Benfield v Farebrother [2011] NTSC 65

PARTIES:	JULIA BENFIELD
	v
	JAMIN FAREBROTHER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	36 of 2010 (21013180)
DELIVERED:	30 AUGUST 2011
HEARING DATES:	16, 17, 18, 20 MAY 2011 AND WRITTEN SUBMISSIONS TO 29 JULY 2011
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

De Facto Relationships – Application for adjustive property order – Factors relevant to determining the duration of the relationship – Principles relevant to assessment of entitlements – Approach to be taken in determining entitlements – Time limit for commencing actions under the Act.

Practice and Procedure – Sufficiency of prayer for relief – Seeking relief not claimed on the pleadings – Request for extension of limitation period made after closing of evidence.

De Facto Relationships Act ss 3A, 14, 15, 16, 18
Supreme Court Rules r 13.02

Dare v Pulham (1982) 148 CLR 658;

Blay v Pollard [1930] 1 KB 628;
Wicks v Bennett (1921) 30 CLR 80;
Aon Risk Services Australia Ltd v Australian National University (2009) 239 CLR 175.
Kardos v Sarbutt (2006) 34 Fam LR 550.
Evans v Marmont (1997) 21 Fam LR 760.
Parker v Parker (1993) 16 DFC 95-139.
Ottley v Chester [2010] NTSC 38.

Grant, Civil Procedure Northern Territory.
Williams, Civil Procedure.

REPRESENTATION:

Counsel:

Plaintiff:	Mr Black
Defendant:	Ms Gillies

Solicitors:

Plaintiff:	Cecil Black Family Lawyers
Defendant:	Ward Keller Lawyers

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

Benfield v Farebrother [2011] NTSC 65
No. 36 of 2010 (21013180)

BETWEEN:

JULIA BENFIELD
Plaintiff

AND:

JAMIN FAREBROTHER
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 30 August 2011)

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

[2] The prayer for relief in the Plaintiff's Statement of Claim sought orders as follows:-

1. That the Plaintiff retains the property at 45 McInnis Circuit, Driver;

2. That the Defendant settle upon the Plaintiff such other property as it is in the opinion of this Court necessary to effect the principles set out in section 18 of the *De Facto Relationships Act*; and

3. That the Defendant retain his property interests.

[3] When the Plaintiff's case was opened at trial it was revealed that the specific orders that the Plaintiff sought were for a payment representing 40% of the net pool on the basis that the Plaintiff retained her house situate at 45 McInnis Circuit, Driver ("the Driver Property") and with an appropriate adjustment on that account. The Defendant opposes any order in favour of the Plaintiff and seeks orders dismissing the Plaintiff's claim. The Defendant asserts that the distribution of assets to date has resulted in a distribution in favour of the Plaintiff more favourable then she would be entitled to under the Act.

[4] The first mention that the Plaintiff sought a distribution based on 40% of the net pool came in the Plaintiff's opening. The Defendant complains of the late notice of the precise orders that the Plaintiff seeks. However in my view the prayer for relief gives sufficient notice of the nature of the Plaintiff's claim. Order 13.02(1)(c) of the *Supreme Court Rules* ("the Rules"), which is set out in full below, only requires a pleading to "*state specifically the relief or remedy, if any, claimed*". The extant prayer for relief sufficiently complies.[1]

[5] There is no dispute that the parties were in a de facto relationship. The satisfaction of the pre-requisites specified in sections 15 and 16 of the Act has been admitted. There is a dispute both as to the commencement date and the termination date of the relationship. The Plaintiff claims that it

[1] See generally, Grant, Civil Procedure Northern Territory at para 5.13.112 and Williams, Civil Procedure at para 13.02.40

commenced on 25 August 2002 whereas the Defendant says that it was in late October or early November of that year. The Plaintiff says that the relationship ended on 28 November 2008. The Defendant says that the relationship ended in June 2006.

[6] Much turns on which of the two dates I find was the commencement date and both parties have made adverse suggestions against the other concerning motives and possible advantage derived from their versions. Mr Black, counsel for the Plaintiff submitted that the Defendant's pre relationship contributions benefit from a finding of the later date as the evidence reveals that the Defendant's savings were then approximately $30,000.00 more. Ms Gillies for the Defendant points out that the basis of the Plaintiff's claim for non-financial contribution in respect of the acquisition of the Howard Springs Veterinary Clinic ("HSVC") is adversely affected by a finding in favour of the Defendant's version. Agreement for the sale and purchase of that practice was reached in September 2002 with completion occurring in February 2003. Although the Plaintiff asserts a contribution to that practice beyond its acquisition, relevant to the issue of the commencement date of the relationship is that the Plaintiff alleges that the Defendant purchased the practice as a result of the Plaintiff's suggestion, the underlying implication being that absent that suggestion, the Defendant would not have purchased that practice.

[7] The dispute as to the date that the relationship ended is more significant however. The proceedings in this matter were commenced on 19 April 2010

hence if the relationship ended anytime prior to April 2008 then the Plaintiff's application is out of time and requires leave pursuant to section 14(2) of the Act.

[8] The Plaintiff has sought the necessary leave in the event that I find that the proceedings have not been commenced within the time mandated by section 14(1) of the Act. The request was made late in the proceedings. It was made in the Plaintiff's written submissions filed after the Defendant's submissions and approximately two months after the evidence closed.

[9] The proceedings were commenced by Originating Motion filed on 19 April 2010. The relief claimed was a declaration as to the existence of a de facto relationship, an adjusting property order and costs. After I made an order that the proceeding continues as if commenced by writ, a Statement of Claim was filed by the Plaintiff on 27 September 2009. There it was pleaded that the de facto relationship commenced on 25 August 2002 and ended on 28 November 2008. The prayer for relief does not seek the declaration as to the existence of a de facto relationship which was in the prayer for relief in the Originating Motion. The Statement of Claim then elaborates on the adjusting property order sought.

[10] The Defence denied the alleged separation date and asserted a separation date of November 2006. Moreover the Defence sought an order for dismissal of the Plaintiff's claim as being out of time. There has not been an amendment to the Statement of Claim to seek an order for an extension.

[11] The basic purposes of pleadings are to give notice to the other party of the case they must prepare to meet as well as to define the issues for trial. Notice ensures procedural fairness and the general rule that follows is that relief is confined to that available on the pleadings: *Dare v Pulham*.[2] Cases must be decided on the issues raised on the pleadings and if it is intended to raise other issues then there must be an amendment: *Blay v Pollard*.[3]

[12] Rule 13.02 of the Rules provides as follows:-

> **13.02 Content of pleading**
>
> (1) A pleading shall:
>
> (a) contain in a summary form a statement of all the material facts on which the party relies but not the evidence by which those facts are to be proved;
>
> (b) where a claim, defence or answer of the party arises by or under an Act identify the specific provision relied on; and
>
> (c) state specifically the relief or remedy, if any, claimed.
>
> (2) A party may, by his pleading:
>
> (a) raise a point of law; and
>
> (b) plead a conclusion of law if the material facts supporting the conclusion are pleaded.

[13] Although Rule 13.02(1)(c) allows general relief to be claimed as the Plaintiff has done in the prayer for relief relative to the adjusting property order sought, the Court will not grant relief that is not specifically claimed unless it is consistent with the case made out on the pleadings: *Wicks v*

[2] (1982) 148 CLR 658
[3] [1930] 1 KB 628

Bennett.[4] The rather significant consequence that follows as a result of the state of the pleadings is that, were I to find that the relationship ended prior to April 2008, the Plaintiff's claim stands to be dismissed as there has not been an amendment to the Statement of Claim.

[14] An application to amend the Statement of Claim made in the course of the Plaintiff's written submissions and without a formal application, after the evidence has closed and after the Defendant has made submissions would likely be refused. The Defendant clearly made the time point an issue in his Defence yet no attempt has been made to amend the Statement of Claim. None of the usual evidence when an application for an extension of time pursuant to section 14(2) is sought, such as an explanation for the delay has been led. The Defendant can, in the absence of an amendment to the pleadings, rightly claim to have foregone calling any relevant evidence on this issue. The Defendant claims that raising the issue in this way and after the evidence has closed has the effect of denying procedural fairness. I agree. The Plaintiff will, in addition to a grant of leave to amend the pleadings, also require leave to re-open the evidence. In those circumstances leave would likely be refused in accordance with the principles set out in *Aon Risk Services Australia Ltd v Australian National University*.[5]

[15] The Plaintiff submits that I should decline to make an order which denies the Plaintiff any substantive relief merely because there has not been a

[4] (1921) 30 CLR 80
[5] (2009) 239 CLR 175

formal application for leave as the result would not be just and equitable as required by the Act. Presumably that refers to that phrase as it appears in section 18(1) of the Act. I think that confuses the principles relevant to the making of an adjusting property order and the procedural principles relative to claims and pleadings. The former is regulated by the Act whereas the latter is regulated by the Rules and common law.

[16] Dealing first with the evidence relevant to these issues, the starting point is section 3A of the Act. This sets out various indicia for determining the existence of a de facto relationship. It is therefore relevant to both the commencement and cessation date. That section provides:-

> **3A De facto relationships**
>
> (1) For this Act, 2 persons are in a de facto relationship if they are not married but have a marriage-like relationship.
>
> (2) To determine whether 2 persons are in a de facto relationship, all the circumstances of their relationship must be taken into account, including such of the following matters as are relevant in the circumstances of the particular case:
>
> (a) the duration of the relationship;
>
> (b) the nature and extent of common residence;
>
> (c) whether or not a sexual relationship exists;
>
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
>
> (e) the ownership, use and acquisition of property;
>
> (f) the degree of mutual commitment to a shared life;

(g) the care and support of children;

(h) the performance of household duties;

(i) the reputation and public aspects of their relationship.

[17] These indicia are not exhaustive. The existence or absence of any one or more is not determinative. The indicia are a guide to determining whether the parties are in a marriage-like relationship.

[18] Having regard to those indicia, the relevant background facts are that the parties met in early July 2002 at a social function. They began sharing a house in the same month. There is no dispute that initially the relationship was simply one of housemates. The Plaintiff asserts that a de facto relationship commenced on or about 25 August 2002. That date apparently coincides with the time when the parties first had sexual intercourse. The Defendant says that the change in the relationship from housemates to de facto partners did not occur until late October or early November 2002. Although the Defendant initially deposed to sexual relations having commenced in late September or early October 2002, he conceded in cross examination that it occurred at the time the Plaintiff said. The Defendant maintained that until late September or early October 2002 the Plaintiff was in a relationship with a person named Steve. The Plaintiff however said that her relationship with that person had ended before she met the Defendant. If that were correct then it is curious that the Defendant knew anything about Steve. She was not challenged much about her version in this context.

[19] The Defendant was challenged on his version of events and ultimately made a number of concessions. Although Mr Black submitted that the Defendant had agreed in cross examination that the Plaintiff had told the Defendant that her relationship with Steve had ended and at a time consistent with the Plaintiff's version, that is not apparent from the transcript, particularly at the reference cited by Mr Black in his submissions. At best the Defendant acknowledges that the Plaintiff was attempting to dissuade Steve from seeing her but it is clear from his evidence that this was within a timeframe which is consistent with the Defendant's stated position.

[20] The Plaintiff also relied on being sent flowers by the Defendant in early September 2002, she claiming it as indicative of the relationship having commenced by then. The Defendant on the other hand said that it was a courting gesture only and done in the hope that the Plaintiff would end her relationship with Steve. Either version is equally plausible.

[21] The Defendant describes the state of affairs between the parties during this disputed period as being preliminary to a relationship. The Defendant's submission is that there is no evidence to show that there was a continuing sexual relationship beyond the first admitted encounter. That is correct and although it is a notable omission, it is not conclusive either way.

[22] Equally relevant however is the lack of evidence, other than possibly in the form of the bare assertion by the Plaintiff that they were in a de facto relationship, that they presented externally as a de facto couple. What is

lacking in the Plaintiff's case is evidence commonly led when the existence of a relationship is disputed such as evidence of how others viewed the relationship between the parties during the disputed period (section 3A(2)(i)). I consider the absence of that evidence to be very relevant. Also lacking is evidence indicating how the Defendant viewed that relationship given that mutuality to a certain extent is required. Leaving aside her bare assertion, the Plaintiff has not led any evidence to challenge the Defendant's version in respect of this indicium. Although there is evidence which could demonstrate that the Plaintiff believed that a de facto relationship had commenced, there is no evidence which goes to demonstrate that the Defendant viewed the relationship as marriage-like (section 3A(2)(f)).

[23] As to the termination of the relationship, numerous items of evidence are relevant in terms of the indicia in section 3A of the Act. The Plaintiff's nominated termination date of 28 November 2008 is the date that she moved out of the home where the parties last resided together namely, at Bradley Road Livingstone ("the Livingstone Property"). The Defendant accepts that physical separation occurred at about that time but says that the cohabitation after June 2006 was one of separation under the same roof.

[24] The indicium of financial interdependence (section 3A(2)(d)) is not determinative in this case as the parties mostly kept their financial affairs separate throughout the relationship. The only asset which the parties had jointly owned was the veterinarian supply business established by the parties and known as Monsoon Veterinary Supplies Pty Ltd ("Monsoon") and which

was sold early in 2008. However the Defendant established a private superannuation fund in October 2006, i.e., around, and possibly after, the date that the Defendant alleges a separation occurred. Both parties were named as trustees and both parties contributed to the fund. I consider it to be unlikely that the fund would have been set up in this way if the parties had been separated at that time.

[25] The purchase of the property at 45 McInnis Circuit Driver ("the Driver Property") by the Plaintiff is a very significant factor in my view. It appears to be the only real estate that the Plaintiff ever purchased. The Plaintiff purchased that in July 2008 utilising in part some of the funds derived from the sale of Monsoon. The Plaintiff told the Defendant nothing about that. Despite that she would have spent time locating and inspecting a number of properties, negotiating the purchase, arranging finance and attending to numerous other matters in the lead up to settlement, she failed to tell the Defendant anything at all about that purchase yet claims to be in a marriage-like relationship throughout that time. Her explanation was that she feared the Defendant would have been physically aggressive towards her. That does not sit well with the evidence and I was most unimpressed with that explanation having regard to the overall evidence concerning the relationship. I reject that explanation. The Plaintiff's failure to disclose that acquisition is contraindicative of a relationship existing at that time although that needs to be assessed in light of the evidence that the

relationship was fragile by that time and that it occurs less than four months before the latest conceivable separation date.

[26] The other evidence relevant to this issue is summarised below. It can be seen that typical evidence concerning public aspects such as socialising with friends, attending at functions, holidaying together and the like is lacking. The evidence is:-

1. The Plaintiff and the Defendant spent Christmas 2006 together and with the Plaintiff's family interstate;

2. The Plaintiff gave the Defendant a puppy as a gift for Christmas 2006;

3. The Plaintiff participated in the move to the Livingstone Property, paid for the removalists and purchased an outdoor setting for that home;

4. The Plaintiff alleges, and the Defendant disputes, an arrangement for sharing of household chores and expenses at the Livingstone Property;

5. The Plaintiff alleges (and the Defendant disputes) matters which were led primarily as evidence of indirect non-financial contributions but which are also relevant to the question of the existence or extent of the de facto relationship such as gardening, cleaning, cooking, laundry and household chores;

6. The Defendant bought a new bed for the parties to share at the Livingstone Property. The Defendant admits to sharing the bed with the Plaintiff but claims it was a gift for the Plaintiff;

7. The Defendant gave the Plaintiff an expensive watch for Christmas 2007;

8. The Defendant wrote to the Plaintiff's parents in February 2009. In that letter he thanked them for their friendship "*...over the last 6-7 years since I have been going out with Julia*." He added that "*Julia and I had drifted in the last 3-4 years and we seemed not to be a couple anymore...*". Both counsel relied on this letter to support their case. Considering the letter as a whole, I think it is neutral as it is consistent with both versions;

9. The socialising together by the parties ended towards the end of 2006 or early 2007, albeit that it did not appear to be a significant feature of their relationship even during the undisputed period of the relationship.

[27] Relevant also is that throughout the disputed period there were ongoing sexual relationships. The Defendant's explanation for the parties sharing a bed at the Livingstone Property is that neither party wanted to move into the separate granny flat at that property. Why the Defendant apparently considered that to be the only alternative to sharing a bedroom was not explained. That situation persisted for over 18 months which seems unlikely

in the context of the evidence as a whole if the parties were separated as the Defendant claims.

[28] There were also two periods in 2007 when the Plaintiff temporarily moved from the Livingstone Property and moved in with a friend. The duration was in dispute and the versions vary from a span of a weekend only up to a couple of weeks. There is also some controversy regarding the surrounding circumstances. Both parties agreed that the relationship was fragile at those times. Ms Gillies submitted that these physical separations were particularly telling in establishing the separation however I think it is equally telling that the Plaintiff returned on both occasions. The evidence of counselling is also evidence which is consistent with both versions.

[29] What is more significant about that in my view is the Defendant's evidence in his trial affidavit, that he asked the Plaintiff to return on the occasion of the last of those separations. The Defendant offers an explanation for that but I do not consider that to be credible. The Defendant deposes that he said to the Plaintiff "…*I don't want you to move out like this. Come back and save money and move out properly*…". I am uncertain what those last words mean however, given that in cross-examination the Defendant said, more than once, that the relationship was a big mistake on his part and that he wished that he had broken it off earlier, it is anomalous that he asked her to return after she actually left. That claim by the Defendant lacks credit in my view. It is more consistent with the Plaintiff's version that the relationship

was still on foot albeit that it was fragile and the parties were attempting to resolve their issues.

[30] The Defendant also gave some unconvincing explanations when matters which contradicted his claimed separation date were put to him. For example, when asked why he gave the Plaintiff an expensive watch as a gift for Christmas in 2007, his explanation was that it was given as a departing gift, similar in nature to a gift given to a departing employee. If it is a departing gift, then it is given some 12 months after the separation date he alleges. Although he agreed it was given at Christmas 2007, he said that it was not a Christmas gift. I think his explanation is nonsense, particularly as on his version they had already separated as a couple by then.

[31] The Defendant acknowledged that the move to the Livingstone Property in February 2007 represented an obvious opportunity to end his cohabitation with the Plaintiff. However he said he did not do so as he claimed he "*…didn't have the heart to kick her out.*" This precedes the occasion when he implored her to return after her departure to live with her friend. That evidence is likewise inconsistent and unconvincing.

[32] Based on the foregoing, overall I am not satisfied, having regard to all of the circumstances of the case and in particular the indicia in section 3A of the Act, that the evidence establishes the existence of a de facto relationship as at the commencement date the Plaintiff nominates. The evidence is not

sufficient in my view and I find that the relationship commenced in late September 2002.

[33] As to the date of the termination of the relationship, there is no dispute that there was a de facto relationship within the meaning of the Act until at least late 2006. Beyond that the duration of the relationship falls to be resolved based on the credibility of the parties given the extent of, or lack of, objective corroborating evidence. The evidence of both parties on the issue of the termination date was tainted to some extent. Notwithstanding that I have rejected the Plaintiff's evidence as to the commencement date, on the question of the termination date, I prefer the Plaintiff's evidence. I find that the relationship ended on or about 28 November 2008. Clearly there had been a deterioration of the relationship for approximately one year before this date but that relates to the quality of the relationship, not its existence.

[34] That largely deals with the significant areas of factual dispute. The asset pool and financial resources is largely agreed. The areas in dispute relate largely to indirect and non-financial contributions. Having regard generally to my assessment of the credibility of witnesses and also for the reasons which follow, other than the specific instances where I indicate specifically that I prefer the evidence of the Plaintiff, I prefer the evidence of the Defendant to that of the Plaintiff wherever the two are in conflict. In arriving at that I have had regard to the extent that the evidence is corroborated either by objective evidence or by other evidence which I am prepared to accept.

[35] I start the process of determining what, if any, adjusting order is appropriate by looking at the assets and liabilities of the parties at the commencement of the relationship. Leaving aside the dispute about the indirect contribution to HSVC, there is otherwise no dispute as to the asset position at the commencement of the relationship. At the time of the commencement of the relationship the Plaintiff had minimal assets comprising sundry furniture and household effects of approximately $5,000.00 in value, approximately $7,000.00 in savings and a superannuation account claimed by the Plaintiff to be worth less than $10,000.00. This was not proved by any documentary evidence but was not disputed by the Defendant. Her income for the financial year ending 30 June 2003 was $32,760.00.

[36] At the time of the commencement of the relationship the Defendant was a qualified veterinarian and had worked in that capacity for some nine years at various locations. He was employed at HSVC. He had savings of approximately $60,000.00, shareholdings worth approximately $120,000.00, sundry furniture worth approximately $5,000.00 and a motor vehicle claimed to be of $30,000.00, a value disputed by the Plaintiff. He also had a superannuation account which he says, had an account balance of the order of $10,300.00. Although the Plaintiff does not accept that, no evidence contradicting that claim was produced. His income for the financial year ending 30 June 2003 was $107,170.00.

[37] The Defendant was extensively cross-examined as to the source of approximately $21,500.00 of his claimed savings however as I am satisfied

that it was part of the Defendant's assets at the time, I do not consider that anything turns on the source of those savings.

[38] The dispute as to the then value of the Defendant's motor vehicle complicates matters as I have no basis to resolve that. Expert evidence would be required for that purpose, hence resolving it based on the credibility of the parties is not an option. But for that, for the reasons which appear elsewhere in these reasons, I would prefer the evidence of the Defendant. On that basis, the Plaintiff brought into the relationship 5.3% of a total pool of some $227,000.00. For comparison only, if I were to reduce the value of the Defendant's motor vehicle by one third, that percentage would change to 5.5%, hence the difference is small in any case.

[39] Clearly the Defendant's assets at the commencement of the relationship far outweighed those of the Plaintiff. Similarly in respect of earning capacity. To the extent that taxation returns were tendered, they indicate that the parties earnings were:-

Financial Year	Plaintiff	Defendant
2001/2002	**-**	$53,795.00
2002/2003	$32,760.00	$107,170.00
2003/2004	$36,689.00	$144,677.00
2004/2005	$45,371.00	-
2005/2006	$40,838.00	$117,093.00
2006/2007	$83,906.00	-
2007/2008	$163,595.00	$214,639.00
2008/2009	-	$258,802.00

[40] The income for the Plaintiff for the financial years 2006/2007 and 2007/2008 were extraordinary in that they reflected the Plaintiff's shareholder profits from Monsoon as well as the Defendant's share of those profits. Those extraordinary amounts therefore relate directly to issues of contribution to the Monsoon business and I will discuss that in more detail below.

[41] The assets acquired by the parties during the course of the relationship comprise:-

1. HSVC by the Defendant;

2. The property at 16 Smyth Road, Howard Springs ("the Smyth Road Property") by the Defendant;

3. The property at 290 Whitewood Road Howard Springs ("the Whitewood Road Property") by the Defendant;

4. The Livingstone Property by the Defendant;

5. The Monsoon business by both;

6. The Driver Property by the Plaintiff.

In addition, each party made various contributions to their superannuation accounts.

[42] Commencing with the HSVC, it is conceded and the evidence confirms that with one relatively insignificant exception which is discussed below, the Plaintiff made no financial contribution to the acquisition of that practice. The major claim to contribution to the acquisition of that practice by the Plaintiff on her case is that she suggested or motivated the Defendant to acquire that practice. That is disputed by the Defendant. The practice was a very important asset on my view of the evidence. The income derived from that funded the acquisition of all other assets by the Defendant and the bulk of the parties' living expenses, albeit not exclusively in the case of the latter.

[43] The Defendant's evidence in this respect is that he came to Darwin specifically with the objective of working in a practice and to ultimately acquire that practice. His evidence is that he commenced working at HSVC with that objective. He denied that it was the Plaintiff's idea that he did so. The valuation report tendered without challenge suggests that process is a

usual and established course for anyone wishing to purchase a veterinary practice in major centres.

[44] The Defendant's letter of offer of employment at the clinic was tendered. It is dated 13 July 2002. It provides in part for a remuneration based on an incentive scheme to be negotiated based on performance and also acknowledged that "*...opportunities for leasing or buying into the practice if mutually agreed*" would also be negotiated.

[45] I accept that as corroboration of the Defendant's evidence that he commenced work at HSVC with the intention of acquiring the practice. Although Mr Black sought to make something of the reference to leasing or buying into the practice as opposed to buying the practice, I consider that to be irrelevant to the issue. The issue is whether the Plaintiff suggested, motivated or inspired the Defendant to acquire the practice and the letter demonstrates that, in one form or another that was the Defendant's plan before he met the Plaintiff. The parties met three days before the date of that letter, hence the Plaintiff's version as attested before me cannot be correct. I therefore reject the Plaintiff's evidence on this issue.

[46] There is however one undisputed financial contribution by the Plaintiff to the acquisition of HSVC. Although there was a dearth of evidence as to the surrounding circumstances, the evidence reveals that the Plaintiff made a very short term loan to the Defendant of $5,000.00 to enable him to complete the purchase of HSVC. The loan was made on 20 February 2003

and was repaid on 24 February 2003, i.e., a four day loan. It was apparently interest free. Absent evidence of the surrounding circumstances and of the value of this contribution, I consider that the appropriate value is what it would have cost the Defendant to borrow that amount on commercial terms, with little formality and for a short term. Often higher than usual rates of interest are charged for such loans. Even so, if an exceptionally high rate of say 10% per month were to be charged, that would equate to approximately $60.00, which is insignificant as a financial contribution against a total cost of approximately $370,000.00.

[47] Therefore I cannot accept Mr Black's submission that it was a significant contribution. He based this on an assertion that it was made at a time when the Defendant needed support. However there is no evidence of the surrounding circumstances so there is nothing upon which such a conclusion can be based. On the contrary, the Defendant's evidence was that he had an alternative source if necessary namely, his father.

[48] The purchase of HSVC was completed on 20 February 2003. It is agreed the total purchase price was $369,435.00 which included the Smyth Road Property. The purchase price was broken up as to $120,000.00 for the business and $230,000.00 for the land and buildings. The balance is made up of amounts for plant, equipment and stock. The Defendant financed the purchase by way a bank loan of $325,000.00, the short term loan of $5,000.00 from the Plaintiff referred to above and the balance came from his own funds.

[49] The Defendant retains that practice and continues to practice as a veterinarian. He has plans to relocate the practice to the Whitewood Road Property and he has made significant post separation acquisitions of plant and equipment. The bank loan taken out to finance the acquisition of HSVC has apparently been repaid. Although the submissions of both parties make reference to this (the Plaintiff's submissions alleging repayment from the practice income and from the proceeds from Monsoon and the Defendant's submissions acknowledging the former), nonetheless there was no evidence about that.

[50] The Plaintiff claims non-financial contributions to the practice in various forms, most notably by way of after hours assistance to the Defendant for which she was not remunerated. She also claims that she was instrumental in the Defendant securing work from the Darwin Turf Club which in turn later secured work from trainers working at the Darwin Turf Club track. She also claims a contribution by way of special services to HSVC from Monsoon. The extent of that contribution is disputed.

[51] The claimed unremunerated work relates to assistance on after hours call outs and with the visiting clinic at Jabiru. The Jabiru clinic was an initiative commenced after the Defendant acquired the practice and always occurred on a Saturday. The Plaintiff claims that she attended to assist on a number of such trips when the Defendant was the veterinarian who travelled to Jabiru. There is no precision in the evidence as to the exact number of trips. On the Plaintiff's evidence it is between four and eight such trips. I think it is odd

that the Plaintiff cannot be more precise when a small number and range is involved. The Defendant concedes two trips. Only one trip can be verified by objective evidence in that records of the Plaintiff's mobile phone indicate calls made from Jabiru on one occasion.

[52] The Plaintiff also claimed to have assisted with the stock take when the practice was purchased but that proved to be misleading as she conceded in cross-examination that she did so at the request of the vendors. She claimed also to have assisted in obtaining quotes for the purchase of new equipment but gave no details of this and there is little evidence to assess it as a contribution. I am reluctant to rely on the Plaintiff's bare assertions given the number of instances which show her propensity to exaggerate or embellish her evidence to her benefit.

[53] The Plaintiff also claimed that she assisted with internal painting of the HSVC premises but the Defendant denied this. Likewise the Plaintiff appears to claim an indirect contribution by way of her father performing repairs to the flyscreens at the premises. That work allegedly took two days. The Defendant says that the Plaintiff's father commenced that work but had to stop after a matter of hours due to feeling unwell. I prefer the Defendant's evidence as to the extent of the work performed by the Plaintiff's father but in any case, in the absence of evidence of the surrounding circumstances I am not prepared to treat any work by the Plaintiff's father as a contribution by the Plaintiff. The letter from the Defendant to the Plaintiff's parents in February 2009 referred to above shows that the Defendant had a good

relationship with the Plaintiff's parents and that may account for any assistance given by the Plaintiff's father.

[54] The Plaintiff also asserts, and the Defendant agrees, that she lent the Defendant her work vehicle for dump runs. There was no evidence of any detriment to the Plaintiff, either by reason of the loan of her work vehicle or the assistance by her father. The Plaintiff later submitted that any inflated price charged by Monsoon for its products should be ignored due to the lack of detriment to the Defendant's practice and that submission has equal application here if consistency is to be maintained.

[55] As to the assistance with after hours call outs, the Plaintiff claims this occurred both during after hours calls at the clinic as well as visits to clients' premises. The extent of this claimed assistance is extensive. The Plaintiff lists many tasks in her affidavit but lacks any useful details as to the frequency duration and the like. It reads like a job description for a full time employee and given the propensity of the Plaintiff to exaggerate her contribution, which was reinforced by the cross-examination on this issue, I am not prepared to accept her uncorroborated assertions in the face of the Defendant's contradictory evidence. The Defendant concedes there were some attendances but disputes the frequency claimed by the Plaintiff. The Defendant's version is corroborated by other evidence including that of his practice manager which I am prepared to accept.

[56] As for attendances at clients' premises, some of the occasions which the Plaintiff claimed as after hours assistance were occasions where the client was a mutual friend of the parties. The Plaintiff conceded in cross-examination that some of those visits were more for the social visit than for any need to provide assistance to the Defendant. Her evidence in chief portrayed a different impression.

[57] Other instances involved claimed call outs where I consider that it was established sufficiently that a nurse was not required such as attendances to treat a hoof abscess and cases of horse colic. The Defendant's evidence, which the Plaintiff did not effectively challenge and which I accept, was to the effect that a nurse was not required to assist with such cases. However the Plaintiff attempted to create a different impression and again I feel this is another instance of embellishment by her.

[58] The practice accounting and other records do not support the Plaintiff's version. The records are used in part for billing purposes. The practice made a charge for a nurse's attendance on after hours call outs. When challenged that the after hours records of the practice where inconsistent with her claimed after hours attendances, the Plaintiff suggested falsification of those records on the part of the Defendant. I consider that to be a very serious allegation made without any apparent or objective basis. It reflects adversely on the Plaintiff. I reject Mr Black's submission that the evidence of the Plaintiff only alleged an oversight by the Defendant. In my view, it was clear that the Plaintiff suggested falsification.

[59] The Plaintiff also sought to take credit for suggesting to the Defendant that he undertake equine work. Similar to her evidence that she suggested to the Defendant that he purchase HSVC, she claims that she suggested he approach the Darwin Turf Club to become the club's race day veterinarian. That contrasts the evidence of the Defendant that he always had that interest in equine work and his version was corroborated by objective evidence that pre-relationship he attended an equine medicine course. The Defendant's evidence is that he had arranged to be the Darwin Turf Club's race day veterinarian before he and the Plaintiff commenced house sharing. Additionally an invoice, the date of which precedes the commencement of the relationship, disclosed that he had worked as the race day veterinarian at the Darwin Turf Club. All that again points to embellishment by the Plaintiff of her evidence.

[60] Lastly the Plaintiff claims non-financial contribution by having made after hours deliveries from the Monsoon business to the Defendant's practice. Cross-examination revealed that was also an embellishment. The Plaintiff conceded in cross-examination that such a service was provided to all customers of that business and the Plaintiff conceded that HSVC was a major customer. There is was no evidence that the service was provided to any greater extent than to any other customer. I reject that claim by the Plaintiff.

[61] In general terms, for the reasons given to date relative to the assessment of the parties' credit and also for the reasons which follow, on this and other

aspects of evidence regarding contributions, I prefer the evidence of the Defendant. I find that the Plaintiff had no input into the Defendant's decision to buy HSVC or to undertake equine work or to work at the Darwin Turf Club. I find that the Plaintiff assisted the Defendant by accompanying him for the purpose of Jabiru clinics on two occasions. It is difficult to put an accurate number on the after hours call outs that the Plaintiff attended. I do not accept that it was as extensive as she claims. The Defendant says that it was only one or two but I think that understates it. Such a small number as the Defendant suggests seems unlikely given the number of after hours calls the Defendant made and as the Plaintiff was a veterinary nurse. That convenience lends itself to a likely greater use of the Plaintiff's skill than the Defendant concedes. I am prepared to treat the number of attendances by the Plaintiff to assist with after hours calls as ten in all. The number involved is therefore small.

[62] The net value of HSVC for current purposes is agreed at $361,350.00. The net value of the Smyth Road Property from which the practice is conducted is agreed at $600,000.00 for current purposes.

[63] The next asset is the establishment of Monsoon in March 2005. The business was established in conjunction with Ross Ainsworth who was involved in the cattle export industry. The start up costs for the business were met equally by the Defendant and Mr Ainsworth. There was an initial start up loan from both and further amounts were subsequently provided. It is agreed

that the total contributions by the Defendant were approximately $124,500.00 and approximately $133,500.00 by Mr Ainsworth.

[64] The Plaintiff concedes that she contributed nothing financially to the establishment of the business. She claims she was prepared to but "*...was told it was not needed*". That was misleading as she conceded in cross-examination that she had no funds to enable her to do so and had no realistic prospect of borrowing funds for that purpose. This is another example of embellishment by the Plaintiff. Her contribution was non-financial in the form of her experience in running a similar competing business.

[65] Despite that the Plaintiff referred to her initial salary at Monsoon as being a "*minimal*" amount, initially $40,000.00 per annum, the evidence of her tax returns indicates that her salary was closely comparable to her salary with her previous employer. In her last full financial year of employment with her previous employer (2003/2004), according to tax returns put in evidence her salary was $36,666.00.

[66] The Plaintiff concedes that notwithstanding her lack of any financial contribution to the start up costs, the Defendant insisted that she be made an equal shareholder in the business. As a result, and for no financial outlay on her part, the Plaintiff had not only a salary but she also had a right to an equal share of the profits as well as an equal share in the equity of that business.

[67] The Defendant gave evidence that the loans he made to Monsoon meant that he was unable to purchase a property he was otherwise interested in at Noonamah. Mr Black submits that I should reject that evidence as evidence of a non-financial contribution by the Defendant as it is not supported by evidence of probative value. However to the extent that the Defendant was challenged about this, he was not discredited and if I were to accept this evidence, as I do, and corroboration not being mandatory, his evidence is sufficient to support the proposition. The Defendant also claims a contribution in the form of providing free veterinarian services to the Plaintiff. The provision of those services was not challenged. Although I think that both are valid contributions, individually they are not overly significant and I think they fall conveniently within the approximate equality that I have provided for in respect of domestic type contributions.

[68] Monsoon was sold four years after the business was established for $1,100,000.00 exclusive of GST but subject to various adjustments. The evidence however is unclear as to the amount of the net proceeds of sale or the amounts distributed to the three shareholders. Figures for these items have been referred to in the submissions by both parties but it appears that the tendering of that evidence has been overlooked.

[69] The Plaintiff does not refer to any amounts in her evidence but says that she paid part of the proceeds of sale she received into the self managed superannuation fund and that part was also applied to the purchase of the Driver Property. The difference, on the Plaintiff's evidence, between the

purchase cost of the Driver Property ($431,000.00) and the amount funded by bank loan ($348,000.00) was approximately $83,000.00. The amount of that loan as at trial however was agreed to be approximately $179,000.00 which is approximately $169,000.00 less than originally borrowed. No evidence was given to explain that. On the available evidence, other than for the routine reduction of the mortgage amount by regular repayments, the Plaintiff had no source of funds to enable her to make such a significant reduction other than her share of the net proceeds of sale of Monsoon.

[70] Some guidance to reveal the net proceeds comes from the affidavits of the parties. The Defendant deposes that he only received the cash component of the net proceeds of sale sometime in 2010. In her affidavit the Plaintiff says that her share of the proceeds of sale had not then crystallized. Without clearer evidence, I assume that the same applied to the Plaintiff's funds from the sale of Monsoon. Nonetheless, it does not help in determining the value of the Defendant's contribution to those proceeds received by the Plaintiff.

[71] Further complicating the question is the evidence which reveals that Mr Ainsworth made a gratuitous adjustment in favour of the Plaintiff of $50,000.00 from the proceeds of sale. There had not been any previous mention of that. Although the reasons why Mr Ainsworth allowed that adjustment was not clear on the evidence, I do not think anything turns on it. Any suggestion that this somehow follows from the Defendant ensuring that the Plaintiff was to be an equal shareholder in the business and thereby amounting to a non-financial contribution by the Defendant is fanciful.

[72] In comparison the Defendant's evidence is that he received approximately $200,000.00 in money or money's worth from the proceeds of sale of Monsoon but apparently after payment of capital gains tax. No details are given of the capital gains tax and I cannot ascertain that from the tax returns that have been tendered. In any case, I assume that the amounts he refers to must be in addition to reimbursement of his loans as otherwise the effect would be that out of a sale price of $1,100,000.00, he only receives approximately $75,000.00 after his loans funds are repaid. That not only seems inadequate, it appears to be significantly less than what the Plaintiff received. Overall the state of the evidence concerning the dispersal of the net proceeds of sale of Monsoon is unsatisfactory and I will evaluate that as best I can on the available evidence.

[73] It was a term of the contract of sale of Monsoon that the Plaintiff was to remain as manager of the business for the purchaser for a period of three years. The Plaintiff claims that as an indirect contribution. There is no evidence that her employment terms are any less favourable as a result of that contractual obligation. The three year period expired in January 2011 and the Plaintiff is still employed in that business, hence the contractual obligation on sale does not appear to have had any negative impact on her. The Plaintiff conceded that her current salary arrangements are in excess of her base salary when employed as the manager of Monsoon. Mr Black submits that nonetheless it is a contribution as, given it was made as a

contractual obligation, it must have had a bearing on achieving the sale price. That seems self evidently correct.

[74] There was also much evidence concerning the price charged by Monsoon for veterinary supplies to the Defendant's practice. There was much evidence about the pricing of Monsoon's products and whether the Defendant paid premium prices and thereby indirectly propped up the Monsoon business. The evidence was challenged. Mr Ainsworth, who was called by the Plaintiff, indicated that he sourced some supplies from other companies due to price considerations.

[75] One of the Defendant's employees specifically conducted a comparison of prices charged by Monsoon with other suppliers and made a recommendation to the Defendant as a result. That evidence was not successfully challenged in my view. Mr Black submits that it makes no difference as there was no evidence of detriment to the Defendant's practice. I am inclined to agree that there was no detriment to the practice as I expect that the practice passed on the cost to its customers. However, in my view, as the Defendant could have sourced supplies from other competitors, notwithstanding that the Defendant also received a proportionate benefit, the support of Monsoon by the Defendant's practice was an indirect contribution by the Defendant for adjustment order purposes.

[76] In the end the dispute on this issue is largely insignificant. It is clear the Defendant's practice was an important customer of Monsoon. The Plaintiff

conceded that the Monsoon business would be in trouble without the business of the Defendant's practice. Although I am prepared to find that some supplies were purchased by HSVC at prices higher than might have been able to be achieved through other suppliers, the converse was also true in respect of other supplies. I think that it logically follows that it would be impractical for HSVC to purchase supplies from different suppliers based entirely on the price differences of individual products. Although the available evidence favours a finding that overall HSVC paid slightly higher prices for supplies by dealing with Monsoon, absent a full analysis, the evidence is insufficient to satisfactorily establish how much the difference was.

[77] The best evidence called was that of Elisha Horne which indicates that over one particular month the practice could have saved approximately 10% had the supplies been sourced form other suppliers. That is selective and there is no evidence, other than possible inference, to show that the same percentage could be applied throughout. I am not prepared to draw that inference. The indirect contribution of the Plaintiff in committing to a three year employment term is a contribution similar in nature to the contribution of the Defendant in supporting the Monsoon business. Given that the Plaintiff has stayed on with that employer after the expiry of the period she contracted, in assessing these contributions I conclude that the Defendant's contribution exceeds that of the Plaintiff.

[78] The granting of a one third share of Monsoon to the Plaintiff also gave her an entitlement to one third of shareholder profits. The profits were extensive and amounted to $20,000.00 per share in the 2006/2007 financial year and $50,000.00 per share in the 2007/2008 financial year. In addition the Defendant allowed the Plaintiff to retain his share of those profits. That is not disputed but it is unclear how that occurred. The tax returns of the parties for those years are not clear as to how that was treated and there was no other evidence to assist in determining that. From the tax returns it appears to have been treated as if it were salary from Monsoon. Therefore, irrespective as to how that occurred and the efficacy of that, the net effect is that the Plaintiff has paid income tax on those amounts and that needs to be taken into account. Absent expert evidence of that, doing the best I can with the available evidence and relying on legislated tax scales, the additional tax payable by the Plaintiff due to her retaining the Defendant's profit distribution is $6,900.00 for 2006/2007 and $20,700.00 for 2007/2008. The adjusted value of this financial contribution by the Defendant is therefore reduced to $42,400.00 rounded to the nearest $100.

[79] The Whitewood Road Property was purchased in November 2004 by the Defendant. The purchase price was $892,000.00 including acquisition costs. This was financed by a loan from National Australia Bank in the amount of $650,000.00. The Defendant says the balance represents his savings and shareholdings. The Plaintiff challenges that based on credit issues and submits that it should be assumed that the balance was also generated

through the practice. Although the Defendant provides no details of the savings and shareholdings that he claims to have contributed (approximately $240,000.00), there is no evidence to support the Plaintiff's bare contention. The Defendant was not effectively challenged on this. I accept the Defendant's evidence on this point.

[80] The property was primarily acquired for development as new premises for the HSVC practice and construction of that has been planned and financed. The development includes the establishment of a child care centre on the property which affects the value of the property. The loan has been serviced from the Defendant's income generated through the veterinarian practice and the rental income from the child care centre.

[81] The evidence reveals that the negotiations, meetings and the like to secure a child care operator for the site, as well as all of the attendance in respect of the construction of the centre and development of the property were undertaken by the Defendant to the exclusion of the Plaintiff. The Plaintiff has not led any evidence indicating any contribution to the acquisition, improvement and development of that property. The Plaintiff claims that she was involved in decisions concerning that acquisition. The Defendant says that he only discussed his plans with her and that she was not involved in the decision making process. Again I prefer the Defendant's version. The nature of the discussions appear to be consistent with typical discussion of matters relevant to one party in a relationship as opposed to a considered process of consultation and joint decision making. The Plaintiff's only

possible claim to contribution in respect of that property is to the extent that any entitlement that she has in respect of her contributions to HSVC filters through to that property given that the income from the practice was the partly the source of the funds to meet loan commitments.

[82] The evidence of the valuer, Mr Gore, shows the value of the property differs by approximately $1,200,000.00 on account of the establishment of the child care centre on the site. His evidence was that without a childcare centre the value was $1,500,000.00 and with it, $2,700,000.00. The Defendant has submitted that the construction of the child care centre has significantly increased the value of that property as a result. That is self evidently correct in absolute terms, however it overlooks the cost of construction which on the evidence is $1,435,000.00. At current values therefore it appears, as Mr Black submits, that the net value has therefore been reduced by $235,000.00.

[83] I do not think the position is as simple as that. Mr Black's submission seeks to treat the child care centre as a separate matter divorced from the rest of the land and then to apply that back to an overall value. Once the finer details of the valuation are considered, it appears the valuer puts the value of the child care centre on a standalone basis at between $1,428,000.00 and $1,588,000.00 and that exceeds the construction costs. Nonetheless, the available evidence indicates that as at the date of the valuation the construction of the child care centre has not significantly added any value to the Whitewood Road Property.

[84] As to the Livingstone Property, it was purchased for $670,000.00 in January 2007. It was purchased by the Defendant alone with a loan of $590,000.00 from the National Australia Bank and the balance from his savings. The Plaintiff does not challenge the Defendant's evidence as to the source of the funds for that acquisition.

[85] The Plaintiff concedes that she has not made any financial contribution to the acquisition of the property. The Plaintiff however claims an indirect contribution namely that she claims to have located the property and thereafter attended with the Defendant to inspect the property.

[86] Cross-examination however shows that the Plaintiff exaggerated the extent of this intangible contribution. She conceded that the Defendant became aware of the property by chance when he passed by the property. He agrees the Plaintiff went with him when the property was inspected. The fact of merely locating the property as a contribution is of dubious significance in any case. Other than that, the Plaintiff had no other involvement either in the negotiations for the purchase of the property or in respect of the attendances leading up to settlement.

[87] As such I conclude that her indirect contribution is less than that of the Defendant. Again, to the extent that the source of funds to meet loan commitments came from the Defendant's practice, the Plaintiff may be able to trace indirectly through a contribution based on her indirect contribution to that practice.

[88] The valuation evidence in respect of the Livingstone Property puts the current value of that property at $695,000.00. The current liability to National Australia Bank is approximately $507,000.00 resulting in equity of the order of $188,000.00. This represents an increase in the equity of the property in the order of $80,000.00 over the period the Defendant has owned it. However, the Defendant has also expended nearly $50,000.00 on improvements since acquisition. Additionally the Defendant has met all outgoings and utilities for the property since acquisition. The evidence reveals that the Plaintiff has not made any significant financial contribution in respect of the property.

[89] There was some dispute as to the extent of the non-financial contributions of the parties both at the Livingstone Property and before that in their rented accomodation. The Plaintiff says that until the move to the Livingstone Property, the arrangement was that the Defendant would pay the rent and she would pay the utilities and groceries. This was not challenged by the Defendant but no amounts were deposed to so making an assessment of the relative contributions is difficult. I will treat those as equal. At the Livingstone Property however all mortgage payments outgoings and utilities were paid by the Defendant and the costs of groceries were shared, hence that further skews the financial contributions in favour of the Defendant.

[90] The Defendant claims that he has done nearly all of the work in establishing the grounds at the Livingstone Property. Although the Plaintiff claims to have given some assistance in that work, this is disputed by the Defendant

who asserts any such work was minimal. The Plaintiff claims that in any event she performed the bulk of the indoor household tasks during the course of the relationship. A cleaner was employed from approximately 2005 and ordinarily that would water down the extent of that contribution. However the cleaner was paid for by the Plaintiff hence that should nonetheless count as a contribution by the Plaintiff. The Defendant claims that his excess of contribution to the external areas at least matched the Plaintiff's excess of contribution in respect of the internal household chores.

[91] The Plaintiff claims that she did most of the cooking and laundry but the Defendant disputes that and says those tasks were shared approximately equally. For the same reasons I have previously given for generally preferring the evidence of the Defendant over that of the Plaintiff, I accept the Defendant's version over that of the Plaintiff. I find that the domestic type household contributions are approximately equal.

[92] There remains a dispute as to the maintenance of the pool at the property where the parties first resided together. It appears that both parties contributed to the maintenance of the pool at the Livingstone Property, likely more by the Defendant. The Plaintiff claims that she purchased the chlorinator for the pool on that property. She produced an invoice evidencing the cost at $1,099.00. The Defendant queries whether the invoice was paid by the Plaintiff but has no specific recall. On this issue I am prepared to accept the Plaintiff's evidence over that of the Defendant.

[93] With respect to the superannuation accounts of the parties, I was told during the course of the evidence that the parties were seeking to agree a position as to the parties' superannuation. Nothing however was put to me on that basis and presumably the parties were not able to reach agreement as contemplated. However that leaves a shortfall of evidence. The evidence that was led reveals that both parties had separate superannuation entitlements as at the commencement of the relationship which were approximately equal. The parties contributed to superannuation from earnings and then established a self managed superannuation fund in October 2006. In terms of contributions to the fund, the Defendant's income has been greater throughout the relationship and that is reflected in greater contributions to the fund. Each of the parties has a separate account within that fund. Each party contributed to that fund. Both parties said that they made contributions to the fund from their proceeds of sale of Monsoon but no details were put in evidence.

[94] The latest available records put into evidence shows that the balance of the parties' accounts in the fund as at 30 June 2009, again rounded to the nearest $100.00, was $62,200.00 for the Plaintiff and $211,700.00 for the Defendant. I have no other evidence as to the extent of these financial resources. I have otherwise relied on unchallenged amounts as deposed to by the parties in their trial affidavits.

[95] The Defendant claims as an indirect contribution in respect of that fund on the basis that he has been responsible for administering and investing the

funds holdings throughout. He has also dealt with the fund managers and accountants since the separation. He has paid all the expenses of the fund since the separation. An allowance in favour of the Defendant as an indirect contribution to the financial resources of the Plaintiff is appropriate. This evidence was not challenged by the Plaintiff. As the Defendant's income from HSVC was the source of his contributions to superannuation, at least in part, then indirectly the Plaintiff has an indirect contribution to the Defendant's superannuation to the extent of her contribution to HSVC. On my assessment, the Defendant's indirect contribution to the Plaintiff's superannuation exceeds that of the Plaintiff to the Defendant's superannuation.

[96] With that background I now turn to apply that evidence to determination of an appropriate adjustive order.

[97] The pool currently comprises the following. Firstly the assets, with values as I find them, rounded to the nearest $100.00:-

Asset	Held By	Value
The Livingstone Property	Defendant	$695,000.00
HSVC	Defendant	$361,350.00
The Smyth Road Property	Defendant	$600,000.00
The Whitewood Road Property	Defendant	$2,700,00.00
The Driver Property	Plaintiff	$550,000.00
	Total	$4,906,350.00

Additionally both parties must have furniture and other items of personalty but there has not been any evidence of those hence I will treat them as equal and disregard them for current purposes.

[98] Of the aforesaid total the value of assets held by the Plaintiff is $550,000.00 and by the Defendant $4,356,350.00.

[99] Superannuation entitlements, again rounded to the nearest $100.00, comprise:-

Asset	Held By	Value
MLC Superannuation Fund	Defendant	$10,300.00
AXA Superannuation Fund	Defendant	Unknown
Plaintiff's account in Self Managed Superannuation Fund	Plaintiff	$62,200.00
Defendant's account in Self Managed Superannuation Fund	Defendant	$211,700.00
Master Superannuation	Plaintiff	$11,300.00
Australian Super	Plaintiff	$39,200.00
REST Superannuation	Plaintiff	$150.00
	Total	$334,850.00

The only evidence that I have of the value of the Defendant's MLC Superannuation is as set out in paragraph 21(g) of the Defendant's trial affidavit which was admitted without objection. That was an estimate by the Defendant of the value of that fund as at the commencement of the relationship. Although that is not entirely satisfactory, that is the only evidence available. There is no evidence of the value of the Defendant's AXA Superannuation. The values for the parties' respective accounts in their self managed superannuation fund are taken from the latest financials

tendered which were for the financial year ended 30 June 2009. On that basis, the value of the Plaintiff's fund is $112,900.00 and of the Defendant's $222,000.00, in both cases rounded to the nearest $100.00.

[100] The liabilities, also rounded to the nearest $100.00, comprise the following:-

Liability	**Liability Of**	**Amount**
Mortgage over the Driver Property	Plaintiff	$179,000.00
Mortgage over the Livingstone Property	Defendant	$507,100.00
Mortgage over the Whitewood Road Property	Defendant	$250,000.00
Loan Taken for Construction of Child Care Centre	Defendant	$1,405,000.00
Outstanding Builders Fees for Child Care Centre	Defendant	$30,000.00
	Total	$2,371,100.00

[101] On that basis the total liabilities of the Plaintiff amount to $179,000.00 leaving a net position for the Plaintiff of $371,000.00. Likewise the total liabilities of the Defendant amount to $2,192,100.00 leaving the Defendant with a net position of $2,164,250.00.

[102] The power to make an adjustive order derives from 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) 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.

[103] The exercise of the jurisdiction in section 18 of the Act, per *Kardos v Sarbutt*[6] and *Evans v Marmont*,[7] involves three main steps. Firstly, the identification and valuation of the property of the parties which may be subject to an adjustive property order. Secondly, the evaluation and balancing of the respective contributions of the parties. This step typically

[6] (2006) 34 Fam LR 550
[7] (1997) 21 Fam LR 760

results in an apportionment between the parties on a percentage basis of the overall contributions. Thirdly, the determination of the order required to recognise and compensate the parties for those contributions which is typically in line with the percentage determined by step two.

[104] In the course of the first step, the identification and valuation of the property of the parties is usually undertaken at the date of trial (*Parker v Parker*[8] and *Kardos v Sarbutt*[9] and *Ottley v Chester*[10]). 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*[11]). Values are mostly agreed between the parties without apparently demarcating between trial date and separation date and I will deal with it in that manner.

[105] Also relevant to the first step is the determination of the approach the Court takes in that process. The two recognised approaches are vernacularly referred to as the "global" approach and the "asset-by-asset" approach. The approach to take is in the discretion of the Court. The global approach is the approach usually adopted. It typically involves the Court considering the total net property of the parties and awarding a percentage to make any adjustment considered necessary. The authorities say that in exercising the discretion, a major consideration is to ensure

[8] (1993) 16 DFC 95-139
[9] (2006) 34 Fam LR 550
[10] [2010] NTSC 38
[11] (2006) 34 Fam LR 550

that no distortion results and that a party's contributions are properly evaluated. There is particular concern to ensure that use of the asset-by-asset approach does not distort or undervalue the domestic and non-financial contributions: *Kardos v Sarbutt*.[12] As I find that those types of contributions are approximately equal in any event, that concern is not an issue.

[106] The Plaintiff submits that the global approach should be utilised. The Defendant argues for the asset-by asset approach and draws support from:

1. The absence of co-mingling of funds;

2. The brevity of the relationship;

3. That there were no children of the relationship;

4. The disproportionately large initial contribution by the Defendant;

5. That a cleaner was employed from 2005;

6. The lack of cross collateralisation of assets;

7. The nature of the contributions.

[107] The employment of a cleaner is said to be relevant to this issue as the homemaker contribution was thereby decreased. There is insufficient evidence to make that finding. The evidence reveals that the cleaner was employed part time and was paid for by the Plaintiff. That payment is

[12] (2006) 34 Fam LR 550

itself a contribution. There is no evidence of the duties actually performed by the cleaner.

[108] Whether it is co-mingling in the true sense of the word or not there was co-mingling of assets to some extent. True the parties maintained separate bank accounts, however the parties had a jointly owned business in Monsoon and they had a self managed superannuation fund where they were both trustees and into which they both contributed. The de facto tax planning arrangement between them arising from the Defendant allowing the Plaintiff to retain his share of the profits and deflecting tax liability for that income to the Plaintiff is an indirect instance of co-mingling of assets. To the same extent there was cross collateralisation of assets.

[109] I do not consider a relationship of more than six years to be brief. More important is the extent of the mutuality of the relationship. Likewise I do not consider the absence of children to be overly significant to this question.

[110] The global approach is the usual approach adopted and in my view the global approach is to be utilised.

[111] In respect of the third step referred to above, 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*[13]).

[112] The division of assets as it stands, on a net value basis and leaving aside superannuation for the present, is that the Plaintiff holds $371,000.00 and the Defendant holds $2,164,250.00. Expressed as a percentage of the net pool this represents a division of approximately 15% for the Plaintiff. As for superannuation, the evidence reveals indirect contributions by the Defendant to the Plaintiff's superannuation. The only evidence of contribution by the Plaintiff in respect of the Defendant's superannuation is to the extent of her contribution to HSVC as that represents the source of the Defendant's income and his income based contributions to his superannuation derive from that. I assess the Defendant's contribution to the Plaintiff's superannuation to exceed the reciprocal contribution of the Plaintiff.

[113] On my findings as to contributions, crisply the position is:-

- At the commencement of the relationship, the Plaintiff's assets represented between 5.3% and 5.5% of the then total net pool of assets of the parties;

- During the relationship, the Defendant earnt considerably more than the Plaintiff. Even allowing for the profit share from Monsoon (including that the Defendant allowed the Plaintiff to retain his

[13] (1997) 21 Fam LR 760

share of those profits), and comparing only those income years where I have tax returns for both parties, the Defendant's earnings were more than double those of the Plaintiff;

- The extent of the Plaintiff's contribution to HSVC is:-
    - Two Jabiru visits;
    - Ten after hours call outs;
    - the value her interest free loan of $5,000.00 for four days;
- The Plaintiff was given a one third share of Monsoon ultimately resulting in her receiving one third of the proceeds of sale of that company's business and one third of its profits;
- The Defendant gave the Plaintiff his one third share of the profit distribution from Monsoon;
- The Plaintiff had an indirect contribution to Monsoon by way of providing her experience in the field and working for the business, albeit receiving appropriate remuneration. She also contractually bound herself as a term of the sale of that business to stay on with the new owner of the business for three years, again with appropriate remuneration;

- The Defendant contributed to the success of Monsoon by supporting that business through his practice and I assess that contribution as at least equal to the contribution of the Plaintiff through her employment and through accepting the contractual obligation on sale;

- The domestic and household type contributions are approximately equal over the period of the relationship;

- Other than paying for a chlorinator for the pool at the Livingstone Property, the Plaintiff had no other financial contribution to the outgoings, utilities or the loan repayments to that property where she lived for the last 18 months or so of the relationship;

- The Plaintiff had an indirect contribution to the Defendant's superannuation traced from her contribution to HSVC;

- The Defendant had made an indirect contribution to the Plaintiff's superannuation by way of his input into the self managed superannuation fund and I assess that as greater than the Plaintiff's contribution to the Defendant's superannuation;

- The Plaintiff has not made any contribution to the Whitewood Road Property.

[114] Taking a global approach I assess the Plaintiff's entitlements pursuant to section 18 of the Act to be less than 15%. There being no counterclaim, I therefore simply dismiss the Plaintiff's application.

[115] I will hear the parties as to costs and as to any consequential orders.