FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 1) APPELLATE JURISDICTION

Chan & Lee [2022] FedCFamC1A 85

Appeal from:	*Chan & Lee* [2021] FamCA 135
Appeal number:	EAA 38 of 2021
File number:	SYC 2079 of 2018
Judgment of:	**TREE, GILL & WILSON JJ**
Date of judgment:	3 June 2022
Catchwords:	**FAMILY LAW** – APPEAL – PROPERTY – Appeal from final property settlement orders – Orders providing for 100 per cent of pool to wife and for wife to indemnify husband – Notional exclusions of assets from pool – Error of fact as to the debt of the parties – Majority judgment – Appeal allowed – Court re-exercising discretion where parties in net debt position.
Legislation:	*Family Law Act 1975* (Cth) ss 75, 79, 81, 117 *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 36
Cases cited:	*Abalos v Australian Postal Commission* (1990) 171 CLR 167; [1990] HCA 47 *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 65 ALR 53; [1985] HCA 61 *Coghlan v Cumberland* [1898] 1 Ch 704 *De Winter v De Winter* (1979) 23 ALR 211 *Devries v Australian National Railways Commission* (1993) 177 CLR 472; [1993] HCA 78 *Dougherty v Dougherty* (1987) 163 CLR 278; [1987] HCA 33 *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22 *Galea v Galea* (1990) 19 NSWLR 263 *Gissing v Gissing* [1971] AC 886 *Gronow v Gronow* (1979) 144 CLR 513; [1979] HCA 63 *House v The King* (1936) 55 CLR 499; [1936] HCA 40

Hsiao v Fazarri (2020) 270 CLR 588; [2020] HCA 35

Husain v O & S Holdings (Vic) Pty Ltd [2005] VSCA 269

Jones v Hyde (1989) 85 ALR 23; [1989] HCA 20

Lee v Lee (2019) 266 CLR 129; [2019] HCA 28

L'Estrange v F Graucob Ltd [1934] 2 KB 394

Lovell v Lovell (1950) 81 CLR 513; [1950] HCA 52

Mallet v Mallet (1984) 156 CLR 605; [1984] HCA 21

Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259; [1996] HCA 6

Muschinski v Dodds (1985) 160 CLR 583; [1985] HCA 78

Norbis v Norbis (1986) 161 CLR 513; [1986] HCA 17

Oriolo and Oriolo (1985) 10 Fam LR 665; [1985] FamCA 54

SS Hontestroom v SS Sagaporack [1927] AC 37

Paterson v Paterson (1953) 89 CLR 212; [1953] HCA 74

R v Watson; Ex parte Armstrong (1976) 136 CLR 248; [1976] HCA 39

Rimmer v Rimmer [1953] 1 QB 63

Shan & Prasad [2018] FamCAFC 12

Stanford v Stanford (2012) 247 CLR 108; [2012] HCA 52

State Rail Authority (NSW) v Earthline Constructions Pty Ltd (in liq) (1999) 73 ALJR 306; [1999] HCA 3

Storie v Storie (1945) 80 CLR 597; [1945] HCA 56

Suttor v Gundowda Pty Ltd (1950) 81 CLR 418; [1950] HCA 35

Toll (FGCT) Pty Ltd v Alphaharm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52

Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9

Water Board v Moustakas (1988) 180 CLR 491; [1988] HCA 12

Weir and Weir (1993) 16 Fam LR 154; [1992] FamCA 69

Number of paragraphs:	164
Date of hearing:	31 March 2022
Place:	Heard in Sydney, delivered in Cairns
The Appellant:	Self-represented litigant
The Respondent:	Self-represented litigant

ORDERS

EAA 38 of 2021
SYC 2079 of 2018

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
DIVISION 1 APPELLATE JURISDICTION

BETWEEN:	**MS CHAN** Appellant
AND:	**MR LEE** Respondent

ORDER MADE BY: **TREE, GILL & WILSON JJ**

DATE OF ORDER: **3 JUNE 2022**

THE COURT ORDERS THAT:

1. The appeal be allowed.
2. Orders 1, 2, 3 and 4 of the Family Court of Australia made on 23 March 2021 be set aside.
3. The respondent husband do all acts and things required to transfer to the appellant wife all his right, title and interest in the property known as B Street, Suburb C (the "B Street, Suburb C property").
4. The appellant wife indemnify the respondent husband in respect of any and all liabilities relating to the B Street, Suburb C property, including:
   (a) By way of mortgage; and
   (b) The sum of $92,092.50 loaned to the parties by the wife's parents.
5. Other than as provided in these orders, each party shall retain any asset in his or her possession.
6. The respondent husband shall pay the appellant wife's costs in the sum of $550 within 28 days of the date of these orders.

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 10.14(b) *Federal Circuit and Family Court of*

Australia (Family Law) Rules 2021 (Cth)), or to record a variation to the order pursuant to r 10.13 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth).

Section 121 of the *Family Law Act 1975* (Cth) makes it an offence, except in very limited circumstances, to publish proceedings that identify persons, associated persons, or witnesses involved in family law proceedings.

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

REASONS FOR JUDGMENT

TREE & GILL JJ:

INTRODUCTION

1 By her Notice of Appeal filed on 19 April 2021, the appellant Ms Chan ("the wife"), appeals the entirety of orders made on 23 March 2021 by a judge of the then Family Court of Australia. Those proceedings were in relation to the resolution of the property dispute between the respondent Mr Lee ("the husband") and the wife, and the wife's claim for spousal maintenance.

BACKGROUND

2 At the time of the original hearing, the husband was 46 and the wife was 41. The parties migrated from China, with the wife initially granted permanent residency as an independent skilled migrant in 2007. She later sponsored the husband's migration.

3 The parties married on 15 May 2008 and separated on 16 May 2016. Their divorce was finalised on 25 July 2017. There is one child of the marriage who is presently 12, and whose care is by the wife.

4 The property proceedings involve various items of property, including real property co-owned by the husband and wife in Australia, real property held in the wife's name in Australia, but with the beneficial interest held by her parents, and various properties in China, as to which the husband held part of the title with his parents and then, following the death of his mother, with his father.

5 Significant debts were also owed by the parties, both to a bank by way of mortgage secured on the real property held in Australia, and to the wife's parents for various purposes.

6 In determining the proceedings, the primary judge found that the contributions of the parties favoured the wife 80 per cent, to the husband's 20 per cent and that the various factors contained at s 75(2) of the *Family Law Act 1975* (Cth) ("the Act") required a further adjustment to the wife of 20 per cent. Accordingly, the primary judge allocated the whole of the assets of the relationship to the wife.

7 It may be observed that, at face value, the primary judge was effecting the most favourable adjustment of property toward the wife that she was able to, with the wife to receive the whole of the property of the relationship.

8 However, the wife claims that the actual effect of the orders is that she is left in a net debt position, taking responsibility for debts of the relationship that outweigh the property that she is to receive under the orders.

9 It is against this background that the wife lodges her appeal.

NATURE OF AN APPEAL

10 An appeal against a discretionary judgment, such as this, requires that error be identified of the nature set out in *House v The King* (1936) 55 CLR 499. In the absence of establishing procedural unfairness in the conduct of the hearing, it is necessary that it be established that the primary judge acted upon a wrong legal principle, made a mistake of fact, took into account an irrelevant consideration or failed to take into account a relevant consideration. If such features are not directly established, there remains a residual category of challenge, where a judgment can be seen in its result to be manifestly or plainly wrong, such as to permit the inference that the result has been impacted by an otherwise unidentified error. It is not enough to persuade an appeal court that it may have come to a different conclusion.

THE GROUNDS OF APPEAL

11 The wife's grounds of appeal are firstly set out in the Notice of Appeal filed 19 April 2021.

12 The wife challenged the treatment of the parties' various liabilities, claiming that they were misconstrued by the primary judge, and seeks that the husband continue to bear responsibility for the whole of the parties' liabilities, including the mortgage for the property that the wife holds following the proceedings.

13 The wife complained that the primary judge excluded from the pool of property, the real property partly held by the husband in China, and excluded the capital gains that he has received in relation to the properties in China.

14 The wife further asserted that her parents were unable to speak up during the trial, aside from answering questions.

15 The wife complained that no parenting order was made.

16 The wife challenged the primary judge's refusal to make a spousal maintenance order directed to the husband, and the failure on the part of the primary judge to identify the wife's illness.

17 The wife's Summary of Argument filed 29 September 2021 both explained and expanded upon the grounds. The wife also asserted that the primary judge misconstrued her application as being for the wife to receive 70 per cent of the property, including the B Street, Suburb C property, subject to the mortgage. The wife says that what she actually sought was that the husband pay the mortgage following the transfer of the property to her.

18 The wife alleged that the primary judge made an error of fact in failing to make a finding as to the sale price of one of the Chinese properties.

19 The wife made a general complaint as to the husband's failure to make full disclosure in relation to the Chinese properties, implying that failing to give it an effect was in error.

20 The wife complained that the primary judge failed to notionally add back a sum removed from the parties' savings by the husband.

21 The wife asserted that the primary judge made a factual error in relation to the husband's income (and implicitly his capacity to pay spousal maintenance).

22 The wife also complained that the primary judge failed to take into account the special needs of the parties' child in relation to education.

23 The wife complained that there was no order for child maintenance.

THE APPEAL

24 A number of the grounds advanced are plainly without merit.

25 The first is the assertion that the primary judge misapprehended the wife's application, whereby the wife asserts that she sought the transfer to her of the property, being the real property held by the parties at B Street, Suburb C, and that the husband should bear responsibility for the payment of the debt in respect of that property, or at least that the husband would pay the mortgage for the property. This was not the application actually made by the wife.

26 As was observed in *Hsiao v Fazarri* (2020) 270 CLR 588 at [53], the appellant's right of appeal:

> 53. …was a right to have the Full Court review whether the primary judge's discretion to make a property settlement order had miscarried, applying the well-established principles expressed in *House v The King*. It was not an opportunity for the appellant to make a case that she chose not to make at the trial.
>
> (Footnote omitted)

27 What the wife had applied for in her Amended Initiating Application filed 12 December 2019 ("Amended Application") were orders for the transfer of the property and the discharge by her of the mortgage on the property, such that she would hold the mortgage in her sole name. She sought further adjustment of 70 per cent overall of a property pool that was to incorporate property held by the husband in China. This would also involve a cash payment by the husband. The primary judge correctly summarised the claim by the wife at [3] of her reasons for judgment, as follows:

> 3. The wife seeks 70 per cent of the property of the marriage, including the transfer to her, subject to the mortgage, of a property at B Street, Suburb C ("B Street, Suburb C"), the former matrimonial home, and ongoing spousal maintenance of $400 per week. She asserts that properties in China, in relation to which the husband is a registered owner, form part of the matrimonial property.

28 There is no merit in this complaint, as the wife's claim does not reflect the case put at trial.

29 The second is the complaint regarding the treatment of the wife's parents during the trial. While the wife complained that the primary judge did not permit her parents to speak, other than to answer questions, this challenge to the judgment was not explained. It was not made apparent that there was any deficit in the primary judge's treatment of the wife's parents, who were witnesses, rather than parties to the litigation. This ground is also without merit.

30 The third is in relation to the failure to make a child maintenance order. Allied to this issue was the wife's complaint that the primary judge failed to take into account particular needs of the parties' child in respect of education. The Amended Application seeks no order for such maintenance, and no jurisdiction was identified for the making of such an order. This ground is without merit.

31 The fourth, plainly unmeritorious ground, is in relation to the failure of the primary judge to make a parenting order. The wife's Amended Application did not seek one.

32 The balance of the appeal grounds can be grouped into a number of categories.

33 The first is the assertion that the primary judge mistook a material fact, being the debts owed by the parties as set out in the balance sheet at [53] of the judgment, resulting in orders that left the wife in net debt, implicitly also encompassing an argument that the result was manifestly unreasonable.

34 The second is that the primary judge erred in her treatment of property held in China, both factually, in relation to its value, and in excluding such and any associated capital gains from the pool of property for the purposes of distribution. The complaint as to the treatment of the husband's non-disclosure is also in relation to these holdings.

35 The third was in the primary judge's dismissal of the spousal maintenance claim, in her failure to take account of the wife's illness and in her findings (or lack thereof) in relation to the husband's income.

36 The fourth was the complaint that the primary judge failed to add-back a sum of money disposed of by the husband, post separation, derived from the parties' savings.

Mistake of fact in relation to the parties' debts - manifest unreasonableness

37 Where, as here, one of the issues is whether the primary judge made a mistake of fact, the High Court in *Lee v Lee* (2019) 266 CLR 129 at [55] has observed through the plurality of Bell, Gageler, Nettle and Edelman JJ that:

> 55. A court of appeal is bound to conduct a "real review" of the evidence given at first instance and of the judge's reasons for judgment to determine whether the trial judge has erred in fact or law…
>
> (Footnote omitted)

38 The plurality went on to observe at [56] that it is the responsibility of the appellate court to:

> 56. …persist in its task of "weighing [the] conflicting evidence and drawing its own inferences and conclusions"…
>
> (Footnote omitted)

39 In undertaking that task, it should be observed that the primary judge was dealing with a case with little clarity, sparse evidence, and at [53] in her words, was forced to do the "best I can" to formulate a balance sheet, under circumstances where the parties had failed, contrary to directions, to formulate a joint balance sheet. It should also be observed that each of the litigants was self-represented, and English was their second language, such that the proceedings were conducted through an interpreter.

40 The primary judge set out that the primary sources of evidence that she would rely upon to determine the balance sheet were the financial statements prepared by each of the parties. The wife's balance sheet and financial statement is contained in the Appeal Book. The husband's balance sheet was embedded within his trial affidavit filed 2 March 2021.

41 It may be observed that the husband's balance sheet is silent in relation to indebtedness, while the wife's financial statement is broadly consistent with the balance sheet that she presented to the Court, but expressed between the two documents in a manner that was apt to confuse. It is illustrative to reproduce the balance sheet below:

Ownership		**Description**	**Applicant's value $**	**Respondent's value $**
ASSETS				
1	W&H	B Street, Suburb C Property	285,000	285,000
2	W H	Motor Vehicle 1 Motor Vehicle 2	20,000	 20,000
3	W	Bank account	1,060	?
4	W	Suburb G Property on trust (non-contribution)	0	0
5	H	1/3 share of H Street, City J (not including 50% heritage of …)		400,000
6	H	1/3 share of sale proceeds for K Street, City J (not including 50% heritage of …)		120,000
Total			**306,060**	**825,000?**
ADDBACKS				
7	H	Withdrawal from parties' joint offset bank account		36,000
8	H	50% heritage of … (TRANSFERRED AWAY) [Respondent] dad said [Respondent] was going to return debts to Wife's parents and support the child		260,000
Total			**0**	**296,000**
LIABILITIES				
9	W	Student loan	26,826	0
10	W&H	B Street, Suburb C Home Loan & W's parents Loan	320,000	320,000

11	W	Suburb G Home Loan (500,000 home loan on trust)	0	0
12	H	Two properties in City J	0	0
Total			**346,826**	**320,000**
SUPERANNUATION				
13	W	Australian Super	27,978	?
Total			**27,978**	**?**

42 It may be observed that under the heading "liabilities", the wife has provided a single line item aggregating two debts, expressed under the "ownership" column as "W & H" and then under the "description" column as "B Street, Suburb C Home Loan & W's parents Loan". The wife has then recorded $320,000 under her value and $320,000 under the husband's value.

43 Ordinarily, such entries would be taken to mean that there was agreement between the parties as to the amount of the indebtedness, and that each party agreed that the total indebtedness was $320,000. However, that was not the case here. What the wife was asserting by her balance sheet under the columns "Applicant's value" and "Respondent's value", was the value of the interest or debt that she attributed respectively to herself or to the husband's share of the asset or debt.

44 Such an understanding is consistent with other entries contained on the balance sheet.

45 For example, while the line items for the "B Street, Suburb C Property" records the applicant's value at $285,000 and respondent's value at $285,000, the actual value was asserted to be $570,000. Further, line item two records the husband's car as $20,000 and the wife's car as $20,000 as two separate entries under the one line item. Similarly, the entries in relation to the Chinese properties follow a similar pattern, the values being assigned to the husband.

46 The wife's financial statement records in the liabilities column at item 46 is $220,000, in respect of home mortgages, and at item 50 is $105,300 being loans from the wife's parents. However, these amounts recorded by the wife are under the heading "amount of your share" and the wife has noted that it is a 50 per cent share. This, as with the balance sheet, meant that the overall debts asserted at item 46 was $440,000 (rather than the $220,000 expressed as

the wife's share) and at item 50 was $210,600 (rather than merely $105,300 expressed as the wife's share).

47 Consideration of the documents leads to the conclusion that what the wife was doing was recording the share attributed to each of the parties, rather than the overall value. Thus, if these figures were accepted and applied to the value of their B Street, Suburb C property, this left a capital value of $570,000, but an indebtedness of $650,000.

48 Given that the primary judge misconstrued the evidence of the wife, the question remains as to what findings should have been made in relation to the indebtedness of the parties.

What was the appropriate finding as to debt?

49 Ascertaining the mortgage on the parties' property is straightforward. The key uncertainty as to the debt flows from what may have been owed to the wife's parents. A number of sources of evidence addressing this issue were contained in the Appeal Book, although none was without its flaws.

50 In his affidavit filed 21 November 2020, the wife's father asserted that numerous amounts were provided to both the wife and husband from 2010.

51 He firstly asserted that $15,000 cash was initially lent to the couple to pay for rent, furniture, living expenses and savings. This asserted cash amount was unsupported by any bank statement, unlike a number of the other transactions that were evidenced by bank records. It was, however, supported by a Deed of Loan dated 13 October 2013 executed by the husband.

52 Secondly, he asserted that $6,732.58 was deposited into the parties' account, although this was not asserted by him to be a loan, with the deposit being evidenced in the Commonwealth Bank statement of the parties. The wife's father further asserted that $15,500 was lent for a car (at paragraph 10), with the amount reflected in the bank statement showing a deposit of that amount on 13 October 2010. It was also supported by the Deed of Loan executed by the husband.

53 Thirdly, the wife's father asserted that a sum of $7,000 was lent on 6 May 2011 for living expenses for the following seven months (at paragraph 11). This asserted cash amount was also unsupported, as there were no bank statements annexed which captured the May 2011 period.

54 Fourthly, the wife's father asserted that there were two transactions totalling $92,092.50 (at paragraph 17). The amounts of $46,092.50 on 17 October 2011 and $46,000 on 14 December 2012, were respectively shown in Commonwealth Bank and Westpac statements. It was asserted that these amounts were to assist the parties in the purchase of their apartment. These were further evidenced by the Deed of Loan agreement executed by the husband.

55 The primary judge concluded that the husband was not aware of what he was executing in the Deed of Loan, and that he would simply sign whatever the wife asked him to, as English was not his first language. Accepting this to be the case, it still leaves the proposition that the Deed of Loan demonstrates, that as early as 2013, it was being maintained by the wife and her parents that these amounts were loans.

56 The wife's father further asserted that in 2016 the wife took $30,000 to buy a new car (at paragraph 42). This was not supported by any bank statement, nor by a Deed of Loan, as had been used in respect of the previous amounts.

57 Although the wife's father says that a further $167,000 was loaned between June 2014 and May 2015, this appeared to be a sum that was returned to the wife's parents following a request made on 7 May 2016 in order to facilitate the wife's parents purchasing a property.

58 The wife's father asserts that the parties owe a combined amount of at least $180,000 as at 28 February 2018, dividing the responsibility for such between the parties at $90,000 each, setting out his calculations.

59 As was the case for the primary judge, we are left with doing the best that we can from this to determine the debts in respect of the wife's parents. Taking those matters supported by the bank statements or the Deed of Loan document leaves the following:

(a) $15,000 – initial cash loan;

(b) $15,500 – loan for car;

(c) $46,092.50 – 17 October 2011 loan for home; and

(d) $46,000 – 14 December 2012 loan for home.

60 Some similar figures are asserted by the wife's mother in her affidavit filed 21 November 2020, with the same bank statements annexed as with the wife's father's affidavit.

61 The wife's mother asserts that loans were given to the couple of more than $30,000 in 2010, $46,000 in October 2011, and $46,000 in December 2011 (at paragraphs 3–4). These general

amounts were not identified in the bank statements and appear to be a double counting of a further $46,092.50 (at paragraph 7) and another $46,000 (at paragraph 8). These are the same figures asserted by the wife's father and also identified in the Commonwealth Bank statements of 14 September 2011 to 13 December 2011, and Westpac statements for 20 September 2012 to 20 December 2012.

62 The wife's mother also asserts that transfers of $80,000 and $77,000 were made to the couple between June 2014 and December 2014 (at paragraph 27). It is unclear that these amounts remained outstanding.

63 The wife's mother further asserts a deposit of $9,000 into the wife's offset account on 3 July 2014, with a further $10,000 deposit and loan in March 2015 of $10,000. It is far from clear that these amounts remained outstanding as, for example, the $10,000 purportedly provided by the wife's mother on 30 June 2014 is followed by a transfer of $10,000 out of the wife's account on 1 July 2014 described as "Mum 10000."

64 In reliance upon bank statements annexed to the wife's mother's affidavit, it is claimed that in addition to the amount set out in the Deed of Loan of $122,592.50, a further $167,000 was loaned to the parties from January 2014 to May 2015. From this she asserts that the husband owes at least $90,000. It is, however, far from clear that the January 2014 to May 2015 transferred amounts remain outstanding, as if they did, the borrowings would far outstrip the totals asserted by the wife's mother.

65 Accordingly, it cannot be thought that the wife's mother's evidence advances the issue of the loans beyond what was established by the wife's father.

66 The primary judge's finding that $92,000 was advanced as a loan for the purchase of the parties' home, with the intention that it be repaid, was unimpeachable.

67 Taking the evidence of the wife's father as being the best evidence of the loans owing, sums totalling approximately $30,500 have been described by him as loans, for living expenses and the purchase of a vehicle for the use of the parties. Other sums appear to have been repaid, or were not described by him as loans, such as the transfer of $6,732.58, or were not sufficiently established to have taken place absent the provision of a relevant bank statement.

68 This leaves total borrowings of $92,092.50, referable to the purchase of the home, and $30,500 during the relationship for various aspects of the support of the family. To ascertain

the total liabilities these are to be added to the mortgage amount of $440,000 and the outstanding student loan in the sum of $26,826.

Conclusion as to liabilities

69 This leaves a position of liabilities held by the parties of approximately $589,000, of which $532,000 is associated with the purchase of the property, albeit only $440,000 is secured by mortgage. A balance of about $92,000 remains owing to the wife's parents.

70 The wife also retains a student loan of $26,826.

71 The parties jointly owe the wife's parents a further $30,500 in respect of loans to meet various living expenses during the relationship.

72 Applying those loan figures to the analysis of the pool of property conducted by the primary judge at [79] leaves the parties with the B Street, Suburb C property at $575,000, and with debts totalling $589,000, a net indebtedness of $14,000 as opposed to the primary judge's reckoning that there were $162,874 in net assets.

73 This is not the position that the primary judge considered the parties to be in, no doubt in large part due to the opaque manner in which the case was run before her.

74 This in turn feeds into the second of the central complaints, which is as to the nature of the orders made by the primary judge that essentially required the wife to indemnify the husband in respect of the total indebtedness. This means that although the wife received the whole of the interest in the B Street, Suburb C property, the end point is that she received a net liability, a result not within the primary judge's contemplation.

75 How this impacts on the ultimate disposition of the matter, will be dealt with further below.

The Chinese properties

76 The wife asserts that the primary judge was wrong to exclude these properties from the pool for division and to disregard any capital gain associated with them. It should be observed that the primary judge found that the husband co-owned the properties at H Street, City J and K Street, City J with his parents, in accordance with the obligation to identify the parties' legal and equitable interests, as identified in *Stanford v Stanford* (2012) 247 CLR 108 ("*Stanford*") at [37]:

> 37. First, it is necessary to begin 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…

77 However, the primary judge was correct to conclude as she did (at [71]):

> There is no admissible evidence of the sale price of K Street, City J.

78 The primary judge was also correct to consider that (at [75]):

> Although the husband is a registered proprietor of H Street, City J, there is no evidence that he is presently able to receive any benefit from it.

79 The primary judge did not fail to identify the husband as having an interest in the properties. Further, the primary judge was not in error in considering the weight to be attributed to such interests as analogous to a future bequest on the death of his father. The conclusion of the primary judge reflects the lack of evidence to establish the capacity of the husband to realise the assets in the face of the interests held by his father.

80 That consideration of weight led to the notional removal of the items from the pool of property. That removal in such a manner is not to be equated with a failure to determine the interests as required by *Stanford.*

81 The wife has not identified why the primary judge was wrong to treat the interests in such a manner.

82 Insofar as complaint is made by the wife in relation to the husband's non-disclosure, it may be seen that it was an issue both that the primary judge was alive to and addressed appropriately in the judgment, observing that the wife was at all points aware of, and able to establish their existence.

83 Error is not demonstrated in relation to the treatment of the Chinese properties.

Dismissal of spousal maintenance application

84 In order to make a spousal maintenance order the primary judge was required, in compliance with s 75(1) of the Act, to find that the husband was reasonably able to maintain the wife. This required adequate evidence to allow such a conclusion to be drawn.

85 The primary judge identified that the only evidence relied upon by the wife to establish that the husband has the capacity to pay spousal maintenance was a social media post made by the husband (at [107]):

> The only evidence relied upon by the wife in relation to his capacity to pay was a

> post on social media where the husband asserted he had an income of $80,000 per annum. The husband, in cross-examination, said he made up that figure because he had not had a girlfriend for a long time.

86 In the face of the explanation of the post made by the husband, the primary judge considered that capacity had not been established. While the wife asserted that she had provided evidence of the husband's income, the figures provided were via bank statements for 2017 and 2018, disclosing, generally between $3,000 and $5,000 per month by way of deposits. The primary judge has not been shown to have been in error in concluding that there was inadequate evidence to demonstrate capacity current as at the trial of the matter in 2021.

87 Accordingly, the primary judge has not been shown to have been in error in refusing the spousal maintenance application.

Failure to add-back

88 Shortly following separation, the husband withdrew approximately $36,000 from the savings of the parties, using it for purposes that included the acquisition of a motor vehicle. The wife sought that this amount be added back, a step declined by the primary judge. However, to leave the matter there mischaracterises the primary judge's approach. The primary judge specifically recognised that the husband had the use of this sum, and identified that its use in such a manner would be taken into account in making the overall adjustment. The adjustment at s 75(2) of the Act was a 20 per cent adjustment leading to an overall 100 per cent allocation of the property to the wife. No error is identified in the approach taken by the primary judge in this respect.

CONCLUSION

89 Of the myriad of complaints made by the wife, she has correctly identified that the primary judge mistook the debts of the parties and the effect of the orders that she had made, being orders designed to be most favourable to the wife.

90 The issue that remains is as to what the consequences of this error might be.

91 Section 36 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) provides the suite of remedies available to this Court on appeal. In particular s 36(1)(b) provides that on appeal the Court may:

> Give such judgment or make such order, as, in all the circumstances, it thinks fit, or refuse to make an order

92 It should be observed that a correct understanding of the evidence as to debt identifies that the parties are in parlous financial circumstances, with little equity in the real property that they acquired during the relationship and outstanding personal debts that exceed what equity there is. These circumstances point away from remittal of the matter and strongly support the re-exercise of the discretion by this Court. In undertaking that task we are assisted, although not bound, by the other findings and analysis of the primary judge which have not been impugned in the same manner as the findings as to debt.

93 As noted, the orders made by the primary judge concluded that the contributions made by the wife favoured her 80 per cent to 20 per cent. The wife has not impugned this conclusion which flows from the history of contributions made by the parties as recited by the primary judge. The error made by the primary judge as to the level of debt does not detract from this assessment of contributions. It should be adopted.

94 The primary judge also concluded that there should be a further adjustment of 20 per cent in favour of the wife taking into account the factors within s 75(2) of the Act. Again this conclusion is unassailable, given the matters recited, including the care the wife will be required to provide for their child and the monies removed from the parties' savings by the husband. This is not an assessment undermined by the error as to the parties' level of debt. It too should be adopted.

95 It may be observed that the effect of this analysis, being that the wife should receive the whole of the property, remains the appropriate outcome, particularly where the wife seeks to retain the B Street, Suburb C property.

96 Although the wife sought, on appeal, that an obligation should be placed upon the husband to pay the mortgage for that property, this is not a sustainable position. If the husband were to be required to hold the obligation for either the secured or unsecured debts in relation to that property he would effectively be required to bring property into existence that does not at present form a part of the parties' pool of property. The Full Court in *Shan & Prasad* [2018] FamCAFC 12 at [97] observed that an order that required a party to receive more property than existed, and the other party to in effect "create property" to comply with the orders constitutes a flawed approach.

97 It may also be observed that such is also the effect of *Stanford* which identifies that orders are to be made in relation to the legal and equitable property interests. Such an approach

excludes the orders now pursued by the wife, as the order sought would not be directed to the parties' legal and equitable interests. Finally, such an order would be unlikely to end financial relations between the parties and avoid further proceedings between them, as the Court is enjoined to try to do by s 81 of the Act.

98 The debt related to the property is constituted by $440,000 secured by mortgage and $92,000 unsecured but owed to the wife's parents, totalling $532,000 in relation to a property valued at $570,000, leaving a net equity of $38,000. Where the wife is to retain the B Street, Suburb C property, she should indemnify the husband in respect of all debt associated with the property, both as secured by mortgage to the bank and unsecured to her parents.

99 The balance of the debts total a $26,826 student loan taken out by the wife and $30,500 borrowed from her parents for various living expenses and supports for the parties.

100 Given that the wife has obtained and retained the qualification connected with that loan it would be inappropriate to cause the husband to indemnify the wife in respect of such.

101 However, insofar as the orders required the wife to indemnify the husband in respect of the non- B Street, Suburb C property related debt to the parents, this should not be the case. Rather, no provision should be made for indemnification in respect of this debt. This leaves the husband also indebted, and both parties in a net debt position. Such an outcome does not offend s 81 of the Act.

102 Whilst this may seem a minor benefit to the wife, given her parlous financial circumstances, it is potentially significant, and not mere tinkering. Moreover, it properly reflects the reality of the position arrived at (correctly) by the primary judge that the orders should reflect a 100 per cent adjustment to the wife. That position does not warrant an indemnification in relation to debts from the relationship that exceed the pool of property where those debts are truly those of both parties. Such an outcome is just and equitable.

103 Orders will be made accordingly.

Costs

104 Neither party filed a schedule in accordance with the orders of the Registrar.

105 Neither party was represented. The only identified expense was for a transcript procured by the wife at $550.

106 As set out at s 117(1) of the Act, the starting position is that each party should bear their own costs, subject to the matters contained at s 117(2A) of the Act justifying a different outcome.

107 Neither party was in receipt of legal aid. Both parties face difficult financial circumstances.

108 Importantly, in the conduct of the proceedings it became apparent that the primary judge had made an error as to the debt of the parties that warranted the allowing of the appeal. This error occurred in the context of the husband's failure to provide a balance sheet as directed, a step that should have made the true position clearer for the primary judge. Whilst the error was made difficult to discern, given the nature of the case presented, it must have been apparent to the husband that such error had been made. Despite this, he continued to oppose the appeal, requiring the wife to obtain the transcript for which she is now out of pocket. This is sufficient to justify the making of a costs order in a sum certain to meet that expense.

WILSON J:

109 I do not agree with Tree and Gill JJ. In my judgment, the appeal should be dismissed. These are my reasons.

110 Reasons appealed against should not be read by an appeal court with an eye keenly attuned to the existence of error, as was held by the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 271–272.

111 The primary judge was confronted at trial with a badly prepared case. Both parties were litigants in person. Each gave evidence and otherwise presented her and his case through an interpreter. Each was wholly unfamiliar with the court process, especially the process of asking questions. In my view, the learned primary judge conducted the trial of this proceeding as well as could have been done, given that the litigants offered next to no assistance.

112 The wife relied on 11 grounds of appeal. Some made no sense such as Grounds 5, 6 and 9. Ground 5 was as follows:

> I am sick that Justice did not mention and dismiss the spousal maintenance.
>
> (As per the original)

113 Ground 6 was as follows:

> My parents were not allowed to speak up during the final hearing, except answering.
>
> (As per the original)

114 Ground 9 was as follows:

> No parenting order from the family court.
>
> (As per the original)

115 In my view, the wife should not have been permitted to advance those grounds of appeal for the simple reason that they were meaningless.

116 The legal principles that guide an intermediate appellate court when considering an appeal against a primary judge's exercise of discretion under s 79 of the Act are very well established by the High Court: see *House v The King* (1936) 55 CLR 499, *Storie v Storie* (1945) 80 CLR 597, *Lovell v Lovell* (1950) 81 CLR 513 ("*Lovell*"), *R v Watson; Ex parte Armstrong* (1976) 136 CLR 248, *Gronow v Gronow* (1979) 144 CLR 513, *Norbis v Norbis* (1986) 161 CLR 513, *Dougherty v Dougherty* (1987) 163 CLR 278 and *Stanford v Stanford* (2012) 247 CLR 108. The discretion under s 79 is extraordinarily wide: see *Mallet v Mallet* (1984) 156 CLR 605 and *De Winter v De Winter* (1979) 23 ALR 211. The mere fact that an appeal court would have decided the case differently is no justification for it substituting its own decision for that of the primary judge's decision: see Kitto J in *Lovell* at 532. Where it is alleged that the primary judge reached a wrong conclusion, appellate intervention will only be justified if the judgment appealed against is shown to have been clearly wrong by reason of it being "unreasonable or plainly unjust" as per McTiernan J in *Lovell* at 526. Family law litigation under s 79 of the Act is adversarial. Issues not raised at trial can only be raised on appeal in extremely limited circumstances: see *Water Board v Moustakas* (1988) 180 CLR 491 and *Suttor v Gundowda Pty Ltd* (1950) 81 CLR 418, to name but a few.

117 In my view, none of the grounds of appeal were made out.

GROUND 1

118 This ground was in the following terms:

> The law was applied wrongly and facts were not awared [sic] by the judge. Thus, I was not convinced for order 2, 3, 4, 5.
>
> (As per the original)

119 No particulars were given in the Notice of Appeal or in the wife's Summary of Argument by which it was possible to assess the alleged erroneous application of the law by the primary judge, or any alleged deficiency in her Honour's treatment of factual matters. It is not the task of the Full Court to guess at the manner in which the wife expresses some unarticulated

grievance in the application of legal principle to the determination of the s 79 application. While I accept that *Lee v Lee* (2019) 266 CLR 129 requires an intermediate appellate court to conduct a "real review" I do not agree that the task of conducting any such "real review" requires the appeal court to hunt for some basis for appeal or to create grounds that the appellant fails to articulate.

120 Ground 1 is devoid of merit. I would dismiss it.

GROUND 2

121 The wife formulated Ground 2 in the following terms:

> I was required to have all liability and responsibility, meanwhile I did not have more asset to cover these liability.
>
> (As per the original)

122 Aside from the infelicitous manner of expression in Ground 2 it seemed that the wife was contending that pursuant to the orders of the primary judge, the wife was required to assume all liabilities and she asserted that she did not have assets to cover those liabilities.

123 Pursuant to Order 1 of the orders made by the primary judge, the husband was ordered to transfer to the wife his right, title and interest in the property known as B Street, Suburb C being the whole of the land more particularly described in strata plan …73. That order had the effect of constituting the wife as the sole registered proprietor of that property. The husband had been a mortgagor of that property. The order of the primary judge did not require the mortgagee to discharge its mortgage. However, pursuant to Order 2 of the primary judge's orders, the wife was ordered to indemnify the husband in respect of all liabilities relating to the property including any liability under the mortgage over the property.

124 In her Summary of Argument, the wife put her contention in relation to liabilities in the following terms:

> 3. The current order is making the Wife to take all the liability and responsibility of raising the child including financial and non-financial support.

125 The wife also said the following in relation to Order 2:

> 8. The wife believes the [sic] orders 2 to 5 are unfair.

126 The wife's belief that an order is "unfair" is not a valid ground of appeal, nor is it a jurisprudentially sound attack on her Honour's path of reasoning in the exercise of her Honour's discretion under s 79 of the Act. However, if the wife is to be taken to be contending that in her submission the primary judge erred in law by making Order 2 of her Honour's orders on the basis that such an order is "plainly unjust" as per McTiernan J in *Lovell* at 526, then she may be on firmer ground, if the facts of the case supported that contention. I do not consider that the facts support such a contention. It must be recognised that at trial, the wife consistently advocated her position that she funded the majority of the parties' expenses. The primary judge referred to a concession by the wife (at [84]) that from August 2013 the husband's earnings serviced the repayments of the mortgage from August 2013 to May 2014 and possibly from May 2015 to May 2016 (at [92]). From 2016, upon the parties separating the primary judge accepted that the wife, with assistance from her parents, was primarily responsible for meeting mortgage payments.

127 Based on that, the primary judge assessed the wife's overall contributions at 80 per cent and the husband's at 20 per cent.

128 Further, the primary judge held that the husband's weekly earnings were $440 as an Uber driver (at [99]).

129 That, among other considerations, led the primary judge to conclude that the wife should retain the property at B Street, Suburb C and that she was not required to pay anything to the husband.

130 In reaching the primary judge's conclusions about the percentage contributions already mentioned, her Honour rejected the wife's criticism of any deficiencies in the husband's disclosure (citing *Oriolo and Oriolo* (1985) 10 Fam LR 665 and *Weir and Weir* (1992) 16 Fam LR 154).

131 I am unable to conclude that the reasons of the primary judge in relation to Ground 2 were plainly unjust within the contemplation of *Lovell.* In my view, Ground 2 was devoid of merit. I would dismiss it.

GROUND 3

132 As with other so-called grounds of appeal in this case, Ground 3 was narrative in nature. It concealed, rather than revealed, any propositions of fact or law by which it could be said that the primary judge's discretion somehow miscarried. Ground 3 was in the following terms:

> The huge capital gain was obtained by the other party and he failed to do the valuation. [The primary judge] accepted him not to do the valuation and accepted him not disclose by himself [sic] during the Federal Circuit Court. He had disclosed until I had the documents from government. Before that, he denied he had. [The primary judge] removed this capital gain and asset from financial pool.
>
> (As per the original)

133 Doing the best I could to comprehend the wife's assertion in relation to that ground, it seemed that she regarded it as being unfair that, in her view, the husband "took" (her word) assets including cash of $36,200 and properties in China, carrying with them attendant capital gains. Yet, orders were made in her favour only in relation to the B Street, Suburb C property.

134 The wife at trial sought orders in relation to "properties in China" (at [3]). She asserted that the husband had not made proper disclosure in respect of his entitlement to real property in China. The evidence before the primary judge concerning the properties in China was perfunctory, to say the least. The primary judge recorded (at [6]) that the wife asserted that the husband jointly owned with his parents an apartment located at an unidentified address at K Street, City J. The primary judge recorded the wife's reliance upon a document obtained from some official source indicating that in 2006 that property had been acquired and that the husband owned a one-third interest in it. That seemed to be an undisputed position except that the husband contended that the husband's father, as head of the family, treated the property as his own. The primary judge referred to other real property in China, namely an apartment owned by the husband's parents at an unidentified address in H Street, City J, China. As with the property at K Street, City J, the primary judge accepted the undisputed evidence that documentary records obtained from some official source revealed that the husband owned a one-third interest in the H Street, City J property. As with the K Street, City J property, the husband asserted that his father had the right to treat that property as his own. In 2015, on the death of the husband's mother, title to the K Street, City J property vested in the husband and his father, as the primary judge accepted. The wife contended that in 2016 the husband and his father sold the property at K Street, City J. The primary judge referred to the wife's assertion that the sale price was $330,000 yet her Honour found that no admissible evidence supported that assertion (at [34]). However, her Honour inferred that the husband's father retained the entire amount.

135 So far as any other assets were concerned, the primary judge accepted (at [39]) that the husband took the whole amount of the parties' cash.

136 To the extent that Ground 3 related to assertions about the capital value of assets, the primary judge ordered the wife to have the main asset. The alleged properties in China were unproved, and to the extent that any aspect of their ownership was proved, her Honour accepted that the husband's father took the property in which he lived in China. I see no error in that.

137 In my view Ground 3 was devoid of merit. I would dismiss it.

GROUND 4

138 This ground related to the deed of loan. It was as follows:

> The deed of loan was prepared and instructed by a solicitor. [The primary judge] ordered me to take over all liability as the other party doesn't know English which is wrong.
>
> (As per the original)

139 The error alleged was that the husband was not conversant in the English language. The wife said that the primary judge's finding in that regard was wrong.

140 The relevant findings about the deed were at [26]–[27] of the primary judge's reasons for judgment. The primary judge found that the deed was prepared by a solicitor and signed by the wife, by her parents and by the husband on 13 October 2013, in the presence of a witness. The primary judge found that the husband in fact executed the deed and that the deed was in the English language, which the husband would not have understood. The wife asserted that such a finding was wrong.

141 Throughout the trial, the husband gave evidence through a translator. His comprehension of the loan deed and his ability to read it in the English language were squarely open as factual matters for the primary judge to find. The primary judge saw the husband and heard him when giving his evidence. The primary judge was in a superior position than are we, and hence better able to make the finding her Honour did about the husband's comprehension of the English language, see: *Coghlan v Cumberland* [1898] 1 Ch 704, *SS Hontestroom v SS Sagaporack* [1927] AC 37, *Paterson v Paterson* (1953) 89 CLR 212, *Warren v Coombes* (1979) 142 CLR 531, *Brunskill v Sovereign Marine & General Insurance Co Ltd* (1985) 65 ALR 53, *Jones v Hyde* (1989) 85 ALR 23*, Galea v Galea* (1990) 19 NSWLR 263, *Abalos v Australian Postal Commission* (1990) 171 CLR 167, *Devries v Australian National Railways Commission* (1993) 177 CLR 472, *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306, *Fox v Percy* (2003) 214 CLR 118 and

Husain v O & S Holdings (Vic) Pty Ltd [2005] VSCA 269. In my view, the primary judge made no error in finding, as a fact, that the husband would not have understood the loan deed having regard to the fact that it was written in the English language. This ground of appeal failed. I would dismiss it.

GROUND 5

142 Ground 5 related to the wife's spousal maintenance claim. Ground 5 was as follows:

> I am sick that Justice did not mention and dismiss the spousal maintenance.
>
> (As per the original)

143 In essence, the primary judge held that the husband did not have capacity to pay spousal maintenance. The wife's focus in Ground 5 was on her alleged ill-health and that the primary judge did not mention the wife's ill-health when dismissing her spousal maintenance claim.

144 The wife did not adduce medical evidence to substantiate her alleged ill-health. In my view, the primary judge was entitled to proceed as her Honour did, that is to say, by dismissing the claim, there being no evidence to make good any allegations of the wife's ill-health being referrable to her spousal maintenance claim.

145 Ground 5 is devoid of merit and I would dismiss it.

GROUND 6

146 This ground was as follows:

> My parents were not allowed to speak up during the final hearing, except answering.
>
> (As per the original)

147 The wife's parents gave evidence during the trial. Each was cross-examined. I do not accept the wife's characterisation of their involvement in this case. They were not parties. They were witnesses. Witnesses answer questions. Ground 6 was wholly misconceived. I would dismiss it.

GROUND 7

148 In Ground 7, the wife asserted the existence of error by reason of her Honour "allocating" (the wife's word) the liability under the deed of loan between the parties and the wife's parents as to 80 per cent to the wife and 20 per cent to the husband. The reference to those percentages, namely 80 per cent and 20 per cent, was a reference to contributions. In that regard, the primary judge held, as at [94]:

> I assess their respective contributions, over the whole period of co-habitation, to be 80 per cent to the wife and 20 per cent to the husband.

149 Under the deed, the husband was jointly liable. The primary judge held the husband "would not have understood what he was signing" (at [27]). Whether that equated to a successful finding of *non est factum* or some other relief on equitable grounds such as unconscientious conduct was not articulated. The primary judge could have, but did not make orders relieving the husband of all liability under the deed of loan. Instead, the primary judge made orders recorded in Order 3 of her Honour's orders requiring the wife to indemnify the husband in relation to any liability under the 13 October 2013 deed of loan. The wife asserted that Order 3 of the primary judge was erroneous. I do not agree.

150 Where a party executes a deed, prepared by solicitors, written in a foreign language in which the signatory is not conversant, the ordinary presumption that a person is bound by what he or she signs may be rebutted, see: *Toll (FGCT) Pty Ltd v Alphaharm Pty Ltd* (2004) 219 CLR 165 and *L'Estrange v F Graucob Ltd* [1934] 2 KB 394. In my view, the primary judge was giving effect to their conclusion that the husband did not know what he was signing. There was no error in that.

151 This ground failed. I would dismiss it.

GROUND 8

152 This ground did not reveal any articulation of a proper ground of appeal. It was as follows:

> Currently, the other party just needs to pay $37. I don't have work and I am sick. I have to take all home loan and liability to pay and support the child.
>
> (As per the original)

153 In my view this so-called ground of appeal was little more than the wife's expression of her view that the result was not as she wished. That is not a proper basis for appeal. I would dismiss this ground.

GROUND 9

154 This ground was as follows:

> No parenting order from the family court.
>
> (As per the original)

155 Aside from the fact that this so-called ground made no grammatical sense, it contained no factual or legal statement by which an appellable basis for impugning the reasons of the primary judge could be assessed.

156 It must not be overlooked that this proceeding was concerned only with property issues and not parenting.

157 I would dismiss this ground.

GROUND 10

158 Several issues emerged in relation to this ground. The ground itself was as follows:

> The other party took all asset from joint bank in one time. I am paying the interest for it. [The primary judge] accept it and refuse to add it back. [The primary judge] took all real assets from our financial pool and allocate no real asset to me except liability.
>
> (As per the original)

159 The primary judge recognised that the husband appropriated a substantial amount of cash from the parties' joint bank account (at [102]). The primary judge then made an adjustment for that (at [103]). The primary judge then determined that the husband's 20 per cent share of the joint property was valued at $32,575 and the primary judge allocated that amount to the wife. It was erroneous for the wife to contend that the primary judge failed to address the husband's appropriation of funds from the parties' joint back account. The primary judge did.

160 When the trial commenced, the wife sought orders for the alteration of property interests as 70 per cent to her. In the upshot, the primary judge assessed the parties' respective contributions as being 80 per cent in favour of the wife. The primary judge ordered the wife to receive the husband's interest in the B Street, Suburb C property. It is wrong for the wife to contend that no real assets were transferred to her.

161 In my view, Ground 10 was predicated on an erroneous premise. The ground was devoid of merit. I would dismiss it.

GROUND 11

162 While not easily legible, as the wife hand wrote the Notice of Appeal, this ground seemed to be as follows:

> The other party doesn't have any liability and responsibility which is unfair and wrong. As above, it cause [sic] the others are wrong.

(As per the original)

163 In essence, the wife asserted that it was "unfair and wrong" (her words) for the husband to have no liability and responsibility. Concepts of palm tree justice have long been eschewed, see: *Rimmer v Rimmer* [1953] 1 QB 63, *Gissing v Gissing* [1971] AC 886 and *Muschinski v Dodds* (1985) 160 CLR 583. The wife made no attempt to cast this ground of appeal under the rubric of some improper exercise of the discretion. This ground seemed to me to amount to little more than a grievance about the ultimate result, even though the wife ran her case at trial seeking a 70 per cent division of assets, which she exceeded. I take the view that this ground of appeal was devoid of merit, so I dismiss it.

164 All grounds of appeal have failed. I would dismiss this appeal.

I certify that the preceding one hundred and sixty-four (164) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Tree, Gill & Wilson.

Associate:

Dated: 3 June 2022