FAMILY COURT OF AUSTRALIA

PHIPSON & PAICE *[2021] FamCA 382*

FAMILY LAW – PROPERTY – Where it is just and equitable to make a property division order – Where the parties generally agree that an adjustment to their interests should be effected in a manner which favours the wife but dispute the magnitude of such adjustment and other matters relevant to the fairness of each of their respective proposals – Where the central matters in dispute between the parties relate to the inclusion of the wife's business as an asset in her hands, whether the former matrimonial property should be treated as an asset wholly owned by the husband and whether sums previously received by the wife should be characterised as partial property settlement payments – Where there is also a dispute about the inclusion of a liability associated with repairing the former matrimonial property, and the value of certain other assets – Where in all of the circumstances, including financial and non-financial contributions made by the parties, the length of the marriage, the size of the pool of assets for distribution and s 75(2) factors, the Court is satisfied that orders that would give effect to the wife receiving a 70 per cent entitlement of the parties' net assets and the husband receiving 30 per cent are just and equitable – Orders made as sought by the wife with the appropriate adjustments.

Family Law Act 1975 (Cth) ss 75, 79, 90AE

Bevan & Bevan [2013] FamCAFC 116
Pierce & Pierce [1998] FamCA 74
Stanford v Stanford (2012) 247 CLR 108
Weir & Weir (1993) FLC 92-338
Williams & Williams [2007] FamCA 313

APPLICANT:	Ms Paice
RESPONDENT:	Mr Phipson
FILE NUMBER:	PAC 2724 of 2016
DATE DELIVERED:	9 June 2021
PLACE DELIVERED:	Parramatta
PLACE HEARD:	Parramatta
JUDGMENT OF:	Hannam J
HEARING DATE:	7 – 9 September 2020

REPRESENTATION

COUNSEL FOR THE APPLICANT:	Mr Bennet
SOLICITOR FOR THE APPLICANT:	Coleman & Greig Lawyers
COUNSEL FOR THE RESPONDENT:	
SOLICITOR FOR THE RESPONDENT:	Self Represented

ORDERS

(1) Within 42 days of the date of these Orders, the Husband pay to the Wife the sum of $170,995 via the Coleman Greig Lawyers Pty Ltd Law Practice Trust Account BSB: … A/C: ….

(2) Within 21 days of any non-compliance with Order (1) above, the Husband do all acts and things and sign all documents necessary to place on the market for sale by auction the property situated at and known as C Street, Suburb D in the state of New South Wales (Folio Identifier …) ("the Suburb D Property") as follows:

(a) Instruct B Conveyancing in Suburb E, or a solicitor/conveyancer agreed between the parties in writing, to have conduct of the sale:

(b) Instruct F Real Estate in Suburb G, or a real estate agent agreed between the parties in writing, to act as real estate agent for the sale of the Suburb D property;

(c) Instruct Mr H, to conduct the auction of the Suburb D property unless otherwise agreed between the parties in writing;

(d) The reserve price for the Suburb D property shall be set by the real estate agent appointed pursuant to Order 2(b) above;

(e) The Husband must accept any offer to purchase the Suburb D property within 5% of the reserve/listing price for the Suburb D property;

(f) In the event that the Suburb D property does not sell by auction pursuant to Order 2(d) to 2(e) above, the Husband shall continue to list the Suburb D property for sale at 3 monthly intervals, at a reserve price not more than 5% lower than the previous attempt until such time as the Suburb D property sells; and

(g) For the purpose of Order 2(f), the Husband must accept any offer to purchase the Suburb D property within 5% of the reserve/listing price for the Suburb D property.

(3) The Husband shall co-operate in every way with the agent, and solicitor or conveyancer appointed pursuant to Orders 2(a) to 2(c) above, including (without limiting the generality of the foregoing):

(a) Doing all acts and things necessary, including appointing any tradesperson necessary, to remove makeshift and temporary structures (with the exception of the converted garage) erected inside the Suburb D property, and rectify any damages and remove any rubbish from the Suburb D property and carry out such work as recommended by the agent to prepare and market the Suburb D property for sale at the Husband's cost;

(b) Making the key available to the agent;

(c) Allowing inspection of the Suburb D property at all reasonable times requested by the agent;

(d) Shall not engage in any conduct to hinder or prevent the sale being effected;

(e) Ensuring the Suburb D property, including the grounds, are in a neat and clean condition at the time of inspection by the agent and prospective purchasers, and during the auction; and

(f) Signing all documents requested by the auctioneer, lawyer and/or agent in relation to the listing for sale and auction of the Suburb D property.

(4) Following the commencement of Order (2) above, these Orders shall act as authority for the Wife to approach any real estate agent, solicitor/conveyancer or auctioneer appointed to assist with the sale of the Suburb D property, and obtain documents relating to the progress of that sale (including but not limited

to offers, and correspondence relating to the reserve price for the Suburb D property and recommendations to prepare the property for sale).

(5) On settlement of the sale of the Suburb D property pursuant to Order (2) above, the proceeds of sale be paid in the following manner and priority:

(a) The costs of the sale of the agent and lawyer in accordance with Orders 2(a) to 2(c) above, including but not limited to fees, disbursements and commission;

(b) The usual adjustments for water rates, council rates, and other utilities for the Suburb D property as between vendor and purchaser; and

(c) Costs to cause the discharge of the Westpac Banking Corporation mortgage dealing no. … secured against the Suburb D property;

(d) The payment of $170,995 to the Wife via the Coleman Greig Lawyers Pty Ltd Law Practice Trust Account BSB: … A/C: …, in addition to interest in accordance with the Family Law Rules from the 43rd day after the date of these Orders; and

(e) The balance to the Husband or as he directs, subject to Order (9) below.

(6) The Husband's brother, Mr J Phipson, do all acts and things and sign all documents necessary to facilitate the sale of the Suburb D property in accordance with Orders (2), (3) and (5) above following the commencement of Order (2).

(7) Immediately following non-compliance with Orders (2) and/or (3) above, the Husband shall do all things necessary to vacate the Suburb D property and provide vacant possession (including the removal of his personal possessions) and thereafter the Wife is to have exclusive occupation of the Suburb D property for the purpose of preparing the Suburb D property for sale, and the Husband shall not enter upon the Suburb D property.

(8) Simultaneously with Order (7) above, the Wife shall be appointed as the trustee for the sale of the Suburb D property and these Orders shall act as authority for the Wife to do all acts and things necessary, including appointing any tradesperson, real estate agents and solicitors/conveyancers necessary, to prepare, market and sell the Suburb D property, without notice to or consultation with the Husband.

(9) Following any commencement of Order (8) above, and for purpose of the Wife implementing Orders (2) to (5) above in her capacity as trustee, any costs met by the Wife in preparing the Suburb D property for sale are to be reimbursed to the Wife from the Husband's proceeds from the sale of the Suburb D property.

(10) Except as specifically provided for by any Orders to the contrary, as against the Husband, the Wife is the sole owner of and the Husband has no interest in:

(a) The Wife's business "K Company" (ABN …);

(b) All real property included in the whole of the land contained in folio identifier …;

(c) Any bank account standing to the credit of the Wife in her sole name;

(d) The Wife's superannuation entitlements;

(e) Any motor vehicle registered in the Wife's name; and

(f) All other property and financial resources of whatsoever nature and kind in the possession or ownership of the Wife as at the date of the making of these Orders.

(11) Except as specifically provided for by any Orders to the contrary, as against the Wife, the Husband is the sole owner of and the Wife has no interest in:

(a) The Husband's interest in the Suburb D property;

(b) The Husband's business "L Company" (ABN …);

(c) Any bank account standing to the credit of the Husband in his sole name;

(d) The Husband's superannuation entitlements;

(e) Any motor vehicle registered in the Husband's name; and

(f) All other property and financial resources of whatsoever nature and kind in the possession or ownership of the Husband as at the date of the making of these Orders.

(12) The Husband shall be solely responsible for all liabilities in which he has an interest, both incurred prior to the date of these Orders and in the future,

including but not limited to all credit card debts and taxation liabilities and the Husband hereby indemnifies and shall keep indemnified the Wife in relation to all of these liabilities.

(13) The Wife shall be solely responsible for all liabilities in which she has an interest, both incurred prior to the date of these Orders and in the future, including but not limited to all credit card debts, taxation liabilities and personal loans, and the Wife hereby indemnifies and shall keep indemnified the Husband in relation to all of these liabilities.

(14) Each party shall do all things necessary including providing all consents to give effect to these orders in the time periods prescribed in these orders.

(15) In the event either party refuses or neglects to execute any deed, document or instrument necessary to give effect to all or any of these orders, then the Registrar of the Court shall be appointed pursuant to Section 106A of the *Family Law Act 1975* (Cth) to execute such deed, document or instrument in the name of the said party and do all acts and things necessary to give validity and operation to the deed, document or instrument upon the Registrar being provided with verification of such refusal or failure by way of affidavit.

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 *Phipson & Paice* 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 PARRAMATTA

FILE NUMBER: PAC 2724 of 2016

Ms Paice
Applicant

And

Mr Phipson
Respondent

REASONS FOR JUDGMENT

INTRODUCTION

1. The parties ("the wife" and "the husband") cannot agree about a fair adjustment of their property interests following the breakdown of their four year marriage.
2. Prior to the commencement of the final hearing the parties were also in dispute as to the future parenting arrangements for their only child, a daughter aged eight ("the child"). However on the first day of the final hearing they reached agreement about the child's future parenting arrangements and orders were made with their consent that they equally share parental responsibility for the child and that the child live with the wife and spend substantial and significant time with the husband.
3. The remaining issues to be determined relate to a fair distribution of the parties' property.
4. The applicant wife contends that property interests should be adjusted so that she receives or retains 75 per cent of the parties' property and the husband retains 25 per cent. She seeks in summary to retain the property in which she currently lives with the child, and that the husband transfer to her $300,000 to effect this division. In the event he fails to so within a specified time, the wife proposes that the property in which the husband currently lives be sold and she receive this sum from the proceeds of sale.
5. The respondent husband agrees that the wife should receive a greater portion of the parties' property and seeks orders that will see him retain 40 per cent of the property available for distribution and the wife retain 60 per cent. He proposes that each party retain the property currently in which they each respectively live and that the wife meet 50 per cent of costs he asserts will be associated with repairing the property in which he lives.

BACKGROUND

6. The husband who is 46 and the wife who is 42 commenced a relationship in September 2010 and began living together a couple of months later in rented premises.

7. From the time the parties began living together the wife's son of a previous relationship ("the wife's son") then aged two also formed part of the household. The husband has a daughter from a previous relationship ("the husband's daughter") who is now aged almost 17 and lives with him. Although it is not entirely clear, I understand that the husband's daughter also lived in the parties' household for most of the time they were together.

8. Prior to commencing their relationship each of the parties operated a sole trader business. The wife also had other part time employment that ceased at about the time the parties began living together and she concentrated on building her business.

9. In May 2011 the wife received a sum of money from a property settlement with her former partner which she put towards a property in Suburb M ("the Suburb M property") which was registered in her name. This property was initially leased between August and December 2011 until the parties moved into it in late December 2011.

10. In 2012 the parties were married.

11. In 2012 the child was born.

12. Between March 2014 and June 2015 the parties separated from time to time and during these periods of separation one or the other moved out of the Suburb M property. When the wife was living elsewhere her son and the child moved to live with her.

13. By June 2015, the parties had reconciled and commenced therapy in an effort to improve their relationship. They also decided to sell the Suburb M property and move to a different part of Sydney.

14. In September 2015 the parties together purchased an apartment at Suburb D ("the Suburb D property") using the proceeds of sale of the Suburb M property and a loan for the balance of the purchase price. At the time they purchased this property, they were aware that the previous owner had carried out various renovations to it without the necessary council approval.

15. In February 2016 the parties separated on a final basis and the wife moved out of the Suburb D property. She and the child and her son initially lived variously with her sister, and in hotel and refuge accommodation before moving to rented premises in April 2016.

16. The wife commenced proceedings in June 2016 seeking orders regarding the future parenting of the child and in relation to the division of the parties' property.

17. In October 2016 interim orders were made in relation to parenting and property following hearing. The property orders provided for the husband to have sole use and occupation of the Suburb D property and required him to maintain that property and pay all mortgage payments and outgoings on it.

18. In March 2017 orders were made with the consent of the parties for the wife to receive $30,000 from the home loan redraw facility with such release "to be characterised as partial property settlement to the wife".

19. There was significant delay throughout the course of the proceedings for various reasons including the preparation of an expert's report as to parenting.

20. On 12 July 2018, orders were made ("the July 2018 orders") with the consent of the parties for the wife to transfer her interest in the Suburb D property to the husband, that the husband refinance the Suburb D property so that the wife bear no liability in relation to it and that the husband pay to the wife the sum of $300,000 as well as $1,829.61 (for his share of the valuation of the wife's business). It was noted in these orders that the husband intended to refinance the property with the assistance of his brother ("the husband's brother") such that the husband would own an 80 per cent share of the property and the husband's brother a 20 per cent interest. There were default orders that the Suburb D property be sold if the husband failed to comply with the orders within 42 days.

21. The husband did not comply with the timeline for compliance with the July 2018 orders and had only transferred $50,000 to the wife by late September 2018.

22. On 13 November 2018 the husband notified the wife that the Suburb D property could not be put on the market due to the unauthorised renovations undertaken by the previous owner. He failed to sign agency documents to place the property on the market in accordance with the default sale provisions in the July 2018 orders.

23. The wife subsequently filed an Application in a Case seeking to enforce the earlier orders in relation to sale but later discontinued this application as the husband transferred the outstanding sum due under the July 2018 orders to her in January 2019. The issue of costs associated with the wife's enforcement application as well as the question of interest to be paid to the wife by reason of the late transfer of funds to her was reserved to final hearing and is a matter to which I will return.

24. In May 2019 the wife purchased an apartment in Suburb N ("the Suburb N property") using some of the funds she received by way of partial property

settlement as a deposit. The wife borrowed the balance of the funds required for the purchase and this loan was secured by a mortgage over the property.

25. In 2019 the wife also opened a second branch of her business in the area close to where she lives. The restrictions associated with the COVID-19 pandemic in 2020 had a particular impact upon her business given that it operates in the health industry and is a matter to which I will return.

26. Due to various financial difficulties, including in particular the impact of the pandemic upon her business, the wife was unable to meet the home loan repayments on the Suburb N property and in June 2020 leased that property and moved to alternate premises with her children nearby.

27. The husband has continued to operate his business which was affected to some extent by the COVID-19 pandemic. He remains living in the Suburb D property and received a six month reprieve from his home loan repayments.

28. Since April 2020, the husband has also repartnered and his partner and her child spend "a lot of time" with the husband in his premises.

29. As the husband is self-represented final hearing dates for April 2020 were adjourned due to the COVID-19 pandemic.

30. In August 2020 further directions were made to prepare the matter for final hearing and that hearing proceeded over three days from 7 to 9 September 2020.

THE LAW & DISCUSSION

31. The approach to the determination of an application for property settlement orders is set out in *Stanford v Stanford*[1], ("*Stanford")* which was considered in detail by the Full Court in *Bevan & Bevan*[2].

32. The starting point is a consideration of "whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles the *existing* legal and equitable interests of the parties in the property"[3].

33. This involves identifying the existing interests and then considering whether having regard to the particular circumstances before me, it would be just and equitable to make orders for the alteration of those interests.

34. If it is just and equitable to alter the parties' property interests, I should next consider the matters set out in s 79(4)(a) to (c) of the *Family Law Act 1975* (Cth) ("the Act"), that is, the financial and non-financial contributions made by the parties to the property and to the welfare of the family constituted by the parties.

[1] (2012) 247 CLR 108.

[2] [2013] FamCAFC 116.

[3] *Stanford & Stanford* (2012) 247 CLR 108 at [37].

35. I must then consider the remainder of the matters in s 79(4) including the matters referred to in sub-section 75(2) so far as they are relevant, and determine on this basis whether there should be a further adjustment to the parties' contribution-based entitlements.

36. Finally, I must then consider the justice and equity of the proposed orders. As was said in *Bevan* (supra) at [86], the just and equitable requirements is "not a threshold issue, but rather one permeating the entire process".

Is it just and equitable to make orders for the alteration of property interests?

37. Although the parties have some disagreement in relation to some assets and liabilities to be included in the Balance Sheet for distribution, there is no dispute that the two significant pieces of matrimonial property, being the Suburb D property and the Suburb N property are registered in the sole names of the husband and wife respectively.

38. Further, both parties agree that an adjustment to their interests should be effected in a manner which favours the wife.

39. There remains a significant dispute about the magnitude of the adjustment in the wife's favour and other matters relevant to the fairness of each of their respective proposals. In these circumstances, the question to be determined as to whether it would be just and equitable to leave the property rights intact is easily answered.

40. As was indicated in *Stanford* (supra) the requirement that it would be just and equitable to make *an* order is in many cases readily satisfied by observing at [42] that:

> … as the result of a choice made by one or both of the parties, the husband and wife are no longer living in a marital relationship. … any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marriage relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence it will be just and equitable that the Court make a property settlement order. …

41. On this basis I consider it just and equitable that there be an order adjusting the parties' property rights rather than leaving them intact.

The Balance Sheet

42. The parties were largely able to agree at the final hearing about many of the assets and liabilities to be included in the Balance Sheet for distribution. They agreed to exclude from the Balance Sheet funds held in bank accounts in each of their names and the wife agreed that the husband's business should not be

treated as an asset and should be regarded as a financial resource available to him.

43. The central matters in dispute between the parties relate to the inclusion of the wife's business as an asset in her hands, whether the Suburb D property should be treated as an asset wholly owned by the husband and whether the sums previously received by the wife should be characterised as partial property settlement payments. There is also a dispute about the inclusion of a liability associated with repairing the Suburb D property. The parties also could not agree about the value of certain assets.

Assets

The Suburb D property

44. The Suburb D property purchased during the parties' relationship is now registered in the name of the husband and the husband's brother. This came about because at an earlier stage in these proceedings orders were made that the wife transfer her interest in the Suburb D property to the husband and that he refinance the mortgage so that the wife had no further liability for it.

45. After the wife transferred her interest in the Suburb D property to the husband he took steps to have his brother registered as having a 20 per cent interest in the property while the husband retained a registered interest in the remaining 80 per cent. The husband and his brother then took out a new loan secured by a mortgage in both names over the property. The husband contends that as his brother owns a 20 per cent interest in this property only 80 per cent of its value should be treated as property for distribution in these proceedings.

46. There is no dispute that the husband's brother has been well aware of the husband's contentions about ownership of the Suburb D property at all relevant times and had ample opportunity to intervene in the proceedings in order to protect his interest. The husband's brother did not take this opportunity to assert that interest and appeared only as a witness on behalf of the husband in the proceedings. The husband's brother accepted under cross examination that he was aware he was able to take part in the proceedings as a party and did not ever seek to be joined in the proceedings.

47. Under cross examination, the husband and his brother both conceded that at the time of the transfer the husband's brother paid only one dollar to acquire a 20 per cent interest in the Suburb D property. The husband's brother also conceded under cross examination that he was only "placed on the title" to assist the husband to obtain finance and that, if it weren't necessary to be placed on the title for this purpose, he would not have sought to "purchase" a 20 per cent interest in the property.

48. The husband and his brother also conceded that as well as not contributing to the capital cost of the Suburb D property the husband's brother has not made

any mortgage repayments in respect of the property or received any rent. Nonetheless, the husband maintains that if he were to sell the property, he would still be required to pay to his brother 20 per cent of the sale proceeds.

49. The wife does not take issue with the husband's contention that the husband's brother has a legal 20 per cent interest in the Suburb D property but contends the whole of the Suburb D property ought to be treated as matrimonial property in the husband's hands.

50. Given the oral evidence including that the husband's brother only came to have a registered interest in this property for the purposes of the husband refinancing his loan, and as the husband's brother did not join the proceedings to protect that interest, I consider that it is appropriate to achieve justice and equity between the parties to treat the Suburb D property as an asset wholly owned by the husband.

Interim payments to the wife

51. The husband contends that the two interim payments made to the wife of $30,000 under the March 2017 orders and $300,000 pursuant to orders made in July 2018 should be treated as partial payments of her entitlement to matrimonial assets. He had also claimed that the wife received other sums which he sought to be "added back" as property of the wife but there was either no evidence to support those contentions or they were not pressed in final submission.

52. In written submissions made on the wife's behalf, it is asserted that the $300,000 in partial property payment was used by the wife to pay off "debts accrued through the relationship" and to purchase the Suburb N property. There is no reference in those submissions to the $30,000 interim property payment.

53. According to the wife's unchallenged affidavit evidence she utilised the $300,000 payment as follows:

- Payment to Australian Taxation Office of $23,693;
- $75,245 towards outstanding legal fees;
- $8,900 in payment for her share of the expert report relating to parenting;
- $28,395 in personal loans and credit card debts;
- Moving costs including a five per cent deposit on a property purchase that did not proceed, conveyancing and real estate costs, furniture removal "deposit" and other expenses - $129,479; and
- Around $35,000 on rental accommodation for the period July 2018 to March 2019 for herself and her children and for the business as well as unspecified business expenses.

54. As can be seen, the last two groups of expenditure are expressed as lump sums and do not differentiate between particular amounts spent on individual items.

55. In the course of final oral submissions, the wife's counsel conceded that the $30,000 interim sum received by the wife in March 2017 was characterised in those orders as a "partial property settlement".

56. It was also conceded on behalf of the wife in submissions that most of her expenditure from the $300,000 in joint funds (with the exception of the deposit on the Suburb N property) was of a personal nature and ultimately she did not press the contention that the entire $300,000 should not be treated as an interim property payment.

57. There was no question however that the portion of the $300,000 interim payment utilised by the wife as a deposit on the Suburb N property should be excluded from treatment in this manner as the Suburb N property itself is being treated as matrimonial property for the purposes of distribution in these proceedings.

58. The wife gives limited evidence in her affidavit in relation to the purchase of the Suburb N property. She deposes only that it was purchased for $1,130,000 but gives no detail of the financing arrangements and in particular the amount she paid as a deposit. The only available documentary evidence in relation to this purchase is a "settlement adjustment sheet" dated 23 April 2019. That document identifies the "deposit paid" as $56,500. There is also a reference to a "vendor finance" of $1,017,000.

59. In final submissions it was contended on behalf of the wife that she contributed $113,000 personally to the purchase of the Suburb N property which came from the $300,000 property settlement and the balance was borrowed by her alone.

60. The husband agreed in final submissions that the amount contributed by the wife to the purchase price of the Suburb N property should not be included in the Balance Sheet as doing so would amount to double counting given the inclusion of the Suburb N property as an asset on the Balance Sheet. However, it is his contention that the correct reading of the property adjustment sheet indicates that the wife only paid $56,500 by way of deposit.

61. Ultimately, it is the wife who is expected to give clear evidence supported by relevant documents about the amount she paid for the deposit on the Suburb N property as it is she who contends that at least the sum that she paid in this regard should not be brought to account as part of the $300,000 she received in a partial payment of her entitlement. In her affidavit she does not depose to the amount she paid by way of deposit for the Suburb N property but rather makes various general statements about the purchase after receiving $300,000, or

includes it without quantifying the amount in a paragraph that deals with a range of other purely personal expenses.

62. Another portion of the $300,000 was spent according to the wife's unchallenged evidence on rent to accommodate herself (and her son and the child) following separation, while the husband remained living in the Suburb D property. Although reasonable living expenses should as a matter of principle be excluded from a party's share of the joint assets, the wife did not particularise the extent of her expenditure on living expenses but rather "rolled it up" with other personal expenditure including expenses relating to her business.

63. As noted, it was also contended on behalf of the wife that the first interim distribution of $30,000 should likewise not be added back.

64. Although at one stage in submissions it was conceded by the wife that she provided no evidence as to how the $30,000 interim property payment was spent, there is some evidence as to this matter. In her affidavit the wife deposes and was not challenged under cross-examination that the orders of 9 March 2017 allowed her to draw down on the mortgage account in the sum of $30,000 "to enable me to meet the costs of my rental accommodation". She goes on to depose that the sum was exhausted within 12 months "on rental accommodation and utilities" which suggests that it was entirely utilised on day to day living expenses. This sum does not appear to be unreasonable given that the wife was required to find accommodation for herself and children including the parties' child as the husband had sole occupation of their former family home.

65. In summary, the wife originally contended that none of the $330,000 paid to her on two occasions pursuant to interim orders should be brought to account as interim property payments. Ultimately, this contention fell away to a large extent as it was conceded that much the $300,000 payment was utilised by the wife for her personal expenses such as paying an outstanding tax liability, legal fees, her share of the cost of the expert's report, personal loans and credit card debts and on miscellaneous matters including a five per cent deposit on a property which was not proceeded with.

66. Ultimately, I consider that the only portion of the $300,000 which should not be credited to the wife is the deposit paid on the Suburb N property. Due to the paucity of evidence in relation to this sum, I can only be satisfied that $56,500 was paid by the wife from the interim payment and this amount will be deducted from the $300,000 partial property settlement. The fact that the wife otherwise solely contributed to the purchase of the Suburb N property will be considered later in these Reasons when dealing with contributions.

67. The wife gave unchallenged evidence that she used some of the $300,000 on living expenses such as rental accommodation for herself and her children

(including the parties' child) between July 2018 and March 2019 but was unable to quantify this amount. Accordingly, an adjustment will be made in her favour rather than deducting a sum from the amount to be added back as such an amount is not able to be quantified.

68. Although the evidence in relation to the use of the $30,000 interim property statement was limited, the husband did not challenge the wife's assertion that this sum was spent on her day to day living expenses for the period March 2017 to about mid-2018 and for the reasons given I regard that expenditure as reasonable in the circumstances.

69. For the foregoing reasons, I propose accounting for $243,500 of the $300,000 sum as a partial property settlement only and not bringing any of the $30,000 payment to account in this manner.

Valuation – Suburb D property

70. Another matter of significant dispute in the proceedings relates to the valuation of the Suburb D property. A single expert ("the valuer") was appointed to value this property in May 2019 and to later update that valuation (and value the Suburb N property) in August 2020 shortly prior to the final hearing.

71. In his first valuation dated 31 May 2019 ("the first valuation") the valuer opines that the value of the Suburb D property is $1,460,000. In giving that opinion the valuer states the following:

> We have sighted a current strata report and note range of substantial remedial constructions works required to be made to the parent building, in accordance with the Strata Report provided by Streamline Strata Searches (extract annexed herein). We note the deficiencies with relation to the substantial remedial construction works required for the parent building, however the Strata Report does not provide a quotation for the costs of said remediation works. Furthermore, we note whilst a garage currently appears on [the relevant strata plan], upon inspection it was noted that the garage has been converted into living space, however, no formal approvals or by-laws have been registered or sighted. On this basis, this valuation is considered to be a "subjective exercise".

72. In the body of the report the valuer explains that the valuation was arrived at by analysing the property "via the direct comparison approach". At several points in the valuation report the valuer refers to and notes the "range of substantial remedial construction works required to be made to the parent building" and the conversion of a designated garage into living space without necessary formal approvals.

73. The market sales evidence relied upon in the valuation (that is, comparable properties) is set out in the report and the "direct comparison valuation approach" is explained.

74. The valuer also explains that a secondary method which he describes as a "check method" of capitalisation of income was also adopted whereby the rental return of the relevant property was examined and compared to its potential sale price. As the valuer had not been supplied with current leasing information in relation to the Suburb D property due to it being owner-occupied, the valuer adopted a rental figure which he believed to be in line with the leasing market as at the date of valuation. The rent range arrived at was then annualised and comparable rental yields considered. Utilising this method, the valuer calculated the current market value for the property as $1,430,000.

75. At the final hearing, the valuer's second report dated 14 August 2020 repeated much of the earlier report and once again valued the property by the direct comparison method and the capitalisation approach. In this report the valuer opined that the value of the property is $1,500,000 using the direct comparison method and $1,465,000 using the capitalisation approach. Noting that there was a difference depending upon the approach taken, the valuer opined that the estimate of the current open market value of the property is $1,500,000.

76. In the second report, the valuer again noted when reporting on "conditions and assumptions of valuation", the substantial remedial construction works required to be made to the parent building, the absence of a quotation for the cost of these remediation works and the conversion of the garage into living space for which "no formal approval or by-laws have been registered or sighted".

77. At the final hearing the expert was cross-examined by the wife's counsel and the husband who represented himself.

78. Under cross-examination the valuer made it clear (as is apparent from both valuations) that he was aware of the garage having been converted into living space without the necessary approvals and that this had been considered and accounted for when giving his valuation. The valuer also confirmed that he was aware at all times that the whole building in which the property is situated is affected by "concrete cancer".

79. Each of the parties asked questions of the expert in relation to the issue of the "concrete cancer". The valuer agreed that there was no document attached to either of his reports which set out a cost likely to be faced by the owner of an apartment in relation to the "concrete cancer". In any event, the valuer made it clear that the presence of "concrete cancer" whether remediated or not had no bearing upon the value of the property when he said:

> Look, quite simply, it has got absolutely no effect at all. And – and the reason I say that is because the comparable sales that I've used in this report to determine market value, in particular several of them that are actually in the parent complex itself, were recently sold and they too are affected by the concrete cancer. So we've based, basically, our rationalisation of value based upon properties of a similar nature, in the

> parent complex, which also are affected by the exact same issue. So that wipes out absolutely any regard for that concrete cancer.
>
> ……. Because the market itself – the market itself has spoken, and they've indicated it's not an issue based upon the actual sales of those particular properties and the prices that those properties have set.

80. The husband's cross-examination of the valuer focused on the two issues of the unapproved garage conversion and the presence of "concrete cancer" in the parent building. As previously noted, the expert made it clear in both his two valuation reports and in oral evidence that he was well aware of both of these matters and had taken them into account when valuing the property. He remained firm as to his valuation.

81. In relation to the unauthorised renovation, the valuer rejected the proposition that work done without council approval or that had actually been rejected by council would affect the sale price explaining "you can obtain retrospective by-laws obtaining approval for similar type of work of this nature. It has happened many times in the past. Retrospective by-laws are very common". The valuer was very firm in his view that previous rejection of an application for the renovations does not in his view affect the value of the property.

82. The valuer also reiterated that there is a market for purchases of properties which include unauthorised renovations and that the parties themselves exemplify such a market. The valuer said that he confirmed this last-mentioned matter with the agent who sold the property in question to the parties. In the words of the valuer, "they [the parties] purchased it, knowing very well that these limitations on the unit, so will someone else".

83. In final submissions the wife sought to rely on the valuer's most recent valuation of the Suburb D property being $1,500,000.

84. The husband submitted that the property should be valued at $1,340,000 on the basis that this sum is "probably as much as you would get without having the council issues sorted out or the renovation undertaken to revert it back to the proper garage set up". He had no evidence to support his view of the value of the property. The husband reiterated a number of times in submission that the valuer had overlooked the unauthorised renovation when forming his opinion which was clearly contrary to the evidence.

85. Having regard to the expertise of the valuer and as no challenge was made to his method of valuation and he was able to justify his opinions under cross-examination, I accept his evidence as to the value of the Suburb D property.

Valuation – Suburb N

86. In his report dated 28 August 2020, the valuer opined that the value of the Suburb N property is $1,250,000. He explained in his report that he adopted a

direct comparison valuation approach and set out the market sales evidence and also adopted a capitalisation (check method) valuation.

87. Under cross-examination, the husband asked the valuer about the asking price for other units in the same building as the property, but the valuer maintained his valuation, explaining that he applies very little weight to a seller's asking price and bases his valuation on the actual sales price.

88. For the reasons previously given, I also accept the opinion of the expert in relation to his valuation of the Suburb N property.

Valuation - The wife's business

89. The wife's primary source of income is a business which she has operated since around 2009 in the health industry. The wife operated this business as a sole trader initially from one business premises only in the area in which she was living at the time. When her business was valued for the purposes of the proceedings by an expert accountant in April 2017, it was still being operated from those single premises.

90. In a valuation report dated 11 April 2017 the valuer assessed the approximate valuation of the business as in the range of $30,000 to $50,000 and said that "the midpoint would probably represent the fairest valuation level", being $40,000.

91. The valuation method adopted was the capitalisation of future maintainable earnings method which the valuer considered appropriate in circumstances "where there has been a sufficient trading to establish business continuity and where it is reasonable to expect that the value of the business is likely to exceed the underlying value of the net assets". Consistent with the wife's evidence, the valuation was carried out on the basis that the wife is the sole trader and the "face of the business".

92. In 2019 the wife opened another branch of her business in the area close to where she resides and deposes that her attempts to grow her business went well until early 2020.

93. The wife gave evidence in an updated affidavit about the impact of the COVID-19 pandemic and its associated restrictions upon her business. She deposes that as she operates in the health industry, the pandemic itself and the restrictions have had a "catastrophic impact" on her business. She deposes that her second business began operation in January 2020 and that after about four weeks the clientele began shrinking due to COVID-19 medical advice. From 23 March 2020, both of the locations from which her business operated closed due to the mandatory government restrictions and her revenue ceased immediately despite having to pay outgoings.

94. The wife deposes to offering online appointments from April 2020, subsequently being able to reemploy staff under the "Job keeper" program,

withdrawing $20,000 from her superannuation entitlements as well as receiving a cash flow bonus through a government incentive scheme for one of her businesses. Despite these steps, the wife deposes to the dramatic effect of the pandemic upon her business.

95. It is effectively the wife's case that the circumstances since the 2017 valuation have completely changed and as at the date of her affidavit (August 2020) she had concerns about the viability of her business at all in the future. She contends that her business does not have any present value. The wife was not challenged about her evidence concerning the impact of the pandemic upon her business.

96. Although the wife questions that the value attributed to her business is correct, she does not challenge the methodology utilised by the valuer.

97. In the course of final submissions it was contended on the wife's behalf that as her business had no value due to the unchallenged evidence from her most recent affidavit, it should be disregarded as an asset for the purposes of the settlement proceedings.

98. The husband's business has not ever been valued and he appeared to accept that this business could be treated as his financial resource. He did not agree in final submissions that this was an appropriate way to approach the wife's business. In his submission, the business should be treated as an asset owned by the wife with a value of $40,000.

99. In my view, there is a real risk of injustice if the valuation of the wife's business is accepted and that business is treated as currently having the value given to it of $40,000. I do not accept, however, that it has no value at all.

100. Although the wife did not require the valuer for cross-examination she was unchallenged on her evidence about the impact the COVID-19 pandemic and its associated restrictions upon her financial state generally and the operation and viability of her business. Various documents tendered on her behalf, including the profit and loss statement for her business for the financial year ending 30 June 2020, appear consistent with her evidence.

101. Given the age of the valuation report, the method of valuation adopted and the wife's unchallenged evidence as to the recent profitability of the business, in my view, it is more appropriate to treat the wife's business as a financial resource for the purposes of this application which I note is the way in which the husband's business is also being treated.

Liabilities

102. The wife originally included credit card debts, a loan and an ATO debt as liabilities for the purpose of the Balance Sheet but in final submissions did not contend that any of these items were matrimonial liabilities. The husband

conceded the same in relation to personal debts that he had originally contended should be included in the Balance Sheet.

103. The husband asserts that he will incur a significant cost associated with a levy expected to be raised upon owners of the building in which the Suburb D property is located to remediate the "concrete cancer" in the building. He also contends that this levy would need to be paid to enable that property to be sold, and that this should be treated as a joint liability on the Balance Sheet. The wife contends that there is no evidence that such a levy will inevitably be paid by the husband, or a quantification of the same, as the only evidence available is that the building is affected by "concrete cancer".

104. It is to be remembered that the valuer opined that the existence of concrete cancer or any remedial works had no negative or positive impact upon the value of the property and there is no evidence to support the husband's contention that the remediation of the building will need to be carried out to enable the Suburb D property to be sold. There is evidence to the contrary, that apartments in the building have continued to be bought and sold while affected by concrete cancer.

105. Further, the evidence of the expert is to the effect that, despite discussions concerning this matter having gone on for some time, there has been no resolution about raising this levy and the relevant amount has not ever been quantified.

106. Having regard to the expert's evidence, I do not accept the husband's contention that the remediation of concrete cancer must be carried out prior to any sale and note that any levy to be raised by the unit holders to pay for this remediation has not yet been assessed. In any event, as the existence of the concrete cancer or its remediation has no impact either way upon the value of the building, there is no reason why as a matter of principle the wife should be responsible for any remediation costs, especially as they are not quantified and it cannot be assured whether or when such costs may be incurred.

107. On the basis of the foregoing findings, the current interests of the parties for the purposes of this application are set out in the following table:

LIST OF ASSETS AND LIABILITIES			
ASSET	HUSBAND	WIFE	JOINT
The Suburb D property	$1,500,000		
The Suburb N property		$1,250,000	
Motor Vehicle 1		$15,000	
Motor Vehicle 2	$40,000		
Motor Vehicle 3	$30,000		

Add back: wife's partial property settlement (minus amount contributed to Suburb N property)		$243,500	
Total Assets	$1,570,000	$1,508,500	
LIABILITIES	HUSBAND	WIFE	JOINT
Mortgage over Suburb D property	$1,120,000		
Mortgage over Suburb N property		$1,017,000	
Total Liabilities	$1,120,000	$1,017,000	
NET ASSETS Excluding Superannuation	$450,000	$491,500	
SUPERANNUATION	HUSBAND	WIFE	JOINT
Super Fund 1		40,721	
Super Fund 2	22,373		
TOTAL NET ASSETS	$472,373	$532,221	= $1,004,594

Contributions

108. Under s 79(4) of the Act, in considering what order should be made in property settlement proceedings, I must take into account the financial and non-financial contributions directly or indirectly made to the acquisition, conservation or improvement of any of the property of the parties and the contributions made to the welfare of the family and the child, including contributions as a homemaker or parent.

109. When the parties began living together they rented a property each paying half of the rent and sharing expenses.

110. Six months later, the property in Suburb M was purchased and registered in the wife's name. The parties' version of events in relation to the purchase differs greatly, with the husband deposing to the parties purchasing the property

"together" and providing an explanation as to why the property was registered in the wife's sole name and the wife deposing to purchasing the property herself. There is no dispute however that the wife alone contributed a large sum ($165,000) to the purchase from her property settlement with her former husband and that the balance was funded by a $500,000 loan secured by a mortgage registered in the wife's name.

111. The husband did not make any financial contribution to the purchase of the Suburb M property and the rent on the property when it was leased between August and December 2021 was income paid to the wife alone. The rent did not cover the loan repayments on the Suburb M property and for the few months that the property was leased each of the parties paid a small amount ($56.50 each week) into the home loan account to top it up.

112. The parties' financial arrangements after they moved into the Suburb M property are somewhat confusing and difficult to follow. There appears to be no dispute however that the wife earnt considerably more than the husband and that her income was paid into her offset savings account from which the loan repayments and other household expenses were made.

113. Under cross-examination, it was put to the husband that the wife was earning between about $60,000 and $90,000 year to year during the period they were living in the Suburb M property. He agreed she earnt a taxable income of over $60,000 but did not believe it was as high as $90,000. He also agreed that his tax returns for the relevant periods were as follows:

- Financial year ending 2011 - $33,188
- Financial year ending 2012 - $35,113
- Financial year ending 2013 - $18,781
- Financial year ending 2014 - $19,041

114. There also appears to be no dispute that each party paid about $330 a week into the same offset savings account in the wife's name. The wife deposes that the parties considered the husband's payments to be "rent" for the accommodation for he and his daughter given the parties' disparity in income and the wife's ownership of the property. The husband contests the characterisation of these payments as "rent".

115. It is also common ground that the husband made a lump sum payment of $40,000 (from his settlement proceedings with his former wife) into the offset account in about December 2012. Although he deposes to "using" a further $10,000 from his previous family law settlement for family expenses, it became clear under cross-examination that he did not deposit any lump sum into any account and it appears that this was his estimate of that contribution.

116. During the period the parties lived together at Suburb M they also maintained a joint account into which they each paid $150 per week for social expenses. Each also maintained other separate bank accounts for personal savings.

117. The parties agree that various improvements to the Suburb M property were carried out when they lived there including the building of a swimming pool and installation of a new kitchen. The wife deposes that she paid $51,250 from her own savings account in 2013 to pay tradesmen to undertake these and other renovations. She also gave unchallenged evidence of undertaking some of the work herself, such as painting.

118. The husband deposes to he and the wife renovating the Suburb M property through engaging various tradesmen and that he undertook much of the manual work himself. The husband also deposes that major items such as the kitchen and pool were paid for out of the home loan/offset savings account. Although the wife denied when cross-examined that the husband had undertaken a number of manual tasks himself, some documents annexed to his affidavit are consistent with his evidence that he had some role in arranging tradesmen and made some small payments from his business account for home improvements.

119. It is not possible nor necessary to make specific findings in relation to the exact financial and non-financial contributions made by each of the parties to improvements on the property, as the assessment of the parties' contributions is not an accounting exercise. It suffices to say that I am satisfied that the parties together made both financial and non-financial contributions to the improvements on the property which is unsurprising given that at that stage the property was their family home which they were improving for the purposes of their life together.

120. Another point of contention between the parties in relation to financial contributions at this time was the extent to which the husband was absent from Sydney pursuing his recreational activities and the extent to which he spent his income on these activities rather than contributing to household expenses.

121. It is the wife's case in summary that "for at least 13 weeks of every year [when their relationship was intact] she did not receive any financial assistance from the husband".

122. Under cross-examination, the husband agreed that his business like any sole trading business was uncertain from week to week but he would not concede there were weeks where he could not contribute to any joint accounts for the benefit of the relationship or the family. It is his case that he was not absent for lengthy periods pursuing his own recreational activities rather than contributing to the family as contended by the wife.

123. I am satisfied that while the husband did spend some time away from Sydney pursuing his interest in outdoor activities the wife's account of this matter is

somewhat exaggerated as there is no dispute that the husband did make some financial contribution to family expenses (albeit was much less than the wife's) most weeks during this time.

124. In addition to the financial contributions to the household expenses as discussed, the husband also contends that work he claims to have undertaken in the wife's business and for his labour in improving the Suburb M property should be considered as a contribution made by him which he quantifies as $100,000. So far as his physical labour in improving the property as discussed is concerned, I reject his contention that a value can be placed on it on the basis that he was engaged as a contractor for which he was unpaid. There is no evidence to suggest that he held any qualifications that would justify his claim that he should be treated as a contractor and I do not accept that he was engaged in undertaking physical or manual work to the extent he claims as in most cases he simply makes assertions without any supporting evidence.

125. Similarly, I do not accept the husband's claim that he had an extensive involvement in the wife's business for which he was not paid "wages" and that this should be quantified together with his unpaid wages for labouring as amounting to a $100,000 contribution.

126. While it appears that the husband did provide some limited practical assistance to the wife in relation to her business, as she conceded under cross-examination, generally he provides no evidence for his contributions to the wife's business other than mere assertions as to this matter. Further, the general tenor of both parties' evidence is that the wife worked hard in her business and its success was the result of her personal effort.

127. In summary, although the parties were having relationship difficulties for much of the time they lived together at Suburb M (from mid 2011 – mid 2015) they were generally pooling their financial resources, and the payment of the mortgage, some improvements on the Suburb M property, day to day living expenses and social expenses were made from these pooled resources. The parties were each funding their respective contributions from their own businesses in which they were sole traders. Due to the greater income earned by the wife throughout this period, her contribution to the finances of the family was greater than the husband's.

128. By the time the wife sold the Suburb M property in mid 2015 and the parties had decided to purchase a property in the Region O area, no inroads had been made in reducing the principal sum borrowed as a home loan as the deposits made over the previous years only covered interest on the loan.

129. Although the loan secured by the mortgage had not decreased over the years that the parties lived in the Suburb M property, the value of the property had increased significantly and it was sold for $1,000,050. After the mortgage was discharged proceeds of just over $500,000 ($503,259) were realised. These

proceeds were used for a deposit, stamp duty and conveyancing costs for the purchase of the Suburb D property. The purchase price of this property was $1,265,000 made up of $503,259 from the Suburb M sale with the balance ($820,000) obtained as a loan in both parties' name and secured by a mortgage.

130. From October 2015, when the purchase of the Suburb D property settled each of the parties paid $1,000 per week into a joint account from which the mortgage was paid. Expenses related to the property as well as day to day living expenses were also paid from this account. By this stage the husband's income had increased significantly. For the financial year ending 2015 he had a taxable income of $60,848, around three times his taxable income in the previous two years.

131. The financial arrangements of the parties following their separation in February 2016 are a little unclear though there is no dispute that the husband has remained living in the Suburb D property since that time and the wife was required to obtain and pay for separate accommodation for herself and her children. As noted, she rented premises until May 2019 when she purchased the Suburb N property.

132. It appears common ground that the husband continued to pay the mortgage and all outgoings in relation to the Suburb D property after the wife moved out, though there are times when the mortgage and other outgoings associated with the property fell into arrears. The available bank records indicate that the loan repayments at the time of separation were $1,350 a week.

133. As noted, $56,500 of joint monies were applied to the purchase of the Suburb N property. A further $56,500 was paid by the wife from her own resources by way of deposit and the balance of $1,017,000 was borrowed by the wife alone secured by a mortgage in her name. The wife has made all payments to that loan since the date of purchase.

134. In assessing the relative financial contributions of each party to the acquisition and improvement of their property, I must first consider the considerable weight that must be attached to the wife's initial sole contribution of $165,000 to the purchase of the Suburb M property being roughly a quarter of that purchase price. I also have regard to the husband's subsequent lump sum contribution of $40,000. The proceeds of sale from the Suburb M property of $503,259 represented the entirety of the deposit for the Suburb D property and amounts to around one third of the current value of the Suburb D property. The Suburb D property itself comprises almost 40 per cent of the parties' net assets.

135. In accordance with the relevant authorities, the Court must not simply have reference to the value of an item when the parties began living together without reference to its value to the parties at the time of the hearing as this may not give adequate recognition to the importance of the contribution at the time of the hearing.

136. In *Williams & Williams*[4],the Full Court at [26] considered that:

> …there is force in the proposition that a reference to the value of an item as at the date of the commencement of cohabitation without reference to its value to the parties at the time it was realised or its value to the parties at the time of trial, if still intact, may not give adequate recognition to the importance of its contribution to the pool of assets ultimately available for distribution towards the parties. Thus where the pool of assets available for distribution between the parties consists of say an investment portfolio or a block of land or a painting that has risen significantly in value as a result of market forces, it is appropriate to give recognition to its value at the time of hearing or the time it was realised rather than simply pay attention to its initial value at the time of commencement of cohabitation. But in so doing it is equally as important to give recognition to the myriad of other contributions.

137. The Full Court in *Williams* also referred to the Full Court decision in *Pierce & Pierce*[5] which had also dealt with the relevance to be paid to initial contributions.

138. In *Pierce* the Full Court at [28] said:

> In our opinion it is … a question of what weight is to be attached, in all the circumstances to the initial contributions. It is necessary to weigh the initial contributions by a party with all other relevant contributions of both the husband and the wife. In considering the weight to be attached to the initial contribution, in this case of the husband, regard must be had to the use made by the parties of that contribution

139. Having noted that weight must be given to the value of the wife's initial contribution to the Suburb M property, which increased significantly over time and as a result must be regarded as a weighty contribution to the Suburb D property (and thus the total assets of the parties), I take into account the other financial contributions of the parties as previously outlined.

140. The other significant asset of the parties is the Suburb N property registered in the wife's name. As previously noted $56,500 (five per cent) of the purchase price for this property came from the parties' joint funds and the balance of the deposit in the same amount was a contribution made by the wife only. Since that date she alone has contributed to the repayment of this mortgage. In other words, she has also made the vast majority of the contribution to that property.

141. So far as other financial contributions are concerned, the husband alone has paid the mortgage on the Suburb D property since separation but he has also had the benefit of remaining on that property including for a period of around

[4] [2007] FamCA 313.
[5] [1998] FamCA 74.

two and half years following separation when the property was registered in both parties' names.

142. As previously discussed, although the wife received $30,000 in joint funds in March 2017 just over one year after separation, this was utilised by her for living expenses including to provide accommodation for herself and her children (including the child of the marriage). I also indicated that as it was not possible to quantify the amount the wife had spent on similar expenses from her $300,000 interim payment, some allowance would be made for the fact that she was also required to continue to rent premises for herself and her children between mid-2018 for almost twelve months prior to the purchase of the Suburb N property.

143. There appears to be some dispute between the parties about their respective contributions towards financial support for the child. Although the husband has been at times in arrears of child support payments during this period he has made a financial contribution in this way and each have made other financial contributions to meet the child's needs. It is noted, however, that the child lives primarily with the wife and it is reasonable to find that she has assumed greater financial responsibility in relation to the child.

144. Non-financial contributions to the improvement of the Suburb M property has been discussed and for the reasons given I consider that each of the parties made a similar contribution in this regard.

145. So far as non-financial contributions to the marriage including to the welfare of the family are concerned, I assess that these matters slightly favour the wife. During the periods of time that the parties separated when living at the Suburb M property the child continued to live with the wife and she thus had a greater responsibility for the child's care. These periods totalled almost twelve months (March to September 2014 and December 2014 to February 2015). Further, following separation the child remained living with the wife and it was not until around two years later that the child began to spend substantial and significant time with the husband.

146. Taking all of the foregoing matters into account and giving weight to the particular matters for the reasons given, I assess the contributions-based entitlement of the husband to be 35 per cent and the wife 65 per cent.

Section 75(2) Factors

147. In considering property adjustment orders I also must have regard to the matters referred to in s 75(2) so far as they are relevant.

148. Each of the parties is in their 40's and so far as I am aware, each is in a good state of health. They both continue to earn an income from their own efforts in their own business and each has the capacity to continue earning an income into the future. Although the wife earnt more than the husband in her business,

for most of the time the parties' relationship was intact the husband's income increased significantly in the year the parties' purchased the Suburb D property and he has been able to make mortgage payments on that loan from his income since that date.

149. Under the final parenting orders, the wife has the greater care of the parties' child who is aged eight. The parties each have the care of another child from different relationships. The financial responsibility of the wife is undoubtedly greater than the husband in this regard as her son is aged 12 while the husband's daughter is aged 17.

150. I consider it likely that the husband will continue to pay child support as assessed as he has done for some time, despite having fallen into arrears previously.

151. The only other relevant matter to be considered at this stage (which falls within s 75(2)(o)) relates to financial disclosure.

152. Although each of the parties allege that the other did not provide full financial disclosure which should be taken into account, the husband's case in this regard amounted to nothing more than mere assertions unsupported by evidence.

153. Ultimately, the wife's case regarding disclosure was that the husband had provided much of the material that ought to have been provided earlier in the proceedings at a very late stage, including in the course of the final hearing. I accept that this is likely to have disadvantaged the wife in the preparation of her case, which the wife's counsel ultimately appeared to agree, may be a matter that she relies upon more with respect to the costs application that she has foreshadowed, rather than in the property settlement proceedings themselves.

154. I accordance with the authorities, the main impact of established non-disclosure or partial disclosure of significant information by a party is that a court should not be "unduly cautious about making findings in favour of the innocent parties"[6]. Ultimately, in these proceedings there were no particular findings in favour of the wife that she contended were connected with the husband's non-disclosure or late disclosure. She did maintain that there were instances where the husband may have failed not only to provide financial disclosure to her but failed to adduce in evidence documents that may have supported his various claims concerning financial matters. Where this occurred and the husband's assertion was unsupported by documents that may be expected to have been under his control, the matter contended for was not established.

155. For example, the husband deposes to a version of events related to the purchase of the Suburb M property to the effect that both parties attempted to obtain a home loan together (and that the wife engaged in dishonest conduct), and refers

[6] *Weir & Weir* (1993) FLC 92-338, 8.

to various documents in support of this contention but adduced none of those documents in evidence. Similarly, the husband deposes to having a significant role in developing the wife's business and refers in this regard to various documents such as his designs and drawings for the layout and other activities which may be expected to have been supported by documentation, none of which was adduced in evidence. In relation to these and other matters in which the husband's bare assertions in his affidavit are not supported by any evidence, I have been unable to find the matters proven as he contends.

156. It appears that there may be considerable overlap between documents that the husband did not provide to the wife by way of financial disclosure (in time or at all) and documents he did not adduce in evidence which caused his particular contention to fail. For this reason, I do not propose taking any such failure to comply with obligations as to financial disclosure into account further when considering s 75(2).

157. Having regard to the foregoing, I make a five per cent adjustment in favour of the wife to account for s 75(2) matters.

Is the proposed distribution just and equitable?

158. As discussed earlier in these Reasons and in light of the authorities, I must consider the overall effect of the distribution under contemplation and in particular consider the amounts each party will receive in dollar terms in satisfying myself that the proposed distribution is just and equitable.

159. For the reasons given, the percentage based entitlement for the parties, adjusted by reference to s 75(2) will see the wife receive 70 per cent and the husband receive 30 per cent of the total net pool of assets **($1,004,594.00)**. In dollar terms (rounded), the husband's percentage interest is $301,378 and the wife's, $703,216.

160. The wife is to retain or has already had the benefit of:

The Suburb N property	$	233,000
Add back: partial property settlement	$	243,500
Motor Vehicle 1	$	15,000
Superannuation	$	40,721
Total	**$**	**532,221**

161. The husband is to retain:

The Suburb D property	$	380,000
Two cars	$	70,000
Superannuation	$	22,373
Total	**$**	**472,373**

162. Thus, for the wife to receive her $703,216 share and for the husband to receive his $301,378 share, the husband is to pay the wife $170,995.

163. It is the husband's contention that justice and equity will be achieved between the parties if he has no further requirement to make any payment to the wife (and if she is to share in 50% of the levy for remediation on the building in which the Suburb D property is located – a contention that I do not accept for the reasons given). The wife's contention in this regard is that justice and equity will be achieved if the husband is required to pay her $300,000.

164. In final oral submissions about the justice and equity of each party's claimed entitlements it was at times difficult to understand how the sums claimed were arrived at. It was conceded on behalf of the wife in this regard that her claimed entitlement of a $300,000 payment by the husband required a "leap" from the amount based on mathematical calculations. In my view, the "leap" is not justified in circumstances where all of the matters raised in this regard have already been considered when arriving at the percentage-based entitlement.

165. In all of the circumstances, including contributions as discussed at length, the length of the marriage, the size of the pool of assets for distribution and s 75(2) factors, I am satisfied that orders that would give effect to the wife receiving 70 of the parties' net assets and the husband receiving 30 per cent are just and equitable.

166. To give effect to this distribution I propose making orders as sought by the wife with the appropriate adjustments. In this regard I note that the wife proposes orders for the sale of the Suburb D property in default if the husband does not comply with orders for the payment of $170,995.

167. As discussed previously at length, the husband's brother has a registered 20 per cent interest in the Suburb D property but it has been regarded as a property solely owned by the husband for the purposes of these proceedings. I accept the submissions made on behalf of the wife that I am empowered to make orders under s 90AE(2) of the Act that alter the rights or property interests of a third party.

168. In relation to s 90AE(3), which sets out the circumstances in which the Court may make such an order, I consider that the making of such an order is reasonably necessary to effect a division of property between the parties, that the third party (the husband's brother) has been accorded procedural fairness in relation to the making of the order and I am satisfied in all of the circumstances that it is just and equitable to make the order.

169. In the course of final submissions, counsel for the wife also referred to the wife's costs application which was foreshadowed but it was clearly indicated that the wife wished to make further submissions in relation to the matter once the final orders had been made with respect to the property settlement.

170. For all of the foregoing reasons, I make the orders set out at the forefront of this judgment.

I certify that the preceding one hundred and seventy (170) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Hannam delivered on 9 June 2021.

Associate:

Date: 9 June 2021