# SUPREME COURT OF QUEENSLAND

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| CITATION: | *WB v GSH* [2008] QSC 346 |
| PARTIES: | **WB**<br>(applicant)<br>**v**<br>**GSH**<br>(respondent) |
| FILE NO: | BS No 8837 of 2006 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court of Queensland |
| DELIVERED ON: | 23 December 2008 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 6-10 October 2008 |
| JUDGE: | Applegarth J |
| ORDER: | **1. Pursuant to s 333(1)(d) of the *Property Law Act,* 1974 (Qld) the respondent pay the sum of $350,375 to the applicant.**<br>**2. On or before 2 February 2009 the applicant file and serve draft minutes of orders, including orders for the payment of the said sum, that payment be wholly or partly secured and that, in the event the sum is not paid by a specified date, for the sale of specified property and the distribution of $350,375 plus interest at a specified rate from the proceeds of sale.**<br>**3. The respondent file and serve her response, if any, to the applicant's draft minutes of orders within seven days of receiving the same.**<br>**4. On or before 2 February 2009 the parties file and serve submissions on costs.**<br>**5. The matter be listed for review at 9.15am on Wednesday, 11 February 2009 for the making of further orders, including orders as to costs.**<br>**6. There be liberty to apply.**<br>**7. The matters referred to in paragraphs [185] and [186] of the Reasons for Judgment be referred by the Registrar to the Attorney-General of Queensland, and that the Registrar publish to the Attorney-General the identity of the parties.** |

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – GENERALLY – where applicant seeks a property adjustment under Part 19 *Property Law Act* 1974 ("*PLA*") – de facto relationship of approximately 16 years – where parties made substantial contributions to a business that had no significant value at date of hearing – where respondent's initial financial contributions substantially exceeded those of applicant – erosion doctrine in de facto property cases – where respondent's overall financial and non-financial contributions to the relationship greatly outweighed those of applicant – where pool of assets included assets not contributed to relationship – whether a property adjustment should be made under the *PLA*

FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – OTHER MATTERS – unreasonable conduct of respondent – where respondent forged applicant's signature to obtain title deed to a property in which applicant had an equity – use of applicant's equity to raise loans to acquire further properties – where respondent made excessive personal use of assets without taking full advantage of income-producing capacity – where respondent's expenditure after relationship was unreasonable – whether respondent's conduct warranted an adjustment in applicant's favour

*Property Law Act* 1974, s 286, s 288, s 291, s 292, s 293, s 294, s 295, s 297, s 298, s 300, s 304, s 305, s 306, s 307, s 309, s 333(1)(d), s 343
*Australian and Securities Investments Commission v Carey (No 6)* (2006) 233 ALR 475, cited
*Baker v Towle* [2008] 39 Fam LR 323, considered
*Bilous v Mudaliar* (2006) 65 NSWLR 615, considered
*Biltoft, In the Marriage of* [1995] 19 Fam LR 82, cited
*BLM v RWS* [2006] QCA 528, applied
*Browne & Green* [1991] FLC 92-873, considered
*Challen & Challen* [2007] FamCA 1292, applied
*Chang and Su, In The Marriage of* [2002] Fam CA 156, applied
*Chorn v Hopkins* [2004] FLC 93-204, applied
*CL v JMG* [2007] QSC 169, cited
*Delany v Burgess* [2007] NSWCA 360, cited
*Douglas v Douglas* (2006) FLC 93-300, cited
*EB v CT* [2008] QSC 303, cited
*Evans v Marmont* [1997] 42 NSWLR 70, cited
*FO v HAF* [2007] 2 Qd R 138, [2006] QCA 555, applied
*G and G* (1984) 9 Fam LR 969, cited
*HAG v MAW* [2007] QCA 217, cited
*Kardos v Sarbutt* [2006] NSWCA 11, cited
*LW v GAB* [2007] QCA 386, cited

*Mallet v Mallet* (1984) 156 CLR 605, cited
*Manns v Kennedy* [2007] 37 Fam LR 489, cited
*Norbis v Norbis* (1986) 161 CLR 513, cited
*Pierce, In the Marriage of* (1998) 24 Fam LR 377, [1999] FLC 92-844, considered
*Proudman v Dickason* [2008] NSWC 681, cited
*Sharpless v McKibbin* [2007] NSWSC 1498, considered

COUNSEL: A J H Morris QC, with him V G Brennan for the Applicant
The Hon T Carmody SC for the Respondent

SOLICITORS: Alex Mackay & Co for the Applicant
Hopgood Ganim for the Respondent

**Introduction**

[1] The applicant and the respondent were in a de facto relationship between early 1989 and early 2005. During the relationship they exhausted most of the large inheritance that the respondent received from her grandfather in 1987. That inheritance was consumed by a loss-making horse stud business and a lifestyle that the collective incomes of the applicant and the respondent could not support.

[2] At the start of the relationship the applicant worked as a lifeguard at Noosa and owned a house at Tewantin. Currently he is not in paid employment, lives in a de facto relationship with a lawyer and cares for their two young children. In 1998 the proceeds of sale of his Tewantin property and some money that he had inherited were invested by the applicant in a property at Thredbo owned by the respondent. He contributed $165,000. Only in the final stages of the hearing did the respondent, through her recently-appointed legal representatives, acknowledge the applicant's interest in the Thredbo property. Otherwise, the applicant has no substantial property or other financial resources.

[3] The true extent of the respondent's assets, liabilities and financial resources is an issue that occupied a large part of the hearing. Even after a lengthy hearing their true extent is somewhat uncertain. This uncertainty is largely the result of the unreliability of the respondent's evidence and the absence of documents that would either support or undermine her assertions about her assets and liabilities.

**A preliminary issue: the date the de facto relationship ended**

[4] There is a preliminary issue to determine, namely the date the de facto relationship ended. The respondent asserted that the de facto relationship ended in April/May 2004. The evidence does not support this. I find that it ended on 15 February 2005 following a confrontation between the respondent and the applicant. I accept the evidence of the applicant and the evidence of other witnesses that the applicant remained in a relationship with the respondent during the latter part of 2004 and that the relationship continued after the respondent's return in late January 2005 from a holiday in Europe. The respondent did not respond to this

evidence by way of affidavit, and did not cross-examine the applicant or his witnesses so as to test their evidence on this issue.

[5] The application under Part 19 of the *Property Law Act* 1974 ("*PLA*") for a property adjustment order was made within time.[1]

**The principal issues**

[6] I intend to adopt the four step approach discussed in *FO v HAF*.[2] This approach involves:

(1) The identification and valuation of the property, resources and liabilities of the parties.

(2) The identification and assessment of the contribution of the parties to their pool of assets and the determination of their contribution-based entitlements in accordance with s 291 to s 295 of the *PLA*.

(3) The identification and assessment of the factors in s 297 to s 309 of the *PLA* to determine the adjustment to the contribution-based entitlement.

(4) Consideration of the result of these earlier steps to determine whether that result is just and equitable in accordance with s 286 of the *PLA*.

[7] The applicant submits that an appropriate order is to make a property adjustment order in his favour of 50 percent, made up of 35 percent for s 291 to s 295 factors and a further 15 percent for s 297 to s 309 factors. A property adjustment order of 50 percent overall is said to take account of all of the relevant factors prescribed by statute. He further submits that an appropriate "broad brush" approach would be to make orders which, in effect, award to him the Thredbo property (in which the respondent belatedly acknowledges that he has a one-third interest) by ordering the respondent to provide the amount necessary to discharge the existing mortgage over it.

[8] The respondent submits that no property adjustment order is justified and that it would not be unfair to make no order at all on the application. She submits that there is no basis to give the applicant a share of her pre-relationship assets in circumstances in which those assets were consumed, rather than conserved, during the relationship. Her position is that:

(a) there is a massive disparity in their respective financial contributions, in that she met all mortgage and other outgoings in respect of the properties and (save for the $165,000 contributed by the applicant in 1998) funded all significant capital acquisitions, and the improvements to, and the maintenance of, her properties;

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1 *PLA* s 288.

2 [2007] 2 Qd R 138 at 155, [51]-[52]; [2006] QCA 555.

(b) she met "joint everyday spending and lifestyle expenses" out of business income or her assets;.

(c) the extent of the applicant's non-financial contributions is exaggerated, and, in any event, any non-financial contributions by him were matched or exceeded by her own.

The respondent's alternative submission is that she be ordered to pay no more than $266,666 to the applicant "in exchange for his Thredbo equity".

[9] Before dealing with the substantial issues in dispute between the parties in accordance with the approach that I have outlined, it is appropriate to provide a summary of the de facto relationship and matters that have occurred since it ended. I shall also refer to the conduct of the proceedings, and to the reliability of the applicant and the respondent as witnesses. My adverse findings concerning the respondent's conduct of the proceedings and her failure to disclose and produce relevant documents are not a reflection upon the conduct of her legal representatives. The respondent's solicitors and her counsel only came into the matter shortly before the hearing. Before then, the respondent was not represented by solicitors, and had some assistance from a barrister who was a friend of her family and who appeared on interlocutory hearings.

**The de facto relationship**

[10] The respondent came from a wealthy family. By the end of 1987 she had inherited from her grandfather a share portfolio worth $1 million, $100,000 in cash and various artworks and antiques. She had unencumbered title to a seven acre property at Maleny and vacant land at Thredbo. She commenced a relationship with the applicant in 1988.

[11] They commenced a de facto relationship in about April/May 1989 and lived together at the respondent's Maleny property. They each contributed to the operation of a horse stud business, EM[3]. It consistently lost money. The respondent says that by 2000 she had exhausted all of her capital in its operations, having introduced funds totalling in excess of $1.6 million.

[12] By about 1997 both the applicant and the respondent had lost interest in running the stud and its operations declined. Each accuses the other of shortcomings. The applicant says that the respondent and her father used the business to indulge their interest in horses whilst he worked in the operation without payment. Even after 1997 the applicant still took horses for breaking and training and this produced some income and saved the business the expense of paying for outside trainers and employees. Commencing in about 1996/1997 the applicant was absent from the stud for substantial periods. After February 1997 he lived at the Thredbo property and did some intermittent cash work. He built a shed on the Thredbo property and lived in it. He returned to Maleny in July 1997. In the following years he usually went to the snowfields each year in about late June and obtained work there driving

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3 Initials have been used to identify the parties, various witnesses and entities because of the provisions governing publication found in the *PLA*, s 343.

a snowmobile or working as a "snow groomer". During these winters the respondent also spent substantial periods away from the horse stud and at the snowfields.

[13] The applicant and the respondent had a volatile relationship and argued about the business. The applicant says that the respondent enjoyed the good life, travelled extensively overseas and talked about living in London or Thredbo. She says that he enjoyed the good life and did not accept any responsibility in the business, absented himself from it, claimed unemployment benefits for lengthy periods and did not devote the work required to make the business a success. The applicant admits receiving unemployment benefits during part of the time that he worked in the business.

[14] The Thredbo property had been purchased in 1987 by the respondent. A house was built on it in March/April 1991. When the applicant contributed $165,000 in 1998 the title deed to the Thredbo property was deposited with a firm of solicitors as a form of security. Commencing in July 2001 the respondent was involved in a number of property transactions.[4] In August 2001 the respondent forged the applicant's signature on an authority which resulted in the release to her of the title deed. The respondent did not tell the applicant about this, and used the Thredbo property to secure loans for various purposes and property transactions. From time to time the loans secured over the Thredbo property were refinanced.

[15] The respondent sought to justify her conduct in forging the applicant's signature on the authority and not telling him about these matters. Her evidence was that over the years she had always signed his name with his consent on various documents that were required to operate the stud business and, at the time she signed his name on the authority in order to recover the title deed she believed that she had his permission to do so.[5] But under cross-examination she admitted that she did not have authority to forge his signature.[6] The applicant says that his agreement with the respondent was that the title deed would only be released with the signatures of the applicant, the respondent and the solicitor in whose custody it was placed by way of security. He says that in mid-2001 the respondent said that she wanted to mortgage the Thredbo property and that he told her in no uncertain terms that he would not agree to mortgage it since he did not want to risk his one-third interest in the property. He says that he told the respondent that the property could be sold and she could give him his one-third share, but that he would not agree to it being encumbered. He says that was the end to the matter so far as he was aware, that the respondent forged his signature on the authority and did so without his knowledge or consent. It was only in early 2005 that the applicant learned from the solicitor who had taken over the relevant files that an authority, dated 26 August 2001, had been signed authorising the release of the title deed.

[16] In December 2002 the respondent purchased a property at Mission Beach in North Queensland for $570,000.

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4 Summarised in Exhibit 4.

5 Affidavit of the respondent filed 25 February 2008, paragraph 57.

6 Transcript 1-32 ll 30-37.

[17] Before the end of their relationship in February 2005 the applicant and the respondent enjoyed the use of the Thredbo property and the Mission Beach property. Their use of the Thredbo and Mission Beach properties limited the extent to which these properties could be used to generate rental income. The respondent travelled overseas to visit her sons. The applicant earned little income from personal exertion. On occasions he provided some funds to the respondent. In general, however, it was the respondent's assets, income from rented properties and income from the horse stud business that funded their lifestyle.

[18] The horse stud business made losses. The applicant took no interest in its financial affairs. He says that he was not encouraged to be involved in its management, which was undertaken by the respondent, and to some extent, her father. However, he must have appreciated that it was not a financial success.

[19] In summary, during their relationship, and when he was living at Maleny, the applicant did manual work around the horse stud, trained horses and broke horses. The respondent took on the responsibility of managing the business. They contributed in their separate ways to a business that lost large amounts of money.

**Developments since the relationship ended**

[20] After the relationship ended in February 2005 the applicant attempted to discuss a property settlement with the respondent. He sought repayment of the monies he had invested in the Thredbo property. The applicant first did so no later than 22 August 2005.[7] The applicant asked the respondent to have the Thredbo property valued and to be paid for a third share on the basis that the $165,000 that he had contributed was for a third share in Thredbo. He was content at that time to accept a one-third share in the Thredbo property in full and final settlement. I accept his evidence that in June 2006 he met the respondent, who was not prepared to discuss a property settlement and who said to him words to the effect:

> "You left me so you'll get nothing. I'll send you broke if you try to get any of your money off me."

[21] The respondent took no steps to refund the $165,000 that the applicant had contributed to the Thredbo property. She did not sell the Thredbo property, the Mission Beach property, the Maleny property or any other property in order to consolidate her financial position and meet any valid claim that the respondent had to the Thredbo property or to a court-ordered adjustment of their property.

[22] After the relationship ended the respondent spent lengthy periods away from Maleny. She went to the Mission Beach property and undertook work there to restore it after it was damaged by a cyclone in March 2006. She also stayed at the Thredbo property. Her reluctance to live at Maleny during this period, in close proximity to the applicant and his new partner, is understandable. The respondent says that she was depressed as a result of the end of the relationship and, whilst

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7 Affidavit of the applicant filed 16 January 2008, paragraphs 100-103; Exhibit 31.

there is reason to disbelieve many parts of her evidence, I accept that she experienced personal problems and depression after the relationship ended.

[23] She was cross-examined about her spending during 2005, as disclosed in her credit card records. Some of her expenditure during this period is unreasonable for someone with her income and financial obligations, and who at various times in 2005 informally acknowledged an obligation to pay the respondent for his one-third interest in the Thredbo property.[8]

[24] It is hard to know if the respondent's spending habits during this period are representative of spending patterns during earlier years. At the start of the hearing the applicant contended that weight should be given to the effect of the respondent's "consistent and unreasonable spending since the dissolution of the relationship". In due course it will be necessary to consider what should be made of the respondent's expenditure since the end of the relationship, and the extent of her credit card and other liabilities. These liabilities include an unsatisfied judgment in favour of David Jones which issued a bankruptcy notice against the respondent. Her evidence was vague about the status of the bankruptcy proceedings against her.

[25] The respondent was taken in cross-examination to the outline of her case that was filed on 30 September 2008 and the accompanying schedule of liabilities. She stated that she was "in trouble" financially.[9] The respondent could not adequately explain how as recently as 17 October 2006 she told the ANZ Bank that she had net assets of $2.2 million, whereas her Schedule of Property, Capital Liabilities and Financial Resources filed on 30 September 2008 stated that her net property was $325,985. The respondent pointed out that caveats lodged by the applicant on her properties prevented her from selling them, however, there is no evidence that the respondent had approached the applicant's solicitors with a view to reaching an arrangement to sell any property and to lodge the proceeds of sale into an account. She said that she has no money in the bank and has exhausted her credit card facilities. She has borrowed money from her family.

[26] It will be necessary to consider in greater detail the evidence concerning the applicant's assets and liabilities as at the date of the hearing. It was only during the course of cross-examination and after being confronted with a document that she eventually acknowledged that the applicant was entitled to a one-third interest in the Thredbo property.[10] As a result, her final submissions adjusted matters by submitting that the applicant's property included this one third interest valued at $266,666 with the result, it was submitted, that the respondent's net property was $59,319. I do not accept that the respondent is as poor as some of her evidence would suggest. The extent of her current assets and liabilities is considered later. In essence, she is asset rich and cash poor.

[27] The respondent is now aged 58. She is not in a permanent relationship and lives on her Maleny property which is only some 300 metres away from where the applicant,

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8 *ibid* paragraph 100.

9 Transcript 2-85 l 42.

10 Transcript 1-49 l 55; compare her earlier answers at transcript 1-32 l 58 – 1-33 l 5, 1-47 l 3.

his partner and their two young children live. The applicant is aged 51. He described himself as a house husband. In May 2007 he broke his leg and dislocated his ankle in a horse riding accident. He has a permanent disability which prevents him from running or riding horses. Recent medical advice is that there is no medical procedure that is likely to improve this condition. This limits his income-earning capacity. He has a capacity to operate machinery that is hand operated, such as an excavator. In any event, he has no plans to return to work in the next five to ten years unless something unforeseen happens. In his words, he is "doing okay" and is reliant financially upon his new partner.

**Assessment of evidence**

[28] In several paragraphs of her written submissions, the respondent submitted that contentions made by the applicant about the value of her assets had not been proved and that the applicant could not rely upon certain documents to discharge his onus of proof. For instance, it was submitted that cross-examination of the respondent upon her financial statements and taxation returns for the year ended 30 June 2006[11] had been so effective as to destroy the probative value of the document as a whole, and that the applicant was left with no evidence to support the values contended for by him. These submissions raise a general issue relevant to fact finding in circumstances in which the respondent has not disclosed or produced documents that are relevant to the determination of her assets and liabilities, and where some of the documents produced by her are unreliable, at least in part.

[29] The respondent's legal representatives did not respond to the applicant's submission that her attitude to her disclosure obligations could only be described as woeful. I adopt this description of the respondent's attitude. The respondent has provided no explanation for her failure to disclose relevant documents or to produce them in the course of the hearing. The Court of Appeal has recognised that a party's failure to make proper disclosure makes it impossible to approach the determination of the true extent of the asset pool with precision.[12] The Court of Appeal cited with apparent approval decisions of the Family Court of Australia in relation to non-disclosure. *In The Marriage of Chang and Su*[13] the Family Court stated that where there has been non-disclosure by one party, the court should not be "unduly cautious" about making findings in favour of the other party. I adopt this approach in respect of the non-disclosure and non-production of documents that the respondent reasonably could have produced and in respect of which she has given no reasonable explanation for their absence. However, the absence of evidence and adverse inferences that I draw concerning the respondent's unexplained failure to produce relevant documents do not entitle me to simply guess the extent of her assets and liabilities.

[30] Consideration must be given to the informality which may exist when individuals provide financial assistance to a member of their family or reach agreement about financial matters with a family member. Individuals may not document their

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[11] Exhibit 15.

[12] *LW v GAB* [2007] QCA 386 at [41].

[13] [2002] Fam CA 156 at [101].

arrangements with the same degree of care that they would in an ordinary commercial transaction. For instance, one would not expect the respondent's sister to keep a pocket book of loans made to the respondent as if these loans were made in the course of a money-lending business.

[31] In circumstances in which the respondent has submitted taxation returns disclosing plant and equipment in depreciation schedules there is, at least, an evidentiary onus on the respondent to explain why reliance should not be placed upon such documentary sources in determining the true extent of her assets and liabilities. In circumstances in which the respondent contends that one of her adult sons has a one-third share in her Mission Beach property she bears an evidentiary onus of proof in respect of that matter. This onus is not discharged by generalised evidence to the effect that he had such a share in the property. Her son's belief that he had a share in the Mission Beach property does not make this a fact.

[32] It will be necessary to address the evidence in relation to relevant assets and liabilities and to make findings in relation to the reliability of evidence given by the respondent and other witnesses called by her, including the extent to which their evidence is supported by documents. Before doing so I shall address the general reliability of the evidence of the applicant and the respondent.

**The reliability of the evidence of the parties**

[33] The applicant relied upon affidavits that he had filed. He was not challenged about the value of his current assets and his cross-examination was limited to a number of topics. The respondent's version of events was not put to him in elaborate detail and this is understandable because the rule in *Browne v Dunn* has a modified operation where affidavit evidence is filed and served prior to trial, as occurred in this proceeding.[14] The applicant filed and relied upon an affidavit in response to the respondent's affidavits.

[34] The applicant's oral evidence was given frankly. There were some overstatements, for example, the applicant claimed to have devoted "blood, sweat and tears" working on the stud.[15] However, he admitted that "for probably three or four years on and off" he was in receipt of unemployment benefits at the same time as he was working on the stud.[16] At some time he may have been on sickness benefits because of a broken leg.[17] However, he admitted signing on for unemployment benefits in December 2001, to have been registered with the Department of Social Security from then until the relationship with the respondent ended in February 2005 and to have claimed benefits as he "needed to".[18] The precise dates when the respondent received unemployment benefits is not in evidence, however the applicant's Response to a Notice to Admit[19], his Statement of Financial Position

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14 *Cross on Evidence* (Australian edition) [17445].
15 Transcript 1-14 l 28.
16 Transcript 1-10 l 58.
17 *ibid.*
18 Applicant's affidavit filed 15 April 2008, paragraphs 34-36.
19 Court document 83 filed 25 February 2008, which was read as part of the respondent's case.

and his oral evidence are to the effect that he claimed unemployment benefits for substantial periods when he was also working in the stud business. The applicant's oral evidence was to the effect that he claimed unemployment benefits "later in the nineties" when he was "put off in the snowfields".[20]

[35] The evidence does not permit me to conclude that the applicant received unemployment benefits to which he was not entitled. That is a matter that is appropriate for investigation by the Department of Social Security. His registering for unemployment benefits, commencing either in the late 1990s or after December 2001, and his receipt of unemployment benefits during periods when he was also working on the stud farm calls into question his entitlement to receive those benefits, the accuracy of his evidence about the extent to which he was occupied with work on the farm, or both. The impression that the applicant's first substantial affidavit gave was that the applicant worked literally from dawn to dark,[21] and that even after the operations of the business wound down from 1997 onwards, it was still "a full-time job" until early 2003.[22] If this is true, the applicant's registration for, and receipt of, unemployment benefits has not been adequately explained.[23] I do not accept the applicant's evidence that he was working "full-time" in the stud business after 1997 and until early 2003. I conclude that his original affidavit evidence, in not disclosing his registration for and receipt of unemployment benefits, overstated the amount of work that he performed in the horse stud business. I place limited reliance on his other evidence concerning the hours that he worked in the business.

[36] The unreliability of the respondent's evidence was of a different order. I found her oral evidence generally unreliable. She had a poor recollection of matters and appeared to be easily confused. She had difficulty in giving answers to relatively simple questions.

[37] The respondent was prepared to say things that suited her purpose, for instance, to give unreliable estimates of the extent of her assets. When taken to depreciation schedules that disclosed the written down value as at 30 June 2006 of substantial plant and equipment was $142,814, she asserted that these items had a current value of $15,000 to $20,000.[24] I found her evidence about these matters totally unreliable.

[38] The respondent's representations to financiers and the Australian Taxation Office are hard to reconcile with her evidence to the court. For instance, she signed a loan application to the ANZ Bank on 17 October 2006 that represented that she had a total net monthly income of $22,000 and net monthly expenditure of $940 providing her with an uncommitted monthly income of $21,060. These figures cannot be

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[20] Transcript 1-10 l 52.

[21] Applicant's affidavit filed 16 January 2008, paragraphs 26-28.

[22] *ibid* paragraph 81.

[23] c*f.* the explanation given that on occasions the respondent would "throw him out" : Applicant's affidavit filed 15 April 2008, paragraphs 34-36. This does not explain the occasions when the parties were living together and the respondent would accompany him when he went to claim unemployment benefits: Applicant's affidavit filed 15 April 2008, paragraph 36; Respondent's affidavit filed 25 February 2008, paragraph 44.

[24] Transcript 3-30 l 25.

reconciled with her evidence in these proceedings. Her financial statements and taxation returns in which she has claimed all of the expenses incurred in relation to the Mission Beach property are hard to reconcile with her contention that her eldest son, JM, has a one-third interest in that property.

[39] Parts of the respondent's evidence were inconsistent with credible witnesses called by her. For instance, she complained about a solicitor's failure to register mortgages and that his failure to do so had made her "ropable".[25] The solicitors' evidence, which I accept, is that the respondent told him not to proceed with the stamping and registration of the documents because she could not afford the stamp duty.[26]

[40] The respondent was prepared to swear a Statutory Declaration dated 19 August 2008 that stated that she was "gifting the sum of $600,000" to her son, JM, to assist in the acquisition of the Mission Beach property and that the funds were "a gift".[27] The respondent made no such gift and she acknowledged as much in her evidence.[28] She knew that it was not a gift but sought to excuse making this false statutory declaration because others had suggested that she use this term.

[41] This was not an isolated instance of providing false information to obtain some advantage for herself or her family. In September 2001 she procured documents that were used to represent that she had an overseas income of $140,000 that would form part of a taxable income of $238,473.[29] This representation was made on her behalf to a financier. The applicant relied upon documents evidencing amounts that had been sent to her from overseas by her son, JM. JM described the suggestion that the respondent derived income from an investment in his overseas business as "ludicrous".[30]

[42] Finally, and to her discredit, the respondent forged the applicant's signature on an authority and lied to a solicitor to facilitate release of a title deed for her Thredbo property.[31]

[43] I accept the truth of some parts of the respondent's affidavits about matters such as the applicant's lack of interest in the management of the horse stud business, his receipt of unemployment benefits, his absence from the business when he went to Thredbo each year and her contributions to that business. However, in general, I find the respondent's evidence unreliable.

[44] On contentious matters concerning the current extent of her assets and liabilities and her financial resources, I find the respondent's oral evidence unreliable. In circumstances in which she has not produced relevant documents and has not

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25 Transcript 3-10 l 57.
26 Transcript 3-88 ll 10-11; 22-24.
27 Exhibit 12.
28 Transcript 1-59 – 1-60.
29 Exhibits 19 and 20.
30 Transcript 3-79 ll 25-29.
31 Transcript 1-33 ll 30-37.

provided a satisfactory explanation for her failure to do so, little or no reliance can be placed upon the respondent's evidence on disputed questions of fact about the extent of her current assets and liabilities and her financial resources.

**The identification and valuation of the property, resources and liabilities of the parties**

[45] The applicant estimated his total assets in September 2008 as having a value of $43,750. These assets included cash in the bank of $20,000, motor vehicles and personal effects. I accept the applicant's evidence. Account is required to be taken of the belatedly-acknowledged one-third interest of the applicant in the Thredbo property.

[46] Several issues require determination in respect of the respondent's property and financial resources. These can be summarised as follows:

(1) What weight should be accorded to her contention that her son, JM, has a one-third interest in the Mission Beach property.

(2) The position in relation to Unit 19 at the Oasis apartments.

(3) The existence of liabilities that are said to be owed by the respondent to family members, the extent of those liabilities and the likelihood that they will be enforced.

(4) Whether the respondent is the beneficial owner of certain shares in a family company, W Pty Ltd.

(5) The extent to which the respondent's potential future interest in a family trust should be taken into account as a financial resource.

(6) The value of various assets, including household contents and plant and equipment, and the extent of her liabilities.

[47] The identification and valuation of the property, financial resources and liabilities of the respondent is, of course, only one step in the exercise of the judicial discretion conferred by s 286 of the *PLA*. If, for example, the respondent owns shares in W Pty Ltd then an issue arises as to what weight should be given to these and other assets that she owned before the de facto relationship. Senior Counsel for the respondent submitted that if the respondent's shares in W Pty Ltd or the respondent's interest in the trust were to be included "in the pool" it was only the respondent, and not the applicant, who contributed to the pool and therefore "she gets full credit for it".[32]

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[32] Transcript 5-8 l 35.

[48] More generally, Mr Carmody SC submitted that ultimately it did not matter how much I found to be "in the pool" because the applicant had not proved an entitlement to anything other than the property that he currently retains,[33] which was said in submissions to include a one-third interest in the Thredbo property.

[49] I do not accept the submission that it does not matter how much I find to be "in the pool". I accept that there is an important distinction between property that was contributed to the relationship and property which forms part of the pool of property which was owned by a party prior to the relationship, which is still retained by that party and which was never contributed to the relationship. The latter may still be the subject of a property adjustment order. The fact that it was not contributed to the relationship may have implications for any percentage adjustment to existing property interests and may justify a submission that, prima facie, a party who owned property prior to the relationship, who did not use it during the relationship, being property to which the other party did not contribute, should remain the property of the party who owns it. However, such property cannot be ignored even if the property does not constitute a contribution for the purposes of s 291. It is property against which an order might be made and is a matter which the Court must consider to the extent that it is relevant in deciding what order adjusting interests in property is just and equitable.[34]

[50] Accordingly, it is necessary to identify and value the property, resources and liabilities of the parties.

**The Mission Beach property**

[51] This property was acquired by the respondent on 5 February 2002 for $570,000. Its current value is $1.5 million, and it is mortgaged to the ANZ Bank for approximately $760,000.

[52] The respondent asserts that her son, JM, has a one-third interest in the property. This requires consideration of the circumstances in which JM is alleged to have acquired this interest.

[53] In 2001 JM was living overseas. He was then 30 years old. In July 2001 the respondent acquired Unit 67 in the Oasis Apartments. JM swore an affidavit that his mother and he had an arrangement that she would be the purchaser on the contract but that they would be equal owners of the property. The property was acquired for $336,000 with $200,000 financed by the ANZ Bank. JM and the respondent contend that a similar arrangement was entered into for the purchase of Unit 69 in Oasis which was purchased in November 2001 for $450,000, $270,000 of which was financed by the first mortgagee, RAMS.

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33 Transcript 5-16.
34 *PLA* ss 296, 298(a).

[54] There is evidence that JM transferred sums totalling $182,973 between February 2001 and July 2003. Otherwise, there is no documentary evidence to support a finding that there was a financial contribution of JM to either unit or to establish whether any financial contribution that he made towards the acquisition of Units 67 and 69 entitled him to a share in the equity of those units. It is possible that JM made a substantial contribution towards the balance of the purchase price of each unit, but if he did so, he may simply have been an unsecured creditor of his mother to the extent of any such contribution.

[55] In paragraph 6 of his affidavit JM acknowledged that he was not a good document keeper, particularly in relation to dealings with his mother. He says that from documents held by his mother he was able to confirm that in the period 2 February 2001 to 3 July 2003 he sent funds totalling $182,973 to his mother.[35] The transfer of funds from JM to his mother during this period does not establish that the funds in question were used to purchase Units 67 and 69. JM says that from about 1997 his mother had been investing in Australian shares on his behalf. The payments might have been repayment of personal loans made by the respondent to her son. They may have been to pay his mother for shares that she had earlier purchased on his behalf. Documents recording the transfer of $182,973 by JM to his mother prove no more than the fact of these transfers. They do not prove the purpose of each transfer or what became of the funds.

[56] JM's oral evidence provided no satisfactory basis to conclude that he acquired a half-share in Units 67 and 69 or that the proceeds of their sale resulted in his acquiring a one-third interest in the Mission Beach property. He gave evidence[36] that he understood that his half-share in these units was used to purchase the Mission Beach property but this cannot be so. The Mission Beach property was acquired in December 2002 and paragraph 7 of JM's affidavit says that its acquisition was funded by the respondent and her father and mother. JM says that when Units 67 and 69 were subsequently sold he did not receive any payment from the proceeds of sale because it was agreed that his contribution to Mission Beach would be funded by his interest in those units. His oral evidence was unconvincing on this point.[37]

[57] Unit 67 was sold in October 2003 to W Pty Ltd for $375,000. Unit 69 was sold in December 2004 for $630,000. After the first mortgagee was paid out a surplus of approximately $297,000 remained. An amount of $250,000 was deposited into the respondent's bank account. The destination of the balance of approximately $50,000 is unexplained.

[58] If JM acquired a one-third interest in the Mission Beach property then his subsequent conduct is inconsistent with it. In January 2008 JM signed a loan agreement which recited that he was owed $489,000 by his mother.[38]

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[35] Exhibit 26.
[36] Transcript 3-82, ll 10-30.
[37] Transcript 3-82 – 3-84.
[38] Exhibit 27.

[59] I have taken account of the understandable informality of financial dealings between JM and his mother and I accept his evidence that he is not a good document keeper. I find, however, that his evidence is unreliable. He does not explain how an original arrangement that he and his mother would purchase Mission Beach as "equal partners" with the contract being in her name was later transformed to an arrangement whereby he acquired a one-third interest. His oral evidence was given without conviction. He seemed to have difficulty in understanding the difference between lending money and providing money to another for the purpose of investment. He took lengthy periods to answer simple questions. His demeanour was not of a witness who knew what he was talking about, and who was slow to formulate considered answers. JM appeared genuinely lost for answers. I derived no confidence that he had any genuine recollection of the arrangements sworn to in his affidavit.

[60] He was unable to produce any documents that supported the contention that the Mission Beach property was held on trust for him. The loan agreement which asserted that he was owed $489,000 by his mother indicates that he perceived their relationship to be one of borrower and lender. Exhibit 28 is a contract which he signed in which he purported to purchase the Mission Beach property for $1,500,000, and he could not satisfactorily explain why he would purchase a 100 percent interest in a property in which he already had a one-third interest.

[61] Neither JM nor the respondent produced taxation returns that reflected his claimed interest in the Oasis or Mission Beach properties. The respondent's taxation returns claimed deduction for all of the expenses incurred in relation to Mission Beach.[39]

[62] The respondent's affidavit asserted that JM had a one-third interest in the Mission Beach property. However, the respondent is an unreliable witness in relation to such matters.

[63] The evidence does not lead me to conclude that JM acquired a one-third interest in the Mission Beach property.

**Unit 19**

[64] Between 1999 and 2007, the respondent's younger adult son LM lived overseas. LM deposed that some time in 2001 he asked his mother to find an apartment like his brother's. Paragraph 4 of his affidavit states:

> "I then bought Unit 19. The contract was in my mother's name."

His oral evidence about this was as follows:[40]

> "How was unit 19 paid for? – To be honest, I am not totally aware.

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[39] Transcript 2-87 ll 5-30.

[40] Transcript 4-27 ll 33-38.

> Well, did you provide the money? – I provided some - for the initial purchase are you talking about?
>
> Yes? – No."

Apart from the respondent's evidence, there was no other evidence to suggest that LM had an interest in Unit 19. In late 2005 LM arranged for the title to Unit 19 to be transferred to him. On 10 January 2006 a Bank of Queensland mortgage over Unit 19 was discharged.[41] The fact that the mortgage was paid out on 10 January 2006 is not disputed, but the source of the funds to do so is not apparent.

[65] The respondent deposed that Unit 19 was purchased in her name "on a blind trust" for her son LM for $300,000 in 2001.[42] She says that 60 percent of the purchase price was financed by RAMS Home Loans with the balance purchase price being funded by LM. She gave LM furniture for Unit 19. In accordance with my earlier finding about the reliability of the respondent's evidence, I am not prepared to accept her assertion that the balance of the purchase price for Unit 19 was funded by LM. There is no documentary support for this and LM in his oral evidence did not say that he provided money for its purchase.

[66] Accordingly, there is no satisfactory evidence that Unit 19 was held in trust by the respondent after its acquisition in 2001 for LM, or that he had a beneficial interest in it after its acquisition. There is no evidence that LM contributed between 2001 and early 2006 to the payment of principal or interest on any loan secured by a mortgage over Unit 19, or that he paid for outgoings in respect of the property. Unit 19 was rented, and I infer that, like Units 67 and 69 in the same apartment block, during this period it was "self-funding in that the rentals mostly covered mortgage payments and outgoings".[43]

[67] In the absence of satisfactory evidence of a financial contribution by LM towards the acquisition of Unit 19 in 2001, or contributions towards mortgage payments or outgoings in respect of it prior to January 2006, I find that the respondent has a potential claim in respect of Unit 19 concerning her contributions towards its acquisition in 2001, and to a declaration that LM holds at least part of his current interest in Unit 19 on trust for the respondent. I consider these potential claims to be a valuable benefit and part of the respondent's "financial resources" within the meaning of s 263 of the *PLA*. The state of the evidence does not permit me to determine the extent of her interest in Unit 19 or the value of her prospective claim against LM in respect of it.

**Liabilities of the respondent to members of her family**

[68] The existence and the extent of liabilities that are said by the respondent to be owed by her to various members of her family are in issue. There is also a question of whether any such liabilities are likely to be enforced. I adopt the approach that

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[41] This appears in Exhibit 2, being the applicant's summary of the respondent's property transactions.
[42] Affidavit of respondent filed 25 February 2008, paragraph 66B.
[43] Affidavit of JM filed 29 February 2008, paragraph 5.

where an unsecured liability is vague or uncertain or unlikely to be enforced, I may decide not to take it into account or to discount its value. This approach was adopted by the Full Court of the Family Court of Australia in the case of *In the Marriage of Biltoft*[44] The respondent did not submit that such an approach was inappropriate in determining the net assets of the parties for the purpose of a property adjustment order under the *PLA*.

**The respondent's father**

[69] The respondent's father gave evidence that the respondent owes him $280,000. This claimed liability arises from an original loan of $200,000 that was made to enable the respondent to purchase the Mission Beach property. The respondent repaid $100,000 and there was an agreement to pay interest. The balance of $100,000 has not been paid. In addition, the respondent's father advanced her additional monies of $12,000 per month, which was the amount that the respondent calculated as the expenses required to "keep afloat". There was some uncertainty about whether the original loan was made by the respondent's father personally, with appropriate adjustments in loan accounts of W Pty Ltd, or by W Pty Ltd itself. The respondent's father was unable to explain why a mortgage that was prepared by his solicitor originally recorded the amount owed to him as $150,000 and was later amended, by hand, to record $280,000. Despite some unsatisfactory aspects of the evidence of the respondent's father concerning his recollection of his loan account with W Pty Ltd, his motivation to protect both his and his daughter's interests and his acknowledged hostility towards the applicant and his claim, I find that a sum totalling $280,000 as at 1 September 2008 was owed by the respondent. I accept her father's evidence that he recently checked his bank statements to arrive at the figure of $280,000. This evidence was given on the assumption that the original loan was made by him, rather than by W Pty Ltd, which he controls. If this assumption is in error it simply affects the identity of the parties to whom the total amount of $280,000 is owed.

[70] The evidence of the respondent's father indicates that he has no present intention of enforcing the liability. I accept his evidence that his only expectation of repayment of any part of the $280,000 is if the respondent chooses to repay it at some future time while he is still alive. The respondent gave no indication of a plan to realise available assets in order to repay any part of the $280,000. This does not mean that the liability does not exist and will not be enforced at some future date. However, the lack of a present intention to enforce the liability leads me to not take it into account in determining the assets that are available to meet a property adjustment order under the *PLA*.

**The respondent's mother**

[71] There is no dispute that the respondent owes her mother approximately $37,000. To date her mother has not taken steps to recover it because she understands that she has a mortgage to secure it. However, that mortgage is presently unregistered

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[44] (1995) 19 Fam LR 82 at 94.

and the respondent's mother says that she needs the money for her house. I take account of this liability and the possibility that the respondent's mother is likely to require payment of it.

**The respondent's sister**

[72] The respondent's sister gave evidence that between 10 April 2006 and 20 March 2008 she lent the respondent various amounts totalling $63,275. Part of this was a sum of $22,000 which was repaid.[45] I accept the evidence of the respondent's sister that she arrived at the figure referred to in her affidavit by reference to her bank accounts. Those accounts were not produced by the respondent to prove the amount, but I accept the evidence of her sister. This amount does not include the calculation of interest which the respondent offered to pay at a bank interest rate.

[73] The respondent's sister has asked for the money to be paid back but not taken any further steps to enforce the debt. She obtained a mortgage in her favour in order to secure her position and to encourage her sister to repay the amount. The respondent's sister did not rule out taking proceedings against her sister to recover the amount. I take account of the liability of approximately $42,000 that is owed by the respondent to her sister.

**The respondent's son JM**

[74] The evidence concerning financial transactions between the respondent and her son, JM is unsatisfactory. One reason for this is that JM acknowledges that he is not a "good document keeper" and that this is particularly so in relation to dealings with his mother. I have already addressed the issue of whether JM has a one third interest in the Mission Beach property. JM's evidence was that he lived and worked in Europe after 1995 and from about 1997 the respondent invested in Australian shares on his behalf. JM gave oral evidence about cash being brought back to Australia but the extent of those payments, the circumstances under which these transfers occurred and the destination of these funds were not explored further in his evidence and I do not take that evidence into account in determining the existence and extent of any liability that the respondent has to him.

[75] JM's affidavit lists funds totalling $182,973 which he said were sent to his mother between 2 February 2001 and 3 July 2003. Documents forming part of Exhibit 26 evidence transfers of funds totalling $182,973 during this period. JM's affidavit also states that between 7 April 2005 and 28 February 2007 he lent his mother a total of $72,000. Documents evidencing payments totalling $72,621 became part of Exhibit 26.

[76] The documents that formed Exhibit 26 do not disclose what the transferred funds were used for, and they do not necessarily prove the existence of a liability. They

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[45] Exhibit 22.

do not explain whether the transferred funds were used to buy shares or other property for JM and, if so, whether that property was placed in his name. It is possible that some of the funds were used to acquire real property, such as Units 67 and 69. However, all that Exhibit 26 proves is that funds were transferred from JM to his mother. The transfer of those funds does not necessarily create a liability because some or all of the transfers may have been to repay monies that JM owed the respondent, or they may have been used by the respondent for JM's benefit, for instance to purchase shares.

[77] In circumstances in which neither the respondent nor JM provided reliable evidence about the circumstances under which each of the transfers came to be made, and where the application of the funds, so transferred, is not supported by documents, the respondent has not proven that she has a liability to JM to the extent claimed. I find that it is likely that the sums paid to her between April 2005 and December 2007 totalling $72,000 were paid for the respondent's benefit. They are consistent with the respondent's reliance upon members of her family to keep herself afloat in circumstances in which she was unwilling or unable (due to the lodgement of caveats) to sell her real property. It is possible that a number of the payments sent to the respondent by JM between February 2001 and 3 February 2003 were used by the respondent for her own benefit, but the extent that she did so is not satisfactorily proven and the evidence did not exclude the substantial possibility that some of these transfers were used for JM's benefit, for example to repay monies advanced by his mother to buy shares on his behalf.

[78] In summary, the respondent has proven the likely existence of a liability to JM in the order of $72,000. Otherwise the extent of her liability to him is unproven.

**Shares held in W Pty Ltd**

[79] The respondent is registered as a joint owner with her father and her sister in 149,998 shares out of the 150,000 shares issued in W Pty Ltd. The other two ordinary shares are held by her father and her sister. The net assets of W Pty Ltd are approximately $1.59 million. It is the registered proprietor of Mission Beach and of a property named EM at Maleny. The property named EM is held by W Pty Ltd as trustee for the H Family Trust. The respondent's father and his wife live upon the property. It is worth $3.5 million.

[80] W Pty Ltd was incorporated by the respondent's father and her late grandfather in 1960. The will of the respondent's grandfather bequeathed his shares in W Pty Ltd to his son for his sole use and benefit and upon the death of his son to the respondent and her sister to be held in equal shares. After the grandfather's death, and acting upon professional advice, the respondent's father transferred the shares so that they were held jointly between him and his two daughters. The respondent's father recently received legal advice about this, presumably prompted by his concern that the applicant was trying to "attack" his family trust and what he described as his company.[46] The applicant submitted that the attempt to

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[46] Transcript 3-64 l 22.

"quarantine" the respondent's shares in W Pty Ltd was without effect. It is unnecessary to outline the applicant's submissions in detail since the respondent did not contest them in submissions in reply. In essence, the applicant's submission is that, as the sole surviving beneficiaries of the estate, the respondent, her father and her sister chose to restructure the shareholding in the company and, whether or not the legal advice given to the respondent's father was correct, no steps were taken to adjust the shareholding. If this was to be done then the shares would be held by the respondent's father and then, upon his death, be transferred to the respondent and her sister in equal shares, assuming they survive him. I accept the applicant's submission that the respondent's registered shareholding is property which should be taken into account in determining the extent of her property. If, however, I had not reached this conclusion, then her future interests in the shares in W Pty Ltd would nonetheless be a valuable benefit.

[81] The respondent's one-third shareholding in W Pty Ltd has a value of $530,000.

**The family trust**

[82] The H Family Trust has only one asset, the property EM which is valued at $3.5 million. The applicant contends that it is a valuable financial resource and that I should conclude that the respondent's minimum entitlement on administration of the trust is one third of its value.

[83] The relevant trust deed directs the trustee (presently W Pty Ltd) to hold the property on trust for certain beneficiaries including the respondent, the respondent's sister and such of their children as may be living on the death of the respondent's father as the respondent's father may appoint by deed, instrumental or will. The current will of the respondent's father provides for part of the property to be used and occupied by his wife during her lifetime, the balance of the property to be used and occupied by the respondent during her lifetime and for the property then to be sold and divided amongst the surviving grandchildren.[47] The applicant submits that the respondent's father's intention in that regard is subject to change and that in the light of certain evidence I should readily infer that, after the proceedings conclude, his intentions will undoubtedly change. I am not persuaded that this is the case. The respondent's father's power of appointment is likely to be exercised to place what he regards as his property beyond the reach of his daughter's ex-partner[48] and her creditors. I do not find that he is likely to change the appointment made by his current will so as to grant the respondent a larger interest.

[84] I accept, however, that the property of the trust may be applied to her benefit and that her interest as a beneficiary in the trust should be included as one of her financial resources. Whether and the extent to which she benefits by the exercise by her father of his power of appointment is a matter that is under the control of her father. The respondent has a mere possibility of receiving a substantial share of the trust's assets. This is not a case in which it is "as good as certain" that a beneficiary

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[47] Exhibit 24, Transcript 3-56 ll 23-30.

[48] Transcript 3-64 ll 20-25.

will receive the benefits of distribution either of income or capital or both.[49] I do not accept that the value of the respondent's financial resources in respect of the trust comes close to the $1 million contended for by the applicant. The possibility of the respondent acquiring a substantial interest in the trust property beyond the life interest that she currently is given is low. There is only a possibility, not a likelihood, that the respondent's father will decide to alter the appointment made by him after the conclusion of these proceedings.

**Other assets and liabilities**

[85] The parties were required pursuant to court direction to provide contentions in relation to assets and liabilities. Exhibit 15 is the respondent's financial statements and taxation returns for the year ended 30 June 2006. The respondent was cross-examined concerning certain entries in it and the value of her property.

[86] The respondent's schedule of property, liabilities and financial resources attached to her outline of case[50] does not include an entry for furniture, antiques and artwork. The applicant contends that she has assets in this category worth $280,000. Neither the respondent's affidavits nor the other documents filed by her address what has become of the artwork and antiques that she inherited from her grandfather or the current value of her personal property. Given the absence of disclosure of relevant records and the respondent's failure to produce reliable valuations or other documents, such as insurance policies which disclose the insured value of these items, the value of these assets cannot be assessed. I do not accept the applicant's evidence that her moveable property at Maleny has a value of only $6,355.[51] Her "off the top of my head" guess in the witness box of $10,000 as the value of her furniture, antiques and artwork was acknowledged by her to not include one property.[52] I find her evidence unhelpful and unreliable.

[87] The respondent's submissions say that the value of household contents should be assessed as nil on the basis that the applicant has not discharged the burden of proving the claimed amount of $280,000. I do not accept the submission. The applicant may not have proved that the value of the respondent's furniture, antique and artwork is $280,000, but this does not justify attributing a nil value to these items in circumstances in which the respondent herself has done little to prove what these items currently consist of and their true value. I adopt an estimate of $100,000 in the absence of an explanation from the respondent of the fate of the artworks and antiques that she inherited, and because of the probability that she acquired furniture and personal possessions of substantial value over the years.

[88] The respondent's financial statements for the year ended 30 June 2006 recorded shares in listed companies having a value of $95,272. Some evidence suggests that

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49 *Australian and Securities Investments Commission v Carey (No 6)* (2006) 233 ALR 475 at 485, [36] citing *Inland Revenue Commissioners v Trustees of Sir John Aird's Settlement* [1982] 2 All ER 929 at 940.

50 Exhibit 6.

51 Transcript 2-71 ll 1-15.

52 Transcript 3-27 ll 3-7.

this entry was a mistake and that her shares at that time were worth far less. The respondent gave evidence that those shares were worth about $5,000.[53] Despite the respondent's failure to document matters in relation to the value of her shares, on the basis of the evidence of Ms Elliott, I consider that the figure of $95,272 was an error and that the only publicly listed shares owned by the respondent as at 30 June 2006 were worth $19,790. The evidence of their current value is unsatisfactory given the respondent's general unreliability. However, I adopt the figure of $5,000.

[89] Livestock is subject to varying estimates of between $40,000 and $64,500. I am not in a position to determine which estimate is correct and it is sufficient for present purposes to proceed on the basis that they have a value somewhere in this range. I adopt a figure of $55,000.

[90] The respondent owns a Mercedes Benz. The applicant contends that it has a value of $99,355. It had a written down value of $99,355 in the respondent's depreciation schedule for the year ended 30 June 2006. It appears that the vehicle was financed and that $88,911.47 was owed to Daimler Chrysler in respect of its finance. Since then the value of the car presumably has depreciated, and the lease is likely to be less. The respondent's schedule of property and liabilities gives the car a net value of $10,443.53 and I adopt this value.

[91] The applicant contends that the respondent owns "plant and equipment" with a total value of approximately $143,000. This is the closing, written down value appearing on the depreciation schedule for the year ended 30 June 2006. The respondent was cross-examined about the depreciation schedule. It is likely that some items in that schedule have been sold or replaced. They include items at the respondent's investment properties. In the absence of reliable evidence from the respondent it is reasonable to assume that old items were replaced by new ones and that the value of the plant and equipment is not materially different to that contended for by the applicant in reliance upon the respondent's depreciation schedule. I reject the respondent's oral evidence which attributed a ridiculously small value to these assets. I adopt a figure of $120,000.

**The respondent's liabilities**

[92] The respondent's principal liabilities consist of loans from the ANZ Bank secured against the Maleny property, the Thredbo property and the Mission Beach property. There is a slight variation between the figures contended for by each party. The differences are not material. The Maleny property secures a loan which the applicant contends was $432,000 whereas the respondent contends it is $450,000 once account is taken of continuing obligations and an amount of $10,000 which was said to have been in arrears. The Thredbo property is subject to a loan which the respondent says is $520,000 and which the applicant says is $509,000. The Mission Beach property is subject to a loan which the respondent says is $766,000 whereas the applicant contends that it was $754,000. In short, the bank loans secured against these properties are in the vicinity of $1.7 million.

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[53] Transcript 3-29 l 1.

[93] Apart from the liabilities to family members which I have already addressed, the respondent's liabilities include substantial credit card debts together with the David Jones store card debt of $27,628.73. These credit card and David Jones liabilities total approximately $169,035. The respondent owes approximately $10,600 to a finance company in respect of a Toyota Landcruiser.

[94] She is apparently subject to a WorkCover claim by an ex-employee. She has various other debts to councils, accountants and tradesmen which she estimates as totalling approximately $44,000. The applicant contends that the amount owed is less than this, however I am not in a position to provide a reliable estimate of the extent of these miscellaneous debts. I reluctantly adopt the respondent's estimate.

**Summary – respondent's assets**

[95] The Maleny property, the Thredbo property and the Mission Beach property have been the subject of agreed valuations.[54] The respondent's assets and liabilities may be summarised as follows:

| | |
|---|---|
| Maleny property | $740,000 |
| Thredbo property | $800,000 |
| Mission Beach property | $1,500,000 |
| Combined value of real property | $3,040,000 |
| Less ANZ secured debit | $1,700,000 |
| | $1,340,000 |
| | |
| Shares in W Pty Ltd | Approximately $530,000 |
| Furniture, antiques and art work | Estimate $100,000 |
| Livestock | Estimate $55,000 |
| Mercedes Benz after deduction of outstanding lease liability | Estimate $10,443 |
| Shares | Estimate $5,000 |
| Plant and equipment | Estimate $120,000 |
| **Total assets less ANZ secured debts** | **$2,160,443** |

54 Exhibit 5.

| **Liabilities owed to parties other than family members** | |
|---|---|
| Debt on Toyota Landcruiser | $10,623 |
| Credit card liabilities and David Jones store card debt | $169,835 |
| Miscellaneous, other debts and WorkCover claim by ex-employee | Respondent's estimate $44,000 |
| Sub-total of liabilities | $224,458 |
| **Liabilities owed to family members** | |
| Liability to father (unlikely to be enforced) | $280,000 |
| Liability to mother (enforcement uncertain) | $37,000 |
| Liability to sister (likely to be enforced) | $42,000 |
| Liability to son, JM (unproven but adopt) | $72,000 |

[96] I place limited reliance upon exhibit 8 as a reliable indication of the respondent's net assets at the time she signed this statement of her financial position for the purpose of obtaining a loan from the ANZ Bank in October 2006. It was based upon the respondent's estimate of the value of her assets, including real property at the time. The respondent explained in her re-examination that the figure of $3.89 million for her assets was based upon assumed values for her Mission Beach property at $1.8 million, the Thredbo property at $1.1 million and the Maleny property having a value of $1 million.[55] Her statement to the ANZ Bank disclosed total liabilities of $1.65 million with the result being net assets of approximately $2.2 million. The respondent's liability position has altered since then because she has incurred personal liabilities by way of credit card and other obligations and liabilities to members of her family. If the respondent is to be believed, she did not include the value of her shares in W Pty Ltd when this statement of assets and liabilities was provided to the ANZ Bank in October 2006. Remarkably, the figure of $3.89 million placed by the respondent on the value of her three properties took no account of JM's alleged one-third share in the Mission Beach property, not to mention the applicant's one-third share in the Thredbo property. One inference is that the respondent was misrepresenting to her bank the extent of her interests in these properties. So far as Mission Beach is concerned, I find the more probable explanation for the omission to take account of JM's alleged one-third share is that he had no such share.

[97] The respondent's failure to make proper disclosure of financial records makes it impossible to determine the true extent of her assets and liabilities with precision, and the extent of her liability to JM is unproven. However, I conclude that her net asset position at the date of the hearing was approximately $1,800,000. This figure does not take account of liabilities owed to family members that are unlikely to be enforced.

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[55] Transcript 2-89 – 2-90.

[98] In addition, the applicant has financial resources of an uncertain amount in her interest in the family trust, and in potential claims against LM.

**Identification and assessment of contributions**

[99] The second step in the four step approach involves the identification and assessment of the contributions of the parties and the determination of their contribution-based entitlements in accordance with s 291 to s 295 of the Act. Section 291(1) requires the court to consider the financial and non-financial contributions made directly or indirectly by or for the parties to:

(a) the acquisition, conservation or improvement of any of the property of either or both the parties; and

(b) the financial resources of either or both of the parties.

It does not matter whether the property or financial resources mentioned in s 291(1) still belong to either or both of the parties when the court is considering the contributions made.[56]

[100] Section 292(1) requires the court to consider the contributions, including any homemaking contributions, made by either of the parties to the welfare of the parties. I will first identify the respective contributions of the parties to the acquisition, conservation, or improvement of property and to the financial resources of the parties and contributions to their welfare. Certain contributions, such as the provision of so-called "free accommodation" by one party to the other, have a dual aspect under ss 291 and 292 and it is important to avoid double-counting.[57]

**Identification of the applicant's contributions**

[101] The applicant made contributions to property held in the respondent's name including:

(a) improvements to the Maleny property;

(b) general and specific maintenance of the Maleny property;

(c) construction of a house on the Thredbo property in around 1992/1993 including payment to his brother for work, working as a labourer in the construction, organising other workers and providing his own personal labour;

(d) making improvements to the Thredbo property;

(e) paying a sum of approximately $5,000 in around 2003 to assist the respondent to make mortgage repayments on the Mission Beach property;[58]

(f) maintenance and improvements to the Mission Beach property in or about Easter 2003.

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[56] *PLA* s 291(3).

[57] *Baker v Towle* (2008) 39 Fam LR 323 at 334 [48]; *EB v CT* [2008] QSC 303 at [58].

[58] Applicant's affidavit filed 16 January 2007, paragraph 54, and his affidavit sworn 3 October 2008 filed by leave on 6 October 2008. Counsel for the respondent suggested in cross-examination that the contribution was no more than $3,000: Transcript 1-33 l 15. However, I shall adopt a figure of $5,000 in reliance upon the applicant's evidence.

The respondent contests the extent or value of some of these contributions. For instance, she says that the applicant did little general maintenance on the Thredbo property and the applicant does not contest this in reply.[59] She also says that the applicant only went to Mission Beach once and used the trip to go fishing and to visit Dunk Island and only assisted her to install three window blinds. The applicant's contribution to the Mission Beach property was minimal and, as he acknowledges, was undertaken when he was there on holiday. I accept his evidence concerning contributions to the maintenance and improvement of the properties.

[102] The applicant worked in the horse stud business. He also did some work on the property on which the stud business was conducted, EM. That property is owned by W Pty Ltd as trustee of the H Family Trust. The value of the work undertaken on the property, EM, was disputed by the respondent's father. Despite the disparaging evidence given by the respondent's father about the extent and quality of the applicant's work on improvements to the property, I generally accept the applicant's evidence concerning the work that he did in and around this property over the years.[60] The respondent points out that this was work undertaken on a third party's property. However, I take account of the respondent's interest as a beneficiary under the H Family Trust. Accordingly, the applicant's contribution can be said to be a contribution to the financial resources of the respondent. The value of that contribution is a different matter. It contributed to the value of a financial resource of the respondent, namely her interest in the H Family Trust,[61] rather than to the value of a property which the respondent owns. The contribution warrants consideration since it is a contribution in terms of s 291, but the extent to which it has increased the value of the respondents property and financial resources depends upon an assessment of the likelihood that the respondent will receive a substantial benefit arising from an alteration of the exercise by her father of his power of appointment under the trust. I consider such an alteration to be unlikely.

[103] The applicant made a direct cash contribution of $165,000 which was supposed to be secured by retention by a solicitor of the title deeds to the Thredbo property. The contribution equated to one-third of the Thredbo property's unencumbered value at the time. The applicant's equity in the Thredbo property was used, without his knowledge, to fund the respondent's property acquisitions. The respondent mortgaged or refinanced the Thredbo property in April and June 2002 and in September 2005. It was also used as security for a further loan in February 2007. The use of the applicant's equity to facilitate the respondent's acquisition, conservation or improvement of other properties owned by her should be recognised as a contribution by the applicant for the purpose of s 291(1)(a).

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59 Respondent's affidavit filed 16 January 2008, paragraph 55.

60 Applicant's affidavit filed 16 January, paragraph 56.

61 An interest as a beneficiary under a family trust may constitute property in the context of Part 19: *C v B* [2006] QSC 195 at [27]. This proceeding was conducted on the basis that the respondent's interest as a beneficiary was a "financial resource" within the meaning of Part 19.

**The respondent's contributions**

[104] The respondent's assets and income were applied to the horse stud business. The respondent says that by 2000 she had exhausted all of her capital in its operations, having introduced funds totalling in excess of $1.6 million.[62] Apart from funding that business operation, the respondent managed it.

[105] The property owned by the respondent at Maleny provided the principal place of residence for the parties during the course of their relationship.

[106] The respondent undertook the majority of domestic tasks during the course of the relationship and her contribution as a homemaker represents a substantial contribution to the welfare of the parties.

[107] The respondent's assets and income were used to support the parties' living expenses.[63] The applicant's income from outside sources, including unemployment benefits that he received and wages that he earned when working at Thredbo, were applied principally for his own benefit.

[108] The respondent's equity in her properties at Maleny and Thredbo (along with the applicant's equity in Thredbo) was used as security for loans that funded, amongst other things, the acquisition of properties by her. The respondent paid for most of the expenses associated with the maintenance of, and improvements to, the properties at Maleny, Thredbo and Mission Beach.

**Evaluation of contributions**

[109] Both parties favoured a global approach rather than an asset-by-asset approach.[64] I agree that it is appropriate to adopt a global approach. It has been said that in evaluating contributions under provisions analogous to ss 291 and 292 the task "is not akin to an accounting exercise."[65] The court is required to make "a holistic value judgment" in the exercise of a discretionary power of a very general kind.[66] The court is not required to undertake "a reductionist process analogous to the taking of partnership accounts" by examining every contribution of the kinds described in ss 291 and 292 with a view to putting a monetary value on each in order to reach an accounting balance one way or the other, then to be eliminated by the requisite financial adjustment.[67] However, before the "holistic value judgment" is made the court is required, so far as possible, to evaluate the contributions that are

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62 Respondent's affidavit filed 22 March 2007, paragraph 48.

63 The respondent's submissions paragraph 81(c) refer to "joint everyday spending and lifestyle expenses". I shall refer to these as "living expenses".

64 *cf. Norbis v Norbis* (1986) 161 CLR 513 at 523.

65 *Manns v Kennedy* (2007) 37 Fam LR 489 at 499 [63] citing earlier authority of the Full Court of the Family Court.

66 *Kardos v Sarbutt* (2006) 34 Fam LR 550 at 561 [36]; *Delaney v Burgess* [2007] NSWCA 360 at [79]-[82].

67 *Kardos v Sarbutt (supra)* at [36].

being taken into account.[68] In doing so "the origin and nature of the different assets ought to be considered."[69]

[110] Regard to the origin and nature of different assets is important. For instance, the respondent's shares in W Pty Ltd were not contributed to the relationship, and the applicant did not contribute to their acquisition or conservation. They are included amongst the assets against which a property adjustment order might be made, and are part of the property to which regard may be had in deciding what order adjusting property is just and equitable.[70] Assets owned by the respondent and which were not contributed to the relationship may be the subject of a property adjustment order. However, there is an important distinction between the property that may be the subject of a property adjustment order and the property that was contributed to the relationship.[71]

[111] The respondent's substantial "initial contributions" to the relationship in the form of the property in which the parties lived and the substantial financial contributions that she made to the business raise for consideration what is sometimes referred to as the "erosion" principle.[72]

[112] The applicant acknowledges that there was a significant imbalance in the parties' "initial contributions" but says that there are features of the case that would suggest that the significance of the initial contribution of the respondent is reduced over the period of the relationship. The applicant refers to an initial contribution being "eroded" during the course of the relationship. The respondent submits that there is no erosion doctrine in de facto property cases of the kind that there is in respect of matrimonial property cases involving relationships of long duration.[73]

[113] In *BLM v RWS*[74] Keane JA, with whom White and McMurdo JJ agreed, stated:

> "[40] It is well established by decisions of the Full Court of the Family Court in relation to the provisions of the *Family Law Act* 1975 (Cth) analogous to Pt 19 of the PLA that:
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> > "an initial substantial contribution by one party may be 'eroded' to a greater or lesser extent by the later contributions of the other party even though those later contributions do not necessarily at any particular point outstrip those of the other party."

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68 *Manns v Kennedy (supra)* at [64].

69 This is drawn from *G and G* (1984) 9 Fam LR 969 at 980; [1984] FLC 91-582 at 79,697, and was endorsed by the High Court in *Norbis v Norbis* (1986) 161 CLR 513 at 523. see also *Sharpless v McKibbin* [2007] NSWSC 1498 at [60]

70 *PLA* ss 296, 298(a).

71 *Baker v Towle* [2008] 39 Fam LR 323 at 335-336, [52]-[54]; [2008] NSWCA 73; *EB v CT (supra)* at [53]-[54].

72 *Bilous v Mudaliar* (2006) 65 NSWLR 615 at 625-6 [53]-[63]; [2006] NSWCA 38.

73 *Bilous v Mudaliar* (*supra*) at [68]; *cf. In the Marriage of Pierce* [1999] FLC 92-844; (1998) 24 Fam LR 377; [1998] Fam CA 74..

74 [2006] QCA 528 at [40].

[114] In *BLM v RWS* the appellant contributed $340,000 to the acquisition of a business. The respondent left the business, and severed her personal relationship with the appellant, only five-and-a-half months after the appellant had contributed this sum. There was no finding of any "off-setting contribution" by the respondent which was apt to erode the contribution made by the appellant, and the Court of Appeal found that the relevant period was "too short for any 'erosion' to be presumed".[75] Keane JA stated:

> "[44] The assets which the appellant liquidated to fund the acquisition of the business and its associated assets were owned by him prior to the commencement of the relationship. There is no suggestion that these pre-existing assets were in any way augmented by reason of any contribution, financial or non-financial, by the respondent. After acquisition, and before the severance of the relationship, the contributions of the parties to the operation of the business were equal. There is no suggestion that any contribution by the respondent was apt to erode or offset the value of the appellant's initial contribution. Nor could any such suggestion be made having regard to the termination of the relationship after five and a half months and the operation of the business solely by the appellant thereafter until trial. While the respondent's overall contribution to the relationship may have warranted an adjustment in her favour in relation to any value of the asset in excess of the appellant's initial contribution, the assessment of their respective contributions to the acquisition of the business had to recognise the appellant's initial contribution before any adjustment could properly be made pursuant to s 286 of the PLA.
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> [45] In my respectful opinion, the trial judge erred in treating the appellant's financial contribution to the business as having been "eroded" at all."

[115] *BLM v RWS* supports the following propositions:

(1) that an initial substantial contribution by one party may be "eroded" to an extent by the later contributions of the other party;

(2) in a long relationship, and depending upon the circumstances, some "erosion" may be presumed;

(3) later contributions, also described as "offsetting contributions", may be apt to erode the initial contribution of the other party;

(4) whether an initial contribution has been "eroded" and the extent of such erosion depends upon the circumstances of the case.

[116] The Court of Appeal approved the approach adopted by the Full Court of the Family Court in relation to the provisions of the *Family Law Act* that are analogous to Pt 19

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[75] *ibid* at [42].

of the *Property Law Act*. In *In the Marriage of Pierce*[76] the Full Court of the Family Court stated that:

> "…it is not so much a matter of erosion of contribution but a question of what weight is to be attached, in all the circumstances, to the initial contribution. It is necessary to weigh the initial contributions by a party with all other relevant contributions of both the husband and the wife."

[117] I do not accept the respondent's submission, which is said to be based on *Bilous v Mudaliar,*[77] that there is no erosion doctrine in de facto property cases. The Court of Appeal in *BLM v RWS* and other judges of this Court[78] have recognised that, particularly in the case of a long relationship, an initial substantial contribution by one party may be "eroded" to some extent by the later contributions of the other party. It is, however, an error to treat an initial contribution to the assets of the parties as "dead money".[79] The applicant's submissions, whilst contending that the significance of the respondent's initial financial contribution had reduced over the period of the relationship, correctly identified the question for the court as being "what weight is to be attached, in all the circumstances, to the initial contribution?" This approach conforms with *Pierce*,[80] is consistent with the Court of Appeal's approval of *Pierce* and I adopt it.

[118] Under what is described as the "erosion principle" or "the erosion doctrine" the applicant's financial contribution of $165,000, his substantial non-financial contribution of labour in the operation of the business and the other contributions that I have identified might be treated as "off-setting contributions" which reduce or "erode" the respondent's substantial financial contribution to the business and the contribution of her home at Maleny to the relationship. However, adopting the approach of the Full Court of the Family Court in *Pierce* as embraced in the submissions of the applicant, the issue is not so much a matter of erosion of contribution as a question of what weight is to be attached, in all the circumstances, to the respondent's contributions. The size of the respondent's financial contribution to the business is an important, relevant factor. So is the fact that there is nothing of substance to show for it in the pool of assets at the date of the hearing.

[119] The respondent seeks to invoke something akin to the erosion doctrine in submitting that the value of the "relatively minor" financial investments of the applicant of $165,000 in the late 1990's to the conservation of the Thredbo property, to some of the costs of improvements to the Thredbo property and the payment of $5,000 towards the Mission Beach mortgage have "faded over time" and were outweighed by "offsetting contributions of [the] Respondent over time". Again, I adopt the approach that it is not so much a matter of erosion of contribution, as a question of what weight is to be attached, in all the circumstances, to the relevant contribution.[81]

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76 (1998) 24 Fam LR 377 at 385, [28]; [1998] Fam CA 74.

77 (*supra*).

78 *HAG v MAW* [2007] QCA 217 at [20]; *CL v JMG* [2007] QSC 169 at [150].

79 *FO v HAF supra* at [52].

80 *supra*.

81 New South Wales authority is to the effect that the so-called "erosion principle" is not a principle of law, but a shorthand description of the approach to evaluation of contributions which recognizes that initial contributions do not carry forward at full weight, but diminish in significance by reason of

[120] The exercise of weighing contributions arises in respect of the substantial contributions, both financial and non-financial, of the parties to a failed business. Attention is required to the "origin and nature" of contributions to the business since the parties' substantial contributions are not reflected in an asset of any significant value. The parties' respective submissions characterise the contributions very differently. The applicant presents his contribution to the business as something akin to a claim for compensation by an unpaid employee in the respondent's business. By contrast, the respondent's submissions are to the effect that the business was a joint enterprise, and the applicant should share in its losses.

[121] The respondent in her submissions acknowledges the applicant's non-financial contributions to her income and earning capacity by working without pay in the horse stud business and "involuntarily assisting in the acquisitions of other property via his Thredbo interest". However, the respondent submits that the value of these contributions have to be assessed in the light of the respondent's "own offsetting (and greater) overall contribution to funding and running the business, as well as its lack of profitability". The applicant's work without pay on the horse stud was submitted to be a "*quid pro quo* for living rent free and being supported, emotionally and financially by [the] Respondent". The value of the applicant's financial contribution was submitted to be reduced by his lengthy absences during the snow season in almost every year of the stud's operation.

[122] The respondent's reference to the applicant "living rent free" was rejected by the applicant. Mr Morris QC submitted in his address that on no view could the amount of work to which the applicant deposes, and which was largely unchallenged, be said to equate in value "to free board and lodging". In his address, Mr Carmody SC submitted that I should ask the question "at the end of the day, has the [applicant] been sufficiently rewarded for what he put in or not?"[82] Mr Morris QC endorsed the posing of this question, and submitted that the answer would be in the negative due to the amount of work that the applicant did on what Mr Morris QC described as the respondent's "hobby farm", being something that gave her pleasure and enabled her and her father to pursue their interest in horses.

[123] Despite the attractive simplicity of the question of whether the applicant has been sufficiently rewarded for what he "put in" in the form of unpaid labour, the court is not directly engaged in an exercise of compensating the applicant for non-payment of wages. Likewise, it is not engaged in the exercise of compensating the respondent for her unpaid work in the management of the horse stud business, or for her contributions as a homemaker. Instead, the court is required to assess the value of financial and non-financial contributions under s 291 and contributions to welfare under s 292, including the value of unpaid work of the kind undertaken by the applicant and the respondent in connection with the business.[83] The court is not

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other subsequent contributions made by both parties during the relationship: *Sharpless v McKibbin* [2007] NSWSC 1498 at [78].

82 Transcript 5-12 l 25.

83 I respectfully adopt what was said by Warnick J in *Douglas v Douglas* (2006) FLC 93-303 at 81,072 [43] in respect of the analogous provisions of the *Family Law Act*, namely that it is doubtful that, at least without heavy qualification, compensation is a factor which ought to influence alteration of property interests.

required to engage in a process analogous to the taking of partnership accounts, let alone awarding compensation for back wages.

[124] This case is not about a relationship in which the parties' respective financial and non-financial contributions resulted in the establishment and development of a business having a substantial value. Instead, they contributed to a loss-making business that, at the date of the hearing, had no significant value. The parties contributed to that business in different ways. During the course of the relationship each took on different responsibilities in the business and in the relationship. Both parties may have had complaints at the time that the other was not making an adequate contribution and, it seems, that mutual dissatisfaction with the contribution being made by the other led to both losing interest in the business and the consequent running down of its operations. Despite their dissatisfactions at the time the parties chose to conduct the operation and to undertake different tasks in it. Because of his background and aptitude, the applicant undertook physical labour. He lacked aptitude for or an interest in the business side of the operation. The respondent undertook management of the business, and some "hands on" work with the horses.[84] The applicant acknowledged that the respondent did "all the paperwork for the stud which was quite substantial".[85]

[125] It is not possible to take a running account of the time devoted by each party to the horse stud business. Even if it was, the time spent each day provides only a general guide to the value of the contribution of each party. A broad estimate of the contribution of each party to the business is required. I accept that the applicant undertook tasks in the business that were physically demanding and that, over time, he resented having to work without pay in what he perceived to be a "hobby farm" in which the respondent and her father indulged their interest in horses. By the same token, the respondent perceived the applicant as not devoting the time and effort required to make a success of the business. The respondent's final submissions acknowledge the applicant's substantial non-financial contribution to the day-to-day operations of the business. In assessing the applicant's contribution I have regard to the unchallenged evidence of other witnesses concerning their observations of the applicant on the property. I consider that the applicant's oral evidence overstated his endeavours, particularly after 1997 when both parties lost interest in the business and spent substantial periods at Thredbo during the ski season. Some of the work undertaken by him was in pursuits that interested him. The applicant developed an interest in training horses. That said, his work, including training and breaking horses, saved the business the cost of engaging outside services.

[126] The respondent attended to aspects of the business that the applicant was not interested in, including management of its financial affairs and administration. I regard her contribution as substantial.

[127] Whist each party made substantial non-financial contributions to the business in their respective roles, I should not simply assume that the value of their

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[84] Applicant's affidavit filed 16 January 2008, paragraph 30.

[85] *ibid.*

contributions is equal. As with the assessment of mutual, but different, contributions in other contexts, the quality of the contribution counts,[86] and the quality of the contribution of each must be evaluated in comparison with the other.[87] The evidence does not lead me to find that the quality of the parties' non-financial contributions to the business, each judged in their respective areas of work, were other than equal. I consider that it is appropriate to conclude that the respective non-financial contributions of the parties to the business should be accorded almost equal value. The value of the applicant's contributions to the business exceeds the value of the respondent's non-financial contribution as a manager and administrator, but not by any significant extent.

[128] Because of the absence of records in respect of the financial affairs of the business over the lengthy period of years that it was conducted, it is not possible to determine the extent to which the amount of approximately $1.6 million invested in the business by the respondent was the subject of drawings with which she supported the parties joint living expenses. By any measure, the respondent made a significant financial contribution to the business and there is nothing of substance to show for the $1.6 million invested in the business. The business' operations declined and, given its loss-making history, the business cannot be said to have any goodwill. In short, the respondent contributed a sum that she claims to exceed $1.6 million to a loss-making business which depleted, rather than conserved, her assets.

[129] Because of his lack of interest in the financial affairs of the business the applicant may not have known the extent of its losses. The matter was not put to him in cross-examination and, given the state of the evidence,[88] I do not make a finding that he knew the extent of the losses incurred in the business. However, his day to day involvement in the business' operation, his evidence that by 1997 "we had stopped running the stud so intensely",[89] and his perception that the respondent and her father treated the venture like a hobby leads me to infer that he must have been aware that it was not a financial success.

[130] The horse stud business was a financially unsuccessful venture which, in a real sense, was jointly undertaken. The applicant contended that in evaluating the parties' contributions to a de facto relationship, the parties should "share the losses as well as the fruits" unless there was a reason not to.[90] The applicant's submissions tended to characterise him as an unpaid labourer working in the respondent's business. Notwithstanding his lack of involvement in the financial affairs of the business, account should be taken of the fact that the applicant was not simply an employee in the business. He contributed to it as part of a jointly-conducted venture that was undertaken as part of the de facto relationship.[91] This, however, does not result in the evaluation of all of the contributions of the parties under ss 291 and 292 being undertaken on the basis that the applicant should share equally in the losses

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86 *cf. Mallet v Mallet* (1984) 156 CLR 605 at 636 per Wilson J in connection with contributions as a homemaker.

87 *Sharpless v McKibbin* (*supra*) at [69].

88 Transcript 1-23 ll 1-10.

89 Applicant's affidavit filed 16 January 2008, paragraph 67.

90 Transcript 5-23 ll10-35 and see *Browne & Green* [1991] FLC 92-873.

91 Tellingly, his affidavit filed 16 January 2008, paragraphs 25 and 67, refers to the business in terms of a jointly managed business, for instance "we ran the property".

generated by the business. The respondent as the financier of the venture must assume substantial responsibility for her decision to continue to invest in a loss-making venture.

[131] An overall evaluation is required of the contributions, both financial and non-financial, of the parties to the horse stud business. Substantial weight should be placed upon the respondent's financial contribution to the business, notwithstanding her preparedness to continue to inject funds into a loss-making business. Account must be taken of the fact that her large contributions are not reflected in business assets, such as goodwill, that have any significant value. The fact that the respondent's substantial financial contributions to the business over the period of the relationship did not result in an asset of significant value amongst the "pool of assets" at the hearing does not mean that they should be ignored in evaluating contributions, any more than the parties respective non-financial contributions should be ignored. They constitute contributions for the purpose of s 291. However, in circumstances in which both parties were content to devote time and money to a business venture of minimal value, their respective contributions to the business should not be valued highly in arriving at an appropriate percentage of the assets held by them at the date of the hearing.

[132] The applicant's non-financial contributions that I have previously identified, included maintenance of, and improvements to the properties at Maleny, Thredbo and Mission Beach. His financial contributions included payment of some of the costs of construction of the house at Thredbo and the $5,000 he contributed towards the mortgage repayments on the Mission Beach property. However, the value of the applicant's contributions, both financial and non-financial, is relatively small when compared with the respondent's financial contributions from her own resources[92] towards the acquisition, maintenance and improvement of the properties.

[133] The respondent contributed her unencumbered property at Maleny as the parties' principal place of residence. This contribution of so-called "free accommodation"[93] to the applicant has a significant value. The applicant was not required to pay rent, and was able to rent or sell his own home at Tewantin. In addition to these financial aspects, the contribution of the respondent's property at Maleny to the relationship as the parties' principal place of residence, and the use made by the parties of her two-thirds interest in the Thredbo property, constitute contributions to welfare for the purposes of s 292. The respondent's pre-relationship furniture and other household possessions at Maleny were contributed to the relationship and therefore to the parties' welfare. These contributions of accommodation by the respondent should be accorded substantial weight. The use of the applicant's one-third interest in the Thredbo property for the parties' accommodation should be brought into account as an offsetting contribution to welfare.

[134] The extent to which bank loans secured against the Maleny and Thredbo properties were applied to the acquisition of properties, including the Mission Beach property,

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92 Care is required in not treating the loan monies secured against, amongst other properties, the Thredbo property as being contributed exclusively by the respondent, since the applicant's equity in the Thredbo property was used to secure the loans.

93 *cf. Baker v Towle* (*supra*) at [47]; *Sharpless v McKibbin* (*supra*) at [91].

is uncertain, given the unsatisfactory state of the evidence concerning the application of loan funds from the bank, and the uncertain extent of monies advanced by JM to his mother and the purposes to which those funds were applied. The respondent accepts that the unauthorised use of the applicant's equity in the Thredbo property constitutes a contribution. The consequences of the respondent's post-relationship use of the applicant's equity in the Thredbo property will be considered in the third step of the process, and the unauthorised deprivation of the applicant's intended security for his contribution will require consideration of the terms of any property adjustment order at the final stage. At the present stage of evaluating contributions, the applicant's unwitting contribution of his equity in Thredbo to secure advances that were used for, amongst other things, the acquisition of properties, is matched and exceeded by the contribution by the respondent of her equity in the Thredbo property for the same purpose. Account must also be taken of the contribution by the respondent of her equity in her Maleny property for the same purposes. The properties so acquired generated rental income.

[135] Loan funds raised by the respondent and her other financial resources, such as her savings, were used to pay for outgoings on properties, such as rates, and the costs to maintain and improve these properties.

[136] The respondent paid interest on borrowings, save for the $5,000 sum previously discussed that was provided by the applicant, and that part of the rental income that can be treated as having been indirectly generated by the use of the applicant's equity to acquire further properties.

[137] The respondent paid for the parties' living expenses, and this substantial contribution to the parties' welfare over the duration of a long relationship should be given substantial weight.

[138] Despite turbulent periods in the relationship, the applicant provided emotional support to the respondent, and the respondent provided emotional support to the applicant. Each made contributions to the other's welfare and to their welfare as a couple. The respondent contributed services as a homemaker and these substantial contributions to the welfare of the parties were not matched by a similar homemaking contribution by the applicant. The respondent's contribution as a homemaker over a lengthy relationship should be accorded substantial weight. It is invidious and inappropriate to place a monetary value upon it, and the Act does not require it.[94] Gibbs CJ in *Mallet v Mallet*[95] stated that contributions as a homemaker should be taken into account "not in a token way, but in a substantial way". I adopt this approach and accord substantial weight to the respondent's unmatched contribution to welfare as a homemaker.

[139] I do not consider that the respondent's shares in W Pty Ltd or her interest in the H Family Trust were contributed to the relationship. In any event, the applicant did not contribute to the respondent's acquisition of the share in W Pty Ltd or to their preservation, save to the extent that it could be argued that his unpaid work in the

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94 *Baker v Towle (supra)* at [49].

95 (*supra*) at 609; see also Mason J at 623, Wilson J at 636, Deane J at 640-641 and Dawson J at 646.

business and other non-financial contributions meant that the respondent did not have occasion to seek to resort to these shares to meet business and other expenses. However, I do not consider that the applicant's contributions preserved the shares in W Pty Ltd. The shares were essentially under the control of the respondent's father, the respondent did not have resort to them and always was unlikely to have resort to them to meet expenses. The shares in W Pty Ltd are included in the "pool of assets"[96] that have been identified and valued as the first step in the four-step process that guides my discretion. In determining the parties "contribution-based entitlements"[97] in accordance with ss 291 to 295 I take account of the fact that the respondent did not contribute these shares to the relationship, and the applicant did not contribute to their acquisition, conservation or improvement.

[140] One approach in determining the parties "contribution-based entitlements" is to remove these shares from "the pool", to allocate them to the respondent and to determine a just and equitable apportionment of the assets that remain in the pool. An alternative is to take account of the origin and nature of these assets in arriving at a just and equitable determination of property entitlements at the end of the second stage. In that regard, even if the shares in W Pty Ltd had constituted a contribution to the relationship,[98] the respondent's contribution of them would give her a strong *prima facie* claim to retain them and any increment in their value.[99] I shall adopt the former course.

[141] In making a value judgement at this stage of the parties "contribution-based entitlements" to the "pool of assets", a question may be asked whether the origin and nature of a contribution demands that it be treated differently.[100] This question should be posed in relation to the unauthorised use of the applicant's equity in the Thredbo property. The applicant's contribution of $165,000 (equivalent to one-third of the value of the Thredbo property at the time) and the agreement to secure the contribution by lodgement of the title deed to the Thredbo property arises for consideration at the second, third and fourth steps. At the third step it is potentially relevant as a contribution to income[101] and is relevant, more generally, to the justice of the case in circumstances in which the use of the equity was the result of a forgery. At the fourth stage, it is relevant to the terms of any property adjustment order, because it is not just and equitable to deprive the applicant of the security that he would have had in respect of his equity in the Thredbo property without justification.[102]

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96 *FO v HAF* (*supra*) at [52].

97 *ibid*.

98 *cf. Baker v Towle* (supra) at [52] where it was noted that the fact of prior ownership may mean that there was no contribution to their acquisition for the purposes of a section drafted in terms of s 291.

99 *Sharpless v McKibbin* (*supra*) at [85].

100 This second step issue is helpfully discussed in Bourke and Murphy "The Place of Part VIIIB in the s 79 process after *Coghlan*" (2006) *CFL* 62 at 76-77, where the authors draw upon what was said by the High Court in *Mallet* (*supra*) and by Nygh J in *G &G* (*supra*) concerning the need to consider origin and nature of different assets in applying the global approach.

101 Section 303 in the form of rental income. However, I take account of the contribution of the applicant's equity in Thredbo to produce income in assessing the parties' contribution-based entitlements.

102 One possible justification would exist if his contribution is completely outweighed by the respondent's contributions, such that the applicant's financial contribution of the equivalent of a one-third share to the Thredbo and his other contributions result in a contribution-based entitlement that is less than one-third of the value of the Thredbo property.

[142] In determining contribution-bases entitlements at the second step of the process, I have regard to the origin and nature of the applicant's financial contribution of $165,000 and the subsequent unauthorised use of his equity in the Thredbo property. These are substantial financial contributions that should be weighed with all of the other contributions of the parties in determining the parties' contribution-based entitlements.

[143] The outline of the case for the respondent filed on 30 September 2008 contended that the only financial assistance that the respondent received from the applicant was "some $165,000 to meet the expenses of the stud farm". The informality with which the respondent applied funds from different sources, creates the distinct possibility that the $165,000 contributed by the applicant indirectly funded the horse stud business. The applicant's contribution was made after the respondent told him that she was struggling to keep the Thredbo property and might have to sell it. I accept the applicant's evidence that he and the respondent agreed that they would like to keep the Thredbo property for their enjoyment, and agreed that the applicant would invest in the Thredbo property and have a one-third share in it. It is possible that the respondent was struggling to keep the Thredbo property in 1998 because of the financial drain that the horse stud business had on her cash resources. It is likely that the applicant's contribution of $165,000 was applied for a variety of purposes, including expenses associated with Thredbo, ordinary living expenses, lifestyle expenses and expenses associated with the horse stud business. However, the circumstances in which the parties agreed that the applicant would have a one-third share in the Thredbo property and the steps taken to secure the applicant's investment by way of lodgement of the title deed to the Thredbo property justifies the applicant's financial contribution of $165,000 being recognised as a financial contribution made towards the conservation of that property, as distinct from a contribution to meet general expenses or the expenses of the horse stud business in particular.

[144] The applicant's equity in the Thredbo property was used by the respondent, without his knowledge, to raise funds and to acquire other properties. This contribution to the acquisition, conservation or improvement of properties held in the name of the respondent should be taken into account in the evaluation process required in the second step. It is unnecessary to place a monetary value upon it and, in any event, any calculation of the value of the use of his equity would be imprecise.

[145] Having considered the respective contributions of the parties, I am required to make "a holistic value judgment" [103] in circumstances in which some contributions are not capable of evaluation in monetary terms. [104] Some contributions, such as the applicant's contribution of $165,000 involve a direct contribution which can be measured. Other contributions, such as the applicant's general maintenance of the Maleny property that conserve the value of property, cannot be easily measured and should not be measured by reference to the commercial cost of acquiring similar services. Contributions under s 291 need not be reflected in property that is owned by either or both of the parties at the time of the hearing. The parties' financial or non-financial contributions to a failed business that effectively ceased to operate

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[103] *Kardos v Sarbutt* [2006] NSWCA 11 at [36]; *Delany v Burgess* [2007] NSWCA 360 at [82].

[104] *Kardos v Sarbutt (supra)* at [37]; *Baker v Towle (supra)* at [49].

prior to the hearing still qualifies as a contribution under s 291, but should not be given substantial weight in determining contribution-based entitlements to a pool of assets that does not include significant business assets.

[146] Certain contributions that must be considered under s 291, under s 292 or under both sections may not make any significant contribution to the wealth of the parties or either of them, at the time the contributions were made, let alone years later. However, they must be taken into account. Contributions to welfare as a homemaker may not contribute significantly to the parties' collective wealth, but are deserving of substantial weight in determining contribution-based entitlements.

[147] The respondent submits that the financial contributions of the parties should be the predominant consideration, particularly in view of the fact that there are no children of the relationship and the respondent now owns much less than she did at the start of the relationship. The respondent's position is that there is a massive disparity between the parties' financial contributions with the respondent having met all mortgage and deductible outgoings. The respondent submits that save for the $165,000 invested by the applicant she funded all significant capital acquisitions and improvements to, and the maintenance of, her properties. The respondent also relies on the fact that she met joint living and lifestyle expenses out of business income or her savings.

[148] Substantial weight must be given to the fact that the respondent paid for the bulk of living expenses. She also funded most of the cost of property acquisitions, capital improvements to property, the cost of maintenance and outgoings such as rates. A notable exception to this is the applicant's substantial financial contribution of $165,000.

[149] Even with the recognition of the applicant's financial contribution that was to be secured by the Thredbo property and the use of his "equity", there is a very significant disparity in the financial contributions of the parties to their assets and financial resources, and to their welfare in the form of the payment of living expenses.

[150] Overall, I consider that the applicant's financial and non-financial contributions for the purpose of s 291 and his contributions to the parties' welfare are greatly outweighed by the respondent's financial and non-financial contributions for the purpose s 291 and her substantial contribution to the parties' welfare as a homemaker and as the principal source of funds for living expenses over a relationship that lasted almost 16 years.

[151] I evaluate the parties' contribution-based entitlements in proportions of 20:80 in the respondent's favour in respect of net assets of the parties, exclusive of the respondent's shares in W Pty Ltd.

**Third step: assessment of relevant factors in ss 297 – 309**

[152] I must consider the matters mentioned in Subsubdivision 4 (ss 297 – 309) to the extent that they are relevant in deciding what order adjusting interests in property is just and equitable.[105] Some of the matters to be considered might justify an "add back" to the asset pool prior to the determination of contribution-based entitlements. For example, the failure to rent property so as to enhance the value of the pool of assets, or the incurring of extravagant and unreasonable expenditure, might justify an "add back". However I shall address these and other matters in considering the application of relevant maters under Subsubdivision 4.

**Age and health: s 297**

[153] I take account of the age and state of health of each party. I have addressed these matters earlier in my judgment. In short, the applicant is aged 51 and, save for his ankle injury, is in good health.

[154] The respondent's evidence, which I accept, is that she suffers emotional or psychological problems. Their nature and extent are not the subject of independent evidence. There is no evidence to suggest that she is not otherwise in good health.

**Resources and employment capacity: s 298**

[155] The applicant has very limited assets and financial resources, save for the one-third equitable interest in the Thredbo property belatedly acknowledged by the respondent. His lack of a registered interest, and the respondent's unconscionable conduct in relation to the title deed to the property has diminished the value of the applicant's unregistered interest in the property. The applicant's capacity for gainful employment is limited by his ankle injury and his limited history of paid employment.

[156] The respondent has the substantial assets and financial resources which I have previously found. The respondent's income is largely dependent upon the exploitation of her assets, including investment properties at Thredbo and Mission Beach. Rather than seek paid employment, the respondent has continued to operate a loss-making business, invested in properties and, in recent years, relied upon being gifted or loaned money by members of her family. Her choice not to seek paid employment does not mean that she does not have the physical or mental capacity to undertake it. However, her history of not having worked as an employee limits her capacity for gainful employment.

**The matters referred to in ss 299 – 302**

[157] Neither party submits that these matters are relevant. However I note the applicant's responsibility[106] for the care and support of his children.

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[105] *PLA* s 297.

[106] *PLA* ss 300 and 301.

**Appropriate standard of living: s 303**

[158] In accordance with certain observations made in *BLM v RWS*[107] concerning s 303 the applicant canvasses what is submitted to be the respondent's lifestyle and extravagance since the relationship ended in the context of s 303. This includes her continued involvement in the horse stud in circumstances in which she is aware that there is no prospect of making a profit.[108] Although as *BLM v RWS* indicates it is possible to consider wastage or extravagance in the context of s 300 (Necessary commitments) or s 303 (Appropriate standard of living) I intend to address these matters in the context of s 309.

**Contributions to income and earning capacity: s 304**

[159] The respondent used the applicant's one-third interest in the Thredbo property without accounting to him for rent generated by the property or rent on properties, the acquisition of which, was financed in part by loans secured against the Thredbo property. These matters have been considered by me in determining the applicant's contribution-based entitlements.

**Length of relationship: s 305**

[160] I have considered the length of the de facto relationship.

**Effect of relationship on earning capacity: s 306**

[161] Neither party contends that I should consider the extent to which the de facto relationship has affected the earning capacity of each of the parties.

**Financial circumstances of cohabitation: s 307**

[162] I take account of the fact that the applicant is cohabitating with the mother of his children, that he describes himself as a "house husband" and that he is largely dependent, financially, upon his partner.

**Child maintenance: s 308**

[163] No issue arises under this section.

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107 [2006] QCA 528.

108 Transcript 2-41 l 50 to 2-42 l 11.

**Other facts and circumstances**

[164] Pursuant to s 309 the court must also consider any fact or circumstance it considers the justice of the case requires to be taken into account. The applicant raises two matters under this section. The first arises from the respondent's concession that she has failed to fully exploit the Thredbo and Mission Beach properties for their rental potential. Instead she has taken advantage of them for her own use. She prefers to "self manage" the properties.[109] I find that the respondent has made excessive use of these properties for her personal use in recent years, and not taken full advantage of their income-producing capacity.

[165] The second matter relied upon is that the respondent borrowed approximately $22,000 from her sister and subsequently repaid it in order to meet an indemnity costs order made in March 2008. I take account of this matter insofar as her unreasonable conduct in the litigation has diminished the pool of assets that otherwise would be available. However, I have not invoked the "add back" principle discussed in *Chorn & Hopkins*[110] which is helpfully discussed in *Challen & Challen.*[111] Instead, I apply the test of reasonableness discussed in those authorities. I take account under s 309 of the respondent's unreasonable conduct in incurring legal costs that are the subject of the March 2008 order and which have depleted by $22,000 the resources that would be available to meet a property adjustment order.

[166] It is convenient to address together the allegation of waste and extravagance in personal expenditure and the allegation of a failure to fully exploit the Thredbo and Mission Beach properties for their rental potential.

[167] The respondent submits that s 309 has no role to play in this case and that her post-separation credit card spending and her failure to maximise rental receipts on investments properties is not conduct that is so unreasonable as to be unjust to ignore. The respondent submits that she has explained that her state of psychological health prevented her paying full attention to business matters in the aftermath of the separation. So far as her spending is concerned, without acknowledging that there has been any extravagance, the respondent submits that it is her creditworthiness and own money that is at stake.

[168] The legislation governing property adjustment orders does not mention considerations of fault.[112] However, profligate spending after a de facto relationship comes to an end may be considered in determining an appropriate order.[113] The fact that it was the respondent's money to spend and her creditworthiness which was at stake does not provide a convincing answer as to why profligate expenditure after the relationship ended should be not taken into account. This is not to treat such

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[109] Transcript 2-49, ll 25-41.

[110] [2004] FLC 93-204 at [32]-[60].

[111] [2007] Fam CA 1292 at [72]-[81].

[112] *Evans v Marmont* [1997] 42 NSWLR 70 at 79 per Gleeson CJ and McClelland CJ in Equity.

[113] *BLM v RWS (supra)* at [50]. For instance, wasteful personal expenditure on gambling and alcohol may require an adjustment to be made: *Proudman v Dickason* [2008] NSWC 681 at [38]-[40].

expenditure as a "negative contribution".[114] It is simply to recognise that extravagant expenditure operates to diminish the asset pool and the property and financial resources which the court may consider under s 298(a). The entitlement of a party to spend his or her money should be recognised, subject to the qualification that wasteful expenditure in the face of a reasonable claim for resolution of de facto property may result in injustice to a claimant.

[169] I adopt what was said in *M v M*[115] in the context of the *Family Law Act* that neither the *PLA* nor the case law requires the parties to go into "a state of suspended economic animation" once their relationship breaks down pending the resolution of their financial arrangements. What is crucial is an assessment of the reasonableness or otherwise of the expenditure.[116]

[170] The respondent was cross-examined extensively upon her expenditure for the period from late 2004 to early 2006 on travel, entertainment and purchases of luxury items.[117] The limitations upon disclosure of documents by the respondent does not permit a confident conclusion to be reached as to whether the respondent's spending on luxury items escalated and became more extravagant after the relationship ended. One inference is that the respondent engaged in such expenditure, and used all of her credit card facilities in order to claim to be "broke" by the time of the hearing and to carry through on her threat to the applicant that he would "get nothing". It is unnecessary for me to conclude whether the respondent's high level of personal expenditure was predominantly motivated by these reasons or simply reflected an inability by the respondent to confront the need to curtail expenditure. Her expenditure on luxury items, entertaining friends and travel was, as she submits, spending her own money. However, it was expenditure incurred in the face of a known claim to resolve de facto property relations with the applicant. Had the respondent acknowledged the validity of the applicant's one-third interest in the Thredbo property much earlier, the litigation with its attendant costs and distress might have been avoided. In any case, a curtailment of the respondent's unreasonable expenditure would have increased the available pool of assets in respect of which a property adjustment order may be made. I consider that the extent of the respondent's expenditure on luxury items, entertainment and travel after the relationship ended was unreasonable and warrants an adjustment in the applicants favour.

[171] The respondent's failure to fully exploit both the Thredbo and Mission Beach properties creates an injustice. The applicant's one-third interest in the Thredbo property was not accepted by the respondent in her evidence, his interest was not secured as a result of the respondent's forgery, and the respondent denied that the applicant had any such interest until the final stages of the proceedings. The respondent's outline of submissions filed 30 September 2008 identified the Thredbo property as being wholly owned by her. By the end of the hearing, and following the appointment of new legal advisers, the respondent's submissions were to a very different effect. She submitted that the applicant's assets were in excess of

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[114] *BLM v RWS (supra)* at [49].
[115] [1998] Fam CA 42 at 2.11.
[116] *Challen & Challen (supra)* at [79].
[117] Transcript 2-9 – 2-41; Exhibit 14.

$310,000 to reflect "his one-third beneficial interest in Thredbo which still exists despite the 'forged' release and has a current net agreed value of $266,666."

[172] The respondent's belated recognition of the applicant's interest in the Thredbo property was made in conjunction with her submission that the respondent's net property was $59,319 such that the applicant's net property substantially exceeded that of the respondent. I have rejected the contention that the respondent's net property is in the small amount which the respondent submits. The respondent's contention in her submission that the applicant has a one-third beneficial interest in Thredbo is inconsistent with her prior conduct of the litigation and her general conduct towards the applicant in the years since the relationship ended. It was unfair for his interest in the Thredbo property to be locked into an underperforming asset, the rental potential of which the respondent has unreasonably failed to exploit. The injustice was compounded by the applicant's equity in the Thredbo property being jeopardised by the respondent using the Thredbo property to secure loans, something she was only able to do as a result of her forgery.

[173] The failure to exploit the rental potential of the Mission Beach property should be taken into account under s 309.

[174] Rather than acknowledge the validity of the applicant's claim in respect of his significant financial contribution that the respondent agreed to secure by depositing of the title deed to the Thredbo property with a solicitor, the respondent denied that the applicant had any entitlement to a share in the Thredbo property. The costs generated by the respondent's unreasonable conduct of the litigation and her unjustifiable denial of the applicant's one-third share in the Thredbo property should be reflected in an appropriate order for costs rather than a property adjustment order.

[175] The respondent's conduct in forging the applicant's signature and in not permitting the applicant to realize the value of his interest in the Thredbo property should not result in an adjustment order which is punitive. Instead, her unreasonable failure to exploit the rental potential of the Thredbo property and the Mission Beach property in circumstances in which she was on notice of the applicant's claim to an interest in the Thredbo property warrants an adjustment in the applicant's favour.

[176] Rather than make separate monetary adjustments on account of the three matters that I have considered under s 309, namely unreasonable legal costs, unreasonable and extravagant personal expenditure and an unreasonable failure to use the Thredbo and Mission Beach properties to derive rental income, I will take these matters into account in determining an appropriate adjustment to the parties' contribution-based entitlements based on relevant matters under Subsubdivision 4.

[177] Taking account of the relevant factors that I have identified under Subsubdivision 4, I consider that an appropriate adjustment is to increase the contribution-based entitlement to the applicant by a further 10 percent.

[178] The result is a property adjustment order in proportions of 30:70 in the respondent's favour.

### Fourth stage

[179] Having considered the contribution-based factors in accordance with ss 291 - 295 and the factors which I have taken into account in ss 297 - 309 I finally consider whether the result is just and equitable in accordance with s 286 of the Act.

[180] The applicant's assets have a value of $43,750. The respondent's assets, excluding her shares in W Pty Ltd, have a value of approximately $1,270,000. A 30 percent share of the relevant asset pool of $1,313,750 equals $394,125. A property adjustment order in the applicant's favour would be in the amount of $350,375.

[181] I consider that such an order is just and equitable.

### Other orders

[182] I will hear the parties about the terms of any order that is necessary to wholly or partly secure such a monetary order, or for the sale of property and the distribution of the proceeds of sale. My provisional view is that the payment should be secured in an amount not less than $266,666 being the sum that would have been secured in respect of the applicant's one-third interest in the Thredbo property. Payment of the sum ordered may require consequential orders for the sale of specified property,[118] and require agreement to be reached between the parties concerning the withdrawal of caveats to facilitate the sale of one or more of the respondent's properties.

[183] I will hear the parties in relation to costs. However, it will be apparent from my reasons that the respondent's conduct of the litigation, the time spent at the hearing in the identification of her assets and liabilities and the issues in respect of which the applicant has succeeded gives the applicant substantial grounds to seek a costs order in his favour.[119]

### Orders

[184] I order that:

(1) Pursuant to s 333(1)(d) of the *Property Law Act*, 1974 (Qld) the respondent pay the sum of $350,375 to the applicant.

(2) On or before 2 February 2009 the applicant file and serve draft minutes of orders, including orders for the payment of the said sum, that payment be wholly or partly secured and that, in the event the sum is not paid by a

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118 *PLA* s 333(1)(b).

119 *PLA* s 343(2) and (4).

specified date, for the sale of specified property and the distribution of $350,375 plus interest at a specified rate from the proceeds of sale.

(3) The respondent file and serve her response, if any, to the applicant's draft minutes of orders within seven days of receiving the same.

(4) On or before 2 February 2009 the parties file and serve submissions on costs.

(5) The matter be listed for review at 9.15 am on Wednesday, 11 February 2009 for the making of further orders, including orders as to costs.

(6) There be liberty to apply.

**Other matters**

[185] The evidence and the Notice to Admit Facts that was read disclose that the applicant may have received social security benefits to which he was not entitled.[120]

[186] The respondent admitted to forgery and the use of the forged document to lie to a solicitor in order to gain access to a title deed.[121] She admitted to swearing a false statutory declaration in which she referred to a gift which was not in fact a gift.[122]

[187] I direct that the matters mentioned in the preceding paragraphs be referred to the Attorney-General for Queensland by the provision by the Registrar of a copy of these reasons to the Attorney-General. I further direct pursuant to s 342(1)(d) of the *PLA* that in so doing the Registrar shall publish to the Attorney-General the identity of the parties. It will be a matter for the Attorney-General to refer the matter relating to the applicant to an appropriate Commonwealth authority, and the matters relating to the respondent to the Queensland Police Service and the Director of Public Prosecutions for investigation and possible prosecution.

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120 See paragraph [34]-[35] of this judgment.

121 T 1-33.

122 T 1-59 – 1-60, and see paragraph [40] of this judgment.