FAMILY COURT OF AUSTRALIA

DOVGAN & DOVGAN ***[2021] FamCA 306***

FAMILY LAW – PROPERTY – Where single expert appointed to value real estate in a Sydney suburb – Where husband accepted valuation but wife does not – Where wife made application to call adversarial expert evidence of value on fourth day of trial – Where held that the wife failed to satisfy any of the criteria in Rule 15.59(2)(a), (b) or (c) of the Family Law Rules, 2005 – Where court would not have exercised discretion in favour of permitting the wife to call adversarial expert evidence.

REAL PROPERTY – VALUATION – Valuation of real property – Where parcel of real estate had remote potential for rezoning to allow high density residential development – Whether single expert used proper valuation methodology – Whether potential for rezoning too remote – Whether Court should reject valuation evidence of single expert - whether Court should reach its own value as a "best guess" – where held the evidence did not permit departure the value reached by the single expert – Where any potential for a higher value to be taken into account under s 79(4)(e) of the *Family Law Act 1975* (Cth).

DEEDS – CONSTRUCTION – Proper construction of deeds – Where husband executed "Deed of Acknowledgement" – Whether document recorded or created a trust in favour of third respondent – Where held not trust existed – Whether alternatively the document acknowledged a promise to pay on a contingency – Whether conduct of husband swearing affidavit evidence in support of a trust argument was subsequent conduct inconsistent with any contractual or promissory intention.

FAMILY LAW – PROPERTY – Where very substantial asset pool close to $40 million – Where significant dispute concerning what constituted the "*property of the parties to the marriage*" – Where substantial assets held in two non-exhaustive discretionary trusts – Whether the trust assets were property "of" the husband – Where husband a discretionary object but not trustee, settlor, or appointor of the trusts – Where trustee a company – Where husband no longer a director of the trustee – Where decisions of trustee made by husband's father – Where held the trust assets not property "of" the husband – Where trust assets fit more readily within concept of "financial resources".

FAMILY LAW – PROPERTY – where wife sought orders under Part VIIIAA of the Act to protect any payment ordered in her favour – Where rights or property interests of third parties likely to be altered by proposed orders – Where held not appropriate to make orders under Part VIIIAA

FAMILY LAW – PROPERTY – Contributions – Where there was a long marriage as between the parties – Where the parties took gender traditional roles during the

marriage – Where the husband brought substantial assets into the relationship – Where those assets grew significantly during the relationship – Where the asset pool is now close to $40 million – Where husband made overwhelming financial contribution while wife made significant contribution as homemaker and carer of the children – where parties acknowledge husband has substantial financial resources.

Conveyancing Act 1919 (NSW) s 38
Family Law Act 1975 (Cth) ss 4, 75, 79, 80, 81, 90AC, 90AE, 90AF, 114
Evidence Act 1995 (Cth) s 79
Family Law Act Amendment Bill 1983 (Cth)

Family Law Rules 2004 (Cth) rr 1.04, 1.06,1.07, 1.08, 15.42, 15.65, 15.48, 15.49, 15.51, 15.59, 15.63, 15.64B, 15.65, 15.69

Adair & Adair [2019] FamCAFC 70
Allen v Carbone (1975) 132 CLR 528
Arcus Shopfitters Pty Ltd v Western Australian Planning Commission [2002] WASC 174
Ascot Investments Pty Ltd v Harper (1981) 148 CLR 337
Atkins & Hunt and Ors [2017] FamCAFC 79
Atkins & Hunt and Ors [2019] FamCA 977
Australian Broadcasting Corporation v XIV Commonwealth Games Ltd (1998) 18 NSWLR 540
Barnell & Barnell [2020] FamCAFC 102
Benson & Drury [2020] FamCAFC 303
Bevan & Bevan (2013) 29 Fam LR 387
Bollen & Bollen [2020] FamCA 605
Bowen & Williams [2015] FamCA 545
Brambles Holdings Ltd v Bathurst City Council (2001) 53 NSWLR 153
Brewarrana Pty Ltd v Commissioner of Highways (No 2) (1973) 6 SASR 541
Brown v Tavern Operator Pty Ltd (2018) 98 NSWLR 586
Byrnes v Kendle (2011) 243 CLR 253
C & C (2000) FLC 93-220
Campbell & Kuskey (1998) FLC 92-795
Chorn & Hopkins (2004) FLC 93-204
Clauson & Clauson (1995) FLC 92-595
Coghlan & Coghlan (2005) FLC 93-220
Commissioner of Taxation v Tomaras (2018) 265 CLR 434
Commonwealth v Miledge (1953) 90 CLR 157
Conias Hotels Pty Ltd v Murphy & Anor [2012] QSC 297
Conrad & Conrad and Anor [2019] FamCA 106
CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic) (2005) 224 CLR 98
Daniels v Walker [2001] 1 WLR 1382
Darjan Estate Co Plc v Hurley [2012] 1 WLRD 1782
Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588
Dickins v Dickons (2012) 50 Fam LR 244

Dome Resources NL v Silver (2008) 72 NSWLR 693
Equuscorp Pty Ltd and Another v Glengallan Investments Pty Ltd (2004) 218 CLR 471
Federal Commissioner of Taxation v St Helens Farm (A.C.T.) Pty Ltd (1981) 146 CLR 336
Fielding and Nichol [2014] FCWA 77
Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd (1979) 1 BPR 9251
Fischer v Nemeske Pty Ltd (2016) 257 CLR 615
Fitzwater & Fitzwater (2019) 60 Fam LR 212
Flotilla Nominees Pty Ltd v Western Australia Land Authority (2003) 27 WAR 403
Frederick & Frederick (2019) FLC 93-900
G & G (2000) FLC 93-043
Garraway v Territory Realty Pty Ltd [2010] FCAFC 9
Gartside v IRC [1986] AC 553
GWR & VAR (2006) 36 Fam LR 237
Hall v Hall (2016) 257 CLR 490
Harris & Dewell (2018) 58 Fam LR 313
Harris & Harris (1991) FLC 92-254
HCK China Investments Ltd v Solar Honest Ltd (1999) 165 ALR 680
Hickey & Hickey & Attorney General for the Commonwealth of Australia (2003) FLC 93-143
Hocking v Director-General of the National Archives of Australia (2020) 94 ALJR 569
Horrigan & Horrigan [2020] FamCAFC 25
Howard F Hudson Pty Ltd v Ronayne (1972) 126 CLR 449
Howard Smith and Co Ltd v Varrawa (1907) 14 ALR 169
Hsiao v Fazarri (2020) 61 Fam LR 465; [2020] HCA 35
Hunt v Hunt [2006] FamCA 167
In the Marriage of Aleksovski (1996) FLC 92-705
In the Marriage of Biltoft (1995) FLC 92-614
In the Marriage of Borriello (1989) 97 FLR 211
In the Marriage of Burke (1981) FLC 91-055
In the Marriage of Crapp (No 2) (1979) FLC 90-615
In the Marriage of Goodwin (1990) 101 FLR 386
In the Marriage of Kelly No (2) (1981) FLC 91-108
In the Marriage of Kowaliw (1981) FLC 91-092
In the Marriage of Kowalski (1993) FLC 92-342
In the Marriage of Little (1990) FLC 92-147
In the Marriage of Petersens (1981) FLC 91-095
In the Marriage of Pierce (1998) FLC 92-844
In the Marriage of Prince (1984) FLC 91-501
In the Marriage of Reynolds (1985) FLC 91-632
In the Marriage of Townsend (1995) FLC 92-569
Investa Properties Pty Ltd v Nakervis (No 7) [2015] FCA 1004
Jabour & Jabour [2019] FamCAFC 78
JEL & DDF (2001) FLC 93,075

Jillett v Jillett [2018] FamCA 913
Kennon v Spry (2008) 238 CLR 366
Lenehan & Lenehan (1987) FLC 91-814
Liverpool City Council v Commonwealth of Australia (1993) 81 LGERA 405
Longworth v Commissioner of Stamp Duties [1953] 53 SR (NSW) 342
Lovine & Connor and Anor (2012) FLC 93-515
Lunar & Lunar [2019] FCWA 259
Little & Little (1990) FLC 92-147
Macquarie International Health Clinic Pty Ltd v Sydney Local Health District (No 11) [2017] NSWSC 1249
Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705
Malec v J.C. Hutton Pty Ltd (1990) 169 CLR 638
Mallett v Mallett [1984] HCA 21
Manolis & Manolis (No 2) [2011] FamCAFC 10
Marcin & Marcin [2010] FamCAFC 85
Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam (2003) 214 CLR 1
Multari v Roads and Traffic Authority of NSW [2004] NSWLEC 649
Norbis v Norbis (1986) 161 CLR 513
Norman & Norman [2010] FamCAFC 66
Oswald & Karrington [2016] FamCAFC 152
Pacific Carriers Limited v BNP Paribas (2004) 218 CLR 451
Pfenning & Snow [2016] FamCA 29
Phillips & Phillips (2002) FLC 93-104
Players Pty Ltd v Corporations of the City of Adelaide [2001] SASC 369
Public Trustee v Smith (2008) 1 ASTLR 488
Re Snowden (dec'd) [1979] Ch 528
Richstar Enterprises Pty Ltd and Others; Australian Securities and Investment Commission v Carey (No 6) (2006) 153 FCR 509
Rodger & Rodgers (No 2) [2016] FamCAFC 104
Rosati & Rosati (1998) FLC 92-804
Royal Sydney Golf Club v Federal Commissioner of Taxation (1957) 97 CLR 379
Sagacious Procurement Pty Ltd v Symbion Health Ltd [2008] NSWSCA 149
Salmon & Salmon [2020] FamCAFC 134
Sandhurst Trustees Ltd v Roads and Traffic Authority of NSW [2006] NSWLEC 243
Scaffidi v Montevento Holdings Pty Ltd (2011) 6 ASTLR 446
Sharrment Pty Ltd & Ors v Official Trustee in Bankruptcy (1988) 82 ALR 530; (1988) 18 FCR 449
Simmons and Anor & Simmons (2008) 40 Fam LR 520
Simons & Simons [2020] FamCAFC 128
Sippel & Sippel [2004] FamCA 201
Smith and Smith (1991) FLC 92-261
Spencer v the Commonwealth (1907) 5 CLR 418
Stanford & Stanford (2012) 247 CLR 108
Stead v State Government Insurance Commission (1986) 161 CLR 141
Stein & Stein (1986) FLC 91-779

Telstra Corporation Ltd v The Commonwealth (2008) 234 CLR 210
Toll (FGCT) Pty Limited v Alphapharm Pty Limited (2004) 219 CLR 165
Tomasetti and Tomasetti (2000) FLC 93-023
Trevi & Trevi [2018] FamCAFC 173
Tyler v Thomas (2006) 150 FCR 357
Vines v Australian Securities and Investment Commission (2007) 73 NSWLR 451;
Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority (2009) 173 LGERA 155
Walters & Carson [2018] FamCAFC 233
Woodcock v Parlby Investments Pty Ltd (1988) 4 BPR 9568
XYZ Pty Ltd and Anor & Charisteas & Ors; ABC Pty Ltd & Charisteas and Ors (2017) FLC 93-782
Yanner v Eaton (1999) 201 CLR 351

APPLICANT:	Ms Dovgan
FIRST RESPONDENT:	Mr Dovgan
THIRD RESPONDENT:	D Pty Ltd ATF Dovgan Trust
FILE NUMBER:	SYC 866 of 2017
DATE DELIVERED:	14 May 2021
PLACE DELIVERED:	Sydney
PLACE HEARD:	Sydney
JUDGMENT OF:	Harper J
HEARING DATE:	17, 18, 19, 20 & 21 August 2020

REPRESENTATION

COUNSEL FOR THE APPLICANT:	Mr Hutley SC, Mr Lawrence of Counsel & Mr Cooper of Counsel
SOLICITOR FOR THE APPLICANT:	Ferrer Lawyers
COUNSEL FOR THE FIRST RESPONDENT:	Mr Newlinds SC & Ms Jeliba of Counsel
SOLICITOR FOR THE FIRST	Barkus Doolan

RESPONDENT:

COUNSEL FOR THE THIRD RESPONDENT:	Mr Moses SC & Mr Sharp of Counsel
SOLICITOR FOR THE THIRD RESPONDENT:	Gordon & Barry Lawyers Pty Ltd

ORDERS

THE COURT NOTES:

A. The following definitions apply for the purposes of these Orders:

(a) Entities means the following:

(i) W Pty Ltd;

(ii) Dovgan Investment Trust;

(iii) Dovgan Trust;

(iv) Dovgan Trust & C Family Trust;

(v) T Pty Ltd;

(vi) FF Pty Ltd;

(vii) GG Pty Ltd;

(viii) V Pty Ltd;

(ix) HH Limited;

(x) JJ Limited;

(xi) M (Administration) Pty Ltd (Deregistered);

(xii) M Trust;

(xiii) M Pty Ltd;

(xiv) M Pty Ltd & Mr Dovgan & Mr C Partnership;

(xv) M Services Trust;

(xvi) KK Pty Ltd;

(xvii) D Pty Ltd;

(xviii) F Pty Ltd;

(xix) J Investments Pty Ltd;

(xx) U Pty Ltd.

(b) "husband" means Mr Dovgan;

(c) "wife" means Ms Dovgan.

(d) "Suburb H property" means the property situated at and known as G Street Suburb H, in the State of New South Wales, being the whole of the land contained in Folio Identifier … of which the husband and wife are registered proprietors as joint tenants and which is unencumbered;

(2) The Court has determined to effect a just and equitable property adjustment by ordering, inter alia, the husband to pay to the wife a total amount of $12,802,462.

THE COURT ORDERS:

(1) All previous Orders stand discharged from the date of these orders.

(2) Within 45 days of the date of the making of these Orders and contemporaneously:

(a) the wife shall do all acts and things and sign all documents presented to her by the husband as are necessary to:

(i) transfer to the husband the whole of her right, title and interest in her shares in J Investments Pty Ltd ABN: …;

(ii) assign to the husband the whole of her right, title and interest and liability (if any) in any loan account (credit or debit) and/or unpaid distributions she may have in any of the Entities;

(iii) relinquish all her right, title and interest in respect of any trust controlled by the husband, whether such interest may be actual, contingent or otherwise;

(iv) make available for collection by the Husband from the Suburb H property, the following items:

A. The husband's clothing and personal belongings that remain in the master bedroom and the study;

B. The husband's sporting equipment (save the treadmill which shall remain with the wife) and vehicle parts;

C. All electrical tools;

D. The guitar in the lounge room;

E. The signed surfing poster in the rumpus room;

F. The large artwork in the atrium opposite the study.

(b) The husband shall do all acts and things and sign all documents necessary to:

(i) Transfer to the wife the whole of his right, title and interest in the Suburb H property;

(ii) pay or cause to be paid to the wife or as she directs the amount of $9,000,000.

(3) That within 90 days of the date of the making of these Orders, the husband pay to the wife the further amount of $3,802,462.

(4) Except for the purpose of compliance with Orders 2 and 3, and pending such compliance, the husband be restrained from transferring, dissipating, or otherwise dealing with the funds held in:

(a) Term Deposit #...11;

(b) Term Deposit #...02;

(5) The husband indemnify and keep indemnified the wife against any liability of any nature which the wife has at any time arising in any way in respect of any of the Entities whether:

(a) by reason of the wife having been an employee, director, officer and/or shareholder of any of the Entities;

(b) pursuant to any guarantee given by the wife in respect of any liability of any of the Entities;

(c) in respect of the receipt by the wife of any money from any of the Entities;

(d) in respect of any liability of any of the Entities, or otherwise.

(6) The husband hereby indemnifies the wife from and in respect of all actions, claims, suits and demands as may be made against the wife in relation to all liabilities in the name of the husband.

(7) The wife hereby indemnifies the husband from and in respect of all actions, claims, suits and demands as may be made against the husband in relation to all liabilities in the name of the wife.

(8) Except as otherwise provided for by these Orders, each of the husband and wife release the other from all debts owing from one to the other.

(9) That except as otherwise provided for in these Orders:

(a) Each of the parties is the sole legal and beneficial owner of all items of property, including real estate, monies, shares, insurance policies, superannuation and pension entitlements, rollover funds, motor vehicles, furniture, furnishings and personal effects, presently in the name, possession or control of each of them respectively;

(b) The husband shall be the sole legal and beneficial owner of and the Wife has no interest in the Entities and Trusts.

(10) In the event that either party refuses or neglects to execute any Deed, instrument or document necessary to give effect to these Orders then the Registrar of the Court be appointed pursuant to Section 106A of the *Family Law Act 1975* (Cth) to execute such Deed, instrument or document in the name of the defaulting party and to do all acts and things necessary to give validity and operation to the Deed or instrument, and the defaulting party shall pay the costs of the non-defaulting party in relation thereto.

(11) That wife's Application in a Case filed in Court on 19 August 2020 be dismissed.

(12) That all final and interim applications be otherwise dismissed.

Costs

(13) If any party seeks an order for costs, an application to the Court may be made by Application in a Case within 28 days of the date of these orders, with an affidavit in support, to be filed and served within that time period and a copy forwarded to my Chambers.

The Court further notes:

(14) If an application for costs is made in accordance with Order 13, the Court will make procedural orders for any questions costs to be determined.

(15) If no such application is made within the time period specified, no order will be made as to costs.

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

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

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 r 17.02 Family Law Rules 2004 (Cth).

FAMILY COURT OF AUSTRALIA AT SYDNEY

FILE NUMBER: SYC 866 of 2017

Ms Dovgan
Applicant

And

Mr Dovgan
Respondent

And

D Pty Ltd ATF Dovgan Trust
Third Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. Ms Dovgan ("**the wife**") and Mr Dovgan ("**the husband**") have been unable to agree on the division of their property following the breakdown of their marriage. They were married for some 26 years and have been involved in protracted financial proceedings in this Court since February 2017.

2. The property pool is considerable, being no less than $35,000,000. Both parties seek property adjustment orders under s 79 of the *Family Law Act 1975* (Cth) ("**the Act**"), however by his opening Senior Counsel for the wife identified three broad areas of legal and factual dispute necessary for determination before property adjustment orders can be made.

3. The first was whether the husband held a percentage of his interest in a property at K Street, Suburb L ("**Suburb L**") on trust for the Second Respondent, D Pty Ltd ("**D Pty Ltd**") ATF Dovgan Trust ("**DT**") and Dovgan Investment Trust ("**DIT**"). The second was whether D Pty Ltd is no more than the "creature" of the husband, so that all the assets held by it as trustee should be treated as his assets. The third was a valuation issue about Suburb L; there is single expert evidence valuing this property, but the wife contends that the property value may be considerably higher than the estimate given by the single expert. She made an Application in a Case during the hearing for leave to call further expert evidence. This application was heard during the trial.

Judgment was thereafter reserved. My determination of that application forms part of this judgment.

4. The hearing was occupied substantially with the evidence and argument about these three areas of debate, although some others came to prominence as the proceedings evolved.

5. Beyond the three areas just identified, there was dispute in relation to the entitlements of the parties to the asset pool. In relation to questions of contributions under s 79, with reference to s 75(2) factors, the wife argued that orders should be made adjusting the property interests 60 per cent in her favour and 40 per cent in the husband's favour, while the husband argued the split should be 57.5 per cent in his favour and 42.5 per cent in favour of the wife.

BACKGROUND

6. The wife was born in 1960 in Europe. She does not currently work in paid employment, describing her current occupation as homemaker.

7. The husband was born in 1961 in the Middle East. He consistently undertook paid employment, with a focus on building his business interests throughout the relationship. He currently acts as a director for M Pty Ltd, a company incorporated by the husband and Mr C in January 1985. M Pty Ltd specialises in the installation and maintenance of buildings. There was no dispute the business activities of the husband have been the primary source of the parties' vast wealth.

8. The parties have two adult children, Ms Y, born in 1991, and Ms Z, born in 1996.

9. The parties commenced their romantic relationship in 1988, and by May 1989, the parties had commenced cohabitation in Suburb N. It is uncontentious that the wife had nominal assets at the point of cohabitation, while the husband had a 90 per cent interest in M Pty Ltd. The value and significance of this asset is contentious, and will be discussed later in this judgment.

10. D Pty Ltd was incorporated on or around 13 May 1983. The husband's father, Mr O Dovgan, and his mother, Ms P Dovgan, were appointed as directors and each was assigned one share in the company. For ease of reference, and intending no disrespect, I will refer to Mr O Dovgan as "**Mr O**" in the course of these reasons. Later that month, DIT was also settled by deed, with D Pty Ltd acting as trustee and appointer. The husband is a discretionary beneficiary, together with a broad class of other individuals and corporations.

11. All of D Pty Ltd, M Pty Ltd, the husband, and Mr O were involved in contentious proceedings with competitor manufacturing companies in the late-1980s. These proceedings related to Mr O's involvement in those companies prior to the establishment of M Pty Ltd, which Mr O started consulting for in

1985, and specifically centred around a non-compete clause between Mr O and the competing companies. For present purposes, it is sufficient to note that by judgment delivered on 10 August 1989, the parties involved in these proceedings were not found to be in fault. As of 1989, Mr O was no longer restrained from competing with the other companies in the manufacturing area.

12. Soon thereafter, in November 1989, D Pty Ltd applied for ordinary shares in M Pty Ltd. D Pty Ltd was able to purchase 4,500 shares at $1.00 per share and obtained a 30 per cent interest in M Pty Ltd, leaving the husband's interest at 60 per cent. Mr O was also appointed as director of M Pty Ltd.

13. The husband and wife were engaged in December 1989, and married in 1990.

14. In 1992, the Suburb L Partnership was established between the husband, M Pty Ltd and Mr C for the purchase of Suburb L. Suburb L can be described as an industrial unit complex made up of 11 units which are leased out to third parties. Suburb L was registered in the names of the parties as tenants in common, with 50 per cent to M Pty Ltd, 45 per cent to the husband and the remaining 5 per cent to Mr C.

15. On 17 March 1995, DT was established, with D Pty Ltd acting as trustee.

16. In October 1998, F Pty Ltd was incorporated, with the husband's late sister, Ms Q ("**Ms Q**"), acting as director and secretary.

17. Around the same time in 1998, the parties to the marriage purchased a home in joint names unencumbered at R Street, Suburb S for approximately $2,310,000 ("**Suburb S**"). This purchase was funded from the proceeds of sale of a property previously held in the sole name of the husband, with the balance derived from dividends the husband had received from M Pty Ltd.

18. On 10 March 1999, the husband executed a document entitled "Deed of Acknowledgement" ("**the Deed**"). The effect of the Deed is in contention. The arguments in summary were that it acknowledged either a trust in favour of D Pty Ltd in respect of part of the husband's interest in Suburb L, or a promise to pay D Pty Ltd. The terms of the Deed will be discussed later in these reasons.

19. On 18 November 1999, the husband became a director of D Pty Ltd. He continued in this position until 12 April 2018.

20. Eventually, the parties made the decision to sell Suburb S for $4,400,000. They used the net proceeds of sale, along with additional savings and dividends from M Pty Ltd, to purchase an unencumbered property at G Street, Suburb H ("**Suburb H**") in joint names for $4,500,000 in late-2006.

21. The husband continued in his position, both with D Pty Ltd and M Pty Ltd, over a number of years. It is uncontentious that the husband made the bulk of the parties' financial wealth at this time. The wife, on the other hand, acted as

homemaker and primarily contributed to the care of the children during this time.

22. Additionally, the husband was involved in a variety of different companies and investments throughout the relationship. Relevantly, these include;

    a) J Investments Pty Ltd ("**J Investments**"), which was incorporated in May 2004. The husband holds 90 per cent of the shareholding and the wife holds the remaining 10 per cent. The husband is the sole director.

    b) T Pty Ltd, which was incorporated as M Properties Pty Ltd in October 2004. The husband holds 60 ordinary shares in the company, which reflects a 60 per cent interest. D Pty Ltd holds 30 ordinary shares, or a 30 per cent interest, and Mr C holds the remaining 10 ordinary shares, or 10 per cent interest. The husband, Mr O and Mr C act as the directors of M Properties Pty Ltd.

    c) U Pty Ltd ("**U Pty Ltd**"), which was incorporated in July 2015. M Pty Ltd holds 100 per cent of the shares in U Pty Ltd, and the husband, Mr O and Mr C act as directors.

    d) V Pty Ltd, which was incorporated in March 2016. The husband and Mr O both retain a 50 per cent interest in the company. Additionally, V Pty Ltd act as Trustee for the V Family Trust, which was established in May 2016. The husband and wife are the named beneficiaries of this Trust, and the husband is the appointer alongside his brother.

    e) W Pty Ltd, which was incorporated in April 2016. The husband and Mr O both retain a 50 per cent interest in that company, and both are directors.

23. Through the husband's business endeavours, the parties were able to live a lavish lifestyle. According to the wife, this included expensive holidays and designer clothing.

24. The parties first experienced difficulties in their relationship in late-2012 or early-2013, according to the wife. She claims that the husband informed her of his intention to end the marriage at this stage, although the parties did not formally separate.

25. In January 2015, the husband became a director of F Pty Ltd. At this time, 900 new ordinary shares were issued in F Pty Ltd, with the husband receiving 600 shares, or 60 per cent of the F Pty Ltd shareholding, 100 were issued to Mr C, 150 were issued to the husband's brother and the remaining 150 were issued to Ms Q. The ASIC returns for these shares initially recorded the husband as beneficially holding these shares. However, the husband and Mr O gave evidence that he held them on trust for Ms Q. As pointed out below, the ASIC returns were eventually changed to reflect this. Initially, it appeared that the wife intended to argue that the husband's interest in F Pty Ltd should be taken

as his asset, held beneficially for the purposes of final hearing; however nothing was said either orally or in writing about F Pty Ltd by the wife in final submissions. Accordingly, it does not require further comment.

26. On about 3 December 2015, M Pty Ltd transferred its interest in Suburb L to U Pty Ltd.

27. In about December 2015, Suburb L was placed on the market for sale with an advertised price of $40,000,000. It was marketed as a site seeking residential development approval. Expressions of interest were sought privately. The husband was involved in the marketing for sale process. He agreed in cross-examination that he was satisfied enough with the level of interest to consider taking the Suburb L to market. One expression of interest was received, being an offer to purchase Suburb L for $25,000,000 subject to an option free period and rezoning. Another expression of interest was received at $25,000,000 but was subject to unclear conditions and further research. The husband said in cross-examination that he believed at that time these offers were too low. By March 2016, the real estate agent marketing report noted a serious expression of interest at $30,000,000; however, there was no evidence of any unconditional offers at $25,000,000 or any other figure.

28. No sale was achieved at $40,000,000 or at the lower figure of $25,000,000, or at all. Suburb L was withdrawn from sale on about 10 March 2016. On 9 March 2016, the husband and other proprietors of Suburb L entered into a Deed of Call Option granting the husband and Mr O as trustees for the M Executive Superannuation Fund, D Pty Ltd as trustee for the D Superannuation Fund, and B Pty Ltd as trustee for the C Family Trust Superannuation Fund an option to purchase Suburb L for $8,250,000. The Call Option commencing date was the 43rd day after the date of the Deed and the Call Option terminating date was 24 months after the Call Option commencing date. In cross-examination, the husband agreed that at the time he would have considered $8,250,000 on the open market as a "ridiculous" value (Transcript of Proceedings dated 18 August 2020, pg. 78 lines 4-5).

29. It was put to him that he entered the Call Option Deed to put Suburb L beyond the reach of the wife. The husband denied this. I point out here that the wife conceded no case was made by her that there was some collusive arrangement between the husband, Mr O and others to put matrimonial property beyond her reach by using the Call Option Deed. The point the wife sought to make was that $8,250,000 in the Call Option Deed could not be taken as any evidence of the value of Suburb L as at March 2016. I accept that much is correct.

30. In July 2016, the parties separated on a final basis. The husband left the parties' home in Suburb H and the wife has retained the benefit of living in that property since.

31. By August 2016, the husband had purchased another property in his sole name at X Street, Suburb BB ("**Suburb BB**") for $2,700,000 (excluding stamp duty and acquisition costs). This purchase was funded partly from the husband's savings, and from a loan in the sum of $630,000 from M Pty Ltd, while Mr O paid $135,000 for a deposit and loaned an additional $665,000. These loans were interest free and have since been repaid.

32. On 13 February 2017, the wife commenced proceedings in this Court, seeking final property orders. The parties were thereafter divorced on 23 October 2017.

33. The husband continued to engage in his commercial activities following separation.

34. The husband's post-separation actions in relation to F Pty Ltd appeared, for a time at least, to be contentious, although ultimately disappeared as an issue. In February 2017, the husband filed a request to ASIC to record that his 600 ordinary shares in F Pty Ltd were held for Ms Q rather than beneficially. Thereafter, on 13 September 2017 all of the husband's shares in F Pty Ltd were transferred into the names of Mr O and Mr C. The husband's brother and Ms Q also transferred their interest, meaning that Mr O and Mr C together held 100 per cent of the shares of F Pty Ltd.

35. In addition, the husband claims to have gifted significant sums to both Ms Y and Ms Z in December 2017; this involved the husband purportedly obtaining a $1,000,000 loan from Mr O to provide to the children.

36. The husband has repartnered with Ms CC. He commenced cohabitation with her in May 2019, and currently pays her $2,500 per week by way of rent.

The proceedings

37. As previously mentioned, the wife commenced these proceedings in February 2017, seeking final property orders in relation to the husband only.

38. It was agreed early in the proceedings that the husband's interests in M Pty Ltd and Suburb L should be valued by an expert, and one was appointed by consent in March 2017. Additionally, Ms DD was appointed as an expert to value the corporate and trust interests of the husband ("**the entities**") on 19 June 2017. After this date, Ms DD married and her surname changed to "EE". Ms EE continues to use "Ms DD" as her professional name, and as such will be referred to as "Ms DD" throughout this judgment.

39. Following an Application in a Case made by the wife in August 2017, and by consent orders were made on 5 September 2017 for the husband to pay any expenses relating to health insurance, motor vehicles and in relation to Suburb H. Additionally, the husband was ordered to pay the wife a lump sum payment of $100,000, and $2,500 per week by way of spousal maintenance.

40. The parties were referred to a Conciliation Conference, however no agreement was reached.

41. Eventually, on 28 November 2019, the matter was listed for a five day trial before me in August 2020.

42. Litigation funding continued to be an issue for the wife, and on 30 January 2020 orders were made by consent for the wife to receive $497,000 by way of partial property settlement.

43. On 1 May 2020, the husband filed an Application in a Case, seeking to proceed on an undefended basis. He claimed that the wife had failed to comply with the orders of the Court, specifically making complaints about the wife's inability to engage in mediation or make any offers of settlement.

44. Following the husband's application, the parties attended mediation on 18 May 2020. The mediation was unsuccessful.

45. On 19 May 2020, the wife filed a Response to the Application in a Case. She sought updated valuations, further disclosure and sought to join D Pty Ltd, B Pty Ltd (as trustee for the C Family Trust), M Pty Ltd, the executors of the estate of the late Ms Q, and F Pty Ltd to the proceedings. In particular, she sought declaratory relief against the third parties, as well as disclosure.

46. The husband's May 2020 Application in a Case and the wife's Response were listed for interim hearing before me on 20 May 2020. On this date, orders were made by consent for the wife to amend the final relief she sought to join the above-mentioned third parties, and for updated valuations or for first valuations to be prepared. The balance of the wife's Response was adjourned for hearing on 9 July 2020.

47. It is important to note here that on 6 July 2020, the wife filed an additional Application in a Case for leave to rely upon an adversarial expert to value a number of properties, including Suburb L, and for the provision of further litigation funding (amounting to over $1,000,000), as well as a number of other orders. This application, and its outcome, is important background to the application brought and heard on the fourth and fifth days of trial, as discussed in detail later in these reasons.

48. The matter then came back before me on 9 July 2020 for interim hearing. By this time, the wife abandoned most of the relief that she sought in her Application in a Case, including leave to rely upon the evidence of an adversarial expert. She simply pressed orders for further litigation funding. Following the delivery of an ex tempore decision, I ordered that the husband pay to the wife the sum of $600,000 by way of partial property settlement: *Dovgan & Dovgan and Anor* [2020] FamCA 589. The balance of the wife's Application in a Case from 6 July 2020, as well as the husband's Amended

Application in a Case filed 2 July 2020 and all relevant Responses, were dismissed.

49. On 23 July 2020, the wife filed a Notice of Discontinuance seeking to discontinue her claim against B Pty Ltd as trustee for the C Family Trust, as well as her claim against F Pty Ltd. These parties were officially removed from the proceedings on 6 August 2020, leaving the husband, the wife, and D Pty Ltd as the parties to the proceedings.

50. The trial commenced before me as scheduled on 17 August 2020.

MATTERS IN DISPUTE

51. I set out above at [3] how Senior Counsel for the wife articulated the main issues at the opening of the trial. By the end of the trial, and in their closing submissions, Senior Counsel for all parties agreed that the issues in dispute in this matter, although significant and complicated in themselves, were relatively limited. There are five broad areas of debate.

D Pty Ltd

52. The wife maintained her contention that the husband is the controlling mind of D Pty Ltd, and that D Pty Ltd is his "alter ego", notwithstanding the technical legal or equitable ownership. Consequently she argues that the assets held in D Pty Ltd's name should be regarded as assets of the husband as a party to the marriage and included in the asset pool. The husband and D Pty Ltd dispute this. They contend that Mr O is the true controlling mind of D Pty Ltd, and the husband has no legal control of, or right to, any assets owned by D Pty Ltd, either itself or on trust.

53. Although the husband made submissions on the basis that the transfer of shares in F Pty Ltd was an issue under this heading, as already mentioned, the wife ultimately made no submissions about the shareholdings in F Pty Ltd. I therefore take the view that it is therefore no longer an issue, if it ever was.

Suburb L and the Deed

54. As previously discussed, the husband signed the Deed in March 1999. In final submissions, the arguments about the effect of this document shifted. As I understood his argument, the husband did not press a trust argument, at least not with any conviction. Rather, the husband contended the document recorded or acknowledged an enforceable promise that he would pay D Pty Ltd one-third of his share of the net proceeds of sale, if ever Suburb L was sold. This, according to the husband, should be included on the balance sheet as his contingent liability.

55. In final submissions, D Pty Ltd maintained its trust argument but as a fall back adopted the husband's arguments about the Deed acknowledging an enforceable promise. D Pty Ltd seeks a declaration to the effect that the

husband holds one-third of his interest in Suburb L, being a 15 per cent interest in the property, on trust for D Pty Ltd. Somewhat inconsistently with his enforceable promise argument, the husband does not resist such a declaration being made.

56. The wife denies the Deed either creates any trust or embodies any enforceable promise. She resists any declaration being made. She also accepted that, if her argument that D Pty Ltd is the "creature" of the husband succeeds, the arguments about the effect of Deed creating a trust become irrelevant, because the 15 per cent purportedly held on trust would be accounted for in the asset pool in any event.

The value of Suburb L

57. Issues regarding the value of Suburb L occupied almost the majority of hearing time and are of some difficulty. Suburb L was valued by an expert, Mr NN, in two separate reports. According to his answers to questions sent by Barkus Doolan dated 17 August 2020,[1] and which relate to his August 2020 report, the value of Suburb L is approximately $12,500,000 (excluding GST).

58. The wife contends that this valuation cannot be relied upon, for a range of reasons discussed in detail later in these reasons, but which included the contention that Mr NN failed to understand or adopt long settled valuation principles, settled in the High Court, and he failed to take into account the possibility of rezoning the property for residential development, as may be an option pursuant to a *[NSW] Urban Transformation Strategy*. She argued the Court should be satisfied the value of Suburb L should be much greater than $12,500,000 (excluding GST).

59. On 19 August 2020 (being the fourth day of trial), the wife filed in Court an Application in a Case, foreshadowed early in the trial, for the appointment of an adversarial expert to value Suburb L. The detailed circumstances are explained below. A significant amount of time at trial was taken to deal with this Application. Judgment was reserved at the end of trial, and will be discussed further below.

The value of M Pty Ltd

60. The parties were in dispute as to the value of M Pty Ltd, which was valued by Ms DD.

61. Specifically, the husband argued that the value arrived at by Ms DD was incorrect in two respects; firstly because of the effect of the remuneration expert, which the husband argues would affect the amount paid by a new purchaser to hire new staff, and secondly because M Pty Ltd requires

[1] Exhibit 3.

approximately $1,500,000.00 in working capital, which was not properly reflected in Ms DD's report.

62. The wife disputes the husband's assertions, and argues that the valuation included in Ms DD's report should be adopted.

The appropriate adjustment of the property

63. As noted, the husband and wife both argue that they should retain 60 or 57.5 per cent of the net assets available for distribution.

PROPOSALS

64. As set out in in the wife's Case Outline filed 14 August 2020, the wife's proposal is as follows:

THE COURT NOTES:

1. The following definitions apply for the purposes of these Orders:

1.1. "Entities" means the following:

1.1.1. W Pty Ltd;

1.1.2. Dovgan Investment Trust;

1.1.3. Dovgan Trust;

1.1.4. Dovgan Trust & C Family Trust;

1.1.5. T Pty Ltd;

1.1.6. FF Pty Ltd;

1.1.7. GG Pty Ltd;

1.1.8. V Pty Ltd;

1.1.9. HH Limited;

1.1.10. JJ Limited;

1.1.11. M (Administration) Pty Ltd (Deregistered);

1.1.12. M Trust;

1.1.13. M Pty Ltd;

1.1.14. M Pty Ltd & Mr Dovgan & Mr C Partnership;

1.1.15. M Services Trust;

1.1.16. KK Pty Ltd;

1.1.17. D Pty Ltd;

1.1.18. F Pty Ltd;

1.1.19. J Investments Pty Ltd;

1.1.20. U Pty Ltd;

1.2. "Suburb H property" means the property situated at and known as G Street Suburb H, in the State of New South Wales, being the whole of the land contained in Folio Identifier … of which the husband and wife are registered proprietors as joint tenants and which is unencumbered;

1.3. "husband" means Mr Dovgan;

1.4. "wife" means Ms Dovgan.

THE COURT ORDERS:

2. Within 28 days of the date of the making of these Orders and contemporaneously:

2.1. the wife shall do all acts and things and sign all documents presented to her by the husband as are necessary to:

2.1.1. transfer to the husband the whole of her right, title and interest in her shares in J Investments Pty Ltd ABN: …;

2.1.2. assign to the husband the whole of her right, title and interest and liability (if any) in any loan account (credit or debit) and/or unpaid distributions she may have in any of the Entities;

2.1.3. relinquish all her right, title and interest in respect of any trust controlled by the husband, whether such interest may be actual, contingent or otherwise.

2.2. The husband shall do all acts and things and sign all documents necessary to:

2.2.1. transfer to the wife the whole of his right, title and interest in the Suburb H property;

2.2.2. pay or cause to be paid to the wife or as she directs such sum as is necessary so as to effect an overall adjustment of the assets and liabilities of the parties such that the wife receives 60% and the husband receives 40% of the net property pool.

3. The husband indemnify and keep indemnified the wife against any liability of any nature which the wife has at any time arising in any way in respect of any of the Entities whether:

    3.1. by reason of the wife having been an employee, director, officer and/or shareholder of any of the Entities;

    3.2. pursuant to any guarantee given by the wife in respect of any liability of any of the Entities;

    3.3. in respect of the receipt by the wife of any money from any of the Entities;

    3.4. in respect of any liability of any of the Entities, or otherwise.

4. The husband hereby indemnifies the wife from and in respect of all actions, claims, suits and demands as may be made against the wife in relation to all liabilities in the name of the husband.

5. The wife hereby indemnifies the husband from and in respect of all actions, claims, suits and demands as may be made against the husband in relation to all liabilities in the name of the wife.

6. Except as otherwise provided for by these Orders, each of the husband and wife release the other from all debts owing from one to the other.

7. Each of the parties is the sole legal and beneficial owner of all items of property, including real estate, monies, shares, insurance policies, superannuation and pension entitlements, rollover funds, motor vehicles, furniture, furnishings and personal effects, presently in the name, possession or control of each of them respectively otherwise than provided for by these Orders.

8. In the event that either party refuses or neglects to execute any Deed or instrument necessary to give effect to these Orders then the Registrar of the Court be appointed pursuant to Section 106A of the Family Law Act 1975 (Act) to execute such Deed or instrument in the name of the defaulting party and to do all acts and things necessary to give validity and operation to the Deed or instrument, and the defaulting party shall pay the costs of the non-defaulting party in relation thereto.

9. The wife have leave to amend this Amended Initiating Application on the husband providing full disclosure of his financial circumstances.

10. The husband pay the wife's costs of and incidental to these proceedings.

11. A declaration that all of the property held by D Pty Ltd as trustee for the Dovgan Investment Trust and the Dovgan Trust forms part of the property of the parties for the purposes of sections 4, 75 and 79 of the Act.

12. An order under Part VIIIAA or section 114 of the Act that until final payment is made by the Husband in accordance with the order in paragraph 2.2.2 herein,

D Pty Ltd as trustee for the Dovgan Investment Trust and the Dovgan Trust be restrained from causing or permitting or acquiescing in:

12.1. any amendment or alteration to the terms of the Dovgan Investment Trust or the Dovgan Trust; and

12.2. any distribution of income or capital from the Dovgan Investment Trust or Dovgan Trust other than to the husband for the purposes of satisfying his liabilities to the wife under the order in paragraph 2.2.2 herein.

13. In the event that the husband fails to make payment in accordance with the order in paragraph 2.2.2 herein within the time prescribed by the order in paragraph 2 herein, an order under Part VIIIAA or section 114 of the Act compelling D Pty Ltd as trustee for the Dovgan Investment Trust and Dovgan Trust to do all things and execute all documents necessary to cause that entity to make a capital distribution in favour of the husband forthwith in such sum as the Court may deem appropriate for the purposes of satisfying the husband's liabilities to the wife arising from the order in paragraph 2.2.2 herein.

14. An order than any such distributions as is made in accordance with paragraph 12.2 or 13 herein is to be held on trust by the husband for the benefit of the wife, and that forthwith upon receipt of the said distribution the husband pay such sum to the wife or at her direction.

15. An order that the Third Respondent pay the wife's costs of and incidental to the application against it.

16. Such further or other orders as the Court considers appropriate.

65. As set out in "Exhibit 5", the husband's proposal is as follows:

1. The following definitions apply for the purpose of these Orders:

1.1. "**Entities and Trusts**" means the following:

1.1.1. W Pty Ltd;

1.1.2. Dovgan Investment Trust;

1.1.3. Dovgan Trust;

1.1.4. T Pty Ltd;

1.1.5. V Pty Ltd;

1.1.6. V Trust;

1.1.7. M Pty Ltd;

1.1.8. J Investments Pty Ltd.

1.2. "**Suburb H property**" means the property situated at G Street, Suburb H, in the State of New South Wales, being the whole of the land contained in Folio Identifier … of which the husband and wife are the registered proprietors as joint tenants and which is unencumbered;

1.3. "**Husband**" means Mr Dovgan;

1.4. "**Wife**" means Ms Dovgan.

2. IT IS NOTED, that the Wife's matrimonial property she will retain the following assets:

Suburb H property	$ 6,000,000.00
CBA Smart Access Acc #...95	$72,260.00
Personal effects	$17,815.00
Jewellery	$19,850.00
Motor vehicle 1	$20,000.00
Total	$6,129,925.00

3. IT IS NOTED, that the parties agree that the Wife has had the benefit of interim distributions as follows:

Partial property settlement payments	$455,000.00
Wife's legal fees paid	$697,000.00
Further interim payment to the Wife for legal fees (22.5.20)	$250,000.00
Partial property settlement payment pursuant to orders made 09.07.20	$600,000.00
Total	$2,002,000.00

THE COURT ORDERS:

Payment to the Wife and Transfer of Suburb H property to the Wife

4. That within 120 days of the date of these orders the Husband pay to the Wife the sum of $7,178,444.31 **("the Wife's payment")** and simultaneously with such transfer the parties shall do all acts and things and sign all documents as are necessary to the transfer to the Wife the whole of the Husband's right, title and interest in and to the Suburb H property free of any encumbrance.

5. **It is noted** that the Wife's payment reflects an adjustment that provides for the wife to receive 42.5% of the asset pool as recorded by the Balance Sheet **annexed hereto and marked with the letter "A"**.

Realisation Costs in respect to facilitating the Wife's payment

6. That to give effect to Order 4 the Husband upon filing his income tax returns for the year ended 30 June 2020, the Husband must upon the issue of a Notice of Assessment in his name particularising the income tax payable by him for the financial year ended 30 June 2020 do all acts and things and sign such documents as are necessary to cause a dividend to be declared by M Pty Ltd in the name of the Husband in the sum of $4,480,699;

7. In the event the Court does not accept all of the realisation costs including income tax and CGT, expenses as provided for in the balance sheet submitted by the Husband, then to the extent that any asset is sold or an interest disposed of by or at the direction of the husband or a related entity of the husband to give effect to the payment of the Wife's payment to the wife, then in respect of any sale and as a set off against the Wife's payment

    7.1. The husband shall cause a copy of all documents referable to the sale and the receipt of the proceeds, to be provided to the wife;

    7.2. The husband shall serve on the wife a working sheet, certified by a chartered accountant to be correct, that sets out the costs of marketing and preparation of the property for sale, any commission on sale, auction and agent fees, legal fees and an estimate of the tax of the vendor and or the husband as a beneficiary of a trust in receipt of proceeds of sale and/or top-up tax payable by the husband in the event that sale proceeds are then distributed to the husband from a corporate entity

    7.3. The wife shall pay to the husband an amount equal to the percentage that her overall settlement reflects as against the asset sold, and this shall be a set off as against the [principal sum] payable to the wife [By way of worked example – the wife is awarded 42.5% overall. To pay part of the principal sum, the husband elects to sell an asset and the court NOTES that he is at liberty to sell such assets as he elects to satisfy judgment and the principal sum, and realisation and tax costs of the sale are $100,000. The amount of the wife's share of same and the set off is therefore $42,500.];

Return of Husband's belongings and transfer of assets

8. That upon payment being made in paragraph 4 the Wife hereby indemnifies the husband from and against all expenses associated with the Suburb H property including but not limited council rates, water rates and the like.

9. That simultaneously with the payment referred to in paragraph 4 the Wife sign all documents presented to her by the husband as necessary to:

    9.1. transfer to the husband the whole of her right, title and interest in the J Investments Pty Ltd

    9.2. Assign to the husband the whole of her right, title and interest and liability (if any) in any loan account (credit or debit) and/or unpaid distributions she may have in any of the Entities and Trusts.

    9.3. make available for collection y the Husband from the Suburb H property, the following items

        9.3.1.1. The husband's clothing and personal belongings that remain in the master bedroom and the study;

        9.3.1.2. The husband's sporting equipment (save the treadmill which shall remain with the wife) and vehicle parts;

        9.3.1.3. All electrical tools;

        9.3.1.4. The guitar in the lounge room;

        9.3.1.5. The signed surfing poster in the rumpus room;

        9.3.1.6. The large artwork in the atrium opposite the study.

General

10. That except as otherwise provided for in these Orders, the Husband and the Wife shall each respectively be solely responsible for all and any debts and/or liabilities incurred in that party's sole name or jointly with any other party and/or in relation to any of the assets to which each party is entitled pursuant to these Orders and in the future.

11. The husband shall be the sole legal and beneficial owner of and the Wife has no interest in the Entities and Trusts.

12. Each of the parties is the sole legal and beneficial owner of all items of property, including real estate, monies, shares, insurance policies, super entitlements, motor vehicles, furniture, furnishings and personal effects, presently in the name,

possession, or control of each of them respectively otherwise than as provided for by these Orders.

13. In the event that either party refuses or neglects to execute any deed or instrument necessary to give effect to these Orders then the Registrar of the court be appointed pursuant to Section 106A of the *Family Law Act, 1975* to execute such deed or instrument in the name of the defaulting party and to do all acts and things necessary to give validity and operation to the deed or instrument.

14. All previous Orders stand discharged from this date

15. That all costs be reserved and listed for directions on a date after delivery of reasons for judgement.

    IT IS NOTED: the Husband will seek that the wife pay his costs on an indemnity basis.

66. As set out in their Case Outline, the Third Respondent's proposal is as follows:

    (a) an order that all final and interim applications concerning the third respondent be dismissed; and

    (b) a declaration that the first respondent holds 3/20 of his interest in the property at K Street, Suburb L (being the whole of the interest contained in folio identifier …) as bare trustee for the third respondent in its capacity as trustee for the Dovgan Investment Trust; and

    (c) an order that the applicant pay the third respondent's costs of and incidental to these proceedings on the indemnity basis with the payment of such costs to be stayed until 14 days after the date of the making of a final order pursuant to Section 79 of the Family Law Act as between the applicant and the first respondent.

THE MATERIAL RELIED UPON

67. The wife relies upon the following;

    a) her Amended Initiating Application filed 27 July 2020;

    b) her Trial Affidavit filed 28 July 2020;

    c) her Financial Statement filed 8 July 2020;

    d) her Tender Bundle; and

    e) her Application in a Case filed in Court on 19 August 2020, with supporting material, discussed later in these reasons.

68. In addition to these documents, and for the assistance of the Court, the wife has provided a Case Outline, dated 14 August 2020, as well as a written summary

of her Counsel's closing submissions on 21 August 2020. These documents have also been considered.

69. The wife was required for cross-examination. She was questioned on the first day of trial via Microsoft Teams. Her cross-examination was brief. I generally accept her evidence, to the extent it bears on the issues in dispute.

70. The husband relies upon the following;

    a) his Response to the Initiating Application filed 13 March 2017;

    b) his Trial Affidavit filed 6 July 2020;

    c) his Affidavit in Rely filed 11 August 2020;

    d) his Financial Statement filed 6 July 2020; and

    e) his Tender Bundle.

71. In addition to these documents, the husband provided a Case Outline, also dated 14 August 2020, as well as a written summary of his Counsel's opening statement and closing submissions. These were considered.

72. The husband was required for cross-examination, and did so. He appeared in person on the first and second days of trial. He was generally a satisfactory witness.

73. The third respondent relies upon the following (as specified in the Case Outline, dated 16 August 2020):

    a) the Affidavit of Mr O Dovgan filed 6 July 2020;

    b) the Affidavit of Mr LL filed 6 July 2020;

    c) the Affidavit of Mr O Dovgan filed 14 August 2020;

    d) the Affidavit of Ms P Dovgan filed 14 August 2020; and

    e) the Affidavit of Ms MM filed 14 August 2020.

74. In addition to these documents, and for the assistance of the Court, the third respondents have also provided an Amended Case Outline, sent to the Court 16 August 2020. This has also been considered.

75. Mr O was required for cross-examination, and presented in person on the second day of trial. I note here that the wife made submissions about the fact that Mr O was present in Court during the husband's cross-examination. However, I do not consider it necessary to express any general view about Mr O's evidence. Ultimately, the way the issues were joined and argued, particularly concerning the decision making in D Pty Ltd, there was no serious factual dispute which would require the Court to form a view about the reliability of his evidence. Mr LL, an accountant for D Pty Ltd, was also required and made himself available on the second day of trial via telephone.

76. The third respondent's remaining witnesses were not required for cross-examination.

77. I otherwise note that this is a matter involving an extensive amount of expert evidence. These expert reports were tendered together in a bundle marked "Expert Evidence Court Book" and filed by the solicitors acting for the husband. This Expert Evidence Court Book included the following affidavits, which were all read without objection:

a) the Affidavit of Mr NN, who was engaged by the parties to value Suburb L as well as a property located in Suburb PP, filed 2 July 2020 and including reports from August 2017;

b) the second Affidavit of Mr NN filed 14 August 2020, including an updated report in relation to the above mentioned properties;

c) the Affidavit of Mr QQ, who was engaged by the parties to value a property at RR Street, Suburb SS QLD, filed 12 August 2020;

d) the Affidavit of Mr TT, who was engaged by the parties to value UU Street, Suburb VV QLD, filed 13 August 2020;

e) the Affidavit of Mr WW, who was engaged by the parties to value the property in Suburb BB as well as Suburb H, filed 14 August 2020;

f) the Affidavit of Mr XX, a remuneration expert, filed 21 July 2020; and

g) the Affidavit of Ms DD, who was engaged by the parties to value the entities of the husband, filed 13 August 2020.

78. In addition to their Affidavits, Ms DD and Mr NN also provided answers to questions put to them by the parties pursuant to rule 15.65 of the Family Law Rules 2004 (Cth) ("**the Rules**"). These answers were in evidence.

79. Mr NN, Mr WW, Mr XX and Ms DD were all cross-examined. Both Mr WW and Mr XX presented via telephone, whilst Ms DD and Mr NN appeared in person. I will discuss the oral evidence of experts as necessary in the course of these reasons.

80. The balance of the expert witnesses were not required for cross-examination, as the values proposed by them have been accepted by all parties. .

81. Throughout the trial, a variety of documents were handed up and accepted as exhibits.

Exhibit Label	**Document**	**Tendered by**
A	Wife's Electronic Court Book	Applicant Wife

Exhibit Label	Document	Tendered by
B	Suburb L Property Documents (binder)	Applicant Wife
C	Small Bundle of AF Real Estate Documents	Applicant Wife
D	Letter from Mr NN on YY Valuers letterhead to Ferrer Lawyers on 17 August 2020, and questions from Ferrer Lawyers to Ms DD dated 15 August 2020	Applicant Wife
E	Joint Balance Sheet	Joint
1	Husband's Electronic Court Book	Respondent Husband
2	Planning Certificate dated 3 July 2020	Third Respondents
3	Letter from Mr NN on YY Valuers letterhead to Barkus Doolan on 17 August 2020	Respondent Husband
4	Letter to Ms DD from Barkus Doolan dated 14 August and Ms DD's response dated 17 August 2020	Respondent Husband
5	Final Minute of Orders Sought by the Respondent Husband and Balance Sheet of the effect of the Proposed Orders	Respondent Husband

The Law

82. Part VIII of the Act sets out the legislative provisions relating to property orders that may be sought when parties are or were married. The central provision is s 79 of the Act, which gives the Court power to make such orders for alteration of property interests as it considers appropriate.

83. 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 the circumstances, it is just and equitable to make the order.

84. Section 79(4) of the Act set outs the factors to be taken into account in considering what order, if any, should be made (these will be discussed in more detail below).

85. Section 80 grants a range of specific powers to the Court to make orders adjusting property interests. Specifically s 80(1) is in the following terms:

> 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;
>
> (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.

86. Section 81 is also relevant, although the Full Court has held it is neither a head of power nor an absolute requirement; it reflects a policy of making orders which finally determine the financial relationship between the parties and avoid further proceedings, but this is only to be taken "*as far as (is) practicable*": *In the Marriage of Crapp (No 2)* (1979) FLC 90-615; (1979) 5 Fam LR 47; (1979) 35 FLR 153; [1979] FamCA 17.

87. Section 81 is in the following terms:

> In proceedings under this Part [i.e. Pt VIII], other than proceedings under section 78 or proceedings with respect to maintenance payable during the

subsistence of a marriage, the court shall, as far as practicable, make such orders as will finally determine the financial relationships between the parties to the marriage and avoid further proceedings between them.

The approach to be taken

88. The decision of the High Court in *Stanford & Stanford* (2012) 247 CLR 108; (2012) FLC 93-518; (2012) 47 Fam LR 481; [2012] HCA 52 ("*Stanford*") at [36]- [40] (per French CJ, Hayne, Kiefel and Bell JJ) made clear that the starting point for the determination of what is just and equitable for the purposes of s 79 is the determination, according to ordinary legal and equitable principles, of the existing legal and equitable interests of the parties in the property that is to be settled. This fundamental starting point was confirmed more recently in *Hsiao v Fazarri* (2020) 61 Fam LR 465; [2020] HCA 35. In *Hsiao* at [66], and Nettle and Gordon JJ commented:

> … So much follows from the text of s 79(1)(a) of the *Family Law Act* itself, which refers to *altering* the interests of the parties. But just as importantly, it is the statutory imperative to take into account the considerations stipulated by the legislature, including, critically, the existing interests of the parties, that characterises the power conferred by s 79 as judicial power. Consequently, proper consideration of existing interests is of fundamental importance…
>
> [emphasis in original, footnotes omitted]

89. Prior to *Stanford*, parties generally relied upon the "four step process" set forth in *Hickey & Hickey & Attorney General for the Commonwealth of Australia* (2003) FLC 93-143; (2003) 30 Fam LR 355; [2003] FamCA 395 to structure the determination of an application under s 79, as summarised:

> 1. Identify and value the parties' property, liabilities and financial resources at the date of the hearing;
>
> 2. Identify and assess the contributions of the parties as referred to in s 79 of the Act and determine the contribution based entitlements of the parties expressed as a percentage of the net value of the property of the parties, whether examined on a global approach or an asset by asset approach;
>
> 3. Identify and assess the other factors relevant including the matters referred to in s 75 of the Act, and determine the adjustment (if any) to be made to the contribution entitlements at step two; and
>
> 4. Consider the effect of the above and resolve what order is just and equitable in all the circumstances of the case.

90. The Full Court of the Family Court of Australia in *Bevan & Bevan* (2013) 29 Fam LR 387; [2013] FamCAFC 116 ("*Bevan*") has held that the decision in *Stanford* has not overruled the four step approach. Rather, *Stanford* serves as a

reminder that the four step process "*merely illuminates the path to the ultimate result*" being "*no more than a shorthand distillation of the words of a statute which has but one ultimate requirement, namely not to make an order unless it is just and equitable to do so*" (*Bevan* at [71]-[72]).

91. The Full Court in *Bevan* also summarised three "*fundamental propositions*" laid down by the High Court of Australia to provide *"useful guidance to trial judges in approaching the task under s 79*" at [73] as follows:

> 1. Determination of a just and equitable outcome of an application for property settlement begins with the identification of existing property interests (as determined by common law and equity);
>
> 2. The discretion conferred by the statute must be exercised in accordance with legal principles and must not proceed on an assumption that the parties' interests in the property are or should be different from those determined by common law and equity;
>
> 3. A determination that a party has a right to a division of property fixed by reference *only* to the matters in s 79(4) and without separate consideration of s 79(2), would erroneously conflate what are distinct statutory requirements.

92. The High Court has held that the very fact of separation and the termination of the relationship affects assumptions about property during the existence of a marriage or de facto relationship, and may lead to the ready satisfaction of just and equitable requirement: *Stanford* at [41]-[42]. Where the parties conduct the case on the basis that it is just and equitable to make some form of adjustment, the Court will not need to discuss the s 79(2) issue: *Fielding and Nichol* [2014] FCWA 77 at [43] per Thackray CJ. Here the parties accept it would be just and equitable to make some form of property adjustment. In this matter, the just and equitable requirement has been satisfied by the issues joined and the way the case was conducted.

93. I will therefore approach the determination of this matter by first identifying the assets and liabilities of the parties, then by dealing with s 79(4) factors, including s 75(2).

THE ASSETS, LIABILITIES AND SUPERANNUATION INTERESTS AS AT THE DATE OF HEARING

94. As already noted, the main issues in dispute concerned what assets and liabilities should finally lie on the balance sheet, as determined according to ordinary legal and equitable principles.

Suburb L

95. As already noted, there are two central issues in relation to Suburb L; the first concerns its value. The wife argues that the single expert valuation evidence of

Mr NN should not be accepted, and she should be given leave to rely upon the evidence of an adversarial expert, with time to prepare such evidence. The second is whether, pursuant to the Deed, either the husband holds a 15 per cent interest in Suburb L on trust from D Pty Ltd, or the Deed expresses an enforceable obligation for the husband to pay D Pty Ltd an amount equivalent to one-third of the net proceeds received by him upon any sale of Suburb L.

96. It should be emphasised that the value of Suburb L has a significant impact on another issue, namely, the value of the husband's interest in M Pty Ltd. This is because, although M Pty Ltd no longer directly owns a share of Suburb L, U Pty Ltd now owns 50 per cent of Suburb L, and M Pty Ltd owns 100 per cent of the issued shares in U Pty Ltd. The value of M Pty Ltd's shares in U Pty Ltd is referrable to the value of Suburb L.

a) The valuation of Suburb L and the wife's Application in a Case

97. The issues raised by the wife's challenge to the evidence of Mr NN concerning the value of Suburb L and her Application in a Case require some detailed discussion.

Some Relevant Procedural History up to the wife's Application in a Case

98. Mr NN was jointly appointed as an expert pursuant to Part 15.5 of the Rules to value both Suburb L and OO Street, Suburb PP NSW. He received specific instructions on 2 May 2017 following a letter sent by the wife's then solicitors and signed on behalf of the husband.

99. No issue was taken with Mr NN's valuation of OO Street.

100. Mr NN's original valuation of Suburb L was provided to the parties on 18 August 2017. It was not filed with the Court until 2 July 2020. In this report, Mr NN placed a market value on Suburb L of $10,800,000.00 (GST exclusive). There was no challenge to his methodology in reaching this value, or any other aspect of this report, until July 2020.

101. The wife's then current solicitor, Mr AD, was retained by her on 28 May 2020. He agreed in cross-examination that between May 2020 and 3 July 2020 he "*had a conversation*" with Mr ZZ, of AB Valuers Pty Ltd, but did not officially retain him, to "*critique*" the reports of experts already filed in the proceedings, including the first report of Mr NN (Transcript of Proceedings dated 20 August 2020, pg. 25 line 28).

102. As already noted, on 6 July 2020, the wife filed an Application in a Case seeking, amongst other things, orders which would allow for the appointment of an adversarial expert in relation to Mr NN's expert valuation evidence. Although Mr AD said he did not retain Mr ZZ, at some point prior to 3 July 2020 he clearly did; Mr ZZ swore an affidavit on 3 July 2020 for the purposes of this Application in a Case ("**3 July affidavit**"). This affidavit gave

commentary on Mr NN's valuation of Suburb L, as well as many other expert reports which are now not relevant.

103. It is important to stress here that in relation to Suburb L, Mr ZZ expressed the view in his 3 July affidavit that Mr NN, in his first report, may have made a number of errors, in that he may not have valued the property on a highest and best use basis, may have incorrectly identified the property, had not identified appropriate comparative sales, did not explain his yield figure of 7 per cent, and failed to take account of potential rezoning of the property for high density residential use, in accordance with the *[NSW] Urban Transformation Strategy 2016-2023*. Mr ZZ expressed the view that this potential rezoning could have a material impact on value. Mr ZZ pointed to the fact that in 2016, Suburb L had been marketed for sale by D Pty Ltd seeking offers in excess of $40 million, as discussed earlier in these reasons (see above at [27]), which also lead him to question the value reached by Mr NN in his first report in August 2017.

104. At paragraph 11 of his 3 July affidavit, Mr ZZ specifically stated that he proposed to undertake, or supervise other valuers with relevant geographical knowledge to undertake, valuation reports of the properties the subject of single expert valuation report in the proceedings, including Suburb L. In particular, at paragraph 11(b) and (c) Mr ZZ gave the following evidence:

> 11. In order to assist the Court, I propose to undertake…
>
> … (b) Where an opinion is expressed that the values reached in each of the previous valuation reports is materially different from that based upon relevant research and due diligence (i.e. at least greater than 10% in the valuations), preparation of comprehensive valuation reports, as at current market value, of those properties.
>
> (c) With respect to [Suburb L], provide three valuation reports:
>
> > (i) On an 'as is' basis, as at the date of previous valuation (18 August 2017) – including a detailed critique of the YY Valuers Valuation;
> >
> > (ii) On the basis of 'highest and best use' – taking into account the development potential of the site, as at today's date, reflecting the current market value of the subject property; and
> >
> > (iii) If required, a comprehensive hypothetical feasibility assessment of the subject property reflecting the potential to re-develop the subject property in accordance with the proposed re-zoning under the [NSW] Urban Transformation Strategy 2016.

105. The matter came before me on 9 July 2020. As already noted, the wife did not press her proposed orders for leave to rely upon any adversarial expert. Her application in this respect was dismissed. Orders were made for litigation

funding in the total amount of $600,000 (see [48] above), and the parties agreed that the existing single experts in the proceedings should prepare updated reports.

106. With respect to this agreement about expert evidence generally, in my reasons at [13] I noted as follows:

> …I note that I was informed that the husband and wife had reached agreement that further authorisations were to be given to existing experts in the proceedings for the purpose of updating experts' reports. But that agreement was specifically made on the basis that it was without prejudice to the wife's right to seek the appointment of adversarial experts in the future.

107. In the meantime, the parties jointly wrote to Mr NN on 9 July 2020, requesting an updated valuation in relation to both Suburb L and the Suburb PP property. In this letter, marked annexure "B" in Mr NN's second affidavit filed 14 August 2020, the parties make it clear to Mr NN that the updated report requested would have to be produced in a timely manner, as the valuations proposed would be used by the other single expert, Ms DD, in her updated report to value the entities.

108. I note that the letter sent to Mr NN on 7 July 2020 on its face claims to be a joint request for an updated report. According to the version attached to Mr NN's affidavit, it does not appear as though the wife's solicitor has signed the bottom of the letter. Nonetheless, there was no suggestion that the instructions for the updated report were unilateral, and therefore I take the letter as being jointly requested.

109. Mr NN produced an updated report dated 23 July 2020. He valued the Suburb L property at $12,750,000.00 (excluding GST). This updated report was attached to an affidavit of Mr NN which was sworn on 13 August 2020.

Questions to Mr NN

110. Both the wife and the husband, through their solicitors, then put questions to Mr NN pursuant to rule 15.65 on 14 August 2020. Mr NN provided his answers to these questions by letter dated 17 August 2020, that is, the first day of the trial.

111. In his response to questions put to him by the husband's solicitors, Mr NN reassessed his valuation to be $12,500,000.00 (see Exhibit 3), a reduction of $250,000 from the value given in his updated report. The difference arose from discrepancies in the figures for net rental income provided to Mr NN. He explained this as follows:

> [t]here appears to be some minor discrepancies with the information provided and therefore if a net rental income of $845,000 per annum can be confirmed, I will adopt this as the net rental figure. Applying the

> capitalisation rate of 6.75%, a valuation for $12,518,518 is reflected. For the purposes of this valuation, I have adopted a figure of **$12,500,000 – Excluding GST**. (Exhibit 3, pg. 3 [21]).

112. I point out here that, whilst the wife contends that Mr NN's valuation of Suburb L is flawed, this assertion does not relate to the use of an $845,000 per annum rental figure. The criticisms relate to other asserted problems.

113. In her questions to Mr NN, the wife provided to him a copy of a report from a town planner, Mr AC dated 25 May 2018 (annexure 'C' to the affidavit of Mr AD filed 19 August 2020), and asked him to consider it. Mr AC's report gave evidence about the likely process, based on his experience and expertise, which may lead to a rezoning of Suburb L site. Mr AC's report makes clear that Suburb L is situated in the Urban Transformation Area and is subject to the *[NSW] Urban Transformation Strategy*, and the *[NSW] Urban Transformation Implementation Plan 2016-2023* and *Planning and Design Guidelines*. Mr AC points out that the implementation plan has factored in the complexities involved with the transformation of the aread and defined a "*Precinct Release Process*" over the 5 years to 2023 (affidavit of Mr AD filed 19 August 2020, pg. 37 at paragraph 4.4.1).

114. Importantly, Mr AC also points out that Suburb L is not located within the "*initial release phase*" of the precinct redevelopment, that is, in the period 2016 to 2023. Any proposal which departs from the "*staging and sequencing identified by the Implementation Plan 2016-2023*" would have to be assessed against what is called the "*Out of Sequence Checklist*". Mr AC goes on to express the opinion that:

> It is my opinion that the current implementation timing does not preclude the [owners of Suburb L] from submitting a planning proposal for rezoning at any time. However, the need to satisfy the Out of Sequence Checklist criteria adds a significant element of additional risk. The suite of studies necessary to respond to the checklist would also attract significant cost (affidavit of Mr AD filed 19 August 2020, pg. 38-39).

115. Mr AC estimated such costs to be in the range of $310,000 to $600,000 (affidavit of Mr AD filed 19 August 2020, pg. 52).

116. Mr AC then expressed the following conclusion:

> The Implementation Plan does not identify the site within the initial release phase of the Strategy (2016 – 2023). The Plan does not specify the expected timing for the site's future rezoning.
>
> The Implementation Plan requires any proposal for rezoning that is not scheduled for release in the 2016 – 2023 phase address the Out of Sequence checklist as part of any planning proposal. The Out of Sequence checklist requires preparation of additional investigative studies including an Integrated Infrastructure Delivery Plan, Stakeholder Engagement Report

and Economic feasibility investigation. It is beyond the scope of this report to comment with certainty on the ability of a Planning Proposal to satisfy the Checklist, however on balance, if proposed as a single parcel Planning Proposal, it is my opinion that satisfaction of the Checklist is extremely unlikely and has the potential to result in infrastructure costs exposure which would render out of sequence release as unfeasible.

Subsequent to 2023, prospects for lodging a Planning Proposal will likely be improved as strategic planning within the PRCUTS progresses to Stage 2 Releases. If the subject site is not still within the Out of Sequence area at that time, a Planning Proposal could be lodged with relatively high degree of certainty of a successful outcome. Such a Planning Proposal would be capable of being gazetted within approximately 18 to 30 months, including application preparation time (affidavit of Mr AD filed 19 August 2020, pg. 51)

117. It is clear from the evidence of Mr AC's report, which the wife relied upon, that the Suburb L site is highly unlikely to be the subject of any rezoning before 2023, and, after that time, any rezoning would be contingent upon the site being removed from an Out of Sequence area, or the owners spending the necessary substantial sums of money to put forward a Planning Proposal. There was no evidence which would permit me to form a view as to the likelihood of either contingency being satisfied.

118. In his response dated 17 August 2020, Mr NN gave the following answers relevant to the wife's application for leave to rely upon an adversarial expert:

2. In both of your valuation reports (current and retrospective), you indicate that "I am unaware of any proposed amendments to the zoning which may affect the subject property". What enquiries, if any, did you carry out to determine whether there was any proposed amendment to the zoning which may affect the subject property?

Response: I searched the NSW Planning Portal and the website of AE Council.

3. Please find attached a copy of the report prepared by Mr AC, town planner. Were you aware of the foreseeable proposed change to the zoning in the future?

Response: I was aware that the property was in a location that has potential for future rezoning.

4. Have you considered any comparable sales (in the same catchment area) which may afford similar potential in the future, and thus would provide comparability on a "like for like basis"? If not, please explain why not?

Response: I considered all relevant sales within the immediate and surrounding areas.

…

6. In your opinion, does Mr AC's report have any material impact upon the subject property?

   Response: No.

7. Have you assessed the value on the basis of "highest and best use"?

   Response: Yes

8. Would you agree that a likely buyer, being aware of the potential for future redevelopment, may be prepared to pay a premium, above that which an investor might pay?

   Response: No.

9. Please clarify if this has been reflected in your valuation?

   Response: Yes.

10. Having regard to the details which are readily available on RP Data, did you make any enquiries as to the previous marketing campaign?

    Response: No.

11. Would the previous offers (during the course of the previous marketing campaign) have any impact upon your opinion of the market value?

    Response: No.

12. Do you consider that your opinion of the market value would be similar to and reflects the likely price which the subject property would achieve if offered to the market?

    Response: Yes.

13. Based upon the report prepared by Mr AC, and having regard to any additional research including but not limited to any comparable sales which have also been earmarked within the Suburb L Precinct, with regards to the potential change in the zoning, would you please review your valuation assessment?

    Response: My valuation remains unchanged.

14. Finally, if the zoning were to be changed to R3 – Medium Density Residential, what would be your opinion of the current market value?

> **Response:** This question is overly onerous. I cannot answer this question without being specifically instructed to prepare a valuation on this basis.
>
> **(Exhibit D)**

119. It is important to note here that, at the trial, Mr NN's affidavits sworn on 2 July 2020 and 14 August 2020 were read without objection, including his updated valuation of Suburb L in the substantive proceedings. No argument was made by the wife that his updated report, or specific parts of it, were inadmissible, by reference to s 79 of the *Evidence Act 1995* (Cth). However, as will be discussed, the wife made detailed arguments for the purposes of her application to lead adversarial expert evidence, which sought to deconstruct, and highlight numerous flaws in, Mr NN's valuation of Suburb L. Ultimately in final submissions in the substantive proceedings, the wife accepted that Mr NN's expert valuation evidence was the only valuation evidence of Suburb L before the Court, but argued that the Court was not required to accept it. She put forward reasons why it should not be accepted by the Court. I return to these below.

The Cross Examination of Mr NN

120. Mr NN was cross-examined in the substantive proceedings.

121. At paragraph 1.6 of his August 2020 report, Mr NN set out the following definition of "market value":

> *The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion*.

122. He agreed that his definition of "*market value*" was a summation of the statement of valuation principle in *Spencer v the Commonwealth* (1907) 5 CLR 418; (1907) 14 ALR 253; [1907] HCA 82 ("*Spencer v the Commonwealth*"). He agreed that by using the word "*knowledgeably*" he was applying an approach that, as a matter of law, "*the two hypothetical participants, the willing buyer and the willing seller, are perfectly acquainted with the land and cognisant of all circumstances which might affect its value, either advantageously or prejudicially*" (Transcript of Proceedings dated 19 August 2020, pg. 148 lines 7-31). He agreed also that this formulation included "*all advantages which the land possesses which might be 'matters of future or even contingent enjoyment'*" (Transcript of Proceedings dated 19 August 2020, pg. 148 lines 35-37).

123. Senior Counsel for the wife pressed Mr NN particularly about a potential for rezoning which would permit a more profitable use, suggesting this was something a knowledgeable purchaser would bring to account. Mr NN also

agreed with this. Senior Counsel then asked Mr NN what he meant in his report by "*proposed amendments*" to the zoning in the following exchange:

[SENIOR COUNSEL]: What do you mean there by "proposed amendments"?

[MR NN]: I take that, my interpretation of that or my intention of that was that there was no imminent rezoning of the property.

[SENIOR COUNSEL]: I see. By proposed, you mean "imminent", correct?

[MR NN]: I would probably classify it as realisable.

[SENIOR COUNSEL]: What do you mean by "realisable"?

[MR NN]: In that any future potential can be – it's clear cut what any future potential is.

[SENIOR COUNSEL]: It's a certainty?-

[MR NN]: It's a certainty, yes.

[SENIOR COUNSEL]: I see. So when you use the word "proposed amendments", you mean certain future amendments; correct?

[MR NN]: Sorry, could you say that again please?

[SENIOR COUNSEL]: Well, you say the valuation is based – is predicated on the basis that there are no proposed amendments. You've told his Honour a moment ago that proposed there means certain. That's correct, isn't it?

[MR NN]: I'm not sure whether that really would pertain to be certain.

[SENIOR COUNSEL]: Well, what do you mean by proposed?

[MR NN]: I search the website of the council and also the New South Wales planning portal and on the information provided for that particular property there was no indication that the zoning would be changed.

[SENIOR COUNSEL]: When you say "would be" do you mean that those portals didn't indicate that it was certain that it would be changed?

[MR NN]: There was no information pertaining to a rezoning on those portals.

(Transcript of Proceedings dated 19 August 2020, pg. 149 line 25 – pg. 150 line 3).

124. Mr NN was then asked about the *[NSW] Urban Transformation Strategy Precinct Transport Report*. He confirmed he had read it "*insofar as it pertains to proposals in relation to Suburb L*", that he knew Suburb L fell within an area of potential rezoning for residential development, and that contingent enjoyment of a future rezoning was a characteristic of Suburb L (Transcript of Proceedings dated 19 August 2020, pg. 150-151). He was then asked:

[SENIOR COUNSEL]: That would be a contingent benefit that any hypothetical purchaser or vendor would bring to account in the hypothetical market meeting which the case law dictates, correct?

[MR NN]: The rezoning may not be of benefit.

[SENIOR COUNSEL]: Do you know the character of the – do you say that a rezoning of this property from what it is now to residential would not be a benefit?

[MR NN]: Correct.

[SENIOR COUNSEL]: You say it wouldn't be a benefit?

[MR NN]: Correct.

[SENIOR COUNSEL]: Why not?

[MR NN]: Why? Because it's currently zoned IN1 – sorry, Industrial, and there's a lot of constraints with the site and it, like, there may be quite a strong possibility that it doesn't achieve rezoning.

[SENIOR COUNSEL]: Is that set out in your report?

[MR NN]: No, it's not.

[SENIOR COUNSEL]: You didn't consider that at all in your analysis, did you?

[MR NN]: Yes, I did.

[SENIOR COUNSEL]: Where is it in your report?

[MR NN]: I didn't put it in my report.

[SENIOR COUNSEL]: Why didn't you put it in your report?

[MR NN]: Because I felt that the highest and best use was as the existing use.

…

[SENIOR COUNSEL]: You know you were asked about this topic, don't you?

[MR NN]: I beg your pardon?

[SENIOR COUNSEL]: The topic of the possibility of redevelopment, correct?

[MR NN]: Yes.

[SENIOR COUNSEL]: You focused on it, correct?

[MR NN]: No.

[SENIOR COUNSEL]: Why not?

[MR NN]: Why? Because I felt that the highest and best use was as the existing use and there was limited benefit of the rezoning at this point in time.

[SENIOR COUNSEL]: I see. So you were of the view that for this to be rezoned residential would reduce its value?

[MR NN]: No.

[SENIOR COUNSEL]: Not affect its value?

[MR NN]: I cannot speak to that.

[SENIOR COUNSEL]: Well did you think it was a disadvantage?-

[MR NN]: I felt that it had no additional beneficial value to the current property.

…

[SENIOR COUNSEL]: You consider it gives no advantage or disadvantage, correct?

…

[HARPER J]: Can you agree or disagree with the proposition Mr Hutley just put to you, unconnected with any preceding questions?

[MR NN]: It's my opinion that the rezoning to residential will be a – quite a long period, as – as set out in the planning report, and, by looking at a property now, we don't look that far down – down the track for the current evaluation as that – that date.

(Transcript of Proceedings dated 19 August 2020, pg 152-153).

The Application in a Case and Supporting Material

125. It was after the cross-examination of Mr NN that, on 19 August 2020, the wife filed a further Application in a Case (as foreshadowed by Senior Counsel in his opening). This application sought permission pursuant to rules 15.49 and 15.51 to appoint Mr ZZ as an adversarial expert to value Suburb L, and to appoint Mr AC to prepare a town planning report in respect of Suburb L. This application was heard on 19 and 20 August 2020, during the trial. Although Mr ZZ said in his oral evidence he doubted further town planning evidence would be necessary, the wife pressed for an order for leave to adduce evidence from Mr AC, but seemed to accept that such evidence would only be necessary as part of the basis for Mr ZZ's expert opinion. Therefore if no leave was given for the wife to lead Mr ZZ's evidence, the evidence of Mr AC would become unnecessary also.

126. In support of this application, the wife relied on two affidavits sworn by her solicitor, Mr AD, filed on 19 & 20 August 2020, as well as Mr ZZ's 3 July affidavit, referred to above, and his affidavit sworn and filed on 20 August 2020. Both Mr AD and Mr ZZ were cross-examined. I will come back to the evidence of Mr AD.

127. In his affidavit sworn 20 August 2020, Mr ZZ deposes to receiving the updated report of Mr NN dated 14 August 2020 on the value of Suburb L. He referred to paragraph 11 of his 3 July affidavit (see above at [104]). At paragraph 6 he gave the following evidence:

> In relation to [Suburb L], having regard to the previous marketing campaign, level of offers, Mr AC's town planning reports, information provided, future potential of the site, coupled with my own due diligence, training and experience, I am of the opinion that the market value is likely to be materially significant and higher to the opinion expressed by Mr NN. Furthermore, I am of the opinion that the potential (i.e. benefit of the rezoning) is critical to the valuation and this aspect has not been addressed in Mr NN's report, nor does it appear to be reflected in the valuation assessment.

128. It can be seen that in this paragraph of his affidavit of August 2020, Mr ZZ repeats criticisms he made of Mr NN's valuation at paragraph 11 of his 3 July affidavit. Mr ZZ identifies the "*benefit of rezoning*" as critical to the valuation of Suburb L.

129. Mr ZZ then states that his fee estimate for the preparation of his "*critique report and valuation report*" with respect to Suburb L was $30,000 plus GST; he could commence immediately and would require two weeks from the date of inspection to complete his report (affidavit of Mr ZZ filed 20 August 2020, pg. 3 [7]-[8] & [12]-[13]). This cost, $30,000, was the same estimate Mr ZZ gave in his 3 July 2020 affidavit for the materially the same exercise.

The Rules

130. The wife grounded her application in rule 15.49 which is in the following terms:

> **Appointing another expert witness**
>
> (1) If a single expert witness has been appointed to prepare a report or give evidence in relation to an issue, a party must not tender a report or adduce evidence from another expert witness on the same issue without the court's permission.
>
> (2) The court may allow a party to tender a report or adduce evidence from another expert witness on the same issue if it is satisfied that:
>
> (a) there is a substantial body of opinion contrary to any opinion given by the single expert witness and that the contrary opinion is or may be necessary for determining the issue;
>
> (b) another expert witness knows of matters, not known to the single expert witness, that may be necessary for determining the issue; or
>
> (c) there is another special reason for adducing evidence from another expert witness.

131. The purpose of rule 15.49 is impose limitations on the use of adversarial evidence. Subrule 15.49(2) gives the Court a discretion. The exercise of the discretion is conditioned in satisfaction of at least one of subparagraphs (a), (b) or (c). In *Marcin & Marcin* [2020] FamCAFC 85 at [33] the Full Court said recently:

> Litigants are not permitted to call adversarial expert evidence which they consider to be more favourable simply because of their dissatisfaction with the evidence proffered by a single expert. Rule 15.49(2) of the Family Law Rules 2004 (Cth) ("the Rules"), which is adopted and applied in Western Australia by rr 12 and 13 of the Family Court Rules 1998 (WA), does not permit a party to call adversarial expert evidence once a single expert has been appointed, unless certain conditions are fulfilled. The Rules impose a system which seeks to avoid, so far as is possible, the multiplication of contradictory expert opinions.

132. As pointed out by the Full Court in *Salmon & Salmon* [2020] FamCAFC 134 ("*Salmon*") at [20] - [23] (per Kent J, Aldridge and Ryan JJ agreeing), rule 15.49 sits within a regime of rules which provide for various processes to assist in clarifying expert opinion and identifying where experts really differ.

133. Part 15.5 regulates expert evidence in proceedings under the Act. Rule 15.49 must be construed consistently with the purpose of Part 15.5 of the Rules. This purpose is expressed in r 15.42 as follows:

> **Purpose of Part 15.5**
>
> The purpose of this Part is:
>
> (a) to ensure that parties obtain expert evidence only in relation to a significant issue in dispute;
>
> (b) to restrict expert evidence to that which is necessary to resolve or determine a case;
>
> (c) to ensure that, if practicable and without compromising the interests of justice, expert evidence is given on an issue by a single expert witness;
>
> (d) to avoid unnecessary costs arising from the appointment of more than one expert witness; and
>
> (e) to enable a party to apply for permission to tender a report or adduce evidence from an expert witness appointed by that party, if necessary in the interests of justice.

134. Rule 15.64B is relevant and provides for parties to enter into an agreement about conferring with expert witnesses. If they do not agree about conferring,

the Court, on application by a party, may order that a conference be held in accordance with any conditions the Court determines.

135. Rule 15.65 provides a procedure for submitting questions to an expert witness for the purpose of clarifying their report. This process was employed in this case, as already pointed out.

136. It is also important to observe that in applying any of the Rules in Part 15.5, including rule 15.49, the Court has a responsibility to promote and achieve the main purpose of the Rules, set out in rule 1.04 (see also rules 1.06, 107). The main purpose is "*to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case*".

137. The parties have a responsibility to promote and achieve the main purpose (rule 1.08), by, inter alia:

> (a) ensuring that any orders sought are reasonable in the circumstances of the case and that the court has the power to make those orders;
>
> …
>
> (c) ensuring readiness for court events;
>
> (d) providing realistic estimates of the length of hearings or trials;
>
> …
>
> (f) giving notice, as soon as practicable, of an intention to apply for an adjournment or cancellation of a court event;
>
> (g) assisting the just, timely and cost-effective disposal of cases;
>
> (h) identifying the issues genuinely in dispute in a case;
>
> …
>
> (j) limiting evidence, including cross-examination, to that which is relevant and necessary;
>
> …

138. In *Salmon* at [24] - [33], Kent J continued:

> 24. Underlying the whole of the FLR is the statutory requirement in s 97(3) of the Act that the Court endeavour to ensure that proceedings are not protracted. In pursuit of that requirement, r 1.04 expresses that the main purpose of the FLR "is to ensure that each case is resolved in a just and timely manner at a cost to the parties and the court that is reasonable in the circumstances of the case". Rule 1.06 mandates that the Court must apply the FLR to promote the main purpose.

25. Court rules of practice regulating expert evidence, and the use of single expert evidence, and providing the Court with the discretion to appoint another expert, are not peculiar to this jurisdiction. The principles governing the exercise of discretion to appoint another expert have been considered in other jurisdictions in connection with rules similar to the FLR.

26. As Beazley JA observed of the similar rules in Part 39 of the Supreme Court Rules 1970 (NSW) in *Owners of Strata Plan 58,577 v Banmor Developments Finance Pty Limited and Others* such rules involve consideration of a balance between competing, though not disconnected, factors in the judicial system:

> … The first factor relates to case management principles and the need for the courts to provide, so far as is possible, expeditious resolution of disputes. The second relates to ensuring, again so far as is proper and possible, that the disputes are resolved so as to provide justice according to law to the parties to the dispute…

27. It has been recognised in many authorities from various jurisdictions having similar rules of practice with respect to expert evidence that a mere difference of opinion, particularly in the area of valuation, would ordinarily not be sufficient to engage the discretion to permit expert evidence other than the jointly appointed single expert. As Applegarth J observed in *Conias Hotels Pty Ltd v Murphy* ("*Conias*"):

> It almost may be taken for granted that experts adopting the same methodology applied to the same facts and applying the same assumptions might come to different opinions, simply as a matter of professional judgment. On valuation issues, the mere fact that different experts come to different opinions simply identifies that, in many cases, there is a range of opinion within which the actual value of real property, a business or other thing can be legitimately arrived at.

28. Applegarth J was there referring to the discretion provided by r 429N(3) of the Queensland Uniform Civil Procedure Rules 1999 (Qld) which empowers the court to appoint an additional expert if "the court is satisfied … there is expert opinion, different from the first expert's opinion, that is or may be material to deciding the issue". That rule is, in its terms, broader than r 15.49(2) of the FLR but nevertheless his Honour referred to authority in support of the conclusion that mere differences of opinion on valuation are not enough.

29. It bears emphasis (as Applegarth J emphasised in *Conias*) that fulfilment of a condition expressed in the relevant rule enlivens a discretion. That is, even if one or more of the conditions expressed in r 15.49(2) of the FLR are fulfilled, that simply enlivens the Court's discretion to give permission for another expert. The relevant

circumstances of the case will need to be considered as to how that discretion is to be exercised even where one or more of the conditions are fulfilled.

30. In *Daniels v Walker*, the Court of Appeal in the United Kingdom considered rules of practice similar to the FLR.

31. At pages 1387–1388, Lord Woolf MR observed:

> In a substantial case such as this, the correct approach is to regard the instruction of an expert jointly by the parties as the first step in obtaining expert evidence on a particular issue. It is to be hoped that in the majority of cases it will not only be the first step but the last step. If, having obtained a joint expert's report, a party, for reasons which are not fanciful, wishes to obtain further information before making a decision as to whether or not there is a particular part (or indeed the whole) of the expert's report which he or she may wish to challenge, then they should, subject to the discretion of the court, be permitted to obtain that evidence.
>
> In the majority of cases, the sensible approach will not be to ask the court straight away to allow the dissatisfied the party to call a second expert. In many cases it would be wrong to make a decision until one is in a position to consider the situation in the round. You cannot make generalisations, but in a case where there is a modest sum involved a court may take a more rigorous approach. It may be said in a case where there is a modest amount involved that it would be disproportionate to obtain a second report in any circumstances. At most what should be allowed is merely to put a question to the expert who has already prepared a report.
>
> …
>
> In a case where there is a substantial sum involved, one starts, as I have indicated, from the position that, wherever possible, a joint report is obtained. If there is disagreement on that report, then there would be an issue as to whether to ask questions or whether to get your own expert's report. If questions do not resolve the matter and a party, or both parties, obtain their own expert's reports, then that will result in a decision having to be reached as to what evidence should be called. That decision should not be taken until there has been a meeting between the experts involved. It may be that agreement could then be reached; it may be that agreement is reached as a result of asking the appropriate questions. It is only as a last resort that you accept that it is necessary for oral evidence to be given by the experts before the court. The cross-examination of expert witnesses at the hearing, even in a substantial case, can be very expensive.

> 32. An approach similar to that expressed by Lord Woolf MR was taken by the Full Court of this Court in *Bass and Bass*. In that case the Full Court referred to the observations of Lord Woolf MR and the Full Court expressed the conclusion that both the application for permission made to the trial judge, and the application for leave to appeal refusal of that permission "have what can best be described as a premature quality". At [49] the Full Court said:
>
> > … Division 15.5.6 of Part 15.5 provides a procedure for clarifying matters contained in a report prepared by a single expert witness. It was confirmed before us that that procedure had not so far been employed in this case. While we acknowledge that procedure may only be of limited assistance to the father given the nature of his complaints, we are nevertheless, of the opinion that that procedure ought to have been attempted before the application was made to Steele J, or to this Court.
>
> (Footnotes and citations omitted)

Rule 15.49(2)(a)

139. The wife relied primarily upon subparagraph 15.49(2)(a), but made oral submissions regarding each subparagraph of rule 15.49(2) and written submissions about subparagraph 15.49(2)(a) and (c).

140. In relation to subparagraph 15.49(2)(a), Senior Counsel for the wife argued that the relevant substantial body of opinion does not necessarily or usually come from the proposed adversarial expert. I agree. This is consistent with what was said by Kent J in *Salmon* at [35]:

> In my opinion, viewed in the context of s 97(3) of the Act, r 1.04 and the purpose of Part 15.5 expressed in r 15.42, the words "substantial body of opinion" in r 15.49(2) are to be given real meaning, as was the approach taken by the primary judge. The approach that the words have meaning of substance has been adopted, correctly in my view, in other decisions at first instance in this Court. The mere expression of an opinion as to value by another expert, no matter how substantially contrary it is to that of the single expert, does not in and of itself constitute "a substantial body of opinion" within the meaning of the rule. If such a contrary opinion is founded upon identified and accepted methodology recognised within the field, or some identified and recognised field of expertise different to that founding the single expert opinion, then the requirement of "a substantial body of opinion" will be fulfilled. As the Full Court observed in *Chick and Chick*, an expert witness may refer to textbooks and other published material to support his or her material without being forced to call the author for cross-examination. It is to be considered as one of the bases upon which the expert has formed his or her opinion.

141. The subparagraph does not specify any particular manner in which, or type of evidence whereby, the Court comes to be satisfied that there is a substantial body of opinion contrary to any opinion given by the single expert. As pointed out in *Salmon*, this could be achieved by an adversarial expert preparing a report which expresses a different final opinion but on the basis of different methodology or by reference to different expertise, and by reference to material disclosing a substantial body of expert opinion. It could not be done by tendering an expert report which simply comes to a different view on the basis of the same methodology and body of expert opinion.

142. But whatever approach is adopted by an applicant under subparagraph 15.49(2)(a), they must establish to a persuasive level of probability that the proposed adversarial expert evidence "*is*" or "*may be*" necessary to determine the relevant issue. The presence of "*is*" and "*may be*" in the subparagraph occasions consideration of the distinction between the actual and the possible. Consequently, Senior Counsel argued it was not a prerequisite to satisfaction of subparagraph 15.49(2)(a) to procure a report from a proposed adversarial expert which expresses a final contrary opinion on the issue in question. I accept this much is correct. That, in substance, is the approach of the wife in this matter. As pointed out, the evidence of Mr ZZ did not go so far as to place a value on Suburb L. Rather, his evidence was directed to establishing a substantial body of contrary opinion, which the wife argued was necessary to determine the value of Suburb L. The wife's approach assumed that one way the requisite necessity can be shown is by demonstrating that the opinion of the single expert is seriously flawed or incorrect. If so, and left unaddressed, the Court risks being disabled from determining the relevant issue because of no, or inadequate, expert evidence.

143. But, even if a final expression of adversarial expert opinion on the issue in question is not essential for satisfaction of subparagraph 15.49(2)(a), it would nonetheless, if properly undertaken by a proposed adversarial expert, likely help in determining whether subparagraph 15.49(2)(a) is satisfied, by exposing the basis of the expert's reasoning and body of opinion upon which the opinion is based. This is the point made by Kent J in *Salmon*. This would likely assist in the Court reaching the requisite degree of satisfaction as to whether that body of opinion is substantial, contrary to the opinions upon which the single expert bases their opinion, and "*is or may be*" necessary to determine the issue in question. It would also help identify the issue or issues to be determined. Similarly, the absence of such evidence is likely to be relevant to the same questions.

144. The circumstances in this case demonstrate these points. The wife relies upon Mr ZZ's view that Mr NN is wrong on value, for a range of reasons, however Mr ZZ gives no evidence of the extent of any difference in actual value between his unrealized final opinion and that of Mr NN, except to say "*the*

market value [of Suburb L] is likely to be materially significant and higher" than Mr NN's valuation. This is no more or less than an expression of likelihood, albeit likelihood of a higher value. It was never said to be a final opinion. As at 3 July 2020, Mr ZZ was already indicating he would provide a value for a number of properties, but specifically for Suburb L. But he also gave a precondition to so doing; he specifically said he would proceed to a final valuation of Suburb L, if he determined Mr NN's value was understated by more than 10 per cent.

145. Without competing valuations, how is the Court to be satisfied that there is a real valuation issue to be determined? This is a reasonable question, especially where the clear expectation of a competing higher valuation has been raised by the sworn affidavit evidence of Mr ZZ, but then disappointed because no competing valuation is actually proffered to substantiate the existence of a real issue or issues. The wife relies on Mr ZZ's opinion of a likelihood of a higher value for Suburb L. The wife, therefore, takes the risk that Mr ZZ's evidence may not satisfy the Court that his asserted substantial body of contrary opinion is actually necessary to determine an issue of value. A statement by a valuer of a likelihood of a higher value, expressed at a high level of generality, is not sufficient, in my view. It is self-evident that without an actual valuation, the Court, not to mention the other parties, is unable to know what reasoning the suggested likely higher value may be based upon or to form a view that it is sustainable as an admissible expert opinion, satisfying the requirements of s 79 of the *Evidence Act 1995* (Cth). Consequently, the Court cannot know whether any asserted issue or issues of value are soundly based, real and not fanciful. In the absence of a final valuation report from Mr ZZ, I am not satisfied that his asserted substantial body of opinion "*is*" actually necessary to determine an issue of value of Suburb L for the purposes of subparagraph 15.49(2)(a).

146. On the other hand, Mr ZZ's expression of a likelihood of higher value is sufficient to satisfy me that it "*may be*" necessary for the purposes of subparagraph 15.49(2)(a). The wife has established a possibility rather than an actuality.

147. The applicant must also satisfy the Court that the relevant substantial body of opinion is "*contrary*" to the opinion of the single expert. The wife contends that there is such a substantial body of contrary opinion in the form of venerable and binding valuation principles, established in the line of High Court decisions commencing with *Spencer v the Commonwealth*. The wife argued these judicial decisions constituted a body of opinion, which is relevantly "*contrary*" because Mr NN failed to adhere to the legally binding principles of valuation established in them, while other expert valuers "*universally*" adhered to them as the "*accepted methodology*". This methodology was contrary to that used by Mr NN, so the argument went, and was substantial.

148. Minds may differ as to whether a body of legal precedent established in the High Court and binding on lower courts is a body of expert opinion in the area of real estate valuation. It may be more accurate to say the legal principles of valuation used by valuers regularly inform their opinions, and a valuation opinion which fails to adhere to the proper and well established legal principles is contrary to those properly informed opinions. But, I will accept that High Court authority has established a methodology for valuation which valuers should, and mostly do, use. I will accept that methodology constitutes part of the substantial body of opinion about how valuations of real property are reached; however, I do not accept such a body of opinion is contrary to Mr NN's opinion or his methodology.

149. To make good her contention that Mr ZZ's evidence establishes the existence of a substantial body of contrary opinion, the wife, in summary, argues that Mr NN's approach does not consider relevant contingencies, including potential rezoning, in determining the highest and best use of the site. Specifically, she suggests that he fails to take account of the contingent or possible redevelopment of the site for residential purposes, adverted to in the *[NSW] Urban Transformation Strategy*, the *[NSW] Urban Transformation Implementation Plan 2016-2023*, and the expert evidence of Mr AC. It was suggested that the orthodox way to do this, is to adopt a "top-down" or "bottom-up" approach; where land is affected by a potential rezoning, it is also proper to have regard to comparable sales of other properties similarly affected by rezoning potential. She supports these contentions by arguing that Mr NN's oral evidence disclosed no understanding of alternative valuation methodologies using the valuation principles settled by the High Court. Consequently, the wife argues none of his expert evidence can be safely relied upon by the Court. If so, there would be no expert evidence before the Court allowing a finding about the value of Suburb L. As I understood the argument, this was also said to show Mr ZZ's evidence is or may be necessary to determine the value of Suburb L.

150. I do not accept these arguments.

151. A "top down" valuation gives a value to a property as if a contingency, such as a rezoning, has happened, then applies a discount for the chance it does not happen; and on the other hand a "bottom up" valuation values a property in its current condition, then adds a premium for the possible rezoning: *Walker Corporation Pty Ltd v Sydney Harbour Foreshore Authority* (2009) 173 LGERA 155; [2009] NSWLEC 219 ("*Walker Corporation*") at [33] - [37]. The authorities have recognised a notional spectrum along which land subject to development affectations may be placed in order to decide whether the bottom up or top down valuation methodology is appropriate: *Walker Corporation* at [38]. For example, in the well-known decision in *Royal Sydney Golf Club v Federal Commissioner of Taxation* (1957) 97 CLR 379; (1957) 31

ALJR 478 ("*Royal Sydney Golf Club*"), the relevant land was subject to a prohibition on residential development. Kitto J applied the "bottom up" method and said: "*a notional intending vendor and purchaser, [as at the valuation date] fully informed as to all relevant considerations, would have proceeded, in discussing price, on the footing that there was only a slender chance that it would ever become permissible to use any part of the land for other than recreational purposes*". Kitto J, therefore, applied a premium of 5 per cent for increased value referable to the "*slender chance*" that future approval might be obtained for a higher residential use: *Walker Corporation* at [35].

152. The wife did not argue that Mr NN should have used the "bottom up" or "top down" method and chose the wrong one in the circumstances. No evidence was called from Mr ZZ or any other expert to suggest either method should be used to value Suburb L. Rather, the wife argued that Mr NN did not understand either method.

153. It is true that in cross-examination Mr NN said he had not heard of either of the terms "top down" or "bottom up", but the knowledge of particular labels is not of great significance. After all, Biscoe J pointed out in *Walker Corporation* at [33] that it was he who coined "bottom up" and "top down" as convenient descriptions in *Sandhurst Trustees Ltd v Roads and Traffic Authority of NSW* [2006] NSWLEC 243 at [74] – [75] ("*Sandhurst*"). In *Royal Sydney Golf Club,* Kitto J used the "bottom up" method", but did not use that description. Knowledge of the actual methodology is the important point.

154. The wife made much of a contention that Mr NN conceded in cross-examination that he placed no premium on a potential rezoning of Suburb L because he required such rezoning to be a "*certainty*". It is true Mr NN used this word at one point in his answers, but it was suggested to him by Senior Counsel for the wife, as a synonym for what Mr NN meant in his previous answer by the words "*clear cut what any future potential is*". Thus, Mr NN was using "*certainty*" to refer to the nature of the relevant future potential, as well as the likelihood that it would actually happen. In construing his cross-examination fairly, he also, as the wife conceded, used other adjectives such as "*realisable*", "*possible*", "*imminent*" and "*clear cut*". He was clear that when he did his updated valuation he was careful to ascertain if there was any rezoning, and in the wife's rule 15.65 questions he was specifically asked about the potential for rezoning, canvassed at length by Mr AC and found in the *Transformation Strategy*, *and Transformation Implementation Plan 2016-2023*. As discussed above, this material showed that any rezoning was remote before 2023, and subject to important contingencies after 2023, about the likely fulfilment of which there was no clear evidence. Mr NN agreed with Senior Counsel for the third respondent that there was no real way of assessing what a local government authority or the NSW government may do in the future. Mr

NN, in his rule 15.65 answers, made plain that, in his view, the matters raised in Mr AC's report had no material immediate impact on the value of Suburb L; he disagreed that a potential buyer would pay a premium because of potential redevelopment, and this was reflected in his valuation, so his valuation remained unchanged. Mr NN also made clear the previous marketing campaign and earlier offers in 2016 had no impact on his opinion.

155. In cross-examination, Mr NN adhered to these opinions. He was clear that he had given consideration to potential rezoning but held the view it did not change his opinion of value because it was too remote to affect the mind of a potential purchaser as at the date of valuation. He maintained his view that "*the highest and best use*" was the existing use, because the site is currently zoned industrial, and it may not achieve a rezoning because it had "*a lot of constraints*". Mr NN said in his view the potential for rezoning had "*no additional beneficial value to the current property*". He clearly gave consideration to the potential for a rezoning.

156. I am not persuaded Mr NN was wedded to a concept of certainty, as the wife argues. Rather, it is tolerably clear that what Mr NN meant was that, in his expert opinion, before such rezoning potential for Suburb L caused his assessment of its value to be higher, it should be clearer that the rezoning was closer to realisation or becoming an actuality. In this, there is nothing inherently contrary to orthodox valuation principles relied on by the wife. In cross-examination, Mr NN said he had extensive experience in valuing properties exposed to potential rezoning. In her criticisms of Mr NN the wife glossed over the highly contingent nature of any potential rezoning of Suburb L. Mr AC identified clear reasons why a rezoning of Suburb L was reasonably remote in time and subject to contingencies. One obvious possible fate of the potential rezoning is that it never happens because of local or state government decisions. Mr NN violated no principle of valuation by concluding that the contingent nature of the potential rezoning was such that the putative willing purchaser would not be prepared to pay a premium of Suburb L as at the date of valuation.

157. As I understood them, the wife's arguments contained an unexpressed assumption that any consideration of the potential for rezoning must result in a value for Suburb L higher than Mr NN's. But this is not what orthodox valuation principles require. They require future advantages and potentialities to be considered, not that they necessarily result in a particular value. In *Longworth v Commissioner of Stamp Duties* [1953] 53 SR (NSW) 342, the Full Court of the NSW Supreme Court said at 348:

> A tribunal which is called upon to make such an assessment of value must in each case decide what facts affecting values would have been in the contemplation of the notional buyer and seller at the relevant date, and what, if any, effect on values the existence of those facts would have had

> on the sum which the one was prepared to give, the other to take. One such relevant fact may be the probability or possibility that an event will later occur, and the existence or non-existence of that contingency may have its effect on values. If so, it is relevant. But the value must surely be ascertained in the light of the facts, including the probabilities and possibilities, then existing, and without taking notice of subsequent happenings.

158. This passage was cited and followed as a correct statement of principle in many valuation cases such as *Multari v Roads and Traffic Authority of NSW* [2004] NSWLEC 649 at [30] by Talbot J and by Biscoe J in *Sandhurst* at [72].

159. In *Flotilla Nominees Pty Ltd v Western Australian Land Authority* (2003) 27 WAR 403; [2003] WASC 122 at Pullin J said at [19]:

> Regard must be had to every element of value which the lands possess. Every such element must be taken into consideration insofar as they increase the value to the owner of the land. In short, regard should be had to the highest and best use of the subject land, meaning the most advantageous use of the subject land having regard to planning and all other relevant factors affecting its present and future potential.
>
> (footnotes omitted)

160. This passage was cited with approval by the Full Court in *GWR & VAR* (2006) 36 Fam LR 237; [2006] FamCA 894 at [52]. The Full Court also cited from a valuation text the following passage:

> Each party would take into account 'not only the present purpose to which the land is applied, but also any more beneficial purpose to which, in the course of events at no remote period it may be applied, just as an owner might do if he were bargaining with a purchaser in the market. This is the mode in which the land would be valued.
>
> (footnotes omitted, emphasis added)

161. Each situation is different and subject to individual factors. Mr NN took the view that any potential rezoning was in a "*remote period*." This view was clearly supported by the evidence of Mr AC. Ultimately, it was put to Mr NN that it is unlikely that the rezoning of Suburb L would be value neutral. He answered by saying, quite reasonably, "*it would depend on the constraints of the rezoning*" (Transcript of Proceedings dated 19 August 2020, pg. 155 line 23).

162. It is here that the absence of a final opinion about the value of Suburb L from the wife's expert exposes one of the central weaknesses in her argument. As already pointed out, the wife called no evidence which demonstrated that consideration of the potential for rezoning will actually lead to a higher value than Mr NN's, only that it may. It is true that in *Royal Sydney Golf Club* Kitto

J put a 5 per cent premium on a "*slender chance*" of future residential use, but this was entirely arbitrary. As Biscoe J pointed out in *Walker Corporation* at [40], in *Liverpool City Council v Commonwealth of Australia* (1993) 81 LGERA 405 at 421, Wilcox J said: "*[i]n a case where the task of assessing compensation comes down to the evaluation of a chance, it will rarely be possible to demonstrate that any particular figure is correct*." Rather, it comes down to a 'best guess'. Mr ZZ has not put forward even a 'best guess'.

163. The wife also contended that Mr NN failed to have regard to appropriate comparative sales. The wife relied upon the following statement by Biscoe J in *Sandhurst* at [73]:

> In considering the highest and best use potential of the acquired land, it would be preferable to have regard to sales of other lands that were similarly affected by the proposals relating to [a particular] designation. Their development potential under that designation would be embedded in their sale price…

164. It is important to observe that the final sentence of Biscoe J's statement, which the wife did not include, is "*[h]owever, there are no such comparable sales*".

165. Yet, it is beyond argument that Mr NN did have regard to comparative sales in determining that he thought the existing use was the highest and best use of the Suburb L site. Expert views may differ on what comparative properties should be used, but this is not a difference of method; it is a difference of opinion in using the method. The wife argued Mr NN should have used sales of land in the vicinity of Suburb L which enjoyed the same rezoning potentialities as Suburb L. For example, he was cross-examined about a property in Suburb AH, which had an area rate of $4,968 per square metre and a yield of 2.73 per cent as well as "*[p]otential for development upside*". Mr NN agreed this property likely fell within the *[NSW] Urban Transformation Strategy* but took the view this was not of huge significance. This demonstrated that Mr NN had given careful consideration to comparative sales. More to the point, there was no evidence that there were any comparative sales available, beyond those which Mr NN considered, which showed a premium was paid for the potential of future rezoning or that were in some other way superior or more appropriate than those chosen by Mr NN.

166. In short, I am satisfied Mr ZZ's evidence went far enough to demonstrate his adversarial valuation "*may be*" necessary to determine the issues of valuation, although I am not satisfied it actually is necessary. But in my view, Mr NN demonstrated through the combination of his reports, his answers to questions put pursuant to rule 15.65, and his answers in cross-examination, that he understood and formed his opinion in accordance with the well-known principles of valuation established by the High Court which the wife contends forms a substantial body of opinion. The evidence shows that Mr NN adopted

the methodology for valuation that the wife argued he should have adopted, being the same methodology that the wife says Mr ZZ would use. Mr NN reached an opinion as to value of $12,500,000 using that methodology. The evidence of Mr ZZ does not demonstrate either that Mr NN did not do so or the existence of a substantial body of opinion which was relevantly "*contrary*" and upon which Mr ZZ would rely. Mr ZZ's evidence merely says he might have come, but of course has not come, to a different view about value, adopting the same body of opinion. Even if this is true, as pointed out above at [138], in *Salmon,* the Full Court made clear this cannot satisfy rule 15.49(2)(a).

Rule 15.49(2)(b)

167. The wife also mentioned subparagraph 15.49(2)(b) in oral submissions, although no argument was made about it in writing. As a matter of construction, the wife argued that subparagraph 15.49(2)(b) merely required satisfaction that another expert knows of matters not known to the single expert, not what ultimate opinions the other expert may express on the basis of such knowledge. The existence of those matters could, therefore, be proved on information and belief for the purposes of an application under subparagraph 15.49(2)(b). I accept this is correct as a matter of construction.

168. But here the wife's argument fails on a factual level. The evidence failed to establish any matters which were known to Mr ZZ, but not known to Mr NN. It was faintly suggested that Mr ZZ knew of the potential for rezoning matters which Mr NN did not. The evidence set out above makes this argument untenable in my view, and I reject it. Mr NN knew about the same matters concerning the possible rezoning of Suburb L at least by the time he answered the subparagraph 15.65 questions. I am unable to accept the wife has satisfied subparagraph 15.49(2)(b).

15.49(2)(c)

169. In relation to rule 15.49(2)(c), the wife orally argued that there was a sufficient special reason found in Mr NN's asserted failure to disclose what he knows about the *Paramatta Transformation Plan*.

170. The wife also contended that it was not until Mr NN was cross-examined that he disclosed five crucial matters regarding constraints on the Suburb L site. It was argued he did so in the following answer to a question from the Court:

> [HARPER J]: … what is your expert view about what the hypothetical purchaser would do?
>
> [MR NN]: Looking at all the constraints of the site, the significant constraints of the site, including there's a drainage canal adjoining the site. There's also adjoining industrial property. The main access road, AH Street, it's under

> resourced. It's – traffic's very heavy along there near the supercentre and it would be highly unlikely that that added volume of a residential development would go ahead without some significant changes there. Also, the current FSR of any potential R3 zoning is undetermined so it's very difficult to work out if there's actually any profitability there and it's my opinion that time constrains would also preclude paying any premium for the property as well.

171. The wife argued this answer "*bundled up*" five "*completely new*" matters; a drainage canal, adjoining industrial property, added traffic volumes, uncertain profitability and time constraints on any potential rezoning. The wife said she did not understand what most of these meant. The wife contended Mr NN's answer was "*completely inconsistent*" with the principles in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705, as approved in *Dasreef Pty Ltd v Hawchar* (2011) 243 CLR 588 at 604, because he had not exposed his reasoning and raising these five matters was profoundly unfair to her, imposing a "*massive imposition*", and she could not be expected to deal with them on the run. She also argued that by omitting relevant matters from his report, Mr NN had breached rule 15.63, and he had breached rule 15.59(3)(c) by failing to consider all material facts. She suggested all these factors created procedural unfairness. They were not said to go the admissibility of Mr NN's evidence. As already noted, there was no debate about its admissibility. It was admitted and read. The wife argued this procedural unfairness constituted "*another special reason*" for adducing evidence from Mr ZZ for the purposes of subparagraph 15.49(2)(c).

172. I do not accept this argument for three reasons.

173. First, in *Bowen & Williams* [2015] FamCA 545 at [19] - [22] Tree J pointed out that the use of "*another*" as a modifier of "*special*" in subparagraph 15.49(2)(c) suggests that subparagraphs 15.49(2)(a) and (b) are examples of special reasons for leave to adduce adversarial evidence. At [20] Tree J said "*[b]oth of these point to something more being needed than merely the existence of a different or contrary opinion advanced by the other expert*." Tree J also noted that "*special*" connotes "*out of the ordinary, extraordinary or exceptional*".

174. There may be circumstances where a breach of rules and the resultant procedural unfairness is so extreme as to meet the definition of "*out of the ordinary, extraordinary or exceptional*". Such circumstance are not present in this case.

175. I have already concluded that the evidence shows that in truth Mr NN adopted the basic methodology for valuation that the wife argued he should have

adopted. To the extent Mr ZZ would put forward a different or contrary opinion based on the same methodology, this would not constitute "*another special reason*". It would constitute the same, not "*another*", reason why the wife could not satisfy subparagraph 15.49(2)(a). Nor is it out of the ordinary, extraordinary or exceptional. Indeed, competing valuations of real property are frequent, if not routine, in this Court.

176. Secondly, I am not persuaded Mr NN has breached any rules or his duty to the Court. I am satisfied he endeavoured to present his evidence in accordance with the obligations imposed by rule 15.59, and did so. But in any event, the consequences of non-compliance with rule 15.59 are set out in rule 15.69. These do not obviously include receiving evidence from another expert witness. The fact that the consequences of non-compliance are provided for in rule 15.69 suggests it is not the purpose of rule 15.49(2)(c) to provide an additional consequence.

177. Thirdly, I am also not satisfied the wife has suffered any procedural unfairness, exceptional or otherwise. Procedural fairness does not involve a fixed body of rules to be applied in a formulaic manner: *Vines v Australian Securities and Investments Commission* (2007) 73 NSWLR 451; (2007) 62 ACSR 1; [2007] NSWCA 75 at [59]. Gleeson CJ said in *Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1; (2003) 195 ALR 502; [2003] HCA 6 at [37]:

> Fairness is not an abstract concept. It is essentially practical. Whether one talks in terms of procedural fairness or natural justice, the concern of the law is to avoid practical injustice.

178. In *Stead v State Government Insurance Commission* (1986) 161 CLR 141; (1986) 67 ALR 21; [1986] HCA 54 , the High Court made clear that it is also necessary to show that compliance with the rules of procedural fairness would have made a difference. Practical injustice is avoided, or does not arise, if adherence to rules of procedural fairness would have made no practical difference.

179. The wife did not make clear what she would have done if she had known, at some earlier point in time, of the five 'new' matters spelled out by Mr NN in his answer cited above at [170], so as to demonstrate they raised a practical unfairness. She simply says it is unfair for her to deal with them on the run. But according to her own case, it is hard to see how dealing with these matters not on the run would have made a practical difference. The wife has known since at least 3 July 2020 what flaws are said by Mr ZZ to impugn the expert evidence of Mr NN. They did not materially change by the time the trial commenced. For example, Mr ZZ continued to say the potential for residential rezoning was critical; the length of time to secure any potential rezoning was made plain by the evidence of Mr AC, which the wife herself provided to Mr

NN. It was unclear whether Mr ZZ had taken account of constraints on the site or any of the five matters Mr NN pointed to. At the risk of labouring the point, the wife could have spent another $30,000 on Mr ZZ well before 17 August 2020 to obtain a final valuation which addressed constraints on the site and demonstrated there was a real and significant difference in value worth debating on the basis of Mr ZZ's contentions.

180. To suggest Mr NN's answers in cross-examination were the factors which ultimately impelled the wife to pursue her application is not convincing. Mr NN's answers to rule 15.65 questions showed it was highly unlikely that he would resile from his valuation in cross-examination, and the wife could not reasonably prepare for the final hearing on the expectation that he would. Even without any cross-examination, the wife's fundamental argument is that Suburb L is undervalued significantly. Since July 2020, if she wanted to pursue this argument with different expert evidence, adversarial expert evidence would be unavoidable. Then procedural steps for a conference or conclave of experts may have usefully been considered by the Court. This has not happened because of choices made by the wife. I also refer to and rely upon the matters discussed below at [182] - [205]. On the wife's case, Mr ZZ had identified the central problems with Mr NN's expert evidence by 3 July 2020. I am not persuaded any of the five new matters raised anything sufficiently material to cause unfairness to the wife. I do not accept there has been any procedural unfairness to the wife which has or could make a practical difference.

Conclusion as to Rule 15.49(2)

181. Consequently, I am not persuaded that the discretion in rule 15.49(2) has been enlivened. This is sufficient to dispose of the wife's Application in a Case. However, in case I am wrong, and in deference to the arguments of Senior Counsel, I will express my views about the exercise of the discretion, if it had been enlivened.

The Court's Discretion

182. The conclusions of the Court as to whether the proposed adversarial expert evidence "*is or may be*" necessary will be a consideration which informs the Court's exercise of discretion. If the Court is persuaded that the contrary expert opinion is actually necessary to determine the issue in question, this would be a powerful factor militating in favour of the exercise of discretion to permit adversarial evidence. However, if the Court was only satisfied that it "*may be*" necessary, this conclusion would encourage greater caution, and other considerations may weigh more powerfully against exercising the discretion to grant such leave. I have concluded that the Mr ZZ's asserted body of substantial opinion only "*may be*" necessary to determine the issue of the value

of Suburb L. This cannot be determinative of the exercise of discretion in the wife's favour.

183. There are significant other considerations which bear upon the exercise of the discretion. Senior Counsel argued that when rule 15.49 is read with rule 15.48 and rule 15.65, the intention is clear that before a party is put to any expense in procuring an adversarial expert report, the report of a single expert should be clarified or tested by asking questions pursuant to the rule 15.65. The reason for this is that the process of asking questions may obviate the need for any further adversarial expert report. As a matter of general construction, this much can be accepted, but this level of generality must yield to the particular circumstances of the case. Where, as here, a final hearing date was imminent, the party seeking to rely upon adversarial expert evidence may need to be more proactive, especially where a late application for such leave close to or during the final hearing risks jeopardising the completion of the hearing within the allocated time. This obligation arises from the particular circumstances of the case, as well as from the responsibilities to promote and achieve the main purpose of the Rules and the purpose of Chapter 15.5 of the Rules.

184. It should be emphasised that in his 3 July affidavit, Mr ZZ said he was proposing to undertake a comprehensive valuation where a previous valuation "*is materially different from that based upon relevant research and due diligence (i.e. at least greater than 10% in the valuations*)" (affidavit of Mr ZZ filed 6 July 2020, pg. 8 [11]). So, in early July 2020, Mr ZZ held out the possibility of a valuation of Suburb L at least 10 per cent greater than Mr NN's some six weeks before the commencement of the trial, but no evidence to that effect ever eventuated either before or during the trial.

185. In cross-examination, Mr AD was asked whether he had requested Mr ZZ to give an opinion as to the suggested correct valuation of Suburb L. Mr AD said Mr ZZ had not been asked because it was "*premature*" (Transcript of Proceedings dated 20 August 2020, pg. 31 line 11). It was said to be premature because no leave had been given by the Court for the wife to rely upon an adversarial expert valuer. Mr AD said Mr ZZ had quoted $80,000 to prepare an adversarial expert report in relation to all real estate valuations, not just Suburb L, and that he thought all eight single expert real estate valuations required a response from Mr ZZ. Mr AD also claimed that he had received advice from Senior Counsel that spending another $80,000 on an adversarial valuation report from Mr ZZ was not justified until supplementary single expert reports were received. Ultimately, he claimed that after the "*critique*" of Mr ZZ was received only Suburb L remained in contention.

186. I find this evidence hard to understand. Mr ZZ had prepared his "*critique*" of all single expert valuations, including Suburb L, for his 3 July affidavit. By 9 July 2020, the wife had abandoned, for the time being at least, her application for leave to rely on adversarial expert evidence. By this date, Mr ZZ's critique

was clearly well developed and known to the wife and her advisors. As already noted, in his 3 July affidavit he had already specifically mentioned that, in his view, Mr NN may not have valued Suburb L on a "*highest and best use*" basis, had not identified appropriate comparative sales and had failed to take account of potential rezoning of the property for high density residential use. It should have been clear by 9 July 2020, according to the evidence of Mr AD, that Suburb L was likely to remain in contention, if Mr ZZ was correct. It should also have been clear that the cost of Mr ZZ valuing Suburb L alone, being a single property with which he was obviously already acquainted through his "*critique*" of Mr NN's valuation, would cost less than $80,000. As noted already, Mr ZZ actually estimated his critique about, and valuation of, Suburb L to cost $30,000.

187. The history of the wife's general investment in adversarial expert evidence is relevant. The wife handed up in Court a memorandum of costs dated 17 August 2020. This is instructive. Mr AD agreed that up to 17 August 2020, the wife had spent about $1.5 million on various professionals including lawyers and experts. He agreed he retained in his trust account about $300,000 of the funds provided pursuant to litigation funding orders made on 9 July 2020. He agreed Mr ZZ has been paid $30,250 so far, with estimated work in progress of $10,000. He acknowledged that the amount of $490,000 had been incurred to forensic accountancy "shadow experts" called Accuracy, despite the fact that no application to lead evidence from Accuracy was ever filed or pressed. Nonetheless, the process of obtaining this evidence was obviously not considered to be "*premature*".

188. So in summary, the wife knew by 3 July 2020 with some precision what contentions Mr ZZ made to impugn the valuation of Mr NN, in particular, Mr NN's alleged failure to take proper account of the potential for Suburb L to be rezoned for residential development. She waited until the processes pursuant to rules 15.65 ad 15.42 were exhausted, and Mr NN was cross-examined, before renewing her application for expert evidence and spending further funds. The wife characterised this as a reasonable approach. Usually that may be correct. In the circumstances of this matter, however, I do not accept that it was.

189. When asked by Senior Counsel for D Pty Ltd why the wife waited until 19 August 2020 to renew her application for adversarial expert evidence, Mr AD said he had other things to do, particularly, prepare for the trial. Implicit in this answer is the proposition that somehow Mr ZZ's expert evidence, said to go to a critical part of the wife's case, was not integral to preparation for the trial. I do not accept this either. On the wife's case, Mr ZZ's expert final view about the value of Suburb L was obviously integral and should have been taken up in preparation for trial.

190. On the question of discretion, I should also mention again the five matters referred to above at [170] and [171]. As I understood the wife's argument, she also contended the procedural unfairness created by these new matters was a consideration in the exercise of discretion. But for the reasons given at [173] - [180] above, I am not satisfied any procedural unfairness has been demonstrated.

191. But even if that is wrong, I consider that any prejudice to the wife in this regard could not sensibly be called "*massive*", and is more than outweighed by the other discretionary factors to which I refer.

192. In her argument, the wife also placed reliance on the agreement of the parties to obtain updated experts reports being without prejudice to the wife's right to seek the appointment of adversarial experts in the future, noted in my judgment of 9 July 2020 (see above at [106]). The wife seemed to think that this agreement was another reason why her application made during the trial was quite reasonable. She sought to bolster this argument by contending the other parties were on notice of the prospect she may bring another application. She pointed out that this possibility was repeated in correspondence between solicitors after 9 July 2020. Factually that is true. But I do not accept these arguments either. The agreement of the parties on 9 July 2020 meant only that the wife was not precluded from obtaining adversarial experts' reports by the fact of agreeing to updated single expert reports; it did not relieve the wife from making application which satisfied the relevant rules and promoted or achieved the main purpose, and by its timing at least would not risk derailment of the final hearing.

193. The fact that the wife continued to raise in correspondence the possibility of an application to lead adversarial valuation evidence meant, of course, that she knew right up to the start of the trial that she may put in issue the valuation of Mr NN, with the necessary consequence that, if his valuation was successfully impugned, the Court could or would be left without any valuation evidence unless the wife herself put forward an actual competing expert valuation of Suburb L. These are further considerations which weigh against any exercise of discretion in the wife's favour.

194. No other convincing explanation was given as to why Mr ZZ was not asked to complete a valuation of Suburb L for $30,000 between 3 and 23 July 2020, or at the latest between 23 July and 17 August 2020. The suggestion by Mr AD that he lacked sufficient funds appears almost ludicrous in the circumstances, especially when it is remembered, even as at the date of trial, he held almost $300,000 in his trust account and had spent nearly $500,000 on other "shadow experts", who then never gave evidence. The valuation of Suburb L was said to be a critical part of the wife's case, yet an expenditure of $30,000, a modest amount in the scheme of this matter, to produce an actual valuation of Suburb L

by Mr ZZ was deemed to be excessive. I find this explanation entirely unpersuasive.

195. It should be remembered in this regard that, on her own case, it is not as if the wife was going to escape spending additional fees on Mr ZZ. The incurable defects said to impugn Mr NN's valuation, if correct, meant Mr ZZ would unavoidably have to complete a final valuation of Suburb L at the wife's cost. The whole purpose of her Application in a Case was to allow this to happen. As already pointed out, in his 3 July affidavit Mr ZZ gave evidence that he was already proposing to prepare a comprehensive valuation of Suburb L if his research and due diligence reached a value *"at least greater than 10%"* of Mr NN's. Despite this, he has not done so in respect of Suburb L, the only real estate valuation which remained in issue. Since the alleged defects in Mr NN's valuation, including the suggested failure to have proper regard to the potential for rezoning, were already identified by Mr ZZ in his 3 July affidavit, the absence of a final valuation by him by the time of trial is baffling and unacceptable.

196. Mr AD also contended that it was appropriate to await Mr NN's responses to rule 15.65 questions, and his cross-examination, before renewing the wife's application to bring adversarial expert evidence from Mr ZZ, because depending on Mr NN's answers, such application may not have been necessary. I find this suggestion also entirely unconvincing. On the wife's case, for her application to have become "*unnecessary*", Mr NN would have had to concede not only the criticisms made of his valuation, but also then provide a different and higher valuation in the witness box. Even before Mr NN was cross-examined, there was no realistic prospect of this happening. Neither Mr NN or Mr ZZ were prepared to vouchsafe a valuation orally, and on the run, in the witness box. According to the wife's argument, if Mr NN abandoned his valuation in cross-examination the Court, and with no valuation from Mr ZZ, would be left without an expert value for Suburb L until a new valuation could be prepared. Adjournment would be inevitable.

197. It was also obvious that if the wife waited to renew her application to lead adversarial expert evidence during the trial, before obtaining a final valuation from Mr ZZ, there was a risk that the hearing would not be completed and an adjournment would be inevitable. Indeed, according to the logic of her own argument, this risk must have been recognised as substantial by the wife. Adjournment would automatically follow if her application succeeded; thus adjournment was actually the practical result for which the wife contended, even though she claimed she did not ask for an adjournment.

198. Moreover, even if awaiting Mr NN's responses to questions and cross-examination could be said to explain the timing of the renewed application, it does not explain why a competing final valuation of Mr ZZ had not been prepared prior to the application being made, to avoid the risk of adjournment.

199. This obvious risk imposed an obligation on the wife to be ready with a final valuation by Mr ZZ prior to the commencement of the trial, or at the latest on the first day of the trial. Mr ZZ said it would take him only two weeks to prepare a final valuation of Suburb L. Obtaining such a valuation would have been consistent with the wife's responsibilities to promote and achieve the main purpose of the Rules by ensuring readiness for trial, by assisting the just, timely and cost-effective disposal of this case, by identifying the actual real issues between Mr NN and Mr ZZ on the basis of a final report from Mr ZZ, and by denying the Court the possibility of limiting the expert evidence by ordering Mr NN and Mr ZZ to confer, by the latest, during the trial.

200. Instead, after paying unused shadow experts in excess of $490,000, the wife adopted the course of engaging Mr ZZ as a proposed adversarial expert before July 2020, paid him $30,250, with estimated work in progress of $10,000, for expert commentary, most of which was not used, on all single expert valuations of real properties. The wife then asked Mr ZZ to prepare just enough further evidence to demonstrate that his expert opinion "*may be*" necessary to determine the issue of the value of Suburb L because of an asserted substantial body of contrary opinion. As pointed out already, rather than leave the Court and the other parties with this evidentiary tease, at least two weeks before the trial commenced, the wife could have spent the further $30,000 for Mr ZZ to express a final opinion about the value of Suburb L, which would have been ready in time for the trial. Another $30,000 on what she claims is a critical issue was clearly justifiable in the circumstances. But she did not do so. She chose to leave the Court with Mr ZZ's unconsummated flirtation with a higher value for Suburb L, while knowing the timing of her application to lead adversarial expert evidence from him would, if successful, result in the proceedings being adjourned. This approach, in my view, if not perverse, was unreasonable.

201. Finally, the wife argued that the other parties would suffer no prejudice if her application was granted, which could not be cured by orders for costs. She, on the other hand, may be significantly affected because, if the true value of Suburb L was much greater than Mr NN's value of $12,500,000, this would materially and substantially affect the Court's starting point for identifying the parties existing assets and liabilities and their value for the purpose of making property adjustment orders under s 79 of the Act.

202. This has some superficial attraction but one problem with this argument is that, because of her own approach, the Court has no clear idea what actual alternative value the wife would seek to place on Suburb L. The other is that it is still open for the Court to take account of the possibility of a higher value for Suburb L under s 79(4)(e). In those circumstances, the wife's claims of prejudice are vague and imprecise, and a result of her own forensic choices. She could have avoided or at least ameliorated the asserted prejudice by

providing an actual final proposed valuation from Mr ZZ. Her claims of prejudice do not persuade me that it would be appropriate to exercise the discretion in her favour. Moreover, any prejudice suffered by the wife is outweighed by the factors discussed above at [182] - [200].

203. Conversely, there was prejudice to the other parties which lay in the need for further hearing time, additional costs and lack of finality of the litigation. The allocation of further hearing time in this Court, with its current level of resourcing, is very difficult and could result in a lengthy delay before the Court could be reconvened. There would be an impact on other litigants in the Court who also compete for allocation of judicial resources. A further observation should be made here. It might be thought that in the time it has taken to carefully consider all the issues, evidence and arguments in this matter and deliver judgment, Mr ZZ could have prepared a final valuation and conferred with Mr NN, if necessary, and therefore many of the problems discussed above about permitting the wife the call evidence from Mr ZZ would become otiose. I do not consider this consideration to be either cogent or particularly relevant. The wife had to satisfy the Court of a proper jurisdictional basis for the permission she seeks. I have found she failed in this regard. Moreover, the problems of finding further hearing time, additional delay in finalising the proceedings, and the need to balance the considerable demands made by other litigants in the current situation of the Court, continue to remain real and do not go away.

204. I have also taken account of the fact that if Mr ZZ did provide a final valuation of Suburb L and the Court gave the wife leave to rely upon it, the Court may be in a better position to reach a view about the value of Suburb L by reference to competing valuations. I discuss later in these reasons the authorities which bear on how the Court may determine value where there are competing valuations. Competing valuations may constitute part of an evidentiary basis permitting the Court to form its own view of value. This superficially would be a factor weighing in favour of acceding to the wife's application to lead evidence from Mr NN. However, as explained already, I find Mr NN's valuation persuasive, and below I make clear that I accept the valuation of Mr NN. In any event I also do not think this consideration outweighs the other discretionary factors already discussed.

205. I have also had careful regard to the fact that the amount of difference between Mr NN and Mr ZZ in valuing Suburb L could be substantial, a matter Lord Woolf adverted to in *Daniels v Walker* [2000] 1 WLR 1382 weighing in favour of acceding to the wife's application (see above at [138]). But such a substantial difference is not certain, and the level of difference cannot be gauged with any confidence. I also accept that the wife's application could not be called "premature", as referred to by the Full Court in *Bass* (see above at [138]).

Conclusion concerning the Wife's Application in a Case

206. In summary, my conclusion concerning the wife's Application in a Case are as follows. I am not satisfied that any of the criteria in subparagraphs 15.49(2)(a), (b) or (c) have been met, and the wife has not demonstrated that the discretion in subrule 15.49(2) has been enlivened. Even if it be assumed that the discretion has been enlivened, I would not exercise in favour of the wife for the reasons given at [182] to [205] above.

207. I will dismiss the wife's Application in a Case filed on 19 August 2020.

The Value of Suburb L

208. That leaves for consideration the position of Mr NN's evidence. His reports have been received into evidence, he has answered written questions in accordance with the rules, and he has been cross-examined. Nonetheless, the wife, as part of her application which I will dismiss, argued his evidence could not be "*allowed to stand*", and, in her final submissions, that it is "*wholly unsatisfactory*", mainly for the reasons she gave in arguing her application in a case.

209. It is clear from my discussion and conclusions at [145] - [166] above, that I am not persuaded by the wife's reasons said to impugn Mr NN's reports. In my view, Mr NN's valuation has probative value and I have regard to it. Since I will refuse the wife's application to call adversarial evidence, there is no other valuation evidence.

210. Nonetheless, the parties were unified in submitting that the Court was not obliged to accept the valuation of Mr NN. As discussed in a moment, this accords with authority. Thus, while both parties accepted that the potential for a greater value for Suburb L was a matter which could be taken into account under s 79(4)(e), their preferred approach was for the Court to set a value for Suburb L.

211. There are numerous authorities which are relevant to how the Court should approach valuation evidence to make findings about the value of assets in Part VIII proceedings. It is unnecessary and unproductive to try to discuss all, or even most, of them. In setting out a representative sample I should begin with the High Court decision in *Commonwealth v Milledge* (1953) 90 CLR 157; (1953) 26 ALJR 621; [1953] ALR 199 where Dixon CJ and Kitto J said that the judicial task in arriving at a valuation is a question of fact in the sense that it would be decided:

> "… not by a strict adherence to precise arithmetical calculations, but by a commonsense endeavour, after consideration of all the material before the court, to fix a sum satisfactory to the mind of the court as representing the value contained in the land [on the date for valuation]. … The problem was not to eliminate idiosyncracies of the individual [valuer's] opinions; it was

to form an estimate which really satisfied his Honour's mind as being the value of the property to the plaintiff on the material date.

212. The wife relied upon the following statement of principle in *Arcus Shopfitters Pty Ltd v Western Australian Planning Commission* [2002] WASC 174; 125 LGERA 180 ("*Arcus Shoplifters*") at [76] where Pullin J said:

> It is clear that a trial Judge is not obliged to accept one out of several competing valuations: *In the Marriage of Borriello* (1989) 97 FLR 211; *In the Marriage of Goodwin* (1990) 101 FLR 386 at 394. The trial Judge, however, must never allow himself to be cast in the role of the third valuer: *Players Pty Ltd v Corporation of the City of Adelaide* [2001] SASC 369 at [81]. The court may make such adjustments as are required by the evidence and arrive at a figure between two values offered by valuation witnesses, provided it is not merely an average or a mean (see *Goodwin's* case (supra) at p 394). *Commonwealth v Milledge* (1953) 90 CLR 157 is not to the contrary (see *Borriello's* case (supra) at 221). The trial Judge is not obliged to accept the evidence of a particular valuer. Rather, the task is for the court to be satisfied by the means of the application of proper principles, that the value of the property on the relevant date has been arrived at. If the value happens to be different to the value subscribed to the relevant property by the valuers called in evidence, this in itself does not affect the validity of the trial Judge's finding, providing that proper principles have been applied: *Commonwealth v Milledge* (supra) 160-161 *Borriello* (supra) at 221.

213. In *Tyler v Thomas* (2006) 150 FCR 357 ("*Tyler v Thomas*") at [56], citing *Arcus Shopfitters*, Branson J said:

> [56] A court is not obliged to accept the evidence of a particular valuer, even in a case where only one expert opinion as to value is adduced. However, in making adjustments to a valuation the court must find support for the adjustment in the evidence, apply proper principles and avoid casting itself in the role of an additional expert.

214. In *Salmon* at [42] the Court said:

> [There are] well settled principles as to the means by which a trial judge determines questions of valuation, as expressed by the High Court in *Commonwealth v Milledge* ("*Milledge*") as "*a commonsense endeavour, after consideration of all the material before the court, to fix a sum satisfactory to the mind of the court as representing the value*" *Milledge* has often been applied by the Full Court of this Court in emphasis of the principle that a court must arrive at its own conclusion as to value by application of established principles of valuation.
>
> (Footnotes omitted)

215. In my view, the authorities establish the following principles relevant to the issue of the value of Suburb L:

a) a trial Judge is not obliged to accept one out of several competing valuations: *In the Marriage of Borriello* (1989) 97 FLR 211; *In the Marriage of Goodwin* (1990) 101 FLR 386 at 394; *Tyler v Thomas* at [56]; *Arcus Shopfitters* at [76]; *Investa Properties Pty Ltd v Nankervis (No 7)* [2015] FCA 1004; 333 ALR 193; 109 ACSR 465 at [350]; See also *Macquarie International Health Clinic Pty Ltd v Sydney Local Health District* (No 11) [2017] NSWSC 1249;

b) where there is valuation evidence from only one expert, the trial judge is not obliged to accept that evidence: Federal Commissioner of Taxation v St Helens Farm (A.C.T.) Pty Ltd (1981) 146 CLR 336 ("*St Helens Fact (A.C.T) Pty Ltd*") at [381]; *Investa Properties* at [350]; this applies equally in this Court where a single expert has been appointed pursuant to Part 15.5 of the Rules: *Salmon* at [42];

c) the trial Judge, however, must never allow himself to be cast in the role of a valuer or additional expert: *Players Pty Ltd v Corporation of the City of Adelaide* [2001] SASC 369 ("*Players Pty Ltd*") at [81]; *Arcus Shopfitters* at [76]; *Tyler v Thomas* at [52];

d) a trial judge cannot draw on his or her own knowledge, experience or expertise to choose between experts or impose a second or third opinion: Brewarrana Pty Ltd v Commissioner of Highways (No 2) (1973) 6 SASR 541 at 544-545; *Players Pty Ltd*; *Tyler v Thomas* at [55];

e) valuation is a matter of estimation, not of precise mathematical calculation, involving the making of a value judgment in the metaphorical as well as the literal sense; the value of particular land on a particular day is necessarily to some extent conjectural, no valuation of land can sensibly pretend to be precisely accurate to the last dollar: St Helens Farm (A.C.T.) Pty Ltd at 381; *Tyler v Thomas* at [46];

f) in making a finding of value as a common sense endeavour, the trial judge should consider the whole of the material before the Court, including expert opinion: *Milledge* at 162; *Lenehan & Lenehan* (1987) FLC 91-814 at 76,142; *Phillips and Phillips* (2002) FLC 93-104; (2002) 29 Fam LR 128; [2002] FamCA 350 (at [43]; *Garraway v Territory Realty Pty Ltd* [2010] FCAFC 9 at [57];

g) while a trial judge should determine a disputed valuation issue where the evidence permits such a determination, there is no obligation to do so irrespective of the state of the evidence: *In the Marriage of Little* (1990) FLC 92-147 ("*Little*"); *Lunar & Lunar* [2019] FCWA 259 at [125]; *Atkins and Hunt and Ors* [2019] FamCA 977 at [172].

h) if it is too difficult, complex, uncertain or hazardous for the Court to accept a valuation or come to a separate conclusion as to value on the application of proper principles and methodology, it may be a more proper to consider a sale of the property: *Little* at 78,020; *Smith & Smith* (1991) FLC 92-261 at 78,759; *Bollen & Bollen* [2020] FamCA 605 at [34].

216. The husband supported Mr NN's valuation in submissions. But he also accepted that any divergence from it is likely to be higher than $12,500,000.

217. The wife argued that, on the basis of the following matters, the Court should be satisfied that "*there is sufficient basis in the evidence that the valuation will almost certainly more than Mr NN's, and could well be in the order of 100% more*":

> (a) the opinion of Mr NN that the property is worth $12,750,000;
>
> (b) the statement by Mr NN that his valuations are "*always significantly*" lower than the sale price for properties he values with rezoning potential;
>
> (c) the acknowledgement in the questions and responses from Mr NN that the Suburb L Property is affected by the *[NSW] Urban Transformation Policy*;
>
> (d) the large body of material from Ray White's marketing campaign showing the significant rezoning potential, and offers and expressions of interest at amounts significantly higher than Mr NN's valuation; and
>
> (e) the evidence from the Husband that he has included demolition clauses in each of the leases for the purposes of realising the development potential.

218. These matters were not in dispute factually. Mr NN agreed in cross examination that his valuation were always lower than market value. But, it was not clear precisely what the wife contended should follow, assuming these factual matters form a sufficient basis to conclude Mr NN's value is understated.

219. For example, the suggestion of a possible value of up to 100 per cent more than Mr NN's valuation would mean Suburb L had a value of $25,000,000. But the evidence from 2016, to which the wife points, (see above at [27] and [28]) which might be thought to support such a value, showed it was more likely that buyers considered paying that much if the property was actually rezoned, not for the property with the chance of a potential rezoning. In his written submission the husband examined the evidence on this question closely, and submitted "*it does not demonstrate there was real interest in the property for the price, or at the level for which the Wife contends*." (Outline of Closing Submissions, paragraph [56] and [57]). I accept these submissions. It is

unnecessary to discuss in detail, except to note the factual matters pointed to by the husband are persuasive, and the wife did not dispute them to any significant extent. As already pointed out, no unconditional offers at or near $25,000,000 were received in 2016. It is also necessary to point out that 2016 is five years ago.

220. At the other end of the spectrum, Mr ZZ's evidence suggested, without giving an actual value, that Mr NN's value may be understated by no less than 10 per cent. If that is right, the Court could be satisfied the value of Suburb L should be at least $1,250,000 more than Mr NN's value of $12,500,000; that is, $13,750,000.

221. The affectation by the *[NSW] Urban Transformation Policy* raises the potential for rezoning which Mr ZZ claimed was a critical matter. As discussed earlier, the evidence of Mr AC showed rezoning was unlikely before 2023 and subject to a number of contingencies. There was no evidence before me which demonstrated the likelihood or otherwise of those contingencies coming to pass. Authorities such as *Royal Sydney Golf Club* and *Liverpool City Council* show the arguments about a potential rezoning ask the Court to evaluate a chance of future events happening, or in other words make prediction about future possibilities. In *Malec v J.C. Hutton Pty Ltd* (1990) 169 CLR 638; [1990] HCA 20 ("*Malec*"), when referring to the prediction of income earning capacity, Deane, Gaudron and McHugh JJ said at 639-640:

> The future may be predicted and the hypothetical may be conjectured... Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award…to reflect the degree of probability.

222. In *Fitzwater & Fitzwater* (2019) 60 Fam LR 212; [2019] FamCAFC 251 ("*Fitzwater*"), Austin J said, after citing *Malec*, at [139] "…*The concept of chance lies along a continuum, encompassing all outcomes which lie in the range between highly probable and remotely possible, assuming the polar extremes of certainty are ignored*." The passage from *Malec* above shows the evaluation of a chance as the prediction of future hypothetical possibilities, which may or may not occur, is not proved on simply on the balance of probabilities. It is odd to speak of proving a possibility as a probability: *Oswald & Karrington* [2016] FamCAFC 152 at [60]; *Fitzwater* at [132] to [138] per Austin J. Rather the Court "*must engage in a hypothetical assessment*": *Walters & Carson* [2018] FamCAFC 233 at [52].

223. As I pointed out earlier, there is no evidence which allows me to form a sensible view about the likelihood of that events, including the fulfilment of the contingencies identified by Mr AC, which would be necessary to bring about a

rezoning of Suburb L, will come to pass. Of course, as already noted above, in the *Royal Sydney Golf Club* case, Kitto J put a 5 per cent premium on a "*slender chance*". But here on the available evidence, as a hypothetical assessment, I am unable to find that the chance of rezoning Suburb L is, or was as at the date of Mr NN's valuation, anything other than highly remote; in other words it does not fall within the concept of "*events at no remote period*". (*GWR & VAR*).

224. Having reflected on the problems and issues discussed in [219] to [223], I am not persuaded that the matters pointed to by the wife provide a sufficient basis for the Court to embark upon the process of finding a value for Suburb L different to Mr NN.

225. Even if that be wrong, accepting that it will rarely be possible to demonstrate that any particular figure is correct, as Wilcox J said in *Liverpool City Council* (above at [162]), what does the evidence and "*a common sense endeavour*" indicate should be the value of Suburb L? As the wife would have it, the Court is faced with an embarrassment of options, from simply accepting Mr NN's value of $12,500,000, to allowing for a 10 per cent increase on the basis of Mr ZZ's evidence, to plucking a figure from the air anywhere between $13,750,000 and $25,000,000 as a "*best guess*". The Court is not an expert valuer, and should not try to be. The difference between $12,500,000 and $13,750,000 is very significant, not to mention the difference between $12,500,000 and $25,000,000.

226. In truth, this vast range of figures shows there is no secure basis to settle on any particular figure different to that of Mr NN given either in the evidence or in argument. The evidence is far too uncertain. Any attempt would clearly be unduly hazardous and any figure chosen by the Court would be entirely arbitrary. Moreover, if the Court places a "*best guess*" higher value on Suburb L, this would require a recalculation of the value of the husband's interest in M Pty Ltd, by reason of its shareholding in U Pty Ltd, not to mention a significant alteration to the value of the available pool of assets. No calculations have been made. To make an attempt at a common sense endeavour, and make a "*best guess*" which lands somewhere between $12,500,000 and $25,000,000, a variance of some tens of millions of dollars, not only could, but is likely to, cause injustice to either the husband and wife or both.

227. It should also be obvious that the circumstances of this case are not appropriate for an order for sale. Suburb L is co-owned by the husband with third parties to the marriage. Their interests would have to be closely considered. No party seeks for Suburb L to be sold. No submissions were made about the position of the third parties in this regard.

228. The final result here depends upon a complex interaction of a range of discretionary factors, not just the value of Suburb L, although that is important,

in considering contributions by parties to a marriage over 27 years. If Mr NN's value of $12,500,000 is accepted, the matters pointed to by the wife as suggesting a higher value are not then simply forgotten. Here, the potential for a greater value for Suburb L can be considered under s 79(4)(e), and some adjustment made if appropriate. As I understood the arguments, both parties accepted this possibility.

229. Consequently, I have come to the view that the only viable course for the Court is to accept the expert valuation of Mr NN. This comes about partly as a result of the manner in which the wife chose to approach the issue of valuation of Suburb L and her untimely application to lead adversarial evidence, but also because ultimately the criticism of Mr NN made by the wife do not undermine his valuation to the extent it would be unsafe for the Court to embrace it. I will accept the value of Suburb L as being $12,500,000 in accordance with the evidence of Mr NN for the purposes of identifying the assets of the parties and their value.

Deed of Acknowledgement

230. The husband and D Pty Ltd contend the Deed of Acknowledgement signed by the husband on 10 March 1999 either created a trust in favour of D Pty Ltd or an enforceable promise for the husband to pay to D Pty Ltd one-third of his share of any net proceeds, after allowing for capital gains tax, upon the sale of Suburb L. As a result, the husband's interest in the Suburb L Partnership should be valued at 30 per cent of the Suburb L Partnership, not 45 per cent .

231. The Deed was originally executed in the following terms:

> **DEED OF ACKNOWLEDGEMENT**
>
> This Deed Of Acknowledgement is made on 10th of March 1999.
>
> BY MR DOVGAN of R Street Suburb S NSW.
>
> WITNESSETH:
>
> *1. Mr Dovgan acknowledges that he owes the sum of $384,000.00 to the Dovgan Investment Trust together with interest thereon (at the rate of 5% per annum computed from 1st day of October 1998.)*
>
> *2. Mr Dovgan acknowledges that he will, as soon as practicable after a sale (if any) of the property at K Street, Suburb L ("Suburb L Property") settle on D Pty Limited or other the trustee for the time being of the Dovgan Investment Trust the sum which is equivalent to one-third of the net proceeds of sale received by him (after allowing for capital gains tax, if any) from any such sale of the Suburb L Property (in which the said Mr Dovgan owns a 45% interest.)*

EXECUTED AS A DEED

SIGNED, SEALED AND DELIVERED by

the said MR DOVGAN in the presence of:

232. The husband's signature appears above the words "*Signed, Sealed and Delivered*", while the signature of Mr O appears beside the words "*in the presence of*".

233. According to the husband's evidence in cross-examination, it was Mr O that put this Deed to him, and who suggested he signed it. The husband agreed that this was a process "*over in a second*" (Transcript of Proceedings dated 18 August 2020, pg. 88 line 16).

234. However, clause 1 was at a later point in time crossed out, with an adjacent handwritten note, "*REPAID*" with Mr O's signature and the date 4 December 2012. According to the markings on the Deed, this section was discharged as the debt had been repaid in 2012. There was no dispute that the husband repaid the amount of $384,000. Clause 1 was, in that sense, carried into effect.

235. The background to the creation of the Deed was explored in evidence. The husband gave evidence that he understood he was acknowledging "*I held 15% of [his 45% interest in Suburb L] on trust for D Pty Ltd*". The husband states that Mr O said to him:

> We need to tidy up the arrangements re Suburb L and make it consistent with our agreement. Can you sign the deed? It will reflect the agreement that the interest in Suburb L is the same as our shareholding in M Pty Ltd. (affidavit of the husband filed 11 August 2020, pg. 18).

236. Mr O gave evidence the Deed was and is an acknowledgement that the husband holds 15 per cent of his interest in Suburb L for D Pty Ltd as trustee for DIT. Mr O was clear he did not prepare the Deed and he could not recall who did. He gave evidence that he did not recall anything prompting its preparation, but it was his assumption that "*it was prepared for [the husband] to sign so that it was clear 15% of the interest he held in the Suburb L property was held for D Pty Ltd ATF DIT*" (affidavit of Mr O filed 6 July 2020, pg. 12 [56]).

237. The controversy concerned the meaning and legal effect, if any, of clause 2.

238. No argument was made, or issue raised, as to whether the Deed satisfied formal requirements as a deed. No one put in issue the provisions of s 38(1) of the *Conveyancing Act 1919* (NSW). Section 38(1) requires a document to be signed as well as sealed and attested in order to be a valid deed. Valid attestation by Mr O as witness was not put in issue. No party suggested the Deed was not a deed in the sense it had not been sealed and delivered. No

issue was raised about the fact that the Deed, on its face, was not an instrument between parties, but a document executed by the husband alone. There was evidence that the Deed was delivered to D Pty Ltd and other parties. I will assume the Deed is to be interpreted as a deed which satisfies the necessary formal requirements.

239. The correct principles of construction of the Deed were not in doubt. The words of the Deed must be construed objectively to ascertain the intentions of the parties, their subjective intentions being irrelevant: *Byrnes v Kendle* (2011) 243 CLR 253; (2001) 279 ALR 212; [2011] HCA 26 ("*Byrnes v Kendle*").

240. According to the wife, the Deed has no legal effect. It is incapable of giving rise to a trust over Suburb L. Construed objectively, clause 2 discloses no intention to create a trust of any sort. Nor, according to the wife, does clause 2 contain any language which can be construed objectively as promissory; that is, it articulates no agreement of any sort. The wife characterised clause 2 as a "*precatory statement as to the Husband's future intention with respect to the (as yet unrealised) proceeds of any sale of the property*" (the wife's Outline of Closing Submissions, handed up on 21 August 2021, pg. 13 [50]).

241. In final submissions, the husband did not press a trust argument. Rather, he argued that the Deed embodies an enforceable agreement. Properly construed, the document is a contingent or conditional promise. The contingency is the possible future sale of Suburb L; if the contingency is fulfilled, the husband is obliged to pay to D Pty Ltd a sum of money equivalent to one-third of the net proceeds of sale. D Pty Ltd could enforce this promise if the husband failed to make the payment. In the context of this Deed, the husband argues the verb "*settle*" denotes the promissory intention of the parties. So the argument goes, the husband's obligation to pay is enforceable and will crystallise upon the sale of Suburb L. Consequently, this obligation reflects a liability which should be reflected on the balance sheet.

242. The husband argued that since this promise to pay was contained in a deed, consideration was unnecessary. It is well established that consideration is not required for agreements under seal: *Howard F Hudson Pty Ltd v Ronayne* (1972) 126 CLR 449 at 462; *Dome Resources NL v Silver* (2008) 72 NSWLR 693; [2008] NSWCA 322 at [54]. Since I have accepted the common position that the Deed took effect as a deed I accept this part of the husband's argument. It is therefore unnecessary to consider the question whether the deed may be enforceable merely as a simple contract, in which case the requirement of consideration would have to be satisfied: *HCK China Investments Ltd v Solar Honest Ltd* (1999) 165 ALR 680; [1999] FCA 1156; *Darjan Estate Co Plc v Hurley* [2012] 1 WLR 1782; [2012] EWHC 189 (Ch) at [27]; *Brown v Tavern Operator Pty Ltd* (2018) 98 NSWLR 586; [2018] NSWSC 1290 at [497] - [502].

243. For its part, D Pty Ltd contended as its first position that clause 2 created an express trust, however acknowledged the terms of clause 2 are not easy to construe. D Pty Ltd's second position was that clause 2 created an enforceable contingent promise, adopting the arguments of the husband.

244. I reject the argument that clause 2 creates any trust. Senior Counsel for D Pty Ltd argued the evidence established an earlier oral declaration of trust which the Deed acknowledged in writing. I do not accept the evidence goes that far (see above at [231] - [236]). That evidence does not demonstrate any actual discussion of about a trust, or expression of intention to create one, only that the husband and Mr O made assumptions about a trust. As Megarry J said in *Re Vandervell's Trusts (No 2)* [1974] Ch 269 at 294, "*[n]ormally the mere existence of some unexpressed intention in the breast of the owner of the property does nothing: there must at least be some expression of that intention before it can effect any result*."

245. Furthermore, the words of clause 2, even on a most liberal or generous construction, cannot be understood as creating any beneficial interest in Suburb L itself or a trust of any sort between D Pty Ltd and the husband. To find a trust somewhere in clause 2, it must objectively disclose an intention formed by the husband to create a trust. It does not matter what the subjective state of mind of the husband or Mr O was concerning the effect of the Deed, or what assumptions they made. In *Byrnes v Kendle* at [53] Gummow and Hayne JJ emphasised both the irrelevance of subjectively held intentions and the objective search for meaning in a document said to express a settlor's intention to create a trust; "*[t]he fundamental rule of interpretation ... is that the expressed [written] intention of the parties is to be found in the answer to the question, 'What is the meaning of what the parties have said?', not to the question, 'What did the parties mean to say?'*". In clause 2, no words of trust are used, except perhaps "settle", but this refers to part of the proceeds of sale of Suburb L, not Suburb L itself. It is not possible to extract from the words of clause 2 an objective expression of intention by the husband, as settlor, to settle property on a trustee, including himself, for some beneficiary or beneficiaries.

246. I am also not persuaded that clause 2 embodies a contingent promise by the husband enforceable at the suit of D Pty Ltd. I preface my reasons for this conclusion by noting that, since clause 2 is embodied in a deed, I accept that, in executing the Deed, the husband did intend engage in a "*solemn farce*", something the rules of construction would seek to avoid: *Woodcock v Parlby Investments Pty Ltd* (1988) 4 BPR 9568 at 9570 - 9571. However, this does not take the husband's arguments very far.

247. The evidence of the husband and Mr O did not suggest there was any earlier agreement which clause 2 acknowledged. In this, it differed from clause 1 which acknowledged an existing debt. Indeed, the husband's affidavit evidence was directed to the now abandoned trust argument. The husband said he held

15 per cent of his interest in Suburb L on trust for D Pty Ltd. He explained that this was so because he had tax advice that he should hold a greater proportion of Suburb L in his own name to receive greater tax advantages. He also suggested, somewhat inconsistently, that it was intended that he hold 60 per cent of Suburb L, 30 per cent in his name and 30 per cent through M Pty Ltd. This, so the argument went, was why he held 15 per cent of his Suburb L interest on trust for D Pty Ltd (husband's affidavit filed 6 July 2020, [110] - [112]). It remained a mystery how holding 45 per cent of Suburb L, rather than 30 per cent, gave him better tax advantages.

248. Be that as it may, the important point is that the husband's evidence about the existence of a trust cannot be reconciled with the existence of any promissory intention or intention to make an enforceable agreement when the Deed was signed. The use of a deed may obviate the need to prove consideration. It does not overcome an absence of intention to promise or contract, especially where the deed is executed by only one of the parties to the asserted contract. No argument was made that the Deed created an estoppel by convention: *Frederick & Frederick* (2019) FLC 93-900; (2019) 60 Fam LR 1; [2019] FamCAFC 87 at [90] - [91], or any estoppel by deed, which could only arise if the Deed was legally effective in any event: *Fischer v Nemeske Pty Ltd* (2016) 257 CLR 615; (2016) 330 ALR 1; (2016) 90 ALJR 457; [2016] HCA 11 at [192].

249. The husband's argument about an enforceable promise in clause 2 was put forward as a pure matter of objectively construing an agreement in writing. However, the husband's own evidence about a trust put in issue the question of whether any promissory intention was ever formed by him and whether any agreement was made.

250. The proper construction of any contract is to be determined objectively. Ordinarily, this requires consideration of the text, the surrounding circumstances known to the parties and the object of the transaction: *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451; (2004) 208 ALR 213;[2004] HCA 35 at [22]; *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* (2004) 219 CLR 165; (2004) 211 ALR 342 [2004] HCA 52 at [40]. It is well settled that the subjective beliefs of the parties are generally irrelevant in the absence of any argument that a decree of rectification should be ordered or an estoppel by convention found; but post-contractual conduct is admissible on the question of whether a contract was formed: *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153; [2001] NSWCA 61 at [25] and [27]. So it does not matter whether the husband subjectively believed the Deed was an efficacious legal instrument, rather than a "*solemn farce*". In ascertaining the intention of the parties, whether from a series of communications or from a single document, regard can be had to the commercial circumstances in which the parties exchanged their communications or arrived at the document and to the subject-matter of the

putative contract; the objective intention of the parties is fact-based, found in all the circumstances including by drawing inferences from their words and their conduct in the making of their agreement: *Sagacious Procurement Pty Ltd v Symbion Health Ltd* [2008] NSWCA 149 ("*Sagacious Procurement*") at [69] citing *Allen v Carbone* (1975) 132 CLR 528 at 532; *Australian Broadcasting Corporation v XIV Commonwealth Games Ltd* (1988) 18 NSWLR 540 at 548 per Gleeson CJ. Any subsequent statements or conduct inconsistent with the existence of a concluded contract are directly relevant to proving contractual intention and the formation of a contract: *Howard Smith and Co Ltd v Varawa* (1907) 5 CLR 68; (1907) 14 ALR 169; [1907] HCA 38; *Film Bars Pty Ltd v Pacific Film Laboratories Pty Ltd* (1979) 1 BPR 9251 at 9255-6; *Sagacious Procurement* at [105] per Giles JA.

251. There is only one document relevant here, the Deed itself. The circumstances surrounding its creation are set out above at [231] – [236]. The evidence is sparse, provides little scope to draw inferences, and gives no firm support to the existence of any contractual intention. As a matter of construction, the Deed itself is unclear and ambiguous as a basis to find objectively a contractual intention.

252. More to the point, the conduct of the husband in swearing affidavit evidence on 6 July 2020 which sought to establish a trust, and made no mention of a promissory intention or the formation of an agreement, is clear conduct which tells strongly against a finding that clause 2 expresses any sort of contingent but binding promise. Objectively, I am unable to find any intention to articulate an enforceable promise of a contractual nature in clause 2 of the Deed.

253. I am not satisfied there should be included on the balance sheet a liability for the husband to pay D Pty Ltd one-third of his share of the proceeds of sale if Suburb L is sold. This does not, however, end consideration of the effect of clause 2 of the Deed for the purposes of s 79. I do accept that the Deed imposes a moral or familial obligation on the husband to deal with the proceeds of sale of Suburb L as the Deed acknowledges. The wife accepted this, referring to *Re Snowden (dec'd)* [1979] Ch 528 at 539-40. Although that was a case about wills and secret trusts, at 539-40 Megarry V-C distinguished words which may create no more than a moral obligation from those which carried legal effect. A moral or familial obligation cannot usually constitute a liability for the purpose of identifying the assets and liabilities of the parties for the purposes of proceedings under s 79 of the Act. This, however, does not necessarily end the question. In the circumstances of this case some further consideration of an obligation of this nature is appropriate for the purposes of subparagraph s 75(2)(o). I will return to this later in these reasons.

254. Accordingly, I find that the husband holds a 45 per cent interest in Suburb L and the Suburb L Partnership. It also follows that I do not accept the husband is

under a legally enforceable obligation to pay proportion of his share of the proceeds of sale of Suburb L to D Pty Ltd. I note this conclusion means it follows no such liability should be included in the asset pool requiring the wife to contribute to it by reason of the diminution of the pool: *Jillett v Jillett* [2018] FamCA 913 at [47].

255. On the value of $12,750,000 for Suburb L, Ms DD calculated the husband's 45 per cent interest in the Suburb L Partnership at **$5,029,567**. I accept this figure. The husband argued there should a further reduction of $75,000 by reason of the value of Suburb L being reduced from $12,750,000 to $12,500,000. It was unclear how the figure of $75,000 was reached but, as I understood her submissions, the wife did not contest this reduction. Therefore the husband's 45 per cent interest in the Suburb L Partnership should be included in the balance sheet at **$4,954,567.**

M Pty Ltd

256. The figures for the value of the husband's interest in M Pty Ltd were confusing. However, in submissions I was told the figures on Exhibit 5 were agreed. In what follows, I will discuss what appear to be the areas of disagreement.

257. The wife accepts the value of the husband's 60 per cent interest in M Pty Ltd is $13,784,880, as valued by Ms DD. This included a 5 per cent discount for lack of control and marketability. The husband, on the other hand, argues that such value should be adjusted down to $13,401,840, a reduction of $383,040. He puts forward three reasons; firstly, to account for executive remuneration which he suggests is likely higher than anticipated by Ms DD, secondly to account for $1,500,000.00 which he argues should be treated as a business asset or working capital necessary to operate the business as a going concern, and not a surplus asset, and thirdly, to take account of Mr NN's adjustment of the value of Suburb L down to $12,500,000, the value which I have accepted.

258. In writing, the husband submitted that taking account of his arguments about "*third quartile*" executive remuneration, treating $1,500,000 as working capital, and the adjusted value of Suburb L to $12,500,000, the husband share in M Pty Ltd is valued at $13,401,840.

259. Evidence to support this argument was given by a remuneration expert, Mr XX. He gave uncontested evidence that if M Pty Ltd was required to entice and employ replacement executives, it should expect to remunerate such replacements in what was called the "*third quartile*", or higher, of industry remuneration categories. I accept this is likely. Ms DD was asked to assume, pursuant to a rule 15.65 question, that "*third quartile*" remuneration was appropriate. She agreed this would "*reduce the FME of the business by $170,000*", leading to a valuation of M Pty Ltd at $23,512,000 (Exhibit 4). This is a reduction from the reassessed value of $24,184,000 given by Ms DD in her third report, having taken account of its equity interest in U Pty Ltd, the

Suburb L Partnership and several other entities (Table 5.111, Appendix 11). I accept this evidence. It was only put in issue by the wife in final submissions, by emphasising that Mr XX spoke only of a *possible* higher remuneration category. I do not accept this is a reason to conclude that executive replacements in M Pty Ltd would not likely fall into the "*third quartile*" for remuneration. I accept that they would. Otherwise, the wife did not challenge the calculation of Ms DD.

260. I do not accept the husband's arguments about working capital and Ms DD's evidence. I am satisfied she took account of working capital appropriately in reaching her expert view. She did not resile from her approach in cross-examination.

261. The husband contended that there should be a further discount of $75,000 by reason of Mr NN's reduction the value of Suburb L to $12,500,000. This was not addressed by the wife. It was not clear how the $75,000 related to the figure of $13,401,840. No submissions were made about it.

262. It appeared that, on Exhibit 5, the husband argued further that the amount of $480,000 and $900,000 should be deducted from the value of M Pty Ltd. The deduction of $480,000 was said to be as a result of dividends paid by the husband after 31 December 2019, the date of Ms DD's valuation. Ms DD was not asked about these dividends. No specific submissions were made about this figure, and it was not clear how it related to the figure of $13,401,840. The amount of $900,000 was the subject of some submissions. It was said to be the adjustment for working capital. Again, it was not clear exactly how it related to the figure of $13,401,840.

263. However, as I understood the submissions of the husband, his arguments about executive remuneration, working capital adjustment, and the dividends of $480,000 all lead to a value for his interest in M Pty Ltd of **$13,401,840**. In his written submissions he argued for this specific value. He made no reference to the dividends of $480,000 nor made any submission that the value of $13,401,840 should be reduced by $480,000. Apart from the wife's arguments about executive remuneration, which I have rejected, the wife did not seem to put the figure of $13,401,840 in issue. For these reasons I will accept $13,401,840 as the value of the husband's interest in M Pty Ltd.

D Pty Ltd and the Assets of DT & DIT

264. The wife asserts that the trust assets held by D Pty Ltd as trustee for the DT and DIT should be included in the pool as assets of the husband.

265. Ms DD's value for the assets of the DT was $5,452,230, and for the DIT was $6,162,430.

266. The trust deeds for both the DIT and DT were in evidence. It is unnecessary to refer to them in any detail. There was no dispute that the husband was not

settlor, appointor or trustee of either the DT or the DIT. D Pty Ltd is the trustee. The husband was for many years a director of D Pty Ltd, but is no longer. He is now merely a discretionary object of each trust, together with numerous other named individuals, being his parents, brother and other relatives, together with children and grandchildren of those individuals, charitable bodies in the discretion of the trustee and other corporations. The class of these beneficiaries in each trust is not closed. The trustee may nominate further beneficiaries in its absolute discretion. The husband has no title to any of the DT or DIT trust assets, nor does he have any power through the trust deeds or D Pty Ltd to appoint or distribute trust assets to a beneficiary, including himself.

267. The DIT and the DT fall within the genus of "*discretionary trust*", a term of "*no fixed meaning, used to describe particular features of certain express trusts*"; in the absence of an obligation on the part of the trustee to apply any of the income or capital of the trusts to any of the beneficiaries at any time, it answered the description "*purely discretionary*" or "*non-exhaustive*", with an open class of beneficiaries: *Kennon v Spry* (2008) 238 CLR 366; (2008) 83 ALJR 145; (2008) 251 ALR 257; [2008] HCA 56 ("*Kennon*") at [47].

268. The word "*property*" in s 79 is to be read as part of the collocation "*property of the parties to the marriage*", and widely and conformably with the purposes of the Act (*Kennon* at [64] per French CJ). In *Kennon,* the husband owned the trust assets as trustee, was settlor of the trust, and a beneficiary. The plurality made clear that the power of a trustee to apply income or capital under the terms of the trust deed was not a species of property under the general law, but it can fall within the definition of "*property*" in s 4(1) of the Act as well as within the collocation "*the property of the parties to the marriage or either of them*" in s 79; on the other hand, the right of a beneficiary to due consideration and administration of the trust, which, as an equitable chose in action, is a species of personal property according to ordinary general law principles (at [48], [75], [79], [126]). At [126], Gummow and Hayne JJ, with whom French CJ agreed, said:

> Reference was made earlier in these reasons to the comprehensive sense in which the term "property" is defined in s 4(1) of the Act. And it will also be recalled that the "property" which may be the subject of orders under s 79(1) of the Act is "the property of the parties to the marriage *or either of them*" (emphasis added). The right of the wife with respect to the due administration of the trust was included in her property for the purposes of the Act…And in considering what is the property of the *parties* to the marriage (as distinct from what might be identified as the property of the husband) it is important to recognise not only that the right of the wife was accompanied at least by the fiduciary duty of the husband to consider whether and in what way the power should be exercised, but also that, during the marriage, the power could have been exercised by appointing

> the whole of the trust assets to the wife. Observing that the husband could not have conferred the same benefit on himself as he could on his wife denies only that he had property in the assets of the trust; it does not deny that part of the property of the parties to the marriage, within the meaning of the Act, was his power to appoint the whole of the property to his wife and her right to a due administration of the trust.

269. *Kennon* thus makes clear that, although *Stanford* requires the Court to determine, as a starting point and according to ordinary legal and equitable principles, the existing legal and equitable interests of the parties in the property to be settled, such determination does not necessarily also determine what constitutes the "*property of the parties to marriage*" for the purpose of s 79 of the Act. What falls within this collocation may not be co-extensive with the property which ordinary legal and equitable principles would identify.

270. Orthodox property principles do not identify a beneficial entitlement to trust property as property of a person who controls a trustee but is not a beneficiary. But the High Court has made clear where legal ownership is vested in a trustee, it is not the case that equitable or beneficial ownership must necessarily be vested in someone else: *CPT Custodian Pty Ltd v Commissioner of State Revenue (Vic)* (2005) 224 CLR 98; [2005] HCA 53; *Kennon* at [50]. In *Richstar Enterprises Pty Ltd and Others; Australian Securities and Investments Commission v Carey (No 6)* [2006] FCA 814; (2006) 153 FCR 509 at [29] French J (as he then was) said "*in the ordinary case the beneficiary of a discretionary trust,..., does not have an equitable interest in the trust income or property which would fall within even the most generous definition of "property"*". In *Public Trustee v Smith* (2008) 1 ASTLR 488; [2008] NSWSC 397 ("*Public Trustee v Smith*") White J pointed out at [105] "*to say that a person who controls a trustee which holds property on trust for others, rather than the beneficiary of the trust, is beneficially entitled to the trust property, is inconsistent with the very notion of a trust*".

271. White J's judgment in *Public Trustee v Smith* has been cited and followed in this and the Full Court: *Harris & Dewell* (2018) FLC 93-839; (2018) 58 Fam LR 313; [2018] FamCAFC 94 at [53] ("*Harris & Dewell*"); *Conrad & Conrad and Anor* [2019] FamCA 106 at [77]. In the context of discretionary trusts, the decision in *Kennon* shows a trustee's powers of appointment of trust property, coupled with their fiduciary duties and a beneficiary's rights to due consideration and administration, constitute the elements of an equitable chose in action which is a species of personal property owned by the discretionary objects according to ordinary principles. But the discretionary objects enjoy no beneficial or proprietary interests in the trust assets.

272. As pointed out, however, the statutory expression "*property of the parties to marriage or either of them*" in s 79 has been held to cast a wider net, specifically because of the preposition "*of*". This little word has a wide

semantic range, but the Macquarie Dictionary gives one important meaning as "*belonging or possession, connection, or association*". A long line of decisions, this Court has concluded that, in appropriate circumstances, trust assets are to be treated the property "*of*" a party, even if that party has no legal or equitable title to the trust assets in question. White J discussed these authorities in detail in *Public Trustee v Smith* at [110] to [124] and concluded at [125]:

> It is perfectly understandable that in the context of s 79 the expression "property of the parties to the marriage or either of them" should be read as extending not only to property owned by a party to the marriage but also property controlled by a party to the marriage where the control is such as to put the party in the same position as if he or she were the owner of the property…Ownership is a legal concept. The expression "de facto ownership" appears to describe something which is not legal or equitable ownership but a power which is to be treated as the equivalent of ownership. It involves no stretching of the concept of property to construe the expression "property of a party" as extending to property which a party owns or which the party controls as if he or she were the owner. It comes down to what the word "of" in the phrase denotes – whether it means ownership only, or whether it includes control as effective as ownership. This is the context in which the family law cases must be read. In my view, they do not support the wider proposition that as a matter of general law an object of a discretionary trust can be described as the beneficial owner of the property held by the trustee, merely by virtue of his or her being a discretionary object and also controlling the trustee.

White J said further at [135]:

> …In the construction of statutory powers … trust property might be regarded as the property "of" … a person (depending of course upon the statute in question) if something short of ownership provides the necessary connection between the person and the property denoted by the word "of".

273. In this regard it is worth remarking that a focus "*connection, or association*" in the semantic connotations of the preposition "*of*", in the statutory phrase "*property of a party to a marriage*", is consistent with observations of the majority of the High Court about the concept of "*property*", declaring it is a description of "*a legal relationship with*" a subject matter involving a "*bundle of rights*", and refers to a "*degree of power that is recognised in law as power permissibly exercised over*" the subject matter: *Yanner v Eaton* (1999) 201 CLR 351 at 365 - 366; (1999) 166 ALR 258; [1999] HCA 53. In some contexts, it is best understood in terms of a "*legally endorsed concentration of power*": *Telstra Corporation Ltd v The Commonwealth* (2008) 234 CLR 210; (2008) 243 ALR 1; [2008] HCA 7 at [44]; *Hocking v Director-General of the National Archives of Australia* (2020) 94 ALJR 569; (2020) 379 ALR 395;

[2020] HCA 19 at [89], [171], [172] (although Edelman J expressed reservations at [203].

274. So the statutory definitions and collocations are critical. Murphy JA and Hall J in *Scaffidi v Montevento Holdings Pty Ltd* (2011) 6 ASTLR 446; [2011] WASCA 146 at [151] followed authorities in this Court, and *Public Trustee v Smith,* concerning the interest of the appointor under a trust instrument:

> [151] If, however, on the proper construction of the instrument, the power of the appointor to remove and appoint trustees may be exercised for the purpose of controlling the trust estate for the appointor's benefit, the trust property may be regarded, at least for certain statutory purposes, as effectively owned by the appointor, or as property in which the appointor has a contingent interest: *Australian Securities and Investments Commission v Carey (No 6)* [2006] FCA 814; (2006) 153 FCR 509 [19], [29],[37]–[46]; *Public Trustee v Smith* [2008] NSWSC 397; (2008) 1 ASTLR 48; [108]–[138]; *In the Marriage of Goodwin* [1990] FamCA 147; [1990] FLC 92-192 ; 1990) 101 FLR 386 at 392; *In the Marriage of Davidson (No 2)* [1991] FLC 92-197; (1990) 101 FLR 373.

275. Many authorities in this Court have used words such as "*creature*" or "*alter ego*" in this context to describe the relationship of one party to a marriage to the assets of owned by a company or trust. The wife eschewed the use of language to the effect that the D Pty Ltd is the "*creature*" or "*puppet*" of the husband. The use of such metaphors, while common in the authorities, was criticised by White J in *Public Trustee v Smith* at [120], although, as noted below, the Full Court used them in *Harris & Dewell*. Rather, the wife focussed on the concept of control. She relied upon the numerous authorities in this Court which have held that control of the power of appointment of discretionary trust assets, and other factors, may lead to the conclusion that those assets should be treated a assets "*of*" one or other party for the purpose of establishing the available assets to be settled by property adjustment and be included on the relevant balance sheet. Intending no disrespect, I do not find it necessary to discuss each of these authorities in detail.

276. Ultimately, the wife argued that the DIT and DT are highly artificial vehicles to "*park*" assets for the husband's benefit. There was no dispute that in 1989 the husband transferred 30 per cent of M Pty Ltd to the DIT, or that the husband had loaned large sums to D Pty Ltd, in the order of millions of dollars, unsecured from time to time. Mr O is a director of D Pty Ltd. In cross-examination he conceded D Pty Ltd kept no minute book or record of minutes of decisions by the board. He agreed that D Pty Ltd never had meetings to make decisions in its capacity as trustee. The wife pointed to these matters as indications of artificiality.

277. But, in spite of the asserted artificiality, the wife did not contend the trust structures of the DIT and DT were a "*sham*" in the sense that they were legally

effective but not intended to have their apparent legal consequence, and the Court cannot therefore ignore the interests of those, other than the parties, entitled to the trust assets, or the powers and other terms of the trusts: see *Ascot Investments Pty Ltd v Harper* (1981) 148 CLR 337; (1981) 33 ALR 631; [1981] HCA 1; *Sharrment Pty Ltd & Ors v Official Trustee in Bankruptcy* (1988) 82 ALR 530; (1988) 18 FCR 449; *Equuscorp Pty Ltd and Another v Glengallan Investments Pty Ltd* (2004) 218 CLR 471; (2004) 211 ALR 101; [2004] HCA 55.

278. Although the husband was a director of D Pty Ltd from 1999 to 2018, the evidence shows the decision making for D Pty Ltd was carried out by Mr O. The husband's mother was also a director and gave evidence that she left management decisions to Mr O. Mr O himself said in cross-examination by the wife's Senior Counsel that "*it was always my decision, on my own*", referring to decisions of D Pty Ltd generally (Transcript of Proceedings dated 18 August 2020, pg. 115 lines 4-5). He could not recall any discussions with his son about decisions, but conceded he "*probably mentioned something*" (Transcript of Proceedings dated 18 August 2020, pg. 115 line 13). In cross-examination, Mr O maintained firmly that he made the decisions for D Pty Ltd, not jointly with the husband. It was uncontested that Mr O decided from time to time that D Pty Ltd would make distributions from the trusts. The accountant, Mr LL, who prepared the tax returns for the DIT and DT, gave evidence that he dealt with Mr O for that purpose, rarely with the husband and only for the purpose of going through the financials statements of M Pty Ltd. The wife accepts these facts as true, and as showing Mr O exercises control over the assets held by D Pty Ltd as trustee. The wife also accepts that Mr O has made a large number of decisions without consulting the husband, that he is a dominant personality and patriarch of the family. I find that Mr O is the controlling mind of D Pty Ltd.

279. But the wife contends that Mr O's control over D Pty Ltd and its assets "*is ultimately inseparable from the consensual arrangement he has with his son*" for D Pty Ltd to be run for the husband's benefit (the wife's Outline of Closing Submissions handed up 21 August 2020, pg. 9 [33]). It is true that in *Richstar* at 481 French J opined: "*[a]t least by analogy it may be observed that a beneficiary who effectively controls the trustee of a discretionary trust may have what approaches a general power and thus a proprietary interest in the income and corpus of the trust*". The wife argued that the consensual arrangement "*involves an assurance from Mr O that the property [of the DIT and the DT] is in reality being held*" for the husband (the wife's Outline of Closing Submissions handed up 21 August 2020, pg. 10 [33]). The wife relied on cross-examination of the husband in which the husband agreed that he thought D Pty Ltd was being run "*for his benefit*" (the wife's Outline of Closing Submissions handed up 21 August 2020, pg. 5). For this reason, the husband lent millions of dollars to D Pty Ltd over a number of years at no

interest, on the assurance that the money would be there for him. I note that the husband gave uncontested evidence that D Pty Ltd repaid all loans owed by the DT to him on 24 December 2019. The amount repaid was $3,109,359. The wife otherwise argued that the evidence was "*all one way*" in showing concord between Mr O and the husband.

280. This argument concedes that any "*control*" the husband has over D Pty Ltd and the assets it holds as trustee must be mediated through decisions of Mr O. It may be accepted that Mr O has shown a consistent pattern of conduct which has bestowed benefits on the husband in the form of trust distributions. The husband gave evidence that as at July 2020 he had not received any actual distributions from either trust for 12 years, although there had been some notional distribution was made in 2015 by way of journal entry. Nonetheless there was no dispute that the husband had enjoyed considerable financial plenitude through the assets of the DT in particular from time to time. After 2014 these took the form of dividends declared by M Pty Ltd in the husband's favour, which were not paid and treated as loans by the husband to the DT.

281. However, the point is that any application or distributions of the DIT or DT trust property have taken place by reason of the exercise of powers by D Pty Ltd as decided by Mr O. The husband has no direct powers contained in a trust deed by which he can obtain a beneficial interest in trust assets. He has no "*legally endorsed concentration of power*" nor "*a degree of power that is recognised in law as power permissibly exercised*" over the assets of either trust. The wife did not contend otherwise. Rather, as noted, she relied on concord between Mr O and the husband. The husband gave evidence that Mr O caused D Pty Ltd to make distributions as and when he saw fit to the husband without discussion or negotiation. I accept the evidence shows the exercise of Mr O's controlling mind over D Pty Ltd has been regularly from time to time influenced by a predisposition to benefit the husband; however that is not the same as Mr O being somehow controlled by the husband in making decisions for D Pty Ltd. To the contrary, the evidence, coupled with observing Mr O in the witness box, satisfies me that Mr O knows his own mind, exercises it independently and remained in control of D Pty Ltd at all times. It was not put to Mr O that he simply did the husband's bidding or did not otherwise independently exercise his mind in and about his direction of D Pty Ltd: *Atkins & Hunt and Ors* [2017] FamCAFC 79 at [36]. Indeed as the husband submitted, the tenor of Mr O's cross-examination assumed he controlled the DT. I am not satisfied the wife has established the husband has "*control*" of the DIT and the DT.

282. The wife gave particular attention to the decision of Watt J in *Simmons and Anor & Simmons* (2008) 40 Fam LR 520; (2008) 232 FLR 73; [2008] FamCA 1088 ("*Simmons*"). In that case, Watt J dealt with an application for summary dismissal under rule 10.12 of the Rules. The husband had property in the

nature of a chose in action as the object of a discretionary trust. The wife conceded he had "*no proprietary interest in the property of*" the trust (at [60]). But in accordance with the decision of French J (as he then was) in *Richstar* and *Kennon*, Watt J held that the husband's chose in action was property of a party to the marriage. The wife argued that the Court's powers in Part VIIIAA of the Act could arguably be used to make orders binding the trustee as a third party because the husband, and other family members, had made a very significant investment in the trust assets by way of loans which reflected their shareholdings in an earlier company structure. At [123], Watt J held:

> …there is a sufficient nexus between the assets of the trust and the property of the parties to the marriage for a court to find that Part VIIIAA applies, and is available to enable orders binding third parties to be made for the purpose of the making of orders, or the granting of injunctions, "that are reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage" and that these powers could be exercised in a way that takes into account the existence of other beneficiaries, and is not limited by the terms of the trust deed or any other law.

283. Consequently, Watt J was not satisfied the wife's claim had no prospects of success.

284. The wife argued her case here is stronger than the wife's case in *Simmons*, because the husband has Mr O's assurance that the assets of the DT and DIT were held for his benefit, only the husband had made large, unsecured non-interest bearing loans to the trusts, and only the husband was empowered with Mr O's power of attorney to act on his behalf.

285. But in *Simmons*, the ultimate question was whether the wife had a reasonable prospect of success. Watt J did not express a concluded view whether the assets of the relevant trust were property "*of*" the husband. Indeed, the decision was predicated on the husband not being the owner of the trust assets; that was the reason the wife relied on Part VIIIAA. Part VIIIAA gives the Court powers with respect to the property of third parties, as opposed to parties to the marriage, where that property is sufficiently connected to the property of the parties to the marriage. Watt J distinguished the situation before him from that in *Kennon*, because, "*…the husband is not the owner of the trust assets and the wife seeks to rely on the court's powers under Part VIIIAA specifically*" (at [122]). Watt J accepted the husband had property in the nature of the equitable chose in action usually enjoyed by any object of a discretionary trust. This provided a sufficient nexus between the property of the husband and trust assets to support the wife's argument that the provisions of Part VIIIAA could, arguably, be utilised for the purposes of s 79. Concluding there was a sufficient nexus between the husband's chose in action as a discretionary object and the trust assets is not the same as concluding the trust assets were property "*of*" the

husband. In my view, on the question whether the assets of the DT and the DIT are assets "*of*" the husband, *Simmons*, which determined issues only for the purpose of a summary dismissal application, is distinguishable and does not assist the wife. However, I will return to Part VIIIAA later in these reasons.

286. D Pty Ltd relied upon the Full Court decision in *Harris & Dewell*. In that decision, the Full Court considered a unit trust in which the husband's father was the sole unit holder. The trustee was a company, the sole director of which was a solicitor who, according to the evidence, exercised his functions as director in accordance with instructions from the husband. It was argued by the wife that the extent, manner and history of the husband making decisions directly affecting the relevant trust and his dealings with its property lead to the conclusion that he controlled the relevant trust property, such that it was property "*of*" the husband. This argument was rejected at first instance and on appeal. The husband's father was not only the sole unit holder, he held a controlling shareholding in the trustee company, and by reason of the powers in the relevant trust deed was the only person entitled to benefit from distributions.

287. The Full Court in *Harris & Dewell* reviewed numerous earlier authorities and concluded at [67] - [68]:

> It should be accepted that the principles emerging from the High Court and from the decisions of this Court to which reference has been made permit of a finding that property ostensibly that of a trust can be treated as property of a party for s 79 purposes where evidence establishes that the person or entity in whom the trust deed vests effective control is the "puppet" or "creature" of that party. The metaphor is used to connote a situation where the person or entity with control (the "puppet") does nothing without the party (the "puppet master") controlling or directing that person or entity.
>
> Control is not sufficient of itself. What is required is control over a person or entity who, by reason of the powers contained in the trust deed can obtain, or effect the obtaining of, a beneficial interest in the property of the trust. In our respectful view, it is in that sense, that Finn J speaks of "some lawful right to benefit from the assets of the trust" [in *Stephens and Stephens* (2007) FLC 93-336 at 81,767 – 81,768].

288. The Full Court's references to control though legal powers in a trust deed seem to me to be clearly consistent with, and indeed an example of, the High Court's references to a legal relationship, bundle of rights and legally endorsed power, discussed above at [273].

289. The wife criticised D Pty Ltd's submission based upon the decision in *Harris & Dewell.* She contended D Pty Ltd was wrong in principle in "*its focus upon the presence of some form of hierarchy*" between the husband and Mr O. It was not entirely clear what this submission meant, although I assume it relates to

the issue of control of the DT and the DIT. Where one family member has control of trust assets and powers through control of a corporate trustee and through a trust deed to appoint or distribute them to other family members who are discretionary objects, there is inevitably a hierarchy of sorts. One family member has the legally endorsed power over trust assets and the others do not. This hierarchy is a factor which unavoidably requires consideration in the context of an argument about whether trust assets are property "*of*" one of the parties to a marriage for the purposes of s 79.

290. As already pointed out, here Mr O made the necessary decisions for D Pty Ltd, not the husband. The husband is no longer a director of D Pty Ltd. He enjoys no existing powers pursuant to a trust deed, so as to effect the lawful distribution of property to himself. In my view, it is a situation where the husband relies upon his father as the controlling mind of the trustee to make decisions for his benefit. The husband is not in control, even if he can influence decision making by Mr O because of a longstanding understanding, assurance or consensus between them about the assets of the trusts. Mr O retains the discretion to make decisions for D Pty Ltd as he sees fit. In ***Harris & Dewell*** it was insufficient for the director of the trustee to act on instruction from the husband to establish control so to make trust assets property "*of*" the husband. Similarly, the mere fact of concord between Mr O and husband goes no, or at least insufficient, distance to establish that the assets of either the DT or the DIT constitute property "*of*" the husband.

291. The present situation is distinguishable from other cases such as *Stein & Stein* (1986) FLC 91-779; (1986) 11 Fam LR 353; [1986] FamCA 27. In *Stein* the Court found that the trustee would do entirely the husband's bidding with the consequence that the husband, in the guise of the trustee, could distribute to himself as a beneficiary of the trust, while his existing powers, by reference to the terms of the trust, permitted him to obtain property of the trust in that capacity. In *Harris and Harris* (1991) FLC 92-254; (1991) 15 Fam LR 26 the husband's interest as a beneficiary under the trust in combination with his rights and powers as appointor and guardian placed him into the position of an owner of property, constituted by his interest and his rights and powers under the trust with a value equivalent to the value of the assets of the trust. In *Kennon* the husband was also the trustee of the relevant trust.

292. In her proposed orders, the wife sought a declaration that the assets of the DIT and the DT formed part of the property of the parties for the purposes of sections 4, 75 and 79 of the Act. For the reasons given, I am not satisfied the wife has established a basis for such a declaration. She has failed to establish that, in accordance with authority, the assets of the DT and the DIT are assets "of" the husband, and they are obviously not assets of the wife.

293. *Simmons* was a case in which the wife relied upon Part VIIIAA to support orders for the assets of a trust to be used in the division of the property the

parties the marriage. The wife also in her proposed orders placed reliance on Part VIIIAA or s 114 of the Act in the present matter. Although it was not made express I assume the source of power relied on by the wife was ss 90AE or 90AF. However, she did not do so directly for a division of the matrimonial assets. Rather the wife relied upon Part VIIIAA as the source of power to restrain alteration of the DIT or the DT pending the husband making a payment to the wife in accordance with the Court's orders, or to compel D Pty Ltd as trustee to cause a capital distribution to be made to the husband to satisfy the Court's orders for payment to the wife. No specific mention was made of Part VIIIAA in submissions, but the wife's proposed orders and my conclusion that the assets held by D Pty Ltd are not assets of the husband, require me to express a view.

294. The Court is empowered to make orders binding third parties under s 90AE or 90AF of the Act. Section 90AF extends the injunctive power given to the Court by s 114.

295. The range of orders that the Court can make is broad. For example, orders can be made under s 90AE(2)(b) or s 90AF(2)(b) altering "*the rights, liabilities or property interests of a third party in relation to the marriage*". The expression "*in relation to the marriage*" is important and has been held to mean the exercise of discretion is carefully linked and sufficiently connected to the subject matter of the marriage and matrimonial causes: *Hunt v Hunt* at [119]; *XYZ Pty Ltd and Anor & Charisteas & Ors; ABC Pty Ltd & Charisteas and Ors* (2017) FLC 93-782; [2017] FamCAFC 112 at [89]. By reason of s 90AC(1), such an order overrides the provisions of a trust deed. In *Hunt & Hunt* (2006) 36 Fam LR 64; [2006] FamCA 167 ("*Hunt & Hunt*"), O'Ryan J held that Part VIIIAA did not contemplate "*some arbitrary invasion of the rights of a third party but an alteration of those rights where they are sufficiently connected to the division of the property between parties to a marriage*". The Full Court in *B Pty Ltd & Ors & K & Anor* (2008) FLC 93-380 at [63] made clear that any order made under these sections must be for the purpose of effecting the division of a property between the parties, and cannot be used for the purpose of increasing the property of the parties. In *Allan and Allan and Ors* [2009] FamCA 553; 41 Fam LR 565 at [99] Watts J emphasised that the sections cannot be used "*to deprive a third party of its rights simply to benefit a party to the marriage*". The same comment applies to property interests.

296. In *Commissioner of Taxation v Tomaras* (2018) 265 CLR 434; (2018) 93 ALJR 118; [2018] HCA 62 Gordon J at [73] said Part VIIIAA is "*facultative and protective*". In that decision the High Court emphasised Part VIIIAA sits alongside and is ancillary to s 79 of the Act (at [4], [66]) and the power to make orders binding third parties *only* arises if the conditions in s 90AE(3), or by

parity of reasoning, s 90AF(3) (see *XYZ Pty Ltd* at [89]), are satisfied. For example, in s 90AE(3) these conditions include:

> (a) the making of the order, or the granting of the injunction, is reasonably necessary, or reasonably appropriate and adapted, to effect a division of property between the parties to the marriage
>
> (b) …
>
> (c) the third party has been accorded procedural fairness in relation to the making of the order or injunction; and
>
> (d) the court is satisfied that, in all the circumstances, it is just and equitable to make the order

297. There is no definition of "*rights*" in the Act nor do the provisions of Part VIIIAA indicate clearly what "*rights*" are contemplated by s 90AE(2)(b) or 90AF(2)(f). The word is wide in scope. For example, in *Tomaras* there was extensive mention of a taxpayers rights to object to assessment, and the rights of the Australian Taxation Office to collect revenue. It is not limited to property rights as defined on ordinary principles. The presence of "*property interests*" as a separate elements of the collocation "*the rights, liabilities or property interests of a third party*" shows this. It seems to me that an order, such as that sought by the wife compelling D Pty Ltd directly to make a payment from trust assets to the wife, is an order which alters the right of D Pty Ltd to exercise its discretion as trustee as it sees fit. It would also appear to have the effect of increasing the assets of the parties, because if the order was carried out a substantial sum would be applied to the husband. It could also be said to alter D Pty Ltd's property interests in that it would reduce the assets held by D Pty Ltd as trustee. As pointed out by French CJ in *Kennon* at [62] and [63], the "*dry*" legal title of a trustee to trust assets gives meaning to a trustee's power of appointment and the equitable rights to due consideration and administration. Where assets are held by a non-exhaustive discretionary trustee, there is only the legal title of the trustee, associated with the substantial powers or duties of the trustee, until the discretion is exercised by the trustee to apply some or all of the trust assets for the benefit of a discretionary object or objects.

298. But it seems to me the orders under Part VIIIAA proposed by the wife raise some other issues of no little complexity. D Pty Ltd is not the only third party whose rights or property interests would potentially be altered by the order sought the wife. If the husband owns property in the form of an equitable chose in action comprised of his right to due performance of the DIT and the DT and to be the object of due consideration for the appointment of trust assets by the trustee, so do all the discretionary objects in the DIT and the DT. There is a real question concerning the impact of the wife's proposed orders on rights and property interests of these discretionary objects.

299. It is usually, and correctly, said an individual object of an exhaustive or non-exhaustive discretionary trust cannot claim any part of the trust fund or its income because they are not entitled to any interest in it unless and until the trustees exercise their discretion in their favour; in that sense discretionary objects are in competition with each other for due consideration and "*what the trustees give to one is his alone*": *Richstar* at 517 citing *Gartside v IRC* [1986] AC 553 at 617.

300. Nonetheless, in *Gartside* at 617-618, Lord Wilberforce held "*in a certain sense a beneficiary under a discretionary trust has an 'interest'"* which includes a right that *"some objective consideration ... must be applied by the trustees and that the right is more than a mere spes*", although this interest was not sufficiently definable to be taxed. The difficulty of valuing a discretionary object's equitable chose in action is well known. In *R & I Bank of Western Australia Ltd v Anchorage Investments Pty Ltd* (1992) 10 WAR 59 at 79 Owen J held that the expectancy (or spes) which a beneficiary has that the trustee might appoint capital of the trust fund in his or her favour lacked the requisite aspect of 'value' to enable it to be regarded as an asset. In *Richstar* at [28] French said this view had general application and at [36] he doubted that the beneficiary of a non-exhaustive discretionary trust enjoyed anything other than an expectancy, rather than a contingent proprietary interest in trust assets. In the context of Part VIIIAA, in *Simmons* at [106] Watt J was satisfied each object of the relevant discretionary trust had no present entitlement to a proprietary interest in the assets of the trust; and therefore suffered no "*pecuniary loss* from the orders of the Court under Part VIIIAA. But, despite the statement about value from Owen J in *R & I Bank,* in *Kennon* French CJ said at [78]: "*a valuation might not be beyond the actuarial arts in relation to the right to due consideration*". In *Simmons* at [122] after referring to *Kennon,* Watt J accepted the possibility of such a valuation saying, "*the existence of a longstanding scheme of distributions to beneficiaries such as the husband and his siblings provides a useful starting point in the valuation process*". This allows for the possibility that a discretionary object's equitable chose in action, including the "*spes*" or expectancy to due consideration, has value and not only can, but certainly after *Kennon*, should be regarded as an asset. Such a valuation is analogous to the valuation of a chance and looks to the possibility that after due consideration, the trustee's discretion will be exercised in an object's favour. As already noted, in *Kennon* French J also made clear that the "*dry*" legal title of the trustee to trust assets give meaning to the right to due consideration. As Watt J observed in *Simmons*, patterns of prior distributions from the trust may well bear upon the valuation of the chance.

301. In this way, it seems to me that there is sufficient reason given in the authorities discussed to conclude both that it cannot be said the discretionary object's equitable chose in action can have no value and that the value of the trust assets

must bear, if only indirectly, on the value of that chose in action. To that extent, such equitable property is given substance and consequence by the value of the assets of the trust. The proposition can be tested by observing that if all the trust assets were properly and legally bestowed on one discretionary object, it is difficult to see that the equitable chose in action of the remaining discretionary objects could thereafter have any value. But until that happened, the chose in action would likely have value.

302. Section 90AE(2)(b) and s 90AF(2)(b) permit alteration of "*the rights, liabilities or property interests*" of third parties. They are not limited to pecuniary loss. If a declaration was made as sought by the wife or, for that matter, orders were made by the Court in respect of the assets of the DIT or the DT to compel D Pty Ltd to make a capital payment to the husband, this would likely alter the rights and property interests of each discretionary object by degrading the potential value of their equitable choses in action for due administration of the trusts and their right to be considered as objects of the exercise of the trustee's discretion for a share of those trust assets. Furthermore, if this Court was to declare that the assets of a discretionary trust were the assets of parties to a marriage, one of whom was not a discretionary object, this would change fundamentally the asset base in respect of which the discretionary objects of the trust compete, and have a right to compete, for due consideration by the trustee. As already pointed out, the Full Court has said the provisions of Part VIIIAA cannot be used to increase the property of the parties to a marriage. Such a declaration also has the effect of overriding the trustee's discretion and would potentially adversely affect the discretionary objects' right to due consideration or the value of their equitable chose in action. While I accept s 90AC(1) of Part VIIIAA may well permit this, the conditions in s 90AE(3) and s 90AF(3) would have to be satisfied.

303. No submissions were directed to these matters by any party. As I say, they are matters of considerable complexity. The boundaries of the interaction between the provisions of Part VIIIAA and the property interests of third parties in discretionary trusts remains to be elucidated by judicial decisions. But, I am not satisfied the wife has shown that the declaration or orders she seeks under Part VIIIAA are reasonably necessary, or reasonably appropriate and adapted to effect a division of property between the wife and the husband. No specific submissions were made on this topic. Moreover, the just and equitable condition in s 90AE(3)(d) would extend to the other discretionary objects of the DT and the DIT. As a matter of construction, if the purpose of s 90AE(2) and 90AF(2) are to provide some protections for third parties, there is no reason why the just and equitable condition should not apply to them. The wife did not make clear how it would be just and equitable for the assets of the DT or the DIT, in respect of which the discretionary objects would ordinarily compete for due consideration by the trustee, to be depleted in a manner which solely

favoured the wife. I express no view about the need to give procedural fairness to all discretionary objects of the DIT and DT, apart from observing that the presence of D Pty Ltd as a party may be sufficient to afford procedural fairness as representative of the discretionary objects.

304. For the reasons given, I do not propose to make the declaration or orders sought by the wife under Part VIIIAA.

305. There was no dispute, however, that the DT and DIT and their assets were a significant financial resource of the husband. I will return to this for the purposes of s 79(4)(e).

306. This makes it appropriate here to observe that focus on the proper interpretation of "*financial resources*" for the purposes of s 75(2)(b) gives further reason why the DT and DIT and their assets should not be understood as assets of the husband. The expression "*financial resources*" in the context of s 75(2)(b) has long been interpreted to refer to "*a source of financial support which a party can reasonably expect will be available to him or her to supply a financial need or deficiency*": *In the marriage of Kelly (No 2)* (1981) FLC ¶91-108 at 76,803; (1981) 7 Fam LR 762. In *Kennon*, Gummow and Hayne JJ said at [96] "[t]he term "*financial resources*" is apt to include more than assets which answer the definition of "*property*"" in the Act. In *Hall v Hall* (2016) 257 CLR 490; (2016) 332 ALR 1; (2016) FLC 93-709; [2016] HCA 23 at [54] the High Court said the interpretation given in Kelly was correct and continued:

> [54]…The requirement that the financial resource be that "of" a party no doubt implies that the source of financial support be one on which the party is capable of drawing. It must involve something more than an expectation of benevolence on the part of another. But it goes too far to suggest that the party must control the source of financial support. Thus, it has long correctly been recognised that a nominated beneficiary of a discretionary trust, who has no control over the trustee but who has a reasonable expectation that the trustee's discretion will be exercised in his or her favour, has a financial resource to the extent of that expectation
>
> [55]. Whether a potential source of financial support amounts to a financial resource of a party turns in most cases on a factual inquiry as to whether or not support from that source could reasonably be expected to be forthcoming were the party to call on it.

307. The arguments of the wife tend to highlight that the assets of the DT and DIT more readily fit within the settled interpretation of "*financial resources*". She argues the husband has more than an expectation of benevolence on the part of D Pty Ltd, through the decision making of Mr O. This may be contestable, but the husband clearly has a reasonable expectation that D Pty Ltd's discretion as trustee will be exercised in his favour in making appointments of assets or distributions. But reasonable expectation is not the same as control in any

relevant sense. Indeed, the legal concept of reasonable expectation in this context implicitly assumes direct control is absent, and the party who holds the reasonable expectation relies upon a third party exercising control over the assets in question. The evidence supports a conclusion that D Pty Ltd could reasonably be expected to be forthcoming with funds if the husband were to call on Mr O for financial aid. Thus, the trust assets held by D Pty Ltd are most accurately characterised as a financial resource of the husband.

308. I reject the wife's submission that D Pty Ltd is under the control of the husband. I am not satisfied the assets held by D Pty Ltd as trustee of the DT and the DIT should be included in the property of the parties to the marriage and thus on the balance sheet. The wife seeks a declaration to this effect in her proposed orders, I decline to make such a declaration. I am also not persuaded that orders should be made under Part VIIAA.

The husband's income tax, costs of realisation

309. There was no dispute that the husband should make a substantial payment to the wife to achieve a just and equitable property adjustment in this matter. As noted earlier, he proposes $7,178,444 as a specific amount. In order to meet a cash payment of this magnitude, according to the evidence given by the husband, he has a term deposit of $4,819,002, and M Pty Ltd would be required to declare dividends in his favour from retained earnings to meet the balance. M Pty Ltd has retained earnings of $7,467,831. The husband's share of those retained earnings, if declared as dividends, would be $4,480,699. Thus, the husband can raise cash in excess of $9,200,000 to meet an order for a substantial payment to the wife.

310. Ms DD calculated the top up income tax payable by the husband on the unfranked portion of the M Pty Ltd dividends would be $1,088,170.

311. The husband also provided a calculation in respect of retained earnings in J Investments. Ms DD stated the retained earnings of J Investments as at 31 December 2019 were $456,260. The top up tax payable on a dividend declared of that amount would be $172,025.

312. The husband also adverted to the possibility that other property may need to be sold, which would be likely to attract a capital gains tax liability for him, as well as other usual costs of sale such as marketing and conveyancing costs.

313. The husband argues these liabilities should be included on the balance sheet; that is, the costs of realisation and tax liabilities should be borne by both parties. The wife, while not disputing the calculations, simply argues that it is a matter for the husband as to how he arranges his affairs to satisfy Court orders, and the husband gives no reason why she should suffer the financial consequences of how he does so.

314. It should be noted also that the husband proposes that, if the Court does not accept it is appropriate to include costs of realisation on the balance sheet, orders be made which would provide for the wife to pay a portion of the tax and costs of realisation, calculated as an amount equal to the percentage of her overall entitlement.

315. The difficulties posed by tax liabilities and costs of realising assets have been considered many times in this Court. They can be accounted for in establishing the value of an asset or as a s 75(2)(o) factor, or even disregarded, depending on the circumstances. Having said that, not all the authorities are easy to reconcile, as Kent J observed in *Pfenning & Snow* [2016] FamCA 29 at [89].

316. However, in *Rodgers & Rodgers (No 2)* [2016] FamCAFC 104 ("*Rodgers*"), the Full Court engaged in a thorough consideration of earlier authorities, at [34] - [42], concerning issues of tax and other liabilities and how they are to be taken into account. The following principles emerge:

a) There has been a usual practice in this Court, for the purpose of applying s 79(4) to "*the property of the parties or either of them*", of identifying their property, including superannuation, valuing it, and deducting their liabilities from the total value arrived at: *In the marriage of Prince* (1984) FLC 91-501; (1984) 9 Fam LR 481 ("*Prince*") at 79,076; *Rodgers* at [22];

b) Three exceptional categories have been recognised in which the Court may decide to ignore a liability; where it is vague or uncertain, if it is unlikely to be enforced, or it was unreasonably incurred. The Court may so ignore such liabilities because the circumstances of the case might render it unjust and inequitable for liabilities to be deducted in accordance with the usual practice: *In the marriage of Petersens* (1981) FLC 91-095; (1981) 7 Fam LR 402 at 76,669; *Prince* at 79,076-7; *In the marriage of Reynolds* (1985) FLC 91-632; (1984) 10 Fam LR 388 at 80,110; *Rodgers* at [24] and [41];

c) Where the Court does not take account of a liability, the effect is simply that it does not consider that the other spouse should be called upon to in effect "*contribute*" to the liability by having that spouse's fair share in the parties' property reduced by virtue of its existence; thus the party who has incurred the liability may be left to meet it out of whatever assets remain to that party after a property adjustment under s 79: *Prince* at 79,076; *Rodgers* at [34];

d) In most cases, according to the usual practice of the Court, a trial judge should make a finding, on the balance of probabilities, as to whether or not a tax liability exists, and if so in what amount. If it be found that such a liability exists, the Court should take it into account when calculating the nett amount available for distribution between the parties

rather than use s 75(2) as a means of bringing to account a liability or potential liability: *Campbell v Kuskey* (1998) FLC 92-795; (1998) 22 Fam LR 674, at 84,924; *Rodgers* at [28] - [32];

e) Despite the usual practice, the assessment of debts and liabilities is not necessarily arrived at by a strictly mathematical or accountancy approach in all cases; while some liabilities are charges upon the property which can be accurately assessed at a certain date, others are at large, or have not been precisely determined, e.g. tax liabilities: *In the marriage of Kelly* at 76,801; *Prince* at 79,076-7; *Rodgers* at [37];

f) The usual practice does not constitute an absolute or binding rule of law nor dictate that a trial judge *must* take liabilities into account in accordance with the usual practice so as to determine the quantum of the relevant debt and the nett value of property; the manner in which a particular liability should be treated is, ultimately, dependent upon the nature of the liability, the circumstances surrounding the liability and the dictates of justice and equity shaped by each, because so-called "*exceptional cases*" are but instances of the broader consideration of the justice and equity of the particular case: *In the marriage of Biltoft* (1995) FLC 92-614 at 82-129; *Rodgers* at [33], [40];

317. In relation to capital gains tax specifically, in *Rosati & Rosati* (1998) FLC 92-804; (1998) 23 Fam LR 288; [1998] FamCA 38 at paragraph 6.36, the Full Court set out the following principles for how future capital gains tax liability may be taken into account. The Full Court considered four situations as follows:

> (a) Whether the incidence of capital gains tax should be taken into account in valuing a particular asset varies according to the circumstances of the case, including the method of valuation applied to the particular asset, the likelihood or otherwise of that asset being realised in the foreseeable future, the circumstances of its acquisition and the evidence of the parties as to their intentions in relation to that asset.
>
> (b) If the court orders the sale of an asset, or is satisfied that a sale of it is inevitable, or would probably occur in the near future, or if the asset is one which was acquired solely as an investment and with a view to its ultimate sale for profit, then, generally, allowance should be made for any capital gains tax payable upon a sale in determining the value of that asset for the purpose of the proceedings.
>
> (c) If none of the circumstances referred to in (b) applies to a particular asset, but the court *is* satisfied that there is a significant *risk* that the asset will have to be sold in the short to mid-term, then the court, while not making allowance for the capital gains tax payable on such a sale in determining the value of the asset, *may* take that risk into account as a relevant section 75(2) factor, the weight to be attributed to that factor

varying according to the degree of the risk and the length of the period within which the sale may occur.

(d) There may be special circumstances in a particular case which, despite the absence of any certainty or even likelihood of a sale of an asset in the foreseeable future, make it appropriate to take the incidence of capital gains tax into account in valuing the assets. In such a case, it may be appropriate to take the capital gains tax into account at its full rate, or some discounted rate, having regard to the degree of risk of a sale occurring and/or the length of time which is likely to elapse before that occurs.

318. According to the proposal of the husband, there can be no doubt that the tax liabilities will be incurred upon dividends being declared. They will come about as result of the orders he proposes. As such, I accept dividends will be declared to allow the husband to make a payment to the wife. He accepts such a payment will require the entirety of his share of retained profits in M Pty Ltd and J Investments to be declared as dividends. I find that the husband's income tax liability on the unfranked proportion of dividends declared in his favour by M Pty Ltd and J Investments is virtually certain. Since their quantum has been established by expert evidence by reference to firm figures for retained earnings in both companies, I accept the husband's liability for income tax on declared dividends by M Pty Ltd to be **$1,088,170**.

319. I note here that the husband, in Exhibit 5, included his tax liability for J Investments as $172,025, which, as I understood the evidence, would be the top up tax payable for a dividend declared on 100 per cent of the J Investments shareholding. In his written submissions the husband relied on the lower figure of $154,823, which reflects the fact that the husband presently only holds 90 per cent of the shareholding. But it was a common position that the wife would transfer to him her 10 per cent as part of the overall property adjustment. Accordingly, his tax liability on a J Investments dividend would be for top up tax payable on 100 per cent of the J Investments shareholding, or **$172,025**, if dividends were declared by J Investments for the purpose of the husband making a payment to the wife.

320. I note that the dividends themselves should not be included on the balance sheet as assets of the husband because the retained earnings from which they would be paid are already included in the husband's share of the value of M Pty Ltd on the balance sheet.

321. It was the wife's contention that she should not be required to make any contribution to these liabilities. They should not be included on the balance sheet and the husband should simply bear whatever tax consequences and realisation costs arise. I do not accept this argument entirely. I am satisfied the husband's income tax liabilities incurred upon the declarations of dividends in his favour by M Pty Ltd and J Investments should be included on the balance

sheet as liabilities. They will be incurred immediately upon the husband complying with the orders I propose to make. I consider it appropriate that those liabilities should be borne by both parties. The circumstances in which the liabilities will be incurred support this position. They will be incurred by compliance with Court orders whose purpose is to provide a substantial payment to the wife. As pointed out earlier, there is no dispute that the M Pty Ltd provided the basis for the bulk of the parties' wealth over many years. At present, both parties have an interest in J Investments.

322. Liabilities for capital gains tax and other realisation costs are in a different category. The orders proposed by the husband did not distinguish between these potential liabilities and the husband's liabilities for top up tax on dividends. In his submissions, the husband pointed to capital gains tax on the possible sale of three properties. First, his Suburb BB property; this property has been tenanted. It generates rental income of $14,122 per month. There is no calculation of the likely capital gains tax payable on its disposal. Secondly, his submissions referred to Suburb L and OO Street, Suburb PP. The Suburb PP property is now owned by U Pty Ltd; it was not explained how any tax liability would fall on the husband, if it is sold, rather than on U Pty Ltd. How any such liability would then be treated through the accounts of U Pty Ltd and M Pty Ltd is entirely unclear. Any capital gains tax incurred by the husband on the sale of Suburb L was not clear. There was no calculation, which is perhaps not surprising given the controversy about the value of Suburb L. In light of the husband's available cash resources in excess of $9,200,000, there was no clear evidence that any particular property would be sold, or need to be sold, or what other realisation costs may be incurred by the husband, to satisfy an order for payment to the wife. I am not satisfied the husband has demonstrated a possible liability for CGT or realisation costs, apart from such tax and costs which would be payable by the husband on the sale of Suburb BB because it has been an income earning asset. I accept the property may need to be sold to meet the obligations of the Court's orders, but this is contingent and more appropriately considered under s 75(2)(o).

Stamp duty associated with U Pty Ltd demerger

323. The evidence and submissions in relation to this issue were brief. According to the husband, there is a proposal that M Pty Ltd will dispose of its interest in U Pty Ltd, and that the husband will thereafter retain a 60 per cent interest in the company (with Mr C retaining a 10 per cent interest, and D Pty Ltd retaining a 30 per cent interest).

324. In September 2018, NSW Revenue advised that the proposed transfer would incur duty of $568,490 to be payable. The husband contends that this duty should be taken into account "*[i]f the demerger occurs and the [h]usband has to realise his interest in order to meet property settlement Orders"* (Outline of Closing Submissions of the husband handed up 21 August 2020, pg. 21) .

325. However, during his closing submissions Senior Counsel for the husband acknowledged that it was his duty to inform the Court that "*there's no evidence to actually support the proposition that there is going to be a demerger. It was floated at an early stage so [he couldn't] really take that any further*" (Transcript of Proceedings dated 21 August 2020, pg. 58 lines 10-13).

326. The wife's position in relation to this issue was not particularly clear. In the Joint Balance Sheet, the wife appeared to oppose the husband's asserted figure.

327. I am not satisfied the husband has demonstrated that any demerger is likely. I accept it may happen, but it is not certain in the foreseeable future. In light of the principles set out above at [309] - [317], I consider the possibility of stamp duty on demerger is more properly considered under s 75(2).

Superannuation.

328. The Full Court of the Family Court of Australia's decision in *Coghlan & Coghlan* (2005) FLC 93-220; (2005) 33 Fam LR 414; [2005] FamCA 429 requires the Court, in the majority of cases, to consider the parties' superannuation interest as a separate species of property, unless the parties consent to it not being treated separately. It is open to the Court to decide whether to treat superannuation interests as a separate list of assets, or as part of one asset list. The majority of the Full Court in *C & C* (2000) FLC 93-220 said there is no binding principle as to the exercise of the Court's discretion in deciding whether a one list or a two list approach should be adopted. No submissions were made on this issue. Only the husband has any superannuation. Neither party sought a splitting or other order in relation to superannuation. I will include the husband's superannuation entitlements in the one pool of assets.

Addbacks

329. The parties ultimately agreed that a number of addbacks should be included on the balance sheet, including partial property settlement amounts paid to the wife.

330. Notwithstanding this agreement, there is a residual dispute. First, the wife does not concede the value of the husband's legal fees, but accepted there is no other evidence to contest the quantum of his fees. I accept the husband's quantum of **$517,934**. Otherwise, the wife accepts the husband's legal fees should be included as an addback.

331. Secondly, the husband seeks to argue that all the addbacks should be placed in a 'second pool', effectively quarantined from the rest of the assets. The husband contends that the addbacks disproportionately favour the wife and she should make a payment to him so that the addbacks are divided in the same percentage proportions as the overall property adjustment, for example, on the

husband's case 42.5 per cent of the addbacks should favour the wife, whereas at present they favour her as to 79 per cent.

332. The principles governing addbacks are well known. In *Chorn and Hopkins* (2004) FLC 93-204; (2004) 32 Fam LR 518; [2004] FamCA 633 ("*Chorn*"); at [56], Finn, Kay & May JJ made clear that, "*while the treatment of funds used to pay legal costs remains ultimately a matter for the discretion of the trial judge, in determining how to exercise that discretion, regard should be had to the source of the funds*". The Full Court also recognised at [71] that a decision as to whether "*both parties should bear responsibility*" for taxation debts of one party to the marriage was to be decided by reference to what was just and equitable: *Rodgers & Rodgers* at [38].

333. In *Trevi & Trevi* [2018] FamCAFC 173 at [27]-[42] the Full Court set forth the guidelines relating to addbacks as follows:

> **Guidelines for adding back to the property available at trial**
>
> *(a) Dissipation of property and expenditure other than on legal fees*
>
> [27] The Full Court held in *Omacini and Omacini* that addbacks fall into "three clear categories": where the parties have expended money on legal fees; where there has been a premature distribution of matrimonial assets; and "waste" or wanton, negligent, or reckless dissipation of assets
>
> [28]…
>
> [29] The fundamental precept that addbacks are exceptional,…, also mirrors what has been said in earlier decisions of the Full Court that, for example, "the Family Court must take the property of a party to the marriage as it finds it" at trial. An important parallel proposition is that the parties do not "go into a state of suspended economic animation" after separation. Thus, reasonably incurred expenditure does not usually come within accepted categories of addback.
>
> [30] Two fundamental premises emerge... First, "adding back" is a discretionary exercise. When the discretion is exercised in favour of adding back, it reflects a decision that, exceptionally, in the particular circumstances of a case, justice and equity requires it. The second premise is its corollary: in cases that are not "exceptional" justice and equity can be achieved, not by adding back, but by the exercise of a different discretion – usually by taking up the same as a relevant s 75(2) factor. Indeed, it has been said that the latter is "a course which is, perhaps, technically more correct" than adding back to the list of existing interests in property.
>
> *(b) Expenditure on Legal Fees*
>
> [31] To the considerations just discussed must be added the propositions emerging from authority that paid legal fees as a category of addback is

imbued with considerations specific to that expenditure. The Full Court said in *Chorn*:

> [57] If the funds used [to pay legal fees] existed at separation, and are such that both parties can be seen as having an interest in them (on account, for example, of contributions), then such funds should be added back as a notional asset of the party, who has had the benefit of them.
>
> [58] If funds used to pay legal fees have been generated by a party post separation from his or her own endeavours or received in his or her own right (for example, by way of gift or inheritance), they would generally not be added back as a notional asset; nor would any borrowing undertaken by a party post-separation to pay legal fees be taken into account as a liability in the calculation of the net property of the parties. Funds generated from assets or businesses to which the other party had made a significant contribution or has an actual legal entitlement may need to be looked at differently from other post separation income or acquisitions.

[32] Those passages can be seen as an attempt to establish "guidelines", undertaken after a detailed examination of earlier authorities, for the treatment of paid legal fees within s 79 proceedings. There can be little doubt that the statements made in that case have been applied by trial judges ever since.

[33] The word "guidelines" is used advisedly so as to distinguish the same from "binding principles of law"…

[34] The guidelines emerging from *Chorn* should be read together and read conformably with the Full Court authorities upon which they are based. That being so, the delineations there referred to — "the funds used existed at separation ... such that both parties can be seen as having an interest in them"; or "funds used to pay legal fees have been generated by a party post-separation from his or her own endeavours" or received by a party "in his or her own right (for example, by way of gift or inheritance)" - cannot be seen as determinative of the exercise of discretion but, rather, as informing it.

[35]….

[36] Paid legal fees occupy a particular position in the consideration of addbacks by reason of s 117(1) of the Act; a matter not relevant to any other form of expenditure or dissipation of property the subject of an addback claim.

[37] An order failing to addback legal costs is a pre-emptive decision about one party paying the other's legal costs. The statutorily prescribed

default position is that neither party pays all or some of the other party's costs.

[38] If, contrary to the demands of that section, there is to be a payment of costs, the award is dependent upon a finding of justifying circumstances which, in turn, is dependent upon (non-exhaustive) considerations all of which are informed by antecedent events - for example, whether one party has been "wholly unsuccessful" and "the conduct of the parties to the proceedings". An award of the costs of trial, if any, is in the usual run of events made after the respective entitlements of the parties to a settlement of property have been assessed and, importantly, any awarded costs are paid from the assessed entitlement to property received by the paying party.

[39] As has been said, legitimate guidelines "guide the exercise of a discretion"; they do not replace it. Guidelines, must "[preserve], so far as it is possible to do so, the capacity ... to do justice according to the needs of the individual case". The decision to addback or not addback paid legal fees remains a matter of discretion. But, a finding that it is just and equitable to not addback an amount of legal fees so paid is a finding that it is just and equitable for the other party to contribute to the costs of the first party in that proportion as part of an overall assessment of the justice and equity governing their property division.

[40] The considerations just referred to are plainly always important and central to the exercise of that discretion in respect of paid legal fees.

[41] The passages from *Chorn*, quoted above, draw a distinction between legal costs met from property that would otherwise be available at trial and legal costs met from funds "generated by a party post-separation from his or her own endeavours or received in his or her own right (for example, by way of gift or inheritance)". The proposition there advanced, that such expenditure "would generally not be added back", also needs to be seen as a guideline informing the relevant discretion rather than determining it. A further distinction is suggested in *Chorn* between funds generated in that manner and "[f]unds generated from assets or businesses to which the other party had made a significant contribution or has an actual legal entitlement".

[42] The latter suggestion recognises the discretion inherent in the task and also, perhaps, that in the particular circumstances of a case, adding back sums generated post-separation in the different manners suggested might create injustice as much as it might cure it.

(footnotes omitted)

334. The Full Court at [47] also pointed out that the decision in *Stanford* concerning identification of the parties' assets is not offended by the proper approach to add backs:

> [47] The essence of a claim for addbacks is that the asserted sum/s should be added to the value of the existing property interests of the parties and, subsequent to the assessment of contributions, credited to the spending party as part of the value of their assessed entitlements. Doing so does not offend what was emphasised by the High Court. Adding back does not seek to create property interests that do not exist. Rather, doing so emphasises that satisfying the respective requirements of ss 79(2) and (4) of the Act to do justice and equity can require an "accounting" or "balance sheet" exercise for the purposes of s 79(2) and (4), so as to include the value of the dissipated property or expended sums within the total value of the parties' existing interests in property, and to credit the value of same against the assessed entitlement of the dissipating or spending party.

335. I accept the approach of the parties that it is appropriate to include paid legal fees and partial property distributions on the balance sheet.

336. I do not accept the husband's argument that addbacks should be dealt with in a separate pool. His reasons for this suggestion were that the expenditure on legal fees and experts by the wife was excessive and, partially at least, wasted. However, I am unable to make such a finding on the available evidence. It is true that the wife has engaged four different sets of lawyers, but I can infer nothing from this fact alone and I do not know what factors lead to her changes in legal representation. I cannot form a view that her expenditure on legal fees in a case involving complicated structures and assets of over $35 million has been excessive. Similarly although the wife has spent in excess of $500,000 on experts, most of which were not used in evidence, this may be justifiable because her "*shadow experts*" allowed the wife and her advisors to form a clear view about what was or should be properly in contention in the proceedings. I will give the parties an opportunity to make submissions on costs after delivery of this judgment. The husband can seek to make his contentions about wasted legal fees at that point, if he wishes to press them.

337. I note here that on Exhibit E there was included a figure of $283,860 which was for the total fees of various experts for whom the parties equally shared the costs. The calculation underlying this figure was unclear. Other evidence suggested the amount spent on these other experts was $278,060.20. However, this became irrelevant by the end of the trial. As I understood Exhibit E, the ultimate agreement of the parties was that the amount for expert's fees should not be included as an addback or as part of the balance sheet.

Conclusions

338. There were a range of other items about which there was no real dispute. I will include them on the balance sheet in accordance with Exhibit E. I note that in the balance sheet included with Exhibit 5, the husband's proposed final orders, there were several *de minimis* figures of $50 which I will ignore, such as $50

referrable to M (Administration) Pty Ltd, although I leave in W Pty Ltd and V Pty Ltd since they were clear and not in dispute.

339. In light of the above findings, the assets and liabilities of the parties at the date of hearing are, as follows (all figures are rounded up to the nearest dollar):

Assets		
Description	**Owner**	**Value**
Real Estate		
G Street, Suburb H	Joint	$6,000,000
X Street, Suburb BB	Husband	$3,750,000
Husband's 45% interest in Suburb L Partnership: K Street Suburb L	Husband	$4,954,567
Entities		
M Pty Ltd	Husband	$13,401,840
Interest in W Pty Ltd	Husband	$50.00
Interest in V Pty Ltd	Husband	$50.00
Interest in J Investments Pty Ltd: Husband as to 90 shares and wife as to 10 shares	Joint	$371,024
Bank Accounts		
CBA Smart Access Acc #...95	Wife	$72,261
CBA Account #...77	Husband	$179,713
CBA Account #...17	Husband	$61,811
Term deposit acct #...02	Husband	$4,819,002
Term deposit Acct #...11	Husband	$394,321
Funds in the Trust Account of Barkus Doolan	Husband	$265,666
Capital Accounts		
V Family Trust	Husband	$326,654
J Investments Pty Ltd – loan account	Husband	$566

Loan to Dovgan Trust	Husband	$576,000
General		
Boat	Husband	$480,000
Loan to Ms CC	Husband	$416,000
Personal effects	Husband	$14,315
Personal effects	Wife	$17,815
Surfboard collection	Husband	$1,400
Jewellery	Wife	$19,850
Jewellery	Husband	$12,407
Sports motor vehicle	Husband	$45,000
Cycles	Husband	$8,000
Motor vehicle 1	Wife	$20,000
Shares in listed corporations at fair value	Husband	$81,145
Shares in unlisted corporations at fair value	Husband	$100,000
Loan to friend	Husband	$40,000
Jetski	Husband	$2,000
Total Gross Assets		**$36,431,457**
Addbacks		
Partial property settlement payments	Wife	$455,000
Wife's legal fees paid	Wife	$697,000
Husband's legal fees paid to date including adversarial expert expenses and counsel.	Husband	$517,934
Further interim payment to the Wife for legal fees (22.5.20)	Wife	$250,000
Partial property settlement payment pursuant to orders made 09.07.20	Wife	sti$600,000
Total Addbacks		**$2,519,934**

LIABILITIES		
Suburb L Partnership Loan	Husband	$156,624
T Pty Ltd	Husband	$7,849
Husband's Income tax for Retained Earnings of MPL & J Investments (Top up tax for MPL is $1,088,170 and for J Investments the tax top up figure Is $172,025)	Husband	$1,260,195
Mr O Dovgan	Husband	$170,000
Total Liabilities		**$1,594,668**
SUPERANNUATION		
M Executive Superannuation Fund Account	Husband	$2,142,122
Total Superannuation		**$2,142,122**
Assets		**$36,431,457**
Addbacks		**$2,519,934**
Superannuation		**$2,142,122**
Total Assets (incl, Superannuation)		**$41,093,513**
Total Liabilities		**$1,594,668**
Net Assets		**$39,498,845**

Percentages of net assets at hearing

340. Consequently, on the basis of my findings and conclusions, if there was no property adjustment, the applicant would hold 13 per cent (rounded) of the parties' net assets and the respondent 87 per cent (rounded), including the jointly held assets, the Suburb H property and J Investments. Neither party argues it would be just and equitable to leave this position undisturbed. I agree.

341. I turn now to consider the application of Part VIII of the Act and ss79 & 75(2).

CONTRIBUTIONS UNDER SECTION 79

342. I will deal first with s 79 of the Act. Section 79(4) of the Act sets out the considerations to be taken into account by the Court in determining what order should be made under s 79 of the Act in property settlement proceedings.

343. The approach to the assessment of contributions has been stated many times. In *Norbis v Norbis* (1986) 161 CLR 513; [1986] HCA 17 at 523, Mason & Deane JJ said :-

> Although it is natural to assess financial contributions under s. 79(4)(a) by reference to individual assets, it is also natural to assess the contribution of a spouse as homemaker and parent either by reference to the whole of the parties' property or to some part of that property. For ease of comparison and calculation it will be convenient in assessing the overall contributions of the parties at some stage to place the two types of contribution on the same basis, i.e. on a global or, alternatively, on an "asset-by-asset" basis. ...

344. As already noted above, the husband contended that the Court should use two asset pools, quarantining the addbacks in a separate pool. I have rejected this approach for the reasons given above at [336]. Neither party argued that I should adopt an asset by asset approach. I take a global approach to the assessing the financial contributions of the parties.

345. In accordance with s 79(4) of the Act, the Court must consider all the contributions, both financial and non-financial, to the acquisition, conservation and improvement of the parties' assets as well as to the welfare of the family during cohabitation and after separation. The Court must consider the contributions in an overall sense: *Norman & Norman* [2010] FamCAFC 66; *Hickey* (supra); *In the marriage of Kowalski* (1993) FLC 92-342; (1992) 16 Fam LR 235; *G & G* (2000) FLC 93-043; (2000) 26 Fam LR 592; [2000] FamCA 1075. A broad approach is preferred, rather than reference to precise mathematical calculations: *In the Marriage of Burke* (1981) FLC 91-055; (1981) 7 Fam LR 121, although an evaluation of each party's respective contributions is necessary: *JEL & DDF* (2001) FLC 93,075; (2000) 28 Fam LR 1; [2000] FamCA 1353. Assumptions about equality of contributions should not be made. Separate assessment of matters occurring after separation is not necessary in arriving at an assessment of contributions: *Sippel & Sippel* [2004] FamCA 201.

346. In *Dickons v Dickons* (2012) 50 Fam LR 244; [2012] FamCAFC 154 the Court expressly rejected the notion that there must be a relationship between contributions and what they produced in terms of property, and at [14] - [22] discussed at some length the appropriate way to consider and weigh all contributions:

14. As is plain from earlier decisions of this Court, regard must be had to the use made of contributions of various types so as to compare the contributions made by each of the parties during the course of, and over the length of, their relationship (see, for example, *In the Marriage of Pierce* (1998) FLC 92-844). But that is an entirely different proposition to, as it were, causally linking contributions with their asserted financial "product" or "value". The former recognises that the nature, form and extent of contributions made by each of the parties might differ; the latter suggests that the absence of a causal link counts as no contribution at all.

15. The search for a causal link might be seen to come instinctively to the necessary inquiry and all the more so when regard is had to s 79(4)(a) which refers to financial contributions made "...directly or indirectly..." "...to the acquisition, conservation or improvement of any of the property ..." and goes on to also refer to the financial contribution made "...otherwise in relation to any of that last-mentioned property..." The terms of that sub-paragraph might, naturally enough, be seen to suggest a causal link between those contributions and the "financial product" which those contributions of that type are said to have produced. That same requirement might also be seen to suggest that relevant contributions of that type can be seen to be quantifiable – or, at least, conceptualised – in monetary terms, in contradistinction to contributions made pursuant to s 79(4)(c).

16. While that apparent "causal connection" might be seen in s 79(4)(a) (and (b)), no such connection is apparent from the terms of s 79(4)(c); contributions of that latter type are not linked by the words of the sub-paragraph to the "...acquisition, conservation or improvement of any of the property..." or, indeed, to "property" at all. This is not a legislative oversight; the 1983 amendments to the Act which inserted the current s 79(4)(c) were specifically intended, relevantly, to remove any suggestion that there needed to be a causal link between contributions of that type and any particular asset or property. The Explanatory Memorandum to the Family Law Act Amendment Bill 1983 provides, at Clause 36, that a specific purpose of the re-casting of s 79(4) was, relevantly, to:

> ... revise sub-section 79(4) to remove the possibility of an interpretation of the sub-section requiring that there be a nexus between a spouse's contribution and a specific item of property in section 79 proceedings ...

17. Within that context, then, it is self-evident that financial contributions (whether direct or indirect) can be made to a relationship that have an effect on the property of the parties without those financial contributions finding their way directly into, or being directly linked to, specific property or, indeed, directly to the totality of the property available for distribution at the time of trial. Financial contributions can be made to the "...acquisition, conservation or improvement..." of property "...directly or indirectly..." (s 79(4)(a). Emphasis added). A financial contribution can be made indirectly by, for example, the use by parties of income or assets for

purpose A freeing up the use of other income or assets for purpose B. Moreover, a particular financial contribution might have been used wholly in discretionary expenditure which, but for that contribution, would not have been available to the parties or would have required borrowings or a diminution of capital. Such a contribution can also, in that way, be seen, for example, as an indirect contribution to the conservation of property. Indeed, the principles discussed for example in *In the Marriage of Kowaliw* [1981] FamCA 70; (1981) FLC 91-092 and *In the Marriage of Townsend* [1994] FamCA 144; (1995) FLC 92-569, can be seen as an exception to that general proposition.

18. Any and all such contributions, whether or not they sound in, or are directly linked to, the property available for distribution, should be considered and assessed together with the nature, form and extent of all other contributions of all types contemplated otherwise by s 79(4).

19. That is true of assets or income generated within the relationship and it is equally true of assets or income coming from outside of the relationship (for example, as here, in the form of inheritances). In the same way, s 79(4) specifically requires the Court to take into account contributions made to the welfare of the family (and substantively and "...not in any merely token way..."; see, *Mallett v Mallett* [1984] HCA 21; (1984) 156 CLR 605 at 636 per Wilson J) notwithstanding that those contributions may not be, or cannot be seen to be, directly linked to the available property at trial, or any increase or decrease in the value of the property.

20. Put another way, consistent with authority, the s 79 discretion involves as a necessary requirement that "... trial Judges weigh and assess the contributions of all kinds and from all sources made by each of the parties throughout the period of their cohabitation and then translate such an assessment into a percentage of the overall property of the parties or provide for a transfer of property in specie in accordance with that assessment." (*In the Marriage of Aleksovski* [1996] FamCA 111; (1996) FLC 92-705 at 83,437). In *Aleksovski*, Kay J outlined the well-known "gold bar" analogy and said "[w]hat is important is to somehow give a reasonable value to all of the elements that go to making up the entirety of the marriage relationship" (at 83,443).

21. Those same principles can be expressed as saying that the requirements of the section are met by approaching the assessment of contributions holistically and by analysing the nature, form, characteristics and origin of the property currently comprising that to which s 79 applies, and, in turn, analysing the nature, form and extent of the contributions (of all types) contemplated by s 79). That task is also undertaken by reference to the nature and form of the particular marriage partnership manifested by the particular circumstances of this particular marriage. Is it, for example, a relationship, as Deane J put it in *Mallett* at 640-641 "...where the parties have adopted the attitude that their marriage constituted a practical union of

both lives and property..." or is it, for example, a union where parties lived very separate domestic and financial lives?

347. As the husband pointed out, a number of Full Court authorities, following *Dickons*, have recently confirmed that where the parties have been married for a long period of time and one party to the marriage introduces property or other assets, a "*holistic*" assessment of the parties contributions is required; all contributions must be weighed collectively and so it is an error to segment or compartmentalise the various contributions and weigh one against the remainder: *Jabour & Jabour* [2019] FamCAFC 78 at [31] - [87]; *Horrigan & Horrigan* [2020] FamCAFC 25 at [35] - [49]; *Barnell & Barnell* [2020] FamCAFC 102 ("*Barnell*") at [30] - [43]; *Benson & Drury* [2020] FamCAFC 303 at [35]. Where there has been a long marriage this evaluation occurs often with respect to disparate kinds of contribution made over a substantial period; such evaluation, having regard to its subject matter, inevitably involves value judgments and matters of impression: *Lovine & Connor and Anor* (2012) FLC 93-515; [2012] FamCAFC 168; at [40]; *Barnell* at [30].

348. Below is a discussion of the evidence and my findings in relation to the relevant contributions under s 79(4) of the Act. I note here that s 79(4)(f) and (g) are not relevant in the circumstances of this case.

(a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage

Initial contributions

349. M Pty Ltd was the subject of some dispute in relation to initial contributions.

350. M Pty Ltd was in existence at the start of the relationship. While there was generally no dispute that M Pty Ltd has been the key to and source of the parties' wealth, there was a dispute as to its significance at the start of the relationship. The husband argued that his evidence showed he had expended a good deal of effort on establishing and building up M Pty Ltd prior to the marriage. In oral argument, the wife did not accept that when the husband brought M Pty Ltd to the relationship it was a valuable business. She pointed to the fact that D Pty Ltd purchased 4,500 shares in M Pty Ltd from the husband for $4,500 in November 1989.

351. However, the evidence of the husband, which was not challenged, shows that between 1985 and 1989 he and Mr C worked installing equipment by day and paperwork at night, drawing minimal wages. The husband lived with his parents. He also worked at night taking calls for emergency repairs. At the time the parties commenced their relationship, M Pty Ltd had 40 employees. I am satisfied that M Pty Ltd was a sound and profitable business at the time the parties began cohabitation.

352. An initial contribution has to be weighed against all the other relevant contributions of the parties, but the use made of this initial contribution is relevant*: Pierce v Pierce* (1999) FLC 92-844; [1998] FamCA 74 at [28]. M Pty Ltd was clearly the springboard for the creation of the parties' wealth during the marriage.

353. Apart from M Pty Ltd, the husband brought some other modest assets to the relationship with qualifications and experience. There was no dispute that the wife brought very little in the way of assets or money to the relationship.

Financial contributions during the relationship

354. There was no material dispute that the husband provided all the financial contributions during the 27 year marriage. The wife did not work. There was no suggestion she could not work, but she did not work. The husband funded the expenditure for the family, as well as cleaners and gardeners. M Pty Ltd was the source of money to fund this expenditure.

355. The husband purchased the family home at Suburb AG unencumbered in May 1990. He was able to do so through funds available from M Pty Ltd. The parties' home at Suburb S was later purchased from the sale proceeds of the property at Suburb AG, and further dividends from M Pty Ltd.

356. It should be recorded that in the 31 years since its incorporation, M Pty Ltd has continued to expand. It presently has some 153 full time employees. I take account of the fact that although the husband managed the business of M Pty Ltd, he did so with the assistance of Mr O and Mr C. However, it was the husband's involvement in M Pty Ltd that brought the wealth it created to the relationship.

Financial contributions post-separation

357. After separation, the husband has paid almost all the expenses of the wife, including credit cards, utilities, repairs and maintenance to the Suburb H property, insurances, motor vehicle expense and telephone. As already pointed out the husband has paid partial property settlement amounts of $1,055,000, and $947,000 towards the wife's legal fees, which have been treated as addbacks.

358. The wife has made cash withdrawals of $116,000 and $256,200.

(b) the contribution (other than a financial contribute on) made directly or indirectly by or on behalf of a party to the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them

359. While there was no dispute that the husband made the overwhelming financial contributions through M Pty Ltd, by the same token there was no dispute the wife made the overwhelming contribution as a homemaker and primary carer

of the children. The wife argued, and I accept, that her contribution as parent and homemaker freed the husband to pursue his work in managing and developing M Pty Ltd, to pursue investments and business interests, and thus contributed to the creation of the parties' wealth. The father also argued that he made a real contribution to the care of the children from time to time.

(c) the contribution made by a party to the marriage to the welfare of the family constituted by the parties to the marriage and any children of the marriage, including any contribution made in the capacity of homemaker or parent

360. I repeat my comments at [359] above.

(d) the effect of any proposed order upon the earning capacity of either party to the marriage

361. The proposed orders will not affect the earning capacity of either party. The wife is 60 and has not worked for some 30 years. I accept the prospects of her obtaining employment, even if she wanted to, are extremely remote. On the other hand the husband will continue to enjoy his business interests and work in M Pty Ltd without any real alteration.

Assessment of contributions

362. The wife argued that the contributions should be assessed as equal. She argued that the husband laid too much emphasis on his financial contributions. I am unable to accept this submission. I accept that while the husband worked at developing M Pty Ltd, the wife made a considerable contribution in making a home, caring for the children and freeing the husband from many domestic responsibilities, notwithstanding that he undertook such responsibilities from time to time. But the standard of living of the family and the parties' assets was built on the husband's interest in and work in M Pty Ltd. The wife's ability to make a home and care for the children was facilitated by the money the husband brought to the marriage.

363. Taking account of all the above considerations, I assess the wife's contribution entitlement at 31 per cent, and the husband's at 69 per cent.

364. I now turn to s 79(4)(e) and such of the s 75(2) factors as are relevant.

SECTION 75(2)

365. The Act requires me to take into account the matters referred to in s 75(2) of the Act, so far as they are relevant, when considering what orders should be made in these proceedings. The Full Court has made clear that any adjustment to the parties' contribution-based entitlements by the application of factors prescribed by s 75(2) should be determined inclusively after considering all relevant factors; not by aggregating incremental adjustments in respect of each relevant factor: *Tomasetti & Tomasetti* (2000) FLC 93-023; [2000] FamCA 314

at [107]–[114]; *Benson & Drury* [2020] FamCAFC 303 at [36]. The relevant matters to be so taken into account on these facts are, as follows:

(a) the age and state of health of each of the parties;

366. The wife is 60 and the husband 59. Both are in reasonable health.

(b) the income, property and financial resources of each of the parties and the physical and mental capacity of each of them for appropriate gainful employment;

367. I have already spent considerable time setting out the assets and liabilities of the parties.

368. I return here first to the question of the value of Suburb L. I have accepted the valuation of Mr NN at $12,500,000 for the purpose of the balance sheet. However, the evidence satisfies me that I cannot ignore the possibility, or as Mr ZZ characterised it, the likelihood, of an increase in the price achievable, above $12,500,000 if Suburb L is sold in the future. I have reached this conclusion on the basis of the husband's perceptions of the value of Suburb L in 2016, the contingent expression of some interest in the vicinity of $25,000,000 in 2016 and Mr NN's acknowledgement that his value is likely to be less than the market value. While the husband did not concede the value is likely to be higher than $12,500,000, he agreed in submissions it would be no less, and there was some potential for a higher value. I consider it appropriate to take account of this in making adjustments under s 75(2) in favour of the wife. As discussed extensively already, I am unable to place a precise value on this potential and, in my view, authority does not require me to do so. I note here also that it was not argued there was there is likely to be a significant change in the financial circumstances by Suburb L being sold in the near future to make it reasonable to adjourn the proceedings under s 79(5) of the Act, a power which, as Gordon J pointed out in *Tomaras* at [61], is consistent with the dual objectives of finality and justice in Pt VIII of the Act.

369. Next, there is the husband's undoubted likelihood of enjoying the plenitude of the very large asset holdings of the DIT and DT. It was common ground that these assets should be understood as a large financial resource of the husband. As already noted, Ms DD's value for the assets of the DT was $5,452,230, and for the DIT was $6,162,430. The evidence establishes that the husband can expect to receive a large proportion, if not the bulk, of these assets in some form or another, but over his lifetime. The wife described this as "*massive*". I agree. The wife enjoys nothing equivalent. It should, however, be made clear that the timing of any distributions to the husband is not clear and I take account of the possibility that other discretionary objects, within the extended family, may also receive distributions.

370. The husband will continue to enjoy significant value of his interest in M Pty Ltd, the income it brings him, and the capital gains and revenue from the

Suburb L partnership. He will continue to generate income through his employment with M Pty Ltd, utilise his business interests for future investment and business ventures.

371. I am satisfied that the wife has no prospect of future gainful employment. While it was common ground she should receive the Suburb H property, her income will be derived from investing the money received under the Court orders.

372. The husband has substantial superannuation while the wife has none.

(d) commitments of each of the parties that are necessary to enable the party to support:

(i) himself or herself; and

(ii) a child or another person that the party has a duty to maintain;

373. I do not add anything under this head beyond what has already been said about the assets and liabilities of the parties.

(e) the responsibilities of either party to support any other person;

374. The wife gave evidence that she provides for the needs of her mother, who lives in a care home. She buys her food and washes her clothes.

(g) where the parties have separated or divorced, a standard of living that in all the circumstances is reasonable;

375. The parties clearly enjoyed an affluent standard of living during the marriage. There are sufficient assets available for this standard to be maintained through the orders of the Court.

(h) the extent to which the earning capacity of a party would increase by enabling that party to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;

376. Neither party proposes to undertake a course of education.

(j) the extent to which a party has contributed to the income, earning capacity, property and financial resources of the other party;

377. I do not add anything under this heading beyond what has already been said about the wife's contribution to freeing the husband to develop M Pty Ltd and pursue investments.

(k) the duration of the marriage and the extent to which it has affected the earning capacity of a party;

378. The marriage was of some 27 years duration. As noted already, the wife devoted herself to her role as homemaker and primary carer of the children.

She has been out of the work force for nearly 30 years. I am satisfied the length of the marriage has compromised the earning capacity of the wife.

(m) if either party is cohabiting with another person--the financial circumstances relating to the cohabitation;

379. The husband has commenced cohabitation with Ms CC. He pays her $2,500 per week in rent, and has lent her $416,000.

(o) any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account

380. It is necessary here to return to the Deed. I have already discussed this above at [230] -[255]. The husband argued that the cost to him of his obligation to pay one third of his share of the proceeds of sale of Suburb L was too large to ignore and a significant adjustment should be made in his favour to take account of it. He claimed it was certain he would make such a payment on the sale of Suburb L. I concluded the Deed imposes a moral or familial obligation on the husband to deal with the proceeds of sale of Suburb L as clause 2 of the Deed acknowledges, but not a legal obligation to do so. I considered the authorities concerning contingent liabilities above at [253]. The question for the purposes of s 79(4)(e) is whether a moral or familial obligation should be should be brought to account.

381. In the circumstances of this case on balance I am also unable to conclude to the moral or familial obligation acknowledged by clause 2 of the Deed is likely to result in the husband paying one-third of his share of the proceeds of sale of Suburb L to D Pty Ltd. I do not accept such a payment is certain. The family ties which clearly connect the husband's interest in the Suburb L partnership and D Pty Ltd suggest that, if Suburb L is sold, the manner in which the husband's share of the proceeds will be dealt with is just as likely to be determined at the time of settlement in discussion with Mr O. However, I note that the husband honoured clause 1 of the Deed. This is some indication that if Suburb L is sold, the husband may similarly make payment in accordance with clause 2 of the Deed. But, as already pointed out, clause 1 acknowledged an existing debt, and even so, the largesse received by the husband from D Pty Ltd as trustee suggests if he made such a payment, the benefit of it may possibly ultimately return him indirectly from a trust distribution. Accordingly, I am not satisfied any adjustment should be made in the husband's favour by reason of clause 2 of the Deed.

382. I also take account of the possible tax or other costs of realisation of unspecified assets, possibly falling on the husband, as discussed above at [322]. I accept the husband is likely to be required to sell assets to meet the obligations of the Court's orders.

Assessment of section 75(2) factors

383. The wife submitted that the Court would attribute an adjustment to the wife for s 75(2) factors so as to give her overall 60 per cent of the matrimonial pool. On my assessment of contributions, this would require an adjustment for s 75(2) factors of 29 per cent. The husband submitted that the wife would be entitled to 42.5 per cent of the pool, requiring an adjustment of 11.5 per cent.

384. However, on weighing the relevant factors, while I do not consider 27 per cent is warranted, I am satisfied the wife should receive a significant adjustment of 22 per cent in her favour. While I have carefully weighed all the s 75(2) factors that I have referred to, the wife's age, likely difficulty in obtaining paid employment, lack of superannuation, the needs of her mother and the considerable financial resources of the husband, particularly the potential from an increase in the value of Suburb L and the assets of the DIT and DT which do not appear on the balance sheet, discussed in detail in these reasons, combine to satisfy that an adjustment of this size is just and equitable. In reaching the percentage adjustment of 22 per cent, I have given careful consideration to the husband's likely liabilities for tax. Accordingly, the assets of the parties will be divided 53 per cent to the applicant and 47 per cent to the respondent.

385. As is well established in relation to s 75(2) adjustments, the real impact or value of the adjustment in money terms is ultimately the critical issue, not its expression as a fraction or percentage of the overall assets *Clauson & Clauson* (1995) FLC 92-595; [1995] FamCA 10 at 81,911; *Adair & Adair* [2019] FamCAFC 70 -at [66]; *Simons & Simons* [2020] FamCAFC 128 at [18].

386. I have determined the net value of the property owned by the parties is $39,498,845, inclusive of superannuation and addbacks. On the basis of a 53/47 per cent division, the wife would be entitled to receive assets with a value of $20,934,388 and the husband assets with a value of $18,564,457.

387. There was no dispute the wife should receive the Suburb H property outright and unencumbered, nor that she should transfer to the husband her 10 per cent interest in J Investments. In addition there was no dispute the wife should retain some cash at bank, personal effects, jewellery and a motor vehicle. Consequently, in addition the wife requires a payment of $12,802,462 from the husband to receive her entitlement.

388. On a 53/47 percentage division, with the wife to receive Suburb H and the husband a further 10 per cent of J Investments, the applicant and respondent will have the assets and liabilities, as set out in the below table.

Assets and liabilities to be retained by the applicant	**Value ($)**
G Street, Suburb H	$6,000,000
CBA #...95	$72,261
Personal Effects	$17,815
Jewellery	$19,850
Mercedes	$20,000
Subtotal	$6,129,926
Addbacks	$2,002,000
Subtotal	$8,131,926
Payment from Husband	$12,802,462
Total:	$20,934,388
Assets and liabilities to be retained by the respondent	**Value ($)**
Interest in J Investments Pty Ltd	$371,024
X Street	$3,750,000
Suburb L Partnership	$4,954,567
M Pty Ltd	$13,401,840
W Pty Ltd	$50
V Pty Ltd	$50
CBA #...77	$179,713
CBA #...17	$61,811
Term Deposit #...02	$4,819,002
Term Deposit #...11	$394,321
Barkus Doolan Trust Acct	$265,666
V Family Trust	$326,654
J Investments Loan Acct	$566

Loan to DT	$576,000
Boat	$480,000
Loan to Ms CC	$416,000
Personal Effects	$14,315
Surfboards	$1,400
Jewellery	$12,407
Sports motor vehicle	$45,000
Motorcycles	$8,000
Shares, listed	$81,145
Shares, unlisted	$100,000
Loan to friend	$40,000
Jetski	$2,000
Subtotal	$30,301,531
Addbacks	$517,934
M Executive Superannuation	$2,142,122
Subtotal	$2,660,056
Total Assets	**$32,961,587**
Less	
Liabilities	-$1,594,668
Subtotal	$31,366,919
Payment to the wife	-$12,802,462
Total Assets after Adjustment	**$18,564,457**

IS THE OUTCOME JUST AND EQUITABLE?

389. The court must not make an order under s 79 unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

390. The Full Court of the Family Court of Australia in *Manolis & Manolis (No 2)* [2011] FamCAFC 105 considered the relevant provisions of the Act in relation to this fourth step. At paragraphs [65] and [66] the Full Court made the following observations, which I adopt and follow:

> It can be seen that power to make orders in regard to property is not exhausted after the third step. It is not until orders are made that the power is exhausted. The exercise of power pursuant to s 79 of the Act remains subject to the overarching requirement of justice and equity imposed by s 79(2) until it is exhausted…
>
> … The section does however oblige the court to "stand back" from its preliminary determination, and consider its impact. So doing may inform the terms of the orders appropriate to produce a just and equitable outcome in those terms. It may result in a re-consideration of s 79(4) and or s 75(2) factors, and a different outcome. Whatever the scope of s 79(2), the court's determination with respect to it cannot be dependent upon findings or conclusions which are irreconcilable with those recorded in the context of a consideration of s 79(4) or s 75(2)…

391. The High Court of Australia in *Stanford* (supra) commented at [36] on the meaning of "*just and equitable*" as follows:

> The expression "just and equitable" is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definition. It is not possible to chart its metes and bounds.

392. I also take account of the caution expressed in *Stanford* (supra) at [40] that to conclude that making an order is "*just and equitable*" only "*because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act*".

393. I am satisfied the proposed outcome is just and equitable. The marriage was long. I accept the husband will shoulder the burden of ongoing liabilities and costs of realisation of assets, some of which are presently unknown but will be substantial. But the husband's likely enjoyment of the plenitude of the DIT and the DT, the potential of Suburb L, his retention of his business interests, and sources of significant revenue and potential for investment, as well as his substantial superannuation, far exceed the resources of the wife who has no superannuation or earning capacity at the age of 60 years. While the husband made the overwhelming financial contributions during and after the marriage, the wife's non-financial contributions have also been significant. The proposed outcome will see the wife have a home to live in and substantial financial resources to allow significant investment and to generate a future level of income consistent with the parties' standard of living during the marriage,

while the husband will continue to enjoy access to substantial wealth, supporting his standard of living.

394. Since the husband may need time to take the necessary steps to effect a payment of $12,802,462, I consider it reasonable to permit payment to be made in two tranches, the first of $9,000,000 within 45 days, and the balances within 90 days of the date of the Court's orders. Although I have declined to make orders under Part VIIIAA, some security for this payment should be ordered by restraining the husband from dealing with two term deposits except for the purposes of complying with the Court's orders, and until he does so. I accept this of itself does not fully secure the adjustment in favour of the wife, but my findings about the assets of financial resources of the husband show in the event the husband defaults, which I consider unlikely, there will be ample assets available to enforce payment to the wife, if necessary.

395. I will also make orders for the husband to collect his personal property from the Suburb H property.

COSTS

396. Section 117 of the Act sets out that each party shall bear his or her own costs, subject to the considerations in s 117(2) of the Act.

397. 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 something that can only be addressed after judgment has been delivered.

398. The Court proposes to make the orders and directions in relation to any application for costs that might be made as set forth in the orders at the commencement of these reasons.

I certify that the preceding three hundred and ninety eight (398) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Harper delivered on 14 May 2021.

Associate:

Date: 14 May 2021