# SUPREME COURT OF QUEENSLAND

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| CITATION: | *BLM v RWS* [2006] QCA 528 |
| PARTIES: | **BLM**<br>(plaintiff/respondent/cross-appellant)<br>**v**<br>**RWS**<br>(defendant/appellant/cross-respondent) |
| FILE NO/S: | Appeal No 5759 of 2006<br>SC No 4508 of 2004 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 8 December 2006 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 27 October 2006 |
| JUDGES: | Keane JA, White J and Philip McMurdo J<br>Separate reasons for judgment of each member of the Court, each concurring as to the orders made |
| ORDER: | **1. Appeal allowed, but only to the extent that the orders made by learned trial judge are varied by reducing the amount remaining to be paid by the appellant to the respondent from $119,802.03 to $65,802.03**<br>**2. Cross-appeal dismissed** |
| CATCHWORDS: | FAMILY LAW AND CHILD WELFARE - DE FACTO RELATIONSHIP - ADJUSTMENT OF PROPERTY INTERESTS - GENERALLY - appellant and respondent lived in de facto relationship for approximately four years - appellant and respondent had two children together - respondent applied for property adjustment under Part 19 of *Property Law Act 1974* (Qld) - dispute over trial judge's assessment of the value of business and associated assets - dispute over post-separation loan repayments made by appellant - dispute over the value of the appellant's initial financial contribution to the asset pool - dispute over percentage distribution of the available pool of assets - dispute over allowance made against respondent for her wastage of assets or extravagance - concept of "erosion" - orders as to costs under Part 19 - whether the learned trial judge erred<br><br>*Property Law Act 1974* (Qld) s 286, s 291, s 300, s 303, s 341<br>*Supreme Court Act 1995* (Qld), s 253 |

*Coulton v Holcombe* (1986) 162 CLR 1, cited
*E v S* [2003] QSC 378; SC No 7405 of 2002, 3 October 2003, cited
*Farmer v Bramley* [2000] FamCA 1615; (2000) 27 Fam LR 316, cited
*Fitzgerald v Finch*, BRF No 3420 of 2004, 2 June 2006, considered
*In the marriage of Bremner* (1994) 18 Fam LR 407, cited
*In the marriage of Money* (1994) 17 Fam LR 814, cited
*In the marriage of Pierce* (1998) 24 Fam LR 377, cited
*In the marriage of Way* (1995) 124 FLR 447, cited
*Weir v Weir* (1993) FLC 92-338, cited

COUNSEL: C J O'Neill for the appellant
J O McClymont for the respondent

SOLICITORS: Bennett & Philp for the appellant
McDonald Brown for the respondent

[1] **KEANE JA:** Between January 1998 and 2 June 2002, the appellant and the respondent lived in a de facto relationship within the meaning of s 260 of the *Property Law Act 1974* (Qld) ("the PLA"). There was a period of temporary separation between January and June 2000. There were two children of the relationship: they were born on 13 April 1999 and 31 August 2001. The respondent applied for a property adjustment order under Pt 19 of the PLA seeking, in broad terms, an order that the appellant pay to her 60 per cent of the total net value of the pool of assets, which is constituted largely by property associated with a general store business which they carried on in partnership.

[2] The learned trial judge concluded that the respondent should recover the sum of $204,297 from the pool of the parties' assets, and made orders for the payment of a sum of money to give effect to this conclusion. The sum of $201,297 reflected a 60 per cent share of the assessed value of the pool of assets ($335,495) after deducting from the pool an amount which was described as the "eroded value" of the appellant's initial contribution to the acquisition of the assets. His Honour added, to this sum, the sum of $3,000 giving the total of $204,927. The $3,000 was "the difference between [the respondent's] 'offsets' and [the appellant's] 'contributions'".[1] His Honour ordered that the appellant pay $84,494.97 to the respondent forthwith, with a further sum of $119,802.03 to be paid upon the determination of the appeal by the appellant. His Honour made an order as to costs in favour of the respondent limited to the costs of one issue.

[3] The appellant challenges the trial judge's decision on a number of bases, asserting errors of fact and principle. The appellant also seeks to adduce further evidence on the appeal. The respondent seeks to cross-appeal against the order for costs made by the trial judge on the footing that an order for costs more generous to the respondent should have been made.

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1 *BLM v RWS* [2006] QSC 139 at [130].

[4] It is necessary to summarise the trial judge's findings before one can turn to discuss the contentions advanced on the appeal.

**The findings of the learned trial judge**

[5] The respondent was born on 14 May 1963. The respondent was managing a shop when she and the appellant began their relationship. The respondent had a 13 year old son from a previous relationship. The appellant was born on 4 September 1953. The appellant was, until mid 1998, a sales and marketing representative for a juice company.

[6] At the beginning of the relationship, the respondent was earning $500 a week which she contributed to household maintenance. As a result of social security offences committed by the respondent before the relationship with the appellant began, she was paying off a debt of $9,000 to Centrelink. She also owed $8,000 on a personal loan. Her only assets were a car valued at $12,500 and furniture and personal effects worth $5,000. In 1999, the respondent also received a payment of $10,000 as a result of injuries suffered by her in a fall. This was spent on the household. After the relationship was terminated, the respondent sold her car and ran up a credit card debt of $8,000.

[7] When the relationship began, the appellant was not employed, and was receiving the Newstart allowance. He owned a high rise unit in Surfers Paradise which was sold in October 2001 for $155,000, an amount less than the mortgage debt. He owned another unit at the Gold Coast which he bought in 1997 for about $287,000. This unit became the parties' home. It was sold in July 2001 for $325,000, which was reduced to $316,000 by the expenses of sale. The appellant owned a new motor vehicle, for which he paid $39,000, and which was sold in 2001 for $25,500. He had savings of $15,000 to $20,000, and some furniture and personal possessions.

[8] The sales made by the appellant in 2001 were associated with the acquisition, completed on 27 November 2001, of a general store in a country town for $520,000. The acquisition was financed, as to $300,000 by means of a loan to them jointly, and by the sale of the two units owned by the appellant. The appellant raised $340,000 from his own resources and contributed this sum to the purchase price. The appellant said that he used the proceeds of the sale of his motor vehicle to defray the initial operating expenses of the business. The business was acquired by both parties. A liquor licence attached to the business was held by the respondent.

[9] Initially, the respondent's son and the respondent's mother lived with the appellant and the respondent; but the respondent's mother moved out before the first child of the relationship was born. After an altercation in August 1999 between the appellant and the respondent's son, the respondent's son also moved out to live with his grandmother.

[10] The respondent alleged that the appellant was physically violent and verbally abusive towards her. She said that this led to the separation in January 2000 mentioned above. The appellant denied these allegations. The trial judge found that the relationship was "volatile at times"[2], and that the appellant did inflict "physical violence and verbal abuse" on the respondent.[3]

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2 *BLM v RWS* [2006] QSC 139 at [21].

3 *BLM v RWS* [2006] QSC 139 at [26].

[11] The respondent had complained to the police that, in November 2003, the appellant sexually interfered with their female child who was then four years and seven months old.[4] The appellant was arrested on the basis of a complaint made by the respondent. The charge against the appellant was dismissed at the committal proceedings. The trial judge in the present case was not willing to make a finding adverse to the appellant in relation to this allegation. The respondent's counsel made the point on the appeal that the respondent had not sought a finding adverse to the appellant on this issue in these proceedings, but had sought to show merely that her complaint was genuine. In this regard, his Honour accepted the respondent's contention.

[12] In relation to the value of the pool of property to be distributed, the trial judge was confronted by divergent evidence from each of the parties. His Honour was largely, though not entirely, unassisted by evidence independent of the parties. His Honour was of the view that the credibility of both parties was "impaired".[5]

[13] In this regard, the respondent's record of social security fraud meant that his Honour was disposed to treat her evidence in relation to financial matters with "considerable caution".[6] As to the appellant, his Honour found that he displayed a lack of candour in relation to the preparation and lodgement of his tax returns.[7] The appellant also failed, in the course of the proceedings, to disclose the existence of a term deposit which was converted into a bank cheque in the sum of $84,494.97 and in his resistance to producing the cheque in court.[8] It was in relation to the issue concerning the bank cheque that his Honour made the limited order in favour of the respondent in respect of costs.

[14] Mr Martin Gooley was retained as a joint expert to value the business of the general store as a going concern.[9] His opinion was to the effect that the business was worth $540,000 at trial. That value was based on the assumption that the trading figures produced by the bookkeepers were accurate. These figures showed an annual net income of $16,800 in the 2002 financial year, $15,748 in 2003 and $17,311 in 2004.

[15] Mr Gooley said that, if the net income of the business in 2004 was, in truth, $80,000, that would add about $160,000 to the value of the business. His Honour found that adjustments needed to be made to the expenses incurred in running the business, and that, when these adjustments were made, a net profit of almost $80,000 was revealed.

[16] In relation to the conduct of the business, the trial judge found that:[10]

> "the [appellant] bore the major burden of conducting the business itself. The [respondent] performed a lesser role in that regard, but the other functions she performed counterbalanced his role in their joint enterprise of conducting the store."

[17] The relationship between the parties had been "essentially non-productive in economic terms"[11] until the purchase of the business. The relationship survived the

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4 *BLM v RWS* [2006] QSC 139 at [22] – [24].
5 *BLM v RWS* [2006] QSC 139 at [33].
6 *BLM v RWS* [2006] QSC 139 at [36].
7 *BLM v RWS* [2006] QSC 139 at [34].
8 *BLM v RWS* [2006] QSC 139 at [34].
9 *BLM v RWS* [2006] QSC 139 at [37] et seq.
10 *BLM v RWS* [2006] QSC 139 at [59].

acquisition of the business by only six and a half months. The trial judge concluded:[12]

> "It would clearly not be just and equitable to treat his financial contribution to the acquisition of the property of the parties as having been eroded to the extent that the [respondent] would be entitled to fifty per cent of the net value of the assets. For calculation purposes, $250,000 will be treated as the remaining residue of his financial contribution …"

[18] When the parties separated in June 2002, the respondent removed cheque forms from the business account cheque book and wrote and banked a cheque for $25,000 a few days later. She also removed groceries and at least one cheque on the joint account. The learned trial judge allowed "$5,000 as the amount involved" in relation to the latter cheques stolen by the respondent.[13]

[19] There were a number of disputes between the parties concerning cash payments made by the appellant to the respondent between 18 July 2002 and 25 November 2003. The trial judge found that the total of these amounts, including the $25,000 cheque and stolen cheques referred to above, was $72,000.[14]

[20] The appellant contended that the respondent had engaged in reckless extravagance after the relationship ended. In this regard, the respondent borrowed $158,000 to purchase a home unit. She obtained the loan by falsely representing her financial circumstances to the lender.[15] Thereafter, she borrowed a total of $90,000 against the increased value of the unit over a period of seven months.[16] The trial judge found that, of this amount, the expenditure of $15,000 could be characterised as reckless extravagance.[17] On 24 May 2005, the respondent vacated the unit and gave possession to the mortgagee. The unit was sold on 6 June 2005 for $275,000 from which, according to the respondent, she received nothing.[18]

[21] After the parties separated, the appellant continued to make payments off the debt secured on the business. The respondent claimed to be entitled to a half share of the profits of the business after separation. The trial judge accepted that the business generated a net profit of $80,000 per annum after the separation.[19] The respondent's share of profits, in after tax terms, was approximately $114,800. The respondent claimed that the appellant's contributions to the debt secured on the business should be offset against this share of profits which the respondent had not received. The trial judge calculated a "total offsetting after tax sum" of $90,000 from which he deducted the sum of $15,000 for the respondent's extravagance.[20]

[22] His Honour went on to say:[21]

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11 *BLM v RWS* [2006] QSC 139 at [62].
12 *BLM v RWS* [2006] QSC 139 at [62].
13 *BLM v RWS* [2006] QSC 139 at [69].
14 *BLM v RWS* [2006] QSC 139 at [128].
15 *BLM v RWS* [2006] QSC 139 at [93].
16 *BLM v RWS* [2006] QSC 139 at [94].
17 *BLM v RWS* [2006] QSC 139 at [102].
18 *BLM v RWS* [2006] QSC 139 at [96].
19 *BLM v RWS* [2006] QSC 139 at [104] – [109].
20 *BLM v RWS* [2006] QSC 139 at [109].
21 *BLM v RWS* [2006] QSC 139 at [109].

> "In coming to that conclusion, I have not overlooked that the loan for the business is in the form of a joint obligation which carries with it the joint and several liability of the [respondent] to contribute. As the servicing of the loan is reflected in the profit and loss accounts no further account needs to be taken of it. Also, if extra expenditure had been incurred in running the business because the [respondent] was no longer spending some hours per week directly related to it, such expenditure should have been reflected in the profit and loss accounts."

[23] As to the contribution made by each of the parties to the "homemaking and parenting" aspects of the relationship, the trial judge was of the view that "some allowance" in the respondent's favour was necessary to reflect the circumstance that the appellant's domestic violence made the respondent's contribution to parenting and homemaking "more onerous".[22]

[24] It was asserted on the respondent's behalf that she was reduced to, and remained in, poor psychological health as a result of the appellant's misconduct during the relationship.[23] That assertion was accepted, albeit with considerable reservations and qualifications, by the trial judge who found that there was only a "possibility of a need for further occasional consultations" for psychological and psychiatric treatment.[24]

[25] The learned trial judge then addressed the matters relevant under s 291 to s 309 of the PLA.[25] His Honour summarised his view of these matters as follows:[26]

> "The essential thrust of what has been said above is that, so far as the conduct of the business was concerned, the parties' contributions were similar, although each performed different roles. So were their contributions as a household unit from the commencement of the de facto relationship until the acquisition of the business. The starting point in the just and equitable property division is, in this case, equality in relation to the assets available for division."

[26] In his Honour's view, the distribution of the value of the asset pool 60/40 in the respondent's favour reflected:[27]

> "the more onerous burden on the [respondent] because of domestic violence and its effect on her future earning capacity, standing alone and relative to his. Caring for the children will impact on both her earning capacity and financial burden as well … A small allowance should also be made for ongoing expenses relating to [their older child's] counselling, and any further counselling needed for the [respondent]."

[27] The total value of the assets of the relationship was assessed at $867,494.97. This included a total of $773,000 for the business and associated assets made up of $360,000 for the land, $270,000 for goodwill, $128,000 for stock in trade, and

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22 *BLM v RWS* [2006] QSC 139 at [85].
23 *BLM v RWS* [2006] QSC 139 at [86] – [92].
24 *BLM v RWS* [2006] QSC 139 at [92].
25 *BLM v RWS* [2006] QSC 139 at [110] - [127].
26 *BLM v RWS* [2006] QSC 139 at [129].
27 *BLM v RWS* [2006] QSC 139 at [131] - [132].

$15,000 for plant. There were other assets in the pool, including the bank cheque for $84,494.97 in the appellant's possession and some $10,000 worth of furniture. The associated liabilities were $279,000. From the net assets of $588,495, the trial judge deducted the $250,000 referable to the assessed "eroded value" of the appellant's initial contribution to the pool of assets of the relationship. This produced a figure of $338,495 as the value of the assets available for distribution. His Honour then allowed $3,000 to the respondent being the excess of the respondent's offsets over the appellant's post-separation contributions to the respondent, including the total of the cash and goods taken by the respondent. The figure of $335,495, so derived, was then apportioned as to 60 per cent in the respondent's favour to produce a sum of $201,297 to which the sum of $3,000 was added to produce a total of $204,297. His Honour ordered the appellant to pay over to the respondent forthwith the amount of the bank cheque, with the balance to be paid from the proceeds of sale of the business.

**The issues on appeal**

[28] There were five principal arguments agitated by the appellant on the appeal. They were that the trial judge erred:

- in assessing the value of the business and associated assets at $773,000;
- in failing to take into account the post-separation loan repayments made by the appellant;
- in using $250,000 rather than $340,000 to reflect the value of the appellant's initial financial contribution to the asset pool;
- in fixing upon a 60/40 distribution of the available pool of assets in favour of the respondent;
- in failing to increase the allowance made against the respondent for her wastage of assets.

I shall address these five arguments in turn.

**Valuation errors**

[29] In the appellant's written submissions, it was said that his Honour erred in acting upon Mr Gooley's evidence that a net profit of $80,000 for 2004 would have added $160,000 to the value of the business, and that the better course would have been to order a sale of the business. These submissions overlook his Honour's careful and comprehensive evaluation of the evidence which was available to him.[28] Further, the appellant's written submissions paid scant regard to the circumstance that the appellant's attempts to evade his obligations in relation to disclosure afforded the trial judge a sound basis for approaching the assessment of the profitability of the business on the basis that he could be reasonably confident that no injustice would be caused to the appellant by reason of the absence of further information from him relating to the affairs of the business.[29] Unsurprisingly, this point was not addressed in oral argument on the appeal.

[30] On the hearing of the appeal, the appellant placed greater emphasis on the point that the actual sale of the business afforded decisive evidence that the value of the business and associated assets was approximately $665,000. The appellant sought to rely upon "fresh evidence" of this value in the form of the contract for the sale of the business. The appellant contends that this further evidence shows his Honour over-estimated the value of the business and associated assets by $108,000.

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28 *BLM v RWS* [2006] QSC 139 at [37] - [56].

29 *Weir v Weir* (1993) FLC 92-338 at 79,593.

[31] The learned trial judge delivered his reasons for judgment on 13 June 2006, and invited the parties to seek to reach agreement as to the form of orders to give effect to those reasons. The appellant informed his Honour that a sale of the business and associated property was in prospect. Before the trial judge made his final orders, the contract was put in evidence before him. The contract price was less than the value of the business and associated assets assessed by his Honour in his reasons for judgment.

[32] The contract was relied upon by the appellant to support his application for an order that the respondent execute the documentation necessary to enable the sale to proceed. On 23 June 2006, his Honour ordered the respondent to sign all documents necessary to enable the contract to be made and completed. As his Honour explained:[30]

> "Provided the balance after payment of costs and commission on the sale and of priority creditors is sufficient to meet the payment of the [respondent's] entitlements, the sale price should not be of concern to her. Only the [appellant's] interests would be affected."

[33] The first point to be made here is that the evidence of the contract of sale is not "fresh", or even new, evidence. It was placed before the trial judge before his final judgment was pronounced. The appellant did not, at any time, invite the learned primary judge to reconsider his assessment of the value of the business and associated property in the light of the evidence of the sale. It may well be that the appellant's legal advisers erroneously believed that they were not entitled to do so, but there can be no doubt that the evidence was before the court. It was simply not suggested to the learned trial judge that this evidence warranted the revision of his conclusions as to the value of the business.

[34] The respondent opposed the appellant's attempt on the appeal to rely upon the evidence of the sale as evidence, and, indeed, the best evidence of the value of the business and associated assets. The respondent opposed this course on the basis that the appellant had not sought to rely upon the sale in this way before the learned trial judge. The respondent's position was that, if the sale had been put forward on that basis, the respondent could have investigated the provenance of the contract with a view to showing that it was not an arm's length sale in a fully informed market. Because of the course taken by the appellant, the respondent had no occasion to avail herself of the opportunity to inquire into matters which bore upon the worth of the sale as evidence of the value of the business and associated assets, such as the relationship between the appellant and the purchasers, the circumstance in which the purchasers and the appellant negotiated the sale and the extent to which the appellant advertised the sale.

[35] I am of the opinion that, in these circumstances, to permit the appellant to rely upon the evidence of the sale price to establish the value of the assets would be a serious denial of procedural fairness to the respondent.[31] Accordingly, this Court should reject the appellant's attempt to rely upon the sale as establishing the value of the business and associated assets.

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30 *BLM v RWS* [2006] QSC 154 at [3].

31 *Coulton v Holcombe* (1986) 162 CLR 1 at 7.

**Post-separation loan repayments**

[36] The appellant complained that the trial judge made no allowance for the appellant's post-separation contributions to the mortgage debt secured over the business. The amount was said to be $700 per week totalling approximately $145,000. Taking this figure into account would increase the appellant's contributions from $72,000 to $217,000.

[37] This submission is quite misconceived. The learned primary judge did not ignore the servicing of the loan secured on the business. His Honour was of the view that the servicing of the loan was reflected in the profit and loss accounts so that it was not necessary to refer further to that aspect of the parties' financial situation.[32] That view was clearly correct.

[38] The appellant also seeks to adduce new evidence relating to the repayment of the loan secured by the mortgage over the business. The loan payments were, as has been seen, treated by his Honour as being reflected in the partnership's profit and loss statements.[33] To the extent that this new evidence confirms the figures in the partnership's profit and loss accounts, it is immaterial. To the extent that it is apt to contradict those figures, it would be unfair to allow the appellant now to rely upon such evidence especially when it could, with reasonable diligence, have been made available at trial.

**Erosion of the initial contribution**

[39] The appellant contended that the trial judge erred in treating the appellant's initial contribution of the capital of the business as having been "eroded" to $250,000. In my respectful opinion, this submission should be accepted.

[40] It is well-established by decisions of the Full Court of the Family Court in relation to the provisions of the *Family Law Act 1975* (Cth) analogous to Pt 19 of the PLA that:[34]

> "an initial substantial contribution by one party may be 'eroded' to a greater or lesser extent by the later contributions of the other party even though those later contributions do not necessarily at any particular point outstrip those of the other party."

[41] This approach, while readily applicable to long marriages, is not appropriate to shorter relationships, as Mullins J recognised in *E v S*.[35] In the circumstances of the present case, the suggestion that the appellant's contribution to the acquisition of the business and associated assets had been "eroded" at all is a distraction from, rather than a guide in, the task of arriving at a just and equitable distribution of the assets of the relationship. His Honour's view was that:[36]

> "so far as the **conduct** of the business was concerned, the parties' contributions were similar, although each performed different roles. So were their contributions as a household unit from the

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32 *BLM v RWS* [2006] QSC 139 at [109].

33 *BLM v RWS* [2006] QSC 139 at [109].

34 *In the marriage of Money* (1994) 17 Fam LR 814; *In the marriage of Bremner* (1994) 18 Fam LR 407; *In the marriage of Way* (1995) 124 FLR 447; *In the marriage of Pierce* (1998) 24 Fam LR 377 at 385-386.

35 [2003] QSC 378 at [68].

36 *BLM v RWS* [2006] QSC 139 at [129].

> commencement of the de facto relationship until the acquisition of the business". (emphasis added)

[42] There was no finding of any "offsetting contribution" by the respondent which was apt to erode that made by the appellant, and the relevant period was too short for any "erosion" to be presumed. The $340,000 which the appellant contributed to the acquisition of the business was raised entirely from his own assets. The respondent left the business, and severed her personal relationship with the appellant, only five and a half months after the appellant had contributed $340,000 to the acquisition of the business. During that time, the appellant's contribution to the upkeep of the business was more substantial than that of the respondent. The respondent's contribution to the relationship may have been apt, over time, to offset the value of the appellant's involvement in the business; but once the relationship ceased, which was at the same time as the respondent's involvement in the business ceased, there was no basis on which it can be said that the respondent made any offsetting contribution either to the business or to the relationship.

[43] Section 286(1) of the PLA empowers the court to "make any order it considers just and equitable about the property of either or both of the de facto partners adjusting the interests of the de facto partners or a child of the de facto partners in the property". In deciding what is just and equitable, the court must consider the matters mentioned in subdivision 3 of division 4 of Pt 9 of the PLA. The first of these matters, referred to in s 291(1) of the PLA, is:

> "the financial and non-financial contributions made directly or indirectly by or for the de facto partners … to … the acquisition, conservation or improvement of any of the property of either or both of the de facto partners …"

[44] The assets which the appellant liquidated to fund the acquisition of the business and its associated assets were owned by him prior to the commencement of the relationship. There is no suggestion that these pre-existing assets were in any way augmented by reason of any contribution, financial or non-financial, by the respondent. After acquisition, and before the severance of the relationship, the contributions of the parties to the operation of the business were equal. There is no suggestion that any contribution by the respondent was apt to erode or offset the value of the appellant's initial contribution. Nor could any such suggestion be made having regard to the termination of the relationship after five and a half months and the operation of the business solely by the appellant thereafter until trial. While the respondent's overall contribution to the relationship may have warranted an adjustment in her favour in relation to any value of the asset in excess of the appellant's initial contribution, the assessment of their respective contributions to the acquisition of the business had to recognise the appellant's initial contribution before any adjustment could properly be made pursuant to s 286 of the PLA.

[45] In my respectful opinion, the trial judge erred in treating the appellant's financial contribution to the business as having been "eroded" at all. Accordingly, this consideration was not apt to assist a just and equitable adjustment to be made to the property rights of the parties. Such a result can only be achieved without a fictional reduction in the value of the appellant's contribution to the acquisition of the pool of assets to be divided between the parties.

**The 60/40 apportionment**

[46] The appellant attacks the trial judge's 60/40 apportionment of the asset pool in favour of the respondent. The appellant contends that, in the case of a relationship of short duration where there is a large disparity of financial contributions in favour of one party, an apportionment of 60/40 in favour of a party who makes no initial financial contribution is manifestly not just and equitable. The appellant relies, in this regard, on the decisions of the Family Court in *Fitzgerald v Finch*[37] and *E v S*[38] to suggest that the trial judge's discretion demonstrably miscarried, and that 35 per cent of the pool would represent a generous apportionment in favour of the respondent.

[47] This submission must be rejected. It overlooks the point that the trial judge divided the asset pool only after first deducting the currently assessed value of the appellant's initial contribution to the acquisition of the business. Once this point is taken into account, and especially when the notional erosion of the appellant's contribution to the acquisition of the business is ignored, the basis for this argument disappears.

**Wastage or extravagance**

[48] The appellant contends that the total of $90,000 borrowed by the respondent over a seven month period against the increasing value of the home unit she acquired after separation were spent entirely on personal consumption. The appellant contends that the figure of $15,000 assessed by the learned trial judge as "extravagance" should be increased to $50,000.

[49] The appellant's contention that the respondent's extravagance should be regarded as disentitling conduct finds no support in the language of Pt 19 of the PLA. None of the provisions of Pt 19 of the PLA provide that the financial consequences of decisions made by one party subsequent to the termination of the de facto relationship have a bearing on the identification or assessment of the contribution made by either party to the property in respect of which an adjustment is to be made. In this regard, it may be observed that the analogy between the *Family Law Act* and Pt 19 of the PLA breaks down at some points, the most important being the commencement and termination of a de facto relationship. In the case of a marriage, it is easy to identify when the legal relationship of marriage commences and when it has been dissolved. Separation may occur at some contestable point in between, but one can readily understand why financial windfalls or catastrophes affecting one party after separation but before dissolution may properly be taken into account in terms of a property adjustment under the *Family Law Act*.[39] In the case of a de facto relationship, on the other hand, the point at which the relationship commences and ends may often be contestable as a matter of fact. So far as termination of the relationship is concerned, both parties to the present appeal appeared to contend that the relationship came to an end when the parties separated in June 2002. In these circumstances, it is difficult to see how poor financial decision making on the part of the respondent could be relevant to the exercise contemplated by s 291 of the PLA. That provision speaks of "contributions": it would be a travesty of language to regard "contributions" as including "negative contributions".

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37 2 June 2006, BRF No 3420 of 2004.

38 [2003] QSC 378.

39 Cf *Farmer v Bramley* [2000] FamCA 1615.

[50] Whether or not the respondent was profligate after the relationship came to an end is, on the other hand, an issue to be considered in applying s 300 and s 303 of the PLA. These provisions focus attention upon the commitments of the parties and disparities in the standard of living enjoyed by each party after separation. These provisions address factors to be taken into account in relation to adjustments to be made after the contributions of the parties to the relevant pool of assets have been identified and assessed pursuant to s 291. They suggest that any adjustment thought to be necessary to address these factors should be addressed in the final apportionment of the pool between the parties. In the present case, there is, in my view, no sound basis for increasing the adjustment effectively made against the respondent by the learned primary judge.

**The appeal – summary**

[51] Of the arguments advanced by the appellant, only that in relation to the "erosion" of the appellant's contribution to the business and associated assets should be accepted. That means that the figure of $335,495 to be apportioned between the parties should be reduced by $90,000 to $245,495. An apportionment of that sum 60/40 in favour of the respondent produces $147,297 to which the sum of $3,000 must be added. That produces a figure of $150,297. The respondent has already received the amount of the bank cheque of $84,494.97. The further sum to be paid by the appellant to the respondent should be reduced from $119,802.03 to $65,802.03.

**The cross-appeal**

[52] On the cross-appeal, the respondent seeks an order for the costs of the trial on the indemnity basis. The order the subject of the cross-appeal is an order "as to costs only".

[53] Section 253 of the *Supreme Court Act 1995* (Qld) provides that:

> "[n]o order made by any judge of the [Supreme] court … as to costs only which by law are left to the discretion of the judge shall be subject to any appeal except by leave of the judge making such order."

[54] With the appellant's consent, the respondent obtained the leave of the trial judge to appeal against the orders as to costs. Accordingly, the cross-appeal is competent. It remains the case, however, that the respondent cross-appellant assumes a heavy burden in attempting to upset the exercise of the trial judge's discretion as to costs. Especially is this so in the light of s 341 of the PLA, which provides that a party to proceedings under Pt 19 of the PLA should bear his or her own costs unless the court is satisfied that there are circumstances justifying an order for costs.

[55] Having regard to the view which I have reached in relation to the outcome of the appeal, the cross-appeal has lost much of its force. The basis of the cross-appeal as to costs was that the decision of the learned trial judge in relation to costs was affected by two errors of fact. The first error was said to relate to his Honour's failure to appreciate that the order for the payment of $204,297 was more favourable to her than the offer of compromise she had made on 18 February 2005 whereby she offered to settle her claim for $150,000 and retain the unit she had acquired after separation. In particular, it was said that his Honour failed to appreciate that the value of the respondent's equity in that unit was virtually nil. The second error was said to have occurred because his Honour proceeded on the

basis that the allegation of child abuse levelled against the appellant had unnecessarily lengthened the trial.

[56] As to the first of these points, the success of the appeal to the extent of reducing the adjustment in the respondent's favour from $204,297 to $150,297 means that the contention that the respondent's offer was bettered by the outcome of the case is dubious at best, and, indeed, unlikely to be correct.

[57] As to the second of these points, it may be, as counsel for the respondent contends, that little time was wasted on the allegation of child abuse by the appellant, because it was raised for only a narrow purpose; but it is clearly the case that some time was wasted by this issue. It is also clear that this issue ought not have been raised at all.

[58] In my respectful opinion, no basis has been demonstrated for departing from the prima facie rule laid down by the legislature in s 341 of the PLA that, in proceedings under Pt 19 of the PLA, there should be no order as to costs.

**Conclusions and orders**

[59] The appeal should be allowed, but only to the extent that the orders made by the learned trial judge should be varied by reducing the amount remaining to be paid by the appellant to the respondent from $119,802.03 to $65,802.03.

[60] The cross-appeal should be dismissed.

[61] **WHITE J:** I agree with the reasons of Keane JA and the orders which his Honour proposes.

[62] **PHILIP McMURDO J:** I agree with Keane JA.