ACT Bar Association Seminar

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Significant Developments in Family Law Financial Matters

Just and Equitable? Or Just the Length of the Chancellor's Foot?

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Overview

1.1 The pivotal provision of the Family Law Act giving courts power to alter interests in property, is section 79.

> (1) In property settlement proceedings, the court may make such order as it considers appropriate:
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> (a) in the case of proceedings with respect to the property of the parties to the marriage or either of them--altering the interests of the parties to the marriage in the property; or
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> (b) in the case of proceedings with respect to the vested bankruptcy property in relation to a bankrupt party to the marriage--altering the interests of the bankruptcy trustee in the vested bankruptcy property;
>
> Including:
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> (c) an order for a settlement of property in substitution for any interest in the property; and
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> (d) an order requiring:
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> (i) either or both of the parties to the marriage; or
>
> (ii) the relevant bankruptcy trustee (if any);
>
> to make, for the benefit of either or both of the parties to the marriage or a child of the marriage, such settlement or transfer of property as the court determines.
>
> (2) The court shall not make an order under this section unless it is satisfied that, **in all** the circumstances, it is just and equitable to make the order.
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> ……..
>
> (4) In considering what order (if any) should be made under this section in property settlement proceedings, the court shall take into account:
>
> (a) the financial contribution made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the

contribution, ceased to be the property of the parties to the marriage or either of them; and

(b) the contribution (other than a financial contribution) made directly or indirectly by or on behalf of a party to the marriage or a child of the marriage to the acquisition, conservation or improvement of any of the property of the parties to the marriage or either of them, or otherwise in relation to any of that last-mentioned property, whether or not that last-mentioned property has, since the making of the contribution, ceased to be the property of the parties to the marriage or either of them; and

(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; and

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

(e) the matters referred to in subsection 75(2) so far as they are relevant; and

…

(8) Where, before property settlement proceedings are completed, a party to the marriage dies:

(a) the proceedings may be continued by or against, as the case may be, the legal personal representative of the deceased party and the applicable Rules of Court may make provision in relation to the substitution of the legal personal representative as a party to the proceedings;

(b) if the court is of the opinion:

(i) that it would have made an order with respect to property if the deceased party had not died; and

(ii) that it is still appropriate to make an order with respect to property;

the court may make such order as it considers appropriate with respect to:

(iii) any of the property of the parties to the marriage or either of them; or

(iv) any of the vested bankruptcy property in relation to a bankrupt party to the marriage; and

(c) an order made by the court pursuant to paragraph (b) may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

1.2 From very early days of the Family Court had given itself the following helpful instruction which was initially called the "preferred three-step approach". This involved –

(i) Ascertainment of the relevant property of either of the parties and the values thereof;

(ii) Assessment of the contributions thereto by each of the parties, thereby arriving at a prima facie quantification of the share entitlement of each party based on contributions;

(iii) Determination of what adjustments, if any, should be made to the assessed contribution-based entitlements under section 75(2).

1.3 From the mid-1990s the court endeavoured to assist its members and the profession by introducing a fourth step, which was the proverbial "standing back" and formation of a view whether the outcome arrived at from the first three steps, was considered by the judicial officer to be "just and equitable" within the meaning of section 79(2). This became colloquially known as the "preferred four-step approach".

1.4 Putting aside for the moment various *dicta* about the process of property distribution "not being an exercise in social engineering", or "not intended to achieve equality", and putting aside further any issue of the power of the Full Court to pronounce guideline judgments, even if such guidelines can be described as "mere *obiter*" the 4 steps were generally applied in a workable, and understandable manner. Most outcomes at first instance appeared to be supportable by some previous decisions. There was value in having a degree of consistency, even though the discretion given by statute was extremely wide. To borrow a quote from Dean J in *Mallet* –

> *Otherwise, the law would, in truth, be but the "lawless science" of a "codeless myriad of precedent" and a "wilderness of single instances".*

1.5 True, there was some misapplication of section 79(2) in relatively few cases where a trial judicial officer considered that it was another head of power to make some final adjustment to the outcome of the case. That approach was eventually said to be wrong by the Full Court in *Teal & Teal* [2010] FamCAFC 173. The power to arrive at a form of order was clearly contained in sec 79(4), which itself imported the provisions of sec 75(2). It was also a frequent error to consider the "fourth step" as the determination of the "mix-and-match" of the various items of property in the determination of the final form of the order to be made.

1.6 So was section 79(2) a distinct power to undertake a separate assessment of "satisfaction" that the result arrived at upon consideration of matters in sec 79(4) was in fact "just and equitable"? Logic would suggest that if the process of assessing contributions and consideration of matters under sec 75(2) was undertaken properly, then the outcome should be "just and equitable". Well, that is not quite right.

1.7 As far back as 1991, the Full Court said in *Neale & Neale* (1991) FLC 92-242,

> This leaves open the question to what extent, if any, the considerations set out in sections 79(4) and 75(2) can be supplemented or varied by general considerations of what is just and equitable under section 79(2),

> insofar as they are not covered by section 75(2)(o), but the Court must first take account of the specific factors before it can proceed to any wider question:...
>
> It follows then that in this case in order to determine whether it was just and equitable to make any order in favour of the wife, the learned Trial Judge should have first considered the factors set out in section 79(4) as well as such of the matters set out in section 75(2) as were relevant."

1.8 It is against this background that the High Court heard the appeal in *Stanford* and held that to formulate a conclusion for the purposes of 79(2) on the basis of an assessment of matters under sec 79(4) was to conflate the two separate issues.

Stanford & Stanford [2012] HCA 52

2.1 *Stanford* was a special case which called for a close look at how these provisions worked. The parties were married for about 40 years. They were both retired on Veterans' Affairs pensions, and both had serious health issues. They had lived in a house that was registered in the husband's name following his first property settlement. Both parties had children by their first marriages, but there were no children of this marriage. In 1995 the husband made a will which left his estate subject to a life tenancy for the wife, to his children. In 2005 the wife made a will leaving all her estate to her children. She did not have any real estate in her name, having previously sold her previous house to her daughter.

2.2 In 2008, the wife suffered a stroke and was admitted to full time residential care. She later developed dementia. The husband visited her frequently, and he had set up a modest trust to provide for her incidental needs. The wife's pension met most of the cost of her care. She was still alive when her daughter commenced property proceedings in her capacity as case guardian. At no stage was there any voluntary separation, nor any act that effected any breakdown of the marriage. The husband was still living in "his" home with one of his sons who was now also the husband's carer.

2.3 The wife, through her guardian, sought an order that the house be sold, and that their savings and the husband's superannuation be divided equally.

2.4 In the interval between the appeal to the Full Court and the judgment of the Full Court being handed down, the wife died. Therefore that brought into play the continuation of the proceedings under sec 79(8) by the legal personal representative (in this case, the daughter, who was also a legatee).

2.5 For reasons beyond the scope of this paper, there was earlier Full Court authority that the Court had jurisdiction to make a property adjustment order. I will just quote a telling passage by Justice Kay in a dissenting judgment in *Sterling & Sterling* [2000] FamCA 1150

> "Marriage is not seen to be an institution that is entered into during such time as the health of the parties enables them to live together. The existence of the necessity for the parties to live in separate premises, brought about by the deterioration in the health of one or both of the parties, ought not be seen, as an appropriate trigger for the persons managing the affairs of one or other of the parties to successfully apply to have an order made under s 79."

2.6 It is pertinent to note the cogency of what Dowding SC submitted to the Full Court in relation to the Leave to Appeal application in *Sterling* where the High Court is reported to have expressed it was –

> " …… troubled by the nature of a case where the real purpose or outcome of a property settlement claim might be not to meet the needs of the wife, but really in the nature of 'what used to be called the Testators Family Maintenance and Guardianship of Infants Act'."

2.7 Quoting the High Court in *Stanford* at [11 ff] –

> '11 The Full Court did not make final orders. It invited the parties to make submissions about whether the Full Court should itself decide what orders should be made in place of those made by the magistrate or whether it should remit the matter for further consideration at first instance. Both parties asked the Full Court to deal with the matter finally.
>
> 12 The Full Court then ordered that, on the husband's death, the sum which had been fixed by the magistrate as representing the value of 42.5 per cent of the marital property be paid to the wife's legal personal representatives. The Full Court said that "the many years of marriage [of the parties] and the wife's contributions demand that those moral obligations be discharged by an order for property settlement". The Full Court did not otherwise expressly deal with why, if the wife had not died, it would have been just and equitable to make the orders it did when, as the Full Court had said in its first judgment, the wife "did not have a need for a property settlement as such and ... her reasonable needs could be met in other ways."
>
> …….
>
> 15 …….. These reasons will further demonstrate, however, that it was not shown to be just and equitable to make any property settlement order in this case. The appeal must therefore be allowed.'

2.8 At [26 – 29] the High Court made it clear that orders can be made even if there was no conscious or voluntary separation.

2.9 It then went on to consider from [35 – 46] how sec 79(2) operates independently of 79(4). In [35] it made it said – "

> ".. that s 79(2) provides that "[t]he court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order". Section 79(4) prescribes matters that must be taken into account in considering what order (if any) should be made
>
> under the section. The requirements of the two sub-sections are not to be conflated. In every case in which a property settlement order under s 79 is sought, it is necessary to satisfy the court that, in all the circumstances, it is just and equitable to make the order.
>
> 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. And while the power given by s 79 is not "to be exercised in accordance with fixed rules", nevertheless, three fundamental propositions must not be obscured.

37 First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property. So much follows from the text of s 79(1)(a) itself, which refers to "altering the interests of the parties to the marriage in the property" (emphasis added). The question posed by s 79(2) is thus whether, having regard to those existing interests, the court is satisfied that it is just and equitable to make a property settlement order.

38 Second, although s 79 confers a broad power on a court exercising jurisdiction under the Act to make a property settlement order, it is not a power that is to be exercised according to an unguided judicial discretion. In *Wirth v Wirth*, Dixon CJ observed that a power to make such order with respect to property and costs "as [the judge] thinks fit", in any question between husband and wife as to the title to or possession of property, is a power which "rests upon the law and not upon judicial discretion". And as four members of this Court observed about proceedings for maintenance and property settlement orders in *R v Watson; Ex parte Armstrong*

> "The judge called upon to decide proceedings of that kind is not entitled to do what has been described as 'palm tree justice'. No doubt he is given a wide discretion, but he must exercise it in accordance with legal principles, including the principles which the Act itself lays down".

39 Because the power to make a property settlement order is not to be exercised in an unprincipled fashion, whether it is "just and equitable" to make the order is not to be answered by assuming that the parties' rights to or interests in marital property are or should be different from those that then exist. All the more is that so when it is recognised that s 79 of the Act must be applied keeping in mind that "[c]ommunity of ownership arising from marriage has no place in the common law". Questions between husband and wife about the ownership of property that may be then, or may have been in the past, enjoyed in common are to be "decided according to the same scheme of legal titles and equitable principles as govern the rights of any two persons who are not spouses". The question presented by s 79 is whether those rights and interests should be altered.

40 Third, whether making a property settlement order is "just and equitable" is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in s 79(4). The power to make a property settlement order must be exercised "in accordance with legal principles,

including the principles which the Act itself lays down". 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.

….

42 In many cases where an application is made for a property settlement order, the just and equitable requirement is readily satisfied by observing that, as the result of a choice made by one or both of the parties, the husband and wife are no longer living in a marital relationship. It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common use of property by the husband and wife. No less importantly, the express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the mutuality of the marital relationship. That is, any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end. Hence it will be just and equitable that the court make a property settlement order. What order, if any, should then be made is determined by applying s 79(4).

43 By contrast, the bare fact of separation, when involuntary, does not show that it is just and equitable to make a property settlement order. It does not permit a court to disregard the rights and interests of the parties in their respective property and to make whatever order may seem to it to be fair and just.

44 When, as in this case, the separation of the parties is not voluntary, the bare fact of separation does not demonstrate that the husband and wife have any reason to alter the property interests that lie behind whatever common use they may have made of assets when they were able to and did live together. Common use of some assets may very well continue, as it did here when the husband made provision for the wife's care and accommodation. Past arrangements that the parties have made about their property interests on the assumption, expressed or implicit, that those arrangements were sufficient and appropriate during the continuance of their marriage are not necessarily falsified. If both parties are competent, it can still be assumed that any necessary or desirable adjustment can be made to their property interests consensually. And if one of the parties has become incompetent it is not to be assumed that the other party lacks the will and ability to make those necessary or desirable adjustments.

45 Contrary to the submissions of the husband in this Court, there may be circumstances other than a voluntary separation of the parties marking the breakdown of their marital relationship in which a court may be

satisfied that it is just and equitable to make a property settlement order. For example, demonstration of one party's unmet needs that cannot be answered by a maintenance order may well warrant the conclusion that it is just and equitable to make a property settlement order. It may be that there are circumstances other than need.

2.10 The guidance received from these passages has caused some differences of opinion, and even raised the question whether a determination under 79(2) is to be an additional first step of a new 5-step approach, or a step slotted in between the first and the second steps. It is probably better to say that in some cases the 79(2) question can be determined at different points in time as part of the process under sec 79, depending on how the facts lend themselves to such assessment. However, what is vital, is that it be a separate consideration.

So how does sec 79(2) work?

3.1 Stanford is a relatively clear example of where a court could answer that question early in the process. Nothing in the rest of sec 79 nor in sec 75(2) or 79(8) gives any guidance where a party has died during the proceedings.

3.2 Coming back to basics, how could it be "just and equitable" to order a surviving spouse, who owns the house, and who provided it in the first place, to sell it, and to pay the case guardian a large sum of money (in excess of $600,000), with massive impact on that surviving spouse?

3.3 This question can be answered without embarking on the matters in sec 79(4). There is no need to embark on an assessment of contributions or "future needs". It may however assist the court to consider if there are alternative approaches. For instance, a maintenance order, if the other spouse was still alive. If there was reason to conclude that making some order would have been "just and equitable", then the alternative of deferring payment, or of any necessary sale, until the surviving spouse passed away.

3.4 Although not applicable in *Stanford*, what if the parties had made mutual complementary wills, whereby each left his or her estate to the other? Or what if they each left such complementary wills with a residual provision that upon the death of the survivor, the assets shall go to a charity? Is there any scope for the court to make orders in apparent discharge of "moral obligations"? The Full Court said that "the many years of marriage [of the parties] and the wife's contributions demand that those moral obligations be discharged by an order for property settlement". What was the justification for this purported "demand"?

Examples of recent decisions

4.1 *Bevan & Bevan* [2013] FamCAFC 116 and [2014] FamCAFC 19, was one of the first appeal decisions after *Stanford*. This case received some publicity for its unusual feature that the parties had separated a long time ago when the husband left to go to the UK. Since separation he made representations that the wife is to have all assets in Australia, and that he would develop his life overseas. Then after further thought he decided to commence a property

application in Australia. The Full Court first held (ending in the 2013 judgment) that the trial judge was in error, but then without making a final order, invited further submissions.

20 We must first identify the existing legal and equitable property interests of the parties (see *Stanford* at [37]).

At this further hearing (2014) we see from [28 ff] the following discussion -

Is it just and equitable to make any order?

28. Having determined that the wife is the legal owner of all of the assets, the question arises whether it would be just and equitable to make any order altering her interest in those assets. Only if that question is answered in the affirmative would it be necessary for us to consider the extent to which her interest should be altered.

29. As the plurality said in *Stanford* at [42], the "just and equitable requirement" of s 79(2) will be readily satisfied in many cases because the parties, by choice, are no longer in a marital relationship. Their Honours went on to observe that orders for property settlement can properly be made in those cases:

> 42. ... because there is not and will not thereafter be the common *use* of property by the husband and wife. No less importantly, the express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the mutuality of the marital relationship. That is, any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end ...

30. In the present matter, the husband elected to leave the relationship in 1994, at which time the parties had been married for about 22 years. From time-to-time thereafter, the husband represented to the wife that she could retain their assets for herself and for their sons, on the basis he would build his own life and acquire property elsewhere. Acting on the representations, and believing the assets were hers, the wife dealt with the property as if it were her own. (Trial Judge's Reasons at [40] to [43]).

31. On the other hand, the trial Judge found that, from time-to-time, the husband:

> 44. ... continued to volunteer significant contributions to the benefit of the wife entirely inconsistent with the notion that he was leading a separate life and accumulating his own property and securing his own future. For example, I accept that, when he wound up his share portfolio in 2000 he chose to deposit the proceeds in the parties' account. He also did so in relation to the final winding up of his share portfolio in 2003. I accept the husband also applied the proceeds of his inheritance from his mother to the benefit of the wife.

32. The trial Judge also found, at [45], that during the time the husband worked and lived in Australia in 2001 and 2004 he deposited his income into joint accounts and also "made not insignificant contributions" to renovations the wife undertook to her home in M town in 2004.

4.2 From [81] of the 2013 Full Court judgment in *Bevan*, we see the following –

81 The third "fundamental proposition" demands separate consideration of the preliminary question of whether it is just and equitable to make any order altering property interests before the need arises to consider the extent to which existing interests are to be altered and the manner in which that is to be done.

82 As we have noted, in many cases the preliminary question is effectively answered in the affirmative by the way the parties present their cases. Nevertheless, it is still necessary for it to be shown that the trial judge has expressly, or by clear implication, answered that question in the affirmative before making an order altering existing interests in property.

83 Answering this preliminary question clearly involves the exercise of judicial discretion since, as was said in *Stanford* at [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.

84 Just as the expression "just and equitable" does not admit of exhaustive definition, it is not possible to catalogue the "range of potentially competing considerations" that may be taken into account in determining whether it is just and equitable to make an order altering property interests. However, in our view, it would be a **fundamental misunderstanding to read *Stanford* as suggesting that the matters referred to in s 79(4) should be ignored** in coming to that decision. Indeed, such a reading would ignore the plain words of s 79(4), which make clear that in considering "what order (**if any**)" to make, the court must take into account the matters referred to in that subsection (emphasis added).

85 This **requirement to consider the s 79(4)** matters in determining whether it is just and equitable to make any order provides fertile ground for potential conflation of the two different issues, which the High Court has warned against. However, this potential will not be realised in many cases because of what the plurality said at [42] about the "just and equitable" requirement being "readily satisfied". But there will be a range of cases, of which arguably the present is a good example, where determining whether it is just and equitable to make *any* order altering property interests will not be so clear cut and will therefore require not only separate but very careful deliberation.

86 We do not consider it helpful, and indeed it is misleading, to describe this separate enquiry as a "threshold" issue. We say this for two reasons. First, as was emphasised in *Stanford*, the initial enquiry is to determine the existing legal and equitable interests of the parties. Secondly, although s 79(2) is cast in the negative and amounts to a prohibition against making any order unless it is just and equitable to do so, the corollary is that if the court does make an order, such order itself must be just and equitable: *Woollams & Woollams* [2004] FCWA 32; (2004)

FLC 93-195 per Thackray J at [53] and *Teal v Teal* [2010] FamCAFC 120 per Finn, Boland and Dawe JJ at [70]. The **just and equitable requirement is therefore not a threshold issue**, but **rather one permeating the entire process**.

87 It will be seen from this discussion that while the s 79(2) and s 79(4) issues must not be conflated, they are intertwined because the text of the Act links them. This was recognised in *Ferguson & Ferguson* where Strauss J said that s 79(2) "is directed to both the questions whether an order should be made at all, and what the order should be, if one is made" (supra at 77,615).

88 This understanding of the interplay between ss 79(2) and 79(4) accords with the analysis of Martin Bartfeld QC in his paper entitled "*Stanford and Stanford – Lots of Questions – Very Few Answers*". In that paper, which we drew to the attention of counsel, Mr Bartfeld opined that:

> "49 ... there is scope for taking into account the factors under s 79(4) in the exercise of the [s 79(2)] discretion. This can be accomplished, it is submitted, by treating the contribution factors and the factors under s 75(2) as having two simultaneous characteristics;
>
> a. A discretionary characteristic, which is used to identify those matters which are relevant to enliven the exercise of the discretion. Thus the fact that a party has made substantial contributions, over a long period of time, which are not reflected in their asset holdings but which are reflected in the other party's assets may found a basis for finding that it is just and equitable for an order to be made; and
>
> b. An evaluative characteristic, which is used to measure the weight or to quantify the effect of a particular contribution.
>
> 50 The problem of conflation can easily be overcome by clearly identifying the use to which a factor is being put."

More recent cases

4.3 Subsequent to *Bevan*, the Full Court comprising Bryant CJ, Strickland and Murphy JJ decided *Chapman & Chapman* [2014] FamCAFC 91. In reference to *Bevan*, the plurality stated at [25] "If the plurality (in *Bevan at [85]*) intended that a consideration of the s 79(4) matters is mandatory in answering the s 79(2) question, we respectfully disagree.

4.4 From [18] we see –

> 18. As to inference, the plurality in *Bevan* said (at [89]) "[u]ltimately, however, appellate error will not be demonstrated if it is possible to ascertain, either by reference to an express finding *or by necessary inference*, that the trial judge has given separate consideration to the two issues" (emphasis added). Similarly, the

plurality firmly rejected (at [86]) the notion that s 79(2) forms a "threshold issue" – which their Honours described as a "misleading" description – or that error is demonstrated by a **failure to deal with s 79's separate requirements in a particular order**.

19. **Section 79 demands a consideration, separately, of all of its requirements without conflation**. Provided a trial judge has done so, and the reasons demonstrate that this has been done, **no error is demonstrated by a failure to follow a particular order** in doing so. Further, the breadth and depth of the consideration of the s 79(2) issue, and the extent of an adequate exposition of it in the reasons, will vary from case to case. In that respect, the plurality in *Bevan* said, at [82], that the separate s 79(2) issue will, "...in many cases ... [be] ... effectively answered in the affirmative by the way the parties present their cases."

4.5 Subsequent to *Chapman & Chapman* [2014] FamCAFC 91, the Full Court decided *Scott & Danton* [2014] FamCAFC 203. That judgment is a very useful compilation of the reasoning in the earlier cases. This Full Court Bench comprised Stickland, Ainslie-Wallace and Watts JJ.

4.6 We see here a consistency between *Chapman* and *Scott & Danton*. So far as it helps to understand the outcome of these decisions, it can be said that in coming to a view under sec 79(2) –

(i) There is no threshold issue that must be first decided under 79(2).

(ii) There is no obligation to ignore the matters under 79(4).

(iii) There is no obligation to apply findings under 79(4).

(iv) It is necessary to make a finding under 79(2) distinct from the findings under 79(4), but this consideration permeates the whole of the process.

(v) It does not matter in what order the considerations are undertaken, so long as it is discernible that the processes under 79(4) and (2) were undertaken as distinct assessments.

4.7 Another case that is even more recent, but which involves a couple who kept their financial matters separate, was *Fielding & Nichol* [2014] FCWA 77 by Thackray CJ. The judgment was published after the usual process of making all identification anonymous, about 3 February 2015 and featured in *The Australian* on 18 February under the heading "*Love-Split property ruled out of bounds*". Those parties kept their property separate, including their finances, during their 12 year relationship. His Honour held that a trial judge could consider s 205ZG(4) of the *Family Court Act 1997* (equivalent to s 79(4) of the *Family Law Act 1975*) in determining whether the "just and equitable" test has been met. In effect, the sequence can be the determination of the ratio of property division first, and then a determination whether the "just and equitable" test has been met. This sequence was later also adopted by Watts J in *Dawkins & Reece* [2015] FamCA 28 handed down on 27 January 2015.

4.8 Thackray J found that the parties lived on a property that belonged to the wife. The de facto relationship lasted between December 1998 and May 2012. The husband was 74 and the wife was 66. His Honour stated the principles at [11 – 12] as follows –

> 11 The four-step process still has utility, provided the court exercises the discretion conferred by the legislation in accordance with legal principles and does not assume that the parties' interests in the assets are or should be different from those determined by common law and equity. That this is so was made clear in *Stanford v Stanford* ….. The power to make a property settlement order must be exercised "in accordance with legal principles, including the principles which the Act itself lays down". 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. (footnote omitted, emphasis added)
>
> 12 In a passage on which counsel for the wife places much weight, the High Court in *Stanford v Stanford* went on to say at [42] (emphasis added):
>
> > In many cases where an application is made for a property settlement order, the just and equitable requirement is readily satisfied by observing that, as the result of a choice made by one or both of the parties, the husband and wife are no longer living in a marital relationship. It will be just and equitable to make a property settlement order in such a case because there is not and will not thereafter be the common use of property by the husband and wife. **No less importantly, the express and implicit assumptions that underpinned the existing property arrangements have been brought to an end by the voluntary severance of the mutuality of the marital relationship. That is, any express or implicit assumption that the parties may have made to the effect that existing arrangements of marital property interests were sufficient or appropriate during the continuance of their marital relationship is brought to an end with the ending of the marital relationship. And the assumption that any adjustment to those interests could be effected consensually as needed or desired is also brought to an end**. Hence it will be just and equitable that the court make a property settlement order. What order, if any, should then be made is determined by applying s 79(4).

Existing interests in property

> 14 In considering whether it is just and equitable to make any order altering existing property interests it is necessary first to determine what those interests are: *Stanford v Stanford* at [37].

4.9 From [17 – 53] his Honour gave the benefit of his analysis, and his disagreement with passages in the judgment of the plurality in *Chapman & Chapman*, as follows –

> 17 In arguing it would not be just and equitable to make any order altering property interests, counsel for the wife drew on the part of paragraph 42 of *Stanford v Stanford* highlighted above. Counsel argued that no "express or implicit assumptions" of the parties about their property were brought to an end by the termination of their relationship. On the contrary, their relationship had been conducted on the basis that neither would ever have any interest in the property of the other.
>
> 18 To appreciate this argument, it is necessary to understand that….at the husband's insistence, the parties held their property separately throughout their relationship and maintained their finances almost entirely separately. The wife was content with this arrangement.
>
> …..
>
> 20 While each party retained the money they received from their pensions or from employment, it was agreed they would pool the income they received from the sale of art, plants and seeds in a joint account, which was used to cover the costs of their holidays, art supplies and – when there were sufficient funds – rates on both their properties. Otherwise their funds were kept separate, on the basis that household bills and the cost of groceries were met equally, save for the telephone bill which was usually paid "as per the itemised usage". It was also understood that each was largely responsible for any expenditure on their own real estate. Similarly, it was understood the husband was to be responsible for expenses associated with the motor home.
>
> 21 When the husband finally left Nannup to move to Perth, he took his personal assets, leaving behind only a few pieces of art and sculpture, primarily those that could not be easily moved. They split the funds in their joint account and divided up their art supplies, "right down to counting out coloured beads" in equal shares.
>
> …..
>
> 24 The husband, with assistance from the wife, undertook work around the Nannup property. Some of this could be classified as maintenance, such as keeping up the firebreaks, but other work was done which the parties considered made the property more attractive. This included bringing native vegetation under control, making pathways through the bush, building garden beds and steps and installing various pieces of art and sculpture around the grounds. The husband placed heavy emphasis on the fact that these improvements were highlighted in the advertising material when the property was on the market between 2007 and 2010. The fact is, however, that the property did not attract any offers, notwithstanding it was for sale for years. There was also no evidence (save for a concession made by the wife in cross-examination that was the subject of an objection by her own counsel) that any of the work made a real difference to the value of the property. It should also be observed that the husband did not assert that he anticipated his work

would lead to him acquiring any legal or beneficial interest in the property – the high point of his case was that the parties hoped to use some of the proceeds of sale to fund their proposed trip.

25 The husband now considers it is just and equitable for there to be an adjustment of property interests because he devoted 12 years of his life to the relationship and because he had anticipated the parties would live out the rest of their lives together. He also emphasises that his expectations were dashed only because the wife ended the relationship without giving him any reason for doing so.

26 In authorising a judge to make such orders altering property interests as he or she "considers appropriate", Parliament has conferred a discretion of considerable breadth, tempered by the requirement that the judge shall not make an order unless satisfied "in all the circumstances, it is just and equitable to make the order". As the High Court said in *Stanford v Stanford* at [36] (footnote omitted):

> 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.

27 The expression "just and equitable" and the word "appropriate" are particularly elusive "qualitative" concepts. As McHugh J said in *Perre v Apand* [1999] HCA 36; (1999) 198 CLR 180 at 211-212, and in his dissent in *Mann & Carnell* [1999] HCA 66; (1999) 201 CLR 1 at [130] (footnotes omitted):

> While the training and background of judges may lead them to agree as to what is fair or just in many cases, there are just as many cases where using such concepts as the criteria for duty would mean that "each judge would have a distinct tribunal in his own breast, the decisions of which would be as irregular and uncertain and various as the minds and tempers of mankind". Lord Devlin was surely right when he said:
>
> "For a judge to decide fairly and convincingly every case that comes before him in the light only of his own sense of justice, he would have to be a superman. I doubt if there have ever been more than a handful of men on the Bench who could do it, though doubtless there are slightly more who think that they could."

……

33 I am bound by the law as it has now been explained by the Full Court. If I correctly apprehend the pronouncements, it is open to a trial judge, in addressing the s 79(2) question, to consider matters that may be seen as arising under s 79(4), but consideration of those matters is by no means conclusive in determining whether the "just and equitable" test has been meet. This is, in essence, what the Chief Justice said in her judgment in *Chapman & Chapman*, which was cited by the Full Court

without demur in *Scott & Danton*. This also accords with the view Finn J had earlier expressed in *Bevan & Bevan* where her Honour said:

> 169 Findings of fact concerning the parties' financial history (ie their contributions) and their present circumstances and future prospects made in the context of s 79(4) will also assist, but such findings cannot (according to *Stanford*) be conclusive in determining whether or not it is just and equitable to make an order altering any particular property interest.

34 Murphy J expressed a similar view when he said, sitting as a single judge in *Watson& Ling* [2013] FamCA 57; (2013) FLC 93-527, that the factors in s 79(4) "can inform" the decision to be reached under s 79(2).

35 All of these pronouncements, which authorise judges to consider any matters arising under s 79(4) that they consider relevant in answering the s 79(2) question, are consistent with a long line of authority in the High Court warning against any attempt to fetter the exercise of discretion. For example, Gaudron J said in *FAI General Insurance Co Ltd v Southern Cross Exploration NL* [1988] HCA 13; (1988) 165 CLR 268 at 290, "[w]here a power or discretion is conferred upon a court it is inappropriate that such power or discretion be treated as subject to limitations not contained in the grant of that power or discretion". To like effect, see *Australasian Memory Pty Limited v Brien* (2000) 200 CLR 270 at 279 and *Owners of "Shin Kobe Maru" v Empire Shipping Co Inc* (1994) 181 CLR 404 at 421.

36 It follows that the final sentence of [42] in *Stanford v Stanford* cannot be read as saying that matters arising under s 79(4) can only be considered **after** a court has concluded it is just and equitable to make a property settlement order. The sentence does not in terms say, nor as a matter of necessary inference mean, that matters arising under s 79(4) must be excluded from the myriad of factors that could potentially be taken into account in addressing the s 79(2) issue. The sentence appears to do no more than state the uncontroversial proposition that once it has been determined it is just and equitable to make an order, the content of that order must be determined by reference to s 79(4).

37 It is legitimate, in my view, to ask whether their Honours in the High Court in *Stanford v Stanford* ever anticipated that all of their statements would be pored over and interpreted, as if they were tea leaves, in order to identify the matters that could properly be taken into account in cases of an entirely different complexion.

38 One such statement (ie in *Stanford*) was the following, which has been the subject of much conjecture:

> 51 Section 79(4)(a)-(c) required that the contributions which the wife made to the marriage should be taken into account in "considering what order (if any) should be made" under s 79. It may readily be assumed that the length of the parties' marriage directly affected the extent of the contributions the wife had made. But, as already noted, the inquiries required by s 79(4) are

separate from the "just and equitable" question presented by s 79(2). The two inquiries are not to be merged...

39 I concede that this paragraph is open to more than one reading. However, one available interpretation is that the High Court simply took as a given that the wife had made "contributions" during the 37 year marriage, since the contrary had never been argued. The point their Honours were making is that the mere fact such contributions had been made (absent any assertion that the wife had acquired an equitable interest in the property) did not automatically lead to an adjustment of the existing title. Other matters also needed to be taken into account in determining the s 79(2) issue. Chief among these, as the High Court found at [47], was "the effect upon the husband of making an order ... **that would require the husband to sell the matrimonial home, in which he was continuing to live**" and the failure by the trial magistrate to consider "whether a maintenance order would sufficiently meet the wife's needs". On this reading, the conclusion in *Stanford v Stanford* that it was not just and equitable to make any order was reached after what the High Court described at [36] as an "examination of a range of potentially competing considerations", which included what their Honours clearly accepted were the wife's contributions over 37 years.

40 The fact there was only truncated reference in the High Court's judgment to the contribution factors, and to s 75(2), does not mean they were not taken into account. ….

41 It is in the light of this background that **I would respectfully disagree with the view expressed by Strickland and Murphy JJ at [27] in *Chapman & Chapman* that the High Court in *Stanford v Stanford* "eschewed" reference to matters under s 79(4) in deciding that no order should be made adjusting existing property interests**. On my reading of [51], their Honours in the High Court expressly acknowledged those matters. I also **respectfully disagree with Strickland and Murphy JJ that it is "inconceivable" the High Court would not have gone on to make an order adjusting property interests if they had taken into account the matters in s 79(4).** That conjecture seems to me, with respect, to proceed on an assumption that consideration of the s 79(4) matters would be decisive, whereas the High Court can be seen as saying that whilst they are matters that could be taken into account, they are not conclusive.

42 The fact the "two inquiries" under s 79(2) and s 79(4) are "separate" and "not to be merged" also does not mean, as a matter of logic, that matters arising under s 79(4) can be ignored when deciding whether it is just and equitable to make any order adjusting existing interests. The provisions of s 79(4) encompass what Finn J in *Bevan & Bevan* described as "the parties' financial history (ie their contributions) and their present circumstances and future prospects" – and her Honour went on to hold that findings of fact about those matters will assist in determining whether it is just and equitable to make any order. Similarly, as the Chief Justice pointed out in *Chapman & Chapman* at [5], "the matters referred to in subparagraphs (a) to (c) of s 79(4) in particular, would be likely to

embrace much of the factual substratum on which any exercise of discretion would be based". See also, to like effect, the view expressed by Murphy J in *Watson & Ling* to which I have earlier referred.

43 While I accept that a finding that it is just and equitable to make an order will always be required, in most cases the court will not need to discuss the s 79(2) issue, because the cases will be conducted on the basis of acceptance by the parties that it is just and equitable to make some form of adjustment. In those cases, matters arising under s 79(4) will require discussion only when determining the way the adjustment is to be effected. However, in cases such as the present where the s 79(2) point is taken, **were it not for *Chapman & Chapman*, I would have maintained the view that s 79(4) mandates taking into account any relevant matters arising under that subsection, provided it is understood that they will not be in any way determinative**.

44 This approach, in my view, reflects the legislative prescription that "in considering what order (**if any**) should be made ... in property settlement proceedings, the court **shall** take into account [the matters mentioned in s 79(4)]" (emphasis added). I respectfully agree with Walters J in *Dekker & Dekker* at [128] that the words "if any" in s 79(4) can encompass those cases where a full consideration of that provision will "lead to the court reaching a conclusion ... that the ownership of the parties' property should lie where it has fallen". However, I am not convinced those words should be seen as confined to such cases, nor why, as Walters J suggested at [139], it is "almost inevitable" that a judge who gives consideration to issues arising under s 79(4) in answering the s 79(2) question "will get lost in the luxuriant undergrowth which is certain to sprout from that fertile ground". On the contrary, I anticipate that judges will be able to negotiate the pathway successfully when the principles are being applied to those cases where the issue actually arises. For example, it would be bold to suggest that the Full Court became "lost" in *Bevan & Bevan* (2014) FLC 93-572 in having some regard to matters arising under s 79(4), before determining it would not be just and equitable to make any order adjusting existing property interests.

…

50 I accept, however, that my reasoning is inconsistent with the decision reached by the Full Court in *Chapman & Chapman* and I repeat that I am bound by that decision.

The exercise of the discretion in the present matter

51 Whether I am obliged to take into account the matters in s 79(4) (which *Chapman* says I am not), or whether I am merely at liberty to do so (which *Chapman* says I am), in the exercise of the discretion conferred on me, I have determined that it would not be just and equitable to make any order altering property interests in the present matter.

52 In arriving at my decision, I have taken into account the following matters:

- the husband's insistence (and the wife's agreement) throughout the relationship that the parties' financial affairs should be kept entirely separate, with the intention that each would continue to hold their property separately, in circumstances where each party was mature, intelligent, and not in any way overborne by the other;
- the fact that the assets were indeed kept entirely separate and the great bulk of them now exist in precisely the same form in which they were held at the commencement of the relationship (save for the fact that the wife now has an encumbrance over her property for which she is solely responsible);
- the absence of any evidence to suggest the husband refrained from accumulating other assets (assuming he had the capacity to do so), or otherwise changed his position, as a result of having the benefit of using the wife's home during their relationship and having assumed they would live out their days together;
- the fact that neither party made any provision for the other to receive an interest in their property in the event of their death (save for the minor issue of the car, which lends support to the conclusion that the parties otherwise intended that the other would never obtain an interest in their assets);
- the extent of the work done by the husband around the wife's property was not such as to lead to a conclusion that it would be just and equitable to adjust existing property interests, especially given that the husband (and, for part of the time, his son) lived in the property free of rent; and
- the ages and state of health of both parties, and the fact that although the wife has property of somewhat greater value than the husband's, each party nevertheless has a significant asset which could be realised to meet needs that cannot be met from current income (noting that, at present, both are able to meet their necessary expenditure from their own income).

53 Having thus concluded it would not be just and equitable to alter the existing interests in property, I propose to dismiss the husband's application.

4.10 Perhaps anticipating that there may be an appeal from his decision, his Honour then went on to express in the alternative, an assessment of contributions. This was no doubt to assist the parties in case there was a successful appeal, in an effort to avoid a remittal of the case for a re-trial. Such finding as to contribution may have enabled the Full Court to re-exercise the discretion of the Court.

4.11 However, having determined that it was not just and equitable to make any order and to dismiss the husband's application, would not this alternative finding be obiter? Could it in fact ever be used by the Full Court unless by consent of the parties?

4.12 In *Dawkins & Reece* [2015] FamCA 28 Watts J stated at [99] what his task was in the following terms –

"99 In this matter my task is to:

99.1. Identify according to ordinary common law and equitable principles and then value the property, assets, financial resources and liabilities of the parties;

99.2. Determine whether it is just and equitable to make an order altering those interests and if so;

99.2.1. Identify relevant contributions and assess them;

99.2.2 Consider relevant matters referred to in Section 90SM(4)(d) – (g) of the Act;

99.3. Determine what order adjusting the property, assets and liabilities of the parties is just and equitable.

At [135 – 139] his Honour said –

135 The parties have separated and their partnership has ended. After the separation, there was no longer a continuing commitment to the mutual use of assets and a shared responsibility for liabilities. As the balance sheet set out above demonstrates, the assets and liabilities remaining with each party are $2,810,880.92 (73.5 per cent) held by the wife and $1,015,479.34 (26.5 per cent) held by the husband.

136 Both parties seek an adjustive order pursuant to s 90SM of the Act.

137 The wife seeks a splitting order so that an amount of $305,113 is returned to her from the husband's superannuation interests. If that order is made then the parties would hold assets as to 81.4 per cent to the wife ($2,810,881 + $305,113/$3,826,360) and the husband would receive 18.6 per cent of the assets.

138 The husband's application that he receive 45 per cent of the overall pool of assets would require an order to be made that the wife pay to the husband an amount of $706,383 ($1,015,479 + $706,383 = $1,721,862 (45 per cent)).

139 Although invited to do so, neither party made a submission in this case that no adjustive order be made and accordingly I find that in all the circumstances it is appropriate to consider making an order altering the property of the parties, which is just and equitable.

4.13 After a detailed analysis of the parties' contributions and looking at the assets they each held, his Honour decided to make no further adjustment. Finally in para 247 his Honour simply said: "Standing back, I consider an adjustment of assets and liabilities in that manner to be one that is just and equitable between the parties."

4.14 The point to be made is that the approach had all the hallmarks of a conventional assessment under the *de facto* provisions sec 90SM and 90SF(3) {equivalent to married couple cases sec 79(4) and 75(2)} which showed an alignment between the holdings of the parties and the assessment of entitlement. In that case the

asset pool of $3,826,000 was held as to 73.5% by the wife and 26.5% by the husband. No adjustment was made.

SUNDRY MATTERS THAT MAY BE OF INTEREST

5.1 The issue of "add-backs" has been refined/confined to a sec 75(2)(o) consideration, as the property no longer exists and consequently it is artificial to make orders taking its value into account.

However, unless a judge adds it to pool in a notional way as part of the exercise of deciding what order may be "just and equitable", how can a court ever have a real chance to assess the weight to be given to the fact that either or both of the parties have appropriated some of the assets to his or her sole use?

5.2 There have been numerous *de facto* cases where there was a dispute whether a de facto relationship existed either at all, or at a certain point in time, so as to enable the court to determine the jurisdictional fact that the relationship had broken down after 1 March 2009, being the "start date" for the operation of amendments giving the courts exercising jurisdiction under the Family Law Act power to make orders adjusting the property interests of de facto couples.

5.3 The problem arises in *de facto* cases because of the definition of such a relationship in sec 4AA(1) –

> (1) A person is in a ***de facto relationship*** with another person if:
>
> (a) the persons are not legally married to each other; and
>
> (b) the persons are not related by family (see subsection (6)); and
>
> (c) having regard to all the circumstances of their relationship, they **have a relationship as a couple living together on a <u>genuine domestic basis</u>**.

5.4 There is anecdotal evidence that many couples, whether married or de facto, prefer to "live apart together", ie LAT couples. This may suit the lifestyles of individuals, and it may be that each had a house, and did not wish to sell it once the relationship commenced. There may also be taxation ramifications as there could then be a problem if the ATO decided a house was not a "principal place of residence" for CGT purposes.

5.5 The de facto cases have required the court to examine the quality of the relationship to determine if they had the hallmarks of "coupledome" to fit the "living together on a genuine domestic basis" criterion. This determination is NOT an exercise of discretion. A finding of a jurisdictional fact is vital before the court has jurisdiction to go further and look at contributions etc.

5.6 It should be appreciated that married couples have no "jurisdictional fact threshold" and apparently are free to live apart in their own respective homes if they so choose.

This phenomenon is likely to be more frequent in the future, as people have career obligations which require them to live where their work is.

5.7 Are there going to be more appeals in the future? In an adventurous judgment by a Canberra FCC Judge, in *Hoffman & Hoffman*, the Judge held that he was not bound by Full Court and even High Court guidelines as they were obiter dicta. His Honour held that he had a wide discretion under sec 79, and was not going recognize a "special contribution" adjustment.

At [18 and 19] the Full Court said of the trial judgment –

> 18 An exegesis on "special contributions" is given in the reasons which underpins those statements and within which his Honour asserts that:
>
> - The decision of the High Court in *Mallet v Mallet* (1984) 156 CLR 605 "need not and should not be followed" (at [57]);
> - Such a course is permissible because the decision is "infected by gender bias" and its constituent judges were "...born between 1917 and 1933", and "[t]he zeitgeist of the era when they grew up, and the zeitgeist in 1984 when *Mallet* was decided, was vastly different to the zeitgeist today" (at [46]);
> - The decision of this Court in *In the Marriage of Ferraro* (1993) FLC 92-335 should not be followed;
> - He was free to form his own view as the concept of "special contributions".
>
> 19 Such significant criticism as might, properly, be directed to broad statements such as those being made by a judicial officer in an inferior court is not central to the disposition of this appeal.
>
> 20 Although not expressed in these terms, the thrust of his Honour's reasons is plainly to the effect that nothing said by the High Court, or this Court, about "special contributions", or expressions to similar effect, amounts to a legal principle or "binding rule of law" the failure to observe which constitutes an error of law. The husband asserts centrally (albeit not, precisely, in terms) that there is such a binding rule of law and his Honour erred in not having applied it.

"Special Contributions": A Binding Principle of Law?

> 21 To the extent that his Honour's judgment is to the effect that there is no binding rule of law relating to "special contributions", his Honour is, in our view, correct.

5.8 See however the short discussion at the end of this paper of ignoring considered **obiter** by superior courts, and the High Court judgment in *Farah Constructions (infra).*

Kennon is still a good head of argument

5.9 In *Friar & Friar* [2014] FamCA 689 Murphy J said at [131 -134]

> 131 As ***Kennon*** (and other authorities) make clear, an assessment of contributions that takes account of family violence is not a de facto form of awarding damages or otherwise giving monetary compensation to the victim. Rather, its relevance is in the extent to which the conduct has made the contributions made by the victim more arduous.

Axiomatically, as it seems to me, the seriousness of the violent conduct and its manifest physical and mental consequences must, in turn, have an impact on the degree of arduousness added to the victim's contributions and all the more so, where, as here, the contributions and conduct have occurred in the course of a very lengthy relationship.

132 It should not be thought that the relevant impact on contributions is confined to contributions as an income earner or in the role of homemaker. There can be, and there is here, a direct impact on the nature and extent of contributions as a parent – contributions which, in this case, were made primarily, as I find, by the wife. A hospital report dated 16 December 1998 records a telephone conversation with the parties' child, Mr N Friar, in the absence of the mother. The note records Mr N Friar indicating that he was "...upset [with] the home situation, stating that the [domestic violence] has had a significant effect on him & his siblings..."

133 I have no difficulty in finding, first that there was family violence as defined in the Act,[42] and secondly that there was a "course of violent conduct" by the husband in this case. I find that the wife's contributions as the primary homemaker, the primary parent and her direct financial contributions as a wage earner were all made very significantly more arduous as a result of that family violence.

134 Just as that finding does not sound in these proceedings as damages or compensation, I consider I need to guard against my repugnance at the heinous conduct perpetrated by the husband (which I openly record in these reasons) sounding in a distortion of my assessment of contributions seen as a whole.

5.10 When one reminds oneself that sec 79(1) uses the phrase "the court may make such order as it considers appropriate", quite clearly if the evidence supports a claim that a party was a victim of domestic violence, it must surely be "*appropriate*" to take that history of violence into account. Whether the evidence assists the Court in quantifying a figure for a "just and equitable" outcome, is another matter. Ultimately, in the transition from the qualitative evaluation to the quantitative determination, "*there will inevitably be a 'leap' from words to figures. That is the nature of the exercise of discretion*" as Justice Coleman put it so elegantly in *Steinbrenner & Steinbrenner* [2008] FamCAFC 193.

5.11 Whether the helpful words in Kennon are considered by a first instance judicial officer to be mere "*dicta*" or "*obiter*" they are considered words of guidance to lower courts. Perhaps it is time also to pay heed to what the High Court said in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 at [133] -

133 *Resultant confusion.* The second reason why the Court of Appeal's treatment of this subject was a grave error is the **confusion it is causing**. Either the Court of Appeal is to be treated as abandoning the notice test for the first limb of *Barnes v Addy*, or it is to be treated rather as recognising a new avenue of recovery, which exists alongside the first limb. ….. In doing so, it **(ie the Court of Appeal**) was flying in the face not only of the received view of the first limb of *Barnes v Addy*, but also

of statements by members of this Court in *Consul Development Pty Ltd v DPC Estates Pty Ltd*[88]. It is true that **those statements were dicta** in the sense that the case was decided on the second limb of *Barnes v Addy*. But, contrary to the Court of Appeal's perception, the statements did not bear only "indirectly" on the matter: they **were seriously considered.** And, also contrary to the Court of Appeal's perception, they were not uttered only by two members of the Court, that is Stephen J, with whom Barwick CJ concurred[89]. Gibbs J took the same view[90], **so that it was shared by the entire majority**. ….. Leaving aside any technical question about whether the **doctrine of stare decisis strictly applied**, **abandonment of the rule** that the plaintiff must prove notice on the part of the defendant **is not an appropriate step for an intermediate court of appeal to take in relation to so long-established an equitable rule** - ….. If, on the other hand, the Court of Appeal is to be treated not as abandoning the notice test for the first limb of *Barnes v Addy*, but rather as recognising a new and additional avenue of relief, it is an avenue which tends to render the first limb otiose. **That too is not a step which an intermediate court of appeal should take in the face of long-established authority and seriously considered dicta of a majority of this Court.**

5.11 There is very little reference to this High Court judgment in the Family Law jurisdiction. In the few instances where it is mentioned, it is in the context of notice being given. Seemingly this strong correction by the High Court has not been cited in cases under the FLA where strident minimization of the importance of *obiter* from the Full Court or the High Court, has been articulated.

Hidden Danger Crouching Injustice?

One cannot escape the overall impression that provided a judge gives reasons for each conclusion, and provided there is no "conflation" of the tasks, there will be less and less willingness to interfere at the appellate level. As findings under 79(4) are subject to findings under 79(2), any negative conclusions under the latter would make it extremely difficult to establish error. Are we likely to see a slide into an era of new subjectivity which might not be capable of correction on appeal?

Dated 6 March 2015

George Brzostowski SC