Fernon v Lawton [2010] NTSC 75

PARTIES:	JOAN PATRICIA FERNON
	v
	MICHAEL LAWTON
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	43 of 2009 (20908447)
DELIVERED:	23 December 2010
HEARING DATES:	4 & 5 October 2010
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

De Facto Relationships – Adjusting property order – Evidence of value of superannuation.

De Facto Relationships Act 1991 ss 14, 15, 16, 18.

Kardos v Sarbutt (2006) 34 Fam LR 550; *Evans v Marmont* (1997) 21 Fam LR 760; *Mallet v Mallet* (1984) 156 CLR 605; *Parker v Parker* (1993) 16 DFC 95-139; *Ottley v Chester* [2010] NTSC 38; *Pierce v Pierce* (1999) FLC 92-844.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Young
Defendant:	Mr Black

Solicitors:

Plaintiff:	De Silva Hebron
Defendant:	Cecil Black Family Lawyer

Judgment category classification:	B
Judgment ID Number:	LUP1011
Number of pages:	27

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

Fernon v Lawton [2010] NTSC 75
No. 43 of 2009 (20908447)

BETWEEN:

JOAN PATRICIA FERNON
Plaintiff

AND:

MICHAEL LAWTON
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 23 December 2010)

[1] The matter before the Court is an application by the Plaintiff for an adjusting property order pursuant to section 18 of the *De Facto Relationships Act* ("the Act").

[2] Section 18 of the Act relevant 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) A court may make an order in respect of property whether or not it has declared the title or rights of a de facto partner in respect of the property.

[3] There is no dispute as to satisfaction of the prerequisite conditions in sections 14, 15 and 16 of the Act, nor as to the existence of the relationship and its duration. It is agreed that the relationship commenced in April 1987 and that the parties separated on 21 September 2007. The proceedings were commenced on 6 March 2009. There are two children of the relationship, David born on 25 September 1991 and Kate on 30 May 1997. The issues which remain in dispute are limited but the background facts are nonetheless relatively complex.

[4] Both parties were in full time employment throughout the relationship but for periods of 14 and 28 months respectively when the Plaintiff was off work or on maternity leave following the birth of the children of the relationship. The non financial contributions in relation to the care for children and homemaker contributions were approximately equal save that in

the aforesaid aggregate period of 38 months, the Plaintiff had a greater non financial contribution. At least balancing that though is that the Defendant was the sole source of family income during those periods. All things considered, I find equality of non financial contributions.

[5] Both parties took advantage of their entitlement to salary sacrifice into superannuation, more so in the case of the Defendant. The Plaintiff claims that as a result there was greater reliance on her income for family needs. Although that appears self evidently correct, the Defendant does not agree and asserts that in any event tax savings resulted from the salary sacrifice arrangement.

[6] The Plaintiff asserts that she earned more than the Defendant in the first four years of the relationship up to July 1991 when the first of the children was born. She asserts that the Defendant slowly caught up to her salary and by 2007 the Defendant was earning approximately $10,000.00 per annum more. She claims however that this was partly offset in the amount of approximately $5,000.00 due to her superior travel allowance entitlement through her employment. The Defendant largely agrees but in turn claims in his favour the value of his motor vehicle entitlement through his employer and a greater level of homemaker contribution whilst the Plaintiff undertook some part-time studying.

[7] In broad terms I find that the employment terms and salaries of the parties over the whole of the term of the relationship were approximately equal.

[8] The Plaintiff contends that the salaries of the parties were the bulk of the source of the parties' financial contributions. This was put to the Defendant in cross examination but he would not agree save to say that they represented at least 50% of the financial contributions. He maintained, rightly so in my view, that the proceeds of sale of his pre-relationship mining shares and the sizable inheritance from his mother's estate were a significant contribution. As at 1987, in terms of the average salary of the parties they would represent of at least five, and possibly more, years net salary. Even in 2004, the inheritance the Defendant received from his mother's estate must have been the equivalent of at least three, and possibly four, years net salary. This is before the considerable value of the lump sum nature of those contributions is factored in.

[9] The Plaintiff asserts that the asset pool of the parties at the commencement of the relationship was "negligible" save for the Plaintiff's mining shares. The Defendant does not agree and claims there some savings as well, although he has not elaborated as to the extent of those savings and absent that I have no basis for finding other than as the Plaintiff asserts.

[10] The items of real estate acquired during the relationship are:-

(1) A house property at Humpty Doo was purchased in 1989 and sold in 2003;

(2) A one third interest in an investment property at Surry Hills in Sydney was purchased in 1990. By 1996 the parties had purchased the remaining interests. The property was sold in December 2007;

(3) An investment property in Katherine was purchased in August 2000 and sold in November 2008;

(4) A house property in Parap was purchased in September 2002.

[11] The parties have agreed that the value of the Parap home for the purposes of these proceedings is $875,000.00.

[12] Prior to the purchase of the home at Humpty Doo, the parties resided in accommodation subsidised by the Plaintiff's employer. The total cost of the Humpty Doo property including expenses was $100,000.00 of which $45,000.00 was borrowed. The remainder was contributed equally by the parties from savings. Other than a lump sum paid from the proceeds of the Plaintiff's inheritance, there is no evidence as to the source of the repayments for that loan. Presumably they were met from combined resources.

[13] In June 2004 the Defendant inherited approximately $219,000.00 from his mother's estate. This, combined with $148,000.00 from the proceeds of the sale of his mining shares, was partly reinvested in other shares. Some deposits were also made into the Defendant's superannuation account and some was used to pay off debt.

[14] In relation to the mining shares previously referred to, the Defendant owned a large number of those shares at the commencement of the relationship. They were acquired in 1986 and were approximately 120,000 in number. The shareholding increased through allocation of extra shares by way of a dividend reinvestment scheme. In 1996 a further 17,142 shares were purchased with joint assets but were put into the Defendant's name. The net result of all of those transactions is that the total shareholding was then 146,869 shares. A series of takeovers saw those shares transposed into shares in Placer Dome and the entire shareholding was sold in 2005 for $163,069.00.

[15] As to the Defendant's inheritance, those funds were expended as follows:-

(1) $91,000.00 was paid off the loan over the Parap home in September 2004;

(2) $50,000.00 was paid off the loan over the Surry Hills property in December 2004;

(3) $64,000.00 was expended in the purchase of Auzex shares in May 2005 and $11,500.00 in the purchase of Schaffer shares in July 2005.

Of the $50,000.00 paid off the Surry Hills loan, $26,000.00 was subsequently redrawn to buy Great Southern woodlots.

[16] The proceeds of sale of the mining shares were expended as follows:-

(1) $52,500.00 in purchasing additional Auzex shares in July 2006;

(2) $6,000.00 was invested in Telstra in November 2006;

(3) $32,500.00 was applied in purchasing additional Auzex shares in July 2007;

(4) The balance was paid into the Defendant's AGEST Superannuation account.

[17] In 1990 the Plaintiff inherited approximately $40,000.00 from her mother's estate. She says that $7,000.00 was applied to paying off the loan on the Humpty Doo property. The balance, together with further borrowings of approximately $42,000.00 was invested in the one third share of the Surry Hills property.

[18] A further $65,000.00, funded jointly by the parties from borrowings, was spent on improvements to the Surry Hills property shortly after it was acquired. In 1995, and again in 1996, the parties borrowed funds to buy out the interests of the remaining co-owners. The evidence shows that most of the increase in value in the property came after the parties had acquired the entirety of that property. Nonetheless I find that the significant contribution from the Plaintiff's inheritance made that investment possible. This property was ultimately sold for $915,000.00 in December 2007 and the net proceeds of sale of $784,072.00 were divided equally on an interim basis.

[19] The Defendant's parents gave the parties $15,000.00 in 1989 which was used to reduce the debt on the Humpty Doo property. The Plaintiff claims

however that some ten years later the Defendant expended $12,000.00 on the home of his parents. The Defendant however maintains that the $15,000.00 was provided by his parents as a gift. He says that the repairs to his parents' home occurred in 1995 and that expense was shared between him and his brother. He says that his share was $5,000.00. I accept the Defendant's evidence on this point.

[20] In 2003 the Plaintiff inherited $10,000.00 from her brother's estate. She says, without details, and apparently without dispute by the Defendant, that the amount was generally expended for the purposes of the relationship. The amounts in this and the preceding paragraph are sufficiently close in value, after allowance for the differing time periods, to set off against each other when taking a broad approach to the determination of contributions.

[21] There are a number of superannuation funds held by the parties. Both have a Commonwealth Superannuation Scheme account. The Plaintiff assert that the value of the benefit in her fund as at the separation date was approximately $212,000.00 and in the case of the Defendant approximately $173,000.00.

[22] The Defendant says that the CSS superannuation is a defined benefit scheme and the main benefit is the indexed pension. The amount of the pension entitlement is based on years of service and final salary. All of that is fairly well known. He adds that owing to the age difference between himself and the Plaintiff, the Plaintiff will make additional contributions through

ongoing employment and thereby her final pension benefit will be greatly enhanced. Logically that follows in my view. He argues that that needs to be taken into account and I agree.

[23] However no evidence has been produced to enable me to do so. The Defendant asserts that if regard is had to the value of the pension then the respective values of the funds are approximately $804,000.00 in the case of the Plaintiff and approximately $722,000.00 in the case of the Defendant. Although the Defendant may be correct in principle, his assertion of value is inadmissible. I can only assess values based on the available, and admissible, evidence. In this context I only have admissible evidence of the balance of the various accounts. There is no evidence from which even an estimated assessment of the pension component of the CSS superannuation could be made. That would require actuarial evidence. Without that the only practical approach is to determine the value of that superannuation at separation based on the capital balance of each account.

[24] Both parties also have AGEST Superannuation accounts, two in the case of the Defendant. The Plaintiff claims that as at the date of separation, the balance of her account based on advice received from the fund was approximately $33,000.00. Similar documentary evidence shows the value of the Defendant's fund was approximately $307,000.00 at a time well after the separation. The Plaintiff submits that the value of the Defendant's AGEST superannuation as at the separation date is approximately $264,000.00. This is done by calculation taking guidance from documentary

evidence in respect of her own AGEST account. The Plaintiff has arrived at that amount by reducing it in the same proportion (86%) as the capital reduction of her own AGEST account between a comparatively proximate date and the separation date. This calculation is necessary as the only documentary evidence of the balance of the Defendant's account sets out the balance well after the separation date. There is otherwise no evidence of the balance to the Defendant's credit in those accounts as at separation.

[25] The Defendant objects to the accounts being valued on this basis as it does not take into account the effect of losses which have been incurred since separation as well as draws affected by him to minimise tax by way of transition to retirement. He says that these are of the order of $50,000.00. The Defendant points out that the flaw in the Plaintiff's approach is an assumption that the investments within each parties' accounts are of the same nature. He says they are not and that differing loss rates apply.

[26] Irrespective of whether or not the Defendant is correct in principle, there is no evidence which enables the value of the accounts to be assessed with regard to those factors. Expert evidence would be required to establish that. The Plaintiff's approach appears to me to be the best approach based on the available evidence and I adopt it.

[27] The Defendant also has an NTSS fund. That is a non contributory superannuation fund. It was apparently given to the Defendant in lieu of a

pay increase at some point. The value of the benefit as at February 2010 was approximately $61,000.00.

[28] The Defendant has continued in occupation of the Parap home since separation. The Plaintiff claims an allowance to represent the benefit received by the Defendant in that regard. The Plaintiff's claim is based on the rental value of the property. The Defendant counters that appropriate allowance should be made for the nature of the tenancy i.e., long term owner occupier and the benefits which flow from that compared to an actual rental situation. There would also have been rental management fees in a commercial rental arrangement. The Defendant has paid utilities, repairs and maintenance. Income tax would also have been payable by the Plaintiff and possibly also some capital gains tax, had there been a commercial arrangement. The Plaintiff's taxable income at the appropriate time was of the order of $90,000.00 per annum. Any net income from rental would therefore attract income tax at the rate of 40%. If a rental basis is to be adopted for this purpose then an appropriate allowance for these factors will need to be made.

[29] The Plaintiff acquired some real estate after the separation. In particular she purchased a house property in Moil very soon after the separation. When that was sold the proceeds of sale were in part applied to the purchase of properties at Pascoe Vale and Woodend in Victoria.

[30] The evidence reveals that the Plaintiff was only able to secure funding to purchase the Moil property by reason of the Defendant agreeing to give a guarantee for the loan. The form of the guarantee document was tendered. It reveals that the Defendant guaranteed for the full value of the loan, plus enforcement expenses. The guarantee was secured over the Surry Hills property. Clearly the financier was not prepared to rely only on security over the Plaintiff's interest in that property. Without the Defendant's guarantee, the Surry Hills property could not secure the Plaintiff's borrowings given that the Surry Hills property was in joint names. The overall effect is that the Surry Hills property was used as security to enable the Plaintiff to borrow the funds required to purchase the property in Moil. As the Defendant undeniably had an interest in the Surry Hills property, his guarantee therefore is an indirect contribution to the acquisition by the Plaintiff of the Moil property.

[31] The two properties in Victoria however are entirely different. At the time that the Moil property was purchased the parties had agreed to the sale of the Surry Hills property and the sale was in process albeit at an early stage. When the Surry Hills property was sold and the parties agreed to a distribution of the net proceeds of sale without prejudice to the property settlement, the Plaintiff applied her share of the funds from that distribution to discharge the loan on the Moil property. Thereafter, and some 18 months post the separation, the Plaintiff partly utilised those funds from the sale of the Moil property in the acquisition of both the Woodend property and the

Pascoe Vale property. The Defendant attempts to categorise the various distributions as other than an interim distribution but that is untenable. In my view, as the parties agreed to equally distribute those proceeds, they were entitled to use the funds from that distribution as they saw fit. The Plaintiff needed alternative accommodation in consequence of the separation. I agree, as Mr Young submitted that it was simply the Plaintiff getting on with her life post the separation.

[32] Although the Defendant can rightly claim some contribution to the acquisition of the Moil property due to his guarantee, it is not appropriate to trace those funds through to the acquisition of the two Victorian properties. The position might have been different had the Defendant's guarantee still been in existence at the time that the Moil property was sold. That was not the case.

[33] The Defendant also suggested that some capital gains losses occurring on share sales prior to the commencement of the relationship were an indirect contribution as they offset the capital gains on the sale of his mining shares. Mr Young challenged the Defendant's claim and cross examined him about various taxation documents. The documents were of such a nature that I would have expected them to contain some reference to the alleged liability. They did not. The Defendant attempted to explain that with a vague suggestion that it did not need to appear in those taxation documents, a suggestion that I find extraordinary. I reject that evidence.

[34] The exercise of the jurisdiction in section 18 of the Act, per *Kardos v Sarbutt*[1] and *Evans v Marmont*,[2] 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 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.

[35] The identification and valuation of the property of the parties is undertaken typically at the date of trial (*Parker v Parker*[3] and *Kardos v Sarbutt*[4] and *Ottley v Chester*[5]). 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*[6]).

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

---

[1] (2006) 34 Fam LR 550
[2] (1997) 21 Fam LR 760
[3] (1993) 16 DFC 95-139
[4] (2006) 34 Fam LR 550
[5] [2010] NTSC 38
[6] (2006) 34 Fam LR 550

- Contributions as a homemaker and parent are not inferior to financial contributions (*Mallet v Mallet*,[7] *Evans v Marmont*[8]).

- Contributions before cohabitation commences and those post separation and before trial are relevant (*Kardos v Sarbutt*[9]).

- 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*[10]).

[37] 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 of the Act without regard to factors such as the respective needs of the parties (*Evans v Marmont*[11]).

[38] The erosion principle has application in the current matter. This is relevant in respect of the Defendant's initial shareholding and the inheritance he received from his mother's estate. Similarly in the case of the Plaintiff, she also received an inheritance from an estate which was then applied to the acquisition to the Surry Hills property. The effect of the erosion principle is that the significance of an initial contribution may be diminished over time particularly in a long relationship once all other contributions, including non

[7] (1984) 156 CLR 605
[8] (1997) 21 Fam LR 760
[9] (2006) 34 Fam LR 550
[10] (2006) 34 Fam LR 550
[11] (1997) 21 Fam LR 760

financial contributions, are taken into account. In this respect the term "erosion" is a misnomer as we are not dealing truly with a question of erosion of contribution but with the question of what weight is to be attached to the initial contribution (*Pierce v Pierce*[12]).

[39] The relevance of the principle in the current case is highlighted in the case of the Defendant's initial holding of mining shares. Some further shares were purchased during the relationship from joint funds, the shares were transposed owing to corporate acquisitions and lastly the shares were sold and the capital gains tax liability which was incurred which was paid from the parties' resources.

[40] In respect of the Surry Hills property, that property was only able to be acquired due to the Plaintiff's inheritance. Thereafter the acquisition of the interests of co owners by the parties was all effected with joint funds. The Plaintiff's initial contribution was $33,000.00 out of a purchase price of $225,000.00. The acquisition occurred in 1990 and the property was sold for $915,000.00 in December 2007. Noting the values at the time that the last of the co owners' interest was purchased, it is clear that the most significant part of the capital appreciation of the property occurred in the later years of the ownership.

[41] Generally in respect of financial matters both parties have attempted to perform detailed calculations and some tracing of assets. The Defendant

[12] (1999) FLC 92-844

additionally submits that regard should be had to the benefit of savings in the form of tax minimisation and the saving of mortgage interest. Overall I think that such an approach unnecessarily complicates the process and is inappropriate in my view. In accordance with *Kardos v Sarbutt*,[13] a broader approach is preferable.

[42] Based on my assessment of the evidence the property pool comprises the following assets, with values in rounded figures:-

(1)	The Parap property			$875,000.00
(2)	The Surry Hills property			$784,100.00
(3)	The Katherine property			$106,500.00
(4)	The chattels			$42,700.00
(5)	Plaintiff's superannuation			
	(i)	CSS	$187,254.00	
	(ii)	AGEST	$28,828.00	
			$216,082.00	$216,100.00
(6)	Defendant's superannuation			
	(i)	CSS	$138,385.00	
	(ii)	AGEST	$251,159.00	
	(iii)	NTSS	$61,147.00	
			$450,691.00	$450,700.00
(7)	Great Southern woodlots			Nil
(8)	Telstra, Schaeffer, Wesfarmers			

[13] (2006) 34 Fam LR 550

	and Comsec Trading shares	$28,600.00
(9)	Coles, Telstra and Schaffer shares	$17,700.00
(10)	Auzex, Coles and AMP shares	$22,800.00
(11)	Scholarship fund	$39,000.00
(12)	Auzex shares	$104,400.00
Total		$2,687,600.00

[43] The proceeds of the Surry Hills property and the Katherine property as well as the personal property, have been distributed equally between the parties. The shares specified in item (8) represent the proceeds of sale of shares where the proceeds have gone to the Defendant and conversely, those in item (9) to the Plaintiff. The shares in item (10) have been distributed equally between the parties. The scholarship fund represents an investment to fund the education of the children of the parties, something which the Defendant wishes to be retained as is for that ongoing purpose. For now I will treat it as a divisible asset and the parties can then come to an alternative arrangement with respect to that fund if they wish.

[44] In the course of the Defendant's evidence he emphasised the extent of the variations in the value of the Auzex shares. He said that the listed price of the shares as at 4 October 2010 was $0.41 per share. The values relied on in the evidence were at the then current price of $0.46 per share. I have adopted the higher figure as the price varies from time to time, both up and

down, and as the absence of actual share numbers makes the recalculation problematic.

[45] The Defendant also ascribed a value of $20,000.00 to the “MIS products”. These products include the wood lots forming part of the Great Southern Forestry venture. Some of the wood lots relate to timber for chipping purposes and others, referred to as high value timber lots, relate to production of timber for furniture manufacturing purposes. Included also are some lots involving the production of olives and almonds. The Defendant accepts that the base wood lots have no current value but claims that the remainder have a value. He estimates this value at $20,000.00 which is partly based on his ongoing contributions. The Defendant’s estimate of value is unqualified and is based on untested assumptions. He said in part of his evidence that “the higher value timber may have some value” (emphasis added). The Defendant also relies on the report of his financial planner prepared in June 2008. Investment advice at that time might be indicative of value at that time at best. It is not even clear whether that advice precedes the collapse of the Great Southern Forestry venture. In that event its integrity as a valuation becomes more questionable. The figure ascribed by the Defendant is an unqualified opinion. Absent appropriate admissible evidence, I am not prepared to place any value on those products for the purposes of determining the pool. The lack of admissible and objective evidence of their value leads me to conclude that they have no value.

[46] As to the appropriate allowance on account of the Moil property, the Defendant's contribution was an indirect one, i.e., a guarantee which did not involve any actual financial contribution. It was secured over the Surry Hills property of which the Plaintiff has a superior contribution to that of the Defendant. The guarantee was of short duration, approximately three months only. I have determined that an appropriate allowance is $2,000.00. It is based on the length of time that the guarantee was in place, the respective entitlements on a contributions basis to the Surry Hills property and the extent of the appreciation of the Moil property averaged over the time the Plaintiff owned it, as best I can determine that.

[47] That then leaves the question of an adjustment on account of the occupation of the Parap property by the Defendant. The absence of a mortgage over that property leads me to conclude that an adjustment based on rental values is appropriate. The evidence that I have of rental value is that in the affidavit of the valuer, Mr Gore. He assesses the rental value of the property at various years and that averages out at $800.00 per week over the relevant period. Contrary evidence from the Defendant is that the average rental for the period is $725.00 per week. I prefer the valuation of Mr Gore as the evidence obtained by the Defendant is less considered and it is expressed to be an appraisal only.

[48] I accept however that significant set offs need to be made here on account of the matters in paragraph 28. Total rental over a three plus year period would be of the order of $135,000.00. Deducting 11% as rental management and

the like and a further 2% to allow for the owner occupier and long term tenancy factors amounts to a deduction of $17,500.00. I allow a similar amount to represent rates, taxes, insurance, maintenance and incidentals over the three year period. Net rental would therefore be $100,000.00. I estimate that of her half share, the Plaintiff would have incurred an overall tax liability of the order of $20,000.00. That results in a net adjustment of $30,000.00 in broad figures in the Plaintiff's favour.

[49] The evidence reveals that there are differing capital gains tax liabilities incurred and payable by the parties post the separation. The evidence of this comprised the affidavit of the Plaintiff's accountant, Nick Tsonis, sworn 30 September 2010. The total of the liability is $73,200.00, in rounded figures, on account of the Plaintiff's capital gains tax liability and $38,000.00 in rounded figures for the Defendant which gives a rounded total of $111,200.00. Deducting that liability from the net value I have determined above puts the net value of the pool at $2,576,400.00.

[50] The approach advocated by Mr Young as to the calculation of the amount required to be paid to the Plaintiff by way of adjusting property order is an appropriate one in my view and I adopt his methodology. However, I do not accept all of his assumptions and his calculations. In relation to the value of the Defendant's initial mining shares, I think his calculation oversimplifies the position. He has come to a weighting based purely on an arithmetical calculation. The Defendant points out that there is a flaw in this approach and I agree. That flaw is that it does not have regard to the history of the

acquisitions and additions to the shareholding over the period of time and the differing values at different times.

[51] The Defendant also argues that there was some value in the lump sum nature of the proceeds of sale, the opportunities thereby created and the interest savings made. The Defendant was not challenged on this and I agree with his contention.

[52] Mr Young's calculation put the current value of the shares purchased from the Defendant pre-relationship mining shareholding at $100,422.00. This was on the basis that it represented 88% of the total shareholding. The Defendant says that it should be 93.5% for the reasons stated above. He provided calculations on which this was based and he was not challenged on this. Nonetheless that percentage appears to me to be too high. I am prepared to fix it at 92.5% which includes some allowance for the value of the lump sum nature of the funds. Adjusting Mr Young's calculation accordingly, that puts the value at $105,600.00. Allowing an appropriate amount on account of the capitals gains tax on the sale of the initial shareholding which was paid from joint funds, I assign $89,000.00 as that net value for adjusting order purposes.

[53] Mr Young submitted that the value of the Plaintiff's contribution by way of her mother's inheritance traced through to the Surry Hills property is $79,000.00. I accept that calculation. He went on to submit that after allowance for the erosion principle the value of the Defendant's contribution

from his mining shares is approximately equal to that of the Plaintiff from the inheritance from her mother's estate. As I have assigned a value of $89,000.00 to the current value of the Defendant's pre-relationship shareholding for adjustment purposes, consequently I do not accept Mr Young's submission. An appropriate adjustment needs to be made. The difference in the Defendant's favour is $10,000.00.

[54] That leaves the matter of the current value of the contribution from the Defendant's inheritance from his mother's estate. The Plaintiff's case is that the value should be fixed at approximately $212,000.00. Importantly, $91,000 of that inheritance was used to pay off the Parap home loan. The Plaintiff's calculation does not have sufficient regard, even allowing for the payment occurring in 2004, to the value of the mortgage debt reduction to the family finances as a whole. Although Mr Young submitted that this contribution came late into the relationship, I do not consider that it came in so late that it should be diluted to the extent he suggests.

[55] Mr Young calculated that value at 8% of the net pool after a rounding to factor in the Plaintiff's contribution to the mining shares. On that same basis and to allow for the factor in the preceding paragraph, I think the value should be set at 8.2% of the net pool.

[56] The net amount of the adjustments for firstly the occupation of the Parap home by the Defendant ($30,000.00), secondly the guarantee for the acquisition of the Moil property ($2,000.00) and lastly the amount to

equalise the Defendant's mining shares against the Plaintiff's inheritance ($10,000.00) is therefore $18,000.00 which represents 0.7% of the net pool.

[57] Accepting that other than for these adjustments, an equal distribution would be just and equitable having regard to the factors stated in section 18 of the Act, the net overall adjustment should be 7.5% in the Defendant's favour. I make no adjustment on account of balancing the financial and non financial contributions given that I have found they are sufficiently equal.

[58] Of the assets listed in paragraph 42 above, the Plaintiff has received those items numbered (5) and (9) as well as half of items (2), (3), (4), (10) and (11). According to the value I have attributed to those items, that comes to $731,350.00. After allowance for the capital gains paid or payable by her as set out in paragraph 49 ($73,200.00), that becomes $658,150.00. The corresponding total in relation to the Defendant is the sum total of the values specified in items (6), (7), (8) and (12) as well as half of items (2), (3), (4), (10) and (11), namely $1,081,250.00. After likewise allowing for the capital gains paid or payable by him ($38,000.00), that becomes $1,043,250.00.

[59] Applying the percentages that I have arrived at on the basis that each party retains the benefit of the assets agreed to be retained or otherwise in their possession, if the Parap home sells for a net of $875,000.00 the Plaintiff should receive $533,435.00 ($1,191,585.00, i.e., 46.25% of the net pool, minus $658,150.00) to achieve a just and equitable distribution in

accordance with section 18 of the Act. That represents 61% of the proposed sale price of the Parap home. An appropriate variation needs to be made depending on the actual sale price of the Parap home and the selling costs. I will give liberty to apply in respect of that as well as any consequential orders. I will hear the parties as to the final form of order, any other consequential orders and as to costs.