SUPREME COURT OF QUEENSLAND

CITATION:	*TFV v JRG* [2012] QSC 276
PARTIES:	**TFV** (Applicant) **v** **JRG** (Respondent)
FILE NO/S:	BS No 10328 of 2008
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	16 August 2012
DELIVERED AT:	Brisbane
HEARING DATE:	8 - 9 March 2012 Final written submissions 4 May 2012
JUDGE:	Ann Lyons J
ORDER:	**I will hear from counsel as to the terms of the order and as to costs.**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – PARTICULAR CASES – Where applicant seeks an order under Subdivision 2 of Division 4 of Part 19 of the *Property Law Act 1974* (Qld) – Where parties were in a de facto relationship for five years before separation – Where respondent sold his business two and a half years after the parties separated and received in excess of $6 million in cash and shares before tax – Where the applicant earns approximately $30,000 per year – Where applicant and respondent adopted equal shared care arrangements for their four children after separation – Where respondent has married and had a further two children – Where the respondent purchased a property for the applicant, met the costs of renovation to that property, paid child support and made regular large cash payments to the applicant, purchased vehicles for the applicant and the applicant was allowed to use the respondent's credit card after separation – Where the asset pool at the time of trial amounts to approximately $3.4 million – Where the applicant contends for an asset pool other than the funds available at the time of trial – Whether

there has been a premature distribution of funds which justifies 'add backs' – Where the applicant contends for 60 per cent of the asset pool and an order that she receive $4,000 per month pending the adjustment – Whether there has been a 'special contribution' but the respondent – Whether the division of the asset pool is just and equitable.

Property Law Act 1974 (Qld), s 255, s 262, s 263, s 283, s 287, s 288(1)(a), s 291, s 292, s 293, s 294, s 295, s 297, s 298, s 299, s 300, s 301, s 303, s 304, s 305, s 306, s 307, s 308
Uniform Civil Procedure Rules 1999 (Qld), r 389(2)

Brown v Green (1999) FLC 92-873, cited
Cerini [1998] Fam CA 42, cited
Chorn and Hopkins (2004) FLC 93-204, cited
Cumpton v Cumpton (2007) 38 Fam LR 377, cited
Ferraro and Ferraro [1992] Fam CA 64; (1993) FLC 92-335, cited
FO v HAF [2006] QCA 555, cited
GAJ v RAJ [2011] QCA 65, cited
JEL v DEF [2000] Fam CA 1353; (2000) 28 Fam LR 1, cited
McLay [1996] Fam CA 29, cited
Mallet v Mallet [1984] HCA 21; (1984) 156 CLR 605, cited
Marker v Marker [1998] Fam CA 42, cited
Omacini and Omacini (2005) FLC 93-216, cited
Phillips v Phillips [1998] Fam CA 1551, cited

COUNSEL: P Baston for the Applicant
G Burridge for the Respondent

SOLICITORS: Daley Law Practice for the Applicant
Jones McCarthy Lawyers for the Respondent

ANN LYONS J:

[1] After a five year relationship and the birth of four children, the applicant mother (**TFV**) and the respondent father (**JRG**), who never married, separated. The applicant now seeks an order under Subdivision 2 of Division 4 of Part 19 of the *Property Law Act 1974* (Qld) (**PLA**).

[2] The major issue in this proceeding relates to the valuation of the asset pool given the sale of the respondent's business two and a half years after the parties separated. The respondent received in excess of $6 million before tax for his share in the business, which he developed during and after the parties' five year relationship.

Brief history of the relationship

[3] The applicant is currently 34 years of age and the respondent is 37 years of age. They commenced their relationship in November 2001, when the applicant worked as a childcare worker and the respondent had a business, R Pty Ltd. In late 2001 he started a new business, G Pty Ltd. They commenced to cohabit sometime in the

period between November 2001 and March 2002. The respondent had a property worth about $150,000 and some shares at the time the relationship commenced. The applicant had no significant assets.

[4] The four children of the relationship were born in January 2003, March 2004, January 2005 and March 2006. They are currently aged 9, 8, 7 and 6 years of age.

[5] In 2005, the respondent's business G Pty Ltd in 2005 merged with another business and D Pty Ltd was formed. The respondent and a business partner were equal shareholders in D Pty Ltd.

[6] The parties separated in February 2007 after approximately five years together.

Circumstances in the five years since the separation

[7] Following separation, the applicant and respondent essentially adopted equally shared care arrangements for the children. The applicant commenced these proceedings after almost two years of separation on 15 December 2008. The proceedings however essentially lay in abeyance until May 2011 when she applied for leave to take a step in the proceedings pursuant to *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**) r 389(2). The evidence indicates that initially there were attempts at reconciliation and there were then many subsequent unsuccessful attempts to settle the property and custody issues. The tension escalated when the respondent re-partnered in September 2007 and the applicant refused him contact with the children. Two children were born of the respondent's new relationship, in September 2008 and February 2011. The respondent subsequently married his new partner in November 2011.

[8] The shared care arrangements between the parties were frequently the subject of contested proceedings in the Federal Magistrates Court. I consider that the litigation history indicates that the applicant would on many occasions unilaterally deny the respondent access to the children.

[9] In a report prepared for the Family Court by psychiatrist, Dr Scott Harden, dated 26 July 2011, it was indicated that the applicant suffered from a personality disorder with "histrionic, narcissistic and possible anti-social features."[1] Dr Harden indicated that the personality dysfunction interfered with the applicant's ability to separate her own rather volatile emotional reactions to events and people from the needs of her children. The applicant was advised to receive ongoing psychiatric follow up and consultation.

[10] On 11 August 2011, Purdon-Sully FM ordered that the four children of the relationship reside with the applicant six nights a fortnight and with the respondent on eight nights a fortnight.

[11] In August 2009 D Pty Ltd was sold to the R Group for $28 million. The respondent received a total of $6,088,706, made up of cash in an amount of $4,006,362 and shares in R Group then valued at $2,082,344. They are currently valued at $3.5million. A number of assets owned by D Pty Ltd were not part of the R Group sale and were subsequently distributed between the respondent, the applicant and his business partner.

---

1 Report of Dr S Harden dated 26 July 2011 at p17.

[12] Under the Share Purchase Agreement, the respondent was retained by R Group to manage its power products division; his package included an entitlement to participate in *"earn outs"* as part of a performance incentive scheme.

[13] Following separation, the respondent purchased a property to the south of Brisbane at the applicant's request for herself and the children. The respondent also met the costs of renovations to that property. The respondent also paid child support and has also made regular large cash payments to the applicant. The applicant was also allowed to use the respondent's credit card which had a limit of $28,000. As well as continuing to pay child support, the respondent pays the costs of the children's schooling, sporting and extracurricular activities.

[14] From December 2010 until early 2012 the respondent provided financial support for the applicant and children by way of $4,000 a month together with $886 per month in child support.[2] The respondent also continued to meet all of the outgoings of the home. Recently, child support has been reassessed at $2,310 per month. The respondent currently pays the applicant $3,000 per month as well as meeting all the other expenses. The applicant was also provided with a Hummer vehicle, a power boat and motor bikes, one of which was later sold by the applicant.

[15] It is uncontested that the applicant initially also had extensive access to the respondent's credit card. The evidence indicates that he was indeed generous to her and the children on many occasions, having provided significant cash sums to the applicant for special occasions, including at least two family trips to Sydney to attend concerts.

[16] The applicant currently resides in the property south of Brisbane. The respondent resides in a property in the same area.

[17] The applicant currently works part-time as an aged care worker and earns approximately $30,000 a year. The applicant indicated in cross-examination that from the age of about six months all of the children would be in day care for at least three days a week. She worked part-time in a number of positions during some periods of the relationship, but not with any regularity.

[18] The respondent is employed managing R Group, which is the business he sold in August 2009 for $28 million. Whilst he received $4,006,362 in cash and shares worth $2,082,344, it is agreed that those shares are now worth $3,581,631.60, as well as options now worth $249,999.20. The respondent has not paid his tax liabilities in relation to the tax years 2009-2010 and 2010-2011. It is estimated that his tax liability is in the order of $1,882,118.10 for 2010 and $97,333.05 for 2011, exclusive of the penalties which must be paid for late payment.

[19] As previously indicated, part of the sale agreement involved the possibility of an "earn out payment". Joseph Box, a Chartered Accountant, has examined the agreement and the issue of the eligibility for a catch up payment. It would seem that there are a number of discrepancies and there are two possibilities in relation to whether the respondent is eligible for an "earn out payment". On one interpretation of the agreement he concludes that the respondent is eligible for a catch up; however, on a different analysis there is no entitlement to a catch up. If there was an

---

[2] Affidavit of TFV sworn 10 October 2011 at 46.

entitlement to a catch up, there could be an "earn out payment" in the order of $1,500,000.

[20] Accordingly, the parties have agreed that, given that uncertainty, the respondent will agree to disclose any "earn out" figure if it is in fact ultimately paid and not otherwise deal with any such funds. The future "earn out" figure will therefore not play any role in the assessment of the asset pool.

The requirements of Part 19 of the *Property Law Act 1974* (Qld)

[21] Section 255 provides that the main purposes of Part 19 of the PLA are to facilitate the resolution of financial matters at the end of a de facto relationship and to ensure a just and equitable property distribution. Section 262 then provides that de facto partners' financial matters are matters about the property or financial resources of either or both of them. Section 263 defines 'financial resources' as including a prospective claim or entitlement or any other valuable benefit.

[22] It is clear that the requirements of s 287 have been satisfied and that the parties lived together in a de facto relationship for more than two years. Section 283 states that after such a relationship has ended, a de facto partner may apply to the Court for an order adjusting interests in the property of either or both de facto partners. The applicant filed such an application in December 2008, almost two years after the parties initially separated but within the time required pursuant to s 288(1)(a). Section 286 then provides that the Court may make any order it considers just and equitable about the property, adjusting the interests of the parties. In deciding what is just and equitable, the Court must consider the matters mentioned in subdivision 3 of the PLA.

[23] Subdivision 3 lists the factors the Court must consider, including: the contributions to property or financial resources (s 291); contributions to family welfare (s 292); the effect on future earning capacity (s 293); child support (s 294); other orders (s 295); as well as the matters mentioned in subdivision 4, to the extent they are relevant in deciding what order adjusting interests in property is just and equitable.

[24] Subdivision 4 then lists additional matters for consideration to the relevant extent in deciding what is just and equitable, including: age and health (s 297); resources and employment capacity (s 298); caring for children (s 299); necessary commitments (s 300); responsibility to support others (s 301); appropriate standard of living (s 303); contributions to income and earning capacity (s 304); length of relationship (s 305); effect of relationship on earning capacity (s 306); financial circumstances of cohabitation (s 307); and child maintenance (s 308).

[25] Generally the first step in resolving such financial matters is to assess the asset pool, which is usually ascertained as at the date of trial. The applicant, however, is seeking that a different approach be adopted in this case. It is necessary therefore to understand the relevant legal principles in order to determine that question.

How should the asset pool be assessed?

[26] In the recent Queensland Court of Appeal decision of *GAJ v RAJ*,[3] White JA confirmed the approach which should be taken was in accordance with the principles outlined by Keane JA in the 2006 decision of *FO v HAF*,[4] as follows:

---

3 [2011] QCA 65.

> "[27] In *FO v HAF* Keane JA (as his Honour then was) discussed the approach to the exercise of the judicial discretion conferred by s 286(1) of the Act:
>
> > 'It has frequently been emphasised that the judicial discretion conferred by s 286(1) of the PLA and its analogues in other statutes should not be constrained by pre-determined guidelines. It is essential, however, that the matters referred to in the provisions set out above be taken into account, and that they are 'seen, in the reasons for judgment, to have been taken into account.' To this end, the four step approach explained by the Full Court of the Family Court in *Hickey v Hickey* provides a useful discipline to ensure clarity of thought and transparency of judicial reasons..."[5]

[27] In *FO v HAF*, Keane JA had indicated:

> "[52] The Full Court of the Family Court explained in *Hickey and Hickey*, in relation to the *Family Law Act* analogue of pt 19 of the PLA, that the first step in making a property adjustment order is identification and valuation of the property, resources and liabilities of the parties. The second step is the identification and assessment of the contributions of the parties to their pool of assets and the determination of the contribution-based entitlements in accordance with s 291 to s 295 of the PLA. The third step is the identification and assessment of the factors in s 297 to s 309 of the PLA to determine the adjustment to the contribution-based entitlement. The fourth step in the process is consideration of the result of these earlier steps to determine whether that result is just and equitable in accordance with s 286 of the PLA."[6]

Keane JA continued:

> "While this approach should be understood as a guide to the exercise of the statutory discretion, it also serves to focus attention upon the importance attached by the legislature to the identification of the contribution of the parties to the parties' assets as a basis from which the process of adjustment is to proceed. That process is distorted if one party's financial contribution to the assets of the parties is treated to a large extent as dead money having little or no bearing upon the increase in the value of the parties' assets."[7]

[28] Accordingly, the usual first step is to identify and value the property, liabilities and financial resources at the date of hearing.

---

4 [2006] QCA 555; (2006) 2 Qd R 138.
5 Above n 3 at [27] (references omitted).
6 Above n 4 at 52 (references omitted).
7 Ibid (references omitted).

[29] It is clear that notional replacements in the pool of property or 'add backs' are an exception. The Family Court cases obviously provide considerable assistance and the general legal principles which are to be applied are not in dispute. I shall therefore adopt the analysis of those principles essentially as outlined in the submissions of the respondent, as they provide a convenient summary of those principles. In *Omacini and Omacini*[8] the Full Court of the Family Court said:

> "Her Honour [the Trial Judge] seemed to be saying that the mere fact that a party had expended money realised from the disposition of assets that existed as of the date of separation would result in that expenditure being added back 'in the usual way' as a premature distribution of the assets without nothing more. If that is what her Honour is saying, in our view, she is being unduly simplistic. In our opinion it was a necessary requirement for her Honour to examine and make some assessment of the reasonableness or otherwise of the expenditure."

[30] In *Marker v Marker*[9] the Full Court held:

> *"*2.10 It is well settled that save in exceptional circumstances that the Trial Judge should deal with the property as at the date of the hearing and make adjustments taking into account the various matters set out under s.79 however the particular justice of the case may make it appropriate to notionally add back assets which have been demonstrated to have been dissipated either during the marriage or post separation. Normally it is necessary to demonstrate an appropriate basis for doing so, for example by wastage such as gambling or extravagant living.
>
> 2.11 There seems to be no appropriate basis for adding back monies that existed at separation which have been subsequently spent on meeting reasonably incurred necessary living expenses. Neither the Family Law Act nor the case law require the parties go into a state of suspended economic animation once a marriage breaks down pending the resolution of their financial arrangements. Parties are entitled to continue to provide for their own support. Whether any expenditure so incurred is reasonable or extravagant is a matter that can be determined by the Trial Judge."[10]

[31] Accordingly, the issue in *Omacini* related to the question of reasonable expenditure and, usually, 'add backs' would not include reasonable living expenses or reasonable expenditure generally, including pre- and post-separation expenditure on investments, even when the source of the funds and investments come from assets existing at the time of separation. Normally, 'add backs' do not include expenditure involved in the maintenance or preservation of assets such as mortgage rates, insurance and repairs.

---

8 (2005) FLC 93-216.

9 [1998] Fam CA 42.

10 Ibid (references omitted).

It is clear that ultimately the test is one of the reasonableness of the specific expenditure sought to be added back.

[32] In *Chorn and Hopkins*[11] the Full Court referred to the statements of the Full Court in *Cerini*[12] where it was observed:

> "While not seeking to place a fetter upon the exercise of the discretion of a Trial Judge in individual cases, it seems to us that the concept of adding monies reasonably disposed of back into the pool ought to be the exception rather than the rule. The parties are entitled to reasonably conduct their affairs in a post separation manner that is consistent with properly getting on with their lives."

[33] The Full Court of the Family Court in *Brown v Green*[13] held that pre- or post-separation losses associated with enterprises or investments do not fall to be determined against a party simply because he or she managed the day to day affairs of such enterprises or investments. Rather, the Court held it is a question of whether in all the circumstances loss should be attributed to one or both parties as a matter of justice and equity, as follows:

> "42. In the present case her Honour determined the husband should bear sole responsibility for the financial loss suffered as a result of the failure of the Hayle system project. Yet there was no finding by her Honour (as would be required on an application of the 'Kowali principle') that the husband had 'embarked on a course of conduct designed to reduce or minimise the value of the parties' assets, or that the husband had acted 'recklessly, negligently or wantonly' with the assets thereby causing their reduction in value."[14]

[34] In the present case the asset pool contended for by the respondent is essentially as recorded in the current list of assets and liabilities available as at the time of trial and amounts to an asset pool of approximately $3.4 million.

[35] The applicant however contends for an asset pool other than the funds available at the time of trial. The plaintiff essentially argues that the asset pool should be the amount of $4,006,362.72, received from the sale of D Pty Ltd, together with current value of the shares and options, being $3,831,631.20, which is a total amount of $7,837,993.92 minus the tax liability which the applicant estimates at $1,980,051.15, which totals an asset pool of $5,857,942.77.

Is this a case justifying 'add backs'?

[36] It is argued by counsel for the applicant that effectively the respondent has made a premature distribution to himself despite the fact that these proceedings were on foot. In my view, both parties adopted the same approach and, if it is argued that there has been a premature distribution, then both parties have received the benefit of such a distribution.

---

11 (2004) FLC 93-204.
12 [1998] Fam CA 143.
13 (1999) FLC 92-873.
14 Ibid.

[37] It is clear that in this case more than five years has elapsed since the parties separated and that significant funds have been expended by both parties since the separation. More than three years have elapsed since the respondent sold his shares in D Pty Ltd and the funds received from the sale of D Pty Ltd have essentially funded expenditure which on any analysis has to be considered to be high. It is clear, however, that both parties have been the beneficiaries of this expenditure.

[38] In particular, I note that $20,000 has been provided to the applicant for cosmetic surgery, as well as other costs including legal fees of $150,000. Direct cash payments to the applicant of $156,750[15] have been made and $40,000 was paid to renovate the applicant's residential premises.[16] An amount of $35,340.45 has been paid by way of child support.[17] She has also received $100,000 as part payment of the property settlement. She has also received $9,000 from the sale of a Harley Davidson given to her by the respondent. She requested and received a Seadoo boat for a purchase price of $68,000.

[39] It is also clear however that the respondent has expended some sums of money, the full details of which have not been fully itemised. I accept, however, that the respondent has had the care of the children of the relationship for essentially half of the time and that he has since re-partnered and had two more children. I also accept that the respondent's income after the sale of D Pty Ltd would not have been sufficient to cover all his expenses, including his legal costs, and that, necessarily, he has used funds from the sale of D Pty Ltd to meet his ongoing living expenses. Furthermore, the respondent has spent over $200,000 in legal fees to date and he has paid an amount in the order of $40,000 in Land Tax. It is also clear that some of the investments the respondent made have been unsuccessful and that loans made to two companies will not be recovered.

[40] There have also been major purchases of both vehicles and real estate since the sale of D Pty Ltd and significantly, those major purchases can be traced into the current asset pool, although there are liabilities attached to them. I note that an amount of $1.6 million was expended on the purchase of the respondent's residential property and that $100,000 was spent on renovations. The respondent's residential property is in fact currently valued at $950,000. It would seem therefore that some of the properties purchased since 2007 have necessarily decreased in value, as have the vehicles and boats.

[41] Whilst all of the funds expended in the last five years have not been fully accounted for, I do not consider that there has been wanton or unreasonable expenditure by the respondent or the applicant. It would seem to me that both parties continued to enjoy an indulgent and expensive lifestyle. In particular, I do not consider that the applicant has satisfied the onus on her to establish that there is evidence that there are missing assets or funds unaccounted for. Neither do I consider that the applicant has established that the sale proceeds from D Pty Ltd have been wasted or dissipated.

[42] I am not satisfied that the applicant has established that there has been any significant wilful failure by the respondent to disclose financial information. Having let the matter lie in abeyance for many years, the applicant sought leave to proceed in May

---

15 See Exhibit 19, Schedule of Direct Cash Payments to Applicant.

16 Respondent's Submissions at 40.

17 See Exhibit 18, Schedule of Child Support Payments.

2011 and immediately sought significant items of disclosure in a very short space of time. On my analysis of the affidavit of the respondent sworn on 21 July 2011, he outlined the details of the D Pty Ltd sale together with a full list of his current assets and liabilities, essentially in the same terms as outlined in the current asset pool.

[43] I also accept that it was the respondent who was fixed with the initial costs and responsibility of obtaining valuations for a number of properties in both Queensland and Western Australia. It would also seem to me that the respondent had a significant burden in relation to disclosure, given the complexity of his business arrangements. In this regard I note that the sale involved a sale price of $28 million and the accompanying financial information is in the order of nine lever arch folders, all of which have in fact been supplied to the applicant. There have been countless statements by counsel for the applicant that there still has not been full disclosure. In my view, counsel for the applicant has failed to substantiate that submission. I cannot ascertain what that apparent failure relates to other than a "failure to narrate" the nature of the D Pty Ltd sale, other than in the way the respondent has already done in his affidavit of 21 July 2011. Neither can I ascertain why that is considered insufficient. There is a lack of clarity about what is still required, given the material that has in fact already been disclosed.

[44] In particular, I do not consider that there is any evidence before me that the respondent tried to keep the sale of D Pty Ltd secret as there is evidence of a letter from the respondent's solicitors to the applicant within a month of the sale referring to the sale and the transfer of some of the D Pty Ltd assets to her. In her affidavit sworn 10 October 2011, the applicant states she knew of the sale and in fact she exhibited the Share Purchase Agreement and the Settlement Statement to that affidavit. Exhibit 8 sets out the correspondence between the parties around this time and that correspondence makes it clear that the applicant was well aware of the sale of D Pty Ltd. I also accept that the respondent was constrained by the Share Purchase Agreement from disclosing details of the sale and that the commercially sensitive nature of the negotiations would have precluded full disclosure.

[45] As I have indicated I do not consider that counsel for the applicant has satisfied the onus incumbent upon him in this regard.

[46] In my view, the fairest approach in the current case is to adopt the usual approach under Part 19 of the PLA and assess the asset pool as at the date of trial and not to undertake an 'add back' exercise as argued for by the applicant. I do not consider that the circumstances of the present case are such as to trigger such an exercise.

[47] The current real property, the liabilities in relation to the properties and the current values should in my view be as I have set out at [49] below. There is no controversy in relation to most of those figures. The values and liabilities in relation to the real property have been agreed between the parties and results in a value of $1,438,500. The values of the vehicles have also been agreed at $345,000. The liabilities have also been agreed to be $2,222,772.65. I have included the share option which in fact vested on 31 August 2011 at $50,000. It was also conceded that purchase price of the Seadoo boat was $68,000.

[48] I agree with the respondent's submission that that the loans said to be owing by two companies, F Pty Ltd and B Pty Ltd, are at negative value, as the entities owe in excess of what they in fact own. In relation to another company, I Pty Ltd, the major

asset was a property in northern Queensland which was sold in early March 2012 and the respondent received $40,738. I consider that any remaining liability has to be ignored.

[49] The valuation for The Parents' Super Fund is in fact $187,688. I accept that this is not an amount which should be in the divisible pool but is more accurately included as a financial resource as defined. Similarly, the second and third R Group Share options are a financial resource within that definition.

The current schedule of assets and liabilities

Real Property	**Current Value**
Respondent's residential property	$950,000.00
Queensland property	$300,000.00
Applicant's residential property	$425,000.00
Western Australia property (1)	$422,500.00
Western Australia property (2)	$337,500.00
Liabilities in relation to Real Properties	
Westpac Mortgage in relation to Applicant's residential property	**-$447,000.00**
Westpac Mortgage in relation to Western Australia property (1)	**-$336,000.00**
Westpac Mortgage in relation to Western Australia property (2)	**-$213,500.00**
Subtotal	**$1,438,500.00**
Relevant Business Entities	
I Pty Ltd (with proceeds from northern Queensland property)	$43,654.00
Family Trust	$91,180.00
F Pty Ltd	-$10,748.00
Subtotal	**$124,086.00**
Investments	
2,082,344 ordinary shares – R Group	$3,581,631.60
R Group First Tranche share options vested 31 August 2011	49,999.20
Subtotal	**$3,631,630.80**
Bank Accounts	
Westpac	$134.00
Westpac Advantage Saver	$1,915.00
Various	$115.00
Subtotal	**$2,164.00**
Motor Vehicles	
2008 Harley Davidson Night Train	$17,700.00
2008 Harley Davidson Cross Bones	$22,000.00
2011 Suzuki	$13,000.00
2009 Honda	$4,000.00

2009 Ducati Sport Classic	$12,500.00
2009 KTM 250CC	$6,400.00
2 x 2010 Yamaha 90CC 4-Wheelers	$8,000.00
2010 KTM 50CC	$2,500.00
2003 BMX X5	$20,000.00
2011 Land Rover Discovery 4	$51,000.00
2010 Range Rover Sport	$72,200.00
2008 Hummer H3	$40,000.00
2006 Suzuki GSXR	$8,000.00
Seadoo Ski Boat	$68,000.00
Subtotal	**$345,300.00**
Liabilities	
Westpac 55 Day Visa Credit Card	**-$18,176.50**
Hire Purchase – 2011 Land Rover Discovery	**-$68,964.00**
Hire Purchase – 2010 Range Rover Sport	**-$105,581.00**
Monies owed to JRK	**-$50,000.00**
ATO Taxation liability 2010	**-$1,882,118.10**
ATO Taxation liability 2011	**-$97,933.05**
Subtotal	**($2,222,772.65)**
Other	
Partial property settlement Orders of 7 May 2011	$100,000.00
Proceeds of Harley Davidson sold by Applicant	$9,000.00
Subtotal	**$109,000.00**
TOTAL	**E$3,427,908.15**

Contingent Assets – not part of divisible pool	
R Group Second Tranche Option	$50,000.00
R Group Third Tranche Option	$150,000.00
Queensland property owned by The Parents' Super Fund	$187,688.00
TOTAL	**$387,688.00**

Contributions

[50] The applicant seeks 60 per cent of the asset pool and an order that she receive $4,000 per month pending the adjustment.

[51] The respondent says that the sale of D Pty Ltd had a significant impact on the current divisible pool and that the sale proceeds are a special contribution by him and should be treated as such. He essentially argues for a 65 per cent division in his favour.

[52] The High Court, in its decision in *Mallet v Mallet*,[18] held that there is no presumption of equality of contribution.[19] Mason J stated:

> "No doubt a conclusion in favour of equality of contribution will be more readily reached where the property in issue is the matrimonial home or superannuation benefits or pension entitlements and the marriage is of long standing. It will be otherwise when the property in issue consists of assets acquired by one party whose ability and energy has enabled the establishment or conduct and the extensive business enterprise to which the other party has made no financial contribution and where the other party's role does not extend beyond that of homemaker and parent."[20]

[53] Wilson J agreed and continued:

> "The contribution must be assessed, not in any merely token way, but in terms of its true worth in the building up of the assets. However, equality will be the measure, other things being equal, only if the quality of the respective contributions of husband and wife, each judged by reference to their own sphere, are equal. The quality of the contribution made by the wife as home maker or parent may vary enormously, from the inadequate to the adequate to the exceptionally good… Similarly, the contribution of the breadwinner may vary enormously and deserves to be evaluated in comparison with that of the other party."[21]

[54] Dawson J stated:

> "But it does not follow in every case where the husband earns the family income and the wife carries out her responsibilities in the home that the contributions of each to property acquired during cohabitation should be regarded as equal. If, for example, the husband is engaged in conducting a business, the nature of the business, the skills which the husband applies in it, the way in which he applies those skills and the manner in which the business has been built up, are all factors which may indicate that it is inappropriate to assume equality of contribution towards the acquisition, conservation or improvement of property during the subsistence of the marriage."[22]

Has there been a 'Special Contribution' by the respondent?

[55] The assessment of the '*quality'* of contributions as referred to by the High Court has presented challenges, and in *Ferraro and Ferraro*[23] the Full Court considered the difficulties of valuing the differing contributions involved in either the breadwinner or homemaker roles but concluded that special skills in the performance of either of those roles must be given some weight:

---

18 (1984) 156 CLR 605.
19 Ibid, per Gibb CJ at 610.
20 Ibid at 625.
21 Ibid at 636.
22 Ibid at 647.
23 [1992] Fam CA 64; (1993) FLC 92-335.

> "…there are cases where the performance of those roles may be described as "special" features about it either adding to or detracting from what may be described as the norm. For example, in relation to the homemaker role the evidence may demonstrate the carrying out of responsibilities well beyond the norm as, for example, where the homemaker has the responsibility for the home and children entirely or almost entirely without assistance from the other party for long periods or cases such as the care of the handicapped or special needs child. On the other hand, in the breadwinner role the facts may demonstrate an outstanding application of time and energy to producing income and the application of what some of the cases have referred to as "special skills"."[24]

[56] In *McLay*[25] the Full Court of the Family Court adopted the observation of the trial judge, about *Ferraro* as well as Wilson J's decision in *Mallet*, as follows:

> "Their Honours concluded that such a qualitative assessment would not normally be embarked upon in the day to day conduct of proceedings under s.79. Usually, those roles would be considered to have been performed within the "normal range". They recognised, however, that in a given case there may be a need for some qualitative assessment by reason of special factors attaching to its performance justifying a conclusion that the party made an "extra" or "special" contribution, taking it outside of the "normal range".[26]

The Full Court continued,

> "The reference to "normal range" in *Ferraro* and in her Honour's judgment is not a return to a presumption of equality as a starting point or any other presumption or starting point but is a practical recognition of the circumstance that in many marriages each party contributes in ways that might be described as the normal way in our society and that in any qualitative evaluation of those matters the likely outcome is one of equality."[27]

[57] The majority of the Full Court in the *JEL* v *DDF*[28] did not accept that special contributions could only apply to cases involving large pools. The Court provided a summary of the general principles in relation to special contributions, as follows:

> "(a) There is no presumption of equality of contribution or "partnership".
>
> (b) There is a requirement to undertake an evaluation of the respective contributions of the husband and wife.

---

24 [1992] Fam CA 64 at 201.
25 [1996] Fam CA 29.
26 Ibid at 59.
27 Ibid.
28 [2000] Fam CA 1353; (2000) 28 Fam LR 1.

(c) Although in many cases the direct financial contribution of one party will equal the indirect contribution of the other as homemaker and parent, that is not necessarily so in every case.

(d) In qualitatively evaluating the roles performed by marriage partners, there may arise special factors attaching to the performance of the particular role of one of them.

(e) The court will recognise any such factors as taking the contribution outside the "normal range" in the sense that the phrase was understood by the Full Court in *McLay*, above.

(f) The determination of an issue whether or not a "special" or "extra" contribution is made by a party to a marriage is not necessarily dependent upon the size of the asset pool or the "financial product". When considering such an issue, care must be taken to recognise and distinguish a "windfall" gain.

(g) While decisions in previous cases where special factors were found to exist may provide some guidance to judges at first instance, they are not prescriptive, except to the extent that they purport to lay down general principles.

(h) It is ultimately the exercise of the trial judge's own discretion on the particular facts of the case that will regulate the outcome.

(i) In the exercise of that discretion, the trial judge must be satisfied that the actual orders are just and equitable, and not just the underlying percentage division."[29]

[58] It is clear that special contributions have been found in a number of cases and indeed the Court has found on a number of occasions that particular commercial acumen and novel business ideas does amount to a special contribution. The decision in *McLay*[30] involved a property developer; *JEL v DDF*[31] involved a geologist's developing a gold prospect; and *Cumpton v Cumpton*[32] involved the development of intellectual property. All were held to be cases involving a special contribution.

[59] I note in particular that the sale of D Pty Ltd occurred two and a half years post separation. Significantly, the evidence of the respondent was that after separation with the applicant he decided to completely reposition the D Pty Ltd business and embark upon a different business strategy which involved providing power generation on a rental basis to mining, construction and industrial businesses in Queensland and Western Australia. He stated that prior to the shift to rental income in 2007 D Pty Ltd obtained 80 per cent to 90 per cent of its income from capital sales and the rest from rental activities. By the time R Group bought the business, the rental income had changed to 70 per cent of its gross profit, producing an EBITDA (earnings before interest, taxes, depreciation an amortisation) of $4.8 million compared to $785,000 in 2007.

[60] The respondent's evidence was that in the two years post separation the debt of the business increased four fold from $3.137 million to $13.3631 million as he needed to

---

29 (2000) 28 Fam LR 1 at [152].
30 Above n 25.
31 Above n 28.
32 (2007) 38 Fam LR 377.

procure equipment to be rented out. He also stated that R Group would not have purchased the business had he not moved to this new business strategy. The clear evidence of the respondent was that he undertook an increase in his debt post separation as the applicant was very opposed to any increase in their debt levels during their relationship and that her opposition had precluded such a strategy.

[61] The evidence indicates that in June 2009 the respondent gave a presentation to the executives of R Group, prior to the sale of D Pty Ltd, where he outlined the change in business strategy in 2007 which substantiates his claims in this regard. I note the parties separated in February 2007. Whilst I have not made any specific findings about the credit of either party, I was not impressed by the evidence of the applicant when cross-examined about her attitude to debt. I consider that the applicant's evidence was evasive. Accordingly, I prefer the respondent's evidence in this regard.

[62] Ultimately, therefore, I accept the argument of counsel for the respondent that the respondent's business acumen led to the sale of D Pty Ltd for many millions of dollars and that such acumen should be considered a special contribution. It would seem to me that the respondent's knowledge of the market and his entrepreneurial skill was such that it led to a particular business strategy being undertaken, which was clearly risky given the level of debt he incurred, but ultimately successful. Furthermore, the applicant had no real role in the business and did not contribute any expertise to it. Significantly, the sale of D Pty Ltd occurred two and a half years post separation.

[63] In addition, it is clear that the proceeds of $6,088,362, payable to the respondent in August 2009 after the sale of D Pty Ltd, would have incurred a tax liability, particularly Capital Gains Tax, which means that the net proceeds were more accurately in the order of $4.2 million.

[64] I therefore consider that essentially most of the figure of $6,088,362, received post separation, was a significant and special contribution by the respondent. I do not consider that all of it is, because the company was started by the respondent during the relationship and the applicant did have some involvement in it, although her involvement was limited.

[65] Because of this factor, I consider that a figure of 70 per cent should be assessed in favour of the respondent. In this regard, I am conscious of the analysis of some of the large money cases undertaken in *JEL v DDF*[33] which considered the proportions awarded in cases such as *Ferraro*[34] and *Phillips v Phillips.*[35] It is clear, however, that the asset pools in those cases were significantly larger, the marriages longer and the homemaker contributions by the wives were more substantial. This case, however, has some unique features which must however be taken into account.

What is the 'just and equitable' apportionment?

[66] In the present case the relationship lasted five years. Other than the 'special contribution', which I have already referred to, the contribution of each party was essentially equal.

---

33 Above n 28.
34 Above n 23.
35 [1998] Fam CA 1551.

[67] The respondent will continue to pay child support and significant ongoing costs for the four children given he has them eight days per fortnight. The respondent has a new wife and two further children to support. He therefore will essentially be supporting himself, his new wife and his six children into the future. He will, however, have a significant income into the foreseeable future and some further contingent assets.

[68] The evidence is that the applicant works part-time and earns $30,000 per year. I do not consider that this will alter going into the future based on her past employment history and the personality factors which Dr Harden has referred to in his report.[36] She accepts that she only worked briefly during the relationship and there is no evidence of recent, long term, stable, full-time employment. The applicant told Dr Harden that the longest full-time job she ever had was "for two years when she was backpacking".[37] I note, however, that he considered that she was a "rambling digressive and poor historian"[38] who was prone to flamboyant turns of phrase. Given her history, I consider it unlikely that she will actually undertake further study in nursing.

[69] Clearly, every case turns on its own unique facts. As the Court recognised in *JEL v DDF*,[39] the discretion is indeed wide. In my view the applicant's future prospects, when compared to those of the respondent, call for an adjustment in her favour. In addition, it would seem uncontroversial that the respondent was the beneficiary of significant expenditure in the period since the sale of D Pty Ltd. Such expenditure needs to be acknowledged in some way. Accordingly I would adjust the respondent's share down by a further ten per cent. In my view, balancing all of those factors, I consider that the applicant should receive 40 per cent of the asset pool and the respondent 60 per cent.

[70] The asset pool is essentially $3,427,908 and 40 per cent of that is $1,371,163.20. The applicant's residential property, in which the applicant currently resides, is valued at $425,000. I do not consider there is any basis for the applicant's claim that she should be given the larger house which the respondent and his wife live in and have adjusted to their needs, particularly due to the fact that at times there are six children in occupation of that house. The applicant's home normally only has five occupants. The applicant cannot sustain an argument based on need.

[71] In my view the applicant should receive the her residential property, unencumbered, together with a cash payment and shares representing the balance of 40 per cent of the asset pool after the house value and the assets already in her possession have been factored into that calculation. The percentage allocation as between cash and shares can be negotiated between the parties or, failing such negotiations, there should be a 60 percent split in favour of cash and 40 per cent shares. That should still represent a substantial cash payment to the applicant. Should the 'earn outs' become payable, the applicant should receive 40 per cent of that figure.

[72] Accordingly Counsel for the parties are to draw up a minute of order reflecting the orders I have proposed based on the findings I have made.

---

36 Above n 1.
37 Ibid p 5.
38 Ibid p 9.
39 Above n 28.

[73] I will also hear from Counsel as to costs, the time period required for the payment of the cash amount and the transfer of the shares and whether any further orders are required pending payment and transfers to the applicant.