Dianne Kathleen Rowley v Dennis Howell Williams [2010] NTSC 45

PARTIES:	Dianne Kathleen Rowley v Dennis Howell Williams
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
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JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

FAMILY LAW – De facto relationships – Application for adjustment of property interests – Separation agreement – Whether separation agreement should be set aside – Whether an inheritance is divisible by an adjusting order.

VALUATION OF LAND – Valuation of land – Determining correct approach to valuation – Admissibility of valuation where background data is not set out – Reconciling differing valuations.

De Facto Relationships Act 1991 (NT), ss 3, 14, 15, 16, 18, 44, 46

Van Jole v Cole [2000] NTSC 18; *LF v RA* (2006) 2 Qd R 561; *Ottley v Chester* [2010] NTSC 38; *The Commonwealth v Milledge* (1953) 90 CLR 157; *Mallet v Mallet* (1984) 156 CLR 605; *Spencer v Commonwealth* (1907)

5 CLR 418; *Makita (Australia) Pty Ltd v Sproules* (2001) 52 NSWLR 705; *Riverbank Pty Ltd v Commonwealth* (1974) 48 ALJR 483; *Evans v Marmont* (1997) 21 Fam LR 760; *Wallace v Stanford* (1995) 19 Fam LR 430; *Kardos v Sarbutt* (2006) 34 Fam LR 550; *Parker v Parker* (1993) DFC 95-139;

Freckelton & Selby, *Expert Evidence, Law Practice, Procedure and Advocacy*, 4th Ed, 2009.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Young
Defendant:	Mr Harper

Solicitors:

Plaintiff:	Robert Welfare
Defendant:	Withnalls

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Dianne Kathleen Rowley v Dennis Howell Williams [2010] NTSC 45
No. 121/09 (20927150)

BETWEEN:

Dianne Kathleen Rowley
Plaintiff

AND:

Dennis Howell Williams
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 7 September 2010)

[1] This claim is brought pursuant to the *De Facto Relationships Act 1991* ("the Act"). The Plaintiff seeks an order pursuant to section 46 setting aside a separation agreement and an order pursuant to section 18 adjusting property interests.

[2] The Court's power to make an order adjusting the property interests of partners in a de facto relationship is contained in section 18 of the Act which provides as follows:

> **18 The order for adjustment**
>
> (1) The order which a court may make under this Division with respect to the property of de facto partners or either of them is

such order adjusting the interests of the partners in the property as the court considers just and equitable having regard to:

(a) the financial and non-financial contributions made directly or indirectly by or on behalf of the partners to the acquisition, conservation or improvement of any of the property or to the financial resources of the partners or either of them; and

(b) the contributions (including any made in the capacity of homemaker or parent) made by either of the partners to the welfare of the other partner, or to the welfare of the family constituted by the partners and one or more of the following:

(i) a child of the partners;

(ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners; or

(iii) any person dependent on the partners who has been accepted by the partners or either of them into the household of the partners.

(2) Omitted.

[3] There are no children for the purposes of section 18(1)(b).

[4] Sections 14, 15, and 16 of the Act set out various preconditions to the making of an adjustive property order. There is no dispute in relation to those matters and I find that all such preconditions are satisfied.

[5] A separation agreement is defined by section 3(1) of the Act as follows:

separation agreement means an agreement (whenever entered into) between 2 adults, whether or not there are other parties to the agreement, which:

(a) is made in contemplation of terminating a de facto relationship between them or after terminating it; and

(b) makes provision with respect to financial matters (whether or not it also makes provision with respect to other matters).

[6] By section 44 of the Act, separation agreements are made valid and binding subject only to the power given to the Court by section 46 to set them aside in appropriate cases. The document signed by the Plaintiff is therefore, absent an order under section 46, an effective bar to the proceedings.

[7] Section 46 of the Act provides as follows:

> **46 Variation and setting aside of agreements**
>
> (1) On an application by a de facto partner for an order under Division 3 or 5 of Part 2, the court may, in the circumstances specified in this section, vary or set aside all or any of the provisions of a cohabitation agreement or separation agreement made between that de facto partner and the other, being an agreement which is in writing and is signed by that other.
>
> (2) The court may exercise its powers under subsection (1) in respect of a cohabitation agreement or separation agreement only if, in its opinion:
>
> (a) enforcement (whether on the application before the court or on any other application for any remedy or relief under any other Act or law) of the agreement would lead to serious injustice between the parties; or
>
> (b) circumstances have arisen since the time when the agreement was made making it impracticable for its provisions, or any of them, to be carried out.
>
> (3) A court may exercise its powers under subsection (1) notwithstanding any provision to the contrary in a cohabitation agreement or separation agreement.

[8] The Court's power under section 46 of the Act to set aside or vary a separation agreement is essentially based on "serious injustice". That term is

not defined in the Act. In relation to that term, in *Van Jole v Cole*,[1] Riley J said:-

> "It is clear that the Court will not interfere with a separation agreement simply because it believes a different form of agreement was more appropriate. Further it will not interfere where there is simple injustice. Rather, it must be satisfied that a failure to intervene would result in "serious injustice" between the parties. What is meant by that expression is not defined in the Act and has not been explored in any helpful way in any case that either counsel or myself have been able to locate. The expression is not a term of art and does not have any technical legal sense. It is therefore to be understood in the sense in which it is commonly used in the English language.
>
> It is necessary for a court to look at the whole of the surrounding circumstances of such an agreement in order to determine whether, in accordance with the ordinary English usage of the words, a serious injustice arises. An injustice is opposite of justice and includes the concepts of wrong or unfairness. The word serious in this context suggests weighty, grave or considerable. I agree with the submission made by Mr Young, who appeared on behalf of the respondent, that in the circumstances of this matter the expression "serious injustice" should be given its ordinary meaning of a considerable wrong or unfairness."

[9] In *Van Jole v Cole*,[2] Riley J upheld a decision of a Magistrate who had decided that a "serious injustice" had occurred as the plaintiff in that case had received far less than she should have under an equitable distribution. His Honour also took the view that the circumstances under which the agreement was entered into, specifically whether there was any misconduct in the pre-agreement process, could also amount to a serious injustice in appropriate circumstances. In *LF v RA*,[3] White J, after referring to *Van Jole*

[1] [2000] NTSC 18
[2] [2000] NTSC 18
[3] (2006) 2 Qd R 561 at [56].

v Cole,[4] said that "it is not… a serious imbalance of itself which will give rise to a conclusion of serious injustice. The detail of the relationship and the parties' financial and other contributors to the acquisition of the assets in the course of the relationship will be determinative of that question". Mildren J approved of both decisions in *Ottley v Chester*.[5]

[10] The Plaintiff relies both on the inequitable distribution aspect as well as on the pre-agreement conduct aspect. She claims that the division which results under the separation agreement will be of the order of a 50/50 division whereas contributions are in the proportion of 80/20 in her favour. In addition, she also relies on common law and equitable principles in that she alleges that she was lead to sign the separation agreement by the actions of the Defendant in circumstances which amount to duress, unconscionable conduct and equitable fraud. There is considerable overlap between the allegations relevant to the equitable principles and those relevant to the second aspect of the statutory basis.

[11] The specific alleged actions of the Defendant, in summary form, are as follows:-

- The deliberate delay in finalising the terms of the agreement;
- The Defendant's daughter, Ms Charles, telling her that the delay was due to the default of her lawyer;

[4] [2000] NTSC 18
[5] [2010] NTSC 38

- The Defendant knowing of, and taking advantage of, firstly the Plaintiff's eagerness to acquire the house in Karama and secondly, that the interim payment was critical to the Plaintiff's finance;

- The Defendant deliberately stalling until almost the deadline for the satisfaction of the Plaintiff's finance condition;

- The Defendant via Ms Charles, arranging to meet with the Plaintiff ostensibly to hand over the interim payment;

- Upon obtaining the cheque for the interim payment, the Defendant then telling her that he would not hand over the cheque until the separation agreement was signed;

- The subsequent attendance by the Defendant with the Plaintiff at the office of the Defendant's lawyer and then presenting her with a final separation agreement as opposed to a finalised interim separation agreement.

[12] The separation agreement as signed had its genesis in an interim separation agreement negotiated between the parties' lawyers. The interim separation agreement was negotiated to provide an interim payment to the Plaintiff pending a valuation of assets, predominantly a valuation of the previously jointly occupied property at Adelaide River ("the Adelaide River Property").

[13] The intention of the Plaintiff was to purchase her own house. In anticipation of receiving the interim payment the Plaintiff entered into an agreement to

purchase a home in Karama. The interim payment was critical to enable the Plaintiff to secure the finance she required to complete the purchase of the Karama house.

[14] As the time to finalise finance for the Plaintiff's purchase of the Karama house was fast approaching, the Plaintiff became concerned at the apparent delay in finalising the interim separation agreement. The Plaintiff therefore enlisted the assistance of the Defendant's daughter, Deborah Charles, with whom she had a good relationship. Ms Charles apparently attempted to facilitate the settlement and interceded in the discussions between the Plaintiff and the Defendant. The net result of all this was that the Plaintiff, the Defendant and Ms Charles attended at the offices of the Defendant's lawyer, Mr Maley on the day that the separation agreement was signed. Shortly before that attendance the Defendant had instructed Mr Maley that the agreement was to be a final agreement. Mr Maley prepared the agreement for signing on that basis without reference back to the Plaintiff's lawyer, Ms Allan.

[15] As the Plaintiff was keen to secure the purchase of the Karama home, she signed the separation agreement despite appreciating that it was no longer expressed to be an interim agreement only. She claims that she felt pressured into signing the agreement. She claims that she had been manipulated by the actions of both the Defendant and Ms Charles, they being summarised in paragraph 11. Those allegations are denied, at least to

the extent that all that occurred as part of a deliberate plan to manipulate and trick the Plaintiff into signing the document.

[16] As it is necessary to effectively determine entitlements to see if the separation agreement should be set aside on the basis of inequitable distribution, it is necessary to first consider the history of the relationship and the financial and non-financial contributions made by the parties.

[17] The parties commenced a de facto relationship in 2001 and it ended in October 2008. The Plaintiff is 58 years old and the Defendant is 66 years of age. At the commencement of the relationship the Plaintiff was in full time employment. She owned an investment property on Magnetic Island. It appears to have been negatively geared for the period from 2000 until it was sold in 2004. The Defendant was also in full time employment and co-owned a property at Millner ("the Millner Property") with his former partner. Each party had existing superannuation funds, the balance in the Plaintiff's account at the time being approximately $17,000.00 and approximately $10,000.00 for the Defendant.

[18] In April 2004 the Plaintiff sold her unit on Magnetic Island. This resulted in net proceeds of the order of $143,000.00 in April 2004. Of this, $80,000.00 funded the acquisition of the Adelaide River Property at about the same time. The balance was entirely expended on stock and equipment and the establishment of the business on that property.

[19] The Plaintiff inherited an amount of approximately $206,000.00 and a parcel of shares of approximate value of $45,000.00 in November 2004. Of this amount she claims to have applied $60,000.00 to enable the Defendant to pay out his former partner's interest in the Millner property. The Plaintiff says that the balance was also expended on the Adelaide River Property as well as to cover living expenses for both her and the Defendant from December 2005. She claims that the entirety was exhausted by January 2007. She still owns the shares.

[20] The Defendant admits that $60,000.00 was required to pay out his former partner for her share of the Millner property but claims only $50,000.00 of this came from the Plaintiff, as a loan, and the balance was from his own funds. I accept the Defendant's evidence in that respect because of the matters discussed in paragraph 39, although that may not necessarily matter given the approach I have taken to determine contributions, see below. He subsequently borrowed $100,000.00 against the Millner Property and that amount was used as a line of credit to cover the business and personal expenses of the parties. The Defendant sold the Millner Property in August or September 2008 resulting in net proceeds of approximately $157,000.00 after discharging the debt. There is some controversy as to what became of these funds. That is discussed below.

[21] The Karama home was purchased by the Plaintiff in March 2009 i.e., after the separation, for $425,000.00. The Plaintiff contributed the $50,000.00 payment she received under the separation agreement as well as a further

$60,000.00 which she withdrew from her superannuation. The Plaintiff has a mortgage on that property with a current balance of approximately $317,000.00.

[22] The Plaintiff claims to have also paid a tax bill of the Defendant of approximately $12,500.00 but it appears to be conceded that this was repaid, hence it may be disregarded.

[23] The Plaintiff also paid $21,000.00 towards the purchase of a motor vehicle in 2002. The Defendant's contribution to this was the value of his existing vehicle valued as a trade in at approximately $3,000.00. The Plaintiff also purchased a Land Cruiser utility in 2003 for $35,000.00 and a Nissan flat top truck, presumably for the business, in 2005 for approximately $5,000.00.

[24] The Defendant owned a dinghy (including outboard motor) and tools at the commencement of the relationship. Presumably both parties had items of furniture and personal effects. There has not been any evidence of those so I will treat them as being approximately equal in value on both sides and will disregard them.

[25] At separation the Plaintiff had approximately $5,700.00 left in her superannuation account. It is unclear as to what occurred to the funds in the Defendant's superannuation. He deposed to there being approximately $10,000.00 in his superannuation account at the time of the separation.

[26] The work history of both parties was affected by injuries. The Defendant sustained serious injuries from an assault from November 2002 as well as a back injury at work in September 2003. The Defendant received workers compensation for the latter until November 2004 and thereafter was in receipt of a disability support pension. For a time he was receiving as little as $44.00 per fortnight (due to the Plaintiff's income) and this increased to a maximum of the order of $440.00 per fortnight from approximately February 2006. The Plaintiff was assaulted in the course of her employment in October 2003 resulting in a period of approximately six months totally off work, ultimately resuming part time in April 2004. She retired in December 2005.

[27] During the relationship the Plaintiff had been employed as a nurse working remotely. She deposed to a gross income of the order $330,000.00 between 2001 and 2008. She last worked in 2005 and her income was far greater in the years 2001 through to 2004. I estimate her net income from 2001 to be $260,000.00 over that period.

[28] The Defendant's income according to tax returns was approximately $97,000.00 for the financial years from 2001 to 2004. There were no tax returns beyond that, presumably due to the Defendant's low income as he was on minimal social security benefits from November 2004. The evidence suggests a total of approximately $26,000.00 in social security benefits from November 2004 until the separation making a total of $114,000.00. I estimate that no tax would have been payable during the period that the

Defendant was in receipt of social security benefits and allowing for that I estimate a net income of the order of $75,000.00 over the relevant period. Although the Defendant claimed to have both savings and income in cash form over the years, I am not prepared to accept that evidence (see paragraph 42).

[29] At the time of the separation the parties resided at the Adelaide River Property. It was run as a hobby farm producing fruit, vegetables and running some cattle. The business was known as Sin Valley Enterprises. There was some dispute as to who was the proprietor of that business but nothing appears to turn on that as both parties worked on the hobby farm and that does not appear to have generated any net taxable income for the parties. The available evidence lends itself to a finding of approximately equal contribution to that venture.

[30] The parties claim to have made ongoing financial contributions during the relationship. There is a dispute as to the Defendant's claimed contributions. His claims appear excessive based on the available documentary evidence. He claimed post separation expenditure on the Adelaide River Property of the order of $72,000.00 but could only verify approximately $16,000.00 in value. His evidence on this point was unimpressive and I reject it.

[31] The Plaintiff drew $49,000.00 from her superannuation in 2008 which was partly spent on the Adelaide River Property and partly used for living expenses. The Defendant is entitled to some allowance as an indirect

contribution to the significant salary sacrifice to superannuation effected by the Plaintiff during the relationship.

[32] The Defendant paid for Mr Loveridge's valuation fee of approximately $5,000.00. This is a term of the separation agreement. I accept that he would have made ongoing payments in respect of outgoings for the Adelaide River Property post separation but as this was when he was residing there to the exclusion of the Plaintiff, the usual rule applies and that is disregarded.

[33] There was much dispute as to the extent and quality of the non-financial contributions of the parties. This related particularly to the work on the Adelaide River Property and homemaker contributions. The Defendant claimed superior contribution in this respect but his evidence on this point was unimpressive. If I were to accept his evidence, he claims to have effected works on the Property to the value of nearly $260,000.00. Although I am prepared to accept that he performed some works over and above that of the Plaintiff, I cannot accept his estimate of value which is clearly exaggerated.

[34] As the Defendant had effectively ceased work as early as September 2003 compared to the Plaintiff in December 2005, then, subject to the Defendant's disabilities, he had scope for greater non-financial contribution than the Plaintiff. The works claimed to be effected by the Defendant, i.e., construction of dams, fencing, cattle yards and roads, are works more akin to the Defendant's working experience than that of the Plaintiff. The

valuations partly confirm that the works were performed as both valuations describe improvements as consisting of yards, fencing and a dam. Neither valuation makes specific mention of any roads but I accept there was a road else the access restrictions would have been the subject of comment by the valuers. The valuations however refer to only one dam whereas the Defendant claims there were three. I reject the Defendant's evidence in that respect.

[35] Other than for the aforesaid manual work on the Adelaide River Property, I think the respective non-financial contributions are approximately equal. The works on the Adelaide River Property have added value. It is conceivable that the sum total of expenditure, purchase cost and the value of unpaid labour will exceed the total value of the Adelaide River Property. However it is difficult to see how the total value of non financial contribution in the form of work on the Adelaide River Property could be more than $80,000.00. Using this as the value of that work, I assess the Defendant's contribution at 60% thereof. The remainder of non financial contribution being approximately equal, that can be disregarded as it does not materially alter the calculation of percentage contributions.

[36] Against that background the issues for determination in the case are whether the agreement should be set aside and, if so, the appropriate adjustment of property interests. There is a significant difference in the valuations relied on by the respective parties in respect of the Adelaide River Property and that must also be resolved.

[37] There are many conflicts on the evidence. Findings in respect to the disputed matters turn on my assessment of the main witnesses. The evidence called on behalf of the Plaintiff consists of her own evidence and some documentary evidence. The Plaintiff called a valuer, Mr Semets as well as Mr Maley. The case for the Defendant comprises the Defendant's own evidence, some documentary evidence, the evidence of his daughter Ms Charles and the evidence of his valuer, Mr Loveridge.

[38] I thought that the Plaintiff was vague and unexpectedly imprecise in her evidence. She was also evasive on a number of occasions in the course of her cross-examination. I was unimpressed by her numerous claims that her memory was not clear, resulting in vague answers, often on important details and of which I would have expected a better recall. I thought she was feigning a lack of recollection as a way of avoiding answering difficult questions. Her unresponsive and volunteered accusations of violence by the Defendant against her, raised for the first time during cross-examination, were equally unimpressive. Likewise her ongoing gratuitous general allegations against the Defendant. I cannot be overly critical of the Plaintiff in this respect as the Defendant exhibited a similar propensity.

[39] The Plaintiff was reluctant to make concessions that were clearly appropriate. The main instance was when she was challenged about her failure to change the amount she alleged she had contributed to the Millner property in the recitals to the draft separation agreement. The amount of her contribution is disputed. The draft separation agreement recited a

contribution of $50,000.00 but her case is that she actually contributed $60,000.00. Although she requested another error in the draft to be rectified, a minor correction in comparison, she did not request the amount of that contribution to be varied. Leaving aside what her explanation was for that omission, she resisted conceding that she did not request the change, something which appears glaringly obvious. There were other instances as well.

[40] Although therefore I had concerns about the Plaintiff's evidence, there were similar concerns with the evidence of the Defendant. There were some dramatic contradictions in his evidence. The most striking example of this related to his retraction in cross-examination of the previously admitted date of separation. There had apparently been very little issue as to the date of separation. However when that became an issue in the context of some specific cross-examination he remarkably purported to challenge that date of separation despite having earlier conceded it in evidence in chief and in his own affidavit.

[41] He also refused to make concessions when they were clearly called for and appropriate. When he was presented with medical notes suggesting that he was intoxicated at the time that he was assaulted in 2002, he refused to concede that. This was in the context of allegations made by the Plaintiff that the Defendant's heavy drinking had indirectly and adversely impacted on his contributions.

[42] There were other objective contradictions in the Defendant's evidence. His claim as to the extent of his working capacity is inconsistent with his level of disability. His claim of financial contribution is inconsistent with his record of income and objective documentary evidence. When challenged in cross-examination as to the extent of his financial contributions and his sources of his income which supported those claims, he made vague claims to either having earned cash income or having large sums in cash available to him and saved over a period of time. The objective evidence showed very little income for an extended period of time i.e., $44.00 per fortnight in disability benefits for a period of almost two years to November 2006. Claims such as that are easy to make but by their nature are difficult to verify or refute. I regard such claims as highly suspicious particularly as it is to the Defendant's favour. I am not prepared to place any weight on that evidence.

[43] The Defendant also dismissed, more than once, the documentary evidence regularly put to him which challenged his version of events. He typically said that all documents were taken care of by the Plaintiff. The Defendant was also evasive in response to some questions. His testy behaviour when challenged with documentary evidence which seriously questioned his claims of financial contribution and income was particularly telling. The Defendant was also uncooperative during the course of his evidence. On one occasion he refused to consider a document provided to him in the course of cross-examination.

[44] The Defendant went as far as to deny giving instructions to his lawyer to broadly agree to the in principle terms for the draft separation agreement. Despite those terms being confirmed in the correspondence passing between lawyers for both parties, the Defendant claimed that they were all made up by the lawyers or words to that effect. It is inconceivable that he did not give his lawyer instructions in accordance with those terms. That the Defendant makes such allegation in cross-examination only and without previously raising it either in evidence in chief or in his affidavit, is very damaging to his credibility. It shows a willingness to change his testimony at will, something which is inconsistent with a credible and reliable witness.

[45] Like the Plaintiff, the Defendant also made some unresponsive and volunteered allegations against the Plaintiff, including some in re-examination. I do not look at this in isolation given that the Plaintiff is guilty of similar behaviour and of allegations of equal seriousness. Those made by the Defendant were that she was lazy, a heavy drinker, had stolen his car, had damaged property and had stolen or doctored records.

[46] Overall as between the Plaintiff and the Defendant there were unsatisfactory aspects to differing degrees in the evidence of both. By far however there more in the case of the Defendant.

[47] Mr Peter Maley was called by the Plaintiff. He had represented the Defendant in the negotiations leading up to the signing of the agreement. His file was produced. He had a good general recall of the matter and was

able to reinforce his responses where greater specifics were required by reference to his file. Overall, I consider that he was an objective and truthful witness.

[48] In respect of one key allegation, namely whether he had told the Defendant or Ms Charles that the matter had been delayed due to the tardiness of the Plaintiff's lawyer, Mr Maley's recollection was that he did not say that. Importantly he said also that he had no basis to say that. I accept that evidence from Mr Maley.

[49] When approximately four instances of notes of unreturned phone calls to Ms Allan over a period of time were put to him in cross-examination it was apparent that those were matters which he had not considered in that context. These could possibly be the evidence which the Defendant and his daughter were referring to when they said that Mr Maley showed them evidence of Ms Allan's delay. However, even if that is so, the emphasis and the impact of those delays have clearly been exaggerated by both of them. I think it is telling that Mr Maley's overall impression was that there was no tardiness on the part of Ms Allan which impacted on the progress of the matter.

[50] Ms Charles, the Defendant's daughter, had a significant part to play in the lead up to the signing of what became the final separation agreement. The Plaintiff had put some trust in her at around that time and had enlisted her aid in attempting to resolve the matter.

[51] Overall I found Ms Charles to be far from an impressive witness. Although she tried to convey the impression that she was being objective and was in fact trying to help the Plaintiff, this is not borne out by the end result. I was particularly unimpressed by her repeated and volunteered claims, throughout cross-examination and mostly when her evidence was under challenge, that she was helping the Plaintiff or looking out for the Plaintiff's interests. She had a key part to play in the signing of the agreement. She claimed that Mr Maley had specifically shown her instances from his file which showed that Ms Allan was responsible for the delays. This was contradicted by Mr Maley. I have preferred Mr Maley's evidence to that of Ms Charles in respect of that issue. I find there was no delay by Ms Allan. I reject the version of the Defendant and his daughter, in favour of the version of Mr Maley, as to what occurred at the conference with Mr Maley in the lead up to the signing of the separation agreement.

[52] The two remaining witnesses called were the respective valuers, Mr Semets called on behalf of the Plaintiff and Mr Loveridge called on behalf of the Defendant. The respective valuers have taken a different approach to the valuation. Mr Semets has used the direct comparison method i.e., relying on evidence of sales of what he considers are similarly located and featured properties. Mr Loveridge used the auction realisable value method, on instructions according to him, which determines the value which could be achieved at auction. If I understand Mr Loveridge's evidence correctly, his approach is based on evidence of sales but there is an adjustment to reflect

the price which could be achieved within a realistic time frame. It is essentially based on what he considers the property could fetch at auction within that time frame.

[53] In *The Commonwealth v Milledge*[6] the High Court said that where there is a valuation dispute, Courts should take a common sense approach to determine a value after consideration of all material. Further, in *Mallet v Mallet*[7], the High Court said that there is no fixed rule as to the proper method of valuation and the methodology to be preferred depends on the facts of each case.

[54] Mr Loveridge's rationale for utilising the auction realisable approach is that although a value fixed in accordance with the direct comparison method might be achievable, the time required to do so could be significant. Although I may be viewing that too simplistically, it seems to me that some discount is being made to achieve a timely sale.

[55] The legal definition of the value of land derives from *Spencer v Commonwealth*[8] and is what, according to the then current opinion of land values, a willing but not anxious purchaser would have to offer to induce a not unwilling vendor to sell the land.

[56] It seems to me that Mr Loveridge's approach falls foul of that basic principle. His approach is also based on an assumption that some inordinate

[6] (1953) 90 CLR 157
[7] (1984) 156 CLR 605
[8] (1907) 5 CLR 418

period of time will be required to sell the property. Mr Semets conceded that some time might be involved to achieve to the price determined by the direct comparison method and he said that he took that into account although how he took that into account was not explored in evidence in chief or in cross-examination. The evidence suggests that it is normal for properties in that area to take time to sell.

[57] It was conceded by both valuers that there were very few sales of properties in the area of the subject property. There is therefore an expectation that some time will be involved in the sale process. I think that is an important factor to consider if a sale of a similar property is being affected. Inbuilt into Mr loveridge's approach is that the property should be sold to the highest bidder at auction subject to a reserve which is to be set at the value he determines. Logically if a reserve price is fixed then that compromises the auction realisable value. A value arrived at by that approach appears illusory as a sale above that reserve may not be achieved at auction. If not, then presumably the property would be marketed in the usual way. The property could then still take as long to sell. If it is to be sold to the highest bidder without reserve then that changes the dynamics of the basic premise as that is more indicative of a sale by a vendor who is keen to sell or a forced sale situation. Moreover, no one can predict the time that it would take. Making a significant reduction in price based on that is inappropriate in my view.

[58] Mr Harper for the Defendant submitted that Mr Semets' comparators were unsuitable as they are of differently sized, featured or located properties. He had put this to Mr Semets in cross-examination. I thought Mr Semets convincingly addressed that and said that they were used as comparators and that he took the differences into account. It is interesting that Mr Loveridge also says that he started with some information of property sales. However he did not research these himself, he obtained these from another valuer. He said that his approach, utilising the auction realisable value method essentially starts with evidence of sales and then appropriate adjustments are made. How these adjustments are determined was not explained. However, this is effectively what Mr Semets has done also, yet Mr Semets is now being criticised for this. It would be interesting to see what properties were used as comparators by the valuer who assisted Mr Loveridge. Query whether they differed to those of Mr Semets. I suspect not as the person who provided them, a Mr Linkson on Mr Loveridge's evidence, works for the same firm as Mr Semets. It seems to me therefore that the same criticism could be levelled at Mr Loveridge, yet he has effectively avoided scrutiny by indirectly obtaining that information and by not detailing that background information in his report. In contrast Mr Semets has not relied on hearsay information and has disclosed his comparators. He is the more open. Mr Semets' approach is to be preferred.

[59] I think there is also good basis to prefer Mr Semets evidence to that of Mr Loveridge by reason of superior qualification as an expert. Mr Semets not

only has extensive experience in the field, he also has the backing of appropriate study at tertiary level before commencing work in the field.

[60] Mr Loveridge on the other hand has no formal qualifications and relies on his experience in the industry. I accept that he has extensive experience. He conceded that he is primarily a business broker and auctioneer and that he lacks formal qualifications but did not concede any adjustment of his expertise based on that. Curiously though his report seems to acknowledge, indirectly at least, the superiority of expertise of a "Certified Practising Real Estate Valuer". One paragraph of his report provides:-

> "From information received and research on sales in the area, the Valuer wishes to emphasise that he has with the assistance of a Certified Practising Real Estate Valuer, estimated the Auction Realisable Value to be $200,000.00, also emphasising that this is at today's rate. (To have a full report by a Certified Practising Real Estate Valuer the cost will be a further $1 650+/- plus GST). We recommend Mr Bill Linkson, Integrated Valuation Services, Darwin, phone 8942 0744."

It is difficult to see how this does not acknowledge the superiority of expertise of a Certified Practising Real Estate Valuer. Mr Semets has signed off his valuation as a "Certified Practising Valuer" which surely must be the same. In my view Mr Semets has the superior qualifications and expertise.

[61] As to the evidence of Mr Semets, I thought he was an impressive witness. Although he was challenged by questioning in cross-examination, particularly as to the suitability of the comparators as discussed above, I consider he competently addressed that. I thought he gave appropriate explanations and made concessions where appropriate.

[62] Some matters were put to Mr Semets in cross-examination which were bare unfounded accusations. Mr Semets' denials of these allegations were convincing. The allegations were that Mr Semets had tailored his valuation to favour the Plaintiff out of sympathy and that he had adjusted his valuation fee on the same basis. Implicit in this is that he was generally prepared to favour the Plaintiff, allegations which go to his professional integrity and objectivity. Presumably the allegations were made on the Defendant's instructions. The convincing denials by Mr Semets and the failure by the Defendant to adduce any evidence to support those allegations reflects poorly on the Defendant.

[63] Objection was raised to the admissibility of Mr Loveridge's evidence based on evidentiary principles. Mr Young, for the Plaintiff, challenged the evidence based on authority of *Makita (Australia) Pty Ltd v Sproules*[9]. In that case, Heydon JA emphasised that the duty on a expert was to furnish the trier of fact with criteria to enable the valuation of the validity of the expert's conclusion. This principle was seemingly supported by the Defendant's submissions. His Honour then went on to say that it is inappropriate for an opinion to be attributed weight if the conclusions cannot effectively be scrutinised. However, that does not necessarily mean that it is inadmissible.

[64] In support of Mr Young's objection he pointed out that, clearly correctly in my view, that Mr Loveridge's valuation did not set out the data that he used

[9] (2001) 52 NSWLR 705

in coming to his conclusions. Contra the valuation of Mr Semets where he set out in sufficient detail the evidence of the sales of properties which he used to form his opinion.

[65] Mr Young submitted that valuation is a science and, as with all sciences and in accordance with *Makita (Australia) Pty Ltd v Sproules*[10], it is important to be able to evaluate the data used in coming to a conclusion. As to valuation being a science it is interesting to note the comments of Stephen J in *Riverbank Pty Ltd v Commonwealth*[11], (discussed in Freckelton & Selby, *Expert Evidence, Law Practice, Procedure and Advocacy*, 4th Ed, at page 1253) namely:-

> "Even the first step of selecting sales of properties thought to be sufficiently comparable is attended with difficulty. But all this is the stuff of valuation, the reason why it is an art, not a science (emphasis added)."

[66] Mr Loveridge's valuation refers to and relies on information as to sales provided by others. That indicates that he has relied on data. His failing is that he has not set out that data. A valuer is entitled to rely on information provided by others. I think that it is a well established principle that a valuer may rely upon information obtained from his professional brethren to formulate an opinion provided that he does not go into hearsay information related to any particular comparable transaction. (See generally Freckelton & Selby, *Expert Evidence, Law Practice, Procedure and Advocacy*, 4th Ed, at pp 1253-1258).

[10] (2001) 52 NSWLR 705
[11] (1974) 48 ALJR 483

[67] Based on the foregoing, I am of the view that although Mr Loveridge's evidence lacks background sources and data, the evidence is admissible. However, for the reasons stated above Mr Semets' evidence is to be preferred.

[68] Based on that I find that the value of the subject land and for current is $325,000.00. There is no challenge to the valuation by Mr Loveridge of other items such as stock, plant and equipment. Indeed this is something that is clearly within his expertise as a business broker and auctioneer. I accept that part of Mr Loveridge's evidence and find the value of the livestock to be $27,750 and of the plant and equipment to be $27,250.00.

[69] I am able to fully accept, fully reject or accept in part the evidence of any one or more witnesses. I do not consider it appropriate to entirely reject one version in favour of another in light of the failings on both sides. Fortunately, there is a lot of undisputed evidence. Findings on disputed evidence will be resolved having regard to the foregoing and to the extent there exists other objective evidence or other acceptable corroborating evidence supporting a party's version. I have accepted the evidence which I consider to be the most correct version having regard to the foregoing.

[70] I now turn to determine the appropriate entitlements of the Plaintiff pursuant to section 18 of the Act so as to compare that to her entitlement pursuant to the separation agreement to ascertain whether there has been an inequitable

division as a preliminary to determining whether the separation agreement ought to be set aside.

[71] Preliminary to that is the issue of the Plaintiff's parcel of shares. These are valued in the order of $45,000.00 and represent all that is left of her inheritance previously referred to. She had contributed the cash component of that inheritance and that counts as a financial contribution for that purpose. However there seems to be a difference of opinion as to whether those shares can be taken into account in the making of an adjustive property order. In *Ottley v Chester*[12] Mildren J approved of the decisions in *Evans v Marmont*[13] and in *Wallace v Stanford*[14] as it applied to the issue of an inheritance. Both cases dealt with the New South Wales equivalent of section 18 of the Act. Mildren J noted and held that those cases made it perfectly clear that an inheritance was not something to be taken into account. He accepted Mahoney JA in *Wallace v Stanford*[15] where he said that a windfall has no relationship to the exercise of the Court's discretion. Accordingly, the Plaintiff's shares cannot be taken into account.

[72] The exercise of the jurisdiction in section 18, per *Kardos v Sarbutt*[16] and *Evans v Marmont*,[17] involves three main steps. Firstly, the identification and valuation of the property of the parties to determine the property of the parties or of either of them which may be subject to an adjustive property

[12] [2010] NTSC 38
[13] (1997) 21 Fam LR 760
[14] (1995) 19 Fam LR 430
[15] (1995) 19 Fam LR 430
[16] (2006) 34 Fam LR 550
[17] (1997) 21 Fam LR 760

order. Secondly, the evaluation and balancing of the respective contributions of the parties referred to in that section which typically though not invariably results in an apportionment between the parties on a percentage basis of the overall contributions of the types set out in section 18. Thirdly, the determination of the order required to recognise and compensate the parties for those contributions which typically leaves the parties with the percentage determined by step two of the property identified by step one.

[73] The identification and valuation of the property of the parties is undertaken typically at the date of trial (*Parker v Parker*[18] and *Kardos v Sarbutt*[19] and *Ottley v Chester*)[20]. In cases where there have not been ongoing contributions by one party which have benefited the other party since separation, it may be appropriate to adopt the date of separation as the appropriate date. (*Kardos v Sarbutt*)[21].

[74] There are a number of recognised principles applied in the course of the second step. In summary form, these are:-

- Contributions as a homemaker and parent are not inferior to financial contributions (*Mallet v Mallet*,[22] *Evans v Marmont*).[23] This has minimal application of the facts of the current case.

[18] (1993) 16 DFC 95-139
[19] (2006) 34 Fam LR 550
[20] [2010] NTSC 38
[21] (2006) 34 Fam LR 550
[22] (1984) 156 CLR 605
[23] (1997) 21 Fam LR 760

- Contributions before cohabitation commences and those post separation and before trial are relevant (*Kardos v Sarbutt*).[24] This may have some application on the facts here as the Defendant claims significant post separation financial contributions. In addition the Plaintiff acquired the home in Karama post the separation;

- The Court is not required to approach the exercise of its discretion analogous to the taking of partnership accounts, rather it is preferable that the Court makes a holistic judgment in the exercise of a discretionary power of a general kind (*Kardos v Sarbutt*).[25]

[75] In relation to the third step, the Court is concerned with what is just and equitable having regard to, and only to, the respective contributions of the parties of the type referred to in section 18 without regard to factors such as the respective needs of the parties (*Evans v Marmont*).[26]

[76] As to the contributions of the parties, in my view the best approach to determine this and to achieve the required balancing between financial and non-financial contributions on the facts of this case is to look at the total of the sources of the contributions of each party. It is a relatively straightforward task to identify the assets of the parties before the commencement of the relationship. There is little dispute in that respect. Likewise, there is sufficient undisputed evidence to enable a sufficiently

[24] (2006) 34 Fam LR 550
[25] (2006) 34 Fam LR 550
[26] (1997) 21 Fam LR 760

accurate estimate of the parties' net income during the relationship. Lastly, with one adjustment, it is a relatively straightforward task to identify the post separation asset position of the parties. Putting a value on the non financial contributions of the parties completes the process. Determining contributions based on this simplifies the process. Both counsel have suggested various calculations for the purposes of this task. My approach better reflects the holistic approach suggested by *Kardos v Sarbutt*.[27] On that basis the respective sources of the parties' contributions are as follows:-

The Plaintiff:

1.	Inheritance	$205,000.00
2.	Proceeds of Magnetic Island unit	143,000.00
3.	Superannuation drawings	49,000.00
4.	Nett income	260,000.00
5.	Non-financial contribution	32,000.00
TOTAL		$689,000.00

The Defendant:

1.	Proceeds of Millner Property	$257,000.00
2.	Nett income	75,000.00
3.	Motor vehicle trade in	3,000.00
4.	Non-financial contribution	48,000.00
TOTAL		$383,000.00

[27] (2006) 34 Fam LR 550

[77] Having regard to the foregoing, contributions are near enough to 65/35 in favour of the Plaintiff.

[78] The pool available for distribution with values as I find them comprises:-

1.	Adelaide River Property	$325,000.00
2.	Cattle	27,750.00
3.	Stock	27,250.00
4.	Karama	1,500.00
5.	Add back	30,000.00
6.	Toyota motor vehicle	8,000.00
7.	Plaintiff's net credit at bank	3,400.00
TOTAL		$422,900.00

[79] As to the Karama house, that is a post separation asset of the Plaintiff. It is the house property acquired by the Plaintiff and to which the $50,000.00 payment was applied. The separation agreement acknowledged that and it also acknowledged that the Defendant wished to occupy the Adelaide River Property pending a full property settlement. The acquisition of the Karama home by the Plaintiff enabled that to occur.

[80] The evidence is to the effect that the value of the Karama home has appreciated since acquisition. It was valued at $450,000.00 in February 2010. The Defendant's direct contribution to that home was the payment of $50,000.00 pursuant to the separation agreement. I do not consider that this is a contribution for adjustive property order purposes. It is in the nature of a part award or a set off. However the Plaintiff did divert considerable

income to superannuation during the term of the relationship. As she applied $60,000.00 of her superannuation to the acquisition of the home, the Defendant thereby has made an indirect financial contribution. Nonetheless, only a proportion of the increased value of the Karama home should go into the pool. The increase in value is $35,000.00. The superannuation draw represented 11% of the purchase price. I assess the amount which is to be the subject of the adjustive order at $1,500.00.

[81] The amount identified as add backs represent an adjustment to account for the Defendant's failure to adequately explain what has occurred with the balance of funds he held after the separation. He deposed to having $120,000.00 in his bank at the time of separation. These came mostly from the sale of the Millner property. He also deposed to having $10,000.00 in superannuation. In his affidavit of 16 April 2010, the Defendant deposes to the balance in his account then being approximately $600.00 and a nil superannuation balance. I am not, as Mr Harper submits, adding back funds which the Defendant no longer has. I am not convinced that the funds have been disposed of the Defendant. I have rejected his evidence as to the bulk of the expenditure he claimed that those funds were applied to. He has only accounted for approximately $16,000.00. The interim payment accounts for a further $50,000.00 of that but that leaves up to $54,000.00 unaccounted for.

[82] I do not accept as Mr Harper submitted, that the Defendant's claimed expenditure was genuine and his lack of precise records should not detract

from that. I have already set out why the Defendant lacks credibility generally. His evidence in relation to the extant expenditure played a part in that assessment. Moreover, the extent of the discrepancy is too large to be explained away as simply being a reflection of a man who fails to keep receipts or is not overly troubled by keeping records or paperwork. I think it goes beyond that. His unlikely explanation suggests that he has secreted those funds under the guise of having used them for financial contributions. The Plaintiff submits that $40,000.00 is the appropriate add back amount. I consider it should be $30,000.00 as some allowance needs to be made for some genuine unaccounted expenditure.

[83] As to whether the separation agreement should be set aside, under the interim separation agreement the Plaintiff was to receive $50,000.00 as an interim payment and the parties were entirely free to negotiate a final settlement once a valuation was obtained. The Plaintiff was not bound by that valuation. The final separation agreement differed in that it bound the Plaintiff to equal contributions and it provided for an equal division of the net value of the Adelaide River Property and related assets once the valuation was obtained. It also bound the Plaintiff to accept the valuation. Having regard to my findings as to the value of the Adelaide River Property, even allowing for an equal entitlement between the parties for present purposes, being bound by the valuation represents a disadvantage to the Plaintiff of $125,000.00, before adjustment, on that account alone. In my view a serious injustice occurs on that account alone given that the amount

represents nearly 30% of the value as found by me of the Adelaide River Property and related assets. That the agreement acknowledges and is based on an equal contribution when that is not the case on my findings is also a serious injustice.

[84] Further, having regard to the assets retained by the parties and their values, applying the separation agreement as signed to the division of the net value of the Adelaide River Property will result in the Plaintiff receiving approximately $147,000.00 and the Defendant $167,000.00 of the total pool. Expressed as a percentage, the Plaintiff receives 47% and the Defendant 53%.

[85] The discrepancy between the Plaintiff's contributions and her entitlements pursuant to the separation agreement are a serious injustice in terms of *Van Jole v Cole*[28]. The agreement must be set aside on that account also.

[86] I will briefly deal with the second basis on which the Plaintiff sought that order namely the alleged misconduct by the Defendant in the pre-agreement process.

[87] Although well argued and presented, the evidence did not support that contention in my view. The evidence was not, put simply, sufficient for me to draw an inference that the Defendant and his daughter deliberately misrepresented matters and, with the unintended assistance of Mr Maley, manipulated the Plaintiff. In the end, the Plaintiff had other options but left

[28] [2000] NTSC 18

things to the last minute and put herself in a position of disadvantage. She was keen to acquire her own home and driven by that motivation, acted foolishly when other perhaps less preferable but available options existed. She ignored Mr Maley's recommendation to consult her lawyer or another lawyer. It is difficult to accept that time was so critical for her. She had the option until then of commencing proceedings. She did nothing at all until at a critical time for the acquisition of the Karama home.

[88] As to the actual orders, the parties have contemplated all along that the Defendant would keep the Adelaide River Property and related assets. He may not now be able to do so but nonetheless he should be given an opportunity to take up that option. One month should suffice for that purpose. If he opts to do that then, he must pay the Plaintiff 65% of the value of those assets, i.e., $247,000.00, less the $50,000.00 already paid. A net set off of the remaining assets according the 65/35 adjustment results in a net adjustment to the Plaintiff of $14,985.00 and is on the basis that she retains the assets numbered 6 and 7 (the remaining amounts being notional only) in paragraph 77.

[89] If the Defendant fails to take up that option within that time then the Adelaide River Property and related assets are to be sold and divided as to 65% to the Plaintiff, less the $50,000.00 already paid plus the adjusting amount referred to in paragraph 88. The Defendant then retains the balance. Again the Plaintiff retains the assets numbered 6 and 7 in paragraph 77.

[90] I will hear he parties as to costs and ancillary orders.