SUPREME COURT OF QUEENSLAND

CITATION:	*SOC v JBW* [2015] QSC 233
PARTIES:	**SOC** (applicant) **v** **JBW** (respondent)
FILE NO:	BS1950 of 2010
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	18 August 2015
DELIVERED AT:	Brisbane
HEARING DATE:	30-31 March 2015
JUDGE:	Mullins J
ORDER:	**1. Proceeding adjourned to enable the parties to agree on the terms of the order that will reflect these reasons and to make submissions on costs.** **2. If the parties are unable to agree on the form of order and/or unable to agree on a timetable for exchanging submissions on costs, the proceeding may be re-listed before Mullins J on two days' notice in writing by one party to the other.**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – DE FACTO AND OTHER RELATIONSHIPS UNDER STATE LEGISLATION – ADJUSTMENT OF PROPERTY INTERESTS – GENERALLY – where parties were in a de facto relationship for 13 years with two children of the relationship – where parties set up a company that developed a successful business due to the respondent's invention of the machine that made the goods sold by the company – where applicant was the homemaker and primary carer of the children – where the applicant also kept the books and undertook other administrative tasks for the business – where the applicant largely ceased working for the business almost two years prior to separation when the relationship commenced to break down – where applicant went on a spending spree in that same period – where upon separation the applicant left the family home and lived in rented premises with one of the children – where the respondent remained in the family home with the other child and continued to work in the company's business and had access to the funds of the company for the purpose of meeting

personal expenses – where applicant endured financial hardship after separation – where applicant commenced full time tertiary study four years after separation – where final hearing of the application for a property adjustment order took place six and one-half years after separation – where parties were in dispute about the identification and value of some items in their pool of assets and the assessment of their contribution-based entitlements and the adjustments that should be made to those entitlements – whether just and equitable to make a property adjustment order on the basis of the adjusted contributions entitlements

Family Law Act 1975 (Cth), s 79

Property Law Act 1974 (Qld), s 263, s 286, s 293, s 298, s 304, s 309

FO v HAF [2007] 2 Qd R 138; [2006] QCA 555, followed
Hickey & Hickey [2003] FamCA 395, considered
Hoffman & Hoffman [2014] FamCAFC 92, considered
NHC v RCH (2004) 32 Fam LR 518; [2004] FamCA 633, considered
Stanford v Stanford (2012) 247 CLR 108; [2012] HCA 52, considered
In the Marriage of Wilkinson (2005) 40 Fam LR 273; [2005] FamCA 430, considered

COUNSEL:	J Bunning for the applicant A B George for the respondent
SOLICITORS:	Browns Lawyers for the applicant Parker Family Law for the respondent

[1] The applicant and the respondent were in a de facto relationship for about 13 years that ended in about August 2008. There were two children of the relationship born in 1996 and 1997. The applicant applies for a property adjustment order pursuant to Part 19 of the *Property Law Act* 1974 (Qld) (the Act). This proceeding was commenced in February 2010 and took some time to reach the final hearing. Pursuant to interim orders made by the court, the respondent paid the applicant the sum of $180,000 in December 2013 and a further sum of $80,000 in June 2014.

Summary of the parties' relationship

[2] It will assist in putting the issues in context by summarising briefly the history of the parties' relationship and their activities subsequent to the breakdown of their relationship.

[3] The parties commenced their de facto relationship in mid 1995 in regional Queensland. The applicant was 31 years old and the respondent was 36 years old. The respondent had

two children from an earlier relationship who were aged 10 years and 8 years and resided with their mother. At that stage the applicant was working in hospitality as a food and beverage manager and the respondent who had a bad back was on sickness benefits, but working on his own account buying and selling building materials. They rented a property in which to reside. At the commencement of cohabitation both parties had minimal assets.

[4] They transformed an old bus into a mobile home which they used for travelling and a residence. The respondent was successful in 1996 in obtaining a disability pension. He started working as a contractor making goods for use in connection with power lines. It was through this work that the respondent developed a machine to produce the goods that resulted in the registration of the company in April 1997 to conduct the manufacturing business which is the focus of this proceeding. The company patented the machine for making the goods and the variations of the machine that it developed. During this period the family lived in many different places, including Mossman in North Queensland and Kingaroy.

[5] In 2000 the parties moved to a residential property at Eagleby which was acquired in the respondent's name, but the loan from the ANZ Bank for the purchase was made to both parties.

[6] The applicant ceased working full time in the business in November 2006. The respondent remained working in, and being paid by the business, and continues to do so.

[7] The parties were estranged from some time in 2007, but continued living in the same home until they separated in about August 2008 when the applicant left the family home to seek inpatient medical treatment. The respondent continued to reside in the family home and remains there. After discharge from the hospital, the applicant moved into a unit for which the rent was paid by the respondent through the business and debited against a loan account in the applicant's name. The whitegoods for furnishing the unit were purchased by the company and also debited to the applicant's loan account. The applicant relocated to other rented premises. Payment on account of the applicant's rent by the business continued until November 2012.

[8] After separation, the elder child resided with the respondent (apart from a period of three months residing with the applicant) and the younger child resided with the applicant. The younger child has lived independently since January 2015. Whilst the younger child resided with the applicant, the respondent paid child support for him.

[9] The applicant commenced work as a barista in March 2009. In 2012 the applicant commenced full time tertiary study to qualify as an occupational therapist and is due to complete the course in December 2016. The applicant is working part time as a waitress/barista at a café while studying.

Issues

[10] The major issues in dispute between the parties are the identification and value of some items in the property pool and the appropriate adjustment of the property pool between the parties.

[11] Accountant Mr Brian McDonald was appointed by the court as a single expert to prepare an independent assessment of the financial interests held by the parties in the company. Mr McDonald prepared a valuation dated 10 October 2013. This proceeding was set down for a hearing to commence on 26 March 2014, but was adjourned to enable a further report to be obtained from Mr McDonald, as the applicant alleged that there were unaccounted profits of the company for the period 2009 to 2013 in the amount of $957,889. Mr McDonald then prepared a further valuation dated 18 August 2014. Mr McDonald identified the flaws in the applicant's calculation of unaccounted profits and determined the total amount unaccounted for was $115,378, but this amount was ultimately not an issue at the hearing. Neither party required Mr McDonald to give oral evidence at the hearing. Apart from the submissions made on behalf of the applicant (and disputed by the respondent) in relation to the treatment of the increased cash at hand in the company's bank account at the time of the hearing and the treatment of some of the expenditures by the company on behalf of the respondent after 1 July 2013 that were debited to the respondent's loan account, the valuation by Mr McDonald of the company in the report dated 18 August 2014 was not disputed. That valuation of the parties' interest in the company (before taxation and realisation costs) is $1,651,415.

[12] The applicant seeks to deduct from the pool as a liability her HECS debt in respect of her partially completed degree of $24,966. The respondent submits that it is inappropriate to deduct that from the pool.

[13] The respondent seeks to deduct as liabilities from the pool of assets his 2013 income tax liability of $69,781 and the company's 2014 income tax liability of $182,091. Those deductions are disputed by the applicant.

[14] The respondent's schedule of assets and liabilities (exhibit 2) shows the net value of the pool (if the company were not sold) as $2,156,336 on the basis that would save the notional taxation on the sale of the company of $418,589. The respondent seeks an apportionment of 80 per cent/20 per cent in favour of himself.

[15] The applicant's schedule of assets and liabilities (exhibit 7) shows a net value of $3,516,819. The applicant seeks a distribution of 60 per cent in her favour.

[16] The parties are agreed as to the value of the Eagleby property ($550,000), the furniture and household items in the applicant's possession ($7,130) and the furniture and household items in the respondent's possession ($24,935). They also agreed on the value of five boats (including specified outboards and trailers) having a total value of $196,000. These boats are in the possession of the respondent. The respondent also has a motor vehicle which the parties agree is valued at $105,000.

Evidence

[17] The evidence-in-chief of each of the applicant and the respondent was given in the affidavits that were read for the purpose of the hearing. The applicant relied on her affidavits filed on 31 January and 10 March 2014 and 11 March 2015. The respondent relied on his affidavits filed on 28 February 2014 and 3 March 2015. The parties had differing recollections or perceptions about many details concerning their respective contributions to their relationship and the business. Despite these numerous differences, the parties confined their cross-examination, so that oral evidence was completed within the first day of the hearing. That no doubt was attributable to the fact that many of the differences in the detail will not have a significant impact on the outcome of the application. For the purpose of deciding the issues on which findings must be made, I will set out parts of the evidence of each of the applicant and the respondent that fill out the history of their relationship and the growth of the business and give greater context to the issues between them.

[18] I have endeavoured not to be distracted by the allegations each made against the other (such as drug use and in the latter two years of their relationship the applicant complained about how the respondent treated her and the respondent complained about the applicant's behaviour), as I am not satisfied these matters materially affect the conclusions that I have reached about the parties' contributions to the building up of their assets and to the family welfare and the other matters relevant to the adjustment of these contributions. The recollections of both parties were tainted to some degree by the resentment that each has for the other's conduct since their relationship commenced to break down. The respondent is extremely negative about the fact that he has been unable to settle with the applicant for what he considered was a significant sum at the time of separation when he had no funds readily available for settling with the applicant. The applicant has been outraged by what she considers was the respondent's "extravagant spending post-separation" using company funds, while she was living relatively frugally.

[19] The respondent relied on affidavits from four further witnesses who were not required for cross-examination. The deponents included two consultants to the company, the parent of a child who commenced pre-school with the parties' elder child and orthopaedic surgeon Dr Scott-Young who is the treating orthopaedic specialist for the respondent's back problem.

The applicant's evidence

[20] At the time the parties separated they owed a debt to the ANZ Bank that was secured by a joint mortgage, there was a business loan owed to the ANZ Bank in respect of the business and both the applicant and the respondent had credit card debts in respect of the credit cards held by them in their respective names. During the period of cohabitation the repayments in respect of the mortgage, loan and credit card debts were paid from the profits of the business. Neither the respondent nor the company made payments in respect of the applicant's credit card debts after separation. At the time of separation the applicant owed approximately $95,000 in respect of her credit cards. The applicant has suffered significant financial hardship since separation in having to deal with the pressure from the banks and collection agencies pursuing the payment with credit card debts in her sole name. (The applicant does not contend that those credit card debts should be treated as a liability against the parties' pool of assets available for distribution.)

[21] Upon separation the respondent provided the applicant with the Honda CRV motor vehicle which she continues to drive. The vehicle is owned by the business and the payments made by the business on account of the vehicle have been debited to the applicant's loan account.

[22] During the period of cohabitation, the applicant did the majority of housework and household chores and was responsible for the primary care of the two children.

[23] When the children were very young and the family was living in regional centres that facilitated the respondent working on powerline construction, the respondent was away from home for many nights during each week. The applicant kept the books for the business. She went to TAFE and completed a MYOB course. By 1999 the business was turning over approximately $200,000 per annum.

[24] A home office was established in the garage at the Eagleby property. The applicant attended to all the administration work in relation to the business including paying wages, marketing, presentations for grants, applications for loans, paying the creditors and all financial management of the business. The applicant estimates that she worked 60 hours per week in the business plus caring for the children, the garden, the pool and the house.

[25] By 2001 the business was being conducted from factory premises, but the applicant continued to work from the home office.

[26] The applicant conceded (at Transcript 1-47) that it was the respondent who was responsible for the invention of the machines operated by the company, the making of the goods manufactured by the machines, the day to day operation of the business and negotiating contracts.

[27] The respondent travelled to the United States to promote his invention in 1999 and 2000. There were difficulties with the sale of the machine to a company in the United States which required the respondent to go there again in 2000. The company won design awards and obtained grants for building a prototype machine and to commercialise the product. The respondent had a trip to Greece in 2002 and to England in 2003. Both parties went to Dubai in 2005 to exhibit the company's machine. There was another work trip to Dubai in 2007 for the respondent and the applicant and the children joined the respondent in Thailand for a holiday.

[28] The applicant juggled the finances when cash was short and on occasions the applicant borrowed money from the mortgage offset account to pay cash wages to employees who were working for cash.

[29] Even though the applicant ceased full time work in the business in November 2006, she continued to be paid by the company at the rate of approximately $800 per week and $200 for fuel, although she claims that the payments were not made every week. The applicant was not sure whether the payments were treated by the respondent as wages or housekeeping.

[30] The applicant describes herself as being "greatly depressed" from about July 2007 due to the differences that she and the respondent had and what she saw as the respondent's distancing himself from the family. To placate her depression, the applicant started spending money on herself buying and selling clothes and jewellery on eBay with an idea of starting her own business redesigning clothes. The applicant admits she went on a "spending spree". The applicant obtained a loan from Cash Converters in late 2007 by depositing jewellery. The respondent provided her with $5,000 to redeem the jewellery.

[31] Between late 2007 until July 2008, the applicant paid money to herself from the respondent's credit card every time the respondent abused her or called her names. The amount she took was about $4,000. The applicant admits that she took tools and other items from around the house which she sold to Cash Converters, as she needed moneys to support herself and on one occasion for a trip to Sydney with the children when she had not received the sum of $1,000 which the respondent has said he would give her for the trip. The applicant admits that she cashed 12 cheques drawn on the respondent's personal account between 18 June 2007 and 1 May 2008, but only used $2,660 which was for reimbursement for expenses for which she had not been paid by the company, despite making the claims for reimbursement.

[32] The applicant was very stressed leading up to her leaving the family home.

[33] The applicant disputes that after separation that she ever agreed to the amounts paid on her account by the company be debited to a loan account with the company in her name.

[34] In 2010 and 2011 the parties were involved in a proceeding in the Federal Magistrates Court of Australia for parenting orders in relation to their children. Ultimately consent orders were made on 8 February 2011. The applicant incurred legal costs and disbursements in respect of that proceeding and in the early stages of this proceeding with her former lawyers for which she received an itemised bill of costs for $72,476.16 in December 2011. The applicant intended to use the partial property settlement of $180,000 to pay her legal costs and outlays to the former lawyers and her current lawyers and towards the payment of debts and other living expenses incurred by her.

[35] At the date of the hearing the applicant's only income was from her employment as a barista earning $155.60 net per week plus an Austudy allowance of $426.80 per fortnight and rent assistance from Centrelink of $127 per fortnight. The applicant's rent is $430 per week. The applicant is in good health.

[36] At the date of the hearing, the applicant's HECS debt for her occupational therapy degree was $24,966. She anticipates that her HECS will increase by approximately $10,500 for the last three semesters of her course. The applicant understands that she will be liable to repay her HECS debt when she commences working as an occupational therapist and earns a gross income over $55,000 per annum. She is achieving good grades in her course and has "a fair chance of work" when she graduates. The starting annual salary for an occupational therapist in the hospital system is between $45,000 and $50,000.

[37] The applicant's superannuation entitlements are approximately $19,000. At the date of the hearing, the applicant's credit card and like debts amounted to $112,653. The applicant's legal costs and outlays to her former lawyers remained unpaid.

[38] The proposed orders which the applicant seeks in this proceeding include that she retain the Honda CRV motor vehicle and that upon the payment to the applicant of the moneys payable to her as a result of this proceeding, she will transfer her shares in the company and the non-operating company (incorporated in 2001) in which shares are held by the parties and withdraw the caveat she lodged over the Eagleby property at the respondent's cost.

The respondent's evidence

[39] On incorporation of the company, the respondent was issued with 1,000 ordinary shares and 10 A class shares and the applicant was issued with 10 B class shares.

[40] The respondent has a long term crush injury to his lumbar spine for which he will undergo surgery when this proceeding is finalised. He will have a disc removal and replacement at L4-5 and a disc removal and fusion involving L5-S1. His back causes the respondent considerable pain. If the outcome of the surgery is positive, the respondent expects to work from home for three to six months while he recuperates.

[41] At separation the respondent had credit card debts of approximately $92,500.

[42] It was due to the respondent's ingenuity and acumen that the business invented, developed and marketed the machine that makes the goods that made the business profitable. The company's financial performance has fluctuated. The year 2007 was difficult for the company. The net profit for the year ended 30 June 2007 was $285,506, but that included the receipt of an insurance payment of $200,000 relating to the failure of the computer control system for the machine that made the company's goods. The company had been the subject of a superannuation guarantee audit in March 2007 and at that time the company owed about $70,000 in unpaid superannuation and about $350,000 in unpaid taxation. The company entered into an arrangement with the Australian Taxation Office to pay the outstanding amounts by instalments. The respondent blamed the applicant's negligence in maintaining the company's books for the problems with outstanding taxation. The net profit for the year ended 30 June 2008 was a modest $21,447. The year ended 30 June 2013 was very successful (net profit of $1,690,016), because of the stimulus package for infrastructure and the mining boom, but thereafter business contracted.

[43] The respondent always worked long hours in the business and still works 60 hours per week.

[44] In 2002 the applicant's brother in law lent both the applicant and the respondent about $168,000 to manufacture the machine for a customer in the United States. The loan was repaid in full. A number of small short term loans were made by members of the applicant's family to assist the parties that were also repaid.

[45] Although the applicant ceased working in the home office in November 2006, the company continued paying her wages until June 2008 and reimbursing the applicant until June 2008 for expenses which the applicant claimed she had incurred. The last credit card payments made by the company on the applicant's behalf were made in May and June 2008. The respondent arranged for the bank accounts of the company to be changed in May 2007, so that the applicant did not have access to them.

[46] The respondent had observed erratic behaviour on the applicant's part from about 2004/2005 onwards.

[47] Abigroup Contractor Pty Limited sent a cheque for $10,590.80 made payable to the company for work done and dated 19 June 2008. On 2 July 2008 the cheque was deposited by the applicant to an account in the name of the non-operating company. Then on 4 July 2008 the sum of $10,590.80 was transferred by internet banking from the account to which the cheque was deposited to another account on which the applicant was a signatory and could operate.

[48] The applicant had an extensive collection of clothing and shoes. At the time of separation she had 1,000 items of clothing, 100 pairs of shoes and at least 13 fur coats and jackets.

[49] On or about 30 November 2007 the applicant sold tools belonging to the company to Cash Converters.

[50] On 27 June 2008 the applicant sold a winch which belonged to the company to Cash Converters. On 1 July 2008 the applicant obtained a loan of $300 from Cash Converters against a generator owned by the company. The respondent redeemed the generator on 8 August 2008 by payment of the sum $390. A number of other items belonging to the company were sold by the applicant to Cash Converters on 7 August 2008.

[51] The parties had a mortgage offset account associated with the loan from the ANZ Bank over their home. The respondent exhibits the offset account statements for the period June 2005 to June 2006 which show transfers being made to the applicant's account when there was a credit balance in the offset account. The respondent did not become aware of these transfers out of the offset account into the applicant's account until July 2008.

[52] The respondent also claims that between 18 June 2007 and 1 May 2008 the applicant drew 12 cash cheques on his personal ANZ Bank account without his permission. The total amount of these cheques was $13,280.

[53] Since the relationship broke down, the respondent has undertaken all repairs, maintenance and renovations to the Eagleby property and the total expenditure has been approximately $150,000, some of which was funded by the respondent and the rest by the company and debited to the respondent's loan account.

[54] When the company retained new accountants, a significant division 7A loan account issue relating to the loan accounts in the names of the applicant and the respondent with the company was identified. As a result of advice from the new accountants, the respondent

caused the company to declare dividends to the respondent for the year ended 30 June 2013 equal to the amount of the loans owing by the applicant and the respondent with interest that would have been paid under commercial loan agreements, if they had been in place, and the dividends declared were then offset against the loan accounts. The new accountants were engaged to prepare a submission to the Australian Taxation Office to mitigate the effect of the division 7A issue. Due to the dividend declared by the company for the year ended 30 June 2013, the respondent incurred a taxation liability of $217,560 and there was no corresponding liability for the applicant. At the date of the hearing, a total sum of $157,000 had been paid to the Australian Taxation Office in respect of this liability. (It appears that the sum of $157,000 was paid in instalments by the company and debited to the respondent's loan account between 30 July 2014 and 2 February 2015. An amount of $60,560 plus interest of $9,221 (making a total of $69,781) remains outstanding.)

[55] The respondent received no cash payment from the dividends that were declared for the year ended 30 June 2013. The dividends totalling $940,288 were applied as follows:

Payment of the respondent's loan account at 30 June 2013	$688,637
Payment of the applicant's loan account as at 30 June 2013	129,980
Payment of joint loan accounts at 30 June 2013	4,965
Division 7A interest	88,645
FBT reimbursement	15,788
Insurance	11,098
Legals	1,175
Total	**$940,288**

[56] Both children commenced working as apprentices in the business. The elder child continues to be employed by the company. The younger child ceased working for the company in January 2015.

[57] The respondent has a new partner and they commenced living together in September 2013 in the Eagleby home. The respondent's new partner is employed independently and contributes to the household living expenses.

[58] The respondent's gross wages per week from the company are $1,300 which is less than commercial rates for the work undertaken by the respondent. The respondent's superannuation entitlements at the date of the hearing were $5,308.

[59] The respondent exhibited to his affidavit filed on 3 March 2015 as exhibit WJB26 the entries in his loan account with the company between 1 July 2013 and 2 February 2015. The total amount paid by the company on account of the respondent and debited to his loan account during this period is the sum of $934,780.11. On 2 March 2015 the respondent entered into a division 7A unsecured loan agreement with the company in respect of a loan amount of $902,713.80 as at 27 February 2015 pursuant to which the term of the loan was specified as seven years and the respondent agreed to pay to the company interest on the loan calculated at a commercial rate of interest, as defined in the agreement.

[60] Since separation the respondent has maintained a standard of living at a comparable level to that he enjoyed before separation. The respondent conceded (at Transcript 1-75) that his younger child did not enjoy the same standard of living while living with the applicant, as his elder child has enjoyed living with him.

[61] The respondent accepts that prior to taking up residence in the Eagleby property, the fact they moved from place to place in the early part of their relationship affected the applicant's capacity to earn income.

[62] The caveat which the applicant lodged against the Eagleby property has restricted the capacity of the respondent to procure an overdraft for the business of the company.

[63] Amongst the ancillary orders that the respondent proposed in his affidavit filed on 28 February 2014 was that, contemporaneously with the payment which he proposed be made to the applicant, the applicant would at her expense transfer to him her shares in the company and the non-operating company and would withdraw the caveat lodged at the Eagleby property. The respondent proposed that he would cause the company to transfer ownership of the Honda CRV motor vehicle to the applicant.

Valuation of the company

[64] Because of the company's history of trading profitably over the period commencing from the year ended 30 June 2009 until the date of the valuation, Mr McDonald valued the company using the dual method: capitalisation of future maintainable earnings and the net asset backing method. Mr McDonald calculated the future maintainable earnings of the business at $723,927 per annum. One of the adjustments Mr McDonald made in calculating annual future maintainable earnings was to allow for a further $250,000 on account of the wages and superannuation payable to the respondent to reflect a commercial salary based on the duties undertaken by the respondent and the approximate number of hours worked in the business. The future maintainable earnings of $723,927 per annum were then capitalised at a rate of 32.5 per cent to determine the value of the business ($2,227,467). The net business assets of $1,712,773 used in the production of the future maintainable earnings were then deducted from the value of the business, in order to determine the value of the goodwill at $515,000. The value of the goodwill was then added to the net tangible assets to determine the value of the entity ($1,798,197). That amount was adjusted down to $1,651,415 after taking off the loan from related entities of $146,782 which Mr McDonald attributed to the respondent, and that was not in issue. To assist the parties, Mr McDonald calculated the notional taxes that would be payable on the sale of the assets and the winding up of the entities within the group. The amount calculated was $418,589.

[65] Although the applicant ultimately did not dispute Mr McDonald's valuation of the company, the submission was still made on behalf of the applicant that there had been an increase in the cash available to the business, as the balance in one of the company's bank accounts was $1,237,344 as at 10 February 2015 which was almost $500,000 more than at the date of valuation and that increase in cash had therefore not been reflected in the valuation. The respondent submits that all the company's bank accounts have been taken into account in assessing the value of the parties' interests in the company and to take one

account only and look at its increase as a separate asset of the parties without looking at changes in all other assets and liabilities of the company is "double dipping".

[66] The applicant's approach confuses the assets of the company with the parties' interests in the company. The respondent's submission is correct that the applicant's approach to the increase in cash amounts to "double dipping", when the value of the company's business has been assessed and included in the pool of assets. The increase in cash in the company's account should not be a notional add back to the pool of assets as submitted by the applicant.

[67] The applicant also submits the moneys the respondent had received post 1 July 2013 set out in exhibit WJB26 which should be included in the pool available for distribution. The applicant accepts that some of the moneys recorded in that exhibit are reflected in other items in the property pool, namely, the respondent's motor vehicle, the legal fees paid by the respondent, the home mortgage payments and the ATO debt repayments. The total amount for those items is $423,655.61 which leaves a balance of $511,124.50 which the applicant contends should be notionally added back to the pool of assets available for distribution between the parties.

[68] The respondent contends that as his loan account debt to the company for the period 1 July 2013 to February 2015 is his personal liability which he has agreed to repay to the company over the next seven years pursuant to the division 7A agreement, the loan account is not a separate asset of the relationship, but is an asset of the company that has been taken into account in the valuation of the company.

[69] The applicant's approach again confuses the assets of the company with the parties' interests in the company. The notional add back suggested by the applicant should therefore not be made. What should be taken into account, however, in determining the parties' entitlements is that post separation until the determination of this proceeding the respondent has accessed funds provided by the company for his personal purposes, even though he is liable to repay them.

Findings on other disputed issues

[70] It is common ground that the shares in the company are assets of the parties that should be included in the pool of assets for the purpose of this proceeding. Although the company was incorporated with unequal shareholdings for the applicant and the respondent, the building up of that business was a joint effort on the part of both of them in the context of their relationship. The support that the applicant provided to the respondent in encouraging him to build up the business and by taking care of the children and the home enabled the respondent to do so. As the business grew, the applicant contributed by looking after the books of the business and that role expanded when a home office was established at the Eagleby property.

[71] The breakdown of the relationship commenced from at least 2006 and was acrimonious. Particularly after the applicant ceased working formally in the business in November 2006, she was dependent on the respondent paying her an amount each week to enable her to meet household and personal expenses. I find there was a combination of the

applicant being dissatisfied with the amount that she received and there were some weeks when there were delays in the payments being made to her by the respondent, so that the applicant looked to other sources of funds, such as the mortgage offset account to meet her expenditure. The stress of the breakdown of the relationship caused the applicant to behave in erratic ways and she did take moneys from the company or by selling or pledging for items belonging to the company for her personal gain.

[72] The respondent seeks a finding that the applicant's "spending spree" prior to separation was "wanton and reckless and negligent conduct which had financial consequences to the extent of 'thousands and thousands of dollars'". The respondent places too much weight on the events immediately preceding separation which must be considered in the context of the parties' entire relationship. The reality is that the applicant's extravagance in expenditures prior to separation did impact on the funds immediately available in the relationship, but the quantum is ultimately of little significance, having regard to the overall value of the pool of assets. The applicant's conduct has in any case to be balanced against the consequence of the conduct and her departure from the family home which was that she then suffered financial hardship and had no significant access to funds from their relationship until the interim order was made in this Court in December 2013.

[73] The respondent submits as a matter in his favour post separation that he caused the company to pay for or contribute towards the applicant's rent of her separate accommodation for in excess of four years until November 2012. That was the inevitable consequence of the respondent retaining and exercising the control of the company's business which had been the source of the funds for the parties during their relationship. The payments were accounted for by debiting the applicant's loan account in the company's books. (To the extent that the applicant denied agreeing to a loan account in her name being used for such purpose, whether she had agreed or not is irrelevant. The payments by the company for the applicant's benefit had to be recorded or accounted for in some way.)

[74] It was urged on behalf of the respondent that the extent of the applicant's inchoate claim to her share of the company at separation would have been minor, because the value of the company at the time of separation would have been much less in the light of the net profit for the years ended June 2007 and 2008. That submission gives no weight to the applicant's contribution to the building up of the business during the period of the parties' relationship, without which there would not have been the business in existence that was capable of improved performance after the parties' separation. The respondent must get credit for his sustained efforts in maintaining and developing the company's business post separation, but the positive performance of the business post separation had its foundation in the business established during the period of the parties' relationship due to their joint efforts.

[75] The respondent relied on the approach of the Full Court of the Family Court in *In the Marriage of Wilkinson* (2005) 40 Fam LR 273 where an error was found in the trial judge's failure to give weight to the reason for the increase in the husband's superannuation from $120,997 to $197,467 in the six years between separation and trial where it could be assumed that the reason for the increase was the husband's continuing employment. The court noted at [25]:

> "In our opinion, the increase in value of the husband's superannuation between separation and trial and the reasons for that increase were important matters in the circumstances of this case where the assets are relatively few and the husband had continued his employment in the post-separation period."

[76] The approach in *Wilkinson* can be distinguished in this case by the fact that the continued employment by the respondent was in the business of the company where the applicant had an interest in the equity of the company. Even though the applicant's legal interest as a shareholder was limited to one per cent, upon separation her entitlement to seek a property adjustment order gave her the potential of a greater interest than one per cent.

[77] The Full Court's approach in *Wilkinson* to the increase in superannuation of one party post separation due to that party's efforts is therefore of no assistance in this matter. In addition, the submission on behalf of the respondent that post separation the applicant had made "only very minor indirect contributions by reason of her small shareholding in the company" is misconceived for similar reasons.

[78] Apart from giving the applicant credit for her contribution to the business built up during the parties' relationship in determining the contribution based entitlements of the parties as at separation and at the hearing date, the applicant also seeks an adjustment of 10 per cent in her favour for her contribution to the ability of the respondent to earn a greater income into the future than she can. This is on the basis that the applicant in this proceeding is seeking a payment from the respondent which would enable him to keep the company's business and his source of income.

[79] Although s 293 of the Act requires the court to consider the effect of any proposed order on the earning capacity of the de facto partners, that is concerned with the nature of the order made, such as one that permits the respondent to retain the equity in the company and therefore the business which provides his employment, rather than for the purpose that the applicant makes her submission. It is common ground between the parties that the nature of any order to be made in this proceeding is the payment of a sum of money by the respondent to the applicant. Under s 298 of the Act, the court must consider the income, property and financial resources of each of the partners and the physical and mental capacity of each of them for appropriate gainful employment. In that context, the fact that the respondent will, health permitting, continue to work in the company's business and has the prospect of income from that assured employment is the relevant consideration.

[80] Under s 304 of the Act, the court must consider the contributions made by either of the partners to the income and earning capacity of the other partner. The applicant receives full credit for her contribution to the business built up during the parties' relationship until separation and for the benefits it conferred on the respondent post separation to the hearing date and the use made by the respondent of her equity in the company. After the property adjustment order made in this proceeding, the applicant will no longer have any interest in the company. The credit in the applicant's favour under s 304 of the Act for the future must be for what she did during their relationship that went towards setting the respondent up with the capacity to earn at a significantly higher level than her, because of the nature of the company's business. That overlaps with the credit already given to

the applicant for her contributions to the establishment of the business. It is a factor that will need to be taken into account in considering adjustments to the contributions-based entitlements, but cannot in the circumstances have the significance that the applicant seeks to place on it by claiming an adjustment of 10 per cent in her favour.

[81] The applicant contends that $152,138.41 of the respondent's legal fees paid by the company since 1 July 2013 should be notionally added back to the pool of assets of the parties. This amount is incorporated in the sum which has been converted into the debt that is the subject of the division 7A loan agreement the respondent entered into with the company on 2 March 2015. The respondent submits that adding back the amount of legal fees is not appropriate as it amounts to "double dipping".

[82] The Full Court of the Family Court in *NHC v RCH* (2004) 32 Fam LR 518 at [54]-[60] set out the different treatment that may apply to the payment of legal costs by one party, depending on the source of the funds and any liability of that party in relation to repayment of the funds.

[83] In the circumstances of this matter, the payment by the company of the respondent's legal fees for this proceeding under an arrangement whereby the respondent must repay the amount to the company does not equate with expenditure by a party on legal fees of funds that would otherwise have been included in the pool of assets of the parties. The amount paid by the company since 1 July 2013 for the respondent's legal fees is therefore not a notional add back.

[84] The breakdown of the parties' relationship and their separation meant that the applicant no longer had the opportunity of employment by the company. She did not return to the hospitality industry, because she had been out of that industry for such a long period. She eventually decided to qualify as an occupational therapist to equip her for job opportunities in that profession. The applicant's claim to include her HECS debt of $24,966 as a liability to be deducted from the pool of assets is disputed by the respondent on the basis that it is not a current or ascertainable debt and may never become payable, if the applicant does not earn income in the future above the threshold. The respondent's submission is correct, but the reality is that the applicant has a contingent liability of the HECS debt incurred to date, if the circumstances under the relevant legislation that trigger progressive repayment apply to the applicant in the future. It was reasonable for the applicant to seek a new qualification after separation. The potential HECS debt is therefore a matter which should be taken into account under s 309 of the Act.

[85] The respondent seeks to include as a liability against the parties' pool of assets his outstanding 2013 income tax liability of $69,781. That arose as a result of the dividend declared by the company to resolve the division 7A loan account issue which was due largely to the expenses paid for by the company for the respondent's benefit. It is not appropriate to treat it as a liability that reduces the pool of assets for the purpose of this proceeding.

[86] The respondent also submits that the company's 2014 income tax liability (which is shown as $182,091 in exhibit 2) as a liability against the parties' pool of assets. For the same reason that the separate assets of the company are not added to the pool of assets

which includes the assessed value of the parties' equity in the company, a discrete liability of the company should not reduce the parties' pool of assets.

Is it just and equitable to adjust the parties' property interests?

[87] Under s 286(1) of the Act, the court may make any order it considers just and equitable about the property of the parties, in order to adjust their interests. The court's jurisdiction to make an order is not engaged unless it is just and equitable to do so: *Stanford v Stanford* (2012) 247 CLR 108 at [35]. Under s 286(2) of the Act, the court must in deciding what is just and equitable consider the matters mentioned in subsubdivision 3 (s 291 to s 295) and, to the extent they are relevant, the matters mentioned in subsubdivision 4 (s 297 to s 309) (the subsubdivision 4 matters).

[88] The approach the court must take in deciding whether it is just and equitable to adjust the parties' property interests and in any exercise of its discretion to do so under the Act mirrors the approach taken to an application for a property settlement under s 79 of the *Family Law Act* 1975 (Cth): *FO v HAF* [2007] 2 Qd R 138 at [51]-[52]. This is the four step approach explained by the Full Court of the Family Court in *Hickey & Hickey* [2003] FamCA 395 at [39]:

> "The case law reveals that there is a preferred approach to the determination of an application brought pursuant to the provisions of s.79. That approach involves four inter-related steps. Firstly, the Court should make findings as to the identity and value of the property, liabilities and financial resources of the parties at the date of the hearing. Secondly, the Court should identify and assess the contributions of the parties within the meaning of ss.79(4)(a), (b) and (c) and determine the contribution based entitlements of the parties expressed as a percentage of the net value of the property of the parties. Thirdly, the Court should identify and assess the relevant matters referred to in ss.79(4)(d), (e), (f) and (g), ('the other factors') including, because of s.79(4)(e), the matters referred to in s.75(2) so far as they are relevant and determine the adjustment (if any) that should be made to the contribution based entitlements of the parties established at step two. Fourthly, the Court should consider the effect of those findings and determination and resolve what order is just and equitable in all the circumstances of the case ... ."

[89] Although the respondent's submissions emphasised the extent of the respondent's contribution to the success of the company's business, Mr George of counsel conceded that there is no doctrine of special contributions: *Hoffman & Hoffman* [2014] FamCAFC 92 at [52]. Instead it was put in terms on behalf of the respondent that "the contributions of the husband can be assessed as far exceeding the wife's contributions" (exhibit 1, para 7).

[90] In dealing with the first step, the parties' pool of assets at the date of the hearing can be summarised as:

Eagleby property	$550,000
Furniture and household items in applicant's possession	7,130
Furniture and household items in respondent's possession	24,935
The company	1,651,415

Boats (including outboards and trailers)	196,000
Respondent's motor vehicle	105,000
Total	**$2,534,480**

[91] As it is not the respondent's intention to sell the company, the notional taxation on the realisation of the business of $418,589 should not be included as a liability that reduces the parties' pool of assets. The parties' liability at the date of the hearing that should be deducted from the pool of assets can be summarised as:

ANZ home loan	$126,272
Total	**$126,272**

[92] That gives the net value of the pool of assets as $2,408,208.

[93] Superannuation entitlements fall within the definition of "financial resources" under s 263 of the Act and therefore should not be included in the pool of assets, although relevantly must be considered under s 298 of the Act. In this case, the parties' superannuation entitlements are so modest, that even as one of the subsubdivision 4 matters, the existence of the superannuation entitlements will make no difference to the outcome of this proceeding.

[94] As to the second step, the applicant submits the parties' contributions (both financial and non-financial) to the acquisition and improvement of the property of the parties together with their contributions to the welfare of their family during the period of cohabitation is equal. The respondent submits that an analysis of their direct and indirect contributions up to separation of the parties should result in an assessment of 60/40 in favour of the respondent. That is based on the respondent's analysis that the parties had conventional roles of the respondent as "bread winner" and the applicant as homemaker/parent between 1995 and 2000 and there was still a balancing of contributions, but with greater involvement by the respondent in parental responsibilities between 2000 and 2006, but between 2006 and 2008 the applicant's spending spree resulting in a diminution of the property pool. I have earlier rejected the weight which the respondent sought to place on the spending spree and associated conduct. The respondent overstated his role in parenting from 2000 (when he was dedicated to the development of the business and working long hours) and minimised the applicant's contributions to the home and the family and the use of her potential equity in the company in the period immediately prior to separation. The fact that the applicant organised for another parent to transport the children to and from school or had babysitters look after the children from time to time did not mean that the applicant had significantly reduced her parenting role for which she took the primary responsibility until separation. I therefore accept that up to separation the parties' contributions to the property and family remained equal.

[95] The real issue is what adjustment should be made to what were otherwise equivalent contributions until separation to account for the respondent's continued role in the company's business and the continuation of the company's business at a critical stage to its recovery from the financial precariousness of 2007/2008 which was enabled by the availability of all assets at the disposal of the company, including those representing the equity in which the applicant had a contingent interest by virtue of her entitlement to a settlement with the respondent of the property interests arising from their relationship.

[96] The applicant submits that the post separation contributions of the parties remain equal and that is the starting point before taking into account the subsubdivision 4 matters. The respondent submits that there should be a further 20 per cent adjustment in favour of him for his greater contributions post separation to the final hearing.

[97] Between separation and the final hearing, the parties' contributions to parenting have been approximately equal. Post separation, the respondent has been paid a modest salary for the long hours he has put into the business, but has been able to access funds by virtue of the loan account he had with the company to pay bills and make purchases to maintain his lifestyle and interests. He has had the benefit of continuing to live in the Eagleby property. There is no evidence that the sum of $150,000 spent by the respondent on improvements and maintenance to the Eagleby property has resulted in an equivalent increase in value of the property. I can infer, though, that a proportion of that expenditure has been necessary to maintain the value of the Eagleby property.

[98] In contrast, at least until the first interim property settlement payment was made in December 2013, the applicant has struggled financially post separation and has not enjoyed the same lifestyle as the respondent. The applicant did gain some benefit from the respondent's access to the funds of the company, as some of her expenses were paid from that source and she has not accrued any liability as a result of the dividend declared by the company that covered the loan accounts of both the applicant and the respondent.

[99] The respondent's continued role in the business which has resulted in the preservation and increase in the value of the company is the most significant contribution post separation. The contributions (both direct and indirect) made by both parties to the pool of assets and their parenting responsibilities since separation must therefore be weighted in favour of the respondent. I consider it appropriate to make a 20 per cent adjustment in favour of the respondent for his significant and much greater contributions than the applicant post separation.

[100] It remains to consider the subsubdivion 4 matters. The applicant has the benefit of being slightly younger and in better health than the respondent. The respondent has greater capacity for a continuing secure and higher income than the applicant (for which capacity the applicant should be given some small credit as discussed earlier in these reasons). The applicant has the contingency of the HECS debt, if she does manage to earn income above the threshold at which repayment of the HECS debt will commence. Although the applicant expects the younger child may return to live with her, that child will turn 18 years late in 2015, so the prospect of the applicant caring for a child under 18 years could be for only a very short period, if at all. The applicant should be able to enjoy the standard of living which she enjoyed whilst living with the respondent which was largely denied to her during the period between separation and December 2013. The de facto relationship lasted 13 years. Although the respondent is now cohabiting with another person, having regard to the respondent's secure income, that cohabitation has no bearing in this matter. Overall, I consider the subsubdivison 4 matters favour an adjustment in favour of the applicant of five per cent.

[101] I therefore conclude that, taking into account the subsubdivison 4 matters, the contribution based entitlements of the parties should be adjusted to 65 per cent for the respondent and 35 per cent for the applicant. That assessment is considerably different

to the current distribution and legal ownership of assets between the parties. It is therefore just and equitable to adjust their property interests by ordering the respondent to pay to the applicant 35 per cent of the value of the net assets in the pool, subject to the qualifications set out in the succeeding paragraphs.

[102] Each party should keep the furniture and household items in his or her possession and the applicant should be credited with the value of those in her possession ($7,130) in satisfaction of her entitlement as a result of this decision.

[103] In view of the total amount which the respondent will have to pay the applicant, it is appropriate that, if the respondent does cause the company to transfer the Honda CRV motor vehicle to the applicant, the value of that motor vehicle should be set off against the applicant's entitlement.

[104] After allowing for the credits referred to for the applicant's furniture and household items and (if applicable) the Honda CRV motor vehicle, the interim payments totalling $260,000 must also be deducted from the amount determined as the sum which the respondent must pay the applicant by applying the applicant's percentage entitlement to the value of the net assets.

[105] The parties did not deal expressly in submissions with which of them should pay for the costs of the preparation of the documents for the transfer of the shares in the company and the non-operating company from the applicant to the respondent and the withdrawal of the caveat. As the respondent obtains these assets absolutely, my inclination is that those costs should be borne by the respondent. That is a matter, however, on which the parties may endeavour to agree in formulating the order. As the respondent proposed causing the company to transfer of the Honda CRV motor vehicle to the applicant, my inclination is that, if that does occur, it should also be at the respondent's cost. That is another matter for the parties to consider when formulating the order.

Orders

[106] I will adjourn the proceeding to enable the parties to agree on the terms of an order that reflect the published reasons and include all consequential orders (such as the transfer of the applicant's shares in the company in favour of the respondent) and to make submissions on costs. If the parties are unable to agree on the form of order and/or unable to agree on a timetable for exchanging submissions on costs, the proceeding may be re-listed by arrangement with my Associate on two days' notice in writing by one party to the other.