

# SUPREME COURT OF QUEENSLAND

CITATION: *KBC v EXE* [2012] QSC 409

PARTIES: **KBC**  
(applicant)

v

**EXE**  
(respondent)

FILE NO: 7622/09

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 4 December 2012

DELIVERED AT: Brisbane

HEARING DATE: 3, 4, 5, 6 and 10 September 2012

JUDGE: Peter Lyons J

ORDER:

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – DE FACTO  
RELATIONSHIPS – ADJUSTMENT OF PROPERTY  
INTERESTS – GENERALLY – where the applicant and the  
respondent lived in a de facto relationship for approximately  
two years – whether and how the property interests of the  
applicant and respondent should be adjusted

*Property Law Act 1974 (Qld)*, part 19

*Makita (Aust) Pty Ltd v Sprowles (and Makita)* (2001) 52  
NSWLR 705, followed

COUNSEL: The applicant appeared in person  
J Rivett for the respondent

SOLICITORS: The applicant appeared in person  
Counsel for the respondent was uninstructed

- [1] KBC and EXE lived in a de facto relationship for a period of about two and a half years commencing on 10 April 2006. KBC now seeks property adjustment orders under Part 19 of the *Property Law Act 1974 (Qld)* (PLA).

## Background

- [2] KBC is now 61 years of age. She has adult children. Prior to the relationship, she worked as a radiographer. She lived on an acreage property at Tanawha. Her financial position at the commencement of the relationship is discussed later in these reasons.

- [3] EXE is 62 years of age. As a young man, he joined the Royal Australian Air Force, graduating from Officer Training School in 1973. In 1974, he was stationed at the Townsville Air Force Base. He was injured in a motor vehicle accident when driving home from work. He suffered injury to both sides of the frontal lobe of his brain. He was subsequently discharged from the Air Force in about 1975. By this time he had commenced to conduct an earthmoving business, which he carried on for three years. In 1976, he commenced work as a commercial real estate agent, initially employed, but from 1981, carrying on his own real estate practice, in Townsville.
- [4] At the commencement of the relationship, EXE owned his home at 46 Church Street, Caboolture. At that time, EXE was in receipt of a part disability pension from Centrelink. How much EXE received per annum under the disability pension from Centrelink is unclear. Shortly after, he commenced to receive a Total and Permanently Incapacitated (TPI) pension. Payments under the TPI pension totalled approximately \$20,000 per annum.
- [5] During the relationship, KBC and EXE lived at KBC's property at Tanawha. On that property, there is a house, and a smaller cottage. Work was undertaken, initially to improve the cottage, and then more broadly in respect of the property. The circumstances in which this work commenced, and any agreement about what was ultimately to happen in relation to the property, are contentious, and are discussed later in these reasons. However, substantial work was carried out during the course of the relationship. The work extended to the construction of five dams, the installation of an irrigation system, the construction of a tennis court with night lighting, internal roadwork, the construction of a rock wall, and some improvements to the house.
- [6] In the course of the relationship, KBC obtained funds for the project and for other purposes from various sources. These are discussed later.
- [7] Much of the money which thus became available was used to purchase plant and equipment, including a bulldozer, a road roller, and a backhoe; and for work on the property. KBC also gave evidence that EXE maintained an expensive lifestyle at her expense.
- [8] When the relationship came to an end, the work on the Tanawha property had not been completed. EXE moved out, taking with him (while KBC was in Melbourne) most of the machinery, and other personal property of KBC. KBC subsequently borrowed money to complete the work. She then moved out of the property, renting it to get money to pay interest on her debts. She has borrowed further money from a friend, Mr A, primarily to meet her interest liabilities.
- [9] In early 2011, EXE received a payment from Comsuper in the sum of \$654,326, net of tax; and on his evidence, little of this remains available. EXE has claimed a refund of the tax deducted in respect of this payment, being an amount of \$333,597. That claim has not been finally determined.
- [10] Before dealing with some specific issues, and some matters which need to be considered to determine the application, it is convenient to note the provisions of the PLA which regulate the powers of the Court.

### Property Law Act provisions

- [11] The court’s power to grant the relief sought by KBC is found in s 286 of the PLA, which is as follows:

**“286 Court may make property adjustment order**

- (1) A court may make any order it considers just and equitable about the property of either or both of the de facto partners adjusting the interests of the de facto partners or a child of the de facto partners in the property.
- (2) In deciding what is just and equitable, a court must consider the matters mentioned in subdivision 3.<sup>1</sup>
- (3) It does not matter whether the court has declared the title or rights in the property.
- (4) In this section –

*adjust*, for interests of persons in property, includes give an interest in the property to a person who had no previous interest in the property.”

- [12] Section 286 is found in Sub-Division 2 of Division 4 of Part 19 of the PLA, the purpose of this sub-division being “to ensure a just and equitable property distribution at the end of a de facto relationship”.<sup>2</sup>

- [13] Sub-sub-division 3 of sub-division 2 identifies the following matters for consideration, potentially relevant to the relationship between KBC and EXE:-

- (a) the financial and non-financial contributions made directly or indirectly by the de facto partners to the acquisition, conservation or improvement of property<sup>3</sup>;
- (b) the financial and non-financial contributions made directly or indirectly by the de facto partners to the financial resources of either or both of them<sup>4</sup>;
- (c) the contributions, including any home making contributions, made by either of the parties to the welfare of the de facto partners<sup>5</sup>;
- (d) the effect of any proposed order on the earning capacity of either of the parties<sup>6</sup>.

- [14] Section 296 requires the Court to consider the matters mentioned in sub-sub-Division 4 of sub-division 2 of Part 19 of the PLA, “to the extent they are relevant

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<sup>1</sup> Subdivision 3 (Matters for consideration in deciding what is just and equitable)

<sup>2</sup> See s 282(1) of the PLA

<sup>3</sup> See s 291(1)(a) of the PLA

<sup>4</sup> See s 291(1)(b) of the PLA

<sup>5</sup> See s 292(1) of the PLA

<sup>6</sup> See s 293 of the PLA

in deciding what order adjusting interest in property is just and equitable". The following are potentially relevant in the present case:-

- (a) the age and state of health of each of the parties<sup>7</sup>;
- (b) the income, property and financial resources of each of the parties<sup>8</sup>;
- (c) the physical and mental capacity of each of the parties for appropriate gainful employment<sup>9</sup>;
- (d) the commitments of each of the parties, necessary to enable that party to support himself or herself<sup>10</sup>;
- (e) the eligibility of either party for Australian pension, allowance or benefit that is not income tested<sup>11</sup>;
- (f) a standard of living which is reasonable for each of the parties in all the circumstances<sup>12</sup>;
- (g) the length of the de facto relationship<sup>13</sup>;
- (h) the extent to which the relationship has affected the earning capacity of each of the parties<sup>14</sup>;
- (i) any fact or circumstance which the court considers the justice of the case requires to be taken into account<sup>15</sup>.

### **Financial position at commencement of relationship**

- [15] KBC had purchased the property at Tanawha on 13 August 2002 for the sum of \$330,000. At the commencement of the relationship, there was no outstanding debt in respect of the purchase of this property. She also owned a half-interest in an investment property at Weipa, and she had two share portfolios.
- [16] KBC gave evidence that at the commencement of the relationship, her assets had a total value of \$1,262,430.90<sup>16</sup>. The major asset was the property at Tanawha. The value of \$600,000 which KBC attributed to it at the commencement of the relationship does not appear to be contentious.
- [17] KBC included in her assets, a sum of \$89,779.48, identified as salary insurance from Asteron. Cross-examination about this amount suggested that it was income rather than an asset (and, apparently, for that reason wrongly included in the assets);

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<sup>7</sup> See s 297 of the PLA

<sup>8</sup> See s 298(a) of the PLA

<sup>9</sup> See s 298(b) of the PLA

<sup>10</sup> See s 300(a) of the PLA

<sup>11</sup> See s 302 of the PLA; an Australian pension, allowance or benefit that is income tested, is to be disregarded

<sup>12</sup> See s 303 of the PLA

<sup>13</sup> See s 305 of the PLA

<sup>14</sup> See s 306 of the PLA

<sup>15</sup> See s 309 of the PLA

<sup>16</sup> See the affidavit of KBC , Court File Index No. (CFI) 128 para 6

and that it was subject to tax. It was not suggested that it duplicated the Asteron salary insurance included in the amount provided by KBC during the relationship. An examination of the supporting documents suggests that the amounts relate to different payments.

- [18] Although KBC did not articulate her reason for treating this amount as an asset at the commencement of the relationship, it seems to me a matter of little moment whether it is dealt with as such, or is added to the amount she supplied during the relationship. It is unlikely that tax is a relevant consideration, as KBC received tax refunds in 2007 and 2008<sup>17</sup>. Accordingly, I propose to treat it as KBC did, rather than as a financial contribution during the relationship.
- [19] The submissions made on behalf of EXE do not accept the amounts identified by KBC of \$100,000 for her house contents and car; long service, sick leave, and annual leave entitlements of \$23,210; and a debt owed by KBC's son and his wife of \$3,500. KBC was not cross-examined about the house contents, the car, or the debt owed by her son. In the absence of any other evidence, I propose to accept her evidence about them. During the relationship, KBC received money from QDI in respect of her entitlements. There appears to me to be no reason to reject her evidence that she had, at the commencement of the relationship, the accrued entitlements she claims, though it will be necessary to avoid taking the entitlements into account twice.
- [20] At the commencement of the relationship, KBC's major liabilities were a loan with a balance owing of \$127,119.63, relating to her share purchases; and one-half of the debt incurred to pay for the Weipa property, her liability being \$81,000. KBC's stated liabilities of \$209,375.73 at the commencement of the relationship do not appear to be contentious. Accordingly, the net value of her assets at that time was \$1,053,055.17<sup>18</sup>.
- [21] It was common ground that the value of EXE's house at Caboolture at the commencement of the relationship was \$170,000; and that his liabilities were \$5,252. KBC gave evidence that his other assets had a value of \$33,731.32. The net value of his assets at the commencement of the relationship was accordingly \$198,479.32<sup>19</sup>.

### **Agreement relating to work at Tanawha**

- [22] KBC gave evidence that EXE told her that he was a very successful property developer with extensive experience. He initially proposed to renovate the cottage on the Tanawha property, and build in a garage. However, the project expanded to include the construction of five dams; an irrigation and pump system for the property; a tennis court with night lighting; numerous internal roads; upgrading the entry driveway; construction of a rock wall along the entry; replacing the pool safety rail; refurbishing the laundry; and external painting of the main house. EXE expected the project to be completed by Christmas 2006.
- [23] KBC gave evidence that she was to be entitled to the value of the original equity in the property. She would be reimbursed for the cost of the development. She would

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<sup>17</sup> See CFI 128 par 8.

<sup>18</sup> See generally CFI 128 par 6.

<sup>19</sup> See generally CFI 128 par 7.

pay EXE's living costs, and would be reimbursed for them. The balance remaining was then to be divided evenly between them. They planned to move together to Townsville, and buy a property where they would live. They would also use the machinery to carry out subdivisions in Townsville. The machinery would be hired out when not in use<sup>20</sup>.

- [24] EXE's evidence was that, at the beginning of the relationship, KBC told him that she wished to sell her property at Tanawha, and asked him to assist in renovating it for that purpose. KBC was to pay all of the expenses. He said that after the property had been sold, the debt incurred by KBC would be repaid, and an acreage property would be purchased in joint names for development, using the machinery which had been purchased<sup>21</sup>.
- [25] The principal difference between the versions of the parties is that KBC says she was entitled to be given credit for the value of her property, and to be reimbursed for money she provided to EXE during the project. EXE, on the other hand, appears to claim that he was entitled to one half of the proceeds of sale, after the loans were repaid.
- [26] General considerations about credit are discussed later in these reasons, leading to a conclusion that KBC is a more reliable witness than EXE. It also seems to me that KBC's version is inherently more likely. Her financial position at the commencement of the relationship could only be the result of careful management of her finances, and it seems to me unlikely that she would make the arrangement alleged by EXE. I would therefore accept that the arrangement between the parties was as described by KBC.
- [27] However, it seems to me that the determination of this issue is not of particular importance. The work on the Tanawha property was not completed when the relationship came to an end. At that time, the property was not in a condition where it would have been sensible to sell it. The work and the sale were part of a larger plan, including a proposed move to Townsville, which did not proceed. It seems to me to be quite unlikely that KBC would have agreed to the sale of her property, except on the basis of the purchase of another property where she could live, though she then intended to live with EXE. That did not happen. Because, after EXE left, taking the machinery, the parties did not proceed to complete the project in accordance with their arrangement, no occasion arose to deal with the proceeds of it.

### **Work done on Tanawha property during relationship**

- [28] The work on the Tanawha property was in part carried out by the parties themselves, and in part by contractors. As has been mentioned, machinery was purchased to carry out the work.
- [29] KBC gave evidence of amounts expended on machinery, tools and equipment. Her initial evidence was that, on separation, EXE took with him property which she described as plant, equipment, machinery, tools and household items which in total cost \$346,704.33<sup>22</sup>. She identified transactions for which there are bank or credit card entries and invoices, totalling \$290,816.64. For transactions for which there

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<sup>20</sup> See CFI 131 paras 140, 141.

<sup>21</sup> See CFI 35 par 52.

<sup>22</sup> See CFI 2 par 20(a)(i), (b) and (c).

were entries on bank or credit card statements, but no invoices, the total was \$41,848.21. The balance of \$14,039.48 refers to purchases for which there is no documentary evidence. It should be noted that the expenditure is not confined to machinery. Thus it includes amounts spent on EXE's cars; consumable items such as paint and fertiliser; garden hoses and materials for home brewing.

- [30] Much of the plant and equipment was purchased second hand, with additional parts and accessories also being purchased. EXE worked on these items. In particular, a truck chassis was purchased which was rebuilt to produce a "tipper". Some of the work was done by EXE, though substantial sums were paid for the work of tradespersons. In exhibit 2, KBC has aggregated costs for much of the property taken by EXE on separation, being principally pieces of equipment and related items. Omitting two items which appear to be unrelated to the work on Tanawha<sup>23</sup>, the total cost is \$297,163.98. No allowance is made for EXE's work on any machinery in this total.
- [31] EXE denied that so much was spent on plant and equipment. His recollection was that the amount spent by KBC in this way was \$123,560<sup>24</sup>. I accept KBC's detailed evidence of the amounts spent, and the purposes for which they were spent. Two of the items in exhibit 2 (the home theatre system, costing \$19,630, and the dog bath and dryer, costing \$3,310) would not seem to me aptly described as plant and equipment; but I accept that most of the balance of the items could be so described.
- [32] KBC gave evidence that both of them worked hard on the project. EXE claimed to have worked between 8:00 am and 8:00 pm everyday he was on the property. He estimated the value of his work at \$225,204. This was by the application of rates he said were appropriate for a machine operator and for labour with tools; on the basis that he worked nine hours a day, seven days a week, for two and a half years (save for a short trip to Adelaide, a seven day trip to Weipa, and seven days spent at his residence in Caboolture)<sup>25</sup>.
- [33] While I accept that EXE worked hard on the project I do not accept that he worked the hours claimed. He was at this time drawing a pension on the basis that he was totally and permanently incapacitated. Much of the work was done by contractors. However, I do accept that, because of his skills, the hourly rate payable to have someone do the work performed by EXE was greater than for the work carried out by KBC.
- [34] One of the contractors was a Mr Harris, to whom some \$50,000-\$60,000 was paid<sup>26</sup>. However, other work was done by a Mr Trevor Buchanan<sup>27</sup>. There is evidence from KBC that payments to contractors were at times made by EXE using money provided by KBC<sup>28</sup>. That evidence (about which KBC seemed to express some reservation) includes payments apparently made to contractors, as well as for other purposes. On its face, this evidence would suggest payments to contractors were of

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<sup>23</sup> Item 10, home theatre; and Item 18, hydro-bath and dog electric grooming dryer

<sup>24</sup> See CFI 35 para 40.

<sup>25</sup> See CFI 35 par 46

<sup>26</sup> See CFI 35 par 40; CFI 131 par 144

<sup>27</sup> See CFI 131 par 147, 148

<sup>28</sup> See CFI 2 par 28 and ex JAB 11

the order of \$135,000<sup>29</sup>. This total does not include the sum of \$9,000 paid to Mr Buchanan for work on the tennis court. This evidence strongly suggests that at least \$100,000, and perhaps as much as \$144,000, was paid to contractors for work on the Tanawha property, during the relationship.

### **Financial contributions during relationship**

- [35] During their relationship, to provide money to carry out the work on Tanawha, and to aid in living and other expenses, KBC obtained funds from a number of sources. She sold both her share portfolios. She received payments of salary insurance, the insurer being referred to as Asteron. She also sold her interest in the Weipa property. KBC anticipates a liability for capital gains taxes as a result of this sale. She borrowed money from Westpac. She also was paid money by QDI in respect of her leave entitlements. She gave evidence (with documentary support) that the total of the funds she supplied during the relationship was \$991,510.46<sup>30</sup>.
- [36] The amounts for the share portfolios are common to the amounts she has calculated as her financial input during the relationship, and her assets at the commencement of the relationship. They totalled \$240,877.42. Her net equity in the Weipa property at the commencement of the relationship, based on her evidence, was \$34,000. It would seem that the amount she received from QDI included the accrued entitlement at the commencement of the relationship of \$23,210. On that basis, her financial contribution to the relationship, beyond the net value of assets at its commencement, was \$693,423.04.
- [37] There was some controversy about monies received by EXE (other than from KBC) during the relationship. KBC's evidence was that EXE received Centrelink payments and Veteran Affairs payments, which, on her evidence, totalled \$79,734.90<sup>31</sup>. Her evidence identified other payments into his bank account of \$10,230.56, from Sunsuper. Other receipts which KBC attributed to EXE in this period were either monies from her, refunds for items for which she had paid, property which he took at the end of the relationship, and payments totalling \$38,663.37, for which KBC could not identify the source.
- [38] Ms Rachael Gray, a corporate accountant, worked for EXE for a period in 2012, in part providing secretarial assistance, and in part preparing some accounting information relating to his affairs. She calculated the sum of \$110,491.42 as EXE's income during the relationship. Primarily, that income comprised payments from Centrelink and Veteran Affairs. However, it appeared to include two opening balance figures of \$8,327.78 and \$15,877.35 which were unexplained. It included a figure of \$9,120.56 as a "superannuation cash out". It was included by KBC in payments from Sunsuper. KBC identified payments from the Department of Veteran Affairs in January 2007, not identified by Ms Gray<sup>32</sup>. It seems likely, given the nature of these payments, that such payments were made to EXE in this period.

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<sup>29</sup> The result is based on the cash withdrawals in ex JAB 11 being for contractor's work on Tanawha, save for payments relating to a compressor, work on a hovercraft trailer, a ride on mower, some payments for engineering work, augers, a traxcavator, and payments relating to various other items of machinery. It would seem that, of the cheques, one for the payment for \$4,000 should be included.

<sup>30</sup> See CFI 128, para 8.

<sup>31</sup> See CFI 128 par 9

<sup>32</sup> See CFI 128, ex JAB 9/2-1

On the other hand, Ms Gray included a number of small payments, on occasions of a few dollars, and even on occasions of some cents, not identified by KBC. It should be added that the period covered by Ms Gray's evidence ends on 9 October 2008; while KBC's continues until 6 November of that year.

- [39] Taken together, it seems to me that this evidence demonstrates that during the relationship, EXE received a sum approximating \$89,000 from identified sources, being Centrelink, Department of Veteran Affairs, interest, and Sunsuper. Of the amounts referred to by Ms Gray, the source of some \$24,205.13 is unidentified.
- [40] It does not follow that moneys received by EXE from sources other than KBC were applied to the relationship. As has been mentioned, it was agreed that KBC would support EXE, and she did so. She gave evidence that considerable sums of her money went into his bank account<sup>33</sup>. Other funds which may be regarded as originally coming from her also ended up with EXE<sup>34</sup>.
- [41] EXE claimed his pension income was used for relationship purposes, in particular paying for items generally related to the work at Tanawha. He has provided no documentary evidence to support that claim.
- [42] KBC's evidence was that the sum of \$55,725 of her money was paid into EXE's bank account<sup>35</sup>. That evidence was not challenged in cross-examination. In addition, she identified payments either made to EXE or on his behalf in excess of \$150,000, including some \$22,000 on his car, and \$8,000 in respect of his property at Caboolture<sup>36</sup>. Again, she was not cross-examined about this evidence. I am prepared to accept it. While it seems to me likely that at times EXE made payments relating to the work at Tanawha, he was reimbursed for these. I also note that it was common ground that, during the relationship, KBC was to support EXE; and that she provided him with a credit card.
- [43] KBC gave evidence that, at the end of the relationship, the balance in EXE's bank accounts was, in total, \$9,267.18<sup>37</sup>. Her evidence also shows that it was she who ultimately paid for the property taken by EXE on separation, which seems to have included virtually all of the property purchased during the relationship.
- [44] The likely explanation for the state of EXE's bank accounts is that EXE was disposing of money in some way other than by depositing and retaining it in his bank accounts, or using it for purposes related to the relationship.
- [45] It seems to me unlikely that either his income from the sources earlier identified (including his pension) or other sums from unidentified sources were, to any significant extent, applied to the relationship. I do not accept his evidence to that effect.

### **Other contributions during relationship**

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<sup>33</sup> See CFI 128 par 9, and in particular ex JAB 9/4

<sup>34</sup> See CFI 128 par 9 and ex JAB 9/6-JAB 9/15.

<sup>35</sup> See CFI 128 par 9 and ex JAB 9/4

<sup>36</sup> See CFI 128 par 9 and exs JAB 9/10-9/15

<sup>37</sup> See CFI 128 par 11 and exs JAB 11/3 and JAB 11/4

- [46] KBC gave evidence that, during the relationship, she worked hard in assisting with the work being done to that property. Although the evidence was general in nature, I nevertheless accept it.
- [47] EXE gave evidence of the hours he claimed to have worked on the property and the value of his contribution<sup>38</sup>. As previously indicated, I accept that EXE worked hard on the property. Nevertheless, I do not accept that the work was as extensive as he claimed.
- [48] EXE asserted that he had provided tools and the like, which, if hired would have cost \$20,000<sup>39</sup>. I accept that tools of his were used in relation to the work on the Tanawha property. There is no way of testing the reliability of his assertion of the hire costs. However, it seems to me that the value of the use of them would be very small, compared to the value of the use of the machinery for which KBC paid.
- [49] EXE claimed that he successfully negotiated the sale of KBC's interest in the Weipa property at a high price<sup>40</sup>. In cross-examination, KBC attributed the profit to the fact that the price of land in Weipa had increased significantly because of a mining boom<sup>41</sup>. She also said that EXE's role was to lead her to believe, incorrectly, that her sister was defrauding her<sup>42</sup>. Given the state of the evidence, I am not prepared to find that KBC's interest in the Weipa property was sold by her for more than her share of its market value.
- [50] EXE claimed that he contributed to the value of the truck by reason of his work on it<sup>43</sup>. He acknowledges that some of the work was done by a boilermaker, on his evidence for a sum of \$3,500. KBC's evidence is that she paid \$12,000 for labour on this truck<sup>44</sup>. She was not cross-examined about this, and generally her evidence reflects significant effort correctly to collate various items of expenditure. EXE provides no documentary support for his figure. I would not be prepared to attribute any significant value to EXE's contribution to this truck, particularly, when compared to the sum of \$52,846.47 paid by KBC towards it<sup>45</sup>. I also note that EXE had the use of this truck since separation; and that in June 2011 it was valued at \$14,000.

### **End of relationship**

- [51] It appears to be common ground that EXE moved out of the property at Tanawha on about 10 October 2008<sup>46</sup>. EXE says that that is when the relationship ceased. KBC's evidence was that they had arguments previously, and that he had left "lots of times ... he'd just go away and then he'd come back again"<sup>47</sup>.
- [52] It was also common ground that EXE returned to Tanawha early in November 2008, about the time that KBC went to Melbourne for a wedding. She understood that he

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<sup>38</sup> See CFI 35 pars 46-47

<sup>39</sup> See CFI 35 par 48

<sup>40</sup> See CFI 35 par 54

<sup>41</sup> T1-28/1-15

<sup>42</sup> T1-26/20-1-27/15

<sup>43</sup> See CFI 35 par 60

<sup>44</sup> See ex 2, Equipment Identification Sheet #2

<sup>45</sup> Ex 3, Equipment Identification Sheet #2

<sup>46</sup> See CFI 35 par 70(b)

<sup>47</sup> T1-43/30

- was coming back permanently<sup>48</sup>. She learnt that he was not staying, when he removed property from Tanawha, and she subsequently spoke to him by telephone from Melbourne.
- [53] On EXE's evidence, his return to Tanawha in November was only intended to be temporary.
- [54] When EXE left Tanawha in November 2008, he arranged for a team of people to assist him. He removed a great deal of property from the premises. That included the machinery and other items purchased in the course of the relationship for work at Tanawha, discussed previously in these reasons. In particular, it included a home theatre system purchased by KBC in March 2007 for a total of \$19,625<sup>49</sup>. It also included a number of personal items which KBC had purchased before the commencement of the relationship, for which she estimated the cost to be \$26,827.20<sup>50</sup> (it should be noted that this includes the home theatre system). The property taken included KBC's passport, her European currency, and personal papers including bank statements, as well as items likely to have been of importance to KBC for reasons other than any monetary value.
- [55] An attempt was made in the course of cross-examination of KBC to suggest that she did not intend to perform the agreement relating to the development and sale of her property. That was denied by KBC. When EXE was cross-examined, however, he did not maintain that position and attributed his departure to the fact that KBC injured his puppy. However, he also sought to suggest that it became clear that KBC would not sell the property.
- [56] KBC gave evidence that EXE left "as soon as I told him I was broke"<sup>51</sup>. She gave oral evidence that they had had previous disputes, "because I was running out of money because he told me I was tight with funds and I just couldn't support him any more"<sup>52</sup>.
- [57] On 6 February 2009, EXE sent an email to KBC. The tone of the email is nasty. In it EXE stated that he had given consideration to the possibility that KBC might go back on the plan to sell the property on completion "to spite me"; and that he was prepared to continue working until KBC's "constant whinging and nagging" about her loss of money and the debts annoyed him until he was no longer prepared to stay. The email continued, "You stupid offer to put me in your will did you think I would stay after the money ran out."
- [58] The email goes on to assert an entitlement to a share in KBC's property by virtue of the relationship; and included an offer to "come and finish the property and sell it saving us both the huge cost of commissions once you agree to swrite over to me all the machinery and half the house".
- [59] KBC's explanation for the ending of the relationship is consistent with what EXE stated in the email, written a few months later. Moreover, EXE's concern for the

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<sup>48</sup> T1-44/15-20

<sup>49</sup> See ex 2, Equipment Identification Sheet #10

<sup>50</sup> See CFI 2 par 20(d) and ex JAB6

<sup>51</sup> See CFI 121 par 22

<sup>52</sup> T1-43/40

improvement of his financial position at KBC's expense provides some support for that view.

### **Property taken by EXE at separation**

- [60] The cost of this property has been discussed earlier. As mentioned, the cost does not include any allowance for EXE's work on some of the equipment. Nevertheless, EXE was prepared to allow depreciation of 15% on cost as a reduction in value up to the date of separation.
- [61] Some items were recently returned in a damaged condition, being a stand for the home theatre system, a steam iron and ironing board, and an easy cook oven. The total cost of these items was \$1,028. It seems that a television set, part of the home theatre system, was returned earlier<sup>53</sup>.
- [62] EXE provided a commentary on some of KBC's evidence about the items taken at separation<sup>54</sup>. He commented on items which had a total cost, according to his material, of \$201,591.58. It should be observed that of that amount, \$69,000 was the cost of a John Deere loader/backhoe<sup>55</sup>, that cost not being included in KBC's calculations, as this piece of equipment had been sold during the course of their relationship. Of the rest, many, and perhaps the majority, are said to be included in the valuation of other items of property, principally machinery. A few are said to have been worn out, or no longer to function. Some are said to have remained at Tanawha. In my view, EXE's commentary does little to detract from the picture which emerges from KBC's evidence, namely that on separation, he took with him a considerable quantity of property which had a cost in excess of \$300,000, including items which were plainly personal to KBC.
- [63] It should be noted that in his affidavit, EXE attributes a value of \$50,000 to the items in his possession in June 2011<sup>56</sup>, discussed again later in these reasons.

### **Work done on Tanawha property post relationship**

- [64] EXE gave evidence that, at separation, "all of the relevant works jointly agreed to between the Applicant and myself were brought to practical completion"<sup>57</sup>. KBC gave evidence that extensive work needed to be carried out on the property at the time of separation<sup>58</sup>. She described this work as work which needed to be undertaken to make the property ready for sale; but it is obvious that the work generally relates to work which remained to be done in respect of the project. Her evidence is supported by photographs<sup>59</sup>. KBC gave evidence that she spent "around \$110,000" on the restoration of her property after separation<sup>60</sup>. She has provided a detailed list of expenses, totalling \$116,130.33; but these include expenditure for rates, tenants insurance, pool care and garden maintenance. KBC was not cross-

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<sup>53</sup> CFI 74, par 5.

<sup>54</sup> KBC's evidence is found at CFI 2, particularly in ex JAB 1. EXE's evidence is found at CFI 44, particularly at ex DWD-1.

<sup>55</sup> Item 78

<sup>56</sup> See CFI 44, par 26

<sup>57</sup> See CFI 35 par 42

<sup>58</sup> See CFI 2 par 16

<sup>59</sup> Found in ex 2

<sup>60</sup> See CFI 74; and ex JAB 9(p 180-182)

examined about this evidence. It seems to me appropriate to accept that she spent at least \$100,000 on completing the work on her property, after separation.

### **Valuation matters relating to Tanawha property**

- [65] KBC purchased this property in August 2002 for \$330,000. She estimated its value at the commencement of the relationship in April 2006 as \$600,000. The submissions made on behalf of EXE at the end of the hearing appeared to accept this estimate.
- [66] The value of the property at the end of the relationship and its current value were contentious. In addition, EXE led evidence from a valuer, Mr Frost of the extent to which the work done on the property had improved its value. That was also contentious.
- [67] Mr Frost provided a report which recorded that he inspected the property on 17 July 2010 and on 3 August 2011. He valued it, as at 14 October 2008, at \$980,000; and as at 31 March 2012, at \$1,050,000. In addition, he expressed the view of the work carried out on the property had improved its value by \$375,000.<sup>61</sup> KBC did not call valuation evidence.
- [68] KBC challenged Mr Frost's independence. Mr Frost's report commenced with a statement that his company did not have any relationship with the parties other than a professional one<sup>62</sup>. In cross-examination Mr Frost accepted that he had known EXE for a period of 35 years. On 17 May 2010 EXE sent him an email<sup>63</sup> the terms of which seem to me to be quite unusual in the context of a relationship which is purely professional.
- [69] In his report, Mr Frost placed some weight on the advantage of the dams constructed by EXE which contained water with a value, in his view, of \$70,000<sup>64</sup>. In his oral evidence in chief, he supported his view about the significance of the dams by referring to their utility if the property were to be used for market gardening. In cross-examination, he conceded that because of the steepness of the land and the quality of the soil, market gardening would require the introduction of soil in retained areas<sup>65</sup>. Mr Frost's reliance on the value added by the water in the dams seems to me to be misplaced.
- [70] At another point, Mr Frost sought to say that the house had air-conditioning throughout; but when cross-examined had to accept that he did not know of more than one air conditioning unit there<sup>66</sup>.
- [71] Later in these reasons, reference is made to Mr Frost's evidence relating to changes in the value of the property, in line with the movement of the prices of property in the Tanawha area<sup>67</sup>. Mr Frost was reluctant to concede that, without the works, the value of the property would have increased between the 2002 and 2008 years

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<sup>61</sup> Mr Frost's report is ex 4

<sup>62</sup> Ex 4 p 2 par 1

<sup>63</sup> Ex 5

<sup>64</sup> Ex 4 p 17

<sup>65</sup> T2-37

<sup>66</sup> T2-42

<sup>67</sup> Recorded at ex 4, p 19

- consistent with the movement in median house price, for no apparent reason other than that to do so would present difficulties for the value which he attributed to the works for which EXE claims the credit.
- [72] Overall, I was left with significant reservations about the objectivity and independence of Mr Frost's evidence.
- [73] For some unexplained reason, Mr Frost was instructed to exclude that any value which the cottage added to the property from his valuation. He considered that it would have added value, but did not specify the amount.
- [74] Mr Frost's valuation assumed that the project had been brought to completion<sup>68</sup>. However, as has been discussed, the work was by no means complete; and an amount of \$100,000 was expended for this purpose.
- [75] In my view, assuming it otherwise to be correct, Mr Frost's valuation does not reflect the value of the property in its condition at the time of separation. Nor do I think that that value is likely simply to be the difference between its value when the work was completed, and the cost of completing the work. On that basis, it seems to me that the value of the property on separation should be taken to be \$860,000.
- [76] Mr Frost valued the property as at 31 March 2012, and as at the date of hearing, at \$1,050,000. There being no better evidence, and no specific reason to reject this evidence, I am prepared to act on that basis.
- [77] The most contentious part of Mr Frost's evidence was his opinion about the added value of the works, in the sum of \$375,000. There were, in my view, a number of difficulties with this evidence. Mr Frost's primary approach was to determine the value of the property by the direct comparison approach<sup>69</sup>. He then apportioned, in a summation, his value as at 31 March 2012 to land value, including driveways, access and site fencing at \$580,000; and improvements, accounting essentially for the balance of the value. Of the land value, he attributed \$150,000 to the works (excluding the surfacing of the driveway)<sup>70</sup>. The figure of \$580,000 which appears in the summation was derived from a comparison with the amount for which another undeveloped property, 47 Cunning Road, sold. Accepting for present purposes Mr Frost's oral evidence that this property had good access<sup>71</sup>, this provides no explanation for the attribution of an enhanced value of the relevant work on KBC's property of the sum of \$150,000. There is no identification of criteria for testing the accuracy of Mr Frost's conclusion; nor is his reasoning process identified<sup>72</sup>. The result is that it is not possible to form an independent judgment about this matter<sup>73</sup>.
- [78] Similar difficulties arise with respect to amounts attributed to power reticulation, the tennis court, the dams and water reticulation, and the landscaping and floor slabs. Indeed, no sale was identified as specifically supporting the amounts attributed to

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<sup>68</sup> T2-25/1-10; 2-35/45-55

<sup>69</sup> Ex 4 p 20

<sup>70</sup> T2-76/30-40; 2-78/55

<sup>71</sup> T2-76/30; in his report he described the access to this property as "difficult"; ex 4 p 19

<sup>72</sup> See *Makita (Aust) Pty Ltd v Sprowles (and Makita)* (2001) 52 NSWLR 705 at [59], [61], [79], [85]-[88]

<sup>73</sup> See *Makita* at [59], [67], [68], [71]-[73], [80], [82] and [87]

these items (passing reference was made to a sale of a property on which there was a “vastly superior five bedroom executive home” where the property included a tennis court<sup>74</sup>). Much of the evidence becomes the *ipse dixit* of Mr Frost<sup>75</sup>.

- [79] It seems to me that there is a methodological difficulty with Mr Frost’s approach. It seems to me that the correct approach would have been to assess the value of the property, on the assumption the works had not been carried out; as well as on the basis that the works had been completed; and attribute the difference to the value of the work.
- [80] Mr Frost’s report included a table setting out, year by year, the average and median sale prices of house properties at Tanawha<sup>76</sup>. He relied on this table to identify market movement at Tanawha, no doubt to be taken into account in the application of the sales<sup>77</sup>. He noted that the movement of the market at Tanawha was quite different to the general housing sector, including at Buderim<sup>78</sup>.
- [81] It can be seen from that table that the price at which KBC purchased her property in 2002 was slightly below the median house price in the locality that year<sup>79</sup>. By 2006, the median house price had increased to \$570,000. Mr Frost accepted that it was likely that the value of KBC’s property would have increased in a manner similar to the increase in the median house price between 2002 and 2006<sup>80</sup>. He was also prepared initially to accept that even without the work, the value of the property would have continued to rise generally consistently with the rise in the median house price between 2006 and 2008<sup>81</sup>. In that time, the median house price at Tanawha rose to \$850,000. However, he resiled from that almost immediately, justifying his position by sales, one of which was remote in time and the other was of a quite different property<sup>82</sup>. He also said that if, without the works, the value of KBC’s property was more than \$800,000 that would not cast doubt on his assessment of \$375,000 as the added value attributed to the works<sup>83</sup>. In my view, this evidence defies reason.
- [82] The likely explanation for his position is that to accept that, without the works, the value of the property would have risen between 2006 and 2008 in line with the movement in the median house price, would mean that his assessment of the added value attributable to the works was wrong. At one point he was prepared to accept that, without the works, in 2008 the value of KBC’s property would be “probably mid sevens” which I take to mean approximately \$750,000. Even that figure, it seems to me, is significantly inconsistent with the added value which Mr Frost attributes to the works.
- [83] I am therefore not prepared to accept Mr Frost’s evidence about the value to be attributed to the works. It seems to me that at the time of separation, without the

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<sup>74</sup> Sale 13 on p 20 of ex 4

<sup>75</sup> See *Davie v Lord Provost, Magistrates and Council Law of the City of Edinburgh* [1953] SC 34, 39-40, cited in *Makita* at [59].

<sup>76</sup> Ex 4, p 19

<sup>77</sup> See ex 4, p 19 par 5.0

<sup>78</sup> T2-25/15

<sup>79</sup> \$330,000 as against \$342,000

<sup>80</sup> T3-3/50-60

<sup>81</sup> T3-4/5-10

<sup>82</sup> T3-4/10-T3-5/20

<sup>83</sup> T3-5/25-35

works, the value of the property would have approximated the median house value in 2008, being \$850,000. On that basis, very little value was added to the property by the works in their incomplete state, on separation; and even the completed works would have added less than \$150,000 to the value of the property.

### **EXE's Comsuper payment**

- [84] In early 2011, EXE was entitled to a payment of \$987,922.76 (gross) from Comsuper. In January 2011, he was paid the sum of \$654,326, the sum of \$333,597 being deducted by Comsuper as income tax<sup>84</sup>.
- [85] In an affidavit sworn on 15 August 2012 identifying his current assets and liabilities, the only assets there identified which might result from the application of this payment are vehicles with a value estimated, in total, at \$60,000<sup>85</sup>.
- [86] In March 2011, EXE swore an affidavit which sought to explain the application of the monies received from Comsuper<sup>86</sup>. At that time, he said that he retained \$250,000 in cash<sup>87</sup>. He set out the purchase price of the vehicles previously mentioned, totalling \$77,500; and then ascribed to them a realisable value of \$105,000. He also stated that he had purchased silver and gold bullion for \$169,000, which then had a realisable value of \$189,000.
- [87] He also attributed \$60,000 to the payment of a Mastercard debt for living expenses for two years. It might be observed that in this period, his income approached \$90,000 per annum from pensions; and he received the sum of \$48,000 from Ms Taylor, a matter which will be referred to later in these reasons. In addition, he said that \$40,000 of the Comsuper money had been paid for legal expenses for a number of matters. He also purchased a shipping container and a "donga" for \$10,500, and timber for the renovation of the donga for \$3,500. His expenditure for work on his house and machinery maintenance and a carer's wage totalled at \$26,726. It is unnecessary to refer to other items of expenditure.
- [88] It should be added this evidence was given in opposition to an application for an order restraining the disposal by EXE of his assets. It appears that, at about that time, KBC had learnt that EXE was considering buying a light aircraft or a rural property<sup>88</sup>; hence the application.
- [89] EXE's evidence as to what he retains from the proceeds of Comsuper payment is again discussed later in these reasons.
- [90] Early in 2011, EXE made an application for a private ruling as to his liability for the sum of \$333,597 tax deducted from the amount due to him from Comsuper<sup>89</sup>. There is no evidence as to the status of the application; nor is there any evidence from EXE explaining why the matter has not yet been determined. An order was made on 17 March 2011 requiring EXE to comply with the requirements of Practice Direction No 33 of 1999, which relates to providing a statement setting out a party's

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<sup>84</sup> See CFI 35 par 35

<sup>85</sup> See CFI 132 pars 2, 4, 6

<sup>86</sup> See CFI 35

<sup>87</sup> See CFI 35 par 64

<sup>88</sup> See CFI 35 pars 78 and 79.

<sup>89</sup> See CFI 38 par 42(i) and CFI 35 ex DWD-5.

financial circumstances. The order particularly required EXE to provide full particulars, including relevant documents, of the monies received by EXE from Comsuper, and of any tax paid or payable on those monies, and particulars of any expenditure or divestiture of those monies. While EXE has given some limited evidence about these matters, and disclosure (for the purposes of showing expenses he has incurred) of his solicitor's tax invoice on 28 February 2011, he has generally not complied with the requirements of the order. It might be noted that the Practice Direction does not limit a party's obligation to disclose the party's financial circumstances.

### **Other evidence relating to EXE's financial position**

- [91] EXE was engaged by a Ms Taylor to construct a driveway into her property in about July 2009, for the sum of \$41,000. The evidence includes signed statements from Ms Taylor (not subject to objection) to the effect that the driveway has cost her an amount approaching \$130,000 (although not all of this would appear to have been paid to EXE). Ms Taylor stated that she had transferred to EXE two large sums (at least one of \$30,000), plus another large amount, and had made regular payments of cash, each of \$1,000<sup>90</sup>. In an analysis by KBC of EXE's bank records, where she identified matters about which she had asked EXE questions to which he had not provided answers, she listed payments from Ms Taylor in varying amounts, totalling \$48,300. EXE's affidavit filed on 4 April 2011, which dealt with his income for the financial years from 1 July 2006, made no reference to the receipt of any payment from Ms Taylor<sup>91</sup>. He denied receipt of any taxable income in that period. I accept that EXE received payments from Ms Taylor of (at least) \$48,300.
- [92] At the hearing I was informed that the parties had agreed that the value of EXE's home was \$237,500. That did not include the contents of the home, which were not valued. The same is true of his tools. Strophairs were engaged to carry out a valuation of machinery, plant and equipment held by EXE. The valuation was conducted on 17 June 2011, and the value attributed was \$71,663. The most significant items were a John Deere loader/backhoe (\$24,000), an Isuzu tip truck (\$14,000), a Case drum roller (\$9,000), and a Mitsubishi dozer (\$5,500). The valuation included a Range Rover vehicle (\$2,800) which was not amongst the items that KBC identified as being purchased by her and taken from the property in 2008. The difference between the value attributed by Strophairs to the plant and equipment held by EXE in 2011, and the amounts paid by KBC for the items taken by EXE late in 2008, whether considered globally, or by a comparison of the amount paid and the 2011 value of the more significant items, can not be explained by the ordinary decline in value of most chattels over time. Assuming that the equipment in EXE's possession in June 2011 is substantially the same as the equipment which he took in 2008, the differences are only explicable by very poor decisions about the purchase of the equipment (on the evidence, which I accept, instigated by EXE); together with very poor care for the equipment when in EXE's possession.
- [93] The submissions made at the hearing on EXE's behalf relied on the value attributed by Strophairs to the plant and equipment. A value of \$8,000 was attributed to the contents of his home (without evidence); to the three vehicles purchased after

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<sup>90</sup> See CFI 75 ex JAB6 pages 166 – 168.

<sup>91</sup> See CFI 38 pars 9 – 18.

receipt of the Comsuper payment of a total of \$60,000; and to some other items and cash (without the identification of evidence supporting these matters) of \$8,400. His liabilities were submitted to be \$172,866. EXE deposited to these liabilities<sup>92</sup>, without documentary support.

- [94] EXE's evidence of his financial position may be contrasted with that which he gave in March 2011 when seeking the discharge of a freezing order made on 4 March 2011. He gave evidence that he had a "capital fund" of \$571,800, including \$250,000 in cash. That was after payment of the MasterCard debt of \$60,000, and legal expenses of \$40,000.
- [95] In the same affidavit, bringing into account the value of his house, his assets were said to total \$892,800, and his liabilities \$16,292, with a net asset value of \$876,508<sup>93</sup>. His evidence in March 2011 was that he was receiving income by way of disability payment and a tax free pension of \$2,971 per fortnight (totalling \$77,246 per annum). His current evidence is to similar effect.
- [96] Before making findings about EXE's current financial position, it is necessary to make some further observations about his credit.

#### **EXE's credit**

- [97] There is much in the evidence which leads to me to take a seriously adverse view of EXE's credit. It commences with the fact that, at separation, in KBC's absence in Melbourne, he organised the removal of a great deal of property from her home. That included her passport and some currency, as well as personal items to which he could have no possible claim. In addition, he removed valuable plant and equipment for which KBC had paid substantial amounts of money. In my view, he could not have honestly thought he was entitled to do so. Moreover, such equipment as EXE is now prepared to acknowledge as being in his possession has a value much less than the amounts paid for it, a result that I regard with some suspicion.
- [98] On 6 February 2009, EXE sent an email to KBC<sup>94</sup>, referred to earlier. It related to their separation, and property disputes. It included the following:

"You deserve everything you get ... You have no idea of what I consider is fair when money is concerned ... I was prepared to work together until your constant whinging and nagging about your loss of money and debts annoyed and alarmed me so much that I felt I was no longer prepared to stay and take the risk of not getting a payout ... under the law you now have to give me a payout and I am legally entitled to half of everything you own ... I know how the system works carry out your threats and take me to court it wont get you anywhere I know how to play this game ... you don't have the funds to see this through court you will never win so make me an offer now or lose everything ... I will come and finish the property and sell it saving us both the huge cost of commissions once you agree to swrite [sic] over to me all machinery and half the house ..."

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<sup>92</sup> See CFI 132 par 7.

<sup>93</sup> See CFI 35 par 73.

<sup>94</sup> See CFI 75 ex JAB1 p 4.

[99] On 13 February 2009 EXE sent KBC an email which included the following<sup>95</sup>:

“... While you have been carrying on like a bloody spoilt brat unable to accept the reality that others have a greater ability, experience and know how to ensure their own financial future, I have remained silent keeping my powder dry! ... I own all the machinery you bought. According to the law of the land, morally and practically I do, and you know it ... You will never get any of it back, I have seen to that, I have legally transferred it to a third person and there is nothing you can do about that now. As to all the other goods I have taken, haven't you heard the saying 'possession is 9/10 of the law'”

[100] On 26 March 2009, EXE sent a further email to KBC<sup>96</sup> which included the following:

“I will delay this until your finances are exhausted and I win by default”

[101] In some cases, the weight attributed to statements made in correspondence between recently separated parties might be reduced, in view of the emotional conflict likely to exist between them. However, in the present case, in my view, these communications are a fair indication of EXE's attitude to KBC's claim.

[102] When the claim was instituted, the solicitors then acting for KBC attempted to serve documents on EXE. His evidence was that he frequently communicated that he was ready to make himself available for personal service of documents by prior arrangement<sup>97</sup>. Notwithstanding that evidence, the affidavits of Ms Cannell, the solicitor then acting for KBC, show the difficulties experienced in attempting to serve documents on EXE, including a car chase by a process server, for a period approaching an hour and a half along roads in Morayfield, and up and down the Bruce Highway<sup>98</sup>. Mr Jones, a solicitor who subsequently acted for KBC, also experienced difficulties in attempting to serve on EXE orders for disclosure and the provision of material<sup>99</sup>. The events deposed to by these people are consistent with the attitude displayed by EXE in his emails, and inconsistent with his statements about his willingness to accept service of documents.

[103] In his affidavit sworn on 8 March 2011, EXE claimed that of the money received from Comsuper, \$60,000 was applied to the payment of a MasterCard debt, being for two years living expenses<sup>100</sup>. No document was produced to support this claim. He alleged that he was forced into this position because a caveat which KBC had lodged over his home prevented him borrowing for living expenses (no investment made in this period was identified). I treat this evidence with considerable suspicion. At the time, EXE's income was \$2,971 a fortnight; and as previously discussed, he had in the preceding two years received money from Ms Taylor.

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<sup>95</sup> See CFI 75 ex JAB 1 p 2.

<sup>96</sup> See CFI 75 ex JAB 1 p 1.

<sup>97</sup> See CFI 35 pars 90 – 91.

<sup>98</sup> See CFI 4 and CFI 15.

<sup>99</sup> See CFI 21.

<sup>100</sup> See CFI 35 p 64.

According to Ms Taylor she also provided him with board and lodging for several months<sup>101</sup>

- [104] In the same affidavit, EXE said that he could not afford legal representation prior to the Comsuper payment<sup>102</sup>. That payment was made in January 2011. However in an affidavit sworn on 1 April 2011, in relation to KBC's claim made under Part 19 of the PLA, he swore that he had by then incurred legal expenses of \$110,600<sup>103</sup>. Legal fees were not included in his then current liabilities<sup>104</sup>.
- [105] In January 2011, EXE used \$169,000 of the money he received from Comsuper to purchase silver and gold bullion<sup>105</sup>. His explanation for a significant decline in his financial position since that time was that he had to sell the silver and gold bullion to pay legal and living expenses<sup>106</sup>. Some of the bullion was sold in May 2011, for \$128,236. The balance was sold between March and June 2012, for a total of \$111,989.42; the total proceeds of sale being \$240,425.42<sup>107</sup>, as has been mentioned, EXE claims to have an outstanding judgment for legal fees of \$91,000, and to be indebted to his barrister for \$25,000.
- [106] KBC has analysed the financial records of EXE of which she has been able to obtain possession. Her evidence was that of the proceeds of sale of the bullion, only \$96,045 had appeared in EXE's bank accounts.
- [107] When one examines EXE's evidence, his explanation for what he says to be his current financial position is not creditable.
- [108] There are other aspects of EXE's evidence which, in my view, reflect adversely on his credit. He gave evidence that it was not his idea to develop the property at Tanawha<sup>108</sup>, evidence which, in my view, is improbable. He gave evidence that when he left the Tanawha property in the latter part of 2008, the works had been "brought to practical completion". The evidence of KBC supported by photographs and evidence of the cost to complete the work, demonstrates this to be untrue. His claim in relation to the work which he did on the property, and its value, is obviously exaggerated. As mentioned, he was in receipt at the time of a pension on the basis that he was totally and permanently incapacitated.

### **EXE's financial position at separation and currently**

- [109] There is no reason to think that the value of the assets which EXE possessed at the commencement of the relationship had declined materially by the time of separation. Nor is there any evidence to suggest that his liabilities increased markedly (the submissions made on behalf of EXE suggested that his liabilities increased in this period by about \$5,000). At separation, EXE also had in his possession the property which he had taken from Tanawha, which was likely to have been of substantial value. It is not possible to make further findings about EXE's financial position at that time.

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<sup>101</sup> See CFI 75 p 166, 168.

<sup>102</sup> See CFI 35, p 68(a).

<sup>103</sup> See CFI 38 par 42.

<sup>104</sup> See CFI 39 par 37.

<sup>105</sup> See CFI 35 par 64.

<sup>106</sup> See CFI 132 par 6.

<sup>107</sup> See CFI 129 ex GB15-20.

<sup>108</sup> See CFI 35 par 37.

- [110] I accept the evidence given by EXE that he now has the assets previously mentioned, being his house at Caboolture, the cars, and the machinery referred to in the Strophairs valuation. I also accept that he currently has a potential entitlement to a tax refund of \$333,597. It may be that if the money is refunded, interest will be included. I also accept that EXE currently is in receipt of the income previously referred to, amounting annually to approximately \$78,350. I accept that evidence from EXE primarily because it is based on admissions adverse to his interests. I am however not prepared to accept that the evidence fully identifies EXE's financial resources.
- [111] I am not prepared to make a positive finding as to whether EXE at present has any liabilities, and if so what they are. He has not provided documents to establish them. In any event, on the state of the evidence it would be difficult to give weight to them, in view of the uncertainty about his asset position.

### **KBC's financial position**

- [112] KBC gave evidence that, at the end of the relationship, her net worth was \$178,634.82<sup>109</sup>. Save for the value which she attributed to the property at Tanawha, this was accepted in the written submissions on behalf of EXE. In view of my finding about the value of that property, this figure should be increased by \$250,000, the result that I find her net worth at that time to have been \$428,634.82.
- [113] KBC also gave evidence that currently, her liabilities exceed her assets by \$155,494.11<sup>110</sup>.
- [114] Save as to the value attributed to the property at Tanawha, her evidence about her assets was not challenged. In view of my earlier finding about the value of the property at Tanawha, the figures should be increased by \$360,000.
- [115] KBC gave evidence that her liabilities totalled \$856,994.82<sup>111</sup>. The total was accepted in the respondent's written submissions. Accordingly, I find KBC's current worth to be \$204,505.89.
- [116] I should add that KBC anticipates an (unquantified) liability for capital gains tax in respect of the sale of the Weipa property. While it is likely that tax is payable, that has not been reflected in these findings.

### **Other considerations**

- [117] I have previously made reference to the evidence as to EXE's income. KBC gave evidence that on two occasions she has had a nervous breakdown<sup>112</sup>, and in January 2009 she fell from the pool deck and injured her back<sup>113</sup>. She considered that she had no prospect of work<sup>114</sup>. KBC also gave oral evidence that she could no longer work in radiography as a result of a back injury because of the lifting; and because it

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<sup>109</sup> See CFI 128 par 10.

<sup>110</sup> See CFI 128 par 14.

<sup>111</sup> See CFI 128 par 14.

<sup>112</sup> See CFI 2 pars 31 and 40; CFI 139 par 29.

<sup>113</sup> See CFI 2 par 31; CFI 138 p 8 par 7.

<sup>114</sup> See CFI 131 par 2.

would require her to be working on her feet. She acknowledged that some jobs required little lifting, which she described as “not a full practice”<sup>115</sup>.

- [118] Given her age, and her recent health history, in my view there is little realistic prospect that KBC will obtain employment in the future.
- [119] I do not consider that EXE is likely to obtain employment in the future. He does, however, appear to have the capacity, and interest, to invest with some success.
- [120] KBC moved out of the Tanawha property late in 2009<sup>116</sup>. She did so in order to obtain rent, to help meet her liabilities. Her evidence indicates that up to July 2012, she was paid rental totalling approximately \$63,360. This was applied to expenses associated with the rental; and the balance to meeting her interest obligations on her Westpac debt<sup>117</sup>. Had she not done so, her financial position would be worse than it in fact is. To enable her to do this, KBC has been required to live in shared accommodation.
- [121] A psychiatrist, Dr Dwyer, gave evidence that he has been treating EXE for some time<sup>118</sup>. He considered that EXE was suffering from post traumatic stress disorder, resulting from his service in the Air Force in the early 1970’s<sup>119</sup>. He also considered that he suffered from an anxiety disorder and depression<sup>120</sup>. He gave evidence that EXE “tends to be easily overwhelmed, associated with feelings of panic and agitation when he is subject to stress”<sup>121</sup>. He said that KBC’s behaviour had lead to EXE feeling extremely anxious and vulnerable, to the point that he now feels his life, and the life of his dogs, is in danger. This evidence was given in a report in support of an application by EXE for a domestic violence order against KBC<sup>122</sup>. Dr Dwyer considered that EXE was totally and permanently incapacitated, a state resulting originally from his head injury and the post traumatic stress disorder from his service in the Air Force<sup>123</sup>. Dr Dwyer considered that EXE required a carer<sup>124</sup>. It became apparent during cross-examination that to an not insignificant extent, Dr Dwyer’s evidence was dependant on what EXE told him<sup>125</sup>. Dr Dwyer considered that Dr Davis had been unable to work for the past six or seven years by reason of his post traumatic stress disorder and depression<sup>126</sup>. Dr Dwyer considered that, in the condition in which EXE has been while he has known him, he could not have worked the hours EXE claimed he had worked between 2006 and 2008. He did, however, state that he understood that EXE’s mental state seriously declined after separation<sup>127</sup>.

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<sup>115</sup> See T1-56/40-55.

<sup>116</sup> See CFI 129 ex GB12-2.

<sup>117</sup> See CFI 129 exs GB12/2, GB12/3 and GB12/4.

<sup>118</sup> His oral evidence was that it was from early 2011; see T2-2; though one report referred to treatment from May 2010; ex 3.

<sup>119</sup> T2-7.

<sup>120</sup> See ex 3.

<sup>121</sup> See ex 3; report of 3 August 2012.

<sup>122</sup> See ex 3; report of 3 August 2012.

<sup>123</sup> T2-7.

<sup>124</sup> T2-9.

<sup>125</sup> T2-10.

<sup>126</sup> T2-18/50.

<sup>127</sup> T2-20/55 to 2-21/10.

- [122] There is tension between EXE's evidence about the work he performed on the property at Tanawha between 2006 and 2008, and his condition as diagnosed by Dr Dwyer. Even KBC's description of the extent to which EXE worked does not sit comfortably with EXE's condition as diagnosed by Dr Dwyer. Much of Dr Dwyer's evidence is based on what he has been told by EXE. Some of it was in support of an application made by EXE for a domestic violence order against KBC, pursued as recently as August of this year. My observation of EXE in the witness box would indicate that he has greater powers of concentration and better mental organisational skills than Dr Dwyer's evidence would suggest.
- [123] For these reasons, it seems to me that I should treat with some caution Dr Dwyer's evidence about EXE's condition and his needs.

### **Disposition**

- [124] I have found that at the commencement of the relationship, KBC's net worth was \$1,053,055.17<sup>128</sup>. It might be observed that at this time she had financial security, with investments which could be expected to provide her with some income when she ceased to be employed.
- [125] During the relationship KBC's net worth declined to \$428,634.82<sup>129</sup> (excluding her interest in the property taken by EXE on separation). The principal explanation for the decline is the debt which she incurred to purchase machinery and improve Tanawha, no doubt on EXE's advice; together with the removal by EXE of the machinery and other property from Tanawha. The fact that the project had not been completed also had some negative effect on the value of the property. These negative effects were in my view, primarily the consequence of EXE's advice and conduct. To some extent, they were mitigated by the general increase in property values in the locality in this period.
- [126] KBC's current net worth is \$204,505.89. It seems to me the primary reason for the further decline in her financial position was the need to service the debts incurred in relation to the project, without employment, substantially because of her age and health. To some extent, the decline in net worth in this period has been mitigated by a further increase in the value of the Tanawha property; but that was achieved by the expenditure of a substantial amount of money by KBC to complete the works.
- [127] It was submitted that KBC could have sold the property, thereby repaying the debt and avoiding interest payments; in which case her financial position might be better. However, at least in some of this period, there was an increase in the value of property in the locality. It is likely that, at least early in the proceedings, KBC entertained some hope of recovering substantial property from EXE which might have been sold. In any event, it seems to me that it is difficult for EXE to be critical of KBC's decision to retain the property, when the position in which she found herself was primarily the consequence of his conduct.
- [128] It seems to me that EXE's role in the decline in KBC's financial position is relevant by virtue of either s 291 (the contribution being negative) or s 309 of the PLA.

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<sup>128</sup> RJ[20].

<sup>129</sup> RJ[112].

- [129] I do not accept that EXE's financial position has worsened since the commencement of the relationship. It seems to me likely that it has improved, though it is difficult to identify the extent of improvement.
- [130] After the hearing, I invited the parties to consider the effect of s 302 of the PLA. I was informed that EXE's TPI pension was not income tested. I was also informed that the other income he receives is administered by Comsuper, but that body is not the source of the income. However, no attempt was made to establish that this income is income tested. It seems to me that it would be within EXE's power to establish its starters?; and by reason of his failure to do so, I propose to proceed on the basis that the payments administered by Comsuper are not income tested.
- [131] KBC gave evidence that she received income by way of payments from Centrelink in the sum of \$25,133.19 from separation to trial<sup>130</sup>. Her income appears to be by way of Newstart allowance and widow allowance<sup>131</sup>. These are income tested<sup>132</sup>. In any event, on an annual basis, the amount of income is very small. I do not propose to take it into account in determining the relief that should be granted.
- [132] I give some weight to the substantial difference in the current and future income positions of the parties.
- [133] I also give some, though limited, weight to the fact that KBC has found it necessary to live in shared accommodation, a matter which seems to me to be relevant either under s 303 or under s 309 of the PLA.
- [134] As will be apparent, I do not consider that EXE's work made any material contribution to any improvement of the value of the property at Tanawha. I am satisfied that KBC made significant contributions to the financial resources available to EXE during the relationship. I am not satisfied that EXE made any significant financial contribution to the financial resources of KBC during this period.
- [135] Little attention was paid in the case to the contribution of each party to the welfare of the other during the relationship. No doubt some such contributions were made, but they do not attract weight. I am conscious of issues relating to EXE's health, though, as stated previously, I treat with some caution Dr Dwyer's evidence about it.
- [136] In the unusual circumstances of this case, I am prepared to order that EXE's interest in his property be varied by requiring him to pay the sum of \$350,000 to KBC. I would also order that, on the making of that payment, as between the parties he be absolutely entitled to retain the property which at the hearing has been identified as being in his possession. I would also be prepared to order that, as between the parties, KBC be absolutely entitled to the property, which, at the hearing, was identified as being in her possession.

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<sup>130</sup> See CFI 128 par 12 and ex GB 12/1.

<sup>131</sup> T 1-56/15-35.

<sup>132</sup> See s 302(3) PLA; s 4(1) of the *Family Law Act* 1975 (Cth), def "income tested pension, allowance or benefit"; reg 12A of the *Family Law Regulations*; and s 23(1) of the *Social Security Act* 1991 (Cth).

- [137] Since the jurisdiction conferred by the PLA is one which permits adjusting the interests of the parties in property<sup>133</sup>, I consider that I can make no order beyond that which would relate to the property which it has been established either of them currently owns.
- [138] I gave consideration to making an order to give KBC some interest in EXE's right to claim a refund of the tax deducted from the Comsuper payment. I have decided not to do so. The value of the right is uncertain; and the making of the order is likely to be productive of further litigation.

### **Conclusion**

- [139] I shall invite the parties to make submissions about orders to be made to give effect to these reasons.

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<sup>133</sup> See s 286(1) of the PLA.