FAMILY COURT OF AUSTRALIA

Massalski & Riley [2021] FamCAFC 116

Appeal from:	*Massalski & Riley* [2019] FamCA 1013
Appeal number(s):	EAA of 14 of 2020
File number(s):	SYC 496 of 2015
Judgment of:	**RYAN, ALDRIDGE & WATTS JJ**
Date of judgment:	13 July 2021
Catchwords:	**FAMILY LAW** – APPEAL – PROPERTY – Appellant seeks re-transfer of part of proceedings to another court – De facto financial cause – Appeal against property settlement order under s 90SM of the *Family Law Act 1975* (Cth) – Appeal against order to dismiss proceedings transferred to Family Court from the Supreme Court of Victoria – Contributions – Finding that appellant did not have equitable interest in respondent's property upheld – Credibility – Applications to adduce further evidence allowed in part – Appeal dismissed – Orders made for written submissions on costs in appeal.
Legislation:	*Family Law Act 1975* (Cth) Pt VIIIAB, ss 4(1), 31(1), 39A(5), 90RC, 90RD, 90SF, 90SL, 90SM, 90ST, 93A(2) *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic) ss 5(1), 13 Family Law Rules 2004 (Cth) r 4.06
Cases cited:	*Bennett and Bennett* (1991) FLC 92-191; [1990] FamCA 148 *Biltoft and Biltoft* (1995) FLC 92-614; [1995] FamCA 45 *CDJ v VAJ* (1998) 197 CLR 172; [1998] HCA 76 *Christmas v Nicol Bros Pty Ltd* (1941) 41 SR (NSW) 317 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194; [2000] HCA 47 *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1; [2000] FCA 1084 *Dublin, Wicklow & Wexford Railway Co v Slattery* (1878) 3 App Cas 1155 *Gronow v Gronow* (1979) 144 CLR 513; [1979] HCA 63 *House v The King* (1936) 55 CLR 499; [1936] HCA 40

	Kowaliw and Kowaliw (1981) FLC 91-092; [1981] FamCA 70 *Metwally v University of Wollongong* (1985) 60 ALR 68; [1985] HCA 28 *Norbis v Norbis* (1986) 161 CLR 513; [1986] HCA 17 *Trustees of the Property of Cummins (a bankrupt) v Cummins* (2006) 227 CLR 278; [2006] HCA 6
Division:	Appeal Division
Number of paragraphs:	117
Date of hearing:	20 October 2020 & 6 May 2021
Place:	Sydney
The Appellant:	Litigant in person
Counsel for the Respondent:	Mr Coleman SC
Solicitor for the Respondent:	Russell C Byrnes Solicitor

ORDERS

EAA of 14 of 2020
SYC 496 of 2015

APPEAL DIVISION OF THE FAMILY COURT OF AUSTRALIA

BETWEEN: **MS MASSALSKI**
Appellant

AND: **MR RILEY**
Respondent

ORDER MADE BY: **RYAN, ALDRIDGE & WATTS JJ**
DATE OF ORDER: **13 JULY 2021**

THE COURT ORDERS THAT:

1. The Applications in an Appeal to adduce further evidence filed on 16 July 2020 and 26 April 2021 be allowed in part.
2. Other than provided for in Order 1 (above), the Applications in an Appeal filed on 16 July 2020, 12 October 2020 and 26 April 2021 be dismissed.
3. The appeal be dismissed.
4. In the event that a party objects to the question of the costs of the appeal being determined without a further oral hearing, written notice to this effect is to be given to the Appeal Registrar at …@familycourt.gov.au and the other party within seven (7) days.
5. A party who seeks costs in the appeal in addition to those already sought shall:
   (a) file and serve written submissions in support of that application of no more than ten (10) pages (plus details of the amount sought), within fourteen (14) days; and
   (b) if the order for costs is opposed, the party opposing shall file and serve written submissions of no more than ten (10) pages within fourteen (14) days of service of the submissions referred to in the order above; and
   (c) the party seeking costs shall file and serve any submissions in reply of no more than five (5) pages within seven (7) days of service.

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

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

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

REASONS FOR JUDGMENT

RYAN, ALDRIDGE & WATTS JJ:

INTRODUCTION

1 By the Amended Notice of Appeal filed on 16 July 2020, Ms Massalski, the de facto wife ("the wife") appeals orders for the settlement of property made pursuant to s 90SM of the *Family Law Act 1975* (Cth) ("the Act"). The wife and Mr Riley, the de facto husband ("the husband"), who is the respondent to the appeal, were in a de facto relationship which broke down in October 2012 [311]. A dispute then arose between them as to a property settlement, in relation to which the wife sought an adjustment in her favour. With the parties unable to reach an agreement, on 30 January 2015 the wife commenced proceedings in the Family Court of Australia, which invoked its jurisdiction to, relevantly, make declarations about the existence of de facto relationships (s 90RD of the Act) and make orders for the alteration of interests in property and/or related declarations (s 90SM and s 90SL of the Act).

2 Stated broadly, by way of her Initiating Application, the wife sought:

- a declaration pursuant to s 90RD that she and the husband were in a de facto relationship from circa 2005 to October 2013;
- that the husband pay her an amount equivalent to 50 per cent "of the net assets";
- that the husband indemnify her in relation to all debts in the joint names of the parties or in his sole name; and
- that the husband pay the wife's costs of her application.

3 In the event the husband failed to pay the wife the adjusting amount, she proposed orders by way of enforcement which would require that he transfer to her the extent of his interest in a property located in Suburb A, which consisted of two dwellings, one at B Street, Suburb A, and the other at, C Street, Suburb A (collectively "the Suburb A property"). At this juncture it is useful to note that the wife claimed an interest in the Suburb A property, by way of direct financial contribution and/or various equitable remedies**.** Thus, from when the wife commenced proceedings in the Family Court, the parties' interests in the Suburb A property and what adjustment between them, if any, was appropriate taking it into account was in play.

4 By his Response filed on 8 July 2015, the husband conceded the wife's claim that the parties had been in a de facto relationship within the meaning of the Act, and the Court's jurisdiction

and power to make orders and declarations of the type raised by her was invoked. However, he opposed the relief the wife sought, and applied for orders and declarations to the following effect:

- a declaration pursuant to s 90RD that the parties were in a de facto relationship from March 2009 to October 2012;
- that the wife pay him $150,000;
- pending payment of the $150,000, that he be permitted to lodge a caveat over Lot A in a proposed subdivision of F Street, Suburb G ("the F Street property");
- that the wife retain Lot A of the proposed subdivision and he retain Lot B of the F Street property; and
- that the parties otherwise retain property registered in their name or in their exclusive possession.

5 When the trial commenced the issues between the parties had expanded somewhat and the husband had reduced the adjusting amount he sought from the wife to $92,000. The husband still proposed that the parties each receive one of the two lots in the F Street property, and also that he indemnify the wife with respect to the mortgage secured thereon. Furthermore, he sought that the wife pay his costs of the proceedings commenced under the Act (secured upon the wife's interest in the F Street property) and indemnity costs of the proceedings between the parties commenced in the Supreme Court of Victoria ("the Supreme Court") but "cross-vested" to the Family Court ("the transferred claim").

6 The primary judge ordered the husband to pay the wife $18,263.50, dismissed proceedings transferred from the Supreme Court and otherwise made a series of orders designed to give effect to their separate interests in specific property and determined the financial relationship between them. The husband seeks to uphold the orders.

The Supreme Court proceedings

7 Although the transferred claim assumes unjustifiable prominence in the appeal, it needs to be understood that in 2015 the wife lodged caveats against the Suburb A property. More will be said about the Suburb A property and at this stage it is sufficient to note that in 2006, before the parties commenced their de facto relationship, the husband and Mr K, who was married to but at that time separated from the wife, and whose Power of Attorney (in relation to real

estate and banking matters) she held, purchased the Suburb A property as tenants in common in equal shares.

8 The husband and Mr K planned to build two townhouses on the Suburb A property, subdivide and take one each. The husband disputed that the wife was entitled to lodge a caveat and lodged a lapsing notice. In response, on 22 December 2016, the wife commenced proceedings in the Supreme Court against both the husband and Mr K to extend the operation of her caveat and for declarations in relation to ownership of the Suburb A property. As the wife described it, "to establish the existence of an equitable interest in fee simple" by way of constructive trust "in a share proportionate to the [wife's] contribution to the acquisition of the land" (wife's Case Outline Document tendered 1 August 2018).

9 The husband disputed that claim as well and filed a defence and counterclaim. He then applied to transfer the entire proceedings to the Family Court. On 18 August 2017, Riordan J transferred the wife's claim against the husband (but not against Mr K, the second defendant) and the husband's defence to that claim (but not his counterclaim against the wife and Mr K) to the Family Court, to be consolidated with the property settlement proceedings between the husband and the wife then under way. This included the wife's application to extend her caveat. Costs in the transferred claim commenced by the wife were reserved as costs in the transferred cause. These are the Supreme Court proceedings in relation to which the husband sought his costs.

10 By that stage, the wife and Mr K were agreed that the wife had a five per cent interest in Mr K's share of the Suburb A property and a declaration of trust was made to this effect. Thus, it was further ordered that the wife's claim against Mr K in the Supreme Court be dismissed with no order as to costs. Mr K was thus not a party to the transferred claim.

11 Thereafter the proceedings in the Supreme Court continued as if commenced by the husband's counterclaim against the wife and Mr K. In so far as the counterclaim concerned the wife, the husband sought:

- a declaration that the wife had no estate or interest in the land;
- an order that the wife's caveat lapse;
- an order that the Registrar of Titles amend the register accordingly; and
- costs.

12 Given that the wife's application to extend the caveat and claim an equitable interest in the husband's share of the Suburb A property was transferred to the Family Court, it is tolerably clear that the failure to include in the transfer order that portion of the husband's counterclaim, which dealt with the same issue, was an oversight. Although the wife sees this as creating an opportunity to have the Supreme Court reconsider the nature and extent of her interest in the husband's interest in the Suburb A property, it does not.

13 Returning to the counterclaim, in so far as the husband sought orders against Mr K, as the trial reasons record:

> 61. On 5 October 2017, [the husband] and Mr K signed consent orders in respect to those Supreme Court of Victoria proceedings which, among other things, provided for the two (2) Units that had been built on the Suburb A property to be partitioned such that each of the Units have a separate address one address being B Street and the other address being C Street. The [husband] also agreed to indemnify Mr K in respect to the guarantee Mr K had provided in relation to the husband's portion of a $600,000 loan he and Mr K had obtained in order to develop the Suburb A property.
>
> (Footnote omitted)

14 So that it is clear, Mr K would retain one dwelling (C Street) of the Suburb A property and the husband would retain the other dwelling (B Street) of the Suburb A property. The case then proceeded before the primary judge on the basis that the wife's interest in Mr K's share in the Suburb A property was known, there was no issue requiring court intervention between the husband and Mr K as to their respective interests in that property, and it was for the primary judge to determine how the husband's legal interest in that property should be adjusted between the parties, which is what occurred.

15 By the wife's Applications in an Appeal filed 16 July 2020 and 26 April 2021, we received unopposed further evidence in the appeal (orders and reasons for judgment) which revealed that after the primary judge gave judgment, it was discovered that the consent orders between the husband and Mr K had not been perfected. Mr K then withdrew his consent to the orders and proceedings are under way in the Supreme Court as to that and related issues. The wife contended that this justified the bifurcation of this appeal so that the issues related to the Suburb A property (Ground I) be dealt with first. Assuming success on Ground I, the wife proposed that the remainder of the appeal be adjourned pending the Supreme Court's determination of the dispute between the husband and Mr K (wife's Application in an Appeal filed 12 October 2020).

16 The appeal would then resume with this Court presented with the outcome of those proceedings. We declined to bifurcate the appeal. As there is no suggestion that Mr K proposes that the husband receives a greater entitlement to the Suburb A property than is provided for in the unperfected consent orders, and the husband seeks no more than the previously agreed amount, the outcome of those proceedings is irrelevant to this appeal. That alone is sufficient reason for the bifurcation application to be dismissed. Considerations of costs, finality and delay demanded the same outcome.

17 Notwithstanding our decision to not bifurcate the appeal, by her Application in an Appeal filed on 26 April 2021, the wife presented another application which sought orders designed to have the transferred claims transferred from the Supreme Court to the Family Court transferred back to the Supreme Court and joined with the action between the husband and Mr K (to which she apparently seeks to be a party). Conscious that no appeal lies against the transfer order (s 13 of the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Vic) ("*Victorian Cross-vesting Act*"), the wife also sought a declaration that because the transferred claims were invalidly transferred, the primary judge's decision in relation to the transferred proceedings is "ineffective". Having disavowed that in reality the application is for leave to add an additional ground of appeal, the wife was either unwilling or unable to identify the provision on which she relied for the relief sought.

18 As the facts recorded above amply demonstrate, the proceedings between the wife and the husband as to the wife's claim to an interest in his share of the Suburb A property are a "de facto financial cause" and within this Court's original and exclusive jurisdiction (s 31(1)(aa) and a 39A(5) of the Act).

19 Relevantly, paragraph (c) of the definition of "de facto financial cause" in s 4(1) of the Act, provides that the meaning of "de facto financial cause" includes:

> …
>
> (c) proceedings between the parties to a de facto relationship with respect to the distribution, after the breakdown of the de facto relationship, of the property of the parties or either of them[.]

20 Section 90RC of the Act deals with the relationship between State and Territory laws and applications to which the de facto financial provisions under the Act apply. Section 90RC(2) provides:

> …

State and Territory laws do not apply to financial matters

(2) Parliament intends that the de facto financial provisions are to apply to the exclusion of any law of a State or Territory to the extent that the law:

(a) deals with financial matters relating to the parties to de facto relationships arising out of the breakdown of those de facto relationships; and

(b) deals with those matters by referring expressly to de facto relationships (regardless of how the State or Territory law describes those relationships).

(Notes omitted)

21 Although there can be no serious question that, in the exercise of its original jurisdiction the Family Court has power to order the wife to remove her caveat, the Court's accrued jurisdiction filled any suggested gap.

22 Given that the wife had already commenced proceedings in this Court for the orders outlined above, perhaps other than the extension of her caveat, the wife's action in the Supreme Court against the husband was an abuse of that Court's process. Be that as it may, the order transferring the proceedings was no more than a conventional application of the *Victorian Cross-vesting Act* and to simply transfer federal proceedings (and the related issue concerning the wife's caveat) to a federal court (the Family Court).

23 As s 5(1) of the *Victorian Cross-vesting Act* provides:

5 Transfer of proceedings

(1) Where—

(a) a proceeding (in this subsection referred to as the *relevant proceeding*) is pending in the Supreme Court; and

(b) it appears to the Supreme Court that—

(ii) having regard to—

(A) whether, in the opinion of the Supreme Court, apart from any law of the Commonwealth or another State relating to cross-vesting of jurisdiction and apart from any accrued jurisdiction of the Federal Court or the Family Court, the relevant proceeding or a substantial part of the relevant proceeding would have been incapable of being instituted in the Supreme Court and capable of being instituted in the Federal Court or the Family Court;

(B) the extent to which, in the opinion of the Supreme Court, the matters for determination in the relevant proceedings are matters arising under or involving

> questions as to the application, interpretation or validity of a law of the Commonwealth and not within the jurisdiction of the Supreme Court apart from this Act and any law of the Commonwealth or another State relating to cross-vesting of jurisdiction; and
>
> (C) the interests of justice—
>
> it is more appropriate that the relevant proceedings be determined by the Federal Court or the Family Court, as the case may be—
>
> the Supreme Court shall transfer the relevant proceeding to the Federal Court or the Family Court, as the case may be.
>
> (Emphasis in original)

24 The word "shall" should be emphasised. For completeness, even if it assumed this Court had the power to transfer the proceedings, could issue the declaration sought and transfer the proceedings back, the contentions on which the wife relies are devoid of merit and this application too will be dismissed.

25 Although the wife did not take the point in the court below, her argument that the transfer order was made in breach of r 4.06 of the Family Law Rules 2004 (Cth) is misconceived. Rule 4.06 is invoked where a party seeks to rely on a cross-vesting law instituted in, or already commenced, in the Family Court. It had no application in the Supreme Court.

26 For clarity, the balance of the documents the wife sought to have admitted as further evidence in the appeal have not been admitted. The power to admit further evidence is constrained and as governed by s 93A(2) of the Act. In *CDJ v VAJ* (1998) 197 CLR 172 at 201, the plurality explained that the principle purpose of this provision is to admit further evidence which, if accepted, would demonstrate that the order under appeal is erroneous. This is the purpose of the wife's application for its admission. The proposed evidence does not do so and its admission would impermissibly blur the distinction between the exercise of this Court's original and appellate jurisdiction. Thus, other than as already provided, the application to adduce further evidence in the appeal will be dismissed.

The reasons for judgment

27 Given the issues raised in the appeal, including the challenge to the adequacy of the trial reasons, it is appropriate to set out their key components.

28 The primary judge made damning findings about the integrity of the wife's and Mr K's evidence. Having regard to the trial transcript, it is easy to understand why these go unchallenged in the appeal. The primary judge was satisfied that the wife deliberately failed to fulfil her obligation of disclosure [89] which meant that it was not possible to determine her assets and liabilities [90]. Furthermore, the wife had paid a substantial amount to Mr K and she failed to disclose investments held jointly with him [90]. As the findings at [91]–[98] and [104]–[109] record, her non-disclosure was material and not an isolated occurrence. For example, the wife failed to produce evidence of her income earned as an employee of the New South Wales Government and had not completed any tax returns since 2002 [105]. She failed to disclose income received from renting out a unit at Suburb G and had not declared, for taxation purposes, income she received from a business [106]. Documents provided by the wife were misleading [109] and her evidence was variously non responsive and caused the primary judge to conclude she was "an unimpressive witness" [103].

29 The primary judge noticed obvious inconsistencies in the evidence given by Mr K and his failure to produce documents in relation to significant transactions [113].

30 The husband on the other hand, was a credible witness and the submission by the wife that the primary judge would find the husband had acted dishonestly and attempted to mislead the Court was rejected [130]. Thus, wherever there was a conflict in the evidence of the wife and the husband or Mr K and the husband, absent evidence supported by independent documentation, the primary judge accepted the evidence given by the husband. Unsurprisingly, various tables and schedules of payments that the wife provided, including in her trial affidavits, were not regarded as independent.

31 Another consequence of the lack of reliable evidence given by the wife and Mr K (which is unaffected by the challenge to the finding as to the husband's credibility), is that the primary judge determined:

> 99. …that it would be unsafe to consider making an adjustment of any property of the parties other than where there is a reasonable degree of certainty regarding the value of that property and the contributions of the parties to that property. The property that I identify as being in that category, are the following;
>
> a) [the F Street property];
>
> b) [the Suburb A property];
>
> c) the property of the late Mr P Riley at the Suburb J property;

> d) the property that [the husband] currently resides in with his present wife at D Street Suburb E ("the Suburb E property").
>
> 100. In that respect, I have not included in the assessment, the proceeds of the sale that [the wife] received from selling her Unit in the W Street Complex at Suburb G. This is because I am not satisfied that [the wife] has acted appropriately in deducting monies that she has from the proceeds of sale including in transferring substantial sums of money to Mr K. The fact that I have not included that property has been a factor relevant to the exercise of my discretion in determining that it would not be appropriate to make an adjustment in respect to the proceeds of sale received by [the husband] in respect to the Suburb J property. As a related matter, I have not made an adjustment in respect to the Suburb E property which [the husband] purchased with his current wife from the proceeds of the sale of the Suburb J property.

32 For the same reason, the parties' superannuation interests were excluded because his Honour had "no confidence" that the wife had accurately disclosed hers and thus it would be unfair to take into account superannuation interests disclosed by the husband [101].

33 After the primary judge summarised the evidence in exquisite detail, he concluded that the parties were in a de facto relationship from March 2009 to October 2012 [310]–[311] and was satisfied that it was just and equitable to make an order for the alteration of the parties' property interests [315].

34 The primary judge then considered whether to adopt a global or asset-by-asset approach to the assessment of contributions. This was a discretionary determination and, by reference to the short duration of the parties' relationship, their having maintained separate financial affairs and a clear division of personal investments, an asset-by-asset approach was understandably adopted (see *Norbis v Norbis* (1986) 161 CLR 355). As the primary judge explained:

> 339. In this matter, I am satisfied that the nature and quality of the parties contributions to the F Street property is significantly different from the nature and quality of the parties contributions to both the Suburb A property and Suburb J property and, by extension, the property at D Street, Suburb E. It is also relevant that the proceeds of the sale of the Suburb J property were received after the end of the parties' relationship.
>
> (As per original)

35 Although there is no ground of appeal addressed to this decision, the wife said the approach resulted in an unjust outcome vis-à-vis her claim against the Suburb J and Suburb E properties (wife's Summary of Argument filed 16 July 2020, paragraph 52). Appeals are not so undisciplined that parties can be permitted to stray far from their grounds. To proceed otherwise would be procedurally unfair to other parties. However, and although the wife was

not given leave to agitate the point, given the pernickety approach she adopted to the trial reasons and trial record, and the volume of litigation commenced by her, it is appropriate to record that the argument against the asset-by-asset approach cannot be sustained.

36 The primary judge then examined the parties' interests in the Suburb A, F Street, Suburb J and Suburb E properties and specifically, the wife's contention that she has an equitable interest in those properties (in addition to her legal interest in the F Street property).

The Suburb A property

37 According to the wife, she located and brokered the deal which saw the husband and Mr K buy the Suburb A property [175]. The property was purchased for $300,000 [179] in relation to which the registered owners each paid one half of the deposit [176]. The wife's contention that the husband purchased or intended to purchase this property jointly for them both was not established, in relation to which the primary judge took into account that the purchase occurred some three years before the parties started living together [178]. It was uncontroversial that the husband (alone) borrowed $135,000 from the Commonwealth Bank to fund his share of the balance of the purchase price [475]. In due course, the husband and Mr K obtained a construction loan of $660,000 which was used to build two townhouses on the property [26]. In other words, the wife did not pay anything towards the acquisition of this property.

38 As the primary judge correctly recorded, the wife did not contend in her trial affidavits that she made a direct financial contribution to the construction of the houses, other than minor expenses associated with the development [533]. To the extent she subsequently did so, she provided no documents which substantiated her direct financial contributions to the construction of the homes and gave no plausible explanation for her failure to do so [533]. As a consequence, the submission by senior counsel for the husband, that "…the absence of any financial records in support of her claims speaks decisively against [the wife] having made such [payments]", was accepted [534]. It is convenient to note here that, in the absence of documentary proof, the primary judge was not satisfied that some $6,000 was paid from the mortgage secured against the F Street property to pay construction costs for the Suburb A property [245].

39 Notably, the primary judge was unable to differentiate between the contributions the wife made to this property on behalf of the husband from those which she made on behalf of Mr K [535]–[536], including her "overstated" role in respect of the development of the property

[541] and [545] and securing title to what was termed "the revenge strip" [544]. This is reference to a small strip of land adjoining the B Street-perimeter of the Suburb A property, which was ultimately acquired by the husband and Mr K and enabled a separate entrance to that of the C Street-perimeter of the Suburb A property to be created [13] [544]. It was common ground that the second street access increased the property's value [547] but to what extent was neither agreed nor established.

40 Between paragraphs [362] and [409], the primary judge considered the wife's claim to an equitable interest in the husband's share of the Suburb A property. Having correctly stated the relevant principles, and stated broadly, his Honour rejected her claims [361] because:

(a) In relation to various representations the wife said the husband made:

(i) there was no evidence of the contention (see discussion of "The 2003 Riley Representations" [385] and "The 2005 Riley Representations" [395]);

(ii) the husband's evidence was preferred ("The Ongoing Riley Representations" [377] and "Suburb A Construction Loan Promise" [396]);

(iii) the evidence relied on was ambiguous and inconsistent with other evidence ("2005 Suburb A Ownership Promise" [389]); and

(iv) the lack of evidence that the wife's work to secure the revenge strip was undertaken on the condition that she and the husband would own and occupy the C Street dwelling on the Suburb A property ("Suburb A Construction Management Promise" [393]);

(b) In relation to her claim of a resulting trust, the wife failed to establish she contributed any funds towards the purchase of this property and, in so far as she relied on the revenge strip transaction, this post-dated its purchase [404]; and

(c) In relation to her claim that an express trust equivalent to a 50 per cent share of the value of the husband's interest in the property had been created, the evidence was inconsistent and it was implausible that the wife would have then agreed to a proposal that she had a 10 per cent interest in the same property ("Consideration – Express Trust Suburb A" [406]).

41 The primary judge having determined there was no factual or legal basis for the wife's claim to an equitable interest of any type, her claim transferred from the Supreme Court (the

transferred claim), was dismissed [409] and an adjustment was made (as the husband conceded it could be) pursuant to s 90SM of the Act [407]–[408].

The F Street property

42 The F Street property was considered next. By way of background, in December 2008 the parties purchased land at F Street with a view to construction of two townhouses, which have since been built. There was no dispute that the parties agreed they would contribute equally to the acquisition of the land and construction costs [480]. The land was purchased for $330,000 as tenants in common in equal shares. To fund the purchase, the wife borrowed $165,000 from Mr K and the husband borrowed $182,000 from his father, Mr P Riley (as per a deed of agreement dated 19 June 2008 [18], [29]). The husband borrowed $260,000 from the Commonwealth Bank to finance his share of the construction costs [482(g)]. According to him, the bank required the wife to be a party to the mortgage which is what occurred [33]. The wife said the loan was jointly held, which the parties intended to repay from rental income generated from the husband's father's home at Suburb J [33]. As we will record in the discussion of the Suburb J property, the primary judge was not satisfied there was an agreement between the parties as to the rental income [234]–[235] and it was established that the husband alone paid the mortgage [482(h)]. As to her share of the construction costs and to also repay Mr K, in 2010 the wife sold her property at M Street, Suburb G for $377,000, which she owned before the parties commenced cohabitation [219]–[220].

43 The wife retained possession of and continued to occupy Unit A of the F Street property and the husband retained Unit B [17]. Between December 2010 and October 2012, the husband's father lived in Unit B while the parties lived together in Unit A [24]. In late 2012 (when the parties separated) the husband moved to Unit B with his father, until his father entered a nursing home in January 2014 at which time the husband also moved out [28].

44 Between [410] and [425] the primary judge determined that:

- The wife's evidence concerning the husband's representation to her, of an inheritance from his aunt, was internally inconsistent and incapable of establishing misrepresentation by the husband [414]; and
- The wife failed to provide documents to establish her claim that the husband withheld $40,000 from the Commonwealth Bank loan which was to be applied to the

construction loan [415] and to establish that they had agreed they could acquire and develop this property without borrowed funds [422].

45 Hence his Honour concluded:

> 423. I am satisfied that the parties have both contributed approximately half of the purchase price to acquire the F Street property and to construct the townhouses on that land, in accordance with the agreement between the [parties]. The evidence establishes that, with the assistance of funds provided by Mr K, [the wife] financed her share of the development of the townhouses on the property and [the husband] financed his share from the inheritance he received from his Aunt together with funds which were borrowed from the Commonwealth Bank. While the mortgage that secured the funds so borrowed from the Commonwealth Bank was in the joint names of the [parties], who were registered joint owners of the F Street property, it is not disputed that it is [the husband], alone, who has exclusively serviced that loan since it was taken out.

46 Thus the wife's claim to an equitable interest in the F Street property (as detailed at [410]) over and above her legal interest failed. Although, for other reasons which we will shortly discuss, a slight adjustment in her favour pursuant to s 90SM would have been appropriate, other factors militated against doing so [425].

The Suburb J property

47 The Suburb J property was considered next. Again, stated broadly, the wife claimed an interest in this property by way of a constructive trust which she sought to trace via funds used by the husband from its sale towards the acquisition of the Suburb E property. Furthermore, to also establish an interest in the Suburb A property. As has already been mentioned, the Suburb J property was owned by the husband's father. After the husband's father moved into Unit B of the F Street property, by agreement with the husband's father, the husband rented the Suburb J property [168] and retained the rent [234], which he put towards the mortgages secured over the Suburb A and F Street properties [441].

48 With his father's consent, in 2014 which was well after both parties agree their relationship ended, the husband sold the Suburb J property for $1.436 million, with the net proceeds of sale being given to the husband [37] [521]. Following the husband's father's death in June 2015, the husband used his superannuation to repay his father's estate $182,000 [48] [556].

49 The primary judge:

- Rejected the wife's conclusive statement that the husband agreed to share the rent with her as a contribution to the Suburb A property [233]–[235];

- Rejected the wife's contention that when the husband's father moved into Unit B at the F Street property, the Suburb J property became part of the parties' shared property [343];
- Accepted the husband's evidence that the Suburb J property was rented out to avoid distressing his father by its sale [346];
- Found there was no causal connection between the wife's decision to sell her Suburb G property and the husband and his father's decision to rent rather than sell the Suburb J property, or that her sale preserved the Suburb J property [237];
- Rejected that the wife's evidence, as to the various asserted promises and representations, provided any rational basis for a reasonable person to believe they would gain a 50 per cent interest in the Suburb J property [433], [435], [437], [443];
- Accepted that by allowing the husband's father to live in Unit B of the F Street property, the wife allowed the husband to obtain the benefit of rental income earned from the Suburb J property [348]; and
- Concluded that the wife's claims in reliance of common intention and her beliefs were not supported by reliable evidence [445].

50 Accordingly, the wife's claim to an equitable interest in the Suburb J property failed. Furthermore, in the absence of evidence of detriment there was no basis for compensation. Finally she had no interest traceable into the Suburb E property [449] or, as we said earlier, to the Suburb A property.

The Suburb E property

51 Not a great deal needs to be said about the Suburb E property, but for completeness, the husband with his subsequent partner purchased the property in 2015 for $1.32 million paid in part from the proceeds of sale of the Suburb J property [530]. The husband borrowed $300,000 for renovations to that property [451].

Liabilities

52 Having determined that the parties' equitable interests in their respective properties were at home with their legal interests, the primary judge turned his attention to the parties' liabilities, particularly unsecured liabilities, and whether they should be taken into account in determining what adjustment between the parties, if any, would be appropriate. Relevantly, the wife was unable to particularise a debt she claimed she owed Mr K. By reference to cases

such as *Biltoft and Biltoft* (1995) FLC 92-614 and, there being no evidence from the wife as to the basis upon which she was legally required to repay Mr K [463], this and the other debts of the wife were not included in the balance sheet [466]. For consistency, nor were the husband's [468]. Albeit that the husband would take responsibility for the F Street property mortgage, the husband's submission that the parties' liabilities would fall where they lay without further adjustment was accepted [468].

Contributions

53 With the property pool determined as best it could be, the parties' contributions as defined by s 90SM of the Act were evaluated.

54 Whilst living together the parties maintained separate financial lives [472]. They did not have joint accounts (save the wife was a party to the mortgage the husband obtained over the F Street property and which he serviced). The primary judge found that "paradoxically…[the wife] retained much closer financial ties with…Mr K" with whom she maintained joint accounts [472]. At the commencement of cohabitation, both parties owned property and had superannuation. In relation to those initial contributions, "[n]either party argued that their initial contributions to the property of the parties was superior to that of the other" [478].

55 The parties' direct financial contributions to the F Street property were considered first and the dispute as to which of them paid slightly more than the intended equal contribution to the construction costs was resolved in favour of the husband. He paid $20,000 more than the wife [487]. That finding is underpinned by the following:

> 481. In considering the parties respective contentions, it is significant that, on 26 December 2013, the [wife] sent an email to the [husband] in which she stated:
>
> > As we were not keeping records of expenditure related [to] the construction of a house in Suburb G in the early stage when I paid cash I accepted based on rough estimates that you might have spent some $20,000 more than I have for the construction of 2 Units in F Street
>
> 482. Under cross examination, the [wife] refused to accept that the contents of that email sent on 26 December 2013 represented her understanding of the situation as at that point in time. Nevertheless, when the contributions were broken down the [wife] agreed as follows:
>
> (a) In respect to the purchase price of the land being a total of $330,000 that she contributed $165,000.
>
> (b) The [wife] acknowledged that the [husband] borrowed $182,000 from his father, the late Mr P Riley, in order to purchase his half

share of the F Street property.

(c) Despite some prevarication, the [wife] did not dispute the fact that the [husband] subsequently repaid his father that amount by drawing against his superannuation.

(d) The [wife] agreed that she contributed the amount of $245,000 towards the construction of the townhouses at the F Street property.

(e) The [wife] agreed that the [husband] contributed $20,000 from inheritance he received from his Aunt towards the construction of the townhouses.

(f) The [wife] further agreed that the [husband] contributed an additional $50,000 from cash in his possession.

(g) The [wife] further acknowledged that the [husband] took out a loan in the sum of $260,000 from the Commonwealth Bank, albeit with that loan being in the joint names of the [parties].

(h) The [wife] acknowledged that, in the period prior to Unit B at the F Street property being rented out in June 2016, the [husband] made all repayments in respect to the loan of $260,000 from the Commonwealth Bank despite the fact that the loan was in the parties' joint names.

…

484. I have determined that the email which was sent by the [wife], at a time that was contemporaneous with the conclusion of the construction of the F Street town houses, is more likely to be accurate than the [wife's] subsequent recollection in the context of these contested proceedings.

(As per the original) (Footnotes omitted)

56 Furthermore, the husband's evidence that he spent the total sum borrowed from the Commonwealth Bank for the construction of the F Street property was accepted [489] and the wife's submission that, but for Mr K's loan to the wife, the F Street development would not have been undertaken was pure speculation [490]. Both parties were involved in overseeing construction of the town houses but the husband, as the registered owner-builder took seven months off work to oversee the project [494] and in this respect his contribution was greater than the wife's [495].

57 The wife conceded that during the period the parties were in a de facto relationship there was a "roughly equal sharing of the day-to-day activities associated with living together and running a household" [493]. The wife's role in checking on the husband's father while he lived in Unit B was recognised [499] and, given that he occupied the unit rent free, the primary judge calculated rent forgone during the period of rent free occupation. By reference

to current market rental, the parties forwent $85,800 in rent which equated to an indirect contribution by the wife of $43,000 [502].

58 Otherwise, there was a period when the wife had the benefit of Unit A without paying rent but the husband did not receive rent for Unit B. Weighing in favour of the wife, was the fact that she agreed to be a party to the Commonwealth Bank loan taken by the husband for construction costs which was to his benefit [505]. Relevantly, the wife withdrew $25,000 (in March 2014) from the Commonwealth Bank account without the husband's consent or an explanation [509]. With interest taken into account, she had the benefit of approximately $31,500 [510]. Her refusal to cooperate in renting Unit B until ordered to do so, cost the husband $71,500 in lost rent [511].

59 For these reasons, the primary judge determined:

> 512. Having regard to those two (2) matters, that is, the $25,000 withdrawn by the [wife] from the Commonwealth Bank account, to which I have referred, together with her failure to facilitate Unit B being rented out for a period of approximately two and a half (2 ½) years, I have determined that it would not be just and equitable, in terms of s 90SM(3) of the Act, for there to be an adjustment in favour of the [wife] in respect to the [F Street property].

60 The wife made minor contributions to the Suburb J property which, relevantly, was owned by the husband's father and not the husband. Various other contentions of what was said to be a contribution by the wife were considered and rejected [523]–[525]. The primary judge continued:

> 526. Finally, in determining that there should be no adjustment made in respect to the Suburb J property or in respect to the proceeds of sale of that property or in respect to the property at D Street, Suburb E, which was purchased with the proceeds of sale of the Suburb J property, I have also had regard to the fact that I have not made an adjustment in respect to the proceeds of sale which the [wife] received from her Unit in the W Street Complex. For reasons set out above, I have not made such an adjustment in respect to the W Street Complex property, or more accurately the proceeds of sale of that property, because, as a result of the nondisclosure by the [wife]. Specifically I am not satisfied that the [wife] has acted appropriately in deducting monies from the proceeds of sale of that property including in respect to the substantial amounts that she has paid to Mr K.
>
> 527. Accordingly, for these reasons, I have determined that, in the exercise of my discretion, it would not be just and equitable for there to be any adjustment of the parties property, in respect to the proceeds of sale of the Suburb J property, having regard to the circumstances in which the [husband] acquired the proceeds of the sale of that property.

61 Furthermore:

> 532. For reasons which I have set out, I have determined that it would not be just and equitable to make any adjustment in respect to the proceeds of sale of the Suburb J property having regard to the circumstances in which the [husband] acquired the proceeds of the sale of the Suburb J property, which was by way of a gift after the termination of the parties' relationship. In the exercise of my discretion, I similarly determine that it would not be just and equitable for there to be any adjustment of the parties' property having regard to the circumstances in which the [husband] acquired, with his current partner, [the Suburb E property].

62 It is not necessary to repeat findings made in relation to the acquisition and development of the Suburb A property and sufficient to observe that the primary judge accepted that the wife provided some assistance (to the husband and also Mr K) in the development of this property, including in relation to the "revenge strip" which added value to the property [547]. Of these contributions the primary judge said:

> 548. I note that the [wife] has reached agreement with Mr K that the services she provided in respect to the development of the Suburb A property entitle her to a 5% interest in his share of the property. While the exercise of assessing contributions "inevitably involves value judgments and matters of impression", and accordingly it cannot be treated as "a mathematical exercise," I have assessed that it is appropriate and just and equitable to value the contribution the [wife] made to the development of the Suburb A property as also being equivalent to 5% of the net value of the [husband's] interest in that property. To avoid doubt, the net value, is, for the purpose of this decision, the value estimated by the single expert who has provided a report in these proceedings less the amount of the loan that the [husband] has secured against the Suburb A property.

(As per the original) (Footnote omitted)

63 By the conventional application of established principles in relation to "add backs" (see *Kowaliw and Kowaliw* (1981) FLC 91-092), the primary judge refused to, in effect, treat certain monies as the husband's notional property or to include asserted losses the wife claimed by reason of her decision to sell various of her properties. As to the transactions undertaken by the husband, these were not "reckless" or inappropriate [550]–[551]. In relation to the wife's sales, the wife provided no evidence of lost capital growth and failed to establish that the husband had any role in her decisions to sell [544]. As the primary judge observed, the wife failed to establish how expenditure she incurred with respect of the F Street property in 2013 influenced her decision to sell her unit in the W Street Complex in January 2018, which was long after the parties separated [582].

64 Section 90SF of the Act was considered next, the effect of which was there was no basis for an adjustment to the outcome that resulted from the assessment of the parties' contributions [557]–[588].

65 Thus, in determining that the husband should pay the wife $18,263.50, it can be seen that the pivotal findings were:

(a) Neither party claimed to have made a greater initial contribution;

(b) Having regard to the wife's failure to give full and frank disclosure, it was not appropriate to include the items of property identified at paragraphs [100] and [101] of the trial reasons;

(c) For the same reasons, liabilities the wife claimed she owed to Mr K were not accepted [463]–[465] and thus (subject to the F Street mortgage) liabilities would fall where they lay;

(d) The parties lived together for some three and a half years and did not pool their finances;

(e) The husband made slightly greater financial and non-financial contributions to the F Street properties;

(f) In addition to her financial contributions to the F Street properties, the wife contributed through permitting the husband's father to occupy Unit B which gave the husband access to the Suburb J property rent and as, a party to the mortgage raised to fund the husband's share of its construction costs;

(g) However, the wife withdrew funds from the F Street mortgage which she kept, she refused to cooperate with the husband to rent Unit B at a time when she had exclusive use of Unit A and she did not fully disclose her financial circumstances and an adjustment against that property would not be just and equitable;

(h) No adjustment was made in relation to the wife's sale of the W Street complex unit or the husband's receipt of property from his father, all of which occurred after the parties separated and an adjustment in relation to those properties would not be just and equitable;

(i) The wife made a small contribution to the husband's interest in the Suburb A property evaluated as being equivalent to five per cent of the net value of the [husband's] interest in that property which accords with the agreement reached between the wife and Mr K concerning her contributions to his interests on that property; and

(j) Section 90SF factors did not justify any further adjustment.

THE GROUNDS OF APPEAL

66 It needs to be understood that this is an appeal against the exercise of discretion to be determined in accordance with the principles set out in *House v The King* (1936) 55 CLR 499. A different view by an appellate court only on matters of weight by no means justifies a reversal of a decision of the primary judge (*Gronow v Gronow* (1979) 144 CLR 513 at 519). As has already been demonstrated, the primary judge considered the wife's contentions and explained why they did not find favour.

67 The wife grouped the grounds of appeal under four broad concepts, namely:

- the duration of the relationship (Grounds IIC and 8);
- in relation to the transferred proceedings and dismissing the wife's claim (Grounds IA, IB and ID);
- in relation to the orders made under Pt VIIIAB of the Act (Grounds IC, IIA, IIB and IIE) and
- in finding the husband to be a credible witness (Ground IID).

68 Before the grounds are discussed in detail, it is appropriate to consider the wife's complaints about the conduct of the trial. Given that her arguments as to a denial of procedural fairness went much further than even the most generous reading of the grounds on this point might tolerate, strictly speaking the argument need not be addressed at all. However, as they can be dealt with in short compass we will. Apparently the wife's counsel became unwell and thus the wife applied to adjourn the trial which was listed to commence on 30 July 2018. By order dated 27 July 2018, the primary judge granted an adjournment so that the trial would not commence until 1 August 2018. However, on the adjourned date counsel was still unavailable and the wife made another application to adjourn the trial. On this occasion her request for an adjournment failed and the trial commenced with the wife being unrepresented. After two days, the hearing was adjourned part heard and when it was resumed some months later the wife was represented by counsel. As was the case when it was unable to be completed within this period and it was again adjourned part heard.

69 The trial transcript shows that while the wife was unrepresented, the primary judge considered procedural matters and the wife and Mr K were cross-examined. As we will discuss later, after counsel for the wife joined the hearing, the primary judge commented favourably on the suggestion that the wife might be recalled. As it transpired she was not

recalled. Furthermore, given that upon the wife being represented, the trial continued on and off for a few months, if there was procedural unfairness occasioned to the wife during the period when she was unrepresented, the opportunity for counsel and the wife to address the issue before the case closed had not been taken. Again, recourse to the trial record shows that counsel for the wife did not raise any procedural unfairness issues with the primary judge and, for example, there was no application to strike out evidence adduced in cross-examination. Given that the approach adopted by the primary judge and counsel for the husband was entirely orthodox, no criticism is or could properly be made of the approach adopted by counsel for the wife. However, the point not having been raised below, it cannot be raised now. In any event, the trial was not unfair to the wife.

Are the reasons for judgment adequate?

70 The authorities with respect to adequacy of reasons are well known and settled (*Bennett and Bennett* (1991) FLC 92-191). The question as to adequacy depends upon the circumstance of the case. A judge's reasons will be inadequate if this Court is unable to discern from those reasons the foundation for the ultimate decision or if it appears that justice has not been seen to be done.

71 An overview of the trial reasons has already been given. By reference to that exercise, it is clear that the primary judge understood the facts, the case presented by the wife and the principles by which the case should be decided. The trial reasons explain why the transferred claim proceedings would be dismissed and, by way of an adjustment to the parties' property under Pt VIIIAB of the Act, the husband should pay the wife $18,263.50. In so far as Ground IC is a challenge to the calculation of this amount, it is correctly quantified at paragraph [595]. Senior counsel for the husband's description of the trial reasons as "meticulous" is apt and there is no doubt that the primary judge amply explained why the justiciable controversies were resolved as they were.

72 The challenge to the finding concerning the date of separation is also mounted as a reasons challenge. The gravamen of the wife's challenge is that:

> 46. The date of the cessation of the relationship was disputed and the Trial judge did not provide explanation why he accepted the date proposed by the [husband], being October 2012 where in the examination the [husband] confirmed that he removed his belongings from the *Unit A* in December 2013.
>
> (Wife's Summary of Argument filed 16 July 2020, p.13) (Footnotes omitted)

73 The wife in her Summary of Argument relied on the trial transcript of 25 January 2019 (stated incorrectly as 26 January 2019), pages 48 to 50, to establish the proposition that the husband gave evidence that he removed his belongings from Unit A in December 2013. Examination of the trial transcript establishes that the wife's submission misstates the facts. In cross-examination by counsel for the wife, the husband gave evidence that:

> [COUNSEL FOR THE WIFE]: And you were living in the front unit with [the wife]; is that right?---
>
> [THE HUSBAND]: For a period of time, yes.
>
> [COUNSEL FOR THE WIFE]: Yes. So when did you move out of the front unit?---
>
> [THE HUSBAND]: It would have been around September/October of 2012.
>
> [COUNSEL FOR THE WIFE]: Right. Okay. And where did you go then?---
>
> [THE HUSBAND]: I moved all of my clothing, possessions and moved upstairs in the second unit where my father was not living because he couldn't negotiate the stairs. So he was living downstairs, and I was living upstairs.
>
> …
>
> [COUNSEL FOR THE WIFE]: But you said in your evidence that you moved out in December 2013?---
>
> [THE HUSBAND]: No, in '12.
>
> [COUNSEL FOR THE WIFE]: December 2012, you said, did you?---
>
> [THE HUSBAND]: No. I said - - -
>
> [COUNSEL FOR THE WIFE]: When did you actually move out?--- - - -
>
> [THE HUSBAND]: September/October 2012 I moved into the back unit.
>
> [COUNSEL FOR THE WIFE]: Into the back unit?---
>
> [THE HUSBAND]: Yes, with my father.
>
> (Transcript 25 January 2019, p.48 lines 30–38; p.51 lines 1–9)

74 The primary judge cannot have erred by failing to accept evidence from the husband that was not given. Regrettably it is necessary to observe that a pattern became apparent during the hearing of the appeal of the wife misstating the facts and the trial reasons. Our attempts to have the wife show bank records were tendered in her case which demonstrated payments by her from an account ending xx2509 to the Suburb A property development is a simple vignette of the point (Appeal Transcript 20 October 2020, p.16–24). Another concerns the wife's submissions that the primary judge failed to give reasons on specific points. When she was taken to the trial reasons which clearly established her proposition was wrong, she failed to concede the point (Appeal Transcript 20 October 2020, p.19 line 26 to p.20 line 16).

75 As has already been identified, the wife's and Mr K's evidence was unreliable and, with the benefit of seeing and hearing the parties give evidence, the primary judge determined that the husband was a reliable witness and made credit findings, which plainly influenced his decision to accept the husband's evidence as to the date of separation [311]. In this respect the appellant has failed to demonstrate that the finding as to the date of separation was not open.

76 However, even if the finding as to the date of separation was not open and, the appellant's evidence that separation occurred some 12 months later should have been accepted, the error would have been immaterial. An additional 12 months cohabitation would have had no effect on the decision to adopt an asset-by-asset approach, to consideration of the equities, or evidence about the parties' financial affairs and contributions.

77 The effect of this is that Grounds 8, IC and IIC have not been made out.

Credibility

78 By Ground IID, the wife asserts that the primary judge erred by deciding the matter adversely to the wife, essentially on the basis of his conclusion that the husband was a credible witness and that such a finding was against the weight of evidence. We have already explained why the reasons component of this challenge will fail. However, for completeness, the wife's assertion that the husband's case prevailed as a consequence of credibility findings cannot be sustained. It is a fundamental principle that a party who asserts facts bears the evidentiary onus or burden of proving them to the requisite standard. As we have already explained, the evidence adduced in the wife's case was internally inconsistent, was undertaken on the basis of conclusions unsupported by evidence and without her providing bank records to support many of her asserted financial contributions. For example, the wife's evidence at paragraphs 163 to 178 of her affidavit filed on 24 July 2018 as to payments made for the Suburb A property construction. Furthermore, pleadings are not evidence; it is the answers to questions and not the question that is evidence and, even if the wife's evidence as to representations and the like had been accepted, the inferences she sought to establish therefrom could not reasonably be sustained.

79 The wife also contended that in concluding the husband's evidence was credible, the primary judge failed to consider evidence from the husband's former wife which was in conflict with that given by the husband. Further she submitted that if the husband's former wife gave evidence that was not "inherently improbable" [132], the finding that the husband was a

credible witness was not available. The focus of this challenge is on evidence by the husband's former wife that in or around March 2014, she had a conversation with the husband as now set out:

> 133. ….
>
> After [the wife] commenced her proceedings against [the husband] in the Family Court, while he stayed in my house in Suburb T in around March 2014, [the husband] asked me a question to this affect:
>
> *"Would you write a statement saying that we were living together all the time and I only had a business relationship with [the wife]? This would help me to defeat her claim against me and I could pay the $100,000 to you?"*
>
> I replied: *"No, [the husband]. I would not perjure myself".*
>
> (Emphasis in original)

80 Of this, the primary judge said:

> 134. During cross-examination, [the husband's former wife] made it clear that she maintained that her recollection that the conversation referred to in paragraph 36 of her Affidavit was accurate. Nevertheless, I note that the conversation referred to occurred some four (4) to five (5) years prior to it being recorded in [the husband's former wife's] Affidavit.
>
> 135. It is also relevant that the conversation was not referred to in the Affidavit that [the husband's former wife] swore in respect to an earlier aspect of these proceedings on 28 October 2015. [The husband's former wife] attested to the omission being as result of the trauma that she experienced at the time of her divorce from [the husband].
>
> 136. Nevertheless, in circumstances where I have found the [husband] to be a credible witness and in circumstances where there was no contemporaneous note made of the conversation referred to in paragraph 36 of [the husband's former wife's] Affidavit, I prefer the evidence of the [husband] that the conversation referred to in paragraph 36 of her Affidavit did not occur as [the husband's former wife] has recorded it.

81 As to the husband's former wife's evidence (at paragraph 35 of her affidavit filed on 30 July 2018) concerning discussions she had with the husband's father about the possible sale of the Suburb J property, the uncontentious fact is that the property was not sold until after the parties separated. In any event, irrespective of any such conversation, as the primary judge said:

> 524. As I have early stated, I accept the [husband's] evidence was that he did not wish to place his father in a nursing home until such time as it was absolutely necessary and the decision to request the [wife] to agree to his father living beside them was not motivated by financial reasons. Further, the [husband's] evidence was that the late Mr P Riley had sufficient funds such that in any event it would not have been necessary to sell the Suburb J property. This

> was confirmed by the fact that the late Mr P Riley was admitted to a nursing home in January 2014 without it being necessary for him to sell his home.
>
> (Footnotes omitted)

82 It is well-established that a judge can accept some parts of a witness's evidence and reject others. In *Dublin, Wicklow & Wexford Railway Co v Slattery* (1878) 3 App Cas 1155 at 1201, Lord Blackburn said:

> The jurors are not bound to believe the evidence of any witness; and they are not bound to believe the whole of the evidence of any witness. They may believe that part of a witness's evidence which makes for the party who calls him, and disbelieve that part of his evidence which makes against the party who calls him …

83 These comments were echoed by Sir Frederick Jordan in *Christmas v Nicol Bros Pty Ltd* (1941) 41 SR (NSW) 317 at 322:

> …it would be for the jury who saw and heard the witnesses to decide whether they accepted their evidence. They were perfectly at liberty to reject the whole of their evidence, or to accept some and reject the rest, however intimately it might be associated with what they accepted, unless there is something to show that reasonable men could not take up such an attitude…
>
> (Footnotes omitted)

84 The point being that a witness may be accepted as credible even if aspects of their evidence is not accepted (see also *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1 at [121]).

85 It follows that the balance of the credibility ground will also fail.

The wife's contributions towards construction of the Suburb A property

86 By Ground IA, the wife contends that the primary judge "[f]ailed to give adequate weight to the contributions towards construction of the [Suburb A property] by the way of pooling resources together". The primary judge did not accept that the parties "pooled" their resources and, as has already been mentioned, determined that the parties "maintained separate financial lives" [472]. To the extent that the wife seeks to bolster her argument by reference to financial contributions recorded at paragraphs 163–170 of her affidavit filed on 31 July 2018 (incorrectly stated as 30 July 2018) (wife's Summary of Argument filed 16 July 2020, paragraph 16), it has already been demonstrated that she did not prove the facts asserted therein. Otherwise, the primary judge said:

> 233. At paragraph 155 of her Affidavit, the [wife] states:
>
> > The rental income from the Suburb J property, which was to be shared between me and the [husband], was fully retained by the [husband]. This income was considered by the [husband] as my

> contribution into construction of [the Suburb A property] by way of 'pooling resources together.'
>
> 234. I give no weight to that evidence which is expressed in the form of a conclusion without any information being provided as to the basis upon which [the wife] has arrived at that conclusion including such as providing details of purported conversations between herself and the [husband] whereby he agreed to share the rental income with her. In that respect, it is significant that, in an email sent on 26 December 2013, after the termination of the parties' relationship, [the wife] refers to matters relating to the parties contributions to the F Street property but makes no mention of any unpaid rent, from the Suburb J Property, which she now contends that the [husband] was obliged to pay her. In other words [the wife] made no mention of her contributions being made by way of rental income received form the Suburb J property.
>
> (As per the original)

87 Furthermore, the wife did not establish that a property she owned Y Street, Suburb A was offered as security for the husband's loan raised in relation to construction costs on the Suburb A property or that the proceeds of the sale of her property were applied to the Suburb A property [183].

88 Otherwise, the wife's reliance on *Trustees of the Property of Cummins (a bankrupt) v Cummins* (2006) 227 CLR 278 is misplaced. This case concerns a family home acquired jointly by a married couple and bears no relationship to the facts at hand. It is irrelevant.

89 Error as alleged has not been established.

The revenge strip

90 By Ground IB the wife asserts that the primary judge erred in finding that "[b]etween 2006 and 2009, the [husband], with some assistance from [the wife], secured council approval for the transfer of what has been described as a 'revenge' strip of land 19 m² in the area adjoining… B Street [of the Suburb A property]", without any evidence that could support such a finding.

91 In support of this challenge the wife then said:

> 21. The finding in relation to the issue of procurement of the 'revenge strip', was made in reliance of some letters marked as MFI#1 presented to [the wife] during the examination on 01 Aug 2018, without considering the factual evidence from [the wife's] Affidavit from 30 Jan 2015, para 46-48 and Affidavit of Mr K, para 19-39.
>
> (Wife's Summary of Argument filed 16 July 2020, p.7) (As per the original) (Footnote omitted)

92 As the wife explained during oral addresses, her contention is that there was no basis for the primary judge to find that the council transferred title in the revenge strip to the husband and Mr K. This contention and the stated ground are different and, relevantly the primary judge found in any event, there was no dispute that title was transferred from the estate of an unrelated third party and the wife was involved in achieving the transfer. The controversy concerned the extent of the wife's involvement and her role in drafting letters the husband wrote to the council in relation to the council's possible acquisition of the strip from its owner and planning determinations designed to join the revenge strip with the Suburb A property. The trial reasons are replete with references to the transfer of title compared to engagement with council. Reference need only be made to [544] and [546] to establish the point.

93 According to the wife, she was wrongly denied the opportunity to give further evidence about who wrote the letters. As the wife explained the situation:

> [THE WIFE]: On page 142, paragraph 35. And so, he said to your Honour:
>
> > *[COUNSEL FOR THE WIFE]: While we are waiting, I did flag at the start how I did want to re-examine this matter on a few matters rather reopen the case, and then we got into a reopening issue. I just wanted to because there are a couple of questions that she was asked.*
> >
> > *HIS HONOUR: Yes, I do recall that. Then [counsel for the wife]*
> >
> > *[COUNSEL FOR THE WIFE]: Then I would like to just clarify with her that it rose out of cross-examination.*
>
> [THE WIFE]: And Mr - his Honour said:
>
> > *HIS HONOUR: I haven't heard from [counsel for the husband] subject to what he has to say. I would be inclined to permit you to do that. And I haven't heard from [counsel for the husband] on that, but subject to what he has to say I would be inclined to permit you to do that.*
>
> [THE WIFE]: Then the proceedings evolved into the proportionality of costs and time restrictions, and I was not cross-examined.
>
> (Appeal Transcript 20 October 2020, p.39 lines 14–34)

94 However, as the wife ultimately conceded to us, notwithstanding that the primary judge indicated that he was minded to grant counsel for the wife's application that she be recalled, no further attempt was made to do so (Appeal Transcript 20 October 2020, p.41 lines 26–29). Not only is there no denial of procedural fairness to the wife in her not being recalled but the wife is bound by the conduct of the trial (*Metwally v University of Wollongong* (1985) 60 ALR 68).

95 The wife contended that:

> 22. The valuation of the land at B Street, [of the Suburb A property], carried out by the bank at the time of commencement of the construction was $450,000. The increase from the $314,000 that was paid for the land without access to C Street, [of the Suburb A property], could only be attributed to the land being consolidated with the '*revenge strip*' procured by [the wife] which created an opportunity to build [two] separate houses, each with its own street access.
>
> (Wife's Summary of Argument filed 16 July 2020, p.7) (As per the original) (Footnote omitted)

96 The wife relies on evidence she gave at paragraph 169 of her affidavit filed on 24 July 2018 (not her affidavit of 30 July 2018) to establish the bank's valuations. The wife deposed:

> 169. I recommended that [the husband] and Mr K apply for finance using Mr UU a finance broker. Mr UU was the mobile banker I had used for the loan at Y Street and had left the CBA and was now working for YY Pty Ltd. Now produced and shown to me marked "M 21" is a copy of the loan application to the Bank. The valuation conducted by the Bank valued the land at $450,000 and the proposed construction value of $520,000. This was disappointing as the Building Contract was for $685,000. As Mr K had paid his share of the land acquisition by cash rather than loan, the Bank agreed to advance the sum of $686,000. Now shown to me and marked "M 22" is a copy of the emails between Mr UU of YY Pty Ltd the finance broker and Mr K, [the husband] and me. [The husband] states that loan amount had been decreased because the finance broker had forgotten to include the debt of $100,000 owed by [the husband] to the Bank on account of the loan for the acquisition of the land.
>
> (Wife's Affidavit filed 24 July 2018, p.24–25) (Emphasis altered)

97 This evidence did not establish proof of the valuations or value.

98 Ground IB has not been made out.

Constructive failure to exercise jurisdiction

99 By Ground ID, it is asserted that the primary judge erred by failing to constructively exercise jurisdiction accrued from the Supreme Court in terms of equity. Reference has already been made to the primary judge's detailed analysis of the wife's claims in equity and why those claims would be dismissed. A constructive failure to exercise jurisdiction can arise if a judge in the position of the primary judge misunderstands the nature of the jurisdiction to be exercised (*Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194). However, the primary judge did not misunderstand the jurisdiction to be exercised and there was no constructive failure to exercise jurisdiction. In reality, the challenge is a thinly veiled attempt to argue that the primary judge should have preferred evidence given by the wife and Mr K where it conflicted with that given by the husband. The lack of reliability in the wife's and Mr K's evidence has already been discussed and, given

the deficiencies in their evidence as recorded in the trial reasons, no proper basis exists for appellate interference on the point.

100 To the extent that the wife asserts the primary judge failed to consider matters identified at paragraphs 33 to 36 of her Summary of Argument, that assertion too must fail. This is because the wife either failed to establish the facts upon which she relies and it is submitted the primary judge failed to consider, the contention would have required the primary judge to engage in pure speculation or the matters were considered to be rejected.

101 Ground ID has not been established.

Initial contributions

102 By Ground IIA, the wife contends that the primary judge erred by giving "manifestly inadequate weight and significance to the initial contributions of [the wife]".

103 We have already recorded that at trial neither party claimed to have made a greater initial contribution than the other party. Against that background, the wife contends:

> 38. The Trial Judge failed to make proper adjustment resulting from his analysis of the evidence from [the wife's] Affidavit discussing contributions made by the parties towards the construction of the [F Street property]. The issue was not only that it was not known how [the husband] spent the loan money, but also that if such loan could be considered as being spent on the building project, then 50% of the loan amounted to contribution made by [the wife] by the virtue of accepting a joint liability for the loan. At [280], His Honour held:
>
> > *"280. At paragraph 16 of her Affidavit, [the wife] contends that the contributions that she made towards the purchase and improvement of the land at the F Street property "with clear funds" was $576,927, whereas she contends that [the husband] contributed $260,000 together with an additional $220,000 which he obtained by way of a loan. She contends that the amount of $220,000 included the amount of $48,000 which had been paid, she states, as a "partial refund" of the money that [she] was spending before the loan was approved. [The wife] contends that the loan was for the sum of $260,000 and that the remaining $40,000 that had not been spent on the building project.["]*
>
> 39. In para 567, the Trial Judge gave the following reason for not making any adjustment to the property pool:
>
> > *"In terms of ss 90SF(3)(g) of the Act, I accept that the value of the [Suburb E property] where [the husband] lives with his current partner is of greater value than Unit A at the F Street property. Further, [the husband] will have the benefit of his interest in the Suburb A property and the townhouse which is Unit B at the F Street property. Nevertheless, [the wife] will have Unit A of the F Street*

property unencumbered. She will also have the benefit of investment that she shares with Mr K through the self-managed GG Fund. Depending upon the amount of money that [the wife] may decide to spend on future legal proceedings, she has the capacity to have a comfortable standard of living."

40. The value of the [Suburb E] property is significantly higher than the value of Unit A and Unit B of the F Street property together. The decision that [the wife] "is to have the Unit A unencumbered", does not provide a method for releasing the property from the mortgage. The fact that the [F Street property] is not partitioned, and the partitioning cannot be registered without [the husband] paying off the loan, does not allow [the wife] to access her equity in that property.

(Wife's Summary of Argument filed 16 July 2020, p.11–12) (Emphasis altered)

104 The first point to be made, is that [280] of the trial reasons is not a finding, but rather an accurate statement of the wife's contentions. The findings concerning the acquisition of the F Street property and construction costs were made at [481] and [482] of the trial reasons which have already been set out. Those findings provide no justification for the wife's slightly smaller contributions to the acquisition and construction costs of the F Street property to be afforded greater significance than the contributions that the husband made.

105 Otherwise, it is unclear to us how the matters raised by the wife in paragraphs 39 and 40 of her Summary of Argument sound in error as to the attribution of weight given to the parties' comparative initial contributions. Our assessment is that they do not.

106 It follows that Ground IIA must fail.

The F Street mortgage

107 By Ground IIB, the wife contends that the primary judge erred "in attributing the joint loan mortgaged against the [F Street property], as a sole contribution made by [the husband]".

108 Regrettably, it is necessary to observe that once again the wife misstates the trial reasons. The primary judge did not treat the Commonwealth Bank mortgage raised to fund the construction costs for the F Street property as a contribution made solely by the husband. It would only add unnecessary length to these reasons to record the number of occasions on which the primary judge acknowledged the wife's contribution as a party to this mortgage, and for present purposes, it is sufficient to set out [505] of the trial reasons:

505. In assessing indirect contributions, I have also had regard to the fact that, while [the wife] has not been responsible for making repayments, [the wife] agreed for her name to be on the Commonwealth Bank mortgage taken out by [the husband] to secure funds that he borrowed to enable him to contribute

> to his share of the construction of the [F Street property]. In other words [the wife], by agreeing to her name being on the mortgage documents, assisted [the husband] to obtain the source of finance. This was unquestionably of benefit to [the husband].

109 Otherwise, in relation to the rental income received from Units A and B of the F Street property, the rent foregone during the period that the husband's father lived in Unit B was taken into account in favour of the wife [507]. Albeit, weighing in favour of the husband, was:

> 511. In addition, I accept the evidence of [the husband] set out at paragraphs 91 through to 93 of his Affidavit, which was not challenged in cross examination, that [the wife] failed to facilitate Unit B being rented out until June 2016 in response to orders made by this Court. As a result, [the husband] was deprived of the opportunity of benefitting from renting out that property at the sum of approximately $550 per week for a period of two and a half (2 ½) years while [the wife] continued to live rent-free in Unit A of the townhouses. I have assessed the loss incurred by [the husband] as a result of the conduct of [the wife] to be equivalent to $550 per week for that period being equivalent to a lost opportunity to receive the amount approximately $71,500 in rent.

110 Otherwise, the contention raised at paragraph 43 of the wife's Summary of Argument does not accord with the facts as determined.

111 Ground IIB has not been made good.

Subdividing F Street

112 By Ground IIE, the wife challenges Orders (5) and (7)–(10), which are designed to finalise the registration of the strata plan over the F Street property, to give the wife clear title to Unit A of the F Street property and for the husband to have title to Unit B subject to a mortgage due to the Commonwealth Bank. In this respect, the intent of Order (5)(a) is that the existing joint Commonwealth Bank mortgage will be discharged on the basis that the husband will refinance the mortgage and secure the debt due to the Commonwealth Bank over his interest in Unit B. Contrary to the wife's submission, Order (5)(a) does not make her responsible for the husband's capacity to release the debt due to the Commonwealth Bank. It does no more than require her sensible cooperation as a party to the joint mortgage in it being refinanced by the husband. So much is clear from [594] of the trial reasons where the primary judge said "[the husband] would be responsible for paying that mortgage…". So that it is clear, the wife did not join the Commonwealth Bank to the proceedings and the Court's power to make orders which affect third parties was not invoked.

113 Although it is not entirely clear, it would appear that the wife objects to the amount that the husband respondent is required to pay her is to be paid "upon completion of [the wife's] obligations pursuant to the orders" [595]. The rationale for this is obvious and it is understandably and plainly designed to secure the wife's cooperation in finalising the F Street subdivision and, as the primary judge said at [590], "a severance of the parties' financial relationship".

114 That the effect of the orders includes that the parties will each have separate title to one of the two F Street property units does not offend s 90ST of the Act. As the wife correctly states in relation to the F Street properties, she "will be bound to have continuous financial dealing with [the husband] resulting from the necessity to comply with the strata scheme regulations such as establishing sinking fund, maintenance of the common property, annual meetings etc" (wife's Summary of Argument filed 16 July 2020, paragraph 53). However, the duty of the Court to end financial relations as imposed by s 90ST requires that the Court "as far as practical" make such orders as will finally determine the financial relationships between the parties and avoid further proceedings between them. The submission by the husband that the primary judge complied with the provision to the fullest extent reasonably practicable in the circumstances should be accepted.

115 Error as asserted by Ground IIE has not been demonstrated.

CONCLUSION

116 The wife has failed to establish error and the appeal will be dismissed.

117 At the conclusion of the hearing in October 2020, directions were made for the parties to file costs statements. However, the wife subsequently reopened the appeal and, the husband at least, has incurred additional costs and the costs consequences, if any, of that application must also be considered. Subject to a party seeking to have the question of costs dealt with by an oral hearing, the appropriate course is that costs be determined without an oral hearing and by written submissions.

I certify that the preceding one hundred and seventeen (117) numbered paragraphs are a true copy of the Reasons for Judgment of the

Honourable Justices Ryan, Aldridge & Watts.

Associate:

Dated: 13 July 2021