"BUT IT'S MINE" - A REVIEW OF RECENT DECISIONS ON CONTRIBUTIONS

ANDREW BARBAYANNIS AND LAURA JOHNSTON
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The assessment of contributions is a fundamental aspect of every property matter. Very few practitioners would be immune from dealing with clients' remarks of "but it's mine" and the like. What continues to resonate from judgments, old and new, is the need to consider financial and non-financial contributions in their totality.

This paper reviews four recent Full Court decisions on different aspects of contributions, with a view to providing practical tips for practitioners:

1. *Maine & Maine* [2016] FamCAFC 270;
2. *Grier & Malphas* [2016] FamCAFC 84;
3. *Chancellor & McCoy* [2016] FamCAFC 256; and
4. *Mena & Mena and Anor* [2016] FamCAFC 85.

Post-separation contributions: *Maine & Maine* [2016] FamCAFC 270

This recent Full Court decision delivered in December 2016 is a reminder of the need to undertake a proper assessment of post-separation contributions, which the Full Court described as an "*extremely relevant consideration*" in the context of the case.[1]

Facts

The parties commenced cohabitation in 1980 and separated in 2004, with a divorce order made in September 2014.

In 2008 the parties reached an informal oral agreement for the former matrimonial home to be transferred from joint names to the wife's name. The parties acted upon that agreement

[1] At [38].

and transferred the property to the wife, but did not effect a formal property settlement by Court order or financial agreement. There was a dispute between the parties as to whether they had agreed for the wife to pay the husband $80,000 in exchange for the transfer of the property.

The husband commenced section 79 proceedings in 2014, 10 years after the parties separated, with the trial being heard 11 years after the parties' separation.

At the time of the trial the parties' net assets were valued at approximately $660,000, including the former matrimonial home valued at $750,000 and an investment property valued at $330,000, with both properties subject to a combined mortgage of $607,000.

At the time of separation, the former matrimonial home was valued at $490,000, subject to a mortgage of $267,000. The wife continued to live in the property post-separation, and the mortgage repayments were met solely by her. The wife solely purchased the investment property well after separation (in 2009) and was financially responsible for all expenses in relation to the property.

Decision at first instance[2]

Judge Vasta of the Brisbane registry of the Federal Circuit Court of Australia made property orders dividing the parties' net assets 65% to the wife and 35% to the husband. This was based on contributions alone, with no further adjustment pursuant to section 75(2).

The Full Court noted that the parties, and subsequently his Honour, had at trial been pre-occupied with the informal agreement.[3] His Honour found that the wife had repudiated the agreement by not paying the husband $80,000, and that as a result the proper course was to decide whether there should be a property adjustment pursuant to section 79.[4] It was from there that his Honour went on to assess the parties' contributions, ultimately dividing the net assets 65% to the wife and 35% to the husband.

[2] *Maine & Maine* [2015] FCCA 1753.
[3] Full Court reasons at [11].
[4] Decision at first instance at [42].

Full Court decision (per Ryan, Murphy and Kent JJ)

The wife successfully appealed.

While not the focus here, the Full Court found that there was no evidentiary foundation for finding that the informal agreement was intended to be a final agreement and that the wife had repudiated the agreement by not paying the husband $80,000. The Full Court noted that his Honour's approach to informal agreements was erroneous and that the proper approach is well settled, as per *Woodland and Todd* (2005) FLC 93-217. The Full Court confirmed that the proper approach was to first determine whether it was just and equitable to make any property order, and if so to consider what order should be made by reference to section 79(4).[5] One of the grounds of appeal, which the Full Court found had merit, was that his Honour had not properly considered the just and equitable requirement and that there had been a conflation of the section 79(2) and 79(4) considerations. While his Honour had noted that he must be satisfied that it was just and equitable to make orders, there was a failure to make any finding in that regard.

A separate ground of appeal challenged his Honour's findings in relation to contributions, including a failure to provide adequate reasons for the assessment of post-separation contributions. On appeal, counsel for the husband conceded that the wife had made the "*overwhelming bulk of the contributions*" during the 11 year post-separation period.[6] The Full Court found that in assessing contributions, his Honour was obliged to consider the parties' contributions over "*the entire relationship between the parties whether arising out of contributions before, during or after the formal tie of marriage*".[7] The Full Court at paragraph 18 quoted from *Woodland and Todd* (2005) FLC 93-217 in the context of informal agreements, including that "*…it would generally be necessary for the court to acquaint itself with changes in the composition and value of the property pool, so that post-separation contributions can be assessed*".

[5] Full Court reasons at [21].
[6] Full Court reasons at [35].
[7] At [21], quoting from *Kowalski and Kowalski* (1993) FLC 92-342.

In finding merit in this aspect of the ground of appeal, the Full Court concluded at paragraph 38 that:

> "*The parties' respective contributions during the 11-year period between separation and trial were an extremely relevant consideration. That 11-year period represents about a third of the entire 35 years to which the trial judge's assessment of contributions should have been directed. The omission by his Honour of any assessment of the parties' respective contributions during that time constitutes a failure to consider a highly relevant consideration. A consequent inadequacy in his Honour's reasons is in our view also manifested*".

It was ultimately necessary for the matter to be remitted for re-hearing, in part due to the need to properly assess the parties' post-separation contributions.

Assessment of post-separation contributions

While the facts of this case may be seen as rare given the 11 year period between separation and trial, post-separation contributions are an increasingly important consideration in the context of the common delay between separation and trial. The post-separation period may at times be close to or greater than the period of the actual relationship. While this case acts as a reminder of the necessity to properly assess post-separation contributions, there was little consideration of how that assessment is to be undertaken.

From a practical perspective, practitioners should ensure that there is sufficient and detailed evidence before the Court of the parties' post-separation contributions. Where the period between separation and trial is lengthy, evidence should be given of the composition of the asset pool as at separation compared with trial. This evidence was before the trial judge in this case, being evidence of the equity in the formal matrimonial home as at separation and as at trial. If in dispute, retrospective valuations may be required. Parties will need to substantiate their post-separation contributions by bank statements and the like, if those contributions are disputed.

Finally, it is well settled that in assessing post-separation contributions greater weight should not be placed on contributions of a financial nature.[8] In *Trask & Westlake* [2015] FamCAFC 160 there was a four year period between separation and trial, during which time the husband made substantial financial contributions. On appeal, the husband in effect argued that the Court "*should have given greater weight to the husband's post-separation contributions and less to the wife's different contributions*" in her role as parent and homemaker.[9] In rejecting this argument, the Full Court confirmed that the wife's less tangible contributions that "*are not susceptible to a dollar calculation, does not render them less important*".[10]

"Skill sets": Grier & Malphas [2016] FamCAFC 84

The Full Court again considers the notion of special skills that were creatively dressed up as the Husband's "*skill set"* by his Counsel in an attempt to obtain an adjustment in his favour.

Facts

The parties cohabited for a period of nine years and had one child who lived with the wife and spent time with the husband. Neither the husband nor the wife had any significant assets at the commencement of the relationship. Over the course of the relationship the husband established, developed and ultimately sold his interest in a company "he" created during the course of the relationship for an initial sum of $9.75 million, with potential future performance based payments.

Decision at first instance[11]

At trial, the husband successfully argued that the Court should make an adjustment in his favour on contributions as a result of the "*skill set"* he brought into the marriage. The gravamen of the husband's case was that were it not for his "*skill set"* the parties would not have been able to acquire the significant wealth that was available for distribution between them.

[8] See, for example, the Full Court assessment of post-separation contributions in *Fields & Smith* [2015] FamCAFC 57 at [169] to [193].
[9] At [16].
[10] At [15].
[11] *Malphas and Grier* [2013] FamCA 324.

Remarkably, the husband sought an adjustment of 75/25 in his favour on contributions, however, he made the concession that the wife had greater future needs as a result of the child living with her.

The wife's position was that the parties' contributions were equal and that an adjustment should be made in her favour as a result of her greater future needs.

The trial Judge found that the parties' assets should be divided equally between them.

In arriving at this conclusion, her Honour made a ten percent adjustment in favour of the husband as a result of his greater contributions. Although it could be implied that the adjustment arose as a result of the husband's *"skill set"* as her Honour did not reject this concept, she instead gave greater weight to the contributions of the husband:

> *98. The reality is that the net pool of property was derived almost entirely from the fruits of the [Company D] business venture. It seems to me, and I find, that the totality of the wife's contributions cannot match this significant contribution on the part of the husband. I find that the contributions of the parties should be assessed at 60% to the husband and 40% to the wife.*

In comparing the parties' future needs, her Honour made an adjustment of ten percent in the wife's favour, which is what gave rise to the equal division of their property between them, overall. Her Honour's finding in relation to the 75(2) adjustment was not subject to appeal.

<u>Full Court decision (Bryant CJ, Murphy and Kent JJ)</u>

The wife successfully appealed on two grounds. This paper will focus on the successful appeal with respect to the trial Judge's adjustment in favour of the husband as a result of his "*skill set",* however, the Full Court's judgment also provides a helpful summary with respect to the topical and ever-evolving issue of "add backs".

The notion of special skills has been considered by the Full Court in the past and although early cases such as *Ferraro v Ferraro*[12] contemplated the doctrine of "special contributions" or "special skills" in (predominately) "big money" cases, the ensuing few decades have acknowledged that there is no legislative basis for a Court to embark upon the subjective assessment of the quality of a party's contribution. The notion of "special skills" or "special contributions" had its brief moment, but has now been categorically dismissed by the Court. The husband's counsel was clearly aware that he was not going to get any mileage out of pursuing an argument focused on "special skills" and he indicated at the conclusion of the trial that he made no "special skills" submission. Instead, the husband's counsel focused on the husband's contribution being the "skill set" he brought into the relationship.

The Judge at first instance may have been attracted to the subtle differentiation between "special skills" and having a "skill set", although her Honour did not specifically refer to or dismiss the proposition of a "skill set" in her Reasons for Judgment and focused on the fact that the totality of the wife's contributions could not match those of the husband's.

Murphy and Kent JJ summarised the error of the Judge at first instance and the importance of considering contributions holistically:

> *135. What skill or skills a person brings to a relationship which are said to result in the making of money or accumulation of capital is no more or less relevant than the skill set a person brings to a relationship as a homemaker and parent, or as the performer of two roles as a homemaker and parent and income earner. The "skill set" or "potential" of "talent" a party brings to the role or roles which the parties have determined each will undertake in the relationship is, for s 79's purposes, relevant only to how those attributes manifest themselves in what s 79 says must be considered.*
>
> *136. It is not a party's "skill set" which must be considered, but their contributions. Contributions are the product of many things: talent, industry, selflessness and, indeed, luck, to name a few. It is the contributions (in all senses in which that expression is used*

[12] *Ferraro v Ferraro* [1992] FamCA 64

> *in s 79) that fall for consideration and assessment, not the combination of factors that has created the capacity for the making of those contributions.*

Although the above concepts seem relatively straightforward, the reality in our profession is that we are often required to deal with clients who place a greater value on financial contributions in comparison to non-financial contributions such as those of a homemaker and parent. The same clients often also ignore the benefit of tax effective structures that are established to distribute wealth to their spouse through their respective trusts, which, can save the parties hundreds of thousands of dollars every financial year. This concept was also referred to by the Full Court at paragraph 106 of their reasons for judgment:

> *106. But in addition to the greater weight her Honour seemed to place on the financial contributions, I am satisfied there are matters to which her Honour did not apparently give any weight. The first of these was the wife's acceptance of joint liabilities incurred by the husband, particularly to the ATO in relation to the sale of Company D to BB Ltd. Tax effective structures, in this case in the form of a trust, were used to distribute payments from the Company D sale with the effect that both the husband and the wife incurred significant tax liabilities to the ATO as I have previously described. Despite sharing in, and being responsible for, these significant liabilities, her Honour did not give the wife any credit for her involvement, nor for her acceptance of the liability. Indeed, her Honour was somewhat critical of the wife for not agreeing to sell the Suburb DD property so that her tax liability could be paid.*

In summary, the Full Court has now very clearly confirmed that there is nothing within Section 79 that enables a contribution, be it financial or otherwise, to be elevated above another. In some cases one party's contributions may be assessed as being greater than those of the other, although such cases typically involve initial contributions or gifts or inheritances received during the relationship.

The interplay between contributions and the just and equitable requirement: *Chancellor & McCoy* [2016] FamCAFC 256

This very recent Full Court decision focuses on the "just and equitable" requirement in property matters. While it is not a contributions case, it is yet another reminder from the Full Court of the need to consider whether a property division is just and equitable independently from other considerations, including contributions. The case highlights the important interplay between these considerations.

Facts

The appellant and the respondent were in a same-sex de facto relationship for 27 years. There was no dispute as to the existence of the lengthy relationship, and the only question for determination was the division of the parties' property, if any.

At the time of the trial the net value of the respondent's assets was approximately $1.7 million, which equated to 70% of the total net assets. The net value of the appellant's assets was approximately $720,000, equating to 30% of the total net assets.

The appellant sought a division of property. The respondent's position was that it was not just and equitable to order a division of property.

The distinctive feature of the case was that despite the length of the relationship, the parties had kept their financial affairs almost entirely separate:

- The parties commenced their relationship in 1982, and shortly thereafter the respondent purchased a property in her sole name. The parties commenced cohabitation in that property in 1983, and subsequently renovated the property at the respondent's expense but with the appellant assisting with the labour. The property was subsequently sold, and the respondent purchased a new property in her sole name with the sale proceeds.
- The appellant purchased a property in 2002 in her sole name. Again, the parties undertook renovations on the property this time funded by the appellant with the respondent assisting with labour.

- During the lengthy relationship, there was no intermingling of finances, and the parties did not have a joint bank account. The parties were each free to use their income as they chose without explanation to the other, and there was little exchange between the parties of the detail of financial their financial affairs.
- The appellant paid the respondent $100 to $120 per fortnight, and there was a dispute as to whether this was a mortgage repayment or rent.
- The respondent made greater contributions to her superannuation during the relationship, and the difference in the parties' superannuation entitlements largely accounted for the respondent having a greater net wealth at the time of the trial.
- The parties equally contributed to household costs.

Decision at first instance[13]

In early 2016, Judge Turner of the Brisbane registry of the Federal Circuit Court of Australia dismissed the appellant's application for a division of property on the basis that a division of property was not just and equitable as is required by section 90SM(3). Her Honour relied upon the High Court decision of *Stanford v Stanford* (2012) 247 CLR 108 ("***Stanford***"), together with the Full Court decision of *Bevan & Bevan* (2013) FLC 93-545 ("***Bevan***").[14]

Her Honour considered the just and equitable question under a heading entitled "*A separate but very careful deliberation of this matter*". Her Honour had adopted that wording from the Full Court in *Bevan*, where Bryant CJ and Thackray J said that:

> "*…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 [i.e. in determining whether it is just and equitable to make an order]…*
>
> *…*
>
> *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*

[13] *Chancellor & McCoy* [2016] FCCA 53.

> *not be realised in many cases because of what the plurality [in Stanford] 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*".[15]

In concluding that it was not just and equitable to make any order altering property interests, her Honour considered ten factors including *inter alia* the nature of the parties, the acquisition of property and the parties' direct and indirect financial contributions.[16] Her Honour's ultimate conclusion is set out at paragraph 59, and from that paragraph it is clear that the parties' lack of financial intermingling during their 27 year relationship was a key factor in her Honour's decision that it was not just and equitable to make any property orders.

Following the High Court in *Stanford*, her Honour warned against the assumption that property orders will automatically flow from the existence of a marriage or de facto relationship. Her Honour noted that cases such as these are "*in the minority*", but that "*being in the minority does not mean that it [the just and equitable requirement] is to be glossed over lightly*".[17]

<u>Full Court decision (per Bryant CJ, Thackray and Strickland JJ)</u>

The appellant appealed unsuccessfully. While not all of the grounds of appeal will be considered here, one aspect of the appeal was the interplay between the just and equitable requirement and the assessment of contributions.

The first ground of appeal was that the trial judge had erred in applying a different standard than to other de facto couples. One aspect of this ground was that her Honour had erred in finding that there was a lack of evidence on the part of the appellant. Her Honour had found that there was a lack of evidence from the appellant as to her alleged contributions to the

[15] *Bevan* at [84] and [85].
[16] Decision at first instance, [48] to [57].
[17] Decision at first instance, [66] to [67].

respondent's properties and a lack of evidence that those contributions had increased the value of the property. This finding was based on the appellant not providing receipts or bank statements for the work she said she had undertaken.

On appeal, the appellant complained that it was not unusual for a party in a committed relationship not to keep receipts and it was "completely unlikely" for there to be evidence as to how the contributions increased the value of the properties. For example, the appellant claimed that she had undertaken domestic chores to enable the respondent to work on the properties and it was an error to expect there to be evidence of how that work improved the value of the properties.

While the Full Court did "*not dispute the premise of [the appellant's] propositions"*, they were not satisfied that there was any error as her Honour had done no more than to "*point out the paucity of the evidence*" in the context of exploring the just and equitable requirement.[18] The Full Court was satisfied that her Honour had taken into account the parties' contributions notwithstanding the comment about the lack of evidence. The Full Court concluded at paragraph 42 that:

> "*In adopting the approach that she did, her Honour proceeded in accordance with what the Full Court said in both Bevan and Chapman, namely that it is open to a trial judge to take into account the matters stated in s 79(4) (or s 90SM) of…the Act when determining whether it is "just and equitable" to adjust existing property interests. However, consistent with Stanford, her Honour also recognised that it was not open to her to decide that issue merely by reference to those matters*".

A separate ground of appeal was that the trial judge had filed to give adequate consideration to the matters set out in section 90SM(4)(b) to (e), including non-financial contributions and contributions to the welfare of the family. One aspect of this complaint was again that her Honour had erred in relying upon the lack of evidence of any increase in value of the property

[18] Full Court decision at [40].

as a result of the appellant's contributions. In finding that this ground lacked merit, the Full Court concluded at paragraph 59 that:

> "*…Although we accept that contributions that do not improve the value of property may be taken into account in adjustment of property interests, we are not persuaded that it is an appealable error to place little or no weight on such contributions in determining whether it is just and equitable to make any order at all. This must be especially so in a case such as the present where each party made contributions to property owned by the other*".

Interplay between the "just and equitable requirement" and contributions

This is yet another reminder from the Full Court of the need for a "*separate but very careful deliberation"* of the just and equitable requirement. The trial judge's ultimate conclusion was largely based upon a consideration of matters which traditionally would have been considered purely from a contributions perspective in the context of a long relationship: the lack of financial intermingling, the acquisition of separate property and the parties' application of income. It is clear that practitioners need to consider these matters from a contributions perspective, but also from the separate just and equitable perspective. This is a challenging interplay in practice. In the words of the Full Court in *Bevan*, while the two issues "*must not be conflated, they are intertwined…*".[19]

In practice, how do you take into account contributions and other factors in the just and equitable consideration while avoiding the conflation that the High Court has warned against? In *Bevan*, the Full Court considered this interplay by reference to a paper of Martin Bartfeld QC entitled "Stanford and Stanford – Lots of Questions – Very Few Answers".[20] The Full Court quoted from the paper as follows:

> *"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*

[19] *Bevan* at [87].
[20] *Bevan* at [88].

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."

The consideration of contributions from a "discretionary" and "evaluative" perspective is a useful tool in practice, to avoid conflation. While the trial judge in *Chancellor & McCoy* once again noted that "*these cases are in the minority*",[21] repeating what the High Court said in *Stanford*, some may be surprised by the decision in the context of an undisputed 27 year relationship. Practitioners should avoid assuming that the just and equitable requirement will be met, and instead must undertake a "*separate but very careful deliberation*".

Loan from parents: *Mena & Mena and Anor* [2016] FamCAFC 85

This Full Court decision examines the treatment of two loans from the husband's mother from a contributions perspective, and the legitimacy of taking into account a moral obligation to repay the loans.

[21] At [66] of the decision at first instance.

Facts

The parties commenced cohabitation in 1998, and separated after 12 years of marriage. There were two children of the marriage, who at the time of the trial lived with the wife and spent time with the husband.

A key issue at trial was the treatment of two loans alleged to be owed to the husband's mother, who was a party to the proceedings and who was seeking to enforce repayment. The two loans were for $73,000 and $77,000, and the husband claimed that interest of $505,149 was owed.

The first loan arose in July 1997, prior to the parties' cohabitation. The husband's mother transferred a property to him for consideration of $134,000. The mother said that she lent the husband $73,000, and that the husband funded the balance of by way of bank loan. After the transfer of the property a mortgage document was prepared and stamped stating the principal sum as $73,000, with 10% interest. The mortgage was not registered, however, in November 1997 a caveat was lodged on behalf of the mother noting her interest in the property as mortgagee. The husband sold the property back to his mother in 2002 for $320,000. No repayments were made by the husband, and the first request for repayment came 15 days after the parties separated.

The second loan arose in November 1997. The husband's mother advanced the sum of $77,000 to assist the husband obtain an interest in a business. The husband and his mother entered into a Deed of Loan. Again, no payments were ever made and the husband's mother did not seek to enforce the loan until after the parties had separated.

Decision at first instance[22]

Justice Cleary of the Newcastle registry of the Family Court of Australia ordered a division of property as to 55% to the husband and 45 % to the wife.

[22] *Mena & Mena & Anor* [2012] FamCA 1046.

Her Honour found that the loans and interest should not be included as a matrimonial asset. In relation to the first loan, her Honour noted at paragraph 20 that the Court may determine not to take into account an unsecured liability. In refusing to include the first loan as a liability, her Honour had regard to it being "*unjust to impose on the wife the repayment of a loan to which she was not a party and of which she was unaware*" and that the interest rate had become punitive as it greatly exceeded commercial rates.[23] Her Honour reached the same conclusion in relation to the second loan, notwithstanding the Deed of Loan.

Her Honour concluded that the first loan of $73,000 gave rise to a significant initial contribution on behalf of the husband, and that the parties' contributions were otherwise equal during their marriage. Her Honour ultimately concluded that this greater initial contribution on behalf of the husband resulted in a contributions based assessment of 65% to the husband and 35% to the wife.

Her Honour then found that an adjustment of 15% in favour of the wife was appropriate pursuant to section 75(2) factors, primarily being the wife's lower income earning capacity and her primary care of the children. This adjustment was then reduced by 5% to allow for the contingency of "*some kind of accounting between mother and son for the generous financial assistance which the husband has been given credit for in these proceedings*".[24]

Overall, this resulted in a division of property of 55% to the husband and 45% to the wife.

<u>Full Court decision (per Bryant CJ, Strickland and Watts JJ)</u>

The wife appealed, and while the Full Court found merit in some of the grounds of appeal the appeal was ultimately dismissed upon the Full Court reaching the same outcome as the trial judge when re-exercising the discretion.

There was no challenge to the finding that the loans were not to be taken into account as liabilities in the asset pool, and the husband's mother did not participate in the appeal. Although not in issue on appeal, the Full Court noted that the trial Judge was correct "*in*

[23] Decision at first instance at [21] and [22].
[24] Decision at first instance at [73].

finding that the loan was not intended to be by the husband or his mother a legally enforceable liability".[25]

The wife asserted that the trial judge had erred in the assessment of contributions and the adjustment pursuant to section 75(2).

In terms of contributions, the wife asserted that the assessment of contributions of 65% in favour of the husband overstated the husband's initial contribution in the context of the parties' otherwise equal contributions. The wife submitted that the initial contribution did not justify a 30% differential in contributions, and that the initial contribution had been given disproportionate weight. The wife submitted that the value of the initial contribution represented only 4.8% of the net assets and that the contribution finding was "*entirely outside any range of discretion properly available*".[26]

The Full Court was ultimately not persuaded that the contributions based finding was outside the discretion of a trial judge, "*although it might be said that the weighting was a significant one*".[27] The Full Court was satisfied that her Honour had given significant weight to the husband's initial contribution, properly considered against the subsequent contributions of the parties. The Full Court noted that "*we do not think it is particularly helpful to consider the amount of the original contribution as a percentage of the ultimate asset pool as that would not be comparing like with like*".[28]

A further ground of appeal was that the trial judge had erred in reducing the wife's 75(2) adjustment by 5% on account of the contingency of the husband being required to repay the husband. The wife submitted that this was in effect double counting, by making two allowances for the loans in favour of the husband. The Full Court agreed, concluding that it not open to her Honour to make an adjustment after having rejected that there was any

[25] Full Court decision at [82].
[26] Full Court decision at [72].
[27] Full Court decision at [75].
[28] Full Court decision at [74].

legally enforceable liability between the husband and his mother. The Full Court at paragraph 88 stated that:

> "*…In other words, an adjustment had been made as between the husband and the wife and any potential adjustment between the husband and his mother, arising from a moral obligation, should not have played any further part in the calculation of the division of the assets of the parties once the adjustment for the husband's initial contribution had been made*".[29]

Having found merit in this ground of appeal the Full Court re-exercised the discretion rather than remitting the matter for a rehearing. The Husband successfully applied to adduce further evidence, on the basis that while the previous judgment was reserved the parties' oldest child began living with him on a full time basis. The parties subsequently entered into consent orders for the children to live with each parent on a week-about basis. At the time of the trial, the children had been living predominantly with the wife.

The Full Court adopted the trial judge's contributions based assessment of 65% in favour of the husband. Taking into account the new parenting arrangement, the Full Court concluded that a section 75(2) adjustment of 10% in favour of the wife was appropriate. The overall outcome of re-exercising the discretion was for the parties' property to be divided 55% to the husband and 45% to the wife.

The overall decision of the Full Court was therefore the same as the trial judge's "*albeit for different reasons*".[30] On that basis, the appeal was dismissed.

[29] Full Court decision at [88].
[30] Full Court decision at [136].