SUPREME COURT OF QUEENSLAND

CITATION:	*VG v OM* [2005] QCA 183
PARTIES:	**VG** (applicant/respondent) **v** **OM** (respondent/appellant)
FILE NO/S:	Appeal No 9558 of 2004 Appeal No 9899 of 2004 SC No 5072 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	3 June 2005
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2005
JUDGES:	McMurdo P, Helman and Philippides JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. In Appeal No 9558 of 2004: Appeal dismissed with costs to be assessed** **2. In Appeal No 9899 of 2004: Appeal dismissed with costs to be assessed**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – IN GENERAL – STATEMENT OF REASONS FOR DECISIONS – where trial judge made determination that the property of the parties should be divided as to 70% to the respondent and 30% to the appellant – where trial judge considered contributions of both parties to the joint property prior to and after separation and the increase in property value – whether trial judge failed to give adequate reasons for determination – whether trial judge gave proper weight to the evidence – whether trial judge properly exercised her discretion PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – COSTS OF WHOLE ACTION – GENERALLY – where trial judge made costs order under s 341 of *Property Law Act* 1974 (Qld) – where trial judge's determination as to apportionment identical to that of case appraiser's – whether trial judge failed to properly exercise

her discretion

Property Law Act 1974 (Qld), Pt 19, s 341
Uniform Civil Procedure Rules 1999 (Qld), r 344

In the marriage of Wells (1977) 29 FLR 383, distinguished
In the marriage of Zappacosta [1976] 26 FLC 90-089, distinguished
Norbis v Norbis (1986) 161 CLR 513, cited

COUNSEL: R Hamwood for the appellant
M Eliadis for the respondent

SOLICITORS: Watts & Company for the appellant
Harrington Family Lawyers for the respondent

[1] **McMURDO P**: I agree with Philippides J that, for the reasons she gives, the appeals should be dismissed with costs to be assessed.

[2] **HELMAN J**: I agree with the orders proposed by Philippides J and with her reasons.

[3] **PHILIPPIDES J:** This is an appeal from a decision given on 6 October 2004 in respect of the distribution of property following the termination of a de facto relationship. An application for a property adjustment order under Part 19 of the *Property Law Act* 1974 (Qld) ("PLA") was brought by VG, the respondent before this Court. The other party to the relationship OM was the respondent at first instance and the present appellant.

[4] At the commencement of the relationship the appellant was 46 years of age and the respondent was 43 years of age. The de facto relationship endured for nearly 10 years, commencing in January 1991 and ending in November 2001 (although they appear to have continued to reside in the same house until May 2002). The learned trial judge determined that the property of the parties be divided as to 70% to the present respondent and as to 30% to the appellant.

[5] The appellant seeks orders that the trial judge's order of 6 October 2004 be set aside and that the property of the parties be divided as to 60% to the respondent and as to 40% to the appellant. The grounds of appeal are:

(a) The learned trial judge failed to give adequate reasons for the determination that the property of the parties should be divided as to 70% to the applicant and 30% to the respondent;
(b) That the learned trial judge erred in the exercise of her discretion in finding that by reason of the increase in value of the properties, and the applicant's post separation contributions, it was appropriate to divide the property of the parties as to 70% to the applicant and 30% to the respondent;
(c) That the learned trial judge's determination that the applicant's post separation contribution warranted an

adjustment of 20% was against the evidence and the weight of the evidence;

(d) That the learned trial judge misdirected herself in concluding that the appellant was not entitled to the windfall benefit of the increase in value of the properties of the parties in circumstances where the respondent had made the majority of the post separation contributions.

[6] In addition, irrespective of the outcome of the substantive appeal, the appellant also seeks to set aside the costs order made by the learned trial judge.

The decision at first instance

[7] At the end of the hearing of the matter, the parties made written and oral submissions. The issues in dispute were of short compass and the learned trial judge gave an *ex tempore* judgment.

[8] Her Honour was not required to make any findings as to the value of the asset pool of the parties as at the date of the hearing. It was common ground that its net value was $395,857.32, calculated as follows:

Assets			
1.	27 D Road at W		$ 260,000.00
2.	16 C Road at W (under contract)		$ 160,000.00
3.	Write-back of respondent's long service leave received 29.7.02		$ 5,362.00
4.	Write-back of respondent's tax refund received 9.9.02		$ 2,613.00
5.	Write-back of respondent's long service leave received 11.11.02		$ 3,862.00
6.	Write-back of respondent's superannuation received 20.11.02		$ 37,019.00
7.	Proceeds of sale 239 K Road at W, ordered to be paid to applicant by Order dated 31.5.04		$ 17,000.00
			$ 485,856.00
Liabilities			
1.	27 D Road at W mortgage (as at 6.10.04 with interest accruing at $12.22 per day)		$ 63,356.36
2.	16 C Road at W mortgage (as at 6.10.04 with interest accruing at $4.72 per day)		$ 24,642.32
3.	Outstanding loan to applicant's mother	$ 2,000.00	$ 89,998.68
	Net Total		**395,857.32**

[9] There was also no real contest as to what each party had brought into the relationship. In her reasons for judgment, her Honour duly had regard to that consideration. Her Honour observed that the respondent had brought into the relationship a property at M which she owned as joint tenant with her mother. Her Honour noted that it was sold in October 2000 for approximately $120,000, of which

$60,000 went to the respondent. Her Honour found that most of that $60,000 was used either to contribute to the jointly owned property of the parties during the relationship or to pay for the liabilities and maintenance of jointly owned properties after the relationship ended. Her Honour observed that on the other hand the appellant at the time of the commencement of the relationship owned a motor vehicle worth about $3,500, had a small superannuation benefit available to him and had a debt of some $10,000 to the Department of Social Security.

[10] Her Honour then had regard to the contributions made by the parties during the relationship, specifying those matters. Her Honour found that both parties contributed whatever they could financially and non-financially to the betterment of their circumstances. Her Honour noted that the respondent acted as the home maker in the relationship, doing what the respondent referred to as the woman's work in the relationship. She also held full time employment at the commencement of the relationship at a hospital working as a catering assistant and earning approximately $28,000 gross per annum. The appellant worked as a scaffolder and was able to earn considerably more income than the respondent. Her Honour found that the appellant paid his share of the bills and did a great deal of work to the house that they shared together initially, which was the house owned by the respondent and her mother, but that he also worked on other properties that the parties bought subsequently to live in or for investment purposes.

[11] The critical passages of her Honour's *ex tempore* reasons for the determination concerning the apportionment of the joint property are extracted below:

> "As Mr Hutton [for the present appellant] submitted, were this the case of a marriage of that period and this were to be determined in the Family Court, it seems likely that a relatively even split of the property at the moment of the end of the relationship might have been appropriate. But that is not the end of what happened. Subsequent to the end of the relationship, real property owned by both of them has increased in value markedly and all of the contributions, financial contributions and other contributions, to the payment of the mortgages and the maintenance of those properties has been solely done by the [respondent]. In those circumstances, a 50/50 split would be a windfall to the [appellant], which would appear to be inappropriate given the sole financial contribution made by the [respondent] subsequent to the end of the relationship.
>
> On the other hand, added back into the pool are moneys received by the [appellant] which accrued to him during the relationship and it must also be said that the lion's share of the mortgage repayments that were not covered by rental were made by the [appellant] during the course of the relationship. As I have said, all of that was evidence of the hard work and commitment both parties put into the relationship during its existence.
>
> However, a considerable amount of money has been expended by the [respondent] on the properties since the end of the relationship and that is a period of time in which, as I've said, the properties have increased markedly in value by movement of the market.

> The final submissions on behalf of the [respondent] were that the appropriate division was 80% to the [respondent] and 20% to the [appellant]. The final submissions of the [appellant] were that the split should be 60/40.
>
> It is apparent to me, taking into account the increase in value since the relationship ended and the sole contributions of the [respondent] to those properties, that the appropriate division is, in fact, 70% to 30% …"

Ground 1 – Whether the learned trial judge failed to give adequate reasons for the determination that the property of the parties should be divided as to 70% to the applicant and 30% to the respondent.

[12] The appellant, citing *Pettitt v Dunkley* [1971] 1 NSWLR 376 and *In the marriage of Bennett* (1990) 102 FLR 370, contended that her Honour failed to provide adequate reasons for her judgment sufficient to enable the parties to ascertain the process whereby the apportionment set out in the judgment was arrived at, as she was obliged to. The essence of this ground was that it was not possible to determine from her Honour's reasons how the apportionment of 70/30 in favour of the respondent was arrived at. In particular, it was contended that it was not possible to determine from the reasons of the learned trial judge:

> (a) the weight given to the parties' respective contributions to the point of separation;
> (b) the weight given to the inclusion in the pool of monies received by the respondent which accrued to him during the relationship;
> (c) the weight given to the superior contribution to the mortgage repayments not covered by rental during the course of the relationship;
> (d) the weight given to the movement in market value of the properties and the manner in which that increase in value was attributed between the parties;
> (e) the relationship between the post separation contributions of the respondent applicant over and above that proportion she was obliged to make as co-owner and the difference between the parties' respective entitlements under the judgment in the amount of $158,348.

[13] In the course of argument, her Honour indicated to counsel that in respect of the question of the assessment of the parties' contributions and the weight to be given to them, she would take a global approach, rather than conduct "a minute accounting exercise". Both counsel supported such an approach as correct in the circumstances of the case. Her Honour referred to and identified the various contributions by the parties up to the date of separation.

[14] Contrary to the submissions made by the appellant, I consider that her Honour did indicate in her reasons the weight she attributed to both the contribution to the joint assets made by the appellant by the inclusion in the asset pool of monies received by him after separation, but which had accrued during the relationship and also to the

superior contributions the appellant made to the mortgage repayments during the course of the relationship. The quantum of both those contributions was not the subject of dispute. The mortgage repayments amounted to some $51,220 and the monies received after separation, but which had accrued during the relationship, which related to items 3, 4, 5 and 6 of the agreed list of assets of the parties, amounted to some $48,656.

[15] It is apparent from the reasons given by the learned trial judge that both those areas of contribution were characterised by her Honour as contributions made by the appellant during the course of the relationship. That is evident from her Honour's statement that "all of that was evidence of the hard work and commitment both parties put into the relationship during its existence." Rather than attributing an individual value to each of those contributions, her Honour took them into account in the global assessment made as to the parties' contributions during the relationship.

[16] I am unable to accept the submission by counsel for the appellant that her Honour made no assessment of the parties' respective contributions as at the point of separation. At trial, the submission made by Mr Hutton, then acting for the appellant, was that a 50/50 apportionment ought to be adopted to reflect the parties' contributions to the point of separation. It is implicit from her Honour's reasons that her Honour adopted that submission and proceeded on the basis that a 50/50 apportionment of assets appropriately reflected the contributions made by the parties up to the end of the relationship. That is apparent from the reference in her Honour's reasons to the submission made by Mr Hutton, the statement in the reasons that "a relatively even split of the property at the moment of the end of the relationship might have been appropriate" and her Honour's observation that in the circumstances of the present case "a 50/50 split" would be a windfall to the appellant. Her Honour therefore indicated the weight given to the appellant's contributions to the point of separation, including his superior contributions to the mortgage repayments and the inclusion in the asset pool of the monies which had accrued during the relationship, based on a global approach.

[17] Her Honour also identified the factors she saw as requiring a departure from a notional 50/50 apportionment. They concerned certain post separation matters and were specified by her Honour as being that:

> "real property owned by both [the parties] has increased in value markedly and all of the contributions, financial contributions and other contributions, to the payment of the mortgages and the maintenance of those properties has been solely done by the [respondent]."

[18] The quantum of those contributions made by the respondent was not in contention at trial and amounted to some $53,000.

[19] It was conceded by counsel for the appellant, that if the reasons for judgment did impliedly indicate that her Honour proceeding on the basis that a 50/50 apportionment was an appropriate starting point, as at the date of separation, it followed that the adjustment made in reaching the final adjustment of apportionment of 70/30 was also apparent. The weight given by her Honour to the respondent's post separation contributions was thus evident and reflected in the final adjustment of

a further 20% in the respondent's favour and a reduction of 10% against the appellant.

[20] While it might have been preferable to have indicated explicitly the notional apportionment as at separation, her Honour's reasons were given *ex tempore*, a course encouraged by counsel and in circumstances where it appears to have been largely accepted what that notional apportionment ought to be. In my view, the learned trial judge's reasoning process both as to the fixing of the notional apportionment at separation and the ultimate apportionment, allowing for post separation contributions, is sufficiently apparent from the reasons given. It follows that this ground must fail.

Ground 4 - Whether the learned trial judge misdirected herself in concluding that the appellant was not entitled to the windfall benefit of the increase in value of the properties of the parties in circumstances where the respondent had made the majority of post separation contributions

[21] It is convenient to address the matters raised in ground 4 before addressing the other grounds of appeal. It was submitted by the appellant that the learned trial judge fell into error in concluding that the appellant was not entitled to the windfall benefit of the increase in value of the properties and in attributing to the respondent the benefit of the increase in the market value of the Woodridge properties. It was contended on behalf of the appellant that her Honour erred as a matter of law in the approach taken to the question of the appropriate treatment of the sharp increase in land value in the period post separation. In this regard counsel referred to a number of authorities, none of which were put before her Honour, namely *In the marriage of Zappacosta* [1976] 26 FLC 90-089, *In the marriage of Wells* (1977) 29 FLR 383, and *In the marriage of Zyk* (1995) 128 FLR 28.

[22] In *Zappacosta*, the parties owned an orchard the value of which had markedly increased over time because of a re-zoning of the area in which the orchard was situated. McCall J examined the question as to whether a windfall such as the rapidly accelerated value of a property due to re-zoning should be dealt with in any particular way, observing at 75,421:

> "On consideration I am of the view that if a property appreciates, as obviously this one has, but not due to any particular effort or act of either of the parties, then the reason why the property did so appreciate is not relevant to the question of what interests the Court may decide that the parties to the marriage should have in it when exercising jurisdiction under sec.79 of the Act. It is simply a windfall and, accordingly, in my view neither party has any greater or lesser claim to the benefits of the windfall."

[23] In *Wells*, the Full Court of the Family Court, considered the appropriate treatment of a residential property, the value of which had increased from $14,550 at separation on 3 June 1972 to $34,750 at the date of the hearing in early 1977. Their Honours approved the reasoning of McCall J in *Zappacosta*, stating at 62 "We cannot see why in the present case the wife should get a greater share in the increase in the value of the property than the husband." The trial judge had taken a different view, emphasising that after separation, the husband had displayed no interest in the

property and left the management, care and control to the wife, who collected the rents and paid the mortgage, rates, insurance and other outgoings associated with the property and had taken responsibility for its restoration. However, the Full Court observed that the wife had had the rents and the use of the premises and the husband had received nothing from the property since he left. Significantly, the rent was sufficient to pay the mortgage instalments and other outgoings and also to maintain the property. It was therefore held that the parties should share equally in the increase in value of the property.

[24] Relying on those authorities it was contended by counsel for the appellant that the increase in the value of the properties over the period after separation was not the result of any exercise of skill, foresight or aptitude on the part of either of the parties, but rather the outcome of a peculiar set of market circumstances. It was therefore submitted that the increase in the value was a windfall benefit accruing to the parties by reason of their ownership of real property and as such ought not to have been attributed to one party in preference to the other.

[25] One aspect of this submission may be dealt with briefly; that the learned trial judge fell into error in attributing to the respondent the benefit of the increase in market value. Her Honour did not hold that the appellant was not entitled to share in the increase in the value of the properties over the period after separation. Nor did her Honour attribute to the respondent the whole of the benefit of the increase of the properties over that period. Indeed, in the course of argument as to how the increase in the value of the properties post separation should be approached, her Honour identified the issue not as one that the appellant "should not be able to take advantage of the increase in the value of the properties", but rather that the parties' differing post separation contributions "impacts upon the percentage of the pool that [the appellant] gets".

[26] Furthermore, the present case differs from *Zappacosta* and *Wells*. It is one in which the considerable efforts of the respondent ought not to be disregarded as an irrelevant consideration. As her Honour recognised, the respondent undertook financial commitments in respect of the jointly owned properties additional to those she had assumed during the relationship. This she did at her own cost and sacrifice, including accessing her superannuation funds on compassionate grounds. She did not merely continue to contribute to meeting joint financial obligations as she had done prior to separation, but assumed the entire financial burden associated with the properties. Recognising that one of the properties was left untenanted for a period, it nevertheless appears that the properties did not generate income sufficient to meet the expenses as in *Wells*. In those circumstances, I do not consider that it can be said that the preservation of the properties occurred without any "particular effort or act" by the respondent.

[27] It was during the period when the respondent assumed the total financial burden, that the properties achieved increases in value in the vicinity of 253%. It was as a result of the respondent's actions in meeting the financial obligations associated with the properties that the parties were able to retain the properties and benefit from their increases in value. I cannot see that her Honour erred in law in the approach she took to these matters.

Ground 2 – Whether the learned trial judge erred in the exercise of discretion in finding that by reason of the increase in value of the properties, and the applicant's post separation contributions, it was appropriate to divide the property of the parties as to 70% to the applicant and 30% to the respondent

Ground 3 - Whether the determination that the applicant's post separation contribution warranted an adjustment of 20% was against the evidence and the weight of the evidence

[28] The appellant accepted that the third ground of appeal raises issues similar to the second ground. I propose to deal with the two grounds together.

[29] The bulk of the property pool of the parties consisted of two properties at W. In August 1997, the parties had purchased an investment property at C Road, W for $40,000. That property was included in the asset pool at an agreed value of $160,000, being the price at which the property was under contract at the date of the hearing. In November 1997, the parties had also purchased a property at D Road, W for $115,000. Its agreed value at trial was $260,000.

[30] There was evidence before the learned judge that the medium price of property for the suburb of W had increased by some 253% over the 6 months prior to October 2004. Taking the combined value of the two properties at the time of the hearing as $420,000 ($260,000 + $160,000), an increase of 253% represented some $166,007 of that combined value. It also constituted about a third of the gross value of the property pool.

[31] On behalf of the appellant it was contended that whilst there was evidence of an increase in the median property prices in W between the date of separation and the date of hearing, it was of little assistance in relation to the subject properties in question in the absence of any evidence of their value at the date of separation. This was said to be particularly so in the case of the D Road property where the evidence was that significant improvements were effected to that property prior to separation. I do not consider that that submission has merit. There was no objection at the trial to the evidence tendered which supported a medium price increase of 253% nor any submission that such an indicative increase could not be appropriately applied to the properties in question.

[32] At trial it was contended by the respondent that it was as a result of the respondent's efforts in preserving and maintaining the properties that the appellant was able to share in a substantial increase in the value of the properties. It was common ground before her Honour that the appellant had made no financial contribution to the parties' joint financial liabilities from May 2002, when the appellant ceased to reside with the respondent at the D Road property. From that period it was the respondent who met the financial demands of the properties drawing from her net weekly income of approximately $425 and utilising the entirety of certain managed funds of $38,000. These funds represented the balance of the $60,000 which the respondent had received on the sale of the M property. The respondent was also able to access superannuation funds on compassionate grounds to meet mortgage payments. As mentioned, the total amount expended by the respondent in this fashion was not the subject of dispute and amounted to some $53,000.

[33] Counsel sought to compare with those post separation contributions made by the respondent, the contributions made by the appellant which totalled $48,856, being items 3 to 6 referred to in the schedule of assets. However, as already mentioned those contributions of the appellant were categorised by her Honour as contributions made during the relationship and not as post separation contributions. Nor, did the appellant agree to their use after separation to meet the joint financial obligations of the parties.

[34] The appellant did however undertake other financial commitments during this period as the evidence revealed. The appellant, together with his wife whom he married in December 2002, purchased a house in B for $136,000 which was sold in March 2004 for $239,000, a profit of $103,000. They also purchased a further property in May 2004 for $60,000. This matter was referred to in the course of argument before her Honour, with her Honour observing:

> "the fact is that [the appellant] has been in a situation where he's been able to contribute to the increase in the value of another asset of which [the respondent] doesn't get the benefit. [The respondent] contributed to the increase in the value of their joint asset of which he gets a benefit."

[35] It was the above uncontested evidence of the distinctly varying post separation contributions by the parties during a period of rapid increase in the property market that led her Honour to make the final adjustment of 20% in the respondent's favour for the post separation contributions, as her Honour expressly indicated:

> "Subsequent to the end of the relationship, real property owned by both of them has increased in value markedly and all of the contributions, financial contributions and other contributions, to the payment of the mortgages and the maintenance of those properties has been solely done by the applicant. In those circumstances, a 50/50 split would be a windfall to the respondent, which would appear to be inappropriate given the sole financial contribution made by the applicant subsequent to the end of the relationship.
>
> … considerable amount of money has been expended by the applicant on the properties since the end of the relationship and that is a period of time in which … the properties have increased markedly in value by movement of the market."

[36] It was the appellant's submission at trial and before this Court that the post separation matters only warranted a minor adjustment of the notional 50/50 apportionment so as to achieve a 60/40 apportionment in favour of the respondent. That is, that out of the pool of $395,857 it was submitted that the appellant should receive $158,342 rather than the $118,757 ordered, being a difference of $39,585.

[37] Given that the nature of the respondent's efforts and that they increased the gross value of the property pool by $166,007, I cannot see that the ultimate apportionment made by her Honour was outside the proper range within which an exercise of discretion might fall. It is not enough that this Court might, or would, have made a different order. A court exercising the power to adjust property in respect of married

or de facto partners has a generous ambit of discretion, as Brennan J (as he then was) observed in *Norbis v Norbis* (1986) 161 CLR 513 at 540:

> "The 'generous ambit within which reasonable disagreement is possible' is wide indeed when there are a number of factors to be taken into account and the comparative weight to be attributed to those factors is not clearly indicated by uniform standards and values of the community. The generous ambit of reasonable disagreement marks the area of immunity from appellate interference."

[38] In my view, the apportionment made was within "the generous ambit" of reasonable disagreement that marked the boundaries of the exercise of the trial judge's discretion.

[39] I would dismiss the appeal dealing with the substantive reasons for judgment (9558/04) with costs to be assessed.

Ground 5 – Whether there was an error in the exercise of the trial judge's discretion as to costs

[40] In a separate appeal (9899/04), the appellant also appeals against the costs order of the learned trial judge of 18 October 2004, that the appellant pay the respondent's costs of and incidental to the proceedings and of a case appraisal of 13 February 2004. On 12 November 2004 the learned primary judge gave the appellant leave to appeal from that costs order.

[41] It was submitted by the appellant that her Honour erred in failing to exercise properly her discretion, in failing to consider properly the submissions made before her by the appellant and in failing to consider and evaluate the evidence.

[42] Her Honour noted in accordance with s 341(1) of the PLA that "Ordinarily a decision as to the distribution of property in a de facto relationship would not have a costs order made in it". Section 341(2) of the PLA gives the court a wide discretion to make "any order for costs", if satisfied there are circumstances justifying it. In making such a costs order pursuant to s 341(2), regard is to be had *inter alia* to any fact or circumstance the court considers "the justice of the case requires to be taken into account" (s 341(4) (g) of the PLA).

[43] In the present case, her Honour took into account as significant that on 13 February 2004, the matter had been the subject of a case appraisal, in which the case appraiser had concluded that the appropriate distribution of the assets was a 70/30% apportionment in favour of the respondent. The appellant was dissatisfied with that determination and had referred the matter for trial.

[44] Her Honour referred to r 344 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") which provides that if "the court's decision in the dispute is not more favourable overall to a challenger than the case appraiser's decision in the dispute was to the challenger, the costs of the proceeding and the case appraisal must be awarded against the challenger".

[45] In her reasons for the decision to award costs in favour of the respondent, her Honour addressed the two principal arguments raised before her against the awarding of costs. The first argument was that in respect of one of the properties the case appraiser had accepted a lower valuation put forward by the respondent over the higher valuation of the appellant and that that valuation remained in dispute. In my view her Honour correctly put that issue to the side, because it was "not possible… to finally determine that question", it being the correct valuation as at the date of the appraisal.

[46] The other matter urged before her Honour on behalf of the appellant was that the court's decision was more favourable overall to the appellant than was the case appraiser's. At the time of trial on 6 October 2004, the agreed net value of the joint assets was $395,857. The 70/30 apportionment determined by the trial judge resulted in the appellant being entitled to receive $118,757 and the respondent $277,100. The appraiser had assessed the net value of the joint assets at the time of the appraisal as $301,142, so that the 70/30 apportionment made by him resulted in a determination that the appellant's entitlement was $90,342 and the respondent's was $210,800.

[47] Her Honour dismissed this submission, dealing with it as follows:

> "Since the case appraisal, of course, the value of property in the area has risen, and so the precise financial figures, as a result of the Court decision, are different from those as a result of the case appraisal. Nevertheless, the central finding both of the case appraiser and of the Court was that the division of property should be 70 per cent to the [respondent], and 30 per cent to the [appellant].
> …
> Mr Hutton, on behalf of the [appellant], has argued that financially the Court's decision is more favourable to the [appellant] than the case appraisal was. Nevertheless, it appears to me that, as I have said, the significant part of both decisions was the division of property between the two parties. There was no dispute before the Court as to the value of the properties or, indeed, as to the asset pool. That did not require a Court decision.
>
> What the [appellant] required from the Court was a decision as to the division and, as I have said, that was precisely the same."

[48] Her Honour's decision to award costs did not rest solely on the application of r 344 of the UCPR. Her Honour stated that "even if this were not a case in which the Court must award the costs of the proceeding against the challenger, this would be an appropriate case to exercise my discretion in that manner" because "the distribution of the property made by me was precisely the same percentage as that decided by the appraiser".

[49] In my view, her Honour was correct in the view that the court's decision was not more favourable to the appellant than the appraiser's because both had made the same apportionment and the appellant could not take advantage of the continuing movement in the market price of the properties to argue to the contrary. In any

event, it is in my opinion sufficient for present purposes that the matters referred to by her Honour were a proper basis for the exercise of the discretion under s 341 of the PLA, independently of any issue as to whether such a result was one which was mandated under r 344 of the UCPR.

[50] In the circumstances, I am not persuaded that it has been shown that there was any error in the exercise of the discretion in awarding costs. I would therefore also dismiss the appeal against the costs order made by the learned trial judge with costs to be assessed.

Orders:

[51] In the circumstances, I would order that both appeal 9558/04 and 9899/04 be dismissed with costs to be assessed.