SUPREME COURT OF QUEENSLAND

CITATION:	*SDJ v FWR* [2008] QSC 256
PARTIES:	**SDJ** **(applicant)** **v** **FWR** **(respondent)**
FILE NO:	BS8788 of 2006
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	24 October 2008
DELIVERED AT:	Brisbane
HEARING DATE:	7-8 August 2008
JUDGE:	Mullins J
ORDER:	**Adjourn the application to a date to be fixed to enable the parties to make submissions on the form of orders that should be made to give effect to these reasons**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – GENERALLY — Part 19 *Property Law Act 1974* (Qld) — consideration of the matters relevant to deciding what is just and equitable in making the property adjustment order — where husband with support of wife commenced making payments overseas as part of a Nigerian scam – where husband lost over $800,000 in the scam — where wife was unaware of the extent of the losses — whether any part of the losses should be added back to the asset pool — whether premature distribution by husband of proceeds of sale for property sold prior to separation — identification of liabilities that reduce the asset pool *Property Law Act* 1974, s 286, s 291, s 292, s 293, s 297, s 298, s 300, s 303, s 304, s 305, s 306, s 309 *Bonnici and Bonnici* (1991) FLC 92-272, considered *FO v HAF* [2006] QCA 555, considered *Kowaliw and Kowaliw* (1981) FLC 91-092, followed *Chorn and Hopkins* (2004) FLC 93-204, considered *Townsend and Townsend* (1995) FLC 92- 569, considered
COUNSEL:	SCA Middleton for the applicant KR Geraghty for the respondent
SOLICITORS:	Journey Family Lawyers for the applicant Hunter Solicitor for the respondent

[1] **MULLINS J:** The parties were de facto partners for about 14 years until they separated in June 2006. The applicant applies for a property adjustment order pursuant to s 286 of the *Property Law Act* 1974 *(PLA).* The parties had agreed on the values for many of their assets. The significant issues that required resolution at the hearing were:

(a) how the losses incurred as a result of payments made by the respondent between 2003 and 2005 to a Nigerian scam should be dealt with;

(b) how the distribution of funds from the sale of the Maudsland property should be treated;

(c) whether the respondent's interest in the Nerang unit should be treated as one of his assets and added to the asset pool;

(d) the extent of the liabilities of the parties at the date of the hearing that can be treated as reducing the asset pool available for distribution.

Relevant background

[2] At the time of the hearing the applicant was 65 years old and the respondent was 69 years old. The applicant is a self-employed podiatrist who worked for remuneration for the duration of the relationship. The respondent is a fully qualified master mariner and had been employed as a ship's captain, but he retired in about 2004 and remained retired at the date of the hearing.

[3] Each of the parties had been in prior relationships. The applicant had a daughter from an earlier relationship who was still at school at the time the parties' cohabitation commenced. The respondent had adult children from earlier relationships.

[4] The applicant concedes that at the commencement of the relationship the respondent had significant assets and the applicant had relatively little by way of assets. The respondent estimated his superannuation to be worth around $350,000 at the commencement of the relationship. The applicant estimated her superannuation at that time was about $50,000.

[5] In 1985 the respondent had purchased a home at Maudsland with his former wife in respect of which he subsequently bought out his former wife's interest in December 1992 as part of a property settlement with her by borrowing $130,000. The respondent estimated the value of the Maudsland home at the time of that property settlement as $350,000. The Maudsland home was rented out until it was sold in May 2006. The rent went towards the mortgage over that property and the respondent contributed the difference between the rent received and the mortgage payments. The net proceeds of sale after paying out the National Australia Bank mortgage of $195,000 were about $436,000.

[6] In 1990 the respondent acquired a unit in his name at Coombabah. The purchase price was $115,000, but the respondent's mother provided $26,086 towards the purchase and his aunt provided a further $5,000 towards the purchase. The respondent borrowed the balance required for the purchase. The unit was rented and the rent was used to meet the mortgage payments. According to the respondent,

either the respondent's mother or his aunt would pay the shortfall between the rent received and the mortgage payment that was due. The parties moved into this unit at the commencement of their relationship, remained there until September 1993 and contributed equally to the rent.

[7] The respondent purchased a house property at Burleigh Waters in 1993 (the Burleigh property) for which he borrowed almost the entire purchase price of $229,000 and the parties moved to this property. The respondent paid for the renovation of the kitchen. A surgery for the applicant's podiatry practice was incorporated into this house in 1994 for which the respondent paid. The respondent required the applicant to pay rent for the use of the surgery space. The applicant paid rent to the respondent and in each tax year claimed the amount of rent paid as a tax deduction. The total rent paid by the applicant was $133,490 which the respondent retained as income and estimated that the tax he paid on the rent was $43,304.

[8] The respondent's mother and her sister had purchased a unit at Nerang in 1986 at which they resided. The respondent used the address of that unit as the address to which correspondence relating to his finances were sent. According to the respondent, his mother wanted the respondent to be registered on the title of the unit, after her sister died, in order to assist his mother in dealing with matters in respect of the unit. The respondent became the registered owner of this unit with his mother as joint tenants in 1997. He did not tell the applicant that he had become a registered owner with his mother, but maintained that the unit belonged to his mother. According to the respondent, when his aunt left her estate to the respondent's mother, his mother paid out the mortgage secured over the unit at Coombabah. The respondent stated that he did not receive any financial benefit from the joint ownership of the unit with his mother during the relationship with the applicant and it was not used as security for any loans made to the respondent.

[9] In July 1998 the property that the applicant had owned with her former husband was sold and from the net proceeds the applicant deposited about $30,000 into her superannuation fund. From the commencement of the applicant's relationship with the respondent, however, she was making relatively small payments on account of debts that arose from the business activities that she had conducted with her former husband.

[10] In about 1999 the applicant and the respondent purchased a property at Red Rock in New South Wales, using the equity in the Maudsland and Burleigh properties for security for the loan obtained for the purchase. The respondent paid the deposit. There was an informal arrangement between the parties at the time of the purchase of the Red Rock property that the applicant would endeavour to pay the outgoings in respect of this property including mortgage payments, as the respondent was committed to making the mortgage repayments for the Maudsland and Burleigh properties. The records that the applicant has maintained show that she did make payments on account of the Red Rock mortgage from December 1999 until October 2000, but did not continue making mortgage payments. The applicant did pay outgoings for rates, electricity, land tax and other expenses for the Red Rock property until separation.

[11] Between October 2001 and September 2005 the respondent withdrew $601,046 from his superannuation and paid $155,432 on tax in relation to the superannuation withdrawals. The respondent borrowed $10,000 from Rapid Loans on 1 October 2005 to pay mortgage interest, rates and general living expenses.

[12] The respondent sold the Coombabah unit in February 2005 for $247,000 and $130,625 of these proceeds were used to repay the mortgage over the Burleigh property. The respondent stated in paragraph 23 of his affidavit filed on 14 September 2007 that the balance of this loan was paid into the Red Rock mortgage, but in his oral evidence suggested that the proceeds also went to the Maudsland mortgage.

[13] The respondent borrowed $205,000 from ING Bank (Australia) Ltd (ING) in March 2006 that was secured over the Burleigh property. The respondent stated that he was experiencing financial difficulty at the time in meeting the interest payments on the Maudsland, Burleigh and Red Rock properties. Although the respondent had given different versions in paragraph 24 and 27 of his affidavit filed on 14 September 2007 as to the source of funds he used to pay out Rapid Loans, he ultimately confirmed in his oral evidence that he paid that debt from the loan from ING.

[14] Although the evidence of the respondent was confusing in some respects about the disbursement of proceeds from sales and loans in 2005/2006, it is apparent that the respondent was under severe financial strain and had extended his borrowing capacity to the limit and was relying on funds from credit cards, AMEX line of credit and Rapid Loans.

[15] The respondent's mother commenced residing with the respondent at the Burleigh property in August 2006. According to the respondent, by September 2007 she was suffering from the onset of senile dementia and was no longer capable of looking after herself. She went to England in March 2008 to be cared for by the respondent's sister. At that stage the respondent could not say whether his mother's mental condition had worsened, but he did say it had not improved.

[16] The respondent has deposed to his son David lending him money since the latter half of 2006. At the time the respondent swore his affidavit filed on 14 September 2007, the total amount that had been lent was $89,500. The respondent notated his bank statements to show the payments made by David to him. At the time the respondent swore his affidavit filed on 28 April 2008, the total amount of the loans that he said had been made by David to him was $157,920. The respondent confirmed in his affidavit filed on 12 June 2008 that he had been surviving on regular loans from his son David and that the last transfer of funds made by David to him was the sum of $5,000 on 29 May 2008. The respondent stated that David was experiencing financial difficulties and wished to have the loan repaid. According to paragraph 88 of the respondent's affidavit filed on 22 July 2008, the amount he owes David is $168,920. It was not suggested to the respondent in cross-examination that this loan was not incurred after separation.

Credit of the witnesses

[17] Each party filed five affidavits in this proceeding. That gives an indication of the degree to which the parties have been in dispute. By the time of the hearing of the application, however, the parties managed to confine their disputes mainly to the critical issues that have been identified in these reasons as requiring resolution. That is not to say that all disputed matters raised on the affidavits were resolved. The parties between themselves decided to confine cross-examination (at Transcript D1 p 27). This resulted in the oral evidence of the applicant and the respondent (which in each case was mainly cross-examination by the other party) taking place in less than one day.

[18] I was still able to form distinct impressions about each of the applicant and the respondent that were not entirely favourable, as a result of the content of the respective affidavits and the attitudes and responses evinced during oral evidence.

[19] Both the applicant and the respondent tended to act as their own advocates. They were both keen to criticise the other and advance the arguments that were foreshadowed in their affidavits and by their lawyers whenever they perceived an opportunity to do so in the course of cross-examination. I have endeavoured to overlook the parties' assertions that were of no evidentiary value.

[20] In some respects, the applicant overstated her contributions to the relationship. A good example is the applicant's assertion that her contribution was her gross business income and not her net taxable income. Presumably the logic for the assertion was that many of the deductions were for expenses that were contributions to the household, in addition to being claimed as deductions for her business, such as electricity and telephone expenses. On any view of the applicant's taxation returns that logic did not apply to all the business deductions. The annual income available from the applicant for the benefit of the relationship was somewhere between the gross and net figures.

[21] The applicant had claimed the respondent was secretive about his financial dealings throughout the relationship and did not share with her financial information that affected both of them. The respondent was defensive about these allegations and made assertions in cross-examination that did not always withstand scrutiny. The applicant had stated that she had no knowledge of the loan organised by the respondent from ING in March 2006 at the time that was arranged. The respondent consistently asserted that he did tell the applicant about that loan, but in the context of a conversation that he had asked her to contribute more funds to meet the mortgage payments on the Burleigh and Red Rock properties and that when she did not do so, he had to go outside the National Australia Bank to obtain additional finance. As far as the respondent was concerned, the fact that the applicant declined to provide further funds to meet their commitments meant that she had to "know" what steps he took to obtain additional funds by way of the ING loan. There was no suggestion in the respondent's evidence that he conveyed to the applicant the detail of the steps that he was undertaking in relation to that loan from the ING and the expenditures made from it contemporaneously as these steps were taken.

[22] In view of the respondent's attitude to questions asked of him, as illustrated by the example in the preceding paragraph, I have been careful about evaluating his oral evidence against the other evidence before me.

Asset pool

[23] To the extent that at the date of the hearing there was agreement about the identity and value of assets available for distribution, that list of assets is:

Asset	**Value**
Red Rock property	$310,000
Burleigh property	560,000
Applicant's motor vehicle	12,500
Respondent's Nissan motor vehicle	12,400
Respondent's Mazda motor vehicle	800
Applicant's superannuation	98,107
Applicant's jewellery	9,300
Applicant's furniture	5,000
Respondent's furniture	2,000

[24] The applicant's superannuation has been included because it is able to be withdrawn by the applicant.

[25] The parties agreed that the portion of the mortgage debt secured on the Burleigh property of $205,000 is to be treated as a liability for the purpose of calculating the net value of the asset pool.

Nigerian scam

[26] A friend of the respondent suggested investing into a scheme that would result in a large sum being transferred out of Nigeria which those who invested in the scheme would share. The applicant and the respondent decided to get involved. The money contributed to the scheme had to be sent in cash in US dollars through Western Union. For the purpose of this proceeding the respondent has obtained from Western Union details of all the transactions whereby he sent money commencing in February 2003. The payments commenced on 11 February 2003 and ceased on 16 December 2005.

[27] At the respondent's request the applicant also sent money through Western Union. One transfer was for US$7,400 sent on 14 March 2005 (exhibit 4) and another was for US$7,000 sent on 13 May 2005 (exhibit 5).

[28] The total amount of money sent by the respondent through Western Union based on the details obtained by the respondent from Western Union, including the transfers made on the respondent's behalf by the applicant, is $785,193. The charges made by Western Union for these transfers were $38,217. This makes a total of $823,410 expended by the respondent on this scam between 11 February 2003 and 16 December 2005. When the respondent swore his initial affidavit in this proceeding

that was filed on 5 December 2006 (document 7), he stated that he lost "approximately $300,000" in the Nigerian scam. The respondent explained in his oral evidence that he did not verify his losses by reference to any documents when preparing his first affidavit and that he did not know that he had lost in excess of $300,000 as his approach at that time was to "stick" his head in the sand. When preparing the affidavit that was filed on 14 September 2007 (document 12), the respondent requested the information about payments through Western Union back to February 2003 only. He acknowledged in paragraph 20 of that affidavit that he was not sure whether there were any transfers before then. In cross-examination, he nominated the year 2001 as the beginning of the scam for him.

[29] The applicant was supportive of the respondent's involvement in this scheme when the payments commenced, acknowledging that she and the respondent thought it might be "a good idea" to be involved. She thought that they started talking about this involvement in 2002. She said in her evidence (at Transcript Dl p 41):

> " ... we used to imagine - it's like winning the lottery-what we would do with X amount of dollars when it came through."

[30] The applicant referred to the time that she transferred money through Western Union for the purpose of this scheme as being at the "really early" stages of the respondent's involvement in this scam. She then continued in paragraph 61 of her affidavit filed on 5 October 2007 (document 15) and stated:

> "I begged [the respondent] to please stop sending money to Nigeria and move on before we suffered any more losses."

[31] When the applicant was giving oral evidence, she was asked to identify the timing of the conversations in which she said she asked the respondent to stop sending money to Nigeria. The applicant said that there were several conversations. At one stage in her evidence she suggested that it was in early 2005 that she suggested to the respondent that he "recoup" their losses, because she thought that the money that she sent through Western Union was prior to early 2005 (before she was cross-examined on exhibits 4 and 5). When asked in cross-examination how soon after she transferred the money for the purpose of the scheme that these conversations occurred, the applicant stated (at Transcript Dl p 35):

> "It could have been 6 months, 9 months, but he was very insistent that he have that $7,500 that I gave him."

[32] It is clear from the respondent's explanation for the difference in information about the losses on the Nigerian scam between the respondent's affidavits filed on 5 December 2006 and 14 September 2007 that the respondent at the time of sending the cash through Western Union was not prepared to recognise the extent of the total funds being sent by him. The respondent conceded that he did not tell the applicant at the time that he was sending the funds the precise extent of his investment in this scam, because he did not know (or wish to know) himself.

[33] Both the applicant and the respondent were gullible and greedy about the windfalls they expected to make by sending money to Nigeria. The applicant's support of the respondent's making these cash payments to Nigeria has to be considered in the

context that she did not have accurate information from the respondent about the extent of the funds that he was spending. Although the applicant was unclear about the timing of her request to the respondent to stop sending money to Nigeria, it is likely that it did not happen until at least the time that she had sent money at the respondent's request.

[34] Ultimately the applicant submitted that all payments made through Western Union between April and December 2005 should be added back into the asset pool. The figure that was submitted by the applicant for that purpose was $190,490. That does not accord with the addition of the relevant amounts on the schedule of payments through Western Union which is exhibit "RWF3" to the respondent's affidavit filed on 14 September 2007. It was submitted on behalf of the respondent that the applicant was as much responsible for the losses incurred in the Nigerian scam as the respondent and, taking her evidence literally, that she did not ask the respondent to stop sending money until six or nine months after she sent money herself which coincided with when the respondent stopped making payments anyway. I consider that the applicant was supporting the scheme until at least May 2005, and in the circumstances cannot attribute the losses invested in the Nigerian scam solely to the respondent before May 2005. According to the schedule of payments through Western Union which is five and one-half pages in length, the frequency of the payments in 2005 was much greater then for the preceding years. The list of payments for 2005 comprises about four of the pages. Whether or not the request by the applicant to the respondent to stop making the payments was made after May 2005, the applicant was not privy to the quantum and frequency of payments being sent by the respondent after May 2005. In accordance with the approach taken in *Kowaliw and Kowaliw* (1981) FLC 91-092, the sum of $300,000 should be added back into the asset pool for the funds sent through Western Union between June and December 2005. This allows for some portion of the fees charged by Western Union in addition to the actual payments of $290,645 made through Western Union between June and December 2005.

Distribution of the Maudsland property proceeds of sale

[35] The respondent dealt with the disbursement of the net proceeds from the sale of the Maudsland property in paragraph 61 of his affidavit filed on 5 December 2006:

> "I loaned the sum of $150,000 to my son, Robert Freer. He repays to me the sum of $200 per week. $310,000 was returned to my mother to repay her for the monies she lent me from the sale of the Biggera Waters unit ($220,000), from her inheritance ($60,000) and the general living expenses ($30,000)."

[36] The respondent's affidavit filed on 14 September 2007 is more detailed than the earlier affidavit. In paragraph 27 of this affidavit, the respondent describes how he spent the net proceeds from the Maudsland property:

> "Out of these proceeds, I lent the sum of $150,000.00 to my son, Robert, to try to put him into a position where he could buy a house (he lives in Sydney and had always rented there) on the basis that he paid interest on that sum to me in the amount of $200.00 per week. I paid out an AMEX line of credit in the amount of $15,071.00 which

> was mainly the result of my having used that line of credit to obtain $9,500.00 which I had obtained on the 18th November, 2005 to put towards the Nigerian matter. The remainder I paid to my mother over a period of time to honour the agreements I had reached with her with respect to Pine Ridge, and further to honour the loans she had made to me of about $64,000.00 paid into Maudsland, and the loan was about $30,000.00 made to me over a period of time in 2004/2005. She had also loaned me $60,000.00 to payout the mortgage on Mauds1and which I had taken out to payout my ex-wife; further, she had loaned me $30,000.00 over a period of time in 2004/05. The total that I paid to my mother was $290,000.00."

The respondent in his oral evidence (at Transcript D1 p 58) acknowledged that there was an error in paragraph 27 of this affidavit. There was only the one loan of about $60,000 made by his mother to him and the figure of $60,000 that he mentioned in paragraph 27 of the affidavit was identifying the same loan as the figure of $64,000 in the same paragraph.

[37] The respondent's mother died in England in May 2008. The respondent was not a beneficiary under his mother's last will made in 2001. The residuary beneficiaries under that will were the respondent's brother, sister and cousin. The respondent dealt with the whereabouts of the cash he said he paid to his mother from the proceeds of the Maudsland property in paragraph 83 of his affidavit filed on 22 July 2008 (document 29):

> "I refer to paragraph 61 of my previous Affidavits. Since those Affidavits were filed, I learnt that my mother had put the monies I repaid her into a metal box. I am aware that this was stored in the bottom of her wardrobe in her bedroom at [the Burleigh property] after she came to stay with me but I never saw the money in it. Jane and Vera were living at Honeyeater with my mother and I from January, 2008 to the 14th March, 2008 and before they all left they packed up all of mum's effects that she had at [the Burleigh property] and took them to England with the exception of some valueless clothes, shoes and books. They left the metal box there, but when I checked it, it was empty. I can only assume that my sister and my cousin took this money at the same time as everything else was removed. By reason of my mother's Will, this money does not belong to me but to my sister and cousin."

[38] The respondent in the course of his oral evidence explained that he withdrew cash from his Suncorp account in amounts of $5,000, $8,000 or $10,000 at a time (at Transcript D1 P 62) and repaid his mother in cash (at Transcript D1 p 63):

> "… Because Mother - I paid Mother in cash because Mother is a pensioner and she didn't want her pension interfered with so I gave it to her in cash and she kept it in cash and to decide whether she wanted me to invest for her later on or whatever, that's why I paid her in cash."

and described what she did with the cash:

> "... Now do you know where she put the cash?-- Yes, she kept it with her in a box. She was living with me at the time because she had smashed her pelvis and I gave it to her there and she kept in the bedroom.
> Okay, how big was the box?-- How big was the box? It's an ample toolbox, checker plate aluminium.
> And you're indicating about a metre wide?-- Yeah, about half a metre.
> Half a metre?-- half a metre.
> Okay, and $290,000 in that box?-- Yep.
> And that's where it remained?— Yes."

[39] It strains belief that the respondent would have paid such a significant sum of money to his mother from around the middle of 2006 in progressive sums on more than 30 occasions. Even though the respondent was cognisant of his mother suffering from senile dementia from September 2007, he did not suggest that he checked on the safety of the large amount of cash that he said he had given to his mother and that she was keeping in a box. I am not satisfied that the respondent has shown that he did, in fact, make payments in the total sum of $290,000 to his mother or that there was a true liability owed to his mother. In any case, the applicant makes an alternative submission that, at the very least, the disbursement of the sum of $290,000 at or around the time the parties separated was a premature distribution of property (in reliance on *Townsend and Townsend* (1995) FLC 92-569) and should be added back into the asset pool. On either ground, this sum of $290,000 must be an add back to the asset pool.

[40] In relation to the loan made to Robert, the respondent stated in paragraph 37 of his affidavit filed on 14 September 2007 that Robert had been paying interest payments on the loan of $150,000 and had paid interest of $12,000 and repaid capital, so that the debt owing was reduced to $100,000. By the time the respondent swore his affidavit filed on 28 April 2008, he said that Robert had fully repaid the loan. In his oral evidence, however, the respondent stated that it was an interest free loan that Robert had paid back at $200 per week.

[41] The circumstances in which the loan of $150,000 were made to Robert were such as to justify that loan being treated as a premature distribution by the respondent of proceeds of sale that were available at or around the time of separation of the parties. Although the respondent now states that the loan has been fully repaid, the evidence is unsatisfactory about where those funds now can be located amongst his assets. When account is taken of the loan funds provided to the respondent by David and the other forms of credit and loans utilised by the respondent since separation, it is surprising that the respondent did not endeavour to clearly show the court of the whereabouts of the funds repaid by Robert. The evidence of use of any repaid loan amount was unconvincing. This loan should be treated as a premature distribution which must also be added back to the asset pool.

Nerang Unit

[42] The respondent acknowledged in his affidavit filed on 22 July 2008 (document 29) that as the Nerang unit was registered in the joint names of his mother and himself, the unit automatically vested in him upon her death. The unit was valued as $215,000 as at 30 June 2008.

[43] The fact that the respondent's mother arranged for the respondent to become a registered joint owner of the Nerang unit when his aunt died facilitated the respondent's succeeding to the full ownership of the unit on his mother's death by survivorship. This occurred almost two years post-separation. Although the respondent was registered as a joint owner of the Nerang unit some nine years before separation, nothing in the evidence suggests that either the respondent or his mother treated the respondent as a beneficial owner of an interest in the Nerang unit whilst the respondent's mother was alive. In the circumstances it is appropriate to characterise the entire interest of the respondent in the Nerang unit as an inheritance that accrued on the death of his mother. Guidance on how an inheritance post-separation may be treated is found in *Bonnict and Bonnici* (1991) FLC 92-272 at 79,020. It is not unjust to the applicant to exclude the Nerang unit from the asset pool, as the inheritance was not one that was contributed to by the applicant. The Nerang unit will not be included in the asset pool for the purpose of making the property adjustment order.

Liabilities that reduce the asset pool

[44] At the date of separation, the respondent owed $205,000 to ING and about $25,000 on credit cards. The impact of the losses on the Nigerian scam was to use up the respondent’s superannuation, leave him with the ING loan and credit card debts and make him short of cash while this proceeding was unresolved. The only liability that the applicant is prepared to allow in reduction of the asset pool is the ING loan of $205,000. The level of the respondent’s credit card debts at the date of the hearing was about $42,000. I am satisfied that the financial strain caused by the losses in the Nigerian scam and the flow on effect for the respondent’s cash flow has resulted in these credit card debts. Adding back the Nigerian scam losses of $300,000 to the asset pool without allowing for the related indebtedness of the respondent would be unfair. To the extent that the credit card debts also arise from those part of the Nigerian scam losses which were incurred with the applicant’s support, it would also be unfair if those credit card losses were not taken into account in calculating the asset pool. The respondent’s credit card debts must therefore be treated as a liability in calculating the net asset pool.

[45] At the time of the hearing of this proceeding, the parties were in the process of selling the Red Rock property. Accounting opinion was tendered (exhibit 6) that capital gains tax will be payable on the surplus of the sale proceeds over the cost base of the property. That is estimated to be around $53,000. That is also a liability that reduces the asset pool.

Consideration of matters specified in ss 291 to 309 *PLA*

[46] It was common ground between the parties that the approach that is taken by the court to the making of a property adjustment order pursuant to s 286 of the *PLA* is that which has been applied by the Family Court in an application relating to property under s 79 of the *Family Law Act* 1975 (Cth): *FO* v *HAF* [2006] QCA 555 at paragraph [52]. I will therefore address each of the matters specified in ss 291 to 309 of the *PLA* that are relevant to this application.

Direct and indirect contributions to property or financial resources (s 291)

[47] The applicant acknowledges that the respondent brought into the relationship significantly more assets than the applicant. The applicant also concedes that the respondent made the majority of the financial contributions to the assets that accrued during their relationship. The parties have undertaken extensive analyses of the expenses made by each of them throughout the relationship by reference to credit card statements and cheque butts. In some respects it is difficult to identify these tables of expenditures with the actual funds that the parties had at their disposal during their relationship. Even allowing for inaccuracies, the respective figures claimed by each party as their financial contributions over the period of cohabitation of $262,000 for the applicant and $1.5m for the respondent give some indication of the disparity in contributions, without accepting the accuracy of the figures. This is also verified by the greater earnings of the respondent which the applicant acknowledges was twice as much as her earnings.

[48] It is submitted on behalf of the applicant that taking into account the applicant's contributions to the entire asset pool throughout the relationship and that the significance of the initial contributions of the respondent were eroded over the period of the relationship, a finding of fact should be made that the applicant contributed 30 per cent towards the asset pool. That submission gives far to much weight to the erosion of the initial contributions of the respondent. The respondent’s submission that the applicant’s financial contributions should be calculated at 12 per cent places too much significance on detailed calculations with some artificiality about them. I have concluded that the parties’ respective contributions during the relationship to their pool of assets is fairly reflected by the proportions of 20 per cent on the part of the applicant and 80 per cent on part of the respondent

Contributions to family welfare (s 292)

[49] The family comprised the applicant and the respondent. Although the respondent spent a significant period of time away from home when he was working as a ship's captain, he correspondingly spent more time at home after he retired in 2004. The applicant seeks a 5 per cent adjustment of the pool in her favour, on the basis that she made greater contribution as a homemaker. The respondent argued against that 5 per cent adjustment of the pool in the applicant's favour. The respondent's counsel did not cross-examine the applicant on the material relied on by her in support of this claim, as he conceded he was unlikely to succeed in affecting the view formed on a consideration of the applicant's evidence on this aspect. An adjustment of 5 per cent in the applicant's favour recognises the reality of greater opportunities the applicant had until the respondent's retirement for contributing to family welfare

over those years of the relationship when the respondent worked away from home for extensive periods.

Effect on future earning capacity (s 293)

[50] Any proposed order under s 286 of the *PLA* will have no effect on the earning capacity of either party.

Age and health (s 297)

[51] The applicant suffers from degenerative scoliosis of the lower spine which is treated with steroid injections and pain management. The respondent suffers from early signs of diabetes that he is trying to control with exercise and diet. He also suffers from osteoporosis, depression, a problem with his heart and high cholesterol. He takes medications for these conditions.

Resources and employment capacity (s 298)

[52] The applicant anticipates being able to continue to work as a podiatrist for about another two years, although her back problems affect the manner in which she works. Although the respondent did obtain a contract job in Singapore in an advisory capacity between 26 May and 19 June 2007, he has had no further work since that time and his age and state of health makes it unlikely that he will earn any income in the future.

[53] Although the Nerang unit is not included in the asset pool, it is a financial resource available to the respondent and is relevant in that context.

Necessary commitments (s 300)

[54] The weekly personal expenses of each party are similar.

Appropriate standard of living (s 303)

[55] From their similar weekly expenses, both parties appear to be maintaining a similar standard of living. There was no suggestion during the hearing of this matter that either party was disadvantaged on separation in maintaining the standard of living that they had enjoyed while in the relationship.

Contributions to income and earning capacity (s 304)

[56] The argument is advanced by the applicant that she made significant contributions toward the respondent's income and earning capacity by taking care of things at home while the respondent was away working as a ship's captain. The argument is put in terms that this enabled the respondent to earn greater money and in doing so acquired greater skills and thereby increasing his earning capacity. There is absolutely no evidence whatsoever that the respondent's skills increased in the time that he was working as a ship's captain during the relationship of the parties. I have

already indicated that the applicant should be given a 5 per cent adjustment of the pool to recognise her opportunities for making a greater contribution to the family welfare whilst the respondent was spending time away from home as a ship's captain. It would doubly compensate the applicant, if an adjustment in the applicant's favour were made by reference to s 304 of the *PLA* based on the applicant being able to take care of things at home while the respondent was away.

Length of relationship (s 305)

[57] The relationship was moderately lengthy at almost 14 years.

Effect of relationship on earning capacity (s 306)

[58] The relationship between the parties did not affect the earning capacity of either party.

Other facts and circumstances (s 309)

[59] Under s 309 of the *PLA*, the court must consider any fact or circumstances the court considers the justice of the case requires to be taken into account. This allows the add backs to be made for the Nigerian scam losses, the sum of $290,000 that the respondent said he paid to his mother and the loan of $150,000 made to Robert.

[60] As the applicant acknowledged that she had withdrawn the sum of $25,000 from her superannuation for the purpose of funding her legal expenses for this proceeding, that amount should be an add back to the asset pool: *Chorn and Hopkins* (2004) FLC 93-204 at paragraphs [56] and [57].

What is just and equitable

[61] The net asset pool should be calculated on the basis of the following assets:

Asset	**Value**
Red Rock property	$310,000
Burleigh property	560,000
Applicant’s motor vehicle	12,500
Respondent’s Nissan motor vehicle	12,400
Respondent’s Mazda motor vehicle	800
Applicant’s superannuation	98,107
Applicant’s jewellery	9,300
Applicant’s furniture	5,000
Respondent’s furniture	2,000
Add back for amount claimed to be distributed to the respondent’s mother	290,000
Add back for loan to respondent’s son	150,000
Add back for losses on Nigerian scam	300,000
Add back applicant’s legal expenses	25,000

Total **$1,775,107**

[62] The liabilities that I have identified as reducing these assets are the ING loan of $205,000, credit card debts of $42,000 and capital gains tax liability in respect of the sale of Red Rock of $53,000. That makes a net asset pool of $1,475,107.

[63] The order that the court makes by way of a property adjustment order must be just and equitable: s 286(1) of the *PLA*. The impact of the respondent being required to pay to the applicant the amount that would result in her receiving assets worth 25 percent of the net asset pool will require the respondent to sell assets. Taking into account the assets that the applicant already has, it is possible that the respondent may have to sell the Nerang unit. This is partly attributable to the position the respondent finds himself in, as a result of losing so much money in the Nigerian scam. I am satisfied that a division of the net assets to reflect the proportion of 25 per cent to the applicant and 75 per cent to the respondent is just and equitable in the circumstances.

Orders

[64] At the conclusion of the oral submissions in this proceeding, the parties requested an opportunity to make further submissions after the publication of the reasons for judgment to accommodate any changes that may have occurred in the form of the assets after the hearing of the application. I will therefore give the parties the opportunity to consider these reasons for judgment and adjourn the application to a date to be fixed to enable the parties to make submissions on the form of orders that should be made to give effect to these reasons. I will also consider any submissions on the question of any order for costs of the proceeding at the same time.