SUPREME COURT OF QUEENSLAND

CITATION:	*EB v CT* [2008] QSC 303
PARTIES:	**EB** (applicant) **v** **CT** (respondent)
FILE NO/S:	BS No 5118 of 2003
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	26 November 2008
DELIVERED AT:	Brisbane
HEARING DATE:	15-17 September 2008
JUDGES:	Applegarth J
ORDER:	**1. Pursuant to s 333(1)(d) of the *Property Law Act* 1974 the respondent pay the sum of $100,000 to the applicant.** **2. The respondent be released from undertakings given to the court in respect of his Balmain property.**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – GENERALLY – where applicant seeks a property adjustment under Part 19 *Property Law Act* 1974 ("the Act") – where litigation occurred more than seven years after end of relatively short de facto relationship – where both parties had substantial assets on entering relationship – where parties effectively kept their property separate during relationship – where respondent's financial contributions substantially exceeded those of applicant – where applicant's welfare contributions substantially exceeded those of respondent – whether a property adjustment should be made under the Act *Acts Interpretation Act* 1954, s 32DA(2) *Property Law Act* 1974, s 99, s 282, s 286, s 291, s 292, s 293, s 294, s 295, s 297, s 298, s 300, s 304, s 305, s 306, s 307, s 309, s 333(1)(d) *Superannuation Industry (Supervision) Regulations* 1994

Baker v Towle [2008] 39 Fam LR 323, considered
Bilous v Mudaliar (2006) 65 NSWLR 615, cited
BLM v RWS [2006] QCA 528, considered
Challen & Challen [2007] FamCA 1292, applied
Chorn v Hopkins [2004] FLC 93-204, considered
CL v JMG [2007] QSC 169, cited
Delany v Burgess [2007] NSWCA 360, cited
Douglas & Douglas (2006) FLC 93-300, considered
Farnel, In the Marriage of (1995) 128 FLR 374, cited
Finborough Investments Pty Ltd v Airlie Beach Pty Ltd [1995] 1 Qd R 12, cited
FO v HAF [2007] 2 Qd R 138; [2006] QCA 555, applied
HAG v MAW [2007] QCA 217, cited
Hardman v Hobman [2003] QCA 467, cited
Harkianakis v Skalkos (1997) 42 NSWLR 22, cited
Kardos v Sarbutt [2006] NSWCA 11, considered
Manns v Kennedy [2007] 37 Fam LR 489, cited
Moore & Moore [2008] FamCA 32, cited
NFO v PFA [2005] QSC 176, considered
NHC v RCH (2004) 186 FLR 240, cited
Norbis v Norbis (1986) 161 CLR 513, cited
S v B (No 2) [2005] 1 Qd R 537, cited
Townsend, In the Marriage of (1995) FLC 92-569, cited

COUNSEL: The Hon T Carmody SC for the applicant
CJ Forrest for the respondent

SOLICITORS: KL King & Associates for the applicant
Edwards Lawyers for the respondent

[1] The parties have taken longer to litigate this case than their relationship lasted. They met in July 1997. The applicant, then aged 55, had worked as a counsellor for the same employer for 30 years. She was experiencing difficulties in her workplace, and her future employment was in doubt. The respondent, then aged 51, was still grieving over the death of his wife of 23 years, who died in late 1995. He met the applicant on his way to see a therapist. They exchanged emails and met socially in late July. Their friendship developed quickly.

[2] There is a dispute about when their de facto relationship started. The applicant says it was 9 September 1997. The respondent says it was in late November 1997. There is no dispute that the relationship ended in June 2001. During this period of less than four years, the applicant and the respondent lived together at various times in Brisbane, Sydney and Melbourne. At the start of the relationship the applicant and the respondent each had substantial assets, including investment properties. At the end of the relationship each still had substantial assets registered in their respective names. They did not jointly acquire any substantial property.

[3] More than seven years after the relationship ended, the court is asked to make a property adjustment order under Part 19 of the *Property Law Act* 1974 ("the Act").

Much has changed in those seven years, including the value of their respective assets.

The parties' positions

[4] The applicant seeks a lump sum payment of $500,000. The respondent says that she is not entitled to any order. He says that, if anything, his substantially greater financial contribution should be reflected in an adjustment in his favour, even after account is taken of all the matters the court is required to take into account in the applicant's favour.

[5] In essence, the applicant's case turns upon what was submitted to be her contributions, both financial and non-financial, and the consequences, both financial and non-financial, to her of being in the relationship. Her contributions included assisting with the renovation of a property that the respondent acquired in Brisbane. The applicant supervised the renovation project whilst the respondent worked in Sydney. This contribution of time and effort was said to have had an opportunity cost in that the applicant was unable to devote time to developing her practice as a psychologist. The establishment of a private practice was disrupted by relocating to Sydney and Melbourne. The applicant says she contributed emotional and domestic support to the respondent. Finally, she points to the conduct of the respondent who, after the relationship ended, made complaints to professional bodies about the applicant. These complaints were said to have been personally devastating to the applicant and to have adversely affected her health and her earning capacity as a registered psychologist.

[6] The respondent submits that the extent of the applicant's contributions are overstated. He says that the applicant owned more property at the end of the relationship than she went did at its start and that she did not contribute any of her property to the relationship, apart from some cash savings. He says that his contributions allowed the applicant to achieve this financial result. He acknowledges that the applicant provided her Brisbane property as a home for the parties for seven to eight months, but says that otherwise she was able to use the rental and other income that she received during the relationship to her own benefit, and that she made a minimal financial contribution to their joint needs. The respondent submits there is insufficient evidence to support a finding that the de facto relationship has affected the applicant's earning capacity. He says that her income earning capacity was, and is, unaffected by the relationship. He submits that the evidence does not suggest that the applicant had the capacity to earn a large income at the commencement of the relationship, or intended to exploit that capacity. He says that she regarded herself as being semi-retired after she was retrenched on 8 August 1997, and that she did not sacrifice any earning capacity for the relationship.

The issues

[7] The parties acknowledge the difficulties in applying the four step approach discussed in *FO v HAF*[1] in a case in which:

1. The duration of the de facto relationship was relatively short.
2. The parties effectively kept their property separate during the relationship, with the respondent buying and selling some properties during the relationship.
3. The parties separated more than seven years before the hearing, during which time much happened to their properties and their financial resources.
4. No valuation of their respective assets, liabilities and financial resources as at the date of their separation has been undertaken.
5. The reasons for differential changes in the value of their respective assets were not explored in the evidence and could not be explained in submissions.[2]

[8] To speak in the context of such a relatively short de facto relationship of an "asset pool" is something of a misnomer in circumstances in which each party had substantial assets at the start of the relationship, did not pool them during its short duration and retained their respective assets at its end. Attempting to assess what difference their respective contributions during the relationship made to the value of their collective assets at the date of the hearing is fraught with difficulty in a case in which seven years have passed since the relationship ended, and numerous supervening matters contributed to the value of those assets. However, in the absence of evidence of the value of the property, financial resources and liabilities of the parties as at the date of their separation in June 2001, it is appropriate to follow the four step approach. Accordingly, the principal issues for determination are:

1. When the de facto relationship commenced.
2. The identification and valuation of the property, resources and liabilities of the parties at the date of the hearing.
3. The identification and assessment of the contribution of the parties to their pool of assets and the determination of their contribution-based entitlements in accordance with s 291 to s 295 of the Act.
4. The identification and assessment of the factors in s 297 to s 309 of the Act to determine the adjustment to the contribution-based entitlement.
5. Consideration of the result of these earlier steps to determine whether that result is just and equitable in accordance with s 286 of the Act.

The commencement of the de facto relationship

[9] A marriage commences on a certain date. The date that a de facto relationship commences can be uncertain. The Court of Appeal has observed that the legislation

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1 [2007] 1 Qd R 138; [2006] QCA 555 at [51]-[52].

2 To take one example, the applicant's St Lucia property grew in value from $280,000 to $1,000,000 between the commencement of the relationship and the hearing, whilst the respondent's Balmain property grew from $680,000 to $1,000,000 during the same time.

does not provide any great assistance in resolving this uncertainty.[3] None of the matters listed in 32DA(2) of the *Acts Interpretation Act* 1954 is necessarily decisive. The ultimate issue is whether the parties "are living together as a couple on a genuine domestic basis". This phrase necessarily draws attention to whether the parties are living together "to maintain a household in a relationship which exhibits the characteristics of the relationship of marriage, save for the solemnities involved in the formal exchange of wedding vows".[4]

[10] The issue is not simply when the parties began to live under the same roof. Parties may spend most nights of the week in the same household but lack "the degree of mutual commitment to a shared life, including the care and support of each other"[5] which is indicative of "living together as a couple on a genuine domestic basis". There is no general rule that a couple must maintain one joint household in order to be living together as a couple on a genuine domestic basis. [6] Accordingly, the fact that the respondent retained a unit in Brisbane until late November 1997 does not mean that he was not in a de facto relationship at an earlier date.

[11] During this period the applicant met the respondent she was separated from a former husband, and did not appear to the respondent to be interested in having a romantic relationship. The respondent says that he was not interested in a romantic relationship and was still going through a grieving process. However, the relationship between the applicant and the respondent quickly developed into a romantic relationship. They spent increasing amounts of time together. A sexual relationship started in early September 1997, and the applicant says that the respondent "moved in" with her to her St Lucia home at that time. The respondent acknowledges that in September 1997 he commenced staying overnight with the applicant at her home, and describes this as an "ad hoc arrangement" that continued until he sold his unit in Auchenflower at the end of November 1997. He says he stayed at her home "on an irregular basis", whereas she says that he stayed there practically every night that he was in Brisbane.

[12] In late 1997 the applicant encouraged the respondent to be discreet about being at her home, and he usually only went there at night. A predominant reason for having a discreet relationship was that the applicant did not want her former husband to know that she was in a new relationship. The parties' desire to not publicise their relationship in late 1997 is equivocal in determining whether, at that time, they were living together as a couple on a genuine domestic basis.[7] The applicant's desire that her former husband not know about her relationship with the respondent is consistent with her not wanting her former husband to know of a potential de facto relationship that she might enter. It does not prove that she was in such a relationship.

[13] The respondent does not explain why he decided to sell his unit at Auchenflower. Settlement of that sale took place on 28 November 1997, and the respondent says

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3 *FO v HAF supra* at [24].
4 *ibid.*
5 *Acts Interpretation Act* 1954, s 32DA(2)(f).
6 *CL v JMG* [2007] QSC 169 at [5].
7 *cf. Acts Interpretation Act* 1954, s 32DA(2)(i).

that he had looked for temporary accommodation until the applicant offered him the opportunity to stay with her until he purchased another home. He says that he stayed at the applicant's St Lucia property for longer than he had intended. This and other affidavit evidence was given in September 2007 when the respondent denied that he was involved in a de facto relationship with the applicant and when he swore that his cohabitation with the applicant at her St Lucia property up to and including July 1998 was "an arrangement that was mutually convenient to each of us and was without any commitment to each other". I do not accept this evidence. The respondent did not persist with this position at the hearing and contended that the de facto relationship commenced on 29 November 1997.

[14] The applicant has the onus of proving whether or not a de facto relationship existed at a particular date.[8] I am persuaded that a de facto relationship commenced between the applicant and the respondent no later than 1 October 1997. This is about the date that the applicant arranged for the respondent's unit to be cleaned and liaised with real estate agents about its sale. By 1 October 1997 their cohabitation was not simply a matter of mutual convenience. It involved a substantial degree of mutual commitment to a shared life. In the absence of satisfactory evidence explaining the respondent's decision to sell his unit, I find that the decision was prompted by a desire to "move in" with the applicant, and to live together as a couple on a genuine domestic basis. I find that the de facto relationship commenced no later than 1 October 1997.

The course of the de facto relationship

[15] The parties lived together at St Lucia for the first half of 1998. The respondent's contract as a senior public servant expired on 30 June 1998 and was not renewed. The applicant earned fee income in her private psychotherapy practice of $11,950 between 12 August 1997 and 8 July 1998. Based on a rate of $70 per session this averaged approximately 3.5 sessions per week during that period.

[16] Between December 1997 and January 1998 the applicant and the respondent travelled overseas together and paid separately for their travel packages, save for time spent in Canada at an apartment arranged by the applicant's sister and for a week in New York which was paid for by the respondent. The respondent paid for most of the expenses on the overseas holiday totalling $11,500. The respondent purchased a ring for the applicant in New York which the applicant retains, and which was valued in 2007 at $5,305.

[17] During the initial phase of their de facto relationship, the applicant and the respondent developed mutual interests and attended meetings and conferences. They discussed the idea of establishing a "retreat centre" which would use the applicant's psychoanalytic training and the respondent's management experience. The retreat centre would help senior managers with communication, negotiation and motivation techniques and provide psychological coaching. On 21 July 1998 the respondent registered a company named Retreat Services Pty Ltd. He denies that

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8 *S v B* [2005] 1 Qd R 537 at 541, [5].

the applicant was to become involved with this company, which he said was set up after he consulted his accountant so that he could pursue the future option of trading as a consultant.

[18] On 10 July 1998 the respondent contracted to purchase a property at Twigg Street, Indooroopilly (Twigg Street) for $395,000. The sale settled on 11 August 1998.

[19] In August 1998 the respondent commenced employment in Sydney.

[20] Renovations to Twigg Street were extensive and expensive. Major structural defects were found and engineering services were required. The applicant travelled to Sydney in late August 1998 and stayed with the respondent at his Balmain home until mid-October. The major renovations to Twigg Street occurred between October and late December 1998. The applicant coordinated and supervised this work. She also did demanding physical labour on the site. She sourced fittings and worked in close conjunction with a builder, Mr Reibel. She dealt with contractors and sub-contractors. Most of the costs associated with the Twigg Street renovations were paid for by the respondent. The applicant paid for some relatively minor items for which she did not seek reimbursement. They cost about $1,500. The respondent returned to Brisbane on several weekends and was involved in negotiations with contractors about the work.

[21] At Christmas 1998 the applicant and the respondent travelled overseas and the respondent paid $15,855 for the costs of that trip. The applicant stayed in Sydney from 16 January 1998 until 2 February 1999 when she returned to Brisbane.

[22] The renovations to Twigg Street were finalised shortly afterwards and the property was listed for rent. However, the property was not able to be rented and in March 1999 it was listed for auction. The property did not sell at auction. No bid was received. No offers to purchase it were received after the auction and it was withdrawn from sale in July 1999. It remained vacant until October 1999 when it was rented. Twigg Street was eventually sold in 2007 for $1,100,000.

[23] The applicant moved to Sydney in about February 1999 and lived with the respondent at his Balmain property. Arrangements were made for one room in this property to be available to the applicant to see clients and another room had a computer that was available for her use. The applicant had only started to set up her practice in Sydney when the respondent's employment in Sydney came to an end.

[24] In April 1999 he commenced work with a new employer in Melbourne. The applicant decided to relocate to Melbourne with the respondent, where they lived in an apartment. They moved apartments in September 1999. During their time in Melbourne the respondent paid more than $2,000 per month for the rent of the apartment and paid for the cost of utilities and phones. The respondent paid for most household items.

[25] During her time in Melbourne the applicant undertook some work as a psychotherapist and obtained guest list status with the Victorian Association of Psychoanalytic Psychotherapists. She saw some patients and attended various courses and meetings.

[26] The parties made use of the applicant's car and the applicant tended to drive the respondent. This always had been a feature of their relationship and became a necessity after the respondent's new vehicle was stolen in Sydney and not replaced.

[27] After the applicant left Brisbane in early 1999 her property at St Lucia was rented. She also received rent from another investment property. In November 1999 the applicant reached a property settlement with her former husband. As a result, she acquired unencumbered title in a property at Mermaid Beach on the Gold Coast in exchange for the payment of $15,000. In late 1999 the applicant inherited $48,902 from an aunt.

[28] The parties travelled to Mexico in November 1999 and the respondent met costs of $7,255 associated with that trip. He also paid $1,151 towards the cost of a trip to New Zealand in October 2000. Between November 2000 and January 2001 the parties travelled to the USA and Mexico and the respondent paid $16,361 towards the cost of that trip.

[29] Throughout their relationship the applicant performed almost all domestic tasks without assistance from the respondent. The respondent was either busy at work or absorbed in writing a book which was eventually published under the title: *A Man's Grief: Death of a Spouse*.

[30] Strains in the relationship developed, and by April 2000 the applicant and the respondent consulted a psychologist to discuss difficulties that they were experiencing. He saw them during 52 sessions, including 44 joint sessions, between April 2000 and June 2001, and the focus of the sessions was on "couple psychotherapy". One aspect was the respondent's continuing need for support in connection with his experience of loss. According to the psychologist, the divisions between the applicant and the respondent centred around the status of his deceased wife, his book and pictures of his deceased wife.

[31] Strains in the relationship were exacerbated by an incident in February 2001. For some time after this incident the applicant and the respondent continued to reside in the same apartment. The respondent travelled overseas for a fortnight in March 2001. In May 2001 he attended Europe on business. By the time he returned to Australia in late May 2001 the applicant was living elsewhere in Melbourne. The applicant made preparations to return to Queensland and arrangements were made for the removal of her property. The relationship ended in June 2001.

Property held at the end of the de facto relationship

[32] At the end of their de facto relationship the applicant had the following unencumbered property:

(a) St Lucia, Brisbane
(b) Toowoomba
(c) Mermaid Beach, Gold Coast

The applicant owned a car, artwork, jewellery and other personal possessions. She had approximately $66,000 in the bank. Her financial resources included superannuation.

[33] At the same time the respondent had properties that were encumbered at:

(a) Balmain, Sydney
(b) Hamilton, Brisbane
(c) Twigg Street
(d) Wisemans Ferry, New South Wales.

He had personal possessions, artwork and money in the bank. He also had superannuation. Two adjoining properties at Wisemans Ferry had been purchased by the respondent for $215,000 in October 1998. There is a dispute about the purpose of their acquisition. The respondent says that he purchased them after the applicant and he visited the area and he intended to build a weekender there one day or even retire there. The applicant says that the properties were purchased with a view to be being used as a retreat centre. In any event, nothing came of that due to their relocation to Melbourne and the end of their relationship.

Events after the relationship

[34] After the relationship ended the applicant lived on the Gold Coast. She used her professional qualifications and applied for jobs as a psychologist or counsellor. The respondent returned to live in Sydney. In July 2001 he obtained employment with the Commonwealth. He remains employed by the Commonwealth earning approximately $214,000 taxable income per annum. The respondent remarried in September 2004.

[35] The proceedings were commenced by claim and statement of claim on 11 June 2003. They have had a protracted interlocutory history. Initially the applicant claimed declaratory relief in respect of the Twigg Street property.

[36] In late 2004 the respondent made various formal complaints against the applicant to a number of professional bodies which are responsible for the registration, regulation and representation of psychologists and psychotherapists. The complaints were similar in substance. They alleged that the applicant had engaged in unacceptable professional behaviour by providing professional treatment to the

respondent whilst she and he were cohabiting in a personal relationship between April 1999 and March 2001. The complaints were investigated by each of the professional bodies and were found to be unsubstantiated. They found no evidence of unprofessional conduct and found that no professional relationship existed between the applicant and the respondent. For instance, the Victorian Registration Board found that the applicant provided practical and emotional assistance to the respondent and that the respondent acknowledged that there was never a client/psychologist relationship. The complaints made against the applicant caused her acute distress and affected her health.

[37] The applicant's taxable income for the years ended 30 June 2005, 30 June 2006 and 30 June 2007 was:

(a) $85,104 including gross fee income of $38,376;
(b) $29,557 including gross fee income of $27,400; and
(c) $35,539 including gross fee income of $34,475

respectively.

[38] The applicant sold her Mermaid Beach property and used the sale proceeds to purchase a property at Southport. She encumbered her Toowoomba property to the extent of about $64,000 and used $35,000 from this source towards payment of her legal costs. In recent years the applicant has accessed her superannuation and used in excess of $150,000 of it towards payment of her legal fees which total approximately $200,000.

[39] The respondent sold the Twigg Street property in June 2007. The sale price of $1,100,000 was used to pay out a mortgage debt of $405,432. The respondent paid capital gains tax of approximately $118,000 on a capital gain of approximately $490,000.[9] In evaluating the financial consequences of the acquisition of Twigg Street, account must be taken of the respondent's original contribution to its purchase price,[10] sums totalling $136,550 paid by him towards its renovation, his payment of outgoings and costs incurred in servicing the debt[11] and income derived by him from its rental. Rental income did not cover interest on the mortgage.[12]

[40] The blocks at Wisemans Ferry were sold in 2007 and 2008. The respondent made capital gains on each property.

The identification and valuation of the property, resources and liabilities of the parties at the date of hearing

[41] The parties' property, financial resources and liabilities at the date of the hearing can be summarised as follows:

[9] Transcript at 2-55 line 5; exhibit CT17 to affidavit of the respondent filed 5 September 2007.
[10] Affidavit of the respondent filed 5 September 2007, at par [45].
[11] *ibid*, exhibit CT15.
[12] *ibid*, at par [73].

APPLICANT		RESPONDENT	
St Lucia property	$1,000,000	Balmain property	$1,000,000
(free of capital gains tax)		Subject to debt	-$769,000
Toowoomba	(A) $237,000 (R) $237,500	Kiama property (equitable interest in half)	$337,500
Subject to debt	(A) $64,224 (R) $28,500[(1)]		
Southport property	$400,000	Bank accounts	$1,700
Car	$13,000	500 Rio Tinto shares	$55,000
Artwork	$6,000	Artwork	$61,000
Household chattels	$15,000	Household chattels	$10,000
Jewellery	$10,700	CGT Liability on sale Wisemans Ferry	-$48,409
Bank accounts	$11,412		
Total	**(A)$1,628,888** **(R)$1,665,112**	**Total**	**$647,791**

Superannuation		Superannuation	
Macquarie Super Fund	$220,000	Self managed super fund	$959,857
UniSuper	$39,000	Public Sector Super Scheme	(R) $220,000[(2)]
	$259,000		$1,179,857
Total	**(A)$1,887,888** **(R)$1,924,112**		**$1,827,648**

(1) This debt does not include a sum of about $35,000 spent on legal fees.

(2) This is based upon what is said to be the value of a pension of $22,558.58 per annum (subject to income tax) under a Public Sector Superannuation Scheme referred to in the respondent's updated statement of financial circumstances filed 10 September 2008: Transcript at 3-31.

[42] This table is based upon the submissions made by Counsel at the hearing on 17 September 2008 in the light of the evidence, including the parties' updated statements of financial circumstances. Mr Carmody SC stated on that occasion that he wished to submit a revised document in relation to assets and liabilities.[13]

13 Transcript at 3-70.

Despite a written request from the Court dated 29 October 2008, and a further request from the Court dated 20 November 2008, the document was not provided until 21 November 2008. It asserted that the respondent's superannuation totalled $1,270,648. The respondent's September 2008 statement of financial circumstances about the value of his superannuation was read at the hearing and was not the subject of challenge. In the circumstances, the respondent's superannuation total of $1,181,857 is adopted in the table.

[43] The applicant also sought to add to the table credit card debts of $3,928 (Visa), $6,000 (AMEX) and an estimate of unpaid tax for 2007/2008 of $3,250. The credit card debts were included in her statement of financial circumstances which was read, and should be taken into account. The estimated tax debt was not listed as a liability, and should not be included, however it does not make a material difference to the resolution of the matter. The difference of $500 between the value of the Toowoomba property is immaterial. The difference between the applicant's and the respondent's figure for the debt on the Toowoomba property is addressed below in connection with the "add back issue" concerning legal fees.

[44] The respondent's solicitor, in a letter responding to the applicant's late submission of suggested revisions to the table, made assertions concerning reductions in the value of the respondent's Rio Tinto shares and his superannuation since the date of the hearing. An attempt to raise this issue and introduce evidence by this means is inappropriate. The respondent made no application to re-open the evidence during the period of two months taken by the applicant to provide final submissions concerning the table of assets as at the date of the hearing. The hearing was conducted on the basis that the relevant issue was the parties' property, financial resources and liabilities at the date of the hearing. To permit the respondent to introduce evidence about the current value of his shares and superannuation would open the issue of the current value of the applicant's superannuation, and more generally the current value of the parties' other assets, including real property, which may have altered due to recent economic developments. The just resolution of the proceeding requires the agreed issue for determination, namely the valuation of the property, resources and liabilities of the parties at the date of hearing, to be determined. The various issues that were litigated should be determined without further delay in the interests of justice and because of the need for finality in litigation.[14]

[45] The table of the parties' property, financial resources and liabilities records assets totalling almost $4,000,000 at the date of the hearing. This was the basis upon which submissions were made.

The parties' property and financial resources at the start of the relationship

[46] The evidence does not permit an accurate comparison between the value of the property and financial resources of the parties at the start of the relationship and their value at the date of hearing because there was no evidence about the debt

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[14] *Finborough Investments Pty Ltd v Airlie Beach Pty Ltd* [1995] 1 Qd R 12 at 16-17.

secured against the respondent's properties at the start of the relationship. However, the following table provides an indication of their property and financial resources, and permits a comparison to be made between the value of specific assets and financial resources, such as superannuation, at that date and at the date of the hearing:

APPLICANT		RESPONDENT	
St Lucia property (Unencumbered)	$280,000	Balmain property (No evidence as to debt)	$680,000
Toowoomba (Unencumbered)	$75,000	Auchenflower property (equity)	$230,000
Half interest in Mermaid Beach property Subject to debt. A right of action for s.79 FLA property division with her second husband yet to be determined	$70,000	Hamilton property (No evidence as to debt)	$190,000
Car	$5,000	Western Australia No evidence as to debt	$700,000
Art	(A) $6,500 (R) $8,000		
Bank accounts	$59,000		
Chattels	$15,000		
Total	**(A) $510,500 (R) $512,000**	**Total**	**$1,800,000 (less debt)**
Superannuation		**Superannuation**	
AMP Super	$295,000	Q Super	$39,410
UniSuper	(A) $16,195		
Total	**(A)$821,845 (R)$807,000**		**$1,839,410 (less debt)**

The add back issue

[47] The applicant has expended approximately $200,000 of her capital to pay legal fees. Payment of those fees came from her superannuation and $35,000 of equity in her Toowoomba property. The respondent submits that this amount should be

notionally added back to the pool of divisible property and financial resources[15] on the basis that legal fees should be added back to prevent one party using common property to pay legal fees concerning a dispute over common property. The applicant opposes any "add back" relying upon the general principle that the court takes the property of the parties or either of them as it finds it at the date of trial and that adding back to the pool is the exception, not the rule. She further submits that if legal fees are added back into the asset pool then a notional liability to pay them will need to be recognised.

[48] The applicant relies upon the summary of relevant principles by Murphy J in *Challen and Challen,*[16] which I respectfully adopt. His Honour considered a number of authorities including the decision of the Full Court of the Family Court in *Chorn and Hopkins*[17] which concerned the use of funds to pay legal costs. The authorities emphasise the importance of the source of the funds used to pay legal fees when determining whether they should be added back.

[49] The property and financial resources that were used by the applicant to pay legal fees, namely superannuation and a house that existed at the date of separation, cannot be seen to be property in which the respondent had an interest on account, for example, of his direct financial contributions. The superannuation fund was at least partly generated by the applicant's pre-relationship and post-relationship contributions. The house in Toowoomba was owned by the applicant at the start of the relationship, was not used in the relationship and the respondent did not contribute to its acquisition, maintenance or improvement. The mere fact that the applicant has expended money realised from assets and financial resources that existed at the date of separation should not necessarily result in that expenditure being added back. What is crucial is an assessment of the reasonableness of the expenditure. In circumstances in which the respondent has no claim to the applicant's Toowoomba property or her superannuation fund it is inappropriate to "add back" the amount paid by her on legal fees.

[50] An additional reason not to do so is that the issue of the respondent's legal fees was not raised and it would seem inconsistent to add back the applicant's legal fees but not the respondent's. The respondent's legal fees may have been paid from the proceeds of the sale of property, been funded to some extent by loans secured against his property, been paid out of his income or been funded by a combination of these. In any event, the payment of his legal fees out of his assets, income and financial resources can be argued to have diminished the "asset pool". The same can be said of the applicant's payment of her legal fees.

[51] The preferable approach is to take the property of each of the parties, as it exists at the date of the hearing, in circumstances in which each party has incurred legal expenses and paid for them out of their respective resources. Although each party might be said to have an interest of sorts in the assets of the other on account of their respective contributions, the nature and extent of their assets and the absence

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15 *Townsend, In the Marriage of* (1995) FLC 92-569; *Farnel, In the Marriage of* (1995) 128 FLR 374; *NHC v RCH* (2004) 186 FLR 240.

16 [2007] FamCA 1292 at [72]-[81].

17 [2004] FLC 93-204 at [32]-[60].

of what can be regarded as common property makes it inappropriate to add back legal fees in order to value their property, financial resources and liabilities.

The property of the parties and contributions to it

[52] Assets that were owned by each party at the start of the relationship, such as the applicant's St Lucia home and the respondent's Balmain home, were retained by them at the end of the relationship. The collective assets of the parties at the date of the hearing, which totalled almost $4,000,000, were not a pool of assets built up by contributions, both financial and non-financial, during the course of a long relationship. No jointly owned property was acquired in the course of the relationship. It is difficult to specify the extent to which the value of the parties' collective current assets, or the value of individual assets, has been enhanced as a result of contributions, both financial and non-financial, during the period October 1997 to June 2001. Neither party favoured an asset-by-asset approach.[18] Both favoured a global approach with adjustments based upon percentage adjustments or a lump sum payment. Both parties recognise the difficulty of making a discretionary judgment in a case where the parties effectively kept their property separate throughout the course of a relatively short relationship and several years have passed since the relationship ended. However, this is the task that the court is required to undertake.

[53] The purpose of Subdivision 2 (Adjustment of property interests) of Part 19 of the Act is "to ensure a just and equitable property distribution at the end of a de facto relationship".[19] The court may make any order it considers just and equitable about "the property of either or both of the de facto partners" adjusting their interests.[20] Property that is made the subject of a property adjustment order may include property that was owned by one of the parties prior to the relationship. For instance, where it is just and equitable to order that an interest in property be transferred to a de facto partner who provided a substantial welfare contribution, the court may order that property that was owned by the other de facto partner and never used in the relationship be transferred. A gold bullion bar that was held in a safety deposit box by one of the parties before and throughout the relationship is an example.[21] There is an important distinction between the property that may be subject to a property adjustment order and the property that was contributed to the relationship. Accordingly, care is required in treating all the property of one of the de facto partners at the start of the de facto relationship as an "initial contribution". Such a term is apt to describe "a house, business or car which is actively used, maintained or changed into other property during the course of the relationship".[22] In *FO v HAF*[23] the term "initial contribution" was used to describe the financial contributions of a party "to the relationship". In *BLM v RWS*[24] the term "initial

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18 *cf. Norbis v Norbis* (1986) 161 CLR 513.

19 *Property Law Act* 1974, s 282.

20 *ibid*, s 286(1).

21 *cf. Baker v Towle* (2008) 39 Fam L R 323 at 335-336, [52]-[54], [2008] NSWCA 73, in which Basten JA provides other examples of property that should not be treated as a "contribution" within the meaning of s 20(1)(a) of the New South Wales Act.

22 *Baker v Towle supra* at [53].

23 *supra* at [35] and [37].

24 [2006] QCA 528 at [39]-[47].

contribution" described a contribution by a party to fund the acquisition of a business that was carried on in partnership by the de facto partners. In that case, it was appropriate to divide the "asset pool" after deducting the currently assessed value of the appellant's "initial contribution" to the acquisition of the business. In this case, it is inappropriate to treat all of the property of the parties at the commencement of the relationship as an "initial contribution" to the relationship. For instance, the applicant's Toowoomba property was not a contribution "to the relationship".

[54] The Act contemplates that the property of either or both of the de facto parties may be the subject of a property adjustment order, including property that was owned by one of the parties at the start of the relationship. However, this possibility does not support the conclusion that their separately owned assets are all "initial contributions" or contributions "to the relationship" that are pooled.

[55] The course of comparing the net value of the assets of the parties at the start of a de facto relationship with the net value of their assets at the end of the relationship has an obvious utility where the parties' assets are in some way pooled even though they are not jointly owned, or in circumstances in which the parties' incomes are pooled in order to service borrowings.[25] It has less utility where, as here, the parties did not pool their assets to acquire a property in which they lived or investment properties, and did not pool their income to meet mortgage payments on their respective properties. In any case, it is not possible to determine the value of their respective assets at the end of the relationship as a first step in determining the extent of any increase in their value during the course of the relationship, and the effect of their respective contributions (initial or otherwise) to that increase. The value of the parties' assets at the end of the relationship is not the subject of evidence.

[56] The value of their assets at the date of the hearing reflects, in part, movements in property markets in different parts of Australia between the end of the relationship in June 2001 and the hearing in September 2008, investment decisions, the extent to which properties were encumbered and numerous other factors which make it difficult to assess the extent to which their values, and increases in their values reflect contributions, both financial and non-financial, during the course of the relationship.

[57] One such contribution is what may loosely be described as "free accommodation". Each party enjoyed periods of "free accommodation" enabling them to save money and enhance the value of their assets. The applicant was able to rent her St Lucia home and not pay rent for substantial periods and this enhanced her financial

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[25] See, for instance, *Kardos v Sarbutt* (2006) Fam LR 550, [2006] NSWCA 11, in which each party brought significant assets to a relationship that lasted a little under three years. The parties were employed and pooled their incomes, including rental income, into a joint account that was applied to living expenses and mortgage payments. In such a case it may be appropriate for the parties' assets to be divided proportionally to the assets owned by each of them at the start of the relationship. *cf. Bilous v Mudaliar* (2006) 65 NSWLR 615, [2006] NSWCA 38; *Baker v Towle supra* at [62]. *HAG v MAW* [2007] QCA 217 was a case in which the parties took out a joint loan to cover debts on all of their properties.

position. The same can be said for the period that the respondent lived "rent free" at the applicant's home in St Lucia. The value of those contributions cannot be assessed with mathematical precision and it is difficult to place a monetary value on the extent to which those contributions between 1997 and 2001 have enhanced the value of the property and financial resources of each party at the date of hearing. However, the impossibility of calculation of the value of the "free accommodation" that one party provided to the other during the relationship, and the long-term financial benefit that was derived from it, does not relieve the court of doing its best to assess that contribution in determining contribution-based entitlements in accordance with the Act.

[58] The provision of "free accommodation" by one party to the other has a dual aspect under ss 291 and 292. It enables the recipient to rent their own house, or to not incur the expense of renting elsewhere. It contributes to the property or financial resources of the recipient. The rental income that is generated, or the expenditure of rent that is saved, can be used to acquire, conserve or improve their property[26] or to enhance their financial resources.[27] In addition to this financial aspect, the provision of "free accommodation" has a welfare aspect for the purpose of s 292. It literally puts a roof over the other party's head. It is not necessary or appropriate to separately value a notional rent in respect of the "free accommodation". Instead, it should be taken into account in an overall evaluation of the contributions made during the relationship.[28]

[59] In the case of contributions to the welfare of the de facto partners,[29] one is concerned with, amongst other things, an assessment of the contribution made by the applicant in performing household tasks and providing emotional support to the respondent. Again, there is a potential dual aspect. The contribution of the applicant can be said to have indirectly contributed to the respondent being able to undertake demanding, full-time employment, and to have contributed to his income and earning capacity,[30] and indirectly to the acquisition, conservation or improvement of his property[31] and to his financial resources[32], such as superannuation. It also has a welfare aspect which must be evaluated under s 292. It is important to avoid double-counting.[33]

[60] It is invidious to place a monetary value on contributions to welfare, and the Act does not require it. The assessment of contributions is not undertaken by reference to the opportunity cost to a party in providing services, or the commercial cost that would have been incurred if those services had been acquired in the market. For instance, the housekeeping services provided by the applicant in Sydney and Melbourne meant she could not continue to practice as a psychologist in Brisbane. Any property adjustment order which takes account of her contributions in this regard does not directly compensate the applicant for lost income or impairment of

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26 *Property Law Act* 1974, s 291(1)(a).
27 *ibid*, s 291(1)(b).
28 *Kardos v Sarbutt supra* at [78]-[81], [100].
29 *Property Law Act* 1974, s 292.
30 *ibid*, s 304.
31 *ibid*, s 291(1)(a).
32 *ibid*, s 291(1)(b).
33 *Baker v Towle* s*upra* at [48].

her earning capacity. Instead, the extent to which the de facto relationship has affected her earning capacity may be separately considered as a matter under Subsubdivision 4.[34] The assessment of the value of her contribution in providing housekeeping services is not undertaken by reference to the price that the respondent would have been required to pay to purchase housekeeping services in the market.

[61] The assessment of contributions to wealth and welfare under ss 291 and 292 is not an exercise in awarding compensation. As Warnick J stated in *Douglas & Douglas*[35] in the analogous situation of a property settlement under the *Family Law Act*, 1975 (Cth):

> "…I doubt that, at least without heavy qualification, intention and compensation are factors which ought influence alteration of property interests. In particular, I consider that the concept of compensation for income lost during a marriage (of itself) and compensation for a loss of living standard (of itself) are not factors which ought influence the outcome of a property settlement."

[62] The task of the court is not to compensate the applicant for disappointed expectations, for instance, the expectation that she and the respondent would remain together and establish a business providing "retreat services" to business executives. Detrimental reliance and disappointed expectations are not compensated under the Act or comparable provisions of the *Family Law Act*.[36] Instead, the applicant is entitled to a recognition of her contributions to the renovation of Twigg Street which were undertaken in the belief that it might be used in a business venture or become a home for her and the respondent.

[63] Because the parties to a de facto relationship usually do not conduct their financial affairs on the basis that one day, following a parting of the ways, each would be in a position to give accurate evidence as to the financial contribution made by each to the relationship, and as to the value of that contribution when the relationship ended, contributions cannot be determined on the basis of mathematical calculations.[37] The task is not akin to an accounting exercise.[38] However, the assessment of contributions, particularly financial contributions, requires attention to be given to the manner in which the parties, individually and together, conducted their financial affairs during the relationship.

Disputed questions of fact and the reliability of witnesses

[64] The assessment of contributions, both financial and non-financial, the assessment of relevant matters under ss 297-309, the determination of whether a property adjustment order should be made, and the terms of any order depend, in part, on a

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34 *Property Law Act* 1974, s 306.
35 (2006) FLC 93-300 at 81,072, [43].
36 *cf. Moore & Moore* [2008] FamCA 32 at [302].
37 *Hardman v Hobman* [2003] QCA 467 at [3].
38 *Kardos v Sarbutt supra* at [36]; *Manns v Kennedy* [2007] 37 Fam LR 489 at 499, [2007] NSWCA 217 at [62]-[66].

resolution of disputed questions of fact. The parties are agreed that it is unnecessary to resolve many of the disputed questions of fact that emerge from the affidavit material. One reason is that substantial parts of the affidavit material were directed at issues that became non-issues by the time of the hearing. For instance, the respondent denied until shortly before the hearing that a de facto relationship existed and much of the affidavit material was directed at that issue. The applicant originally sought a declaration concerning the extent of her interest in Twigg Street. This application was not pressed. The respondent filed substantial material in relation to the Twigg Street renovations and the applicant filed material in reply. In submissions the respondent acknowledged that the applicant made unmatched non-financial contributions in the form of unpaid labour in renovating Twigg Street over a period of months. The submissions acknowledged that she was "heavily involved in supervising and actually physically working on renovating the Twigg Street property between October and late December 1998 alongside a builder whose services were paid for by the respondent". The course of the proceedings and these concessions make it unnecessary to dwell upon the minutiae of evidence concerning the applicant's work in the renovation of Twigg Street.

[65] Both the applicant and the respondent were prone in their evidence to rewrite history, to exaggerate the extent of their contributions and to ignore or devalue the extent of the other party's contributions. Neither are reliable witnesses of events in their relationship.

[66] I formed an unfavourable view of the applicant's reliability as a witness. Many of her answers were unhelpful or evasive. For instance, she was unable or unwilling to clearly explain the circumstances under which she took "sick leave" from her employment in early 1997, or the reasons she saw a therapist between 1995 and 1997. Her evidence concerning financial matters was unreliable in many respects. For instance, she suggested in the course of her oral evidence that she received an inheritance of about $80,000 when, in fact, the amount was $48,902. On the eve of the hearing the plaintiff provided an updated statement of her financial circumstances which stated that the value of her St Lucia property was $650,000. The valuation agreed by the parties was $1,000,000. The applicant gave no satisfactory explanation as to why the value placed upon her interest in the property was so substantially below the property's value, and her evidence that she was not aware of general newspaper reports concerning trends in residential property was unconvincing. To like effect, her updated statement of financial circumstances gave a value of $125,000 to a property that she owned in Toowoomba. Its value was $237,500. No satisfactory explanation was given for this sizable disparity.

[67] Whilst denying that she had effectively retired as a psychologist by late 1997 and denying that she considered herself to be semi-retired at that time, she was unable to explain why she wrote a letter in late 1997 to a colleague in North America which stated that she had "just retired".[39]

[68] The respondent's evidence also was unreliable. Because of appropriate concessions made on his behalf by recently engaged counsel at the start of the hearing, the extent

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39 Exhibit 5.

of his cross-examination was limited. However, the fact that the course of evidence relieved the respondent from cross-examination on this evidence does not prevent the court from forming an adverse view of the reliability of substantial parts of his affidavit evidence. He denied that he was in a de facto relationship during his time at the applicant's St Lucia property,[40] or at any other time[41] and he made a general assertion[42] (not limited to the time at St Lucia) that he and the applicant "did not have a mutual commitment to a shared life with each other". This is inconsistent with the facts, and his belated admission of a de facto relationship. He denied that he said to the respondent in respect of the Twigg Street property words to the effect "I only want my money back. You can keep any profit."[43] However, I prefer the evidence of the applicant's daughter that he said words to this effect.

[69] The respondent's evidence is that there was never any suggestion that the applicant was to become involved in Retreat Services Pty Ltd.[44] Whilst I accept that she was not involved in discussions about the company's incorporation, the respondent did not acknowledge that it was envisaged that the applicant would play a role in this business. I find that both parties contemplated the establishment of a business venture in which the applicant would play a prominent role. Contrary to the respondent's denial, I find that he said to the applicant words to the effect that he wanted to work with the applicant and use her skills to set up a retreat centre to help others in the same way that the applicant had helped him.[45] I find that they discussed the joint business venture with Ms Tilyard. Contrary to the respondent's denial,[46] the properties that he acquired at Wisemans Ferry were in contemplation as a possible site for a retreat centre. I accept the evidence of the applicant that she undertook activities including accompanying surveyors, attending upon council offices, consulting architects and other steps in anticipation of developing a retreat centre at the Wisemans Ferry property.

[70] The respondent's evidence devalued or ignored the extent of his dependence on the applicant for emotional support.

[71] These unsatisfactory aspects of the respondent's evidence and the unconvincing manner in which he gave his evidence lead me to place little reliance on his evidence concerning matters in dispute.

[72] Because I regard both the applicant and the respondent as unreliable witnesses, it is not possible to express a general preference for the evidence of one over the other in relation to disputed questions of fact. The bitterness associated with the end of their relationship and the disappointment of earlier expectations about their future life results in neither party being able to give an objective account of their respective contributions and events during their relationship. It is impossible to reach any general conclusion about whether the truth lies closer to the evidence given by the

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40 Affidavit of respondent filed 5 September 2007 at par [32].
41 *ibid* at par [122].
42 *ibid* at par [198].
43 *ibid* at par [69].
44 *ibid* at par [39]. This may refer to involvement as a shareholder or director.
45 Affidavit of applicant filed 9 August 2007 at par [17]; *cf.* Respondent's affidavit at par [135].
46 Affidavit of respondent filed 5 September 2007 at par [77].

applicant or the evidence given by the respondent. Accordingly, I will resolve questions of fact on matters of substance in the course of considering the matters that I must consider under ss 291-309.

Contributions to property or financial resources: s 291

[73] The respondent lived at the applicant's St Lucia home after 1 October 1997 and prior to his relocation to Sydney in August 1998, and also when he returned from Sydney on weekends in late 1998. The applicant estimates her direct costs of food, electricity and other utilities, rates and other costs during this period were about $25,000. Of course, a substantial part of these costs would have been incurred by the applicant in any event. However, they provide some assistance in assessing the applicant's contribution in providing "free accommodation" to the respondent during this period.

[74] The applicant incurred some costs for which she did not seek reimbursement associated with the renovations to Twigg Street. These total approximately $1,500. She also incurred mobile phone costs in organising for the delivery of equipment and materials for the Twigg Street property.

[75] The work that the applicant undertook at Twigg Street is described in an affidavit of the builder, Mr Riebel, and there is no reason to not accept Mr Riebel's evidence since he was not required for cross-examination. In essence, the applicant attended the property each day during the renovation period from around 7:30 am and did not leave until it was dark. She gave directions to Mr Riebel and approved work. She was responsible for the hiring of and supervision of tradesmen at the property. She undertook demanding physical labour in connection with landscaping, rectification of a retaining wall, assisting tradesmen with transporting materials and securing the property. In Mr Riebel's words, she "worked like a labourer" and her efforts contributed to the work being effectively completed by Christmas 1998. I accept the applicant's evidence concerning the off-site work that she undertook in sourcing materials and fittings.

[76] The applicant's contribution to the renovation of Twigg Street enabled the property to be put in a condition to be advertised for sale and, when no sale eventuated, to be rented. The applicant did not contribute to the cost of acquiring Twigg Street, or outgoings such as mortgage repayments and rates. Her disappointed expectation that Twigg Street would be a base for a proposed joint business, and the respondent's words to the effect that he only wanted his money back and the applicant could keep any profit, are relied upon by the applicant in the context of contending that she indirectly contributed to the acquisition, conservation or improvement of the property. These matters may explain her motivation in working as she did on the property's renovation. However, her disappointed expectations about Twigg Street and any financial benefit that she hoped to derive from it do not qualify as a contribution under s 291. Her substantial contribution in connection to the property's renovation does. The respondent ultimately derived a capital gain from the sale of Twigg Street. The applicant's contribution to the Twigg Street renovation can be said to have contributed to the conservation or improvement of

the property and thereby assisted the respondent to derive rental income from it and an eventual capital gain. However, it was the respondent who made the major financial contribution to the Twigg Street property by funding its acquisition, almost all of the cost of its renovation, repayments of mortgages, payment of outgoings and sale costs. The respondent made the financial commitment associated with acquiring and improving the property and is entitled to the return on his investment arising from its sale 10 years later, subject to appropriate recognition of the applicant's role in connection with its renovation.

[77] A similar position applies in relation to the capital gain that the respondent realised in respect of the sale of the Wiseman Ferry properties. The applicant may have expected that these properties would become a part of a jointly conducted business, but this did not happen. Her contributions in connection with surveying the property, attending at council and consulting with architects and others in connection with the property and its potential future use as a retreat centre did not make a substantial contribution to the acquisition, conservation or improvement of the properties as events transpired, or enhance their capital value. Instead, these services relieved the respondent of the task of attending to these matters personally.

[78] The applicant used her motor vehicle in connection with the Twigg Street renovations. She also provided her vehicle for the benefit of the respondent in Brisbane, Sydney and Melbourne. This included driving the respondent to and from work and to appointments when they lived in Melbourne. The applicant estimates that her vehicle expenses in Melbourne were approximately $5,000.

[79] When they lived in Melbourne the applicant purchased fresh food at markets with cash. She did not keep receipts but estimates that the total cost was approximately $6,000. She may have been reimbursed for some of these costs.[47] Her relatively minor financial contributions assisted the respondent in his goal of building up his superannuation fund.

[80] She provided assistance at various times in connection with the respondent's relocation. This included assisting in connection with the sale of his Auchenflower unit in late 1997, cleaning the unit and assisting in some of the respondent's possessions being moved to her home at St Lucia. She assisted in the relocation from Sydney to Melbourne, including cleaning of the respondent's Balmain property so that it could be rented. She was primarily responsible for relocating from one unit to another in Melbourne. These contributions indirectly contributed to the respondent's financial position by facilitating the sale or rental of the respondent's property and thereby enhanced his property or financial resources. The applicant's contributions saved the respondent the cost of acquiring services in the market and that saving enabled the respondent to enhance his financial resources, including superannuation. The applicant's contributions in assisting the respondent to relocate have a dual aspect in that they can be said to have contributed

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47 *ibid* at par [93]. The general unreliability of each party's evidence, the absence of records and the understandable absence of cross-examination on such relatively minor matters of dispute, does not permit a conclusion to be reached about the extent of reimbursement.

to both his wealth and welfare. I take account of them in reaching an overall assessment of the applicant's contributions under Subsubdivision 3.

[81] The respondent's financial contributions to the applicant during the relationship were substantial. He provided "free accommodation" to the applicant in Sydney and Melbourne and paid for the majority of joint living expenses during the time they lived in Sydney and Melbourne. I have previously addressed his expenditure on overseas trips[48] and the acquisition of jewellery.

[82] There are disputed issues on the affidavit material concerning which party incurred costs in relation to relocation and storage. These conflicts were not the subject of cross-examination, do not involve substantial amounts of money and it is unnecessary to undertake a detailed accounting exercise in relation to them. I find that the applicant and the respondent each incurred costs associated with the relocation, and storage of their respective properties and that, to the extent that one paid for the transport or storage of the other's property, their contribution by way of expenditure did not significantly enhance the other party's financial resources.

[83] The "free accommodation" provided to the applicant in Sydney and Melbourne enabled her to rent her St Lucia property in early 1999. Her rental income supplemented her income from counselling services, enabled her to meet costs and expenses and to conserve her property and financial resources. Although the applicant contributed to some joint costs, such as the purchase of fresh food, it was the respondent's substantially greater salary that met the ordinary costs of living during the period the parties lived together in Sydney and Melbourne. The applicant earned relatively small amounts of income from psychotherapy services. The respondent's financial contribution saved the applicant expenses that she would otherwise have incurred on ordinary living expenses. Had she not derived the benefit of the respondent's financial contributions she would have been required to meet these costs from her rental and other income and her savings. At the start of the relationship she had $59,000 in the bank. At the end of the relationship she is said to have had about $66,000 in the bank. The applicant inherited approximately $49,000 in about late 1999 to supplement her savings. She used $15,000 from her savings to acquire full title of the Mermaid Beach property pursuant to property settlement orders. Account needs to be taken of the use of her savings in this regard and the addition to her savings from the inheritance in order to assess the extent to which the applicant's savings were used during the relationship to support herself and certain joint expenses that she paid. The conclusion is reached that the applicant used about $27,000 of her savings to support herself and for joint expenses.[49] In circumstances in which the applicant earned relatively small amounts of income from professional fees, the applicant's limited resort to her savings over the length of the relationship reflects the fact that the main source for payment of her living expenses was the respondent.

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48 The respondent paid $52,122 for the cost of the overseas trips between late 1997 and early 2001.

49 $59,000 + $49,000 - $15,000 - $66,000 = $27,000; *cf* Respondent's submissions, Transcript at 3-19, line 20 – 3-20, line 22.

[84] The extent of the respondent's financial contribution during the relationship cannot be calculated precisely, nor can the extent to which his contribution towards joint expenses, overseas trips and the provision of "free accommodation" contributed to the conservation of the applicant's existing property or her acquisition of full title to the Mermaid Beach property. It is preferable to treat her acquisition of that property as something that was paid for out of existing savings rather than something that was only possible because of savings which she achieved because of the respondent's contributions. Whilst it is not possible to undertake an accounting exercise in respect of the respondent's financial contributions and the extent to which they were offset by the applicant's financial contributions, the respondent's financial contributions substantially exceeded the applicant's financial contributions. His contributions to the financial needs of the parties, his funding of overseas trips and the provision of "free accommodation" during the time that the parties lived in Sydney and Melbourne assisted the applicant to retain her existing properties, to rent her St Lucia property and not resort to her savings or other property to the extent that she would have been required had the respondent not provided this level of financial support.

Contributions to welfare – s 292

[85] As I have observed, the provision of "free accommodation" by one de facto partner to the other can constitute a contribution to the property or financial resources of the other party for the purposes of s 291. It also contributes to the other party's welfare and, accordingly, must be considered in the context of s 292. The provision of "free accommodation" should not be double counted. In this case, there was a period starting on 1 October 1997 during which the applicant provided the respondent with "free accommodation" followed by periods in which the parties lived together in Sydney and Melbourne and during which the respondent provided the applicant with "free accommodation".

[86] The applicant made significant contributions as a homemaker. Throughout the de facto relationship the applicant provided household services including cooking, washing and cleaning. In addition to her contribution to the purchase of groceries, food, pharmaceutical items, items of clothing and other household necessities, she contributed her time as a homemaker by performing domestic duties. The respondent made minimal contributions to domestic tasks. The applicant contributed her time to relocating the respondent from his Auchenflower flat and later relocations to Sydney and Melbourne.

[87] The applicant provided emotional support to the respondent which assisted him in his transition from one job to another and in undertaking demanding full-time employment. She also provided emotional support to the respondent in dealing with his continuing psychological adjustment to the loss of his wife. This included providing moral support and some practical support in connection with his book, including reviewing his manuscript, suggesting ideas to him and introducing him to others who were able to advise him in connection with its publication.

[88] There is a dispute about whether the respondent experienced conflicts in his workplace and the extent to which the applicant provided advice and assistance which aided him in dealing with his responsibilities at work. The applicant contends that she assisted the respondent to control "his unpredictable and negative outbursts", and that severe workplace problems that he experienced whilst employed in Queensland left him in tears and in moods which required constant consolation and attention. Ms Adermann, who had the opportunity to observe the respondent at work during this period, gave evidence that she never observed the respondent to suffer from "unpredictable or negative outbursts or tears and mood swings". Ms Adermann commenced employment as the respondent's Executive Assistant in Melbourne in February 2000 and remained in that position until February 2001. She attended lunches and coffee breaks with the applicant and discussed personal issues concerning the applicant's relationship with the respondent. Her evidence, which was not subject to cross examination, is to the effect that during the time that she worked with the respondent in Melbourne the applicant made demands on the respondent's time, telephoned him incessantly at times and engaged in other behaviour that had an adverse impact upon the respondent's work. Ms Adermann says that she observed the respondent increasingly went home during the day, missed meetings, and worked through the night and early hours of the morning to meet deadlines for reports.

[89] Another deponent, Ms Read, gave evidence that during the time that she worked with the respondent between 1996 and 1998 in Queensland she did not witness the respondent engage in unpredictable or negative outbursts or display the moods that the applicant alleges. I accept the evidence of Ms Adermann and Ms Read that the applicant did not display unpredictable or negative outbursts, tears or mood swings in their presence during the time that he was employed in Queensland. The applicant's evidence is an unreliable source to assess the respondent's behaviour at work. However, the evidence leads me to conclude that the respondent undertook emotionally demanding work in Brisbane, Sydney and Melbourne. His work in Brisbane included an attempt to significantly alter the culture of the Department of which he was Director-General and he faced the demands that are placed upon the Director-General of any government department. The respondent's employment in Sydney and Melbourne also was demanding. There is some evidence of circumstances in which the respondent experienced difficulties with his superiors, and the respondent does not deny this.[50] It is unnecessary and impossible, given the state of the evidence, to reach detailed findings concerning the extent to which the respondent's employment was affected by workplace conflicts. The evidence does not support a finding that the respondent engaged in unpredictable and negative outbursts at work.

[90] The respondent's depression and grief reaction over the loss of his wife and the demands that were placed upon him in his employment required substantial emotional support. He disputes the applicant's evidence concerning the extent to which she provided him with advice and support in connection with his employment and denies that she helped him in any way in his work. In this regard, I find that the applicant has overstated the extent to which she provided advice and support in relation to workplace issues.

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[50] Affidavit of the applicant filed 9 August 2007 at par 72(e).

[91] The extent of emotional support that the applicant provided the respondent is the subject of assertion and counter-assertion by the parties in their affidavits. The applicant says that she "utilised her psychological skills to assist the respondent with his problems regarding work conflict and personal psychological problems". The respondent goes further than simply denying that the applicant utilised her psychological skills to assist him with problems regarding work conflict. He denies that her skills assisted him with personal psychological problems. I do not accept his denial. Based upon the parties' oral evidence, I find that the applicant provided emotional support, including skills she possessed as a trained psychologist and physiotherapist, that assisted him with his personal psychological problems. Given the extent of those problems and the growing estrangement between the applicant and the respondent in the latter part of their relationship, the assistance that the applicant gave did not enable him to overcome his grief and depression.

[92] It was not simply the respondent who required psychological assistance. The applicant and the respondent together sought assistance from a psychologist, Mr Fullerton, in Melbourne commencing in April 2000. Their relationship, not simply the respondent's pre-existing grief and depression, was the "primary preoccupation" of the sessions with Mr Fullerton.[51]

[93] The fact that the applicant's attempts to assist the respondent with his personal psychological problems met with limited tangible results presents an issue in terms of s 292 of the Act as to whether efforts to assist the respondent with his personal psychological problems and to address problems in their relationship should be treated as a contribution to the welfare of the de facto partners in circumstances in which the respondent's psychological problems did not improve. There seems no reason in principle why they should not be.

[94] The respondent submits that the parties "provided each other with varying levels of company, affection and emotional support throughout the duration of their relationship". This is true, but it fails to acknowledge the far greater contribution of the applicant to the respondent's emotional support than he contributed to her emotional support. Although I do not accept that the respondent "begged" the applicant to follow him to Sydney, and then to Melbourne, she did follow him for reasons that included a commitment to the relationship, including the care and emotional support of the respondent. Even if the applicant's emotional support for the respondent did not significantly contribute to his income, earning capacity and wealth,[52] s 292 is not confined to assessing the economic benefit derived from the applicant's contribution to the respondent's emotional welfare. I find that during the course of the relationship the applicant provided substantial emotional support to the respondent. During the early stages of the de facto relationship the applicant's support was appreciated by the respondent, as evidenced by his interest in psychoanalysis and discussion about the establishment of a retreat centre. I accept the evidence of the applicant that the respondent said words to the effect that he wanted to pursue such a venture in order to enable others to receive the kind of assistance which the applicant had provided to him.[53]

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51 Exhibit 9.

52 *cf.* ss 291 and 304 of the Act.

53 Affidavit of the applicant filed 9 August 2007 at par 17.

[95] The applicant's provision of transport for the respondent has a welfare component. I accept the evidence of Ms Adermann that in Melbourne the respondent worked through the night and early hours of the morning to meet deadlines for reports. The respondent's book referred to "midnight escapades". The applicant gave evidence that it was a "common occurrence" when they were living together in Melbourne for the respondent to have her drive him to work at midnight and then collect him at 4:00 am. She says that she did this two or three nights a week.[54] The respondent says that this is an untruth, that he borrowed her car, and that there were only a handful of occasions when he went to work in the middle of the night.[55] Given my reservations about the reliability of the parties' evidence and the tendency of the applicant to exaggerate her contribution, I do not accept that the applicant drove the respondent to and from work in the middle of the night with the frequency that her evidence states, namely two or three nights a week. However, I find that the respondent's evidence is also unreliable and understates the frequency with which he went to work in the middle of the night. The truth lies somewhere in the middle and, to the extent that the applicant provided transport to the applicant to go to and from work at odd hours, it adds to the services that she generally provided in transporting him to and from work at more conventional hours and to appointments.

[96] I find that the respondent provided only limited emotional support to the applicant throughout the duration of their relationship. The conclusion that I reached from the evidence as a whole was that the respondent continued throughout the relationship to experience grief and depression arising from the loss of his wife, and was absorbed in his problems and completing a book about his grief. Notwithstanding her close friendship with the respondent, I accept the evidence of Ms Tilyard that the respondent appeared to be lacking in energy and was generally negative. Ms Tilyard referred to him as a "sad sack"[56] and this seems an apt description of his psychological condition during most of the period of the de facto relationship. The applicant attempted to provide emotional support to the respondent in order to overcome his emotional problems. The extent of her contribution to his and their welfare was substantial in circumstances in which the respondent relocated his employment from Brisbane to Sydney and then to Melbourne and, at all times, worked in demanding positions.

[97] The respondent's contribution to the applicant's welfare, including providing her with "free accommodation" in Sydney and Melbourne, arranging for space in Sydney and Melbourne to be available for her use as a psychologist and in funding a number of overseas trips, constitutes a significant contribution to the applicant's welfare.

[98] Overall, the applicant made a far greater contribution to the respondent's welfare than the respondent made to hers. She followed him to Sydney and Melbourne and, at all times during the relationship, attempted to provide what she thought was appropriate emotional assistance with the respondent's personal psychological problems. The applicant's contribution to the respondent's welfare was substantial

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54 Transcript at 1-73.

55 Transcript at 2-93.

56 Affidavit filed 13 December 2007 at par [20].

and should not be discounted significantly because the respondent's psychological condition did not significantly improve.

[99] In assessing the applicant's contribution the court is not engaged in an exercise in directly compensating her for the opportunity cost of not remaining in Brisbane and undertaking work there as a psychologist in private practice. Instead, her contribution is assessed having regard to the fact that she made a substantial commitment to a shared life with the respondent, acted as a homemaker and provided emotional support to him. As the respondent points out, there were some attractions to the applicant in relocating to Sydney and then to Melbourne. She had a good friend in Sydney and recognised the opportunities that existed in Sydney and Melbourne to develop her practice. To the extent that her relocation to Sydney and Melbourne and the disruption to her psychological practice in Brisbane in doing so was a source of disadvantage to her in her career, these aspects will be addressed in the context of s 306 (effect of relationship on earning capacity) and s 309 (other facts and circumstances that the court considers the justice of the case requires to be taken into account).

Effect on future earning capacity – s 293

[100] It is not suggested that any proposed order will have any significant adverse effect on the earning capacity of the parties.

Child support – s 294

[101] No issue of child support arises.

Other orders – s 295

[102] No other orders of the kind referred to in s 295 apply.

Assessment – ss 291-295 factors

[103] The assessment of what might be described as the contribution-based entitlements of the parties under Subsubdivision 3 arises in the context of a relatively short relationship.[57] The fact that the relationship was relatively short means that the court is not required to address the so-called "erosion principle" that is said to apply in the context of long relationships in which one party makes a disproportionately large "initial contribution". As already explained, this is not a case in which either or both parties made a substantial initial financial contribution by way of a dwelling house in which they resided during the course of their relationship or in which the parties jointly acquired a house in which to live or investment properties. As a

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[57] *cf. NFO v PFA* [2005] QSC 176 at [52] citing *Quinn & Quinn* [1979] FLC 90-677 at 78,615. In *NFO v PFA* it was said that the fact that the de facto relationship was only about three years justifies "a close examination of the parties' financial contributions to the relationship".

result, the contribution-based form of assessment which commended itself to courts in other cases is not necessarily appropriate in this case. For instance, this is not a case in which the current value of one party's substantial initial financial contribution should be deducted from the total value of the "asset pool" and the balance apportioned.

[104] The fact that the parties' relationship was a relatively short one does not require primacy to be given to the financial contributions referred to in s 291 over the welfare contributions referred to in s 292. The parties' respective contributions must be assessed, and the Act does not require the welfare contributions referred to in s 292 to be given a net monetary value to be offset against the monetary value of contributions under s 291. The diligent application of both parties to their respective roles as breadwinner and homemaker should be recognised.

[105] The court is not required to undertake a reductionist process analogous to the taking of partnership accounts by examining every alleged "contribution" of the kinds described in s 291 and s 292 with a view to putting a monetary value on each in order to reach an accounting balance one way or the other.[58] Rather, the court is required to make a holistic value judgment in circumstances in which some contributions are not capable of evaluation in monetary terms.[59]

[106] The length of the relationship is a matter to consider in a variety of contexts, and it is referred to in s 305 as a matter which the court must consider to the extent that it is relevant in deciding what order adjusting interest in property is just and equitable. It will be necessary to consider its implications at the third stage of the process when considering matters such as the effect of the relationship on the earning capacity of each of the parties,[60] and the contributions made by either of the parties to the income and earning capacity of the other party.[61] As the respondent submitted, the shorter the relationship, the less discernable the contribution to the ongoing earning capacity of the other. The length of the relationship will be later considered in connection with matters referred to in Subsubdivision 4. It is important to not engage in double-counting by bringing the same matters into account in assessing contribution-based entitlements. For instance, the disruption to the applicant's practice as a psychotherapist by the relationship, including her relocation to Sydney and Melbourne and the devotion of her energies to housekeeping and emotional support of the respondent, had certain consequences for her which remain to be assessed by reference to the effect of the relationship on her earning capacity (s 306) and the economic consequences of the relationship on her property and financial resources.[62] But these consequences are not as significant as they might have been if the relationship had been a much longer one. Rather than adjust for these consequences at the second stage of the four step process, or as the applicant contends is appropriate, by making an overall assessment without

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58 *Kardos v Sarbutt supra* at [36].

59 *ibid* at [36]-[37]; *Delany v Burgess* [2007] NSWCA 360 at [82]; Although the New South Wales legislation differs in material respects to the Queensland legislation, observations made in the cases about the assessment of contributions are apposite in determining what is just and equitable in relation to contributions under the Queensland Act.

60 *Property Law Act* 1974, s 307.

61 *ibid*, s 304.

62 *ibid*, s 298 and s 309.

going through that process, it is preferable to take account of these matters at the third stage.

[107] The length of the relationship, and the fact that several years have passed since it ended, are relevant in determining any appropriate percentage adjustment at the end of the second stage of the process. As significant as the applicant's contribution as a homemaker during the relationship was to the respondent's ability to devote himself to full-time employment, this contribution was over the period of a few years, not a few decades. She assisted him to earn a substantial income and to contribute to superannuation, but did so for only a few years. This is not a case of a homemaker and supportive partner whose welfare contribution launched the other partner on a successful career early in his professional life and supported him for decades, with a major long-term contribution to the parties' pool of assets.

[108] The passage of more than seven years since the relationship ended must be taken into account. It must be taken into account in the applicant's favour in some contexts including an assessment of the extent of the economic consequences to her of disruption to her career several years ago and the impact which this has on her current asset position. The passage of time since the end of the relationship also must be taken into account in that the current assets and their capital growth over the seven years prior to the hearing were, in large measure, reflective of assets which the parties always owned. A party has a strong claim to capital growth in assets that were not used in the relationship, such as an investment property which was unencumbered or to which the other party made no direct or indirect financial contribution in meeting mortgage payments and outgoings, or an asset that was used for a relatively short time in the relationship, such as the applicant's St Lucia home or the respondent's Balmain home.

[109] A further aspect of the need to recognise the passage of seven years after the relationship ended relates to the income which the respondent derived during that period and the contribution of that income to his assets and financial resources, including superannuation. This involves a recognition that the applicant's welfare contribution during the relationship did not significantly contribute to the respondent's wealth-generation over the last seven years. During those years he has been a highly paid Commonwealth government employee, had a high earning capacity and been able to contribute to superannuation. His ability to do these things in the last several years of full-time employment is not something to which the applicant significantly contributed. It is largely a function of his age, his pre-existing earning capacity and his pursuit of full-time employment. He always had the capacity to earn a significant income in the final years of his career, and I do not consider that it is just or equitable in determining contribution-based entitlements to find that the applicant has an entitlement to the wealth generated by the exercise of the respondent's earning capacity over the last seven years.

[110] The applicant contends that her overall contribution to the relationship was neither matched nor offset by the respondent's. The main factors submitted in support of a property adjustment order in her favour in terms of contributions are:

(a) she used of her professional skills and training to help the respondent with work-related and other conflicts, and his chronic emotional and personal problems of depression, anger, grief and moodiness;
(b) she performed almost all domestic tasks unassisted;
(c) her supervision and assistance in renovating Twigg Street;
(d) her practical assistance and moral support in relationship to the respondent's book.

[111] She also submits that her current and future earning capacity is reduced due to relationship-related matters, namely:

(a) the disruption to establishing and maintaining her private practice as a result of relocating to Sydney and Melbourne as well as the demands of the Twigg Street renovations;
(b) the damage caused to her health and reputation by the making of unsubstantiated complaints by the respondent about her to professional bodies.

[112] The applicant submits that the four step process is not mandated, that the process under Part 19 is discretionary, not rule based, and that the guiding principle of contribution reflects the underlying object of economic justice after separation. She submits that the function of a contribution-based scheme such as Part 19 is to mitigate "adverse economic relationship related post-separation disadvantage". Mr Carmody SC submitted that the appropriate approach, or outcome, and one that should be reached in any event at the end of the third step in the process is for an adjustment in favour of the applicant of at least 10 per cent, or $400,000 which would take into account her contribution to the current pool, discretionary matters based on fairness including her health, age and current earning potential, and considerations of justice and equity. The applicant's submissions did not follow the four-step approach. It was submitted, for reasons that are not entirely clear, that one would arrive at a figure of $400,000 by using the four-step approach but that the process advanced in the applicant's submissions would result in a property adjustment order of $500,000.

[113] The applicant acknowledged that the respondent might have been entitled to a 50/50 division if the matter had been determined shortly after the relationship ended but because the applicant's assets had increased over the last seven years more than the respondents, her contribution to the pool was greater than his so that her entitlement to the pool would be between 55 and 60 per cent. After taking account of the applicant's health and other discretionary considerations that arise as a result of the relationship, it was submitted that the applicant would be entitled to an additional ten per cent. This was said to involve a process of considering contributions to wealth and welfare and supplementing an adjustment in the applicant's favour because of the economic disadvantage that she has suffered for the last seven years arising out of the relationship. In making this submission the applicant agreed with the respondent's submission that the court's task is made difficult due to the long lapse of time between separation and the hearing.

[114] On the issue of contribution, the applicant recognised that her submissions that "qualifying contributions" include a compensation type element for opportunity

losses incurred in making a positive contribution to the relationship were not supported by judicial interpretation of comparable contribution-based legislation.

[115] The applicant's ultimate submission in terms of contribution was that the applicant probably made a greater overall contribution to the pool of approximately $4,000,000 than the respondent, particularly because of the increase in her asset values since separation.

[116] As previously indicated, I consider the appropriate approach is to assess the value of contributions, both to wealth and welfare, in determining an appropriate adjustment based on ss 291 and 292 and to later consider the economic consequences of the relationship for the applicant's career and earning capacity and the effects of the respondent's complaints to professional bodies. I shall deal, in turn, with the contributions of the applicant, which she contends were neither matched nor offset by the respondent's contributions. The first is the use of her skills and training and the overall emotional support which she gave to the applicant's personal problems. For the reasons previously given, it warrants substantial recognition although it is impossible and inappropriate to place a monetary value upon it. The fact that the applicant performed almost all domestic tasks unassisted is similarly deserving of substantial recognition.

[117] The applicant's contribution in supervising and assisting in renovating Twigg Street is acknowledged in the respondent's submissions. I find that the applicant encouraged the respondent to purchase this property and, as is undisputed, she made a significant contribution to its improvement. The value of her contribution is not to be determined on an asset by asset basis. However, reflection on what an appropriate assessment would be if contributions were determined on an asset by asset basis is a useful check. An assessment of the applicant's contribution is not based upon what the respondent would have been required to pay a builder or someone else to undertake the supervision and labouring work which the applicant undertook in late 1998 and for a short period in early 1999. It is not based upon what the applicant would have earned if she had pursued full-time employment or sought and obtained patients in her psychotherapy practice for these several weeks. Regard should be had, however, to the cost that the respondent incurred in having a builder on site for most of this time so that any nominal assessment of the applicant's contribution is not out of proportion to the real value of her work. The respondent submitted that at best for the applicant she would have a claim of between five and fifteen per cent of the capital gain which he ultimately achieved on the sale of Twigg Street. I agree and consider that, having regard to the respondent's major contribution towards the acquisition and holding costs of Twigg Street, the duration of the relationship and the fact that the capital gain was achieved only as a result of a sale in 2007, that an asset by asset approach would entitle the applicant to no more than 10 per cent of the capital gain of approximately $490,000 that the respondent achieved upon his investment.[63]

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63 This was estimated by the respondent's adviser to be $489,987: Exhibit CT-17 to affidavit of the respondent filed 5 September 2007.

[118] The practical assistance and moral support that the applicant provided in relation to the respondent's book forms part of her general contribution to his welfare.

[119] The applicant's contributions include matters previously discussed in the context of s 291 such as the provision to the applicant of "free accommodation" at St Lucia, use of a motor vehicle, the cost of fresh food in Melbourne and miscellaneous items of expenditure.

[120] As against these matters, the respondent points to the substantial, direct financial contribution that he made during the relationship out of his income to the support of the applicant, meeting the cost of overseas travel, the purchase of jewellery and the advantages that flowed to her as a result of having "free accommodation" supplied to her when the parties lived together in Sydney and Melbourne. The advantage of such "free accommodation" was that the applicant did not have to pay the cost of her own accommodation and gained the advantage of being able to rent her home at St Lucia to her long term benefit. The applicant relies upon the limited resort that the applicant had to her savings despite only receiving a relatively small income from the provision of psychological services.

[121] As a result, the respondent submits that the applicant made a very limited indirect contribution across the length of the short relationship to the respondent's income and earning capacity by undertaking the work at Twigg Street for several months and by maintaining a home throughout the relationship that freed the respondent to continue working. The respondent further submits that his contributions to the financial needs of the parties allowed the applicant to retain her capital assets during the relationship without having to access any of that capital to meet those needs during that time.

[122] The respondent acknowledges that following the orthodox approach at the second stage and notionally fixing a percentage division is "extremely difficult". He submits that, if it is to be done, it should not be done on the basis of the percentage proportion that their respective current property and financial resources bear to the total pool, as that would not give proper weight and recognition to the fact that the respondent's total contribution during the relationship was greater than the applicant's.

[123] I find that the respondent made a substantially greater financial contribution to the relationship than the applicant, even after account is taken of the direct and indirect financial contribution that the applicant made to the Twigg Street renovation, "free accommodation" provided at St Lucia, her motor vehicle's use and her contribution to certain joint expenses. The respondent's payment of a large proportion of joint living costs and travel costs represents a substantial contribution. The provision of "free accommodation" to the applicant in Sydney and Melbourne enabled her to rent her home at St Lucia to her long-term financial advantage.

[124] I accept the respondent's submission that the substantial financial contributions made by the respondent are not offset by those contributions, both financial and welfare, made by the applicant. As a result, any notional adjustment to their current

property interests at the end of the second stage of the process would be an adjustment in the respondent's favour. However, I do not accept the respondent's submission that such an adjustment would be in his favour by 10 to 15 per cent. An adjustment of this order would result in a very substantial transfer to the respondent. Ten per cent of the total asset pool of approximately $4,000,000 is $400,000. The difference between the overall contributions of the parties does not justify an adjustment in an amount anywhere near that figure. The approach of making a percentage adjustment, with all of the difficulties which the parties acknowledge, is appropriate. I consider that an appropriate adjustment based upon an assessment of the respective contributions of the parties under ss 291 and 292 is in the order of 2.5 per cent or $100,000 in the respondent's favour.

Third stage adjustment based on the factors in ss 297 - 309 of the Act

[125] The court must consider the matters mentioned in ss 297-309 to the extent that they are relevant in deciding what order adjusting interest and property is just and equitable. In considering the specific matters contained in ss 297-308 and, in accordance with s 309, "any fact or circumstance the court considers the justice of the case requires to be taken into account" it is important not to treat these matters as providing a basis to achieve "economic justice" unrelated to the purpose of Part 19 and the purpose of Subdivision 2 in particular, which is to "ensure a just and equitable property distribution at the end of a de facto relationship". There is no obligation to maintain the former partner to a de facto relationship. It is appropriate to first identify those matters in ss 297-309 which are relevant in the present case.

[126] The age and health of the de facto partners are relevant.[64] The resources and employment capacities of the parties are relevant.[65] Neither party has the care of a child of the parties.[66] The respondent has remarried. The respondent's statement of financial position, which was read, says that he has a dependent wife and details their expenses. The applicant's statement of financial circumstances, which was read, details her expenses. I take account of the parties' commitments. [67] The issue of government assistance under s 302 does not arise. There is no suggestion that s 303 arises for consideration, and any order is unlikely to materially affect the standard of living that is reasonable for each of the parties in all of the circumstances.[68]

[127] The contributions made by the applicant to the income and earning capacity of the respondent has already been referred to in the context of the contribution that the applicant made to the respondent's welfare during the course of the relationship. Her work in relation to the Twigg Street renovation also aided the derivation by the respondent of income and his earning capacity.[69] These contributions have already been considered and do not require further consideration in the context of s 304.

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64 *Property Law Act* 1974, s 297.
65 *ibid*, s 298.
66 *ibid*, s 299.
67 *ibid*, s 300-301.
68 *ibid*, s 303.
69 *ibid*, s 304.

[128] As previously discussed, the length of the de facto relationship[70] is a relevant matter in relation to contributions under ss 291 and 292 and also certain relevant matters under Subsubdivision 4.

[129] A relevant matter is the extent to which the de facto relationship has affected the earning capacity of the parties.[71] The applicant places significant reliance upon the allegation that her current and future earning capacity is reduced due to the disruption that the relationship caused in establishing and maintaining a private practice as a result of relocating to Sydney and Melbourne, and the health and reputation consequences of the making of complaints by the respondent about the applicant to professional bodies. If the making of those complaints and their alleged impact on the applicant's earning capacity was not causally related to the de facto relationship so as to arise for consideration under s 306, then it is a fact or circumstance that I consider the justice of the case requires to be taken into account.[72]

[130] No submission was made in relation to any cohabitation by either party with another person.[73] No issue arises in relation to child maintenance.[74]

Age and health

[131] The applicant is currently 66 years of age. She claims to have suffered "physical, psychological and financial trauma" from the respondent's treatment of her. She says that her physical and mental health suffered as a result of the relationship. Her affidavit evidence is that she sought medical advice in relation to her condition and was diagnosed as suffering from post-traumatic stress disorder from which she is unlikely to recover.[75] A late application by the applicant for leave to rely upon medical evidence was not granted at the outset of the hearing due to the absence of a satisfactory explanation concerning non-compliance with court directions and potential prejudice to the respondent by its late reception.[76] The applicant was not cross-examined about her affidavit evidence concerning the medical advice that she had sought. Despite the absence of corroborative medical reports, I accept that the applicant has suffered emotional and psychological problems in recent years, particularly as a result of the complaints that were made to professional bodies about her. I accept that the applicant emerged from the relationship in mid-2001 emotionally exhausted and distressed. There is evidence independent of her supporting this from Ms Tilyard. The duration of her condition is uncertain, since by August 2002 the applicant said in a letter seeking employment that the state about her body and health were "excellent".[77] There probably is an element of overstatement about the state of her health in mid-2002 in this letter since the applicant was interested in gaining employment and it is understandable that she

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70 *ibid*, s 305.
71 *ibid*, s 306.
72 *ibid*, s 309.
73 *ibid*, s 307.
74 *ibid*, s 308.
75 Affidavit of the applicant filed 9 August 2007 at par [165].
76 Transcript at 1-31 – 1-37.
77 Exhibit 6.

would not wish to accentuate any residual problems that the relationship had caused to her health. However, there is no satisfactory evidence that the applicant's health, including her psychological health had not improved more than a year after the relationship ended.

[132] In late 2003 the applicant began receiving notice of complaints that the respondent had made about her professional behaviour. The first complaint of which she became aware was in September 2003, a few months after the applicant commenced proceedings in this court. A series of formal complaints was lodged with various professional associations and psychologists' registration boards in late 2004 and 2005.[78] The applicant says that the making of these complaints and the need for her to make detailed legal responses to the respondent's allegations through her professional indemnity insurer destabilised her, caused her professional and personal embarrassment and affected her emotionally. Although the complaints made by the respondent were dismissed as being without foundation, the applicant says that she continues to suffer from the effects of these complaints. A complaint to the Queensland Psychotherapy Association was investigated and on 20 July 2005 the applicant was advised that no further action would be taken. On 20 April 2005 she was advised by the Psychologists Registration Board of Victoria that the Board had not found evidence of unprofessional conduct. The Australian Association of Group Psychotherapists advised the applicant on 27 June 2005 that no disciplinary action would be taken against her. On 27 March 2006 the Psychologists Board of Queensland notified the applicant that no disciplinary action would be taken. Relevantly, the respondent's complaint to the Queensland Board was lodged on 27 October 2005 notwithstanding the outcome of his earlier complaints. The applicant gave oral evidence about the effect of the complaints upon her personally and professionally. Despite my general reservations about the applicant's evidence, I accept that the complaints were the cause of substantial distress to her, especially during the period that they remained unresolved. I accept her evidence that they came at a time when she was attempting to stabilise herself emotionally and resume her professional practice and that the complaints caused her great distress and upset. Although the complaints were dismissed, I accept that the applicant has a concern that they continue to affect her reputation since at least some people may believe that there was substance in them. To address her emotional problems the applicant sought a variety of remedies in order to restore her confidence, including seeking help from a psychiatrist, Dr Wilkie.[79]

[133] The respondent having heard the applicant's evidence at trial expressed his regret for any hurt or pain or suffering that he caused. It is unnecessary for me to make any finding about whether the making of the complaints was malicious or reckless. It is the effect on the applicant's health and her earning capacity that is presently relevant, not the respondent's intentions or motivations. However, it is appropriate to record that the respondent said that the complaints were made in response to what he saw to be an unfair affidavit that sought to build the applicant up as having made professional psychological assessments, that he discussed the matter with his former solicitor, showed his former solicitor a draft letter and did not send the letters as an

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78 Affidavit of the applicant filed 9 August 2007 at par [153]; affidavit of Philip Edward Battye filed 7 August 2008.

79 Transcript at 2-12.

attempt to exhaust or frustrate the applicant or to prevent her from obtaining employment.

[134] I find that the making of the complaints adversely affected the applicant's health and earning capacity, particularly in the period between 2003 and 2005, and that, despite the passage of time since the complaints were dismissed and the applicant's receipt of treatment, there is a residual impact upon her emotional health for which she has reasonably sought medical and other treatment.

[135] A property adjustment order may take into account the making of these complaints because of their impact upon the applicant's health, her income and earning capacity, or because the complaints and their effects are related to the de facto relationship and constitute circumstances that the justice of the case requires to be taken into account.[80] The complaints and their consequences do not convert these proceedings into a proxy for a defamation action, or the occasion to punish the respondent for what, on one view, might be regarded as conduct that had a tendency to place improper pressure upon a party because of the evidence that she gave in proceedings.[81]

[136] This litigation and its cost has been the source of distress to the applicant, and to the respondent. That distress should subside following the litigation. I do not accept, in the absence of reliable medical evidence, that the applicant is unlikely to ever recover from any psychological disorder from which she currently suffers.

[137] The respondent is aged 62 and there is no evidence to suggest that he suffers from any serious health condition.

Resources and employment capacity

[138] The property and financial resources of each of the parties at the date of the hearing has been addressed.

[139] The applicant's income is derived from rental properties and the provision of psychological services. Her taxable income for the financial year ended 30 June 2007 was $35,539 including gross fee income of $34,475. The respondent is in full-time employment and in 2007/2008 had a taxable income of $214,047. He plans to retire in the next few years. Each party has the capacity to obtain appropriate gainful employment.[82]

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80 *Property Law Act* 1974, s 309.

81 *cf. Harkianakis v Skalkos* (1997) 42 NSWLR 22.

82 *Property Law Act* 1974, s 298(b).

Contributions to income and earning capacity

[140] I have previously considered the contribution made by the applicant during the course of the relationship to the respondent's income and earning capacity. I have taken this into account at the second stage of the process under Sub-subdivision 2. It is inappropriate to address in the context of s 304 what might be described as the respondent's "negative contribution" to the applicant's income and earning capacity. Section 304 speaks of "contributions", and as Keane JA observed in *BLM v RWS*[83] it would be a travesty of language to regard "contributions" as including "negative contributions". Instead, the effect of the de facto relationship on the applicant's earning capacity should be addressed in connection with s 306.

Effect of relationship on earning capacity

[141] The de facto relationship is not said to have substantially affected the earning capacity of the respondent. A significant issue at the hearing was the extent to which it has affected the earning capacity of the applicant.

[142] A threshold issue is the nature of the applicant's earning capacity. An additional issue in evaluating the effect of the relationship on her earning capacity is whether the applicant intended to exploit that earning capacity after her retrenchment in 1997, and the extent to which she would have done so had the relationship not occurred. In a letter written to a professional colleague in late 1997 the applicant described herself as having "just retired".[84] I find that she was "semi-retired", intended to undertake some private practice work following her retrenchment on 8 August 1997, and in fact did so.

[143] The applicant's evidence concerning the state of her health as a result of workplace conflict prior to her retrenchment was unclear and unhelpful. She took stress-related leave from 7 February 1997 to 18 April 1997. She says she took this period of sick leave because she was planning to leave her employment and was "just lying low" because she knew that whatever she did in her employment was going to be "jumped on" because the employer needed to get rid of a number of employees.[85] The applicant was not clear in her evidence as to whether the sessions that she had with another psychologist was because of her illness or for professional development. It may be difficult to determine the reason one psychotherapist sees another, but whether or not the services were self-funded or paid for by the Medicare system illuminates the issue. The applicant accepted that she was claiming Medicare rebates between May 1995 and at least the middle of 1997 for the sessions that she spent with her psychotherapist.[86] She also obtained certificates from a Dr Ritchie who diagnosed her as suffering from an adjustment disorder.[87]

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83 [2006] QCA 528 at [49], with whom White and McMurdo JJ agreed.
84 Exhibit 5.
85 Transcript at 1-56.
86 Transcript at 1-58 line 40 in which a typographical error appears.
87 Transcript at 1-57.

[144] In late 1997 the applicant was dealing with her separation. Despite these personal issues and the residual effects of workplace disputes with her former employer, the applicant had the capacity to earn income in private practice as a registered psychologist. She had considerable experience. She had seen some private patients for many years, but faced the task of establishing a practice if she wished to derive substantial income as a psychologist or psychotherapist. She was not reliant solely upon income from private practice work to support herself since she had rental income, substantial assets and the prospect of obtaining further assets upon the resolution of property issues with her former husband. She also had superannuation which she might access in due course in accordance with relevant legislation.[88]

[145] I find that the applicant was unlikely to utilise her earning capacity to its full extent and after August 1997 was appropriately self-described as "semi-retired".

[146] The de facto relationship disrupted the applicant in developing and maintaining a private practice in Brisbane due to her relocation to Sydney and Melbourne, although she made attempts to conduct private practice in those places.

[147] The relationship was one in which the applicant performed almost all domestic chores and applied herself in supporting the respondent in his employment and in dealing with his emotional problems. After the relationship ended the applicant was in a state of emotional exhaustion for a period but by 2002 had sufficiently recovered to have an earning capacity and to apply, without success, for various positions. The applicant's lack of success in obtaining employment with counselling services, hospitals, clinics and other employers may be due, in part, to the emotional condition that she had as a result of the relationship. However, the applicant faced competition for positions and the de facto relationship and its emotional aftermath has not been proven to be a significant reason for her failure to obtain employment.

[148] The applicant retains a capacity to earn income from private practice work. Although the relationship and its aftermath, including this litigation, may affect the applicant personally and limit her capacity for full-time employment, it is unlikely that the applicant would have been engaged in full-time employment at present if the relationship had not occurred. It is likely that she would have remained semi-retired and undertaken sufficient work to provide a reasonable income to supplement her income from rental properties and superannuation. The applicant presently has an earning capacity which she uses to earn income. Her earning capacity was impaired to some extent by the disruption that occurred to her private practice between 1998 and about 2002 when she attempted to re-establish her practice. Any residual impairment of her earning capacity as a result of the relationship does not presently have a significant economic impact. It is more probable than not that, if the relationship had not occurred, the applicant would now be earning the kind of income that she presently is earning from private practice. In summary, if the applicant had not been involved in the relationship it is likely that she would not have fully exploited her earning capacity over the last 10 years.

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88 *Superannuation Industry (Supervision) Regulations* 1994.

[149] The applicant was seriously affected by the complaints which the respondent made to professional associations. If the consequences of those complaints on the applicant's earning capacity is not a matter which can be said to be the result of the de facto relationship, then I take them into account pursuant to s 309 as a fact or circumstance that the justice of the case requires to be taken into account.

Evaluation of the factors in ss 297 – 309: third stage adjustment

[150] Each party has substantial property and financial resources including access to superannuation entitlements. The applicant is 66 years of age and semi-retired with a moderate income. At the date of the hearing, she had almost $2,000,000 of property and financial resources. At the date of hearing the respondent had property and financial resources in excess of $1,800,000 and was reasonably close to retirement. He is married.

[151] I have found that the relationship and the subsequent complaints made by the respondent had an adverse impact on the applicant's health and earning capacity. However, the impact of those matters and their effect on the applicant's professional income has diminished over time. Any adjustment at the third stage must take account of the length of the relationship and the fact that more than seven years have passed since it ended.

[152] The respondent in his submissions in relation to the third stage adjustment acknowledged that relevant matters are not separately considered in some piecemeal fashion and that the relevant facts should be weighed by me as a percentage, or a dollar sum, arrived at in the exercise of my discretion. He submitted that the relevant factors, viewed overall, probably suggest an adjustment in favour of the applicant. An adjustment of 10 per cent of the total property and financial resources of the parties was said to be not justified in order to do justice and equity in the case. The submission was made that a five per cent adjustment at the most would suffice to do justice and equity having regard to all of the relevant factors.

[153] As previously noted, the applicant's submissions took a different approach and contended that the relevant factors that the court is required to consider under the Act means that by the end of the third stage I should reach at least a 10 per cent adjustment in favour of the applicant. I have adopted the four stage approach and, accordingly, will determine an adjustment to my previous contribution-based findings based upon my assessment of the factors in ss 297 to 309 of the Act.

[154] I do not consider that a 10 per cent adjustment at the third stage is appropriate. In monetary terms it would amount of an adjustment of almost $400,000 in the applicant's favour and an adjustment of this size is not required so as to achieve an order adjusting interests in property that is just and equitable in the circumstances. Taking account of the matters that I have found in relation to the relevant factors in ss 297-309, including the age and health of the parties, their respective resources and employment capacity at the date of the hearing, their commitments, the effects of the relationship on the applicant's earning capacity and actual income and the effects of the complaints made by the respondent to professional associations, I

consider that a third stage adjustment in the applicant's favour in the order of five per cent of the parties' collective asset pool at the date of the hearing is appropriate.

Fourth stage

[155] Finally, I consider the results of the earlier steps in order to determine whether the result is just and equitable in accordance with s 286 of the Act. Consideration of contribution-based matters in accordance with ss 291-295 of the Act resulted in an adjustment in the respondent's favour of 2.5 per cent. Assessment of relevant factors in ss 297-309 of the Act resulted in an adjustment of five per cent in the applicant's favour. The end result is an adjustment in the applicant's favour of 2.5 per cent. The total pool of assets and financial resources at the hearing was slightly less than $4,000,000. Two-and-a-half per cent of $4,000,000 equates to $100,000. A property adjustment order of $100,000 in the applicant's favour is just and equitable in all the circumstances.

[156] The parties each acknowledged the difficulties in arriving at a discretionary judgment in a case that involved a relatively short relationship which ended more than seven years before the hearing. I have adopted the four stage process notwithstanding the difficulties that are identified at the start of this judgment. Ultimately, in deciding whether to make a property adjustment order in respect of the parties' property I have been required to consider the parties' property, financial resources, earning capacities and incomes at the date of the hearing, and to determine the extent to which the de facto relationship affected these matters. I also have assessed the other relevant matters specified in Subdivision 2 of Part 19 of the Act. Having regard to their respective contributions as required by the Act and the other matters that I have found to be relevant in deciding what order adjusting interests in property is just and equitable, I consider that the result that I have arrived at, namely a property adjustment order in the applicant's favour of $100,000, is just and equitable.

Other orders

[157] I will hear the parties about the terms of any order in respect of payment of the sum of $100,000 including the date for payment and whether the payment be in a single amount or by instalments, and wholly or partly secured.

[158] I will hear the parties in relation to costs.

[159] The respondent gave an undertaking to the court to not sell or deal with his Balmain property. The respondent sought an order that he be released from that undertaking upon the giving of my judgment and there was no opposition to this course.

Orders

[160] I order that:

1. Pursuant to s 333(1)(d) of the *Property Law Act*, 1974 (Qld) the respondent pay the sum of $100,000 to the applicant.
2. The respondent be released from undertakings given to the court in respect of his Balmain property.