FAMILY LAW ACT 1975

IN THE FULL COURT
OF THE FAMILY COURT OF AUSTRALIA
AT SYDNEY

Appeal No EA26 of 2003
File No SY2186 of 2001

BETWEEN:

SPAGNARDI

Appellant Husband

- and -

SPAGNARDI

Respondent Wife

REASONS FOR JUDGMENT

CORAM: **KAY, MAY & CARTER JJ**
DATE OF HEARING: **9 July 2003**
DATE OF JUDGMENT: **8 September 2003**

APPEARANCES:

Mr Lloyd of Counsel, instructed by Holt & Allen, Solicitors, 18 Montgomery Street, Kogarah, NSW 2217, appeared on behalf of the Appellant Husband.

Ms Mundey of Counsel, instructed by Raymond Lee & Co, Solicitors, Level 2, 683-689 George Street, Sydney NSW 2000, appeared on behalf of the Respondent Wife.

SPAGNARDI & SPAGNARDI
EA 26 of 2003
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PROPERTY SETTLEMENT – discretion – errors in assessment of contributions and size of pool - errors in s75(2) adjustments.

The parties married in 1967 and separated 2000. There was evidence of some domestic violence during the marriage on the part of H. After separation, H had undertaken renovation work to the former matrimonial home. W was diagnosed with breast cancer at about mid-September 2002.

Chisholm J found net assets to the value of $1,166,560, with $244,580 being represented by superannuation interests. W's superannuation interest was included at $90,850 (its value at the date of hearing) in spite of the fact that within a few months from that date it would be worth $163,060. H's superannuation interest was included at $153,730.

Additionally, W stood to inherit at least $117,000 from her 90-year-old father.

Chisholm J characterised the marriage as one of significant length, with substantial contributions on each side to be regarded equally. He then focused on allegations of domestic violence, and post-separation contributions.

His Honour concluded that they each merited an adjustment but that they balanced each other out.

In considering s 75(2) factors, Chisholm J identified as pertinent: the parties' age and state of health, the parties' income, property, financial resources, and physical and mental capacity for appropriate gainful employment, W's inheritance, and W's new relationship.

The trial Judge's assessment was that if not for W's diagnosis of cancer in September 2002, it would have been appropriate to make an adjustment in favour of H.

Ultimately, Chisholm J made no adjustment and divided the property pool equally between the parties.

H appealed, asserting that:

- His Honour erred in determining the pool of assets by including the superannuation entitlements of W at only $90,850.

- the evidence of violence was insufficient to require some adjustment.

- his "substantial post-separation contribution" merited an adjustment in his favour.

- the medical evidence was that W should have an excellent prognosis, and should be able to return to her normal activities and her previous job.

- His Honour erred in failing to making any adjustment under s 75(2) for W's inheritance, her greater superannuation entitlements (still to accrue) and H's age and future earning capacity.

Held in allowing the appeal and re-exercising discretion:

- It was quite artificial to rely on the figure given for W's superannuation interest at the time of trial given the short period of time between then and April 2003 coupled with the enormous increase in value in that period. Consequently, W's superannuation should have notionally been included in the pool in the amount of $163,060.

- The domestic violence evidence could not properly have led to an adjustment pursuant to s 79. There was the complete absence of evidence as to how H's conduct affected her ability to contribute.

- Similarly H failed to provide evidence of the effect of his post-separation renovations upon the value of the former matrimonial home.

- Despite his Honour's errors equality of contribution to the enlarged pool remained the proper assessment.

- W's illness was a factor of considerable importance, however W's inheritance coupled with H's limited future earning capacity required a small adjustment of 2.5% in favour.

- *On re-exercising discretion:* The finding of equal contribution by both parties during the marriage stood. However, a small adjustment of 2.5% to reflect s 75(2) factors, and particularly H's future earning capacity and W's inheritance, was made.

Appeal allowed.
The sum H required to pay to achieve the assessed distribution adjusted in line with the judgment.
Costs certificates granted.
Not Reportable.

1. By an amended Notice of Appeal filed 4 April 2003 the appellant husband appeals against orders made by Chisholm J on 27 February 2003 whereby his Honour ordered inter alia that the wife transfer to the husband her right, title and interest in the former matrimonial home, and the husband pay the wife $487,030. The orders were premised on an equal division of the property pool by his Honour, which was consistent with the orders sought by the wife in her amended application filed 27 July 2001.

2. The husband proposed at trial that the net assets be divided 70 percent to the husband and 30 percent to the wife. The orders sought in his amended Notice of Appeal are consistent with his original proposal. The only substantive difference between the orders made by Chisholm J and those sought by the Appellant is that the amount of money to be paid by the husband to the wife be reduced by $220,184.66.

3. The trial took place over two days in August 2002, with written submissions received by mid-September. The wife was diagnosed with breast cancer at about this time. Further medical evidence was forthcoming and further submissions completed by mid-November 2002. In January 2003, the learned trial Judge was asked to defer the delivery of judgment to allow the wife to consider her position with respect to superannuation and the amendments brought about by the *Family Law Legislation Amendment (Superannuation) Act* 2001 effective 28 December 2002. The wife ultimately did not seek leave to re-open the evidence and the learned trial Judge made orders on 27 February 2003.

HISTORY

4. The parties married in May 1967 and separated finally in August 2000. They have two adult children. The learned trial Judge found net assets to the value of $1,166,560, with $244,580 being represented by superannuation

interests. Appeal grounds one and two are referable to his Honour's finding as to the value of the wife's superannuation entitlement.

5. His Honour initially characterised the marriage as one of significant length, with substantial contributions on each side to be regarded equally. There were four specific issues of contribution then assessed individually by Chisholm J,

- initial contributions,
- the husband's contribution to property,
- allegations of domestic violence, and
- post-separation contributions.

6. After completing this exercise, his Honour reached the following conclusion (at paragraph 57):

> "I have referred to the relevant matters raised in the evidence and submissions. Overall, as mentioned, in my view this is a long marriage in which, on the face of it, the contributions were about equal. Reviewing the specific matters raised on each side, in my view the most significant factor favouring the husband is his extensive work on renovations and repairs. The most significant factor favouring the wife is that her contributions were made significantly more arduous by the husband's violence. In my view these matters approximately balance out, leaving an equal assessment of contributions as the appropriate finding."

7. His Honour's findings with respect to the relevance of the husband's violence and the assessment of the wife's contributions and his post-separation contributions are both subject to appeal (grounds 6, 7 and 5 respectively).

8. The following factors were identified as pertinent to the assessment promoted by section 75(2):

- Parties' age and state of health;
- Parties' income, property, financial resources and physical and mental capacity for appropriate gainful employment;
- The wife's inheritance;
- The wife's relationship with Mr Taccoli.

9. The learned trial Judge was of the view that if not for the wife's diagnosis of cancer in September 2002, it would have been appropriate to have made an adjustment in favour of the husband (at paragraph 65):

> "However in my view the wife's illness is a factor of considerable importance. While on the one hand the evidence shows she has a good chance of recovery, of course the consequences of further setbacks would be very serious for her indeed. The wife's submissions resist the husband's argument that there should be an adjustment in his favour under s 75(2), but do not expressly seek an adjustment in her favour. Having regard to all the relevant matters, and in particular her illness, I have concluded that there should be no adjustment under s 75(2), and thus the net assets (including superannuation) should be divided equally."

10. The appellant submits that the findings encapsulated in the above paragraph are inconsistent with the evidence, and further, that his Honour failed to give any reason as to why the wife's health resulted in a reluctance to make any adjustment in favour of the husband despite his other findings in respect to the wife's inheritance, greater superannuation entitlements and the husband's age and future earning capacity (grounds 3, 8 and 9).

11. Put simply, the grounds of appeal can be characterised under the headings:

- The Wife's Superannuation Entitlement;
- The Relevance of Domestic Violence to the Assessment of Contribution;
- Post-Separation Contributions (Legal Expenses as a Notional Asset);
- The Balance of Section 75(2) Factors.

12. Section 79 grants to the trial Judge a very wide discretion which was described by Gibbs J in *De Winter and De Winter* (1979) FLC 90-605 at 78,092 as "extraordinarily wide". In *Mallet and Mallet* (1984) 156 CLR 605, (1984) FLC 91-507, Gibbs CJ said, at CLR 608 and FLC 79,110-1:

> "The Act does not indicate the relative weight that should be given to different circumstances, or how a conflict between opposing considerations should be resolved – those things are left to the Court's discretion which must, of course, be exercised judicially."

13. Given the width of the discretion, the limited nature of the appeal process must be recognised, as the numerous authorities in relation to the appellate review of the discretionary orders demonstrate: See, for example, *House v The King* (1936) 55 CLR 499; *Lovell v Lovell* (1950) 81 CLR 513; *Gronow v Gronow* (1979) FLC 90-716; (1979-1980) 144 CLR 513. In the absence of an error in approach or principle, the failure to take into account relevant circumstances, or the taking into account of irrelevant circumstances, the challenge must be that the orders fell outside a reasonable exercise of discretion, that is, that the orders were "unreasonable or plainly unjust".

14. In its widest formulation Brennan J described the discretion and its immunity from challenge in *Norbis v Norbis* (supra) at 75,178; CLR 540. His Honour said as follows:

"...Unless the primary judge reveals an error in his reasoning, the Full Court can intervene only if the order made is not just and equitable. How does the Full Court arrive at that conclusion? In Bellenden (formerly Satterthwaite) v Satterthwaite (1948) 1 All E.R. 343 at p. 345 Asquith L.J. stated the rationale of an appellate court's approach:

> *'...It is, of course, not enough for the wife to establish that this court might, or would, have made a different order. We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere.'*

The 'generous ambit within which reasonable disagreement is possible' is wide indeed when there are a number of factors to be taken into account and the comparative weight to be attributed to those factors is not clearly indicated by uniform standards and values of the community. The generous ambit of reasonable disagreement marks the area of immunity from appellate interference."

The Wife's Superannuation Entitlement

15. Paragraph 31 of the judgment contains the discussion about the superannuation entitlements of each party:

"Superannuation interests are significant. The husband has accumulated superannuation benefits of $153,730. The wife currently has accumulated superannuation benefits of $90,850. As pointed out in the husband's submissions, Mr Humphreys' unchallenged evidence is that in April 2003 she will have accumulated benefits of $163,067 and at 70 years of age will have $499,547 in accumulated entitlements. I take into account, however, that the funds will not be immediately available to her, and that Mr Humphreys' calculations were based on the assumptions that the wife was in good health and that she would remain at work till age 70. These assumptions must of course now be greatly qualified in the light of the evidence that she has cancer."

16. His Honour clearly treated the superannuation as an asset rather than as a resource, giving the superannuation "the value established at trial" (paragraph 8).

17. The relevant appeal ground provides:

> "That His Honour erred in determining the pool of assets by including the superannuation entitlements of the wife at $90,850 rather than $194,544."

18. The figure of $90,850 appears in the Husband's Outline of Case document as referable to the wife's superannuation entitlement "at present" (At AB 41). Counsel for the appellant husband submits that the correct figure was contained within exhibit "H3" in the trial proceedings. That document, along with exhibit "H2" was misplaced from the court record and a replacement copy was sought from the State Super SAS Trustee Corporation prior to the hearing of this appeal. That document was tendered by Counsel for the appellant, without objection from Ms Mundey for the respondent wife. The exhibit in question is a letter from the State Super SAS Trustee Corporation dated 8 July 2002 proffered in response to a subpoena dated 26 June 2002. The letter advises that whilst the gross benefit payable to the wife if she was to resign as at 8 July 2002 would be $90,038.84, upon her reaching the age of 58 (24 April 2003) the gross benefit payable would be approximately $163,060.86.

19. A second document was handed up with the "lost" exhibit, and is a letter from the SAS Trustee Corporation dated 8 July 2003. It is stated in that letter that if Ms Spagnardi was to permanently retire from the work force as at 8 July 2003, she would have received $167,093.13. Neither Counsel urged this Court to use the July 2003 figure.

20. The learned trial Judge noted that it was the "unchallenged" evidence of Mr Humphrey that in April 2003 the wife would have an accumulated benefit of $163,067 and at 70 years of age would have $499,547 in accumulated

entitlements. While Mr Humphrey may well have given that evidence, the valuation of approximately $163,060 was supported by information received from the SAS Trustee Corporation and tended to the Court (exhibit "H3"). In the circumstances, the assessment applicable to April 2003 was the more appropriate value to be attributed to the wife's superannuation interests at the time of judgment. It was quite artificial to rely on the July 2002 figure given the short period of time between then and April 2003 coupled with the enormous increase in value in that period.

21. It is well-established that if the exercise of the discretion of the trial Judge is based upon conclusions of fact which can be shown to be erroneous, then, providing the factual error is something that may have influenced the outcome of the proceedings, prima facie the exercise of the trial Judge's discretion has miscarried. This is irrespective of the fact that the actual result reached by the trial Judge may have seemed within the ambit of what could be considered a proper exercise of discretion. As was said by Gibbs J in *De Winter and De Winter* (1979) FLC ¶90-605 at p 78,091:

> "It is apparent from this statement [an extract from House v The King (1936) 55 CLR 499 at pp 504-505] and is clear law, that a discretionary judgment which is based on a mistake of fact will not be upheld merely because the result reached in itself does not appear unreasonable or unjust. In Storie v Storie (1945) 80 CLR 597 both Latham CJ, at p 600, and Rich J, at p 604, cited from the judgment of Viscount Simon L.C. in Blunt v Blunt (1943) AC 517, at p 526 :
>
> > *'If it can be shown that the court acted under a misapprehension of fact in that it either gave weight to irrelevant or unproved matters or omitted to take into account matters that are relevant, there would, in my opinion, be ground for an appeal. In such a case the exercise of discretion might be impeached, because the court's discretion will have been exercised on wrong or inadequate materials ... '"*

22. It is appropriate that the wife's superannuation should be included in the pool in the amount of $163,060. The value of the total pool is then $1,238,770.80.

The Relevance of Domestic Violence to the Assessment of Contribution

23. The third specific area of contribution discussed by the learned trial Judge concerned the wife's allegation of significant domestic violence perpetrated by the husband, and the manner in which that violence affected her contributions during the period of the marriage.

24. At trial, Counsel for the wife submitted that there was evidence that the wife had been subjected to domestic violence during the course of the marriage which had caused her to approach authorities and on one occasion seek and obtain an apprehended violence order against the appellant. As reiterated by the learned trial Judge, there was evidence by the wife that on three occasions she left the home because of the violence perpetrated against her.

25. The husband admitted to some incidents of violence. Counsel for the wife at trial urged the Court to consider that the wife's contributions to the marriage were more onerous as a consequence of the violence. Counsel relied upon the Full Court decision in *Kennon v. Kennon* (1997) FLC 92-757 in making this submission.

26. There was no suggestion that the trial Judge did not correctly summarise the evidence in its entirety in relation to this topic. His Honour noted that while he was cautious in accepting the wife's evidence of domestic violence in its totality, the evidence clearly revealed that there had been some violent behaviour by the husband towards the wife and more recently, towards her new partner. There were eight incidents of violence particularised by the wife (commencing at paragraph 43):

> ". ...The wife's account of alleged domestic violence commences in the early 1970s, when the parties lived in

their first house at Seven Hills. She says that on one occasion she ran away one night and stayed with a friend taking the first child, Andrew, with her. She said she was frightened of the husband when he became angry, and that at times he would threaten to kill her. She says that on one occasion the police arrived and calmed the husband down. These matters are denied by the husband.

44. Next, in paragraph 31 the wife refers to an incident in which she was cleaning a bath. He [sic] says that the husband pushed her into it, injuring her shoulder and threatened to kill her. Although in the oral evidence the wife refers to a knife, I agree with the submission by the husband to the effect that she never said that the husband used a knife to threaten her.

45. The wife also refers, in paragraph 31, to an incident in which she says that she left home after an episode of violence and went to stay at Bexley. She says that he then asked her to come home, promising he would never hit her again. She says that she was concerned about the boys and returned home.

46. The husband denied the incident. His submission points out that the wife said that she had been to see a doctor but called no evidence from the doctor. Nor did she call evidence from the friends to whom he had gone, although one of them was said to be still alive and living in the same home at Bexley.

47. The next incident was in 1992. The wife's oral evidence was to the effect that she went out to a cosmetic party with friends and returned about 11.30 pm. The husband was upset, and hit her on her head with his left hand, and she was cut by his wedding ring. The next day she had it attended to by a doctor friend (it required a plastic device, but not stiches). Afterwards she went to stay with the child Andrew for three weeks and sought apprehended violence orders against the husband. Again, she said that the husband promised not to do it again, and she returned home. The husband conceded that this event occurred.

48. Next, the wife refers to an incident in March 1999 after which she says the parties began to sleep in separate rooms and after which she began to feel that the marriage was over. There is some suggestion in the wife's evidence that there

was a sexual assault on that occasion, but this is denied. The wife's evidence was not detailed or impressive. [our underlining]

49. Next, there was an incident on 10 January 2000. The husband admits slapping the wife on this occasion. Her evidence involved much more: she said that he locked the doors and windows of the home and assaulted her by kicking her, causing bruising and bleeding to her face and the side of the head, and the right side of her body. She says she reported that matter to the police two days later but did not press charges. The submission of the husband points out that despite the seriousness of the injuries described by the wife, she called no medical evidence, and gave no evidence that she had been to see a doctor. Nor did she rush to the nearest police station.

50. The husband admits that on 26 April, after an argument, he lost his temper and hit the wife on the side of the head. He says the police were not called on that occasion.

51. Finally, the wife gave evidence of an alleged assault by the husband on herself and her friend Mr Taccoli in August 2000 at Chatswood Chase. The husband admitted assaulting Mr Taccoli but denied assaulting the wife. Mr Taccoli has given evidence about the assault."

27. The learned trial Judge made the following finding with respect to credit (at paragraph 7):

"In general, this is not a matter in which I generally accept one party's evidence over the other's. While I have in general more reservations about the wife's evidence that that of the husband, I have made findings on the basis of evidence about particular issues."

28. In relation to his Honour's view of the evidence he stated (at paragraph 53):

"In my view, there is considerable substance in the husband's submissions and I am cautious in accepting the wife's evidence in totality relating to domestic violence. On the other hand, the evidence clearly shows that there has been some violent behaviour

> by the husband directed to the wife and also directed to Mr Taccoli. I also accept that the violence was such as to lead the wife to leave home on some occasions and seek refuge elsewhere."

29. While it is true to say that his Honour found that the evidence of violence was sufficient to require some adjustment in the assessment of contributions, he did not consider that it justified a "major adjustment" (para 55). Paragraph 54 of the judgment provides:

> "It is true that there is no explicit evidence by the wife to the effect that the violence made her performance of her contributions more arduous. However I accept that on the evidence before me it is obvious that her contributions as a homemaker and parent must have been made significantly more arduous than they ought to have been because of the violence inflicted upon her by the husband. On the other hand, the lack of specific and detailed evidence about its effect on those contributions makes it inappropriate to make a substantial adjustment in her favour because of this factor."

30. The description of the adjustment is important because his Honour compares this aspect with the husband's contribution to renovations, which he describes at paragraphs 38 to 39:

> "38. At each of the homes in turn considerable renovation/improvement work was carried out by the husband. It is described in great detail in his affidavit and this evidence was largely unchallenged. I accept it. The wife assisted, however, by way of making curtains, bedspreads, cushions, etc. and by her care of the children and carrying out of domestic chores while the husband was engaged in the work. I take into account that at the time of some of these contributions, the children were close to their majority and did not require the level of attention needed by babies and young children.
>
> 39. These were substantial contributions by the husband, and I take them into account. However in this long marriage involving many contributions of many kinds, it would be wrong to give them excessive weight."

31. His Honour's findings with respect to domestic violence are the subject of appeal grounds six and seven:

> "That his Honour's findings at paragraph 55 that the evidence of violence was sufficient to require some adjustment was against the weight of evidence.
>
> That His Honour failed to provide reasons for his findings at paragraph 54."

32. Mr Lloyd also sought leave to rely upon a further ground of appeal:

> "That His Honour erred in determining that the evidence presented by the Respondent/wife as to alleged assaults was admissible."

33. His Honour dealt with the issue of admissibility, allowing the relevant evidence, in his ruling on 29 August 2002 (A copy of which was annexed to Counsel for the Appellant's written submissions). Counsel for the appellant submitted that:

> "...before evidence of that kind [as to alleged assaults] is admitted material of a kind referred to in the judgment of Kennon should also be provided that is to say its effect, so as to enable a Trail [sic] Judge to determine the nature and extent of any additional contribution which came about as a consequence of that conduct. No such evidence was available to the Trial judge, and the inference that he drew was unavailable to him, and was in any event unsafe given it required a quantitative determination capable of identification by an Appellant [sic] Court."

34. It was submitted by Counsel for the appellant that his Honour also failed to identify the "adjustment" contemplated at paragraph 54 of the judgment (per written submissions):

> "...the learned Trial judge acknowledged that the husband had in effect made a significant contribution in carrying out the extensive work he did to renovations and repairs. His Honour in effect 'neutralised' that contribution by indicating that the contributions made by the wife were otherwise made more arduous. Should there be no evidence to support the proposition that the wife's

> contributions were made more arduous (which there was not), the Appellant/husband submits that there would naturally be an adjustment in favour of the husband as a consequence of the recognition of his greater contribution as identified by His Honour in relation to the renovations and repairs etc."

35. Before this Court, counsel for the wife failed to effectively refute the suggestion that his Honour was without "effect" evidence. Submissions were limited to the assertion that his Honour was entitled to find that the wife's contribution as a homemaker and parent was more arduous than they ought to have been due to the violence, and to conclude that there was sufficient evidence to make a "Kennon" adjustment.

36. Ms Mundey does make reference in her written submissions to some limited "effect" evidence, in that the wife gave evidence that she was afraid of the husband when he was angry (wife's affidavit paragraph 20 – AB 1 page 83):

- "- [In relation to the alleged incident of sexual violence in March 1999] ..the wife's evidence was that she was "really badly affected" and the next day rang a friend and told her what happened....

- In cross-examination the wife said the husband said the words 'I will kill you' very often, that sometimes she was very frightened when he said this and that most of the time when he said it she was afraid (AB 2, p. 71, 1-12);

- In cross-examination the wife agreed, in respect of the occasion after she had been pushed into the bath while cleaning it, that she did not go to a doctor and she did not call the police but had spoken to a friend about it and went on to say: 'When you have this domestic violence it's very humiliating and you really don't want... and you really don't want to go to anywhere and anybody, just a few friends' " (AB 2, pp.75, 76 l. 45-40);

37. While it may be difficult in some cases to determine at the outset whether a claim under section 79 related to domestic violence is likely to be successful, generally a determination should be made at the outset on the evidence filed by the party relying on it. This is the approach taken correctly by the trial Judge.

38. As the Full Court said in *Kennon* at 84, 291:

> "...The question raised in this case was whether and if so to what extent domestic violence was relevant in the exercise of the discretion under s 79 of the Family Law Act. If it is relevant, that should be clearly acknowledged. If it is not, then a disservice is done by attempting to apply the section to circumstances which are not within its ambit. Change is then a matter for the legislature."

39. We also agree with the statement on page 84,292:

> "...The correct position may be that such matters are relevant within s 79 not because they are based in conduct, rather despite that and because they are otherwise part of the legitimate s 79 exercise."

40. There is no doubt that domestic violence may be a relevant factor in assessing contribution. The difficulty as presented in this case and many others is that inadequate evidence makes a proper assessment by the trial Judge either very difficult or impossible. This difficulty was referred to by the trial Judge in his ruling about this topic on 29 August 2002 (at paragraph 18).

41. The key passage in *Kennon* is contained at page 84,294:

> "Put shortly, our view is that where there is a course of violent conduct by one party towards the other during the marriage <u>which is demonstrated</u> to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79. We prefer this approach to the concept of 'negative contributions' which is sometimes referred to in this discussion." *[our underlining]*

42. The question is whether a trial judge may infer from the evidence that the result must be that a party's contributions have been affected. In essence that was the submission of counsel for the wife which was accepted by the trial Judge, both as the reasons for the ruling about the evidence and in the judgment.

43. At paragraph 54 of the judgment his Honour said:

> "It is true that there is no explicit evidence by the wife to the effect that the violence made her performance of her contributions more arduous. However I accept that on the evidence before me it is obvious that her contributions as a homemaker and parent must have been made significantly more arduous than they ought to have been because of the violence inflicted upon her by the husband. On the other hand, the lack of specific and detailed evidence about its effect on those contributions makes it inappropriate to make a substantial adjustment in her favour because of this factor."

44. Reference should be made to page 84,295 of *Kennon* where their Honours said:

> "To be relevant, it would be necessary to show that the conduct occurred during the course of the marriage and had a discernible impact upon the contributions of the other party. It is not directed to conduct which does not have that effect and of necessity it does not encompass (as in Ferguson) conduct related to the breakdown of the marriage (basically because it would not have had a sufficient duration for this impact to be relevant to contributions)."

45. We agree with his Honour the trial Judge's summary of the law as contained in his ruling. In particular his reference to *Kennon* (paragraph 13 and paragraph 18):

> "13. If one looks at that passage, it seems to me that the key words are that the violence is demonstrated to have 'a significant adverse impact' on the parties' contributions, or made them 'significantly' more arduous.
>
> ...
>
> 18. It seems to me that that question of interpretation of the judgment in Kennon is of great importance in resolving this matter. As has been apparent, I have found it a difficult one. It seems to me that the question of whether the evidence in this case is admissible or not, is one of some difficulty. It is partly one of difficulty because the wife's material, although it refers to some specific acts of violence, does not expressly refer to the impact of the violence on

> her contributions. It cannot, however, be the law that the failure to state such matters expressly is necessarily fatal to such evidence; there must be cases where it is obvious or a very likely inference from the facts, that certain kinds of violence must have adversely affected a person's contributions. The question in the present case is whether the material on behalf of the wife can be said to fall within that category."

46. In addition to that stated by the trial Judge we would not want the reference in *Kennon* to "exceptional" on page 84,294 to be understood to mean rare. We do not agree with this qualitative description and would be more inclined to the view expressed by the trial Judge at paragraph 17:

> "In his submissions, Mr Schonell, quite understandably and quite correctly, drew my attention to the strength of the language, referring to 'exceptional cases' and 'the relatively narrow band of cases'. However, it seems to me that, reading these passages as a whole, the references to 'exceptional cases' and 'narrow band of cases' occurs in the context of the principle of misconduct in general rather than the more narrow formulation about domestic violence. My reading of these passages, therefore, is that it is not necessarily correct that only cases of exceptional violence or a narrow band of domestic violence cases fall within the principles. It seems to me that reading these passages carefully, the key words in a case where there are allegations of domestic violence are 'significant adverse impact' and 'discernable impact'. That reading of the passage is, I think, given some additional force by the actual decision in the *Doherty* case and the judgments of Baker J in both *Doherty* and *Kennon*.

47. An insufficiency of evidence in the present case leaves the Court with a limited ability to deal with allegations in the context of section 79 proceedings. As *Kennon* has established, it is necessary to provide evidence to establish:

- The incidence of domestic violence;
- The effect of domestic violence; and
- Evidence to enable the court to quantify the effect of that violence upon the parties capacity to "contribute" as defined by section 79(4).

48. We do not agree that the evidence in this case could properly have led to an adjustment pursuant to section 79. There was no suggestion by counsel of the wife that his Honour did not correctly summarise the evidence in relation to this topic. The particular deficiency apart from those referred to by the trial Judge is the complete absence of evidence as to how the husband's conduct affected her ability to contribute.

49. Counsel for the appellant husband submitted that in the event of such a finding, there should "naturally" be an adjustment in favour of the husband as a consequence of the "recognition of his greater contribution as identified by His Honour in relation to the renovations and repairs".

50. An absence of quantification was also apparent in the appellant's case. While the husband went to great lengths to identify each of the tasks undertaken by him in connection with renovations and improvements to the matrimonial property, he failed to provide evidence of the direct effect of his endeavours upon the value of that property.

51. In our view, it can be properly said that at the end of this long marriage, the wife through her contributions in paid employment and the household, and the husband through his employment and his interest in renovation and property improvement, should be assessed as having contributed equally.

Post-Separation Contributions

52. Ground five of those relied upon by the appellant provides that his Honour erred in making no adjustment for the "substantial post-separation contribution of the husband as found at paragraph 56". That paragraph provides:

> "In the period post-separation the husband made contributions by paying the rates and mortgage instalments. He paid nearly $10,000 towards repairs of one of the North Ryde properties, and put nearly $20,000 into superannuation. It is submitted for him that the wife

did not match these contributions. While in a sense this is true, the husband had the advantage of living in the home."

53. The post-separation period extended for approximately 2 years and 7 months. The wife finally left the former matrimonial home in early August 2000, and judgment in this matter was handed down on 27 February 2003.

54. Counsel for the appellant submits that his Honour failed to provide an explanation or reason as to how the contributions made by the husband during the post-separation period equated to the benefit he may have enjoyed in remaining at the former matrimonial home, sufficient to disregard the husband's contribution.

55. Counsel for the respondent wife properly pointed out that the matrimonial home was unencumbered during the post separation period, and consequently he was not liable for mortgage repayments. Ms Mundey also submits that the "$10,000 towards repairs of one of the North Ryde properties" was in reality shared between the husband and his fellow tenant-in-common, Mr Yap, requiring a payment of $4,800 each.

56. The learned trial Judge accepted the wife's submission that the husband's paid legal expenses of $14,000 should be added as a notional asset, even though the funds paid came from his post separation income. The appellant argues that whilst this option was open to his Honour, consideration should have been given to the source of the payment, and the lack of any contribution to that notional asset by the wife.

57. Counsel for the respondent wife submitted that the approach of the learned trial Judge simply provided warranted recognition of the husband's advantage in living in the former matrimonial home during the post-separation period to the wife's exclusion. She submitted that the husband was spared the expense of alternative accommodation, unlike the wife, and she therefore could

be considered to have "contributed" to the husband's post-separation capacity to accumulate savings.

58. In the circumstances of this case, the inclusion of $14,000 in the pool was an error, as clearly those moneys were accumulated post-separation and the husband has not otherwise been given extra credit. The pool should be reduced by that figure.

The Balance of Section 75(2) Factors

59. The following grounds of appeal are relied upon:

> "That His Honour erred in failing to take into account that the medical evidence was:-
>
> - That the wife had early stage breast cancer.
> - That the wife was to have a course of treatment for six weeks.
> - That the wife should have an excellent prognosis.
> - That the wife should be able to return to her normal activities and her previous job.
> - That His Honour erred in failing to making any adjustment under s.75(2) for the wife's inheritance, greater superannuation entitlements and the husband's age and future earning capacity.
> - That the findings made by His Honour at paragraph 65 were not consistent with the evidence. His Honour failed to give any reasons as to why the wife's health meant there should be no adjustment in favour of the husband."

60. The learned trial Judge's consideration of section 75(2) factors commenced with a discussion of the parties' age and health. The husband is identified as 64 years of age and in reasonable health, the wife's health drew considerably more focus from his Honour (at paragraph 60):

> "The relevant matters are these. There is a family history of breast cancer. The illness was discovered in routine screening, and is described as 'early stage' breast cancer. The wife is otherwise in good health. She had surgery on 18 September. She recovered well. It was likely that she would require radiation treatment and, depending on how far it has spread, possibly chemotherapy or hormonal therapy. The doctor says based on the size of the tumour she should have an excellent prognosis. After the treatment is over, she should be able to return to her normal activities and her previous job; although if she needs chemotherapy this would certainly affect her quality of life, probably for the next 6 to 12 months, and could have an impact on her future performance, although in general patients tolerate this treatment very well in the long term. A recurrence would severely affect her quality of life, but is 'unlikely'."

61. Professor Philip Crowe at page 2 of his first report stated that future medical treatment in respect of the wife's condition would depend upon the results of the analysis of the tissue that had been removed that day (19th September, 2002) and that it was most likely that the wife would require radiation treatment to the breast, and depending upon the characteristics of the tumour and whether it has spread to lymph nodes she may in those circumstances require chemotherapy or hormonal therapy.

62. The subsequent reports refer to the spread of the tumour to the wife's lymph glands. Counsel for the appellant submits that whilst this was the case *"at no time was it suggested in subsequent reports that her prognosis was anything other than excellent"*. While again, this may be case, reporting of this nature is highly selective and in the circumstances the submission is without weight. The doctor states in his first report that future medical treatment would depend upon the results of the analysis of the tissue that was removed on 19 September 2002. It is noted that if she was to require chemotherapy it would affect her quality of life for "probably the next 6 – 12 months". As a result of the discovery that the cancer was more extensive, Dr Crowe advised in his second report that further surgery was planned for mid-October 2002. In his final report which followed that surgery, he said:

> "She will require post-operative radiotherapy which will last 6 weeks but not begin for several months. She will be recommended to have chemotherapy as the tumour has spread to her lymph glands..."

63. Counsel for the appellant submitted that on the balance of probabilities it should have been anticipated that the treatment will be successful and that the wife will return to her full-time employment. While Dr Crowe did refer to an excellent prognosis in his first report, that finding was conditioned upon positive physical testing which did not eventuate (at AB 138):

> "4. Future medical treatment will depend on the results of the analysis of the tissue that has been removed today. It is most likely that she will require radiation treatment to the breast and depending on the characteristics of the tumour and whether it has spread to lymph nodes she may require chemotherapy or hormonal therapy.
>
> 5. Prognosis also depends on the characteristics of the tumour but based on the size of the tumour she should have an excellent prognosis.
>
> 6. Once she has completed the appropriate treatment for this tumour she should be able to return to her normal activities and her previous job. However if she requires chemotherapy as part of this treatment this may have an impact on her future performance but in general patients tolerate this treatment in the long term, very well.
>
> 7. Clearly if she developed a recurrence of her disease this would severely affect her quality of life but as I have indicated above this is unlikely. Again if she requires chemotherapy this will certainly affect her quality of life, probably for the next 6-12 months."

64. We are not of the view that the evidence of Dr Crowe was as simplistic as described by the appellant in the context of appeal ground three. The learned trial Judge was correct in identifying the wife's illness as a factor of considerable importance. Whether her health balanced those section 75(2) factors favouring the husband, is another question entirely.

65. His Honour was of the view that if not for the wife's cancer, he would had made an adjustment in favour of the husband. In the husband's favour, Chisholm J accepted the submission that he had a limited working life with an expectation of retirement in 2003. He accepted that the wife would receive an inheritance from her 90-year-old father's estate of at least $117,000, but noted that the husband had and would make no contribution to this financial resource. The learned trial Judge also made reference to the financial benefit of the wife derived from cohabiting with Sergio Taccoli. "Apart from her illness", the wife was identified as having a capacity for full-time employment of approximately $696 weekly. The parties' respective superannuation entitlements are not referred to in his Honour's discussion of section 75(2) factors. While neither party sought leave to re-open the evidence to enable the Court to make a splitting order, his Honour did treat the superannuation interests as property by saying:

> "In considering what orders should be made under s 79, I will of course keep in mind the special nature of the superannuation interests, in particular that they would not normally be available until retirement age."

66. While the wife's superannuation interest should have been valued at $163,060, the husband was assessed as holding an accumulated superannuation benefit of $153,730. Given his intention to retire sometime this year, one would anticipate that this benefit will vest in the near future. While ground eight of those relied upon by the appellant claims that his Honour failed to make any adjustment for the wife's inheritance, greater superannuation entitlements and the husband's age and future earning capacity, the party's superannuation entitlements really discharge each other.

67. While the wife's future health is difficult to predict, and impossible to financially quantify, we are of the view that her inheritance coupled with the husband's limited future earning capacity does require a small adjustment in

favour of the husband. In the circumstances, his Honour's failure to make such an adjustment represents a miscarriage of his discretion.

Re-Exercise of Discretion

68. In our opinion, there is sufficient material to enable us to exercise our own discretion in substitution for that of the trial Judge. No submissions were made on behalf of either party opposing this course, in the event that the appeal was allowed.

69. This Court would not disturb the finding of equal contribution by both parties during the marriage. We are not of the view that an adjustment should be made for post-separation contributions, or to counteract the notional treatment of the husband's legal expenses. For the reasons referred to in paragraphs 60 to 67, a small adjustment of 2.5% to reflect section 75(2) factors, and particularly the husband's future earning capacity and the wife's inheritance, should be made.

70. When the appropriate figure for the wife's superannuation interest is substituted for that originally accepted, and $14,000 is deducted, the net asset pool increases to $1,224,770.80, $168,460.86 of which the wife presently holds. In order to receive 47.5% of the pool the wife requires $581,766.13, or a further $413,305.27.

71. We note that on 8 May 2003, his Honour Justice Rose ordered the husband pay or cause to be paid to the wife the sum of $94,347 on or before 5:00pm on 5 June 2003. There was no suggestion that the husband failed to pay this amount. In due course the calculation of any interest due and payable on the judgment debt should reflect this payment.

COSTS

72. At the conclusion of the hearing of the appeal both the husband and wife sought that if the appeal were allowed on a matter of law, they each receive a costs certificate pursuant to the provisions of the *Federal Proceedings (Costs) Act* 1981. In our opinion, it is appropriate that each be granted the appropriate certificate.

ORDERS

73. The orders of the Court will be:

1. The appeal be allowed.

2. Order 1made 27 February 2003 be varied by replacing the words "these orders" with the words "the orders made by the Full Court on appeal".

3. Order 2 made 27 February 2003 be varied by deleting "$487,030" and inserting in lieu thereof

   "$413,305 less any sum paid on account pursuant to the orders of Justice Rose made 8 May 2003. Interest shall fall due at the prescribed rate on so much of the said sum as remains outstanding as at the date of transfer of the former matrimonial home to the husband in accordance with Order 1".

4. The Court grants to the appellant a costs certificate pursuant to the provisions of section 9 of the *Federal Proceedings (Costs) Act* 1981 being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the appellant in respect of the costs incurred by the appellant in relation to the appeal.

5. The Court grants to the respondent a costs certificate pursuant to the provisions of section 6 of the *Federal Proceedings (Costs) Act* 1981 being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the respondent in respect of the costs incurred by the respondent in relation to the appeal.