FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 1)

Chiu & Shun (No 2) [2024] FedCFamC1F 167

File number:	SYC 8033 of 2015
Judgment of:	**HARPER J**
Date of judgment:	18 March 2024
Catchwords:	**FAMILY LAW** – PROPERTY – Where the marriage was relatively short – Where the parties' liabilities exceeded their assets – Both parties acquired several properties prior to and during their relationship – Where the properties in the husband's sole name were sold prior to the final hearing with the proceeds applied to discharging the debt – The three remaining properties held in the wife's sole name – Where the husband made a significant cash contribution to purchase of the former matrimonial home – Where wife entered into substantial mortgage – Where the husband sought a declaration that the wife holds 87.5 per cent of the former matrimonial home on resulting trust in his favour – Presumption of advancement – Where add backs sought were largely unsubstantiated and misconceived – Where parties' contributions were largely equal – Where wife sought a *Kennon* adjustment – Where no secure finding that the alleged family violence perpetrated by the husband made the wife's contributions more arduous – Evidence fails to establish any basis for just and equitable orders – No order for property adjustment made – No order for superannuation split made – No order as to costs.
Legislation:	*Family Law Act 1975* (Cth) Pt VIII, ss 44(3), 72(1), 79, 79(2), 79(4), 80, 81 *Federal Circuit and Family Court of Australia Act 2021* (Cth) s 50
Cases cited:	*Anson & Meek* (2017) FLC 93-816; [2017] FamCAFC 257 *Ashford & Ashford* [2012] FamCA 621 *Barnell & Barnell* (2020) FLC 93-961; [2020] FamCAFC 102 *Benson & Drury* (2020) FLC 93-998; [2020] FamCAFC 303 *Bevan & Bevan* (2013) FLC 93-545; [2013] FamCAFC 116

Black Uhlans Inc v NSW Crime Commission [2002] NSWSC 1060

Bosanac v Federal Commissioner of Taxation (2022) 275 CLR 3; [2022] HCA 8

Buffrey v Buffrey (2006) 12 BPR 23,619

Burke and Burke (1981) FLC 91-055

Calverly v Green (1984) 155 CLR 242; [1984] HCA 81

Chang v Su (2002) FLC 93-117; [2002] FamCA 156

Chea & Sok (No 2) [2023] FedCFamC1F 1052

Chiu & Shun [2023] FedCFamC1F 533

Currie v Hamilton [1984] 1 NSWLR 687

Dickons v Dickons (2012) 50 Fam LR 244; [2012] FamCAFC 154

Elliott & Elliott [2007] FamCA 1232

G and G (2000) FLC 93-043; [2000] FamCA 1075

Gadhavi v Gadhavi (2023) 67 Fam LR 174; [2023] FedCFamC1A 117

Greer & Mackintosh [2013] FamCAFC 16

Grunseth & Wighton (2022) FLC 94-099; [2022] FedCFamC1A 132

HDM & MM [2006] FamCA 47

Hickey and Hickey and Attorney General-G for the Commonwealth of Australia (Intervener) (2003) FLC 93-143; [2003] FamCA 395

Horrigan & Horrigan [2020] FamCAFC 25

Jabour & Jabour (2019) FLC 93-898; [2019] FamCAFC 78

JEL and DDF (2001) FLC 93-075; [2000] FamCA 1353

Kation Pty Ltd v Lamru Pty Ltd (2009) 257 ALR 336; [2009] NSWCA 145

Keirn & Moxey [2017] FamCA 487

Kowalski and Kowalski (1993) FLC 92-342; [1992] FamCA 54

Manolis & Manolis (No 2) [2011] FamCAFC 105

Martell v Martell (2023) 66 Fam LR 650; [2023] FedCFamC1A 71

Milankov and Milankov (2002) FLC 93-095; [2002] FamCA 195

Murtagh v Murtagh [2013] NSWSC 926

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

Norman & Norman [2010] FamCAFC 66

Papas v Co [2018] NSWSC 1404

Russell v Scott (1936) 55 CLR 440; [1936] HCA 34

	Sand & Sand (2012) FLC 93-519; [2012] FamCAFC 179 *Shan & Prasad* [2018] FamCAFC 12 *Stanford & Stanford* (2012) 247 CLR 108; [2012] HCA 52 *Twinsectra Ltd v Yardley* [2002] 2 A.C. 164; [2002] UKHL 12 *Vang & Chung (No 3)* [2024] FedCFamC1F 101 *Wei & Xia (No 5)* [2023] FedCFamC1F 679 *Weir and Weir* (1993) FLC 92-338; [1992] FamCA 69 *Welch & Abney* (2016) FLC 93-756; [2016] FamCAFC 271 *Welch & Abney (No 2)* [2015] FamCA 1116 *Zagari & Habib* [2010] FamCAFC 159 *Zyk and Zyk* (1995) FLC 92-644; [1995] FamCA 135
Division:	Division 1 First Instance
Number of paragraphs:	181
Date of hearing:	8–12 May 2023, 4–5 October 2023 and 27 November 2023
Place:	Sydney
Counsel for the Applicant:	Mr Bell
Solicitor for the Applicant:	Dong & Partners
Solicitor for the Respondent:	Ms Zhang of Westlink Legal Pty Ltd

ORDERS

SYC 8033 of 2015

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 1)

BETWEEN: **MS CHIU**
Applicant

AND: **MR SHUN**
Respondent

ORDER MADE BY: **HARPER J**

DATE OF ORDER: **18 MARCH 2023**

THE COURT ORDERS THAT:

1. The Applicant's Amended Initiating Application be dismissed.

2. The Respondent's Response be dismissed.

3. The Respondent's application for spouse maintenance be dismissed.

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 *Chiu & Shun* has been approved pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

REASONS FOR JUDGMENT

HARPER J:

INTRODUCTION

1 These are property proceedings between the Applicant Wife, Ms Chiu also known as Ms Chiu ("the wife") and the Respondent Husband, Mr Shun ("the husband").

2 The parties dispute the length of the relationship, however on either account it was relatively short, between five and six years, with the marriage itself lasting about three years. The parties have now been separated since July 2015, that is, for over eight years. There are no children of the relationship.

3 The wife's contention is that there is no basis for the making any order dividing property, apart from an order splitting the husband's superannuation in her favour. The husband sought orders for the sale of the former matrimonial home, C Street, Suburb D NSW ("Suburb D"), payment to him of 87.3 per cent of the net proceeds and a lump sum spousal maintenance payment in the amount of $100,000.

4 The property pool at the time of the final hearing was modest, and burdened with more liabilities than assets. These reasons prompt the fair observation that since separation the parties slowly dissipated what once seemed like a healthy property pool to the point where continuing these proceedings became folly.

5 Neither party presented as a reliable witness, and this fact coupled with the way they organised their material led me to hold reservations about each of their cases. I have not preferred either the wife or husband as a witness generally. Rather I have been compelled to chart a specific course, to the extent necessary, through each factual dispute, often unaided by much of their evidence, which was voluminous, despite giving it all careful attention.

BRIEF BACKGROUND

6 The husband was born in 1973 and is currently 50 years of age. The husband moved to Australia in 2001 and was granted permanent residency in 2003.

7 The wife was born in Country E in 1983 and is currently 40 years of age. The wife immigrated to Australia in or around 2003 and became an Australian citizen in early 2009.

8 The parties dispute the date that the relationship commenced. I will return to this below because the resolution of the dispute is assisted by a consideration of the evidence concerning property purchases by each of the parties.

9 The parties were married in 2012 in Country E. Nothing turns on the difference.

10 The husband contended the parties separated on a final basis on 17 July 2015, while the wife's case was that they separated on 11 May 2015. The difference is not material. A divorce order took effect in early 2018.

11 The husband worked as an IT professional from late 2008 until 2017 when he became unemployed. At the time of the final hearing the husband's evidence was that he is unemployed and homeless.

12 The wife worked as a financial professional on a full-time basis from 2009 until early 2014, at which time she was made redundant. The wife did not return to paid employment until late 2021 however during this time she received rental income from the properties held in her sole name, as set out below. According to the wife's Financial Statement filed 5 May 2023, she has been employed as a manager from at least late 2022 and presently earns $2,800 per week before tax, being approximately $140,000 per annum, and receives an additional $1,010 per week by way of rental income.

Property Purchases

13 It was the wife's case that sometime prior to the commencement of the relationship, the husband acquired a property at F Street, Region G, City H, Country E ("the City H property").

14 In late 2008, the husband entered into a contract to purchase an off-the-plan property at J Street, Suburb K ("Suburb K") for $395,000 and paid $39,500 for the deposit. He paid $13,269 for stamp duty in early 2010. This purchase did not settle until mid-2013. The husband financed the settlement of the purchase by borrowing $315,000 secured by a mortgage.

15 In early 2009 the wife purchased an off-the-plan property at L Street, Suburb M ("Suburb M") for $460,000. She paid about $90,000 towards the purchase. This purchase did not settle until early 2011 and was funded by way of a $370,000 mortgage.

16 The husband purchased a property at N Street, Suburb O ("Suburb O") for $486,000 in early 2009. The Suburb O purchase settled in early 2009 and the husband financed it in part by way of a $368,000 mortgage. The parties resided in Suburb O from mid-2009 until the first half of 2010, after which time the property was tenanted. The circumstances of this cohabitation will be discussed below.

17 The parties moved out of Suburb O. The wife's evidence was that the parties "lived at a number of properties" after Suburb O. According to the husband, they lived together in rented accommodation in Suburb P from mid-2010 to mid-2011.

18 In early 2011, the husband paid $1,537.50 as a holding deposit to purchase Q Street, Suburb R NSW ("Suburb R Property"). The purchase of the Suburb R property was ultimately settled for $615,000 in mid-2011. The husband was registered as the sole proprietor. There was no dispute that the purchase was paid in part using mortgage finance from S Bank. There was however a considerable dispute about the source of funds for the balance. I will return to this dispute later in these reasons. The parties resided in the Suburb R property until early 2015.

19 The parties resided in Suburb M after leaving the Suburb P rental property until the settlement of the purchase of Suburb R.

20 In mid-2011, the wife purchased two properties "off the plan". The first was T Street, Suburb U Vic ("Victorian property"). The Victorian property settled in late 2013 for approximately $368,000. The second property, V Street, Suburb W, QLD (Lot … in Survey Plan …) ("Queensland property"), was purchased off the plan for a price of $361,000. It was the husband's case that he contributed $20,000 to the purchase price. The property settled in or around early 2014. The wife made these purchases by refinancing Suburb M in mid-2011. This released $56,000 in cash from which she paid $36,800 towards the purchase of the Victorian property, and the balance was applied to the purchase of the Queensland property.

21 I return here to the issue of the commencement of the relationship. The wife contended that the parties commenced cohabitation in late 2009. The husband conceded that the parties lived together from late 2009 until mid-2011, but that the wife commenced residing at Suburb O as a tenant in mid-2009 and in late 2009 they began an intimate relationship. At the time the husband was in another relationship. The husband contended that he was not in a committed relationship with the wife until mid-2011. The wife's evidence is that the parties agreed to marry in 2010 and travelled to Country E together in late 2010. The husband's evidence is

that the couple's first trip to Country E was not until 2012 for their wedding. However, it was undisputed that the parties were living together at Suburb P from about early 2010 and even according to the husband the wife had some participation in facilitating the purchase of Suburb R by early 2011. On balance I find cohabitation in a relationship commenced in about early 2010.

22 In early 2013 Suburb D was purchased for approximately $1,570,000. The property was registered in the wife's sole name. The circumstances of the purchase of Suburb D and the source of the funds were contested by the parties. I will return to this dispute later in these reasons.

23 The husband refinanced the Suburb R mortgage with ANZ in late 2014, to raise cash for the purchase of the Suburb D property.

24 Suburb O was sold in early 2015 for approximately $660,000. The majority of the proceeds were used to retire the debt on the property. The husband received approximately $600 from the sale proceeds.

25 In mid-2015, the police issued an ADVO against the husband and charged him with assault. The husband was escorted from Suburb D. It was the wife's case that husband took the wife's bracelet and other items of her jewellery with him when he was escorted from the property. There was no dispute that the wife owned this jewellery and it was valued at $600,000. The husband was served a notice of criminal proceedings in mid-2016 but the proceedings were dismissed in mid-2017.

26 The wife remained living in Suburb D.

27 In or around late 2015 the husband refinanced Suburb K and Suburb R with Commonwealth Bank of Australia ("CBA") and withdrew an additional $100,000.

28 In early 2019 the husband gave possession of the Suburb K property to the mortgagee, CBA, to be sold. The mortgagee took possession in early 2019 and the property was sold in late 2019 for approximately $500,000. The proceeds of sale, being $476,663, were applied to reduce the debit balance of the loan account secured against Suburb K and Suburb R, reducing the loan amount to $893,906.

29 The husband ceased tenanting the Suburb R property in late 2018 and began living there in April 2019, after the CBA took possession of Suburb K as mortgagee. The husband recommenced letting out rooms in Suburb R while he remained in residence.

30 In late 2021 CBA, the mortgagee, exercised its power of sale and sold Suburb R for $869,000 which was not sufficient to discharge the mortgage. The husband asserted at the date of hearing that he continued to owe $104,227. The wife argued that CBA has ceased pursuing this debt and that it should be excluded from the balance sheet. I will return to this issue later in these reasons.

31 The Queensland property was sold in early 2023 for $260,000 after CBA foreclosed on the property. At the time of sale the mortgage was $362,899, and after council fees, legal fees and water rates there remained a shortfall of $129,994.

32 The wife contended that sometime between 2019 and 2023 the husband transferred the City H property to his mother.

RELEVANT PROCEDURAL HISTORY

33 The wife commenced proceedings on 7 December 2015 in the Family Court of Australia (as it then was). The husband filed his Response on 17 December 2015.

34 On 21 December 2015, the parties were restrained from selling or further encumbering the Suburb K, Suburb R, Suburb D, Suburb M, Victorian or Queensland properties without the written consent of the other party or by order of the Court. The parties were granted leave to file and maintain caveats against the aforementioned properties.

35 Orders were made on 28 May 2018 and again on 13 June 2018 requiring the parties to do all things necessary to cause the Suburb R property to be placed on the market for sale. This sale did not happen. Rather as noted above, Suburb R was sold by the CBA as mortgagee in possession.

36 The matter was first before me on 24 May 2019, and on that occasion I made orders for the parties to comply with their disclosure obligations and to engage in mediation by no later than 7 August 2019. In particular the husband was ordered to provide the wife with the particulars of the acquisition and ownership of the City H property. The parties agreed that the value of the wife's jewellery is in six figures, however, the location of the jewellery remained in dispute.

37 The wife filed an Application in a Proceeding on 1 August 2019 which sought the sale of the Victorian property and the Queensland property. The husband filed a Response on 9 August 2019, and an Amended Response on 12 August 2019, which among other orders sought the sale of Suburb D. The application was partially resolved by consent orders made on 13 August 2019 which provided a regime for the sale of the Queensland property and the Victorian property. As noted above the Queensland property was eventually sold at a loss by the mortgagee. On 13 February 2020, I delivered an *ex tempore* interim judgment and made orders that the 13 June 2018 orders be stayed subject to the husband making regular repayments to reduce the mortgage against the Suburb R property. In the event the husband did not comply I ordered that the wife or Mr X be appointed trustee for the sale of Suburb R along with a range of orders that would allow the trustee to facilitate the sale. I made additional orders placing a flagging order in respect of the husband's interest in his Super Fund 1 account.

38 On 2 March 2020, Chief Justice Alstergren ordered the parties to attend mediation on or before 27 May 2020 and to provide the other with updated disclosure. This did not occur and on 1 June 2020 the parties were ordered to attend a private mediation on or before 31 July 2020. The required mediation did not take place and on 13 August 2020 the parties were further ordered to attend mediation on or before 30 September 2020. On 17 November 2020, mediation was further ordered to occur on or by 20 December 2020. Further orders were made for the parties to provide further and complete disclosure.

39 On 25 February 2021, the husband was ordered to engage an accountant to prepare his outstanding tax returns and provide to the wife the completed tax returns. The parties were to identify and prepare a list of matters they claimed remained to be disclosed by the other and to prepare a schedule listing properties which they owned from the date of their marriage, in Australia and overseas.

40 Trial directions were made on 19 July 2021 and the matter was listed for final hearing with an estimated duration of five days on a date to be fixed.

41 On 25 May 2022, the orders made on 19 July 2021 were discharged and I listed the matter for final hearing to commence on 9 January 2023 with an estimate of five days. Trial directions were made to prepare the matter for final hearing. The trial dates were vacated on 1 August 2022 and the matter was relisted to commence on 8 May 2023.

42 The first tranche of the final hearing took place between 8 May 2023 and 12 May 2023, however, the proceedings were unable to be concluded and were stood over part heard until 4 October 2023 with an estimate of two days. The second tranche of the final hearing did not conclude on 5 October 2023 and was again stood over part heard to 27 November 2023. Final submissions were heard on 27 November 2023 and judgment was reserved.

MATERIAL RELIED UPON

43 According to her Amended Case Outline filed on 8 May 2023, the wife relied upon:

(a) The wife's affidavit filed 1 May 2023;

(b) The affidavit of Ms Y filed 1 May 2023;

(c) The affidavit of Ms Z filed 1 May 2023; and

(d) The affidavit of Ms AA filed 1 May 2023.

44 The wife was cross-examined. The wife's primary language is the language of Country E and she gave her evidence through an interpreter.

45 The wife relied upon a psychologist report prepared by Ms BB which was tendered as part of the wife's tender bundle which became Exhibit 5 (p.1133–1157). Ms BB was cross-examined.

46 As set out in his Case Outline filed 5 May 2023, the husband relied upon:

(a) The wife's affidavit filed 9 December 2015;

(b) The wife's affidavit filed 23 August 2016;

(c) The wife's affidavit filed 24 May 2018;

(d) The wife's financial statements and questionnaires;

(e) The husband's affidavit filed 3 May 2023;

(f) The husband's affidavit filed 18 December 2015;

(g) The husband's affidavit filed 1 May 2018;

(h) The husband's affidavit filed 13 August 2019; and

(i) The husband's affidavit filed 24 January 2020.

47 The husband filed his Case Outline late and did not explain why he relied upon numerous affidavits of the wife. I have had regard only to the affidavit material to which the husband specifically took me. The husband was cross-examined through a Country E interpreter.

48 Both parties relied upon written submissions and further proposed minutes of orders filed in accordance with orders made on 5 October 2023.

49 The documents tendered by the parties and read into evidence are set out in Schedule 1 to this judgment.

Expert Evidence

50 On the second day of the hearing the husband sought leave to rely upon the evidence of an adversarial expert witness with respect of the rent likely to have been received by the wife. Leave was refused (*Chiu & Shun* [2023] FedCFamC1F 533).

COMPETING PROPOSALS

51 I summarised the parties' competing proposals at the start of these reasons. The wife's proposed orders, as contained in Exhibit 19, are detailed in Annexure "A" set out at the conclusion of this judgment.

52 The husband's proposed orders, as contained in his proposed Minutes of Orders filed 20 November 2023, are set out in Annexure "B".

THE LAW

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

54 Section 79(2) of the Act provides that:

> The court must not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

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

56 Section 80 grants specific powers to make a range of different orders to adjust property interests. Section 81 reflects a policy of making orders which finally determine the financial relationship between the parties and avoid further proceedings.

DETERMINATION OF AN APPLICATION FOR ALTERING PROPERTY INTERESTS

57 In determining of an application under s 79 of the Act, it is settled that the Court must identify and value, the parties' property, liabilities and financial resources at the date of the hearing. Then identify and assess the contributions of the parties as referred to in s 79 of the Act and determine the contribution based entitlements of the parties expressed as a percentage of the net value of the property of the parties, whether examined on a global approach or an asset by asset approach. Thereafter, the Court must identify and assess the other relevant factors including, the matters referred to in s 75 of the Act and determine the adjustment (if any) to be made to the contribution entitlements at step two. Finally, the Court must consider the effect of the above and resolve what order is just and equitable in all the circumstances of the case (see *Hickey and Hickey and Attorney General for the Commonwealth of Australia (Intervener)* (2003) FLC 93-143; *Stanford & Stanford* (2012) 247 CLR 108 ("*Stanford*") at [37]). The Full Court in *Bevan & Bevan* (2013) FLC 93-545 at [72]–[73] ("*Bevan*") has held that the decision in *Stanford* has not overruled the four step approach.

58 *Stanford* also made clear that the requirement pursuant to s 79(2) that it would be just and equitable to make orders altering property should not be conflated with the requirements of s 79(4). The High Court also confirmed at [39] that the question of whether it is just and equitable to make an order "is not to be answered by assuming that the parties' rights or interests in marital property are or should be different from those that then exist", in other words, at the time when the discretion may be exercised.

59 In relation to the just and equitable requirement, the Full Court in *Bevan* emphasised that a finding that it is just and equitable to alter the parties' property interests is a pre-condition to do so, such a finding does not form a threshold issue, nor must the requirements of s 79 be followed in a particular order.

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

> 1. Determination of a just and equitable outcome of an application for property settlement begins with the identification of existing property interests (as determined by common law and equity);
>
> 2. The discretion conferred by the statute must be exercised in accordance with

legal principles and must not proceed on an assumption that the parties' interests in the property are or should be different from those determined by common law and equity;

3. A determination that a party has a right to a division of property fixed by reference *only* to the matters in s 79(4) and without separate consideration of s 79(2), would erroneously conflate what are distinct statutory requirements.

61 The High Court has held that the very fact of separation may lead to the ready satisfaction of just and equitable requirement (*Stanford* at [41]–[42]). Here, the parties accept it would be just and equitable to make some form of adjustment. But the Court itself must also be satisfied that that an order altering property interests is just and equitable. I will return to this question later in these reasons.

ASSETS, LIABILITIES AND FINANCIAL RESOURCES AT THE DATE OF THE HEARING

62 I turn then, to the identification of the parties' property, liabilities, and financial resources at the date of the hearing.

63 A joint balance sheet was tendered by the parties, which became Exhibit 18. Where items were agreed and are not the subject of further discussion below they have been included. A number of items of the balance sheet remained in dispute. The overall value of the property pool was considerably inflated by claims to add back notional property. In relation to these disputed items, I express my conclusions as follows, noting the reference to item numbers is a reference to the item numbers on Exhibit 18.

Item 1 – Suburb D property

64 Suburb D is the single most valuable asset on the balance sheet. The value of the property was agreed to be $1,640,000. The wife is the registered proprietor of Suburb D.

65 Suburb D was purchased for $1,570,000 with stamp duty of $71,860. The contracts of sale appear to have been exchanged, following an auction, in or around late 2014 at which time a deposit of $78,500 was paid, with settlement occurring in early 2015. It was clear that the purchase was funded partly by way of two mortgages entered into by the wife with ANZ Bank and totalling $1,256,000. The wife tendered two bank statements evidencing a mortgage drawn down of $656,000 from the account ending …09 in early 2015 (Exhibit 5, p.915), and a mortgage draw down of $600,000 from the account ending …97 in early 2015 (Exhibit 5, p.918). It was an agreed position that the wife contributed a further $52,686.93 towards the purchase price.

66 The husband's case was that he contributed a total of $335,360 to the purchase of Suburb D including stamp duty. It was common ground that $333,000 of these funds were derived from refinancing Suburb R, Suburb O and Suburb K. The wife disputed that this should be treated as a sole contribution by the husband as she contended she had also contributed to those properties. Accordingly, on her case it should be treated as a joint contribution.

67 This argument requires factual findings about the funding of the purchases of and contributions to Suburb R, Suburb O and Suburb K.

68 As mentioned earlier, there was a considerable factual dispute about the source of the balance of the purchase price for Suburb R apart from the mortgage. The husband claimed that he gathered the necessary funds from a number of sources. He withdrew $4,000 from a CC Bank bank account …05 and gave it to the wife in early 2011 to take to the selling agent (Exhibit 8, p.279). He then withdrew $28,000 from the DD Financial Services loan account …52 secured against the Suburb O property in early 2011. He tendered a bank statement showing this withdrawal as a "Redraw" (Exhibit 8, p.284). Then the next day he gave the wife $25,200 to take to the selling agent to make up a deposit of 5 per cent but she deposited this amount into her Westpac account …38. He tendered a bank statement from his CC Bank Account …05 for the period 2 February to 1 April 2011 which showed a cash withdrawal of $25,200 in early 2011 (Exhibit 8, p.279). The selling agent issued a receipt for the deposit of $29,212.50 some days later (Exhibit 8, p.285). In early 2011, the husband refinanced the DD Financial Services mortgage secured against the Suburb O property with another lender, EE Financial Services, and raised $73,935.49. He tendered a bank statement which showed the transfer of this amount from EE Financial Services account …15 (Exhibit 8, p.287). He claimed his brother in law lent him $29,000 in mid-2011 and tendered a bank statement for FF Bank account …12 showing a deposit of this amount on that date (Exhibit 8, p.290). In mid-2011 he paid $27,500 into his EE Financial Services account and then a short time later he paid $30,750 to the conveyancer PP Pty Ltd as a "second deposit" and tendered a receipt for this payment (Exhibit 8, p.275). In mid-2011 he settled the purchase paying $64,160 by bank cheque debited from his EE Financial Services account …15, stamp duty in the amount of $23,185 from the S Bank together with funds obtained by way of a mortgage from the S Bank. He tendered copies of the bank cheques supporting the payment of $64,160 and stamp duty (Exhibit 8, p.298).

69 The wife claimed she paid the deposit in early 2011 in the amount of $29,212.50. She tendered a bank record showing a Westpac bank cheque for $29,212.50 was purchased by her in early 2011 payable to GG Real Estate (Exhibit 5, p.149). The total cost was $29,222.50 including the bank's $10 fee. She also tendered a copy of a receipt from that real estate agency issued to the husband on the same date for $29,212.50 for the Suburb R property (Exhibit 5, p.150). The bank statement for her Westpac Reward Saver account …38 recorded a debit of $29,222.50 in early 2011 (Exhibit 5, p.153). The wife then claimed that a short time later she provided a further $34,168 towards the purchase of Suburb R. The bank statements for …38 showed a withdrawal of $34,168.43 in early 2011 (Exhibit 5, p.153), but there was no evidence from the wife about how exactly she caused this amount to be paid towards the purchase of Suburb R. She claimed then that the purchase of Suburb R did not proceed in early 2011 because the selling agent changed. She said $63,390 was returned to the parties and the husband retained it in a bank account then applied these funds towards the purchase in mid-2011.

70 On balance I prefer the husband's version concerning the purchase of Suburb R. His evidence accords most closely with contemporaneous documents. I do not accept the wife made any financial contribution to the purchase of Suburb R. I accept she may have provided some limited practical assistance to facilitate some of the payments necessary for the purchase.

71 There was no dispute that the wife made no direct financial contribution to the purchase of Suburb O. It was acquired by the husband before the parties formed a relationship. However she claimed she made contributions to Suburb O in two categories. The first was the rent she paid the husband before they formed a relationship because this helped pay the mortgage. I do not accept this contention. In cross-examination the wife said she continued paying rent to the husband after they became intimate (Transcript 10 May 2023, p.89 lines 1–10). The husband claimed the wife stopped paying rent for a room in Suburb O after the parties became intimate. It is unnecessary to resolve this difference. Since I have found a committed relationship commenced in March 2010, I do not accept her payment of rent for a room in Suburb O should be treated as a contribution to the property for the purposes of s 79 of the Act.

72 The second contribution was that she organised or "managed" tenants for the property after the parties moved to new accommodation. She claimed this included placing advertisements. There was no documentary evidence in support of this assertion. She also annexed to her trial

affidavit what she claimed to be a rental agreement between herself and a tenant to rent a single room in Suburb O between March and August 2011 (Exhibit 5, Tab 16). The agreement was handwritten in Country E language with a handwritten English translation. In cross-examination the wife conceded she handwrote the Country E version (Transcript 10 May 2023, p.91 lines 5–6). She first claimed that she could not remember when or by whom the English translation was made (Transcript 10 May 2023, p.91 lines 18–19). When asked why she had an English translation for a Country E tenant, she then claimed the translation was recently made by an unidentified third party for the purpose of the proceedings (Transcript 10 May 2023, p.91 lines 3–5). The wife also annexed some spreadsheets which were partly typed and partly handwritten (Exhibit 5, Tab 17). In her affidavit she claimed these were the records she used to manage the tenants for Suburb O. There is nothing on the face of the documents to connect them with Suburb O. In cross-examination, the wife then said "some are for [Suburb R] and some are for [Suburb O]" (Transcript 10 May 2023, p.93 line 8). It was put to her that the spreadsheets related to her own property at Suburb M and Suburb O was managed by an agent (Transcript 10 May 2023, p.93 line 29 to p.95 line 40). She denied both suggestions.

73 I found the wife's evidence unconvincing in this regard. The documents relied upon by her are equivocal on their face. In particular the handwritten tenancy agreement and the evidence about the creation of the English translation cast doubt on their reliability. I do not accept the wife made the claimed contributions to Suburb O.

74 It was also conceded by the wife that she made no financial contribution to the acquisition of Suburb K. She claimed in her affidavit that she also managed this property for tenants and paid for improvements such as new carpet, and paid "some of the mortgage" during the relationship. She annexed spreadsheets which she claimed were made by her listing tenants for the property (Exhibit 5, Tab 46). She was not questioned about these spreadsheets or her claims that she paid some of the Suburb K mortgage. I accept the wife made some modest contribution to Suburb K.

75 However, I do not accept that the husband's payment of $335,360 towards the purchase of the Suburb D should be treated as a joint contribution. I have rejected the wife's claims of contributions to Suburb O and Suburb R. There is no basis in the evidence to sustain an inference that any of the wife's modest contribution towards Suburb K assisted the husband

in raising the $335,360 he contributed to the purchase of Suburb D. I find that this payment was a contribution by the husband alone.

76 The husband then also claimed a significant beneficial interest in Suburb D. The prima facie position is that the beneficial ownership of real property is commensurate with the legal title (*Currie v Hamilton* [1984] 1 NSWLR 687 at 690; *Black Uhlans Inc v NSW Crime Commission* (2002) NSWSC 1060 ("*Black Uhlans*"); *Kation Pty Ltd v Lamru Pty Ltd* (2009) 257 ALR 336 at [28]). However, the husband seemed to argue that by reason of the payment of $335,360 he contributed in effect 86.35 per cent of the purchase price, while the wife contributed only 13.65 per cent. He further contended that the purchase was intended to be by both parties but his name was wrongfully removed by the wife from the contract and from the transfer at settlement. Consequently, he claimed Suburb D is held on resulting trust as to 86.35 per cent by the wife in his favour.

77 The husband relied upon the well-known presumption of a "purchase price resulting trust" which can arise when a person advances some or all of the purchase price but the legal title is held in the name of another (*Bosanac v Federal Commissioner of Taxation* (2022) 275 CLR 3 at [12], [51] and [57]–[58] ("*Bosanac*"); *Calverly v Green* (1984) 155 CLR 242 at 251, 257 and 267–8 ("*Calverly*")).

78 I do not accept this argument. First, it focuses only upon the cash contribution of the parties to the purchase of Suburb D. The husband argued that the wife's contribution was limited to $52,686.93. He ignores the wife's contribution of $1,256,000 by mortgage finance. Borrowed money normally becomes the beneficial property of the borrower and the lender is left with an *in personam* right, secured or unsecured, of repayment (*Twinsectra Ltd v Yardley* [2002] 2 A.C. 164 at [68]; *Papas v Co* [2018] NSWSC 1404 at [399]). Money raised by a mortgage is treated as a contribution by the party that has borrowed the money from the mortgagee (*Buffrey v Buffrey* (2006) 12 BPR 23,619 at [14]; *Murtagh v Murtagh* [2013] NSWSC 926 at [75]; *Calverley* at 251, 257, and 267–8). Accordingly, the wife contributed 80 per cent (rounded) of the purchase price.

79 Thirdly, at the time of the purchase of Suburb D the parties were married. The question arises therefore whether a presumption of advancement applies to the cash contribution by the husband to the purchase (*Bosanac* at [14]–[15], [30]–[31] and [115]–[116]). The issue of the weight to be attributed to the presumption of advancement was not engaged with by the husband.

80 The presumption of a resulting trust is one which seeks to give effect to the intention of the parties, by making a presumption about what that intention was (*Russell v Scott* (1936) 55 CLR 440 at 451; *Black Uhlans* at [133]–[136]). In *Bosanac*, the High Court made clear that the duelling presumptions of a resulting trust and advancement are "weak" presumptions, over which even weak evidence of the actual intention of the parties must prevail, and it is the objective facts that determine their significance (at [19]–[21], [98], [102]–[103] and [114]–[116]). The intention of the person or persons who contributed funds towards the purchase of the property is a question of fact (*Bosanac* at [32]). It was confirmed by Gordon and Edelman JJ in *Bosanac* at [113], that the inquiry into the intention of the parties is both objective and limited to the point in time when the purchase of the property took place. Gageler J (as he then was) explained that where "other indications of intention are equal, or at least equivocal, the counter presumption [of advancement] is a complete answer to the presumption [of a resulting trust]" (at [53]).

81 The evidence was not greatly illuminating regarding intention. In her affidavit evidence the wife advanced no explanation as to why the property was purchased in her sole name. During cross-examination, she explained that while it was the initial intention to hold the property in both parties' names, the husband and wife had both received legal advice that because the loan was under the wife's name, they should not put the husband's name on the title (Transcript 11 May 2023, p.138 lines 29 –31).

82 It was the husband's case that as he was "very busy at the time" and he thought he was signing documents to give the wife power of attorney to attend to the conveyancing involved in the purchase of Suburb D (Husband's affidavit filed 3 May 2023, paragraph 68). He argued that instead the wife "removed my name from the contract of purchasing of the property by cheating" (Husband's affidavit filed 3 May 2023, paragraph 68 (As per the original)). The husband exhibited two contracts of sale for Suburb D, the first lists the purchasers as both the husband and wife (Exhibit 8, p.394) and the second lists the wife as the sole purchaser (Exhibit 8, p.395).

83 The husband tendered further material to support the case that he was originally a party to the contract of sale but subsequently removed. The first set of documents are a series of statutory declarations signed by the husband and wife and dated late 2014 which assert that they jointly entered into a contract in late 2014 for the purchase of Suburb D (Exhibit 8, p.536–537). Both statutory declarations were witnessed by the then solicitor of the parties. The husband then

tendered a document described as "Direction to Vendor" (Exhibit 8, p.630) signed by both the husband and wife and dated late 2014 which read:

> We, [Mr Shun] and [Ms Chiu] of [Q Street], [Suburb R] NSW, the purchasers under a Contract for Sale of Land entered [in late] 2014 between us and [two people] ("the vendor") for the purchase of [Suburb D].
>
> We hereby direct the vendor to accept the transfer form as submitted where the transferee is [Ms Chiu].

84 This seems to corroborate the evidence of the wife that while there was an intention to purchase the property jointly, at some point between in late 2014 this intention changed. The husband's case advanced in his final submissions appeared to be that he signed these documents without understanding their contents as they were not translated to him and without receiving independent legal advice. He subsequently filed a complaint to the Office of the Legal Services Commissioner against the solicitors RR Lawyers in mid-2016. The husband did not call his former solicitor or another solicitor from RR Lawyers to give evidence surrounding the circumstances of the transaction. The husband proffered no persuasive evidence to support this account of events. Furthermore, the version of events as articulated in the final submissions was not included in the husband's trial affidavit nor was it put to the wife during cross-examination.

85 I am unable to determine what actually happened at the time or what caused Suburb D to be purchased in the wife's sole name. However, I do not accept that the husband was unaware of this and I am able to find ultimately at the time of acquisition there was no actual common intention for the property to be jointly owned legally and beneficially. I also find that the husband had an intention to advance the interests of the wife at the time of purchase, even if he did not intend her to be sole registered proprietor. I consider this is sufficient to support a presumption of advancement in her favour. I am not satisfied the wife holds any part of Suburb D on resulting trust for the husband. The husband did not make any alternate claim to the benefit of a constructive trust. I will include Suburb D on the balance sheet as the wife's asset.

86 However, I should also say this conclusion does not change the fact that the husband made the much larger cash contribution to the purchase and I infer the purchase would not have been possible if he had not done so. I will take this into account in assessing contributions.

Items 4 and 7 – S Bank accounts

87 Each party claimed the other had undisclosed bank accounts in Country E. The wife gave no convincing evidence that the husband currently holds any funds in a Country E bank account. The husband for his part made no submissions to support his claim that the wife holds an estimated $825,000 in Country E bank accounts. I will exclude these items from the balance sheet.

Items 5 and 6 – Jewellery

88 The wife contended that she received a bracelet from her mother (Item 5). The parties agreed the value of the bracelet was six figures. This was noted in a Court order dated 24 May 2019. As noted, the wife alleged that when the husband was escorted from Suburb D he took the bracelet with him. The husband adamantly disputed that he removed the bracelet from Suburb D. In oral evidence he confirmed he left "jewelleries, precious stones and […] sculptures at Suburb D (Transcript 5 October 2023, p.329 lines 14–16). It was not put to him in cross-examination that he took the bracelet. The wife ultimately sought final orders that the husband present the bracelet for valuation and in the event this did not occur for the husband to pay the wife six figures. I will return to the wife's proposed orders later in these reasons, but I am not persuaded she has shown the husband currently holds this item. In those circumstances I will exclude the bracelet from the balance sheet because I am persuaded the wife does not have it, but I am not persuaded the husband removed it from Suburb D or currently has it in his possession.

89 There was some faint attempt to include as Item 6 jewellery and other *objets d'art* as assets of the husband. There was no convincing evidence about this and I will exclude Item 6.

Add backs

90 I turn then to a number of items which the parties seek to have included as added back property. In determining the disputes about these items, it is important to bear in mind that property "added back" no longer exists. Adding back non-existent property can have a distorting impact on the reality of property available to division. In *Bevan,* Bryant CJ and Thackray J observed:

> 79. We observe that "notional property", which is sometimes "added back" to a list of assets to account for the unilateral disposal of assets, is unlikely to constitute "property of the parties to the marriage or either of them", and thus is not amenable to alteration under s 79. It is important to deal with such disposals carefully, recognising the assets no longer exist, but that the

> disposal of them forms part of the history of the marriage – and potentially an important part. As the question does not arise here, we need say nothing more on this topic, save to note that s 79(4) and in particular s 75(2)(o) gives ample scope to ensure a just and equitable outcome when dealing with the unilateral disposal of property.

91 After *Bevan* Austin J held in *Welch & Abney (No 2)* [2015] FamCA 1116 at [35] (not overturned on appeal on this question *Welch & Abney* (2016) FLC 93-756 at ([81]–[85]):

> 35. Any argument about the premature distribution of assets or the deliberate, reckless, negligent or wanton dissipation of assets can only ordinarily be relevant to the inquiry about the proper nature of the property adjustment orders to be made, once it is first determined that an adjustment of property interests is just and equitable. Consideration of such evidence is permissible when comparing the parties' contributions under ss 79(4)(a)-(c) of the Act or otherwise pursuant to ss 79(4)(e) and 75(2)(o) of the Act. Such an approach is not novel (see *Bevan* at [78]-[79], [160]; *Vass & Vass* [2015] FamCAFC 51 at [138]-[139]).

92 As will become apparent, I am unable to conclude that an adjustment of property interests is just and equitable in this case. However, the way the parties presented their material and the joint balance sheet, it is desirable that I express a view about the asserted add backs.

93 I also repeat and adopt what I said concerning when adding back property may be appropriate in *Chea & Sok (No 2)* [2023] FedCFamC1F 1052:

> 81. Adding back property is exceptional and may be appropriate where the parties have expended money on legal fees, where there has been a premature distribution of matrimonial assets, or 'waste' or wanton, negligent, or reckless dissipation of assets (*Candle & Falkner* (2021) FLC 94-069 at [52]–[58]).
>
> 82. However, adding back property is a discretionary exercise and proper consideration must be given to existing interests in property. The Court must take the property of a party to the marriage "as it finds it" and adding back property reflects a decision that, exceptionally, in the particular circumstances of a case, justice and equity requires it. In cases that are not "exceptional" justice and equity can be achieved, not by adding back, but by taking up the same as a relevant s 75(2) factor which is, perhaps, technically more correct" (See *Trevi & Trevi* (2018) FLC 93-858 at [30] ("*Trevi*"); *Vass v Vass* (2015) 53 Fam LR 373 at [138]–[139]). Adding back emphasises that satisfying the respective requirements of s 79(2) and s 79(4) of the Act to do justice and equity can require an "accounting" or "balance sheet" exercise for the purposes of s 79(2) and s 79(4), "so as to include the value of the dissipated property or expended sums within the total value of the parties' existing interests in property, and to credit the value of same against the assessed entitlement of the dissipating or spending party" (*Trevi* at [47] per Murphy J).

Items 8 and 22 – Country E properties

94 Item 8 was the City H property that the wife claimed was beneficially and legally owned by the husband. The wife sought that the value of the property be added back to the property pool, though no evidence of the value of the property was before the Court. In the alternative the wife sought that the Court find the husband has resources and assets in Country E that he has not disclosed.

95 No mention was made of this property in the husband's trial affidavit filed 3 May 2023. The husband ultimately conceded during cross-examination that the City H property was purchased in his name in or around 2005 or 2006 (Transcript 4 October 2023, p.221 line 32 to p.222 line 13). However, he claimed this was purchased for his mother and it:

> … was just a nominal thing. We had an agreement that that I would transfer the property back to my mother once it had been paid off. But once the property was paid off, the limitations of, like, people outside of [City H] to own a property in there has stated, so I wasn't able to transfer it back.
>
> (Transcript 4 October 2023, p.233 lines 32–35)

96 The husband tendered what he claimed to be an Arbitration Award (Exhibit 8, p.1297–1314). An incomplete certified translation was also tendered. The husband contended in his written submissions that this document proved that the Arbitration Award in mid-2019 found that the City H property belonged to the husband's mother. There is nothing on the face of the document that would allow the Court to ascertain with any certainty the provenance of the documents. I also note that, as far as it is able to be discerned from the translation, the document relates to a property located in "[HH Street, Region JJ, City H]". This appears to be an entirely different address to the City H property mentioned earlier in these reasons, namely "[F Street, Region G, City H, Country E]". The husband contended in his written submissions that these were the same property. There is no evidence from the husband's mother before the Court.

97 Item 22 is the property KK Street, Region LL ("KK Street property"). The wife claimed that the husband had told her he owned the KK Street property, and the proceeds of its sale should be added back to the balance sheet. The husband claimed that this property was held by his mother. No evidence was proffered as to its value or the value of any proceeds of sale. The wife tendered the husband's financial questionnaire dated 17 October 2016 which became Exhibit 15. In his financial questionnaire the husband listed the KK Street property as one of the properties he owned at the commencement of cohabitation, though he qualified this later

in the same document stating he held it on trust for his mother. When it was put to him in the cross-examination that he had included this property in Exhibit 15 he claimed it was a mistake and should have been the City H property (Transcript 4 October 2023, p.261 lines 9–48). The wife claimed the husband failed to provide any disclosure about this property.

98 I find that it is likely the husband has held an interest in properties in Country E, although the precise extent of this interest cannot be known. However, I am not satisfied the wife has shown a proper basis to add these properties back to the balance sheet. I will exclude them and take account of the likelihood that the husband has property interests in Country E of undisclosed value under s 79(4)(e).

Items 9 – 12 and 24 – Rental income

99 The husband sought to add back of approximately $459,680 as lost rental income he contends the wife should have earned because she retained Suburb D (Item 9). In the alternative the husband sought that the $459,680 to be added back as "wastage" in the event the Court found the property was not rented out. The husband provided no evidence to support the amount of $459,680 and his evidence about this item was unpersuasive. I will exclude this item. I will take account of the fact the wife holds Suburb D and could benefit from its usage under s 79(4)(e). Otherwise I exclude Item 9.

100 The husband sought $270,000 for the rental income received from Suburb M (Item 10), $155,952 for the rental income received from the Victoria property (Item 11) and $112,032 for the rental income received from the Queensland property (Item 12) be added back as property of the wife. The husband provided no evidence to support these values. The wife conceded that she had received rental income from those properties which was applied to her expenses and mortgage repayments. I do not find that the wife's use of the rental income amounted to waste or a premature dissipation of marital assets. I do not accept these amounts should be added back. I will exclude Items 10 to 12.

101 The wife sought an add back of the rental income received by the husband from Suburb R from September 2017 until May 2022 estimated to be $50,000 (Item 24). The wife contended that between January 2018 until February 2020 and March 2021 until July 2021 the husband did not make payments towards the Suburb R mortgage. She pointed out that this appeared to be in breach of Court orders not to further encumber Suburb R, in the sense that the loan balance secured by the mortgage increased. The husband argued the rental income was applied to mortgage repayments, living expenses and legal fees. I do not accept that a failure

to apply rent only to service the mortgage (which appears to be the wife's contention) necessarily demonstrates unreasonable dissipation of matrimonial assets. If the husband had applied the rent to service the mortgage, clearly the mortgage debt would have been less when the mortgagee sold Suburb R. However, this does not place the expended rent into an exceptional category and justify including it as an add back. This expenditure again is better taken into account under s 79(4)(e). I will consider the legal fees separately and otherwise exclude Item 24.

Items 13, 14 and 17 – Money obtained from refinancing

102 There was some dispute regarding the ownership of $206,344 transferred from the wife's account to the husband's account following their separation. The wife sought that these funds be added back (Item 13) and claimed that the husband had transferred the funds from her account without her permission. It was the husband's case that $206,344 was originally sourced from a transfer made by him to the wife in the amount of $239,000 in early 2015. He separately sought the inclusion of $34,118 which he claims was spent by the wife as an add back (Item 14). The wife accepted in cross-examination that the $206,344 was not her money and had originally derived from a refinance of Suburb R and Suburb K that occurred in early 2015 (Transcript 11 May 2023, p.145 lines 27–46). She explained that the money had been transferred to the offset account to reduce the interest payments for Suburb D. However, following their separation the husband transferred the money out of the offset account without her consent to his account …01. The husband claimed that this transfer was made by the wife at his request prior to separation.

103 In my view, it is unnecessary to resolve this factual difference. The question is whether the $206,344 should be included on the balance sheet as added back notional property. It is clear the husband used part of these funds to indulge his gambling habit. This was wasteful. But I accept he also used some of it for other living expenses. I do not accept it should be included as property. Again, I will take account of it under s 79(4)(e).

104 It was accepted that in August 2015 the husband further refinanced Suburb K and Suburb R and drew down $100,000 (Item 17). These funds have since been dispersed and those properties are no longer part of the property pool. The wife sought that the $100,000 be added back. Although it was not entirely clear, the husband appeared to accept this amount should be added back. The evidence did not demonstrate this amount was not expended by the husband on living expenses. I will exclude it as an add back.

Items 15 & 16 - Gambling

105 The husband conceded during cross-examination that he lost approximately $150,000 or $160,000 post separation and $30,000 during the relationship gambling (Transcript 5 October 2023, p.267 lines 39–41). The wife sought an add back of $190,000 for the money lost by the husband through gambling, arguing that it amounted to wastage. While the husband agreed he had lost significant amounts of money gambling, he claimed it was all his money. The source of the money used for gambling was unclear. As the husband pointed out in submissions there was some doubling counting in Items 13, 15 and 16. I am not persuaded that gambling losses should be added back as notional property. They can also be generally taken into account under s 79(4)(e). I will exclude Items 15 and 16.

Items 20 and 21 – Legal costs

106 The wife sought that $230,000 be added back as marital funds dispersed by the husband on his legal costs (Item 20). The husband conceded in cross-examination that he dispersed a large portion of the money he received from refinancing on legal costs (Transcript 5 October 2023, p.319 lines 17–35). He also agreed that he spent legal fees on police proceedings and an ADVO that did not involve the wife (Transcript 5 October 2023, p.294 lines 31–46). He acknowledged that he had not included any evidence as to the quantum spent or the source of the funds as he claimed it was not relevant to these proceedings (Transcript 5 October 2023, p.295 lines 26–29). In his written submissions, the husband outlined legal fees paid by him between 2015 and 2017 amounting to $120,000. The wife claimed she was unable to provide an exact figure for the husband's legal fees on account of his non-disclosure. The wife's legal costs, while included on the balance sheet as Item 21, are noted by both parties as not applicable. The husband made no submissions seeking to include the legal fees as an add back or about the quantum of the fees sought. It is not possible on the evidence to form a clear view about how much he has spent on these proceedings as opposed to other court proceedings. Accordingly, I will exclude Items 20 and 21.

Items 18 and 19

107 Items 18 and 19 relate to the alleged sale of cars by the respective parties. There was insufficient evidence to support the inclusion of these items or why they should be treated as an add back. They will be excluded.

108 The parties appeared to agree that Item 23 being $4,500 taken from the wife's account by the husband should be included as an add back. I will include it as an add back.

Liabilities

109 Item 25 is the liability claimed by the husband to be owed to the CBA as the shortfall on the sale of Suburb R in amount of $104,227. The wife disputed this liability on the basis that there was evidence of correspondence from MM Pty Ltd, as agents of CBA to the husband dated 18 May 2023 that they had been instructed by CBA to "cease collections activities and place the file on hold" (Exhibit 10, p.10). There was no further evidence at trial disclosing whether this position had changed. I will exclude Item 25.

110 The husband separately sought to include as liabilities the Suburb R property mortgage liability between September 2017 until February 2020 (Item 52) and the associated costs of the Suburb R property for the same period (Item 53). I will exclude both items as no sensible argument was proffered to justify their inclusion as presently existing liabilities, having been discharged upon the sale of the property. If they resulted in an increase in the shortfall they are already taken into account in the amount of the shortfall on sale, discussed in relation to Item 25.

111 The wife claimed the shortfall on the sale of the Queensland property of $129,994 should be included as liability (Item 29). In her affidavit she claimed she paid all mortgage payments and outgoings for this property but unknown to her while in Country E the CBA foreclosed. This seems to be clear evidence that the mortgage must have been in default, suggesting the wife had not been paying the mortgage. Nonetheless she tendered bank records and a settlement sheet which showed there was a shortfall on sale of $129,994. However, the bank statements tendered by the wife showed that $129,994 was repaid into the loan account secured against the Queensland property by two payments, $120,643 on 4 April 2023 and $9,400 on 5 April 2023 bringing the loan balance to zero (Exhibit 5, p.2539–2540) It seems to me that on the wife's own evidence this debt has been discharged. I will exclude it from the balance sheet.

112 Items 30 and 31 are claimed by the husband as monies owing to three individuals. There was no evidence about these asserted liabilities and I will exclude them.

113 Item 32 is claimed by the wife as a liability owed to her parents of $653,503. The wife claimed to have had a conversation with her mother in or around April 2012 wherein her mother expressed that now she was married any money provided to her from the parents would need to be repaid (Wife's affidavit filed 1 May 2023, paragraph 40). The wife's mother, Ms AA provided an affidavit filed 1 May 2023 and was cross-examined. The mother

set out a schedule purportedly representing loans amounting to $653,503. Her evidence that the money provided was a loan was not challenged in cross-examination. The wife tendered a number of receipts of ATM withdrawals that correspond with the dates and amounts recorded in her affidavit and the affidavit of her mother. There are numerous electronic transfers labelled as loans from the wife's mother or father to the wife.

114 Item 33 is a liability claimed by the wife to be owed to her friend Ms Y in the amount of $54,535. Ms Y swore an affidavit in the proceedings and was cross-examined. The husband's legal representative accepted that the transactions as claimed by Ms Y were corroborated with the exception of a transfer of $1000. It was not put to Ms Y during cross-examination that the money transferred was not intended as a loan.

115 The wife also sought to include a liability to her cousin Ms Z in the amount of $132,572 (Item 34). Ms Z claimed to have provided $132,572 to the wife, by way of 10 electronic transfers between 10 March 2017 and 19 August 2019. Annexed to Ms Z's affidavit filed 1 May 2023 were five documents entitled "Application for Funds Transfers (Overseas)" purportedly evidencing the transfer of $79,610 from Ms Z to the wife's account. Ms Z was cross-examined on the absence of the transaction records for the remaining $51,962 and she explained she did not keep evidence of all of the transactions as they had occurred a long time ago, however she believed the transactions could be seen from her and the wife's account (Transcript 10 May 2023, p.129 lines 32–39). It was not put to Ms Z during cross-examination that the money was not transferred or that it was not intended to be a loan. The wife provided bank statements which appear to corroborate the receipt of the 10 bank transfers (Exhibit 5, p.1482–1509). The wife contended the money was loaned to assist her during the family law proceedings and on the understanding that it would be repaid at their conclusion.

116 It was the wife's case that the loans she received from family and friends were applied to mortgages repayments, strata levies and other associated costs of the properties, medical expenses and living expenses. I accept Items 32, 33 and 34 are genuine liabilities of the wife.

117 The husband asserted a liability of $4,673.21 being the cost of surrendering his NN Insurance (Item 37). There was no evidence to support this and I will exclude it.

118 The husband argued against the inclusion of the parties' credit card debts in the balance sheet, on the basis that they were used for daily expenses and not to contribute to joint property. The

husband's credit card debts amount to $8,330 (Items 35 and 36) while the wife's credit card debt totals $74,660 (Items 38 to 42). No persuasive argument was put by the wife, in light of the long period of separation, justifying the inclusion these debts on the balance sheet, even though they were existing liabilities at the date of trial. To do so would have the effect of apportioning part of the wife's much more substantial credit card debt to the husband on the balance sheet. I will exclude these items.

119 Item 45 was claimed as a liability for overdue electricity costs of $2,799. The husband did not agree with this amount but claimed he did not know. I will include it on the balance sheet.

CONCLUSIONS AND ASSET POOL

120 Based on these conclusions, the asset pool is as follows:

Item	Ownership	Description	Agreed value
ASSETS			
1.	Wife	Suburb D	$1,640,000
2.	Wife	Suburb M	$690,000
3.	Wife	Victorian Property	$335,000
22.	Husband	Money taken from the wife's account	$4,500
Total			**$2,669,500**
LIABILITIES			
26.	Wife	Mortgage on Suburb D	- $1,368,170
27.	Wife	Mortgage on Suburb M	- $597,834
28.	Wife	Mortgage on Victorian property	- $341,497
32.	Wife	Loan from wife's parents	- $653,503
33.	Wife	Loan from Ms Y	- $54,535
34.	Wife	Loan from Ms Z	- $132,572
43.	Wife	Suburb D overdue council rate	- $14,719
44.	Wife	Suburb D overdue water rate	- $7,839.87
45.	Wife	Suburb D overdue electricity rate	- $2,799
46.	Wife	Suburb M overdue council rate	- $4,405
47.	Wife	Suburb M overdue water rate	- $3,101
48.	Wife	Suburb M overdue strata	- $8,043
49.	Wife	Victorian property overdue council rate	- $4,480
50.	Wife	Victorian property water overdue	- $138.67
51.	Wife	Victorian property overdue strata	- $12,162
Total			**- $3,205,798.54**
SUPERANNUATION			
Member		**Name of Fund**	**Agreed value**
54.	Wife	Super Fund 2	$36,087
55.	Wife	Super Fund 3	$5,868
56.	Husband	Super Fund 4	$90,464
Total			**$132,419**
NET POOL (INCLUDING SUPERANNUATION):			**- $403,880**

121 Consequently, if there was no property adjustment, the wife would hold all the material non-superannuation assets, but her liabilities would exceed her assets, including superannuation, taking account of the loans owing to family and friends, by some $498,844. The husband has no non-superannuation assets, $4,500 in add backs and $90,464 in superannuation.

122 It cannot go unremarked that the parties provided thousands of pages of documents and five days of oral evidence ultimately only to demonstrate this melancholy reality.

123 I turn now to consider the application of Pt VIII of the Act and the factors set forth in s 79 and s 75(2).

CONTRIBUTIONS

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

125 In closing submissions, the husband argued that an asset by asset approach should be taken when considering the contributions of the parties. The Court has a discretion as to which approach to take (*Norbis v Norbis* (1986) 161 CLR 513 ("*Norbis*")).

126 A global approach is often preferrable, however an asset by asset approach may be appropriate where the marriage of the parties is of short duration and in circumstances where the financial relationship of the parties was such that they treated some property as exclusively the property of one party and to which the other party made no contribution (*Zyk and Zyk* (1995) FLC 92-644 at 82,509-10; *Elliott & Elliott* [2007] FamCA 1232; *Ashforth & Ashforth* [2012] FamCA 621; *Keirn & Moxey* [2017] FamCA 487). However, a short marriage is but one factor which may weigh in favour of an asset by asset approach, it is not determinative in and of itself (*Zagari & Habib* [2010] FamCAFC 159 at [83]; *Greer & Mackintosh* [2013] FamCAFC 16 at [101]).

127 In accordance with s 79(4) of the Act, it has been settled for many years that the court must consider all the contributions, both financial and non-financial, to the acquisition, conservation, and improvement of the parties' assets, as well as to the welfare of the family during cohabitation and after separation. The Court must consider the contributions in an overall sense (*Norman & Norman* [2010] FamCAFC 66; *Kowalski and Kowalski* (1993) FLC 92-342; *G and G* (2000) FLC 93-043). A broad approach is preferred, rather than reference to

precise mathematical calculations (*Burke and Burke* (1981) FLC 91-055), although an evaluation of each party's respective contributions is necessary (*JEL and DDF* (2001) FLC 93-075). Assumptions about equality of contributions should not be made.

128 In *Dickons v Dickons* (2012) 50 Fam LR 244, the Full Court said:

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

129 In this matter, the relationship was of a short duration consisting at most of about five and half years. The marriage itself was only for some three years. The husband argued that with the exception of the Suburb D property the parties maintained largely separate finances. The discussion above, and my findings, do not support this submission. It must be noted that while the parties purchased real property in their sole names, both parties contended that they made contributions, either financial or non-financial, to the acquisition and or maintenance of the property of the other. It is also the case that there was a significant change in the composition of the property pool between the commencement of the relationship and the time of the final hearing some seven years after the separation of the parties. There was a not insignificant blurring of the boundaries between the assets and financial resources of the parties.

130 In the circumstances of this case, I am satisfied that a global approach is preferred and a holistic approach to the assessment of contributions accords with authority.

131 I have already discussed at some length many of the financial contributions of the parties. I will not repeat what has already been said other than where necessary for emphasis. Below is a discussion of my additional findings in relation to the relevant contributions under s 79(4) of the Act. I should also note here that s 79(4)(f) and (g) are irrelevant, as the parties have no children.

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

Initial contributions

132 Where the marriage is relatively short, initial contributions can take on a critical importance, especially if there are no children and the evidence does not disclose any basis to distinguish the contributions of the parties up to the time of final hearing (*Grunseth & Wighton* (2022) FLC 94-099 at [73]).

133 On the basis that the relationship commenced in about early 2010, at the commencement the husband held the following properties:

(1) Suburb O property valued at $486,000 subject to a mortgage of $368,000; and

(2) Suburb K property off the plan deposit $39,500.

134 The wife had paid a $90,000 off the plan deposit towards Suburb M by the commencement of the relationship.

135 In the case of *Gadhavi & Gadhavi* [2023] FedCFamC1A 117 the Full Court held that:

> 30. It was not in dispute that the primary judge applied proper principle in determining that the assessment of the impact of the husband's initial contributions could only properly occur after she assessed "the totality of the parties' contribution-based entitlement over the entirety of the marriage and post-separation" (at [210]).
>
> 31. In that respect, in *Pierce v Pierce* (1999) FLC 92-844 ("*Pierce*"), the Full Court stated at [28]:
>
> > … 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**.
> >
> > (Emphasis added)
>
> 32. To similar effect, in *Cabbell & Cabbell* [2009] FamCAFC 205, the Full Court stated at [54] that in considering the parties' contributions, it is necessary to trace the use of those assets and consider the foundation that they laid for the subsequent accumulation of wealth by the parties.

136 I note that the husband had a greater net worth than the wife at the commencement of the relationship. I have earlier traced how the parties used various properties for the acquisition of further properties. It is unnecessary to repeat myself but I have taken all those matters into account.

Financial contributions during the relationship

137 The wife was employed full time until early 2014 earning between $38,829 to $83,500 per annum. During this period the husband's income was comparable to that of the wife. The husband worked as an IT professional until early 2017 when he became unemployed.

138 As pointed out already, during the relationship both parties purchased and settled several properties in their own names. It is unnecessary to repeat the findings and conclusions already made in respect of these properties.

139 Both parties argued that they contributed money to the purchase price of the properties' held in the other's name. The husband argued that in about early 2014 he contributed $20,000 towards the purchase of the Queensland property. As discussed above at [70] the wife claimed to have financially contributed to the purchase of Suburb R. I repeat my conclusions with respect of the wife's financial contributions to Suburb R, Suburb K and Suburb O as stated above at [69]–[74].

140 Both parties argued that they had made financial contributions to the properties held in the other's name by way of mortgage payments. I am satisfied that the parties may have made infrequent payments that were applied to the mortgage of a property held in the other's name.

141 It was the wife's case that during the relationship she was gifted $250,000 from her mother.

142 The wife argued that she was primarily responsible for the parties' living expenses.

143 The husband argued that he spent $50,000 renovating the Suburb D property. The wife's evidence was that the renovations undertaken by the husband were not approved by the council. Accordingly, the wife was required to remove any non-compliant renovations. The wife tendered invoices showing that she was required to pay $80,850 to repair damage caused by water leakage and to remove the non-compliant renovations (Exhibit 5, p.3042–3044).

144 The initial contributions of both parties provided a basis for the acquisition of further wealth. I find there is no basis to distinguish the contributions of one party in favour of the other.

Financial contributions post-separation

145 I have already described how various properties were sold or utilised after separation. I will not repeat what I have already said, other than to add the following.

146 The wife contended that she was responsible for the mortgage repayments and all outgoings associated with the Suburb D, Suburb M, Victorian properties from separation in July 2015 to present. The evidence before the Court was that the wife paid $546,136 towards the mortgages against the three properties from July 2015 to the date of trial, but the amount outstanding increased by about $178,000 between 2016 and 2023.

147 The wife was responsible for the mortgage and outgoings associated with the Queensland property from July 2015 until early 2023 when the property was sold by mortgagee sale. The mortgage on the Queensland property was $291,655 at July 2015 and the bank records exhibited to the wife's affidavit showed that the wife made the minimum interest payments until December 2018 (Exhibit 5, p.1523–1562). The wife made additional repayments in 2019 such that by December 2019 the home loan was at $294,592 (Exhibit 5, p.1574–1583). Repayments ceased from early 2020 until the mortgage had increased to $362,949 by early 2023 prior to mortgagee sale (Exhibit 5, p.1588–1647).

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

148 Both parties contended they significantly assisted the other party with the management and logistics involved in leasing the other's properties.

149 Both parties argued that they were primarily responsible for the domestic chores.

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

150 Between mid-2014 and early 2015 the wife underwent difficult and expensive assisted medical treatments. From about October 2013, the parties had desired that the wife fall pregnant but this did not occur, leading to the joint decision to engage treatment. The wife bore the physical burden of this treatment, and tendered evidence that showed she paid $3,605 for the cost of the treatment. The treatment was ultimately unsuccessful and the wife did not fall pregnant. The husband claimed that he took some medicine and attended some doctors' appointments and thus "had not done less than [the wife]" (Husband's affidavit filed 3 May 2023, paragraph 33). I reject this contention of the husband. I conclude that while the husband participated in the process the contribution was substantially made by the wife.

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

151 Not applicable.

ASSESSMENT OF CONTRIBUTIONS

152 The wife alleged that during the relationship the husband had perpetrated physical, emotional, financial and sexual abuse towards her. The wife made domestic violence assault statements on three occasions in late 2015. As discussed above, the husband was charged with assault in mid-2015, however the proceedings were dismissed in mid-2017 following the wife's non-attendance at the hearing.

153 Ms Y, a former tenant of the Suburb R property who resided with the husband and wife from September 2012 provided affidavit evidence supporting the wife's account of an alleged physical assault that occurred in early 2013. As discussed above Ms Y was cross-examined. Ms Y deposed that one night in early 2013, she and her husband had awoken to loud noises and shortly afterwards the wife knocked on their door and disclosed that the husband had hit her. She was visibly upset and disclosed that the husband had pulled her from the bed and injured her. The husband then purportedly came downstairs was visibly angry and attempted to hit the wife, however, Ms Y's husband prevented him from doing so. In late 2015, Ms Y provided a witness statement in the domestic violence proceedings as did Ms Y's husband. Ms Y's account was not challenged during cross-examination.

154 The wife attended upon Ms BB for intensive trauma counselling and support between July 2015 and March 2016. Ms BB prepared an undated report which was sent to the wife's former solicitors on 4 March 2016. The report set out the various assessments administered to the wife between 15 July and 21 August 2015 and listed the 27 counselling sessions she conducted with the wife, with the latest having taken place in early2016. The report did not include a copy of any letter of instruction addressed to Ms BB. It was received into evidence without objection, despite obvious problems with admissibility. But it is not the role of the Court to raise questions of admissibility and once admitted a document is part of the evidentiary record of the trial, subject to its weight or rational persuasive power: (*Wei & Xia (No 5)* [2023] FedCFamC1F 679 at [206]–[207]). Ms BB did not prepare an affidavit but she appeared at the trial as a witness pursuant to a subpoena.

155 In her report Ms BB was satisfied the wife was not "able to focus on any work activities due to her grief and as yet has not dealt with her deeper psychological issues involving the

domestic violence" (Exhibit 5, p.1147). Ms BB confirmed in her oral evidence that she assessed the wife to be suffering from severe PTSD (Transcript 11 May 2023, p.172 lines 19–27). Ms BB expressed a view that the wife was genuine in her reported experience of family violence by the husband (Transcript 11 May 2023, p.175 lines 4–11). The wife argued that the family violence resulted in severe PTSD which impacted her ability to obtain post separation employment. The wife sought private treatment for her PTSD which cost her $32,000. As discussed above, the wife was unemployed from early 2014 until late 2021 and is now earning a salary of approximately $140,000 per annum.

156 The question is whether conduct of the husband made the wife's contributions significantly more arduous. In *Martell & Martell* [2023] FedCFamC1A 71 at [24]–[33], Aldridge J, sitting as a single Judge in the Court's appellate jurisdictions, discussed the requisite nexus between established family violence and a party's contributions:

> 24. For the reasons given, the words "significantly" and "more arduous" are not to be read as coterminous with "exceptional". Rather, they arise from the basis of the principle itself which focuses on contributions. If the nature and extent of a person's contributions are made more difficult or harder so that they should be accorded greater weight, such that they should be taken into account in the determining of the outcome, they have therefore been "significantly impacted" or made "more arduous". The focus is not on the conduct per se, but on its effects on contributions.
>
> 25. The threshold for recognition is therefore met by conduct which has a discernible effect on the contributions of the other party such that it should be recognised in determining the respective contributions of the parties.
>
> 26. That, in my view, should be the focus and terms such as "exceptional" or "narrow", or indeed, "onerous" add an unnecessary and unacceptable gloss suggesting that a rare and high level of impact is required and that the violence or its impact must be exceptional. That is not however, what their Honours said. All that was required was a "significant adverse impact" upon a party's contributions. The word "significant" was used, in my opinion, as describing that the effect must be sufficient to warrant recognition but not imparting some artificial threshold. The effect of the conduct must be such that a greater weight should be given to the contributions.
>
> 27. More recent cases have softened some of the harshness of the original application of the principles identified in *Kennon*. For example, it is now the position that the adverse effect of the violence on the contributions of a party can be inferred from the lay evidence of the parties and that there is no need to call evidence to "quantify" that effect (Maine & Maine (2016) 56 Fam LR 500 at [47]–[52] ("Maine"); Britt & Britt (2017) FLC 93-764 at [74]–[75]; Keating & Keating (2019) FLC 93-894 at [27]–[43], [52]–[67]; Benson & Drury (2020) FLC 93-998 ("Benson & Drury") at [47]–[50]).
>
> 28. It seems to me that regarding *Kennon* claims as "special" or "exceptional" is apt to mislead. In reality, all the majority said in that case was that a person's contributions are to be assessed in the light of all of the circumstances and

where those circumstances have the effect of making the contributions more difficult, onerous or arduous, that should be recognised in the assessment of contributions. That, of course, takes place in a holistic manner (*Dickons v Dickons* (2012) 50 Fam LR 244; *Jabour & Jabour* (2019) FLC 93-898).

29. …

30. …

31. The difficulty that arises in this matter is, however, that the primary judge did not explain how the acts of violence of the husband led to the non-financial contributions of the wife being made difficult, distressing and more arduous. The reasons are silent on the issue.

32. In *Maine*, the Court held that the application of the principle in Kennon "required of his Honour findings in respect of evidence that addressed specifically... the impact that the violence had upon the wife's contributions" (at [52]).

33. The requisite finding could, as discussed, be inferred as explained in *Benson & Drury* at [50].

157 In *Benson & Drury* (2020) FLC 93-998 the Full Court held that:

50. Here, the primary judge found that the appellant perpetrated family violence upon the respondent and drew an inference that such violence did have an effect upon the respondent's contributions, making them "all the more arduous" (at [162]). An inference is an assent to the existence of a fact which is based on the proven existence of some other fact or facts, drawn as part of the fact finding exercise of ordinary powers of deduction and reason in the light of human experience, unaffected by the rule of law (*G v H* (1994) 181 CLR 387 at [4]). Obviously, the strength of the subject inference depends upon the quality of the underlying evidence. It must be reasonable to draw the inference from the primary facts. Mere conjecture will not suffice (*Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at 275-278 per Spigelman CJ; *Carr v Baker* (1936) 36 SR (SW) 301 at 306–307 per Jordan CJ). Importantly, the evaluation of the evidence from which the subject inference is sought to be drawn should be thorough and balanced. In the context of a *Kennon* argument, any factual controversies over the alleged misconduct of one spouse and its alleged deleterious consequential effects upon the other spouse should be resolved by familiar forensic techniques. Disputed but untested allegations, are not facts (*Keating* at [55]–[66]).

158 I treat the evidence and opinion of Ms BB with caution. It was based solely on information provided by the wife, whom I found unreliable, although I accept the wife gave a version of events to Ms BB which was at least partially consistent with the evidence of Ms Y. Nonetheless it does support a finding that the wife may have suffered from PTSD. However, even assuming in the wife's favour that some conduct of the husband made it difficult for her to work, I am not persuaded the wife has demonstrated a secure basis to infer that her contributions were otherwise made more arduous by abusive conduct of the husband, if it occurred.

159 I conclude that the initial financial contributions favour the husband and post separation contributions favour the wife. Bearing in mind the short relationship and the long period of separation, I am not satisfied there is any secure basis in the evidence to distinguish the parties' contributions overall. A percentage assessment of contributions however is very difficult on the evidence and seems to be artificial and pointless in light of the modest property pool.

160 I now turn to s 79(4)(e) and the s 75(2) factors.

SECTION 75(2)

161 Section 79(4)(e) requires me to take into account the matters referred to in s 75(2) of the Act, so far as they are relevant, when considering what orders should be made in these proceedings. As disclosed in the evidence and arguments of the parties, the following matters are relevant.

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

162 The wife is 40 years old. While she claims a range of health issues her evidence was not convincing in this regard. The husband is 50 and in reasonable health.

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

163 I have already discussed the parties' assets and financial resources at length. I will not repeat the discussion.

164 The wife currently has gainful employment as a manager. The husband does not appear to have worked in any settled capacity since separation. There was no evidence to establish he is unable to undertake gainful employment.

165 I take account here of the wife's claims about non-disclosure by the husband. She argued that his deficiencies in disclosure should result in adverse inferences being drawn against him. For example, she cast doubt on his evidence concerning initial contributions. She also argued that he failed to provide disclosure about the ownership and disposal of properties in Country E. I accept there is some force in these contentions, but it is not possible to form any precise view on the basis of the evidence. On the other hand, some of her arguments about non-disclosure were either overstated or wrong. For example, I have not accepted her version of the facts concerning the purchase of Suburb R (above at [69]–[70]). I do not accept there was deficient disclosure by the husband about that purchase.

166 Overall I infer the husband may have financial resources of indeterminate worth in Country E, and take that into account.

167 However, he claims to be presently homeless in Australia. He has been out of work for many years and will need to refresh his skills by acquiring further qualifications. He claims to suffer depression but medical evidence was not provided.

(g) the standard of living reasonable in the circumstances

(n) the terms of the proposed order

168 As pointed out the parties have been separated for over eight years. The proposed orders will not affect the standard of living of either party.

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

169 As foreshadowed above, I have taken into account the husband's use of the Suburb R rental income (Item 24), the husband's disbursement of the $206,344 obtained from the refinance of Suburb R and Suburb K (Item 13) and the husbands gambling losses (Items 15 and 16) under this subparagraph.

Conclusion

170 There is no secure basis in the evidence for any adjustment pursuant to s 75(2) in favour of either party.

WHETHER THE PROPOSED ORDERS ARE JUST AND EQUITABLE

171 In light of the modest property pool, and the deficit of assets over liabilities it is important to emphasise that the discretion in s 79(1) to be exercised by the Court is to make orders that are appropriate, just and equitable dividing *existing* property of the parties to the marriage (*Sand & Sand* (2012) FLC 93-519 at 86,657). Orders cannot extend beyond the existing property unless there is evidence to support a finding that other assets, undisclosed, actually exist (*Milankov and Milankov* (2002) FLC 93-095 at [115]; *HDM & MM* [2006] FamCA 47, at [27]; *Shan & Prasad* [2018] FamCAFC 12 at [130]). I accept it is open to the Court to find that indeterminate undisclosed property is held by one of the parties and to make such property orders without reference to the overall pool (see *Weir and Weir* (1993) FLC 92-338 at 79,593-4; *Chang v Su* (2002) FLC 93-117 at [70]). I do not make such a finding in this case.

172 Section 79(2) of the Act provides that:

> The court must not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order.

173 Section 79(2) requires the Court to be satisfied the proposed order itself is just and equitable (*Manolis & Manolis (No 2)* [2011] FamCAFC 105 at [65]–[66]).

174 The High Court in *Stanford* made clear the expression "just and equitable" is very broad:

> 36. The expression "just and equitable" is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definition. It is not possible to chart its metes and bounds …
>
> (footnotes omitted)

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

176 Having carefully considered all the evidence and arguments, I am not satisfied it would be appropriate, just and equitable to make any order altering the property interests of the parties in this case. The wife's application and the husband's response should simply be dismissed. This will result in the wife retaining all her property and liabilities. The husband will retain his superannuation. In reaching this conclusion, I have taken account of all the matters discussed in the course of these reasons, including the modest property pool, the fact that the husband may have contributed more cash to the purchase of Suburb D, but the wife shouldered the mortgage debt, certainly after separation. The wife will be left with a substantial deficit of assets over liabilities, but there is no property identified by her from which this could be addressed, even if I was persuaded any adjustment in her favour was warranted, which I am not. Her claim to a superannuation split would not assist in this regard anyway and the husband is considerably older than her making superannuation relatively more important to him.

177 I am satisfied that there is no secure basis to make any orders altering property interests or splitting superannuation. The claims of the parties for property adjustment will be dismissed.

178 In light of the proposed orders it is unnecessary to repeat the composition of the balance sheet.

OTHER ORDERS

Spousal Maintenance

179 The husband sought an order for a $100,000 lump sum payment spousal maintenance. This was only introduced as a matrimonial cause in his case summary document filed on 5 May 2023. Thus, any claim to maintenance is well out of time and leave to bring it has not been sought (s 44(3) of the Act, putting to one side any jurisdictional problem raised by s 50 of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (see *Vang & Chung (No 3)* [2024] FedCFamC1F 101 at [38]–[73]). In any event, it is self-evident from the discussion above that I would be unable to find the wife has any capacity reasonably to make such a payment. As a result, the husband cannot satisfy the requirements of s 72(1) of the Act. His claim for spouse maintenance will be dismissed.

CONCLUSION

180 For all the foregoing reasons I am satisfied the orders set out at the commencement of these reasons should be made.

181 There will be no order as to costs.

I certify that the preceding one hundred and eighty-one (181) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Harper.

Associate:

Dated: 18 March 2024

Schedule 1 – Material Tendered

The following documents were tendered and placed into evidence:

Exhibit Label	**Document**	**Tendered by**
1.	Orders sought by the wife	Wife
2.	Husband's Amended Case Outline	Wife
3.	Wife's objections to the husband's material	Wife
4.	Corrections to the wife's affidavit	Wife
5.	Wife's tender bundle	Wife
6.	Amended joint balance sheet	Joint
7.	List of corrections to the husband's affidavit	Husband
8.	Husband's exhibits	Husband
9.	Further corrections to the husband's affidavit	Husband
10.	Bundle of documents produced by husband	Wife
11.	Schedule of the husband's transactions	Wife
12.	Email from the wife's solicitors to the husband's solicitors dated 4 October 2023	Wife
13.	Correspondence between the husband and the ATO	Wife
14.	Affidavit of the husband sworn 12 August 2019 confined to paragraph 2	Wife
15.	Financial questionnaire of the husband filed 17 October 2015	Wife

16.	Financial Statement of the husband filed 17 December 2015	Wife
17.	Wife's bank statements dated 18 November 2013 until 16 May 2014	Husband
18.	Further amended joint balance sheet	Joint
19.	Amended proposed minute of orders	Wife

ANNEXURE A – WIFE'S PROPOSED MINUTE OF ORDERS
IT IS ORDERED THAT:

Pursuant to s 79 of the *Family Law Act 1975* (Cth):

1. Within 14 days, the Husband to produce the Wife's jewellery to a jewellery authenticator to be agreed between the parties. In the event, there is no agreement the Wife shall nominate 3 authenticators and within 7 days thereafter the Husband shall select one. The parties shall each be responsible for half of the cost of the authentication.

2. In the event the jewellery authenticator authenticates the jewellery, the jewellery shall be surrendered to the Wife.

3. In the event the jewellery authenticator fails to authenticate the jewellery or if the Husband is unable or unwilling to produce the jewellery to the authenticator, or otherwise refuse to nominate or pay for the authenticator then the Husband, shall within 28 days, pay the Wife the sum of $600,000.

4. That following paragraphs of these Orders are binding on the Trustee of the Husband's superannuation fund being [OO Pty Ltd] account Number […65].

5. That the base amount of $87,000 be allocated to the Wife out of the interests of the Husband's interest in the Fund.

6. That pursuant to s90MT(1)(a) of the Family Law Act 1975 ("the Act") whenever a splittable payment becomes payable in respect of the Husband's interest in the Fund, the Wife shall be entitled to be paid an amount calculated in accordance with Pt 6 of the Family Law (Superannuation) Regulations 2001 ("the Regulations") using the base amount and there be a corresponding reduction in the entitlement of the person to whom the split table payment would have been made out for these Orders.

7. That Order 15 [sic] has effect, 4 business days after the date of service of these Orders upon the Trustee of the Fund.

8. That until such time as the Superannuation split to the Wife pursuant to these Orders can be rolled over onto a separate account to the Wife:

9. The Husband provides to the Wife no less than 28 days' notice before such time as he elects to retire from and/or take voluntary retirement and/or for any reason accept or become entitled to access in whole or in part his entitlement in the Fund.

10. That otherwise each party to retain their respective assets and liabilities.

ANNEXURE B – HUSBAND'S PROPOSED MINUTE OF ORDERS

1. Declaration under s78 of the Family Law Act 1975 that [Mr Shun] and [Ms Chiu] be the joint-tenant of the property at [C Street, Suburb D], NSW (Folio Identifier […]) ("[Suburb D] Property"); and,

2. That the respondent husband notify the mortgagee of the [Suburb D] property with these orders: that the loan account of [Ms Chiu] using [Suburb D] property as the secured property be allowed only to receive the credit payment. Neither refinance nor credit transfer be allowed between [Ms Chiu's] own accounts or between [Ms Chiu's] account or other people's account, or 3rd party account.

3. That [Ms Chiu] be responsible for any increased amount of the mortgage associated with the [Suburb D] property and such increased amount be adjusted against the applicant's interest at the settlement of the [Suburb D] property.

4. That both parties do all things and sign all papers to effect the sale of the [Suburb D] property.

5. Within Twenty-eight (28) days of these orders, the applicant vacate the [Suburb D] property.

6. That the property be sold by auction if not sold at the auction, then by a private sale. That the parties follow the process below,

    a. Within seven (7) days of these orders, the respondent by his solicitor propose three sales agents and three conveyancers to the applicant via her solicitor; and the applicant's solicitor inform the respondent's solicitor about the choice of the agent and conveyancer with fourteen (14) days of these orders;

    b. The applicant via her solicitor drafts a joint instruction letter to the respondent's solicitor for the sale of the [Suburb D] property. Both solicitors execute the joint instruction on behalf of clients and forward to the agent and conveyancer of choice with twenty-one (21) days of these orders;

    c. That property be sold in Forty-two (42) days of these orders. The net proceeds of these orders after deducting the mortgage and the costs incidental to the sale be distributed to,

        (i) 86.35% to the respondent

        (ii) 13.65% to the applicant

7. That the applicant wife pays $100,000 Lump Sum fee spouse maintenance fee to support his homelessness and joblessness at the sale of the [Suburb D] property.

8. That the applicant returns the respondent's personal belongings including but not limited to his university degree and certificates.

9. Declare that at the conclusion of the order 1-6, each party be legal and equitable owner of the property and assets under her or his name;

10. That each be responsible to her or his debt, responsibility and liability

associated with her or his property and assets; each indemnify the other against those debt, responsibility, and liability.

11. That if one party refuse to do acts or sign documents, the court may under s106A to execute the deed or instrument in the name of the party to whom the direction was given and to do all acts and things necessary to give validity and operation to the deed or instrument. The court may make such order as it considers just as to the payment of the costs and expenses of and incidental to the preparation of the deed or instrument and its execution.

The Court Note,

12. The current mortgage of [Suburb D] property be at $1,368,170,

(As per the original)