SUPREME COURT OF QUEENSLAND

CITATION:	*MTP v PAH* [2012] QSC 326
PARTIES:	**MTP** (applicant) **v** **PAH** (respondent)
FILE NO/S:	3 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	25 October 2012
DELIVERED AT:	Brisbane
HEARING DATES:	18 and 19 September 2012
JUDGE:	Atkinson J
ORDER:	
CATCHWORDS:	FAMILY LAW – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – ADJUSTMENT OF ORDERS – FRAUD – where property adjustment order made by consent – where order provided for payment of monies by respondent to applicant from proceeds of sale of property following removal of caveat – where applicant held caveat over property – where respondent represented that equity could be created in that property by adjusting finances – where respondent now asserted that finances could not be so adjusted and an inability to pay applicant – whether consent induced by fraudulent misrepresentation – whether there was a miscarriage of justice – whether the order should be varied FAMILY LAW – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – ADJUSTMENT OF ORDERS – DEFAULT IN CARRYING OUT OBLIGATION IMPOSED BY ORDER – where property adjustment order made by consent for payment of monies by respondent to applicant from proceeds of sale of property – where further order to effect sale of property by auction made by consent – where respondent withdrew property from auction and did not procure second auction – where refused to sell property at price determined by valuer –

where as a consequence of those failures property not sold and monies not paid to applicant – whether respondent defaulted in carrying out an obligation imposed by an order – whether, because of circumstances that have arisen because of the default, it is just and equitable to vary the order

Family Law Act 1975 (Cth), s 79A
Property Law Act 1974 (Qld), ss 286, 333, 334, 341

Barker v Barker (2007) 36 Fam LR 650, considered
Byrne v Byrne (1965) 7 FLR 342, cited
Chang v Su (2002) 29 Fam LR 406; (2002) FLC 93-117, cited
Cominos v Cominos (1972) 46 ALJR 593, cited
Franklin and McLeod (1993) 17 Fam LR 793, considered
Gilpin v Gilpin (1969) 17 FLR 131, cited
In the Marriage of Arpas (1989) 13 Fam LR 314, cited
In the Marriage of B F And D A Simpson (1982) 8 Fam LR 467, cited
In the Marriage of Cawthorn (1998) 23 Fam LR 86, considered
In the Marriage of E and G J Prowse (1994) 18 Fam LR 348, considered
In the Marriage of Holland (1982) 8 Fam LR 233, followed
In the Marriage of J and M Kokl (1981) 7 Fam LR 591, considered
In the Marriage of L F and K R Bonser (1988) 12 Fam LR 299, considered
In the Marriage of La Rocca (1991) 14 Fam LR 715, considered
In the Marriage of LF and KR Bonser (1988) 12 Fam LR 299, considered
In the Marriage of Liu (1984) 9 Fam LR 1060, cited
In The Marriage Of M T And J M Monticone (1989) 13 Fam LR 592, considered
In the Marriage of Molier and Van Wyk (1980) 7 Fam LR 18, cited
In the Marriage of Rohde [1984] FLC 91-592, considered
Livesey v Jenkins [1985] 1 All ER 106, considered
McKenna v McKenna (1971) 18 FLR 15, cited
Molier and Van Wyk (1980) 7 Fam LR 18, cited
Sanders v Sanders (1967) 116 CLR 366, cited
Taylor v Taylor (1977) 3 Fam LR 11,220, cited
Weir (1992) 16 Fam LR 154; (1993) FLC 92-338, cited

COUNSEL: P Baston for the applicant
P Hackett for the respondent

SOLICITORS: Lynn & Rowland Lawyers for the applicant
Lillas & Loel for the respondent

[1] On 19 September 2012, at the conclusion of the two day hearing of this originating application, I made an order that the respondent, PAH pay the applicant, MTP, $140,000 within 30 days. In consequence I set aside paragraph 3(g) of an order made by this Court on 24 December 2011.

[2] The orders of 19 September 2012 were made upon an undertaking given by PAH "that in the event of any sale of a property in which he has an interest whether as registered proprietor or otherwise to provide to the solicitors for the applicant within 48 hours of the entry into such contract:

(a) a copy of the contract;
(b) details of how it is proposed to disburse the sale proceeds."

[3] I will now set out the reasons for those orders and any further orders that should be made.

[4] In order to understand the orders that have been made it is necessary to rehearse something of the history of this matter. On 21 October 2009, the applicant MTP ("Ms P") filed an originating application for property adjustment orders pursuant to s 286 of the *Property Law Act* 1974 in the District Court in Southport. The application was for an adjustment in property on the termination of her relationship with her former de facto partner the respondent, PAH ("Mr H"). According to her affidavit which accompanied the originating application, the de facto relationship began when they commenced cohabitation in May 1998 and ended when they finally separated in early 2009. Ms P filed a statement of financial position on 21 October 2009. On 2 November 2009 an amended originating application was filed.

[5] The proceeding was thereafter transferred to the Supreme Court. On 23 December 2010 the parties filed a request for a consent order. The consent order was made on 24 December 2010 under s 333 of the *Property Law* Act 1974 and was in the following terms:

"1. The Defendant shall forthwith pay to the Applicant the sum of $10,000.00.

2. That upon receipt of the funds in Order 1 above the Applicant will provide to the Defendant a duly signed withdrawal of caveat in registrable form to remove the caveat No: 712749656 from the property at 16 Dirk Hartog Place Hollywell in the State of Queensland more properly described as Lot 57 RP 160160 Title Reference 1575217.

3. That the property situate at 2 Oak Street Nerang more properly described as Lot 132 RP 115825 County of Stanley Parish of Nerang remain listed for sale by private treaty with such agent or agents appointed by the President of the Real Estate Institute of Queensland as [*sic*] a list price as agreed between the parties or as determined by a valuer nominated by the president of the REIQ.

(b) That in the event the property is not sold by private treaty pursuant to the last preceding sub clause [*sic*] on or before three months from the date of these orders of such further dated as agreed in writing

between the parties then the parties shall forthwith take all reasonable steps to sell the property at auction pursuant to the following sub clause:

(i) That the property be placed in the hands of a reputable real estate agent practicing [*sic*] as an auctioneer within the area of the location of the property. In the event that the parties do not agreed on the auctioneer to be employed then the Applicant shall nominated three such auctioneers and the Defendant shall choose one from that list.

(ii) The parties shall execute all necessary documents that may be required to authorise the auctioneer to sell the property by auction.

(iii) In the event that the parties cannot agree to reserve price for the property at auction then such price will be determined by a valuer nominated by the Present of the REIQ.

(c) That on either sale by private treaty or by auction the parties will execute the contract and in due course the transfer and any other documentation required to release any mortgage liability on the property.

(d) The Defendant will co-operate in everyway [*sic*] with the agent in relation to the sale by private treaty or by auction including making the keys available and allowing inspections of the property at all times are reasonably requested by the agent and ensuring that the property is in a neat and clean condition at the time of inspection by prospective purchasers.

(e) That the date of the auction shall take place on or before one (1) month after the initial 3 months allowed for sale by private treaty herein or such further date as agreed in writing by both parties.

(f) That in the event that the property is not sold by auction or private negotiation within one month of the auction referred to herein or such further period of time as may be agreed in writing by the parties from time to time after the said auction then the Defendant shall pay all monies in accordance with the above sub clauses to procure a second auction within a further one month of such further period of time as may be agreed by the parties in writing from time to time of that date, otherwise on the same terms and conditions as applied in the first auction.

(g) That on completion of the sale either by private treaty or by auction the proceeds of sale shall be divided as follows:

(i) Firstly to pay all real estate commissions, valuer fees, advertising expenses, auctioneers fees and legal costs if applicable;

(ii) Secondly to extinguish the mortgage over the property currently held with the Commonwealth Bank financial institution.

(iii) Fourthly the balance then remaining to be divided as follows:

(a) The sum of $140,000.00 to the Applicant.

(b) Balance to the Defendant.

4. Unless otherwise specified in these orders and except for the purposes of enforcing payment of any money due under these or any subsequent orders:

4.1 Each party shall be solely entitled to the exclusion of the other to all property (including choses in action) in the possession of such party at the date of the orders and for this purpose bank accounts are deemed to be in the possession of the person whose names appear on the record thereof;

4.2 Each party forgoes any claim they may have to any superannuation or pension entitlement benefits belonging to or earned by the other;

4.3 Insurance policies remain the sole property of the beneficiary named therein;

4.4 Each party be solely liable for and indemnify the other party against any liability encumbering any item or property to which said party is entitled under these orders.

4.5 Each party will be liable for any debt, credit card or liability in their sole name and will indemnify the other in relation to such debt.

4. That each party will retain for their sole use and benefit any future windfall or inheritance or future financial gain to the exclusion of the other.

5. Each party pay their own costs of and incidental to these proceedings.

6. That in the event that either party refuses or neglects to do any act or thing or to sign any document necessary to give effect to these orders, then the Register of the District Court of Queensland is hereby appointed to execute all deeds and documents in the name of the applicant and/or the respondent and do all acts and things necessary to give validity and operation to the said order."

[6] On 14 December 2011, the applicant filed an application for variation of those orders under 334 of the *Property Law Act* 1974 in the following terms:

"1. That the Order of the Supreme Court of Queensland made 24 December 2010 in these proceedings be amended by deleting Order 3 thereof and inserting in lieu thereof the following:

'3. That within 30 days the Respondent, PAH pay to the Applicant, MTP the sum of $140,000.00 or such other sum as the court may order'

2. Alternatively to Order 1 above, that the Order of the Supreme Court of Queensland made 24 December 2010 in these proceedings be varied in such manner as this Court deems fit.
3. That the Respondent, PAH pay the costs of the Applicant, MTP of the application on an indemnity basis."

[7] Section 334 of the *Property Law Act* 1974 provides for variation and setting aside of orders made under s 333 in any one of four circumstances. It gave effect to a recommendation of the Queensland Law Reform Commission in its Report No. 44 on de Facto Relationships[1] that the circumstances mirror those found in s 79A of the *Family Law Act* 1975 (Cth).[2] There are now equivalent provisions to s 79A in relation to de facto disputes in the *Family Law Act* and every State except South Australia.[3] There is thus a large body of established jurisprudence on these statutory provisions to be drawn from the decisions of the Family Court and the courts of the relevant states.

[8] The circumstances which may be relevant in this case are:[4]

- there has been a miscarriage of justice because of fraud, duress, suppression of evidence, the giving of false evidence, failing to disclose matters as required by this part or another circumstance (s 334(1)(a));

- because of circumstances that have arisen since the order was made, it is impracticable for the order or part of the order to be carried out (s334(1)(b));

- the respondent has defaulted in carrying out an obligation imposed on him by the order and, because of circumstances that have arisen because of the default, it is just and equitable to vary the order (s 334(1)(c)).

[9] On 28 February 2012, after a contested hearing, I made orders designed to prepare this matter for trial and to ensure compliance with Practice Direction No. 33 of 1999. The orders required the respondent by specified dates to, *inter alia*, file and serve a statement of financial disclosure and make disclosure by delivery of a list of documents. With regard to valuation of assets, paragraphs 6 to 8 of the order provided as follows:

"6. The parties shall obtain valuation of all disputed assets and shall jointly appoint Grant Thornton to prepare the valuation of all business related interests, Taylor Byrne to prepare the valuation of all real estate interests and All Assets

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1 At p 118-119.

2 As amended by the *Family Law Amendment Act* 1983 s 37 which added subs (1)(b), (c) and (d) to the grounds on which an order could be varied.

3 *Family Law Act* 1975 (Cth) s 90SN; *Domestic Relationships Act* 1994 (ACT) s 28; *De Facto Relationships Act* 1991 (NT) s 40(1); *Property (Relationships) Act* 1984 (NSW), s 41; *Relationships Act* 2003 (Tas) s 33; *Property Law Act* 1958 (Vic) s 294; *Family Court Act* 1997 (WA) s 205ZH(1).

4 See affidavit of MTP filed 23 February 2012 paragraph 3.

Appraisals to prepare the valuation of any other disputed item.

7. The Applicant and Respondent shall be jointly responsible for the costs of all valuations.
8. All valuations shall be required by 13 March 2012 and requested to be completed by 17 April 2012."

[10] The respondent failed to comply with the orders with regard to his financial statement and disclosure of documents and failed to agree to the joint appointment of valuers to conduct the valuations and to pay his share of the costs of the valuations required by those directions. He did not provide documents requested by the valuers, nor did he facilitate inspections to enable them to produce accurate valuations.

[11] Accordingly the applicant brought the matter back to court and, on 14 June 2012, Philippides J made the following orders by consent:

"1. That the matter be listed for a two day trial commencing 18 September 2012.
2. That on or before 30 June 2012 the Respondent:
   (a) make, file and serve on the Applicant a Statement of Financial Circumstances and make complete disclosure verified by an affidavit of documents sworn by him disclosing those documents sought by the applicant and as identified by the solicitors for the Applicant by way of letter of 16th March 2012 (Annexure DRR8, Affidavit of Dianne Rowland sworn 8th June 2012, filed 12th June 2012);
   (b) do all acts and things sign all documents, provide all documents and information as may be required by Grant Thornton to allow Grant Thornton to conduct the valuation of the various businesses conducted by the respondent, Universal Forces Pty Ltd (trading as Hinterland Chiropractic Centre), SupaTec Pty Ltd and Innate Investment Trust.
   (c) That on or before 30 June 2012 the Respondent do all acts and things and sign all documents and allow access to Taylor Byrne the properties as follows:
      i. 7 Price Street Nerang;
      ii. 2 Oak Street Nerang;
      iii. 16 Dirk Hartog Place Hollywell;
      iv. 118-120 Anzac Avenue Hillcrest
      v. 122-124 Anzac Avenue Hillcrest
      vi. 106 Sutton Street Redcliffe; and
      vii. 73 Redcliff Parade Redcliff;
   (d) Facilitate and otherwise allow All Asset Appraisals to enter into his premises and conduct inspections as to the chattels and equipment located therein including but not limited to:
      viii. Motor Vehicles;
      ix. Boats;

x. Jet Skis;
xi. Plant and equipment of the Hinterland Chiropractic Centre;
xii. Plant and equipment of the Radiology Practice; and
xiii. All other personal chattels, furniture and jewellery.

(e) Pay into the trust account of the solicitors for the Applicant such amount being one half of the valuation fees required by Grant Thornton, Taylor Byrne and All Assets Appraisals for the provision of the valuations.

3. That on or before 30 July 2012 the Respondent file and serve his affidavit of evidence in chief together with affidavits from any other witness he intends to reply upon then the Respondent shall not be entitled to rely upon an affidavit evidence at trial.
4. That on or before 30 August 2012 the Respondent file and serve any further affidavits that she intends to rely upon at trial.
5. That on or before 4pm 6 September 2012 each party serve on the other a list of objections, if any, to the affidavit material sought to be relied upon by the other.
6. That on or before 4pm Thursday 13th September 2012 that each party file and serve upon the other party a Case Summary Document setting out that:-
   (a) The affidavits that that party intends to reply upon at the trial;
   (b) A balance sheet setting out the assets, liabilities and financial circumstances contended for by that party; and
   (c) A minute of the orders sought by that party.
7. That save as is provided for in these orders that no party be permitted to rely upon any affidavit not filed as provided for in these orders without leave of the trial judge.
8. That the Respondent pay the Applicant's costs of and incidental to these proceedings as and from 13th March 2012 up to and including the appearance on the making of these orders on the standard basis.
9. That the Respondent make, file and serve any Application to be relieved of any obligation under Order 2(e) and or the Orders made 28 February 2012 by 30 June 2012."

[12] On 2 July 2012, the respondent filed an application to be relieved from the obligation to comply with paragraph 7 of the order made on 28 February 2012 and paragraph 2(e) of the order of Philippides J made on 14 June 2012. He had not complied with those orders by 30 June 2012, the date for compliance in the consent order made by Philippides J.

[13] It appears from the evidence Mr H gave at the hearing of this matter that he never had any intention of complying with paragraph 2(e) of the order made by Philippides J. He consented to the order without any intention of complying with it. This unfortunately demonstrated his attitude to court orders and to the contract inherent in a consent order. It is most unlikely that the applicant would have agreed to the order being made in the form in which it was had she known that the respondent had no intention of complying with it.

[14] On 2 August 2012, Applegarth J dismissed the respondent's application with costs, extended the time provided for in order 2(e) of the order of Philippides J to 10 August 2012, and gave the applicant leave to amend her originating application by deleting order 3 therein sought and inserting the following:

> "3. (a) That the Respondent, PAH pay to the Applicant, MTP the sum of $140,000.00.
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> (b) To secure such payment the Applicant is at liberty to register a caveat over the Applicant's property at 16 Dirk Hartog Place, Hollywell being Lot 57 on TP 160160 title reference 15757217, such caveat to be withdrawn at the Respondents [*sic*] expense on payment of the amount ordered.
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> (c) The Respondent be solely responsible for, and pay the sum of $1,233.65 to Grant Thornton for professional costs incurred in reviewing the Respondents documents within seven (7) days.
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> (d) The Respondent be solely responsible for, and pay to All Asset Appraisals the sum of $660.00 for the valuation of the Applicants goods and chattels within seven (7) days."

[15] Notwithstanding the orders made by Applegarth J, the respondent has at all times failed to comply with paragraph 7 of the order made on 28 February 2012 and paragraph 2(e) of the order made by consent on 14 June 2012. He filed voluminous material as to his financial affairs before Applegarth J but as his Honour said in his reasons, "there are assertions of an inability to pay [for his share of the valuations] but there are no consolidated cash statements or evidence of any demands from creditors and the like."

[16] Mr H has failed to provide the objective evidence of valuations of his many assets. This is so in spite of the fact that he has obviously expended considerable financial resources defending this matter and commencing an unrelated matter. A further affidavit was filed by the respondent by leave on the morning of the hearing, not having complied with the requirement in paragraph 3 of the order made on 14 June 2012 that it be filed by 30 July 2012. His counsel in reference to the need to seek leave to file it described it as "merely an updating of the current financial situation." There were still no consolidated cash statements and, apart from valuations provided by the applicant, very few reliable valuations of his many assets. The material which he tendered to support his financial position contained many assumptions of dubious validity. Some valuations were provided by the respondent which had been prepared for quite different purposes. Without expert evidence

prepared for the purpose of informing the court of his true financial position, I was not prepared to rely on Mr H's assessment of his financial position and assets, notwithstanding the financial documents disclosed. I have concluded that Mr H intended to conceal the true value of his assets from the applicant and from the court.

Section 334(1)(a): miscarriage of justice

[17] Applications under the equivalent provision in the *Family Law Act* have been held by to involve three steps:

> "The first is to determine whether one of the grounds mentioned in the section exists which has caused a miscarriage of justice. The second step is to determine whether the order should be varied or set aside. The third step is to decide in what way the order should be varied or if it is set aside what other order for property settlement should then be made."[5]

[18] "Fraud" in this section has been held by the Family Court to mean "conscious wrongdoing or some form of deceit."[6] The last item in the list of paragraph (a), "another circumstance," has been broadly interpreted, as not being limited by the general rule of interpretation that its meaning is confined by the terms which precede it. In *In the Marriage of J and M Kokl*,[7] the court found that:

> "The question in the present case is accordingly whether there were, 'any other circumstances', which need not be *ejusdem generis* with those previously mentioned in s 79A(1) but which occurred before or at the time of the making of the order of 14 March 1979 and which resulted in that order being obtained contrary to justice."

[19] In order to satisfy the first step, it is necessary but not sufficient to establish that one of these grounds has occurred. That ground must have occasioned a miscarriage of justice. In *Barker v Barker*, Bryant CJ, May and Boland JJ held:

> "in order for a claim under s 79A(1) [of the *Family Law Act*] to succeed, the court must be satisfied that a miscarriage of justice has resulted. It is not sufficient to merely establish the existence of one or more of the stated grounds, such as suppression of evidence."[8]

[20] Their Honours adopted statements of Brandon LJ in *Livesey v Jenkins*[9] that a variation should not be made where one of the itemised matters occurred, but

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5 *In the Marriage of L F and K R Bonser* (1988) 12 Fam LR 299 at 300.

6 *In the Marriage of J and M Kokl* (1981) 7 Fam LR 591 at 598, citing *Byrne v Byrne* (1965) 7 FLR 342 at 343 and *Taylor v Taylor* (1977) 3 Fam LR 11,220 at 78,589, 78,590, 78,594 and 78,595.

7 (1981) 7 Fam LR 591 at 599 citing *Byrne v Byrne* (1965) 7 FLR 342; *Gilpin v Gilpin* (1969) 17 FLR 131, *McKenna v McKenna* (1971) 18 FLR 15 at 18 and *Molier and Van Wyk* (1980) 7 Fam LR 18; see also *In the Marriage of B F And D A Simpson* (1982) 8 Fam LR 467 at 473.

8 (2007) 36 Fam LR 650 at [123].

9 [1985] 1 All ER 106 at 119.

"would not have made any substantial difference to the order which the court would have made or approved."

[21] This ground may be used to vary orders imposed by the court or those obtained by consent. *In the Marriage of Holland*,[10] Evatt CJ, Ellis SJ and Murray J agreed with the finding of the trial judge in relation to s 79A that:

> "upon its true construction it supplied a remedy for the defects alleged to exist in the consent orders … the term 'miscarriage of justice' was not limited to vitiating elements in the procedure followed in the court but extended to any situation 'which sufficiently indicates that the decree or order was obtained contrary to the justice of the case.'"

[22] The miscarriage of justice under this paragraph must arise from the "circumstances in existence at the date of the order" rather than from matters arising since the order was made.[11] *In the Marriage of LF and KR Bonser*[12] it was held that it was "now 'settled law' that the miscarriage of justice must occur at or before the time when the order was made".

[23] Even if the fraud, duress, lack of disclosure or suppression of evidence does occasion a miscarriage of justice, it is a matter of discretion whether the order should be varied in all of the circumstances. In *Barker v Barker*, Bryant CJ, May and Boland JJ said:

> "The establishment of a miscarriage of justice does not automatically result in the varying or setting aside of orders, the applicant must satisfy the court "not just that there has been a 'miscarriage of justice' but also that the appropriate exercise of the discretion is to so order".[13]

[24] Their Honours cited the Full Court of the Family Court in *In the Marriage of E and G J Prowse*, where it was held that the burden on the applicant was not met once a miscarriage of justice was proved; it remained for the applicant to demonstrate why the order should be varied, rather than for the respondent to demonstrate why the discretion should not be exercised in that way. Their Honours said:

> "Now it might have been argued for the wife, but was not, that rather than look for additional factors justifying the exercise of discretion in her favour, his Honour ought to have looked for factors justifying the exercise of discretion against her, on the basis that, given the 'miscarriage of justice' in relation to the making of the orders, she was prima facie entitled to have them set aside. … However, we do not think it would be correct to say that there is even a prima facie entitlement to have the consent orders set aside once a miscarriage of

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10 (1982) 8 Fam LR 233 at 236 citing *McKenna v McKenna* (1971) 18 FLR 15 at 18 per Allen J; *Taylor and Taylor* (1977) 3 Fam LR 11,220. This approach has been endorsed in *In the Marriage of Liu* (1984) 9 Fam LR 1060 at 1064; *In the Marriage of Rohde* [1984] FLC 91-592; *In the Marriage of Arpas* (1989) 13 Fam LR 314 per Mullane J at 320.

11 (1982) 8 Fam LR 233 at 237 citing *Molier and Van Wyk* (1980) 7 Fam LR 18.

12 (1988) 12 Fam LR 299 at 301.

13 (2007) 36 Fam LR 650 at [134].

> justice has been established, because to do so would be to limit the discretion of the court and to place an onus upon the respondent to show circumstances why the order should not be made."[14]

[25] In order to ascertain whether this ground has been made out, it is necessary first to consider the circumstances which led to the making of the consent order on 24 December 2010.

[26] The consent order made on 24 December 2010 followed a mediation on 7 December 2010 in which the dispute was not settled. However, the solicitors for the parties continued to negotiate and Dianne Rowland of Lynn & Rowland Lawyers, solicitors for the applicant, deposed that on 14 December 2010 she had a telephone conversation with John Frew from Anthony Black Family Law Service, then solicitors for the respondent, who advised that he had instructions to make an offer that the respondent would pay the applicant $150,000 on the sale of a property owned by the respondent at 2 Oak Street, Nerang (the "Oak Street property"). Ms Rowland had seen balance sheets of the respondent and told Mr Frew that according to those, PAH had no equity in the Oak Street property and so all proceeds on its sale would go to the bank. Mr Frew said to her words to the following effect:

> "My client has the ability to move debt from one property to another and the offer is made on the basis that there would be on settlement of the sale of Oak Street sufficient monies to pay your client even if he has to increase the debt on Dirk Hartog Place, which has an equity of about $600,000."

Mr H accepted that the statement was made on his behalf and with his authority.

[27] The property at Dirk Hartog Place was a property owned by the respondent at 16 Dirk Hartog Place, Hollywell. Ms Rowland made a file note of the conversation which was tendered as an exhibit. That file note supports the account of the telephone conversation found in Ms Rowland's affidavit. On 15 December 2010, Mr Frew sent a letter by facsimile transmission to Ms Rowland to "confirm that the parties have reached agreement". He repeated the offer which he said had been made at the mediation in broad terms as follows:

> "1. That Peter pay to Maria the sum of $150,000.00.
> 2. A sum of $10,000.00 of that sum will be paid as soon after the Order is made (and hopefully prior to Christmas).
> 3. The Oak Street property is to be sold by private treaty.
> 4. If the property at Oak Street has not sold by private treaty within 3 months of the date of Order then the property is to be auctioned.
> 5. Maria will receive the balance of $140,000.00 from the sale proceeds of the Oak Street property.
> 6. Maria will remove the caveat over the Dirk Hartog property as soon as possible after the Order is made so as to allow Peter to rearrange securities to ensure that upon settlement

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[14] (1994) 18 Fam LR 348 at 358.

> of the sale of Oak Street, there will be sufficient equity to pay to Maria the $140,000.00"

[28] Ms P signed consent orders on the basis of the representation made on behalf of the respondent that he was able to pay her $150,000, $140,000 of which would come from the proceeds of sale of the Oak Street property. She swore and I accept that she would not have agreed to the consent orders had she known the respondent was unable to provide her with $140,000 from the sale of the Oak Street property.

[29] This representation was particularly important as Ms P and her solicitor knew that the Oak Street property was secured for more than its value at the time the offer was made and, without the representation that Mr H had the capacity to move debt from one property to another and that the offer was made on the basis that there was to be on settlement of the sale of the Oak Street property sufficient monies available to pay Ms P $140,000, the offer was valueless. The offer provided that Ms P would remove a caveat she had over the Dirk Hartog property to allow Mr H to so rearrange the securities "to ensure that upon settlement of the sale of Oak Street, there will be sufficient equity to pay to [Ms P] the $140,000." Neither party could have been in any doubt as to the significance of Mr H's representation as to what he could and would do. Without them, the consent order would not have been made. Mr H admitted in evidence was it was "absolutely" the case that that was why Ms P agreed to the orders contained in the consent orders.

[30] On 22 December 2010, the applicant handed the respondent a general request to remove the caveat from the Dirk Hartog property and the respondent paid $10,000 to the applicant. The consent orders were then made on 24 December 2010.

[31] It appears that, contrary to the representation made in the letter from his solicitors on 15 December 2010, the respondent did not rearrange his securities to ensure that, upon settlement of the sale of Oak Street, there would be sufficient equity to pay the applicant $140,000. Unfortunately, it appears that at the time the representation was made by the respondent he had no intention of doing so. He gave evidence that he approached his bank to redistribute the debt but that they refused to do so until he had sold a property. However, he then asserted that when he signed the agreement, his financial position was "precarious at best". He asserted he assumed he would be able to redistribute his debt because the bank had allowed him to do that in July 2007 when he purchased another property.

[32] The proposition that Mr H had any basis for a representation that he had the ability to move debt from one property to another and that he would therefore have on settlement of the Oak Street property the monies available to pay Ms P $140,000 is absurd. At the time he made that representation, all of his properties secured by mortgages to the National Australia Bank were frozen because of the caveat over the Dirk Hartog property.

[33] Mr H's focus was on persuading Ms P to remove the caveat and accordingly he was prepared to make any representation without any concern as its truth to ensure that she removed that caveat. He agreed in his evidence that he made the representation

that he could move debt from one property to another without finding out whether or not he could do so. In fact, given what he asserted was his precarious financial status and the difficulties he was experiencing with the bank, it is more likely than not that he did not himself believe that the representation he made was true and that he knew that she relied on its truth in entering into the consent order. He provided no documentation to suggest that any such request had been made. When requested, he refused to provide an authority to Ms P's solicitor to enable her to verify this with Mr H's bank. Accordingly, I am satisfied that, not only did he not undertake steps to reorganise his debt with the bank, he never had any intention of doing so.

[34] Accordingly, the consent order was induced by fraud and misrepresentation by Mr H. This led to a miscarriage of justice because it induced Ms P to agree to request a consent order to be made by the Court which appeared to secure the payment to her of $140,000, but which, to the knowledge of the respondent, did not. It is an abuse of the court process for one party to make a fraudulent misrepresentation to another party in order to procure the consent of that party to a court order. It is also a miscarriage of justice because it has led to the making of an order which is not just and equitable.

[35] The respondent contended that he would not have agreed to a consent order for the payment of the $140,000 without any limitation such as that contained in the consent order of 24 December 2010 because of his financial circumstances, and therefore that the order should not be varied to that effect. However, it is apparent from his evidence that the reason he now gives that he would not have so agreed is because such an order would have required him to actually pay the money he represented he could and would pay to the applicant. The requirement in s 334(1)(a) for a variation of the order is that the respondent's fraud has occasioned a miscarriage of justice. A miscarriage of justice has been so occasioned. The order should be varied to give effect to the stated intention of the parties at the time that the applicant be paid $150,000 by the respondent.

[36] This is a case where the nature of the fraud and the resulting miscarriage of justice makes it inevitable that the court should exercise its discretion to vary the order by removing the restriction on the payment of $140,000 to the applicant as set out in paragraph 3(g)(iii) of the order made by consent, a restriction only agreed to because of the fraudulent misrepresentation made by Mr H.

Section 334(1)(b): impracticability

[37] Section 334(1)(b) allows variation of an order "because of circumstances that have arisen since the order was made, it is impracticable for the order or part of the order to be carried out".

[38] In comparison to paragraph (a), for which the circumstances giving rise to the miscarriage of justice must have occurred before the order was made, this paragraph relates to developments which have occurred since the order was made.

[39] The principles relating to the meaning of "impracticable" were outlined by Gee J in *In the Marriage of Rohde:*[15]

> (a) It is not enough that circumstances have arisen since the order was made which make it *unjust* for the order or part of the order to be carried out; the onus is upon the applicant to establish to the reasonable satisfaction of the court, that in the circumstances that have arisen since [the date of the order] it is *impracticable* for the order or part of the order to be carried out.
>
> (b) The word "impracticable" means, gleaning a definition from the Shorter Oxford Dictionary; "not practicable"; "that cannot be carried out or done"; "practically impossible"; "unmanageable"; "intractable".
>
> (c) "Impracticability" is a conception different from that of "impossibility"; the latter is absolute, the former introduces at all events some degree of reason and involves some regard for practice (per Veale J in *Jayne v National Coal Board* [1963] 2 All ER 220).
>
> (d) Provided that more than one circumstance exists, and that the circumstances have arisen since [the date of the order], it does not matter what the circumstances are or by whom they are brought about.

[40] In *In the Marriage of La Rocca*, Kay J opined that "Section 79A(1)(b) should be narrowly interpreted" in a manner akin to frustration, with the consequence that only matters outside the contemplation of the parties at the time of the orders can form the basis for the variation of an order:[16]

> "The concept of impracticability, as referred to in this section, is akin to the application of the doctrine of frustration in contractual matters. What the Parliament is concerned with and what ought to be concerning the court is the happening of events which cannot be reasonably foreseen, which will have the effect of causing an injustice to one of the parties if the happening of such events is not given effect to. … that circumstances that have arisen in which it becomes impracticable to carry out the orders are circumstances that could not reasonably have been contemplated."

[41] This approach was accepted with some qualification by Moss J in *Franklin and McLeod*, who observed that:[17]

> "The suggestion that the principles underpinning the doctrine of frustration of contracts, may, by analogy, be relevant to the construction of this particular statutory provision rests, no doubt, on the terminology of the statutory provision, on the one hand and, on the other, the formulation of the concept of frustration of contracts … The analogy may perhaps be strengthened, by recent changes in the way the basis of the doctrine of frustration is now viewed, in that the basis is now seen to be commercial 'impracticability'."

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15 (1984) 10 Fam LR 56 at 64.

16 (1991) 14 Fam LR 715 at 720 (emphasis in original).

17 (1993) 17 Fam LR 793 at 805.

[42] In *In the Marriage of Cawthorn*, Ellis, Lindenmayer and Joske JJ "agree[d] with the approach adopted by Kay J that the provisions of s 79A should be construed strictly", but went on to say:[18]

> "On a case by case basis, reliance upon authority relating to the contractual doctrine of frustration in its various facets may at times prove to be of assistance. In so doing however, care must be taken and it must remain at all times in the forefront of the court's deliberations that the task before the court is to interpret and administer a section of the Act."

[43] I am not satisfied, for the reasons earlier set out, that the impracticability of carrying out the order has resulted from circumstances which have arisen since the order was made. That circumstances would make it impossible to carry out the order was known to the respondent before he induced the applicant to enter into the consent order. My findings with regard to s 334(1)(a) mean that this ground cannot be made out.

Section 334(1)(c)

[44] It is not strictly necessary to consider this ground as the variation to the order is justified by the ground set out in 334(1)(a); however, I will consider it for completeness and because it provides yet another ground for varying the order. Section 334(1)(c) of the *Property Law Act* allows variation of an order where "a person has defaulted in carrying out an obligation imposed on the person by the order and, because of circumstances that have arisen because of the default, it is just and equitable to vary the order".

[45] The default for the purposes of paragraph (c) need not be deliberate. In *Rohde*, the Full Court affirmed the rejection by the trial judge of an argument that the section should be confined to a person who is guilty of "deliberate flouting of his obligations".[19] That finding of law was affirmed in *In The Marriage Of M T And J M Monticone* by Murray, Nygh and Bell JJ.[20]

[46] The question of whether it is 'just and equitable' to do so will depend on "cogent considerations of justice founded on the conduct and circumstances of the parties"[21] and "a consideration of all the circumstances that have arisen as a result of the default referred to in the provision".[22]

[47] There was a failure by the respondent to comply with his obligations under the orders made by consent. The three months referred to in paragraph 3(b) of the consent order expired on 24 March 2011. The property had not sold by private treaty by that time. It appears that the respondent then listed the property for sale by auction. It was due to be auctioned on 6 March 2011.

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18 (1998) 23 Fam LR 86 at 95.
19 (1984) 10 Fam LR 56 at 65.
20 (1989) 13 Fam LR 592 at 596.
21 *Sanders v Sanders* (1967) 116 CLR 366 at 376.
22 *Rohde* at 66 citing *Cominos v Cominos* (1972) 46 ALJR 593 at 601.

[48] However, for reasons that might be justifiable, the property was withdrawn by Mr H from sale by auction before the auction was due to commence. Accordingly, on 17 May 2011 Ms Rowland wrote to Mr H (who was then acting for himself) requiring a further auction to take place as envisaged by paragraph 3(f) of the order made on 24 December 2010.

[49] It appears that contrary to what was provided in the order the respondent did not procure a second auction of the property. In spite of the applicant's arranging a valuation of the property, he refused to sell the property at the price determined by the valuer.

[50] Because of the respondent's default, the property has not sold and the applicant has not been paid the $140,000 which the respondent agreed to pay from the proceeds of the sale of the Oak Street property when he represented that moneys would be available from that sale to make that payment. The parties had agreed to settlement of their property dispute on the basis of the payment of $150,000 by the respondent to the applicant.

[51] Mr H, and companies wholly owned and controlled by him, have substantial assets, the true value of many of which is unknown. A simple example will suffice. No valuation at all has been made of Mr H's chiropractic practice. The valuation was to have been conducted by a joint independent expert, Grant Thornton, in accordance with the disclosure to be made to Grant Thornton by the respondent referred to in paragraph 2(b) of the order of 14 June 2012 and upon payment of fees referred to in paragraph 2(e) of that order. In place of an independent expert report, Mr H deposes to his opinion of the value of some of the equipment at the chiropractic clinic: see Respondent's Case Outline Assets Item 7 and the affidavit material therein footnoted. It is his failure to allow true valuations of his assets which is responsible for their true value not being disclosed. This is in spite of court orders to the contrary.

[52] He cannot seek to take advantage of his own deliberate failure to comply with court orders and failure to disclose the value of his assets to argue that the monetary settlement agreed between the parties (albeit on the basis of his false representation) is not just and equitable.[23]

Conclusion

[53] The orders were varied because a miscarriage of justice resulted from the consent orders entered into as a result of the fraudulent misrepresentation made by the respondent to induce the applicant to agree with those orders. She relied on the truth of that fraudulent representation. It would be a miscarriage of justice to allow

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[23] See *Weir* (1992) 16 Fam LR 154; (1993) FLC 92-338 at 79, 593 quoted in *Chang v Su* (2002) 29 Fam LR 406; (2002) FLC 93-117 at [70].

orders to stand which operate unfairly to the applicant and which were only made because of the fraudulent misrepresentation of the respondent. A secondary reason for varying the orders was that the respondent failed to carry out the obligations imposed on him by them and, because of the effect of that, it is just and equitable to vary the order in the way in which it was done at the conclusion of the hearing.

[54] In her case outline filed pursuant to paragraph 6 of the order made by Philippides J on 14 June 2012, the applicant set out a minute of the order she sought. Leave, without objection, was given to amend the application to seek that relief. However the relief sought therein was rather too widely cast. It may however be necessary to make some of those orders as to which I will hear further submissions to ensure effect is given to the order made on 19 September 2012.

[55] The applicant has sought her costs on an indemnity basis. The usual rule for an application under Part 19 of the *Property Law Act* 1974 is found in s 341 where subs (1) provides that a party to a proceeding under Part 19 bears the party's own costs. However, subs (2) provides that the court may make any order for costs it considers appropriate "if the court is satisfied there are circumstances justifying it making an order." The circumstances which must be considered are set out in subs (4). Particularly apposite to this case are those enumerated in (4)(c) which requires the court to have regard to the conduct of each of the parties in relation to the proceeding and (4)(d) which requires consideration of whether the proceeding resulted from a party's failure to comply with a previous order made under Part 19.

[56] In this case there are circumstances which justify the court making an order that the respondent's pay the applicant's costs. The respondent has acted with contumelious disregard for the rights of the applicant and his duty to comply with court orders. His behaviour in making a fraudulent misrepresentation to the applicant to induce her to enter into a consent order under Part 19 followed by his deliberate failure to comply with interlocutory orders made in this application means that not only have all the costs of this litigation been caused by his misbehaviour before the application was filed but those costs have been increased by his misbehaviour since the application was filed. In view of the usual rule set out in s 341(1) I will not however order that the costs be paid on an indemnity basis.

[57] I will therefore order that the respondent pay the applicant's costs of and incidental to the originating application to be assessed.