 (Cth) s 114*

Cases cited: *Acton & Burton* [2015] FamCA 469
Davis & Davis (1976) FLC 90-062
Iphostrou & Iphostrou [2011] FamCA 20
Jyotisha & Jyotisha [2016] FamCA 738
S & S [2002] FamCA 59

Number of paragraphs: 73

Date of hearing: 12 May 2021

Place: Sydney by web conference

Counsel for the Applicant: Mr Lawrence

Solicitor for the Applicant: Gayle Meredith & Associates

Counsel for the Respondent: The Respondent in person

ORDERS

SYC 2467 of 2021

BETWEEN: **MS DICKINSON**
Applicant

AND: **MR PACKAM**
Respondent

ORDER MADE BY: **MCCLELLAND DCJ**

DATE OF ORDER: **13 MAY 2021**

THE COURT ORDERS THAT:

1. That within 48 hours of these orders, the husband do all acts and things necessary in relation to the property situated and known as B Street, Suburb C, NSW (**“the Suburb C property”**):
 - (a) to irrevocably authorise and direct Mr D of “F Builders” to transfer the monies held by him for the purpose of paying for work to be undertaken by F Builders to the Suburb C property to a bank account of the wife;
 - (b) in relation to all monies received by the husband in addition to the sum referred to in Order 1(a) herein from the Owners Strata - Plan number ... (**“the Owners Corp”**) pursuant to Deed of Settlement and Release entered into between the Owners Corp and the husband and dated 16 September 2019 (**“the Deed”**) that the husband transfer such monies to a bank account of the wife;
 - (c) to irrevocably authorise and direct the Owners Corp and the Strata Manager of Owners Strata – Plan number ...to deal with the wife on his behalf as the owner of the Suburb C property in relation to all issues which relate to the Suburb C property including in relation to the Deed;
 - (d) to irrevocably authorise the wife to instruct M Pty Ltd or another tradesperson retained to undertake the work to the Suburb C property pursuant to the Deed and to otherwise rectify the Lot Property Damage and Common Property Damage as defined in the Deed (**“the Damage”**) and any additional defects in the Suburb C property;

- (e) to sign any written consent required under section 143(1) of the Strata Schemes Management Act 2015 (“**the SS Act**”) consenting to the making of a common property rights by-law under S142 of the SS Act authorising the undertaking of any variations to the works necessary to rectify the Damage and/or any additional defects in the Suburb C property or otherwise as required in the future;
 - (f) provide an irrevocable authority to the wife to undertake the work to the Suburb C property pursuant to the Deed and otherwise rectify the Damage on his behalf as the “Owner” for the purpose of Special By-law 13 of the By-laws of Strata Plan number ... or any common property rights by-law referred to in order 2.5 herein necessary to rectify the Damage and/or any additional defects in the Suburb C property.
2. That the wife be restrained from using the monies that she receives pursuant to Order 1 herein other than for the purpose of the work to the Suburb C property required pursuant to the Deed and otherwise rectifying the Damage and any additional defects to the Suburb C property.
 3. That forthwith upon the wife receiving the funds referred to in Order 1 that the wife do all acts required to cause the work to the Suburb C property required pursuant to the Deed and to otherwise rectify the Damage and any additional defects to the Suburb C property using the funds paid to her pursuant to Orders 1(a) and (b) herein for that purpose.
 4. That in the event the monies referred to in Orders 1(a) and (b) are insufficient to pay for all the work referred to in Order 3 herein that within seven (7) days of being provided with invoices that the husband pay such sums to M Pty Ltd or such other tradesperson that is retained to undertake the work provided that the total amount spent on repairs to the Suburb C property is less than or equal to \$251,578.
 5. That each of the husband and wife forthwith to do all acts and sign all documents necessary and do all reasonably possible to seek the Owners Corp agreement to adjourn the proceedings commenced by them as Plaintiff in the NSW Civil & Administrative Tribunal number ... (“**the NCAT proceedings**”) until after the work to the Suburb C property required pursuant to the Deed and rectification of the Damage is completed.

6. That pending further order, the wife have sole use and occupation of the Suburb C property and the husband be restrained from entering upon the property.
7. That pending further order, the parties be restrained from selling, further encumbering or drawing down further on any loan facility secured by mortgage against the Suburb C property or the property located at H Street, Suburb J (“the Suburb J”) otherwise dealing with the Suburb C property or the Suburb J.
8. That in default of the parties doing all acts and things and executing all such documents as are necessary to give effect to these orders within two (2) days of an obligation to do so as required under these orders, and on the Registrar being satisfied of such failure or neglect or default by any party by way of an affidavit evidence only, a Registrar of the Family Court of Australia at Sydney is appointed pursuant to s 106A of the *Family Law Act 1975* (Cth) to execute all such documents in the name of the party in default and to do all such acts and things necessary to give validity and operation to the said orders and the party in default pay to the other party to this Application that party’s costs and Disbursements on an indemnity basis.

Note: The form of the order is subject to the entry in the Court’s records.

Note: This copy of the Court’s Reasons for judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to 17.02 Family Law Rules 2004 (Cth).

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Dickinson & Packam* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

REASONS FOR JUDGMENT

McClelland DCJ:

INTRODUCTION

- 1 The matter concerns an urgent Application in a Case filed 7 April 2021 by Ms Dickinson (“the wife”) for the exclusive occupation of the former matrimonial property at B Street, Suburb C (“the Suburb C property”), and authority to undertake works on the property, in circumstances where action has been taken against the parties in the NSW Civil and Administrative Tribunal (“NCAT”) by the Owners Corporation of the Suburb C property Strata Plan in respect to the repair work to fix extensive damage to the property, which have not been undertaken, pursuant to a Deed of Settlement and Release.
- 2 The Application is opposed by Mr Packam (“the husband”). Comparatively, the husband is seeking an order for exclusive occupation of the Suburb C property for the purpose of carrying out work to the property or, alternatively, to negotiate the sale of the property without the work being undertaken. The husband is also seeking an order that instead of an order for exclusive occupation of the Suburb C property that an order be made for the wife to have exclusive occupation of a property at H Street, Suburb J (“the Suburb J property”) that is in the sole name of the wife.

BACKGROUND

- 3 In 2012, the parties commenced cohabitation and married in 2014. There are two (2) children of the relationship, namely:
 - (a) Z born in 2013, currently aged seven (7) years, who has a diagnosis of Autism and Attention Deficit Disorder; and
 - (b) Y born in 2015, currently aged five (5) years.The children currently reside with the wife at the Suburb C property and spend two (2) weekends over a three (3) week period with the husband from Friday afternoon until Sunday night as well as half school holidays.
- 4 In October 2014, the parties moved into the Suburb C property which is held in the husband sole name, as inherited from his late father’s estate. The Suburb C property is currently encumbered and subject to a mortgage of approximately \$320,000. The wife currently lives in the property with the children and has done so since October 2014.

- 5 On 27 November 2015, the parties purchased the Suburb J registered in the wife’s sole name. The husband contends that the Suburb J was purchased from funds he received from his late father’s estate.
- 6 On 7 February 2017, the Suburb C property was damaged by a storm. The Owners Corporation of Strata Plan No ... (“the Owners Corporation”), that manages the building, successfully made an insurance claim to L Ltd.
- 7 On 14 April 2018, the parties separated on a final basis. The husband rented a property in Suburb N. During the course of the proceedings, the husband advised the Court that he currently lives in Suburb R and he intends to remain at that address in the “medium term” irrespective of what orders are made in these interim proceedings.
- 8 On 16 September 2019, L Ltd assessed the Suburb C property and common property damage in the sum of \$270,524, which was paid to the Owners Corporation in a lump-sum cash settlement. The husband and the Owners Corporation entered into a Deed of Settlement and Release (“2019 Deed”) for the sum of \$251,578 (“the insurance monies”) to be paid to the husband to facilitate the necessary repair work being undertaken with the insurance monies. Relevantly, the 2019 Deed stipulated that the necessary works to repair the property must be undertaken within three (3) months from the date of the Deed or within such time as extended by written consent.
- 9 In late 2019, the parties came to an agreement in respect to a final property adjustment and parenting plan. On 26 November 2019, an Application for Consent orders was filed in this Court however, that Application was dismissed following neither party complying with a Registrar’s request requisitioning further information. Neither party wishes to be now bound by those draft consent orders which the parties acknowledge provided for the wife to be given ownership of the Suburb C property and the husband to be given ownership of the Suburb J.
- 10 In 2020, a divorce order was made by the Federal Circuit Court of Australia to take effect in early May 2020.
- 11 In March 2020, the wife engaged F Builders to complete the necessary repairs to the Suburb C property for the cost of \$118,000. The husband consequently transferred that amount to F Builders from the insurance monies. It is acknowledged that some of the repairs required were undertaken however, the majority of the repairs have not been completed. It was agreed

that none of the work was undertaken by F Builders and that Company still retains the original sum of \$118,000.

- 12 On 3 November 2020, by letter from his then solicitors, the husband sought that the insurance monies advanced to F Builders, in the sum of \$118,000, be returned to him. The husband proposed, to the wife, that an alternate builder be instructed. Mr D, from F Builders, advised that they were no longer prepared to complete the repairs to the Suburb C property. The husband states that F Builders refuses to return the monies now in their possession. The wife contends that this has not been confirmed to be the case and requires a formal demand which, if not complied with, can form the basis of further proceedings joining that company if a formal order for recovery of those funds is required.
- 13 The wife contends that, as a result of the emergence of the COVID-19 virus in early 2020, the work could not be completed during 2020. The wife also indicated concern that, in the absence of an order for exclusive occupation, if she moved out of the property to facilitate the work being carried out, the husband, who is the registered owner of the Suburb C property, would not let her return to live in the property.
- 14 As a result of concerns for the delay in the building works being undertaken in accordance with the 2019 Deed, on 5 March 2021, the Owners Corporation initiated proceedings in NCAT against the husband and wife seeking enforcement of the 2019 Deed by requiring the parties to carry out the repair work to the Suburb C property. Pursuant to directions made in those proceedings, the Owners Corporation is required to provide documentary evidence upon which it intends to rely by 21 May 2021.
- 15 The husband has not, to date, participated in the NCAT proceedings but states that he has been in direct communication with members of the Owners Corporation. Those communications, he contends, include the prospect of a Real Estate business, which currently owns and occupies premises at the unit block, offering to purchase the Suburb C property which is the subject of these proceedings. It was submitted that the potential purchaser is prepared to purchase the Suburb C property without the repairs being undertaken. However, no admissible evidence of those discussions or any such offer was presented to the Court and, appropriately in my view, counsel for the wife objected to such evidence being presented from the electronic bar table from where the husband was making his submissions.

16 On 7 April 2021, the wife commenced these proceedings in this Court in respect to an adjustment of the parties' property interests.

17 On 29 April 2021, the husband filed a Response to the wife's Initiating Application and further seeking orders in respect to the parties' children.

18 On 10 May 2021, Senior Registrar McNamara set this urgent Application down for hearing before me "in relation to orders sought by the applicant wife at paragraphs 2-8 inclusive and 11 of the interim orders sought [by the wife]".

APPLICATIONS

19 The wife seeks that orders be made in accordance with the Minute of Order contained in the case outline document included in Exhibit A, as follows:

...

2. That within 48 hours of these orders that the husband do all acts and things necessary in relation to the property situated and known as B Street, Suburb C, NSW ("the Suburb C property"):
 - 2.1. to irrevocably authorise and direct Mr D, builder of "F Builders" to transfer the monies held by him for the purpose of paying for work to be undertaken by F Builders to the Suburb C property to a bank account of the wife;
 - 2.2. in relation to all monies received by the husband in addition to the sum referred to in order 2.1 herein from The Owners Strata - Plan number ... ("the Owners Corp") pursuant to Deed of Settlement and Release entered into between the Owners Corp and the husband and dated 16 September 2019 ("the Deed") that the husband transfer such monies to a bank account of the wife;
 - 2.3. to irrevocably authorise and direct the Owners Corp and the Strata Manager of Owners Strata – Plan number ... to deal with the wife on his behalf as the owner of the Suburb C property in relation to all issues which relate to the Suburb C property including in relation to the Deed;
 - 2.4. to irrevocably authorise the wife to instruct M Pty Ltd or another tradesperson retained to undertake the work to the Suburb C property pursuant to the Deed and to otherwise rectify the Lot Property Damage and Common Property Damage as defined in the Deed ("the Damage") and any additional defects in the Suburb C property;
 - 2.5. to sign any written consent required under section 143(1) of the Strata Schemes Management Act 2015 ("the SS Act") consenting to the making of a common property rights by-law under S142 of the SS Act authorising the undertaking of any variations to the works necessary to rectify the Damage and/or any additional defects in the Suburb C property or otherwise as required in the future;

- 2.6. provide an irrevocable authority to the wife to undertake the work to the Suburb C property pursuant to the Deed and otherwise rectify the Damage on his behalf as the “Owner” for the purpose of Special By-law 13 of the By-laws of Strata Plan number ... or any common property rights by-law referred to in order 2.5 herein necessary to rectify the Damage and/or any additional defects in the Suburb C property.
3. That the wife be restrained from using the monies that she receives pursuant to order 2 herein other than for the purpose of the work to the Suburb C property required pursuant to the Deed and otherwise rectifying the Damage and any additional defects to the Suburb C property.
4. That forthwith upon the wife receiving the funds referred to in order 2 that the wife do all acts required to cause the work to the Suburb C property required pursuant to the Deed and to otherwise rectify the Damage and any additional defects to the Suburb C property using the funds paid to her pursuant to orders 2.1 and 2.2 herein for that purpose.
5. That in the event the monies referred to in orders 2.1 and 2.2 herein are insufficient to pay for all the work referred to in order 4 herein that within 7 days of being provided with invoices that the husband pay such sums to M Pty Ltd or such other tradesperson that is retained to undertake the work.
6. That each of the husband and wife forthwith to do all acts and sign all documents necessary and do all reasonably possible to seek the Owners Corp agreement to adjourn the proceedings commenced by them as Plaintiff in the NSW Civil & Administrative Tribunal number... (“the NCAT proceedings”) until after the work to the Suburb C property required pursuant to the Deed and rectification of the Damage is completed.
7. That pending further order the wife have sole use and occupation of the Suburb C property and the husband be restrained from entering upon the property.
8. That pending further order the husband be restrained from selling, further encumbering or drawing down further on any loan facility secured by mortgage against the Suburb C property or otherwise dealing with the Suburb C property.
- ...
11. That in default of the parties doing all acts and things and executing all such documents as are necessary to give effect to these Orders within 2 days of an obligation to do so as required under these Orders, and on the Registrar being satisfied of such failure or neglect or default by any party by way of an affidavit evidence only, a Registrar of the Family Court of Australia at Sydney is appointed pursuant to s 106A of the Family Law Act 1975 (Cth) to execute all such documents in the name of the party in default and to do all such acts and things necessary to give validity and operation to the said orders and the party in default pay to the other party to this Application that party's costs and disbursements on an indemnity basis.

....

20 The husband opposes the Application of the wife and seeks that orders be made in accordance with his Response to Initiating Application filed 29 April 2021, as follows:

...

2. That the respondent husband retain ownership of the property at B Street, Suburb C currently in his name.
3. That the respondent husband commence immediate and exclusive use and occupation of the in order to resolve the issues pertaining to the property
4. That the applicant wife retain ownership of and sole and exclusive use of the property at H Street.

(As per original)

EVIDENCE

21 The wife relies upon the following documents:

- (c) Initiating Application and Application in a Case filed 7 April 2021;
- (d) Affidavit of the wife filed 7 April 2021;
- (e) Financial Statement filed 7 April 2021;
- (f) Affidavit of the wife in reply filed 7 April 2021; and
- (g) Tender Bundle of documents (marked 'Exhibit A').

22 The husband relies upon the following documents:

- (a) Response to Initiating Application filed 29 April 2021;
- (b) Affidavit of the husband filed 29 April 2021;
- (c) Financial Statement filed 29 April 2021; and
- (d) Un-sworn written statement of the husband filed 11 May 2021 (marked 'Exhibit B').

THE LAW – CONCEPTS AND PRINCIPLES

23 The power of the Court to grant an injunction relating to the use and occupancy of the former matrimonial home is found in s 114 (1)(f) of the *Family Law Act 1975* (Cth) (“the Act”) and such an order can be made if it is considered ‘*proper*’ to do so: see *Davis & Davis* (1976) FLC 90-062 at 75,309.

24 Section 114 of the Act relevantly provides that:

- (1) In proceedings of the kind referred to in paragraph (e) of the definition of matrimonial cause in subsection 4(1), the court may make such order or grant such injunction as it considers proper with respect to the matter to which the proceedings relate, including:

...

- (f) an injunction relating to the use or occupancy of the matrimonial home.

...

- (3) A court exercising jurisdiction under this Act in proceedings other than proceedings to which subsection (1) applies may grant an injunction, by interlocutory order or otherwise (including an injunction in aid of the enforcement of a decree), in any case in which it appears to the court to be just or convenient to do so and either unconditionally or upon such terms and conditions as the court considers appropriate.

25 In my view, it is appropriate for the Court to consider an application for orders for the exclusive occupation of a property in two stages. The first stage involves considering whether the circumstances of the parties are such that an order for exclusive occupation is necessary. If the answer to that first question is in the affirmative, the second question involves considering which party should have the right of exclusive occupation.

26 In respect to that first stage, I am bound by a comprehensive analysis of this issue undertaken by the Full Court in *S & S* [2002] FamCA 59. In that case, the Full Court (per Kay, Holden and Monteith JJ), after discussing several Australian and United Kingdom authorities, said:

- 38. An injunction that prohibits a person from living in their own home is of such gravity that it ought only be granted in restricted and exceptional circumstances. We agree with the sentiments expressed in *G v J (Ouster Order)* [1993] 1 FLR 1008 where the English Court of Appeal cited with approval a passage from Lloyd LJ in *Burke v Burke* [1987] 2 FLR 71 at 73 where his Lordship said:

"It must never be forgotten that an ouster order is a very serious order to make. It is described by Ormrod LJ...as a 'drastic order' and an order that should only be made in cases of real necessity. It must not be allowed to become a routine stepping-stone on the road to divorce on the ground that the marriage has already broken down and that the atmosphere in the matrimonial home is one of tension..."

- 39. Butler Sloss LJ described it as "an extreme order ...that should be looked at with the greatest possible care" in *Tuck v Nicholls* [1989] 1 FLR 283 at 286, and as an "exceptional remedy" in *Silvester v Silvester* [1997] EWCA Civ 1788.

- 40. There are no words of limitation in s 114 other than the grant of the injunction must be "proper". But, even so, it is difficult to see how the grant of such an injunction could be said to be proper unless there is an appropriate factual base supporting it.

27 In respect to the second stage, in *Jyotisha & Jyotisha* [2016] FamCA 738 at [15], Hogan J said:

- [15] It is clear the Court has power to make orders as sought by the parties, provided that such order is considered proper in the circumstances of the

case. It is also clear that authority establishes that:

...

in determining the manner in which a court will exercise its discretionary power [to make an order for one or other of the parties to have exclusive occupation of the former matrimonial home], relief should not depend *merely* on the balance of convenience of hardship; rather, the Court should have regard to the means and needs of the parties, the needs of any children, the conduct of the parties and should also properly balance the hardship to each party (and any children) of making or refusing to make the order sought.

(Citations omitted) (Original emphasis)

CONSIDERATION

Nature of interim proceedings

28 These are interim proceedings and, accordingly, unless agreed or objectively verifiable, it is not possible to resolve factual controversies between the parties. In that respect, in *Iphostrou & Iphostrou* [2011] FamCA 20, Cronin J said at [44]:

In any situation of an interlocutory nature where the facts are controversial and in dispute, a court cannot make findings of fact. Findings of fact form the basis upon which orders are made within jurisdiction.

29 Similarly, in *Acton & Burton* [2015] FamCA 469, Hogan J said at [26]:

The nature of the interim hearing process is such that parties are afforded a truncated process in which it is not possible to make findings about matters that are significantly in contest between them...

30 In this matter the following facts are agreed or verifiable.

31 In 1974, the wife was born. She is currently aged 46 years.

32 In 1984, the husband was born. He is currently aged 36 years.

33 In June 2012, the parties commenced cohabitation.

34 In 2013, the parties' son, Z, was born.

35 In 2014, the parties married in Sydney.

36 In October 2014, the parties moved into the Suburb C property. The property is in the sole name of the husband.

37 In 2015, the parties' daughter, Y, was born.

38 The parties continued to live in the Suburb C property until they separated on or about 14 April 2018 at which time the husband moved to Suburb N. The wife continues to reside in the Suburb C property with the parties' two (2) children.

39 On or about 27 November 2015, the parties purchased the Suburb J in the sole name of the wife.

40 On 7 February 2017, the Suburb C property was damaged by stormwater after a tradesperson left an assembly manual in the gutter of the roofing to the building. The Owners Corporation of the Suburb C unit block successfully made an insurance claim to L Ltd in respect to the damage.

41 By Deed of Settlement and Release dated September 2019, the husband entered into an Agreement with the Owners Corporation. The recitals to the deed are as follows:

- A. The Owners Corporation is the registered owner of the common property located at B Street Suburb C NSW ("**Property**").
- B. The Lot Owner is the registered owner of Lot... in the Property.
- C. On or about 7 February 2017, a storm event occurred resulting in damage to lot property within Lot ... ("**Lot Property Damage**") and resulting in damage to common property within Lot ... ("**Common Property Damage**").
- D. The Owners Corporation made an insurance claim to L Ltd ("**the Insurer**") in relation to the Lot Property Damage and Common Property Damage damaged resulting from the storm ("**Claim No. ...**").
- E. The Insurer assessed the claim and obtained quotation from V Pty Ltd.
- F. The Lot Owner raised concerns that the work in the quotation from V Pty Ltd was not adequate.
- G. The Insurer accepted a second claim for additional electrical repairs, wall lining repairs, repairs to the external glazing façade ("**Claim No. ...**").
- H. The Lot Property Damage and Common Property Damage is set out in a report by Mr S of T Pty Ltd dated 9 March 2018 annexed to this Deed and marked "Annexure A" ("**T Pty Ltd Report**").
- I. The Common Property Damage is referred to at paragraphs 26, 27 and 28 on page 9 of the T Pty Ltd Report under the headings "Doors" and "External Glazing Façade".
- J. The Insurer obtained a further quotation from V Pty Ltd dated 26 June 2018 in the sum of \$271,524.00 to repair the Lot Property Damage and Common Property Damage relating to Claim No. ... and Claim No. A copy of the quotation is annexed to this Deed and marked "Annexure B" ("**V Pty Ltd Quotation**").
- K. The Lot Owner obtained a quotation from P Pty Ltd in the sum of \$300,783.40 to repair the Lot Property Damage and Common Property

Damage relating to Claim No. ... and Claim No. A copy of the quotation is annexed to this Deed and marked “Annexure C” (“**P Pty Ltd Quotation**”).

- L. The Insurer has assessed the work required in relation to Claim No. ... in the sum of \$247,820.00.
- M. The Insurer has assessed the work required in relation to Claim No. ... in the sum of \$22,704.00.
- N. The Insurer has agreed to pay the total amount of \$270,524.00 to the Owners Corporation as a lump-sum payment on a cash settlement basis.
- O. There has been difficulty obtaining access to Lot ... for the purpose of quoting on the External Glazing Façade and to rectify the Lot Property Damage and Common Property Damage.
- P. The parties acknowledge that the total amount of \$270,524.00 includes a provisional sum of \$50,000.00 for External Glazing Façade work which is Common Property Damage and includes other provisional sums as set out in the V Pty Ltd Quotation.
- Q. The Lot Owner agreed to pay the Owners Corporation’s legal costs in relation to this matter because such costs were incurred due to the Lot Owner demanding that its preferred contractor, P Pty Ltd, undertake the work.
- R. Without admission of liability, the Parties have agreed to resolve the Claim in accordance with the terms of this Deed.

42 Relevantly, cl 3.2 (c) of the 2019 Deed provides that the husband:

Undertake the Work by engaging a suitably licensed contractor to perform the Work in accordance with the Home Building Act 1989 and as such procure the completion of the Work within [three] 3 months of the date of this Deed, or within such time as extended by the written consent of the Owners Corporation.

43 It did not appear to be in dispute that the Owners Corporation transferred to the husband the sum of approximately \$251,578 for the purpose of the repair work being undertaken. The evidence provided is, however, insufficient for me to reach a conclusion on how much of that money has been spent on some of the repairs which have taken place and how much remains.

44 In March 2020, the wife engaged F Builders to complete the necessary repair work on the Suburb C property. The husband transferred the sum of \$118,000 to the Building Company for that purpose. It was agreed that the Building Company has not undertaken any of the repair work since those funds were transferred. The wife contends that the work was not completed by that Building Company as a result of the unreasonable attitude adopted by the husband. The husband contends that the situation was precisely the reverse, that is, he contends that the Building Company would not proceed with the repair work as a result of difficulties which they experienced in dealing with the wife. It is not possible to determine, in these interim proceedings, the reason why the Building Company did not proceed with the

work. It is sufficient, for the purpose of these proceedings, to note that, other than in respect to relatively minor work specified on the schedule of work to be completed, the repair work remains substantially outstanding and F Builders remain in possession of the sum of \$118,000.

45 It was not disputed that, after making payment to F Builders, the husband remained in possession of the sum of approximately \$80,000, being the balance of the insurance monies provided to him by the Owners Corporation pursuant to the 2019 Deed. The husband's Financial Statement records that the husband currently retains the sum of \$67,000 in a bank account.

46 Each of the parties have filed affidavits where they are critical of the alleged unreasonable attitude and conduct of the other which, they each contend, has resulted in the repair work not being undertaken in accordance with the provisions of the 2019 Deed. Again, it is not possible, in these interim proceedings, to determine who was or was not responsible for the work not being undertaken. What is relevant, for the purpose of these proceedings, is the fact that the Owners Corporation, as they are entitled to, has commenced proceedings in NCAT seeking orders against the husband, as the registered owner, and the wife, as the occupier of the Suburb C property, requiring them to undertake the necessary repair work. In that respect, the primary order sought by the Owners Corporation is "that the respondents must carry out works to that lot and associated common property". The alternative form of order sought by the Owners Corporation is that the Owners Corporation "may access the respondent's lot for the purposes of carrying out the work". The proposed orders include an application for an order that, in the event that the Owners Corporation undertakes the work, the costs incurred are to be paid by the wife and husband.

47 In April 2021, NCAT made orders in respect to the further progress of those proceedings which included an order for the Owners Corporation to provide relevant documents that they seek to rely upon, in the proceedings, to the Tribunal and the husband and wife by 21 May 2021.

48 It is agreed that the parties have had an acrimonious relationship in the period subsequent to their separation and this is confirmed in email communications attached to the husband's summary statement (marked 'Exhibit B' in the proceedings).

49 It is self-evident by the history of the parties' poor communications that they are incapable of reaching agreement to advance the repair work.

50 The wife contends that, in order for the repair work to be undertaken, orders should be made in terms of those sought by her which would enable her to take charge of the process.

51 Conversely, the husband contends that the orders sought by him, including, specifically, the order for exclusive occupation in favour of himself, should be made to either enable him to ensure that the repair work is undertaken and/or for him to negotiate with the other property owners in the Suburb C property unit block with a view to the parties selling the Suburb C property in its current damaged state.

52 During the course of this hearing, I invited the parties to make submissions as to why I should not infer from the fact that each party sought an order for exclusive occupation that it indicated they each accepted that such an order was necessary in the circumstances of this case. Neither party submitted that I should not draw that inference.

Findings

Stage one – exclusive occupation

53 In terms of the first stage of considering an order for exclusive occupation, to which I have referred, I am satisfied that it is necessary for there to be an order for exclusive occupation of the Suburb C property to ensure that the necessary repair work referred to in the 2019 Deed is undertaken.

54 Despite the husband's submission to the contrary, I do not accept the husband's argument that there is any viable alternative to the repair work being undertaken. This is because the application to NCAT makes it clear that, if the parties do not themselves undertake the repair work, the Owners Corporation seeks authority for the Owners Corporation itself to undertake the work at a cost to the parties. Those costs would also include, according to the application made by the Owners Corporation, legal costs associated with the NCAT proceedings.

55 I respectfully agree with counsel for the wife that, in the circumstances of this matter, which I have broadly outlined above, the wife and husband have no viable defence to the NCAT application which has been bought by the Owners Corporation.

56 In other words, if the parties do not themselves undertake the necessary repair work, it will be taken out of their hands in circumstances where the costs incurred by the Owners Corporation

would be beyond the control of the parties. The parties would also be liable for the costs associated with the NCAT proceedings.

57 In the absence of any admissible evidence presented by the husband in respect to negotiations which he states he has had with certain unit owners of the Suburb C property unit block, who are members of the Owners Corporation, I am unable to find that there is a viable option of a negotiated outcome whereby the parties sell the Suburb C property in its current damaged state.

58 Accordingly, if orders are not made to facilitate the repairs occurring, there is every prospect that the marital property will be diminished as a result of the cost of the repair work being taken out of the parties' hands and placed into the hands of the Owners Corporation. The parties' property pool is also likely to be diminished by legal costs incurred in the NCAT proceedings.

59 In circumstances where, for reasons which I have set out, I am satisfied that the parties are unable to reach agreement between themselves as to the method by which the repair work is to be undertaken and then, further, to cooperate in respect to that repair work being undertaken, I am satisfied that it is just and convenient to make an order for exclusive occupation of the Suburb C property.

Stage two – exclusive occupation

60 In terms of the second step of considering an application for exclusive occupation, to which I have referred, having regard to the submissions and evidence of the parties, I determine that it is appropriate to make the orders as sought by the wife for her to have exclusive occupation of the property for the following reasons.

61 The wife has lived in the property since October 2014, including in the period subsequent to the parties separation to date.

62 Z has lived in the Suburb C property since he was approximately 18 months old and Y has lived in the property all of her life.

63 The wife seeks final orders for the property to be transferred to her sole name. While it is not appropriate to predetermine the issue prior to final hearing, and I do not purport to do so, the wife's application in that respect is not unreasonable in circumstances where the parties have,

previously, reached agreement for that outcome to occur following proposed consent orders being made by the Court.

64 The Suburb C property is in close proximity to the children's school.

65 While the husband challenges the wife's evidence in respect to the learning and behavioural difficulties experienced by Z, I am satisfied that Z has been diagnosed by an appropriately qualified specialist, being Associate Professor Q, that he experiences challenges in respect to cognitive language and social skills. Indeed, in his report dated 28 September 2018, the Associate Professor refers to Z as having severe Attention Deficit Disorder, experiencing challenges in respect to his self-regulation, and requires assistance in developing "patterns of social behaviour to enable his meaningful engagement with peers and education".

66 I recognise that the husband intends to challenge the veracity of the opinion expressed by Associate Professor Q on the basis that he contends the wife has exaggerated her observations and her account of the difficulties experienced by Z. Nevertheless, even at this interim stage, I am satisfied that Z has learning difficulties and experiences difficulties in respect to his self-regulation. In those circumstances, I am satisfied that it would be disruptive of both children for orders to be made requiring the wife to permanently vacate the Suburb C property and I respectfully accept the argument of counsel for the wife that the Court can reasonably infer that it would be particularly disruptive for Z.

67 Having regard to the wife's Financial Statement, I am satisfied that, having particular regard to the wife's weekly income and expenditure, she would experience difficulty in meeting the cost of alternative accommodation on a long-term basis.

68 Conversely, the husband stated, during the course of the proceedings, that he has recently moved into a rental property at Suburb R and, irrespective of the outcome of these proceedings, he intends to remain living in that property.

69 Accordingly, in weighing the balance of convenience including the impact upon the children, consistent with the reasoning of Hogan J to which I have earlier referred, and which I adopt, I am satisfied that the balance favours the wife continuing to reside in the property. I will therefore make orders as sought by the wife for her to have exclusive occupation of the Suburb C property.

Authority to repair the property

70 It is then necessary to consider what, if any, additional orders are required to ensure that the required repair work is undertaken to the Suburb C property including the common property of the unit block.

71 In considering this issue, I respectfully agree with the submission of counsel for the wife that the responsibility for undertaking the repairs should be allocated to that party who is the beneficiary of the order for exclusive occupation. In circumstances where, for the reasons which I have explained, I am satisfied that the wife should be empowered to arrange and oversee those renovations. I am further satisfied that the orders proposed by the wife are appropriate, just and convenient for that to occur. Specifically, the orders will require that any funds provided to the wife pursuant to the orders made in these interim proceedings will be required to be spent on those renovations.

CONCLUSION

72 Accordingly, I am satisfied that it is just and convenient to make proposed orders 2 through to 8, inclusive and proposed order 11 of the interim orders sought by the wife in her Application in a Case filed on 7 April 2021 save to the extent that the wife did not oppose proposed order 8 being varied such that the parties jointly be restrained from selling, further encumbering or drawing down further on any loan facility secured by mortgage against the Suburb C property or the Suburb J or otherwise dealing with the Suburb C and the Suburb J. This will ensure that the real property of the parties cannot be sold or encumbered without the consent of both parties or an order of the Court.

73 I further propose to restrict the sum potentially payable by the husband to the amount which he has received from the Owners Corporation pursuant to the 2019 Deed which I understand to be the sum of \$251,578 but which may now be a lesser sum as a result of some of the funds having been applied to the partial repair work which has already been undertaken.

I certify that the preceding seventy-three (73) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Deputy Chief Justice McClelland.

Associate:

Dated: 13 May 2021