The Latest and Greatest – NQLA Conference
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Michael Fellows [1]

Thorne v Kennedy (2017) HCA 49

[or, last minute financial agreements will always be vulnerable!]

1. The decision of the High Court in *Thorne v Kennedy* was released in November 2017.

2. The trial judge, Judge Demack, set aside a financial agreement which was imposed upon the wife immediately before a wedding, in circumstances where the wife had come to Australia -

   … leaving behind her life and minimal possessions ... if the relationship ended she would have nothing. No job, no visa, no home, no place, no community.

3. The wedding was to occur on 30/9/07. The timetable was:

   8/8/17 Ms. Thorne accompanied Mr. Kennedy to his solicitor's office and though meeting the solicitor was not present during any discussion between Mr. Kennedy and his solicitor. [2]

   19/9/07 Kennedy advise Thorne that he wishes an agreement to be signed and if she did not sign then the wedding would not go ahead. She is given the agreement that had been drafted by his solicitors.

   By this same time Kennedy had arranged for Ms. Thorne's parents and sister to be flown to Australia from Eastern Europe – and all of the arrangements for the wedding had been completed.

   20/9/17 Kennedy drives Thorne to see an independent solicitor (Ms. Harrison) and waits in his car outside. During this meeting Ms. Thorne learns for the first time as to the contents of the agreement and the extent of the wealth of Mr. Thorne.

   21/9/17 Ms. Harrison gave emphatic written legal advice, in some detail, to the effect that the agreement was "entirely inappropriate" and that Ms. Thorne should not sign it.

   24/9/17 At a conference with Ms. Thorne, oral advice was given to similar effect.

[1] Sir George Kneipp Chambers, Townsville

[2] It seems that the solicitor for Mr. Kennedy warned him about the haste which was occurring – see the trial judgement at paragraph 45

26/9/17 Ms. Thorne signed the agreement. For a full description of the agreement read the trial judgement commencing at paragraph 52 of Judge Demack's reasons. For present purposes it need only be mentioned that it provided:

- if a separation occurred within 3 years of the date of marriage then Mr. Thorne would receive nothing other than child support in the event a child had been born

- if a separation occurred after 3 years of the date of marriage then Mr. Thorne would receive only $50,000 [though if a child had been born there was also provision for accommodation to be provided to though not to be owned by Ms. Thorne]

Nov 2017 the agreement also provided that a post-nuptial agreement in virtually the same terms was to be signed – and this occurred.

4. The litigation history was:

Date of separation	June 2011
Application filed	April 2012
Trial dates	March 2014 and January 2015 [3]
Trial decision	4/3/15
Full Court hearing	26/11/15
Full Court decision	26/9/16 [4]
Grant of special leave	10/3/17
High Court hearing	8/8/17
High Court decision	8/11/17

5. As indicated, Ms. Thorne had no assets, and she was entirely dependent upon Mr. Kennedy. He was worth between $18M and $24M.

6. Judge Demack set aside the financial agreement (and a subsequent amending financial agreement) upon the basis of "*duress born of inequality of bargaining power where there was no outcome available to her that was fair or reasonable".* [5]

[3] The trial judgement at [2015] FCCA 484 records that delay in the trial was caused by the husband's advancing illness – he died later in 2014 and the executors of his estate were substituted in his place for the conclusion of the trial and the subsequent proceedings

[4] The reasons for this delay in delivery of judgment is not readily apparent

[5] Trial reasons at paragraph 94

7. The Full Court of the Family Court overturned the trial judge's decision on various bases. Perhaps the best summation is in the head-note [6] where these words appear

...where the wife's real difficulty in establishing duress is that she was provided with independent legal advice, she was advised not to sign the agreement, but she went ahead regardless ...

8. The Full Court's reasoning did not find any traction in the High Court. There was a little disagreement in the separate reasons of Justices Nettle and Gordon (who nevertheless allowed the appeal) with the majority determining that the agreement was vitiated for both of undue influence and unconscionable conduct. Though Judge Demack had used the word "duress" it was clear that Her Honour had "*used that label interchangeably with undue influence which is a better characterisation of her findings"*. [7]

9. In the immediate aftermath of the decision there was some hyperbole in legal commentary to the effect that the decision of the High Court might have put an end to or operated as a serious dissuasion from the use of financial agreements.

10. However, I disagree.

11. What the decision affirms is the usual contract 'rule' that if you commence a legal transaction on a rushed basis, at a time of high emotion and uncertainty and with an inequality of bargaining power the resulting contract may be vulnerable.

12. The purpose of the financial agreement provisions of the *Family Law Act* is to create circumstances in which the jurisdiction of the Family Court is ousted. It enables parties to enter into agreements which will not be just and equitable within the meaning of section 79 of the *Family Law Act*.

13. It was inevitable that in the early years of litigation concerning financial agreements, much attention was paid to compliance with matters of form and appropriate process. See for example section 90G which spells out the matters which are necessary before financial agreements become binding.

14. More importantly, section 90K moves beyond matters of form and procedure to provide for circumstances in which a court may set aside a financial agreement. The section encompasses:

- an agreement obtained by fraud or entered into for the purposes of defrauding creditors or other persons;
- circumstances which have arisen which make it impractical for the agreement to be carried out;

[6] The Full Court's decision is at [2016] FamCAFC 189
[7] High Court reasons at paragraph 2

- the potential consequences of material changes in circumstance relating to children;
- an agreement may be set aside if void, voidable, or unenforceable (s. 90K(b));
- an agreement may also be set aside if in its making one of the parties engaged in conduct that was in all the circumstances unconscionable (s. 90G(e)).

15. Section 90KA imports *"the principles of law and equity that are applicable in determining the validity, enforceability and effect of contracts and purported contracts ..."*

16. The provisions of Part VIIIAB Division 4 of the *Family Law Act* import exactly the same statutory rules concerning *de facto* relationships, the only practical difference being that there is no "wedding date" so, for example, s. 90UB refers to:

People who are contemplating entering into a de facto relationship with each other ...

In some cases, at least, there will not be the same "time pressure" given the more fluid or *ad hoc* nature of the way in which such relationships are formed.

17. To my mind the practical consideration which arises from decisions such as *Thorne & Kennedy* relates to what I might describe as the intersection between the value of time and the value of money.

18. If the rich person wants to limit the entitlements of the poor person then there is, in my view, an inverse proportion to be considered. The harsher the agreement in monetary terms then the more time must be devoted to negotiating that harsh result and well in advance of the planned happy event.

19. If Mr. Kennedy had set about creating the same financial agreement as was the subject of the litigation but had done so say six months in advance would it have been so possible for Ms. Thorne to advance her arguments? It could be argued that she would have had plenty of time to contemplate what was proposed, to negotiate change, to think about making alternative arrangements to return home and so on. It is clear from the decisions of Judge Demack and the High Court that the most significant fact may be characterised as the shortness of time. By the time Ms. Thorne was confronted with the proposed (unfair) agreement, members of her family had been brought out to Australia – the flowers and champagne had been ordered – everything was in place for a wedding just a week later - and in those circumstances the pressure upon her was immense.

20. At paragraph 60 in the reasons of the majority of the High Court this passage appears:

In the particular context of pre-nuptial and post-nuptial agreements some of the factors which may have prominence include the following:

(i) whether the agreement was offered on the basis that it was not subject to negotiation;

(ii) the emotional circumstances in which the agreement was entered including any explicit or implicit threat to end a marriage or end an engagement;

(iii) whether there was any time for careful reflection;

(iv) the nature of the parties' relationship;

(v) the relative financial positions of the parties;

(vi) the independent advice that was received and whether there was time to reflect on that advice.

21. Looking back (with all the admitted benefit of hindsight) we can see that there were three principal flaws in the process that was followed:

[a] the agreement imposed harsh terms on Ms. Thorne – a modicum of generosity might have led to a different outcome;

[b] the negotiating approach was very much one of "take it or leave it" – a modicum of flexibility might have led to a different outcome;

[c] the timetable from start to finish was just 7 days – much more time might have led to a different outcome.

22. In conclusion I stress that mere inequality of bargaining power is not, of itself, a usual basis for a challenge to a contract. Most agreements proposed to be entered into under Part VIIIA or Part VIIIB of the *Family Law Act* will come about in circumstances of inequality of bargaining power.

23. Inequality of bargaining power being a feature of many relationships it follows that the High Court's menu, as set out in paragraph 20 above is a useful tool that practitioners should use for managing the risk for the wealthy client; and managing the risk for the legal practitioner tasked with the drafting of and securing the signature to an agreement intended to be binding.

Ellison v Sandini Pty Ltd [2018] FCAFC 44

(or, how not to draft an order!)

1. This is a decision of the Full Court of the Federal Court of Australia relating to a dispute as to whether a transfer of some 2,115,000 shares in Mineral Resources Ltd ("MIN") made in assumed compliance with a Family Court order was subject to capital gains tax or entitled to the benefit of the rollover relief provided for in the *Income Tax Assessment Act* ("ITAA").

2. The Order which was the subject of the litigation was made on the 21st September 2010. It was a consent order. The parties to the order were Mr. and Ms. Ellison and Sandini Pty Ltd ("Sandini").

3. At 21st September 2010 MIN shares were trading at about $10.40; the amount of money at stake was $21,996,000. [8]

4. The husband via a trust structure owned 35,804,065 shares in Mineral Resources (that is, shares to a value in excess of $372,000,000 as at September 2010). Remarkably all of these shares had the same cost base. [9] The decision of the court does not reveal what the cost base of the shares was but, for example, in December 2008 (nearly 2 years earlier) the shares were trading at only $2.00. My assumption is that a very significant taxation liability may have arisen for the transferor if CGT rollover relief was not available; alternatively, the transferee might not have been receiving something so valuable if a substantial underlying CGT liability transferred with the shares.

5. The wife received a small fraction of the overall shareholding – a little more than 6%. I have assumed this was due to the short marriage. Reading the decision of the trial judge in the Federal Court [10] indicates that it was a relationship of somewhat less than six years as the parties married in February 2002 and proceedings had commenced in the Family Court by March 2008. An added complexity that I am unable to fully investigate as there is little reference to it in the judgements is that the consent order was expressed to be pursuant to section 79A of the *Family Law Act* – so there must have been some controversy between the parties as to an earlier consent order of the Court. [11]

6. To my mind the practical lesson from the decision (though I will turn to the legal lessons for the purposes of this discussion) can be found in Paragraph 5 of the Reasons for Judgment of Logan J where he said

   The evidence in this case ... the subsequent lodgment of a consent by her and Mr. Ellison (of) supporting materials and approval by the Family Court all seemingly

[8] Incidentally the shares are now (26/4/18) worth $17.54
[9] Reasons of Jagot J at paragraph 149 – though the reasons do not state what the cost base was
[10] The trial decision is *Sandini P/L v Commissioner for Taxation* [2017] FCA 287
[11] That the case was resolved by a consent order inevitably means that there is no report of the family court proceedings on Austlii.

without any attention to the possible federal revenue law consequences of the order proposed, made, and later amended gives pause for thought about the risks of over-specialisation in both the practicing profession and the judiciary.

7. Mr. Ellison controlled the company Sandini which was trustee of the Karratha Rigging Unit Trust ("KRUT"). The sole unit holder in that trust was Wabelo Pty Ltd as trustee for the Ellison Family Trust ("EFT"). Mr. Ellison controlled that entity as well.

8. The shares in Mineral Resources were legally owned by Sandini but beneficially held as trustee for KRUT.

9. However, the consent order of the Family Court provided that Sandini as trustee for EFT was to transfer 2,115,000 shares in MIN within seven days and do all acts and things and sign all such documents as necessary to transfer that number of shares to Ms. Ellison.

10. As was to be determined by the majority in the Full Court the orders in question were not capable of enforcement because Sandini was not trustee for EFT and did not own or control the shares for the purposes of that trust.

11. Nevertheless, the parties proceeded as if the orders were efficacious.

12. Shortly after the orders were made Mr. Ellison received an email from Ms. Ellison asking him to not transfer the shares to her but to a company she controlled namely Wavefront Pty Ltd ("Wavefront") as trustee of her own family trust – the Felstead Family Trust.

13. Sandini as trustee for KRUT executed a standard transfer form for the transfer of 2,115,000 shares to Wavefront as had been requested. The shares were transferred. Whether any thought was given to amending the consent orders at that point in time, I cannot say.

14. Nothing happened for several years.

15. In August 2015 the husband was notified by the ATO that it proposed to audit Sandini in respect of the 2010 transaction. By December 2015 the husband was advised that the ATO took the position that CGT rollover relief was not available for the transfer of shares to Wavelength and that Sandini would be taxed on the capital gain.

16. Thereafter proceedings for declaratory relief were commenced in the Federal Court and all parties (including the Commissioner) participated.

17. The decision of the majority of the Full Court was that CGT rollover relief was not available because *inter alia*, the share transfer form was executed in favour of Wavefront as transferee, not Ms. Ellison.

18. There are some attractive and short arguments by Justice Logan in his dissenting reasons for judgment. As with the trial judge, His Honour focused on the evident policy of the

provisions of the ITAA to defer crystallization of a CGT liability. The text of the Act and those beneficial ends were conducive to a liberal construction of the provisions.

19. Nevertheless, the decision of the majority in reasons given by Her Honour Jogot J, with which Syopis J agreed, was that Sandini became obliged to pay CGT on the disposal of the shares to Wavefront.

20. I commend the decision because it demonstrates the sheer complexity with which argument can be made concerning matters such as these; but also, because the decision very clearly demonstrates the danger of incurring taxation liabilities when transferring assets which are not directly owned by the husband and/or wife but are transferred by and/or to corporate or trust structures in which they have an interest or control. To my mind it looks very much that no sufficient thought was given to the drafting exercise.

21. Before turning to some particular points which emerge which emerge from the reasons of the majority I set out the scheme for rollover relied appearing in the ITAA.

ITAA s. 104-10 may be summarised as providing that a CGT event occurs when you dispose of an asset by a "change of ownership" to another entity, though a change of ownership does not occur if you stop being the legal owner of an asset but continue to be its beneficial owner.

ITAA s. 995-1 defines a "spouse" as "another individual" with whom the first individual is in one of a number of defined relationships including marriage or with whom the individual lives on a genuine domestic relationship as a couple.

ITAA s. 126-1 provides that:

A same-asset rollover allows a capital gain or loss an entity makes from disposing of a CGT asset to ... another entity to be disregarded.

ITAA s. 126-5 provides that:

(1) There is a rollover event if a CGT event (the trigger event) happens involving an individual (the transferor) and his or her spouse (the transferee) or a former spouse (also the transferee) because of:

(a) A court order under the Family Law Act ...

...

(4) A capital gain or a capital loss the transferor makes from the CGT event is disregarded.

ITAA s. 126-15 provides that:

(1) There are roll-over consequences in section 126-15 if the trigger event involves a company (the transferor) or a trustee (also the transferor) and a spouse or a former spouse of another individual because of:

(a) A court order under the Family Law Act ...

22. The majority stressed that s. 104-10 required a "change of ownership" not the mere creation of proprietary rights. [12] So, if the original owner continued to enjoy rights to deal with the asset it could not be said that another entity became beneficial owner. [13] The consent order in this case did not create or transfer ownership [14] if only because the order incorrectly identified the capacity in which Sandini owned the shares. [15] As well, absent an injunction, [16] the orders left Sandini free to deal in the shares before transfer. [17]

23. The majority also emphasised the usual rule that a court called upon to construe previous orders cannot go behind the orders to extrinsic material except in circumstances where there is a case of real ambiguity. [18] The Federal Court's reasons pick up the decision of the Full Court of the Family Court in *Langford and Coleman* [19] where it was said that the court cannot take into account whatever agreement might or might not have been reached between the parties which led to the making of the consent order. The order must be

... read and interpreted quite independently of what the parties might have subjectively intended thereby ...[20]

There was no ambiguity on the face of the 21 September 2010 orders so as to allow access to extrinsic material. [21]

24. Matters which reinforced the conclusions of the majority included

[a] the orders referred to "2,115,000 MIN shares" and not to "2,115,000 of the MIN shares owned by Sandini". [22]

[12] Reasons of Jogot J at paragraph 94.
[13] Reasons at paragraph 99.
[14] Author's emphasis of the reasons at 104
[15] Reasons at 116
[16] See the analysis of Jagot J at reasons paragraph 162(6)
[17] Reasons at 116
[18] Reasons at 155
[19] (1992) 16 FamLR 228
[20] *Langford op cit* at page 233
[21] Reasons at paragraphs 157 and 168
[22] Reasons at paragraph 162(2)

[b] the orders did not require Sandini to "transfer" shares to Ms Ellison as distinct from requiring Sandini to do all acts and things and sign all documents necessary to transfer. [23]

[c] the orders "did not suggest" that Sandini held the shares proposed to be transferred in trust, the beneficiary being Ms. Ellison. [24]

[d] the orders did not prevent Sandini dealing in the shares. [25]

[e] the orders refer to the things necessary to transfer to "the wife" – but did not identify the wife as having a power to direct the transfer of shares to another entity.

...*The rights created are thus personal to the wife. It is not apparent that those rights are themselves assignable.* [26]

[f] It was not that the orders were invalid – "they were simply ineffective". [27]

[g] the share transfer was executed in favour of Wavefront as trustee, not Ms. Ellison. [28]

[h] the saving provisions of ITAA s. 126-15 were not engaged because Ms. Ellison was not the transferee. [29]

25. Leaving aside the problem, more unique to this case, of the two major errors namely:

- the misidentification of the entity which owned the shares; and
- the acquiescence to the wife's request to transfer the shares to Wavelength -

from a practitioner's perspective the items at sub-paragraphs 26[a], [b] and [d] loom large in terms of the typical way in which orders tend to be drafted.

26. One matter which is not touched upon in the trial or appellate decision is the separate stamp duty obligation that might or will have arisen in this case. Having regard to the wording appearing in the (Queensland) *Duties Act* 2001 at s. 424 if the same circumstances arose in Queensland then, though Sandini was fixed with the CGT liability, Wavelength as transferee would have incurred a significant stamp duty liability. [30]

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[23] Reasons at paragraph 162(3)
[24] Reasons at paragraph 162(5)
[25] Reasons at paragraph 162(6)
[26] Reasons at paragraph 162(7)
[27] Reasons at paragraph 171 and 195 "wholly inefficacious"
[28] Reasons at paragraph 174
[29] Reasons at paragraph 183
[30] My analysis of the comparable provisions of the (Western Australian) *Duties Act* 2008 suggests that a similar result would have occurred in that jurisdiction.

27. The decision of the Full Court reinforces the need for precision (and better detail) in the drafting of orders; especially where one party or the other may be exposed to tax consequences.

28. In addition, having regard to the matters discussed at paragraph 24 (above), in more complex matters it might be useful to consider the use of notations at the end of the order as a mechanism for conveying information as to the result intended to be achieved by the consent.

Calvin v McTier (2017) 57 Fam LR 1; 93-785
Holland v Holland (2017) 57 Fam LR 57; 93-798

(Or, stop attempting to quarantine property!)

1. Conveniently these two Full Court decisions appear in the same volume of the Family Law Reports and Family Law Cases.

2. Each of them stress that attempts to quarantine property from the pool(s) available for distribution are doomed to failure. In *Holland* (at paragraph 25) their Honours said -

> *... earlier cases often contain references to particular property being "excluded" from consideration. In our view it is wrong as a matter of principle to refer to any existing legal or equitable interest in property of the parties or either of them as "excluded" from or "immune" from consideration in applications for orders pursuant to s. 79.* [31]

3. Both cases involve an inheritance received by husbands long after the date of separation – 4 years in the case of *Calvin* and 3 ½ years in the case of *Holland.*

4. *Calvin* is particularly interesting because counsel for the husband attempted to argue that if the inheritance must be in the property pool, the dissenting judgement of Guest J in *Farmer v Bramley* [32] ought now to be the preferred approach in light of the decision of the High Court in *Stanford*. [33] It will be recalled that Guest J advanced the argument that property acquired by a party after separation should be excluded from consideration unless there was some clear connection between it coming into existence and the parties' marriage. The unanimous decision of the Full Court in *Calvin* rejected the attempt to re-argue *Farmer v Bramley*. I commend the jurisprudence which appears in paragraphs 25 – 50 of the reasons.

[31] The underlined words are emphases by the Court
[32] (2000) FLC 93-060
[33] (2012) 247 CLR 108

5. The decision emphasises that trial judges have a discretion as to the manner in which the after-acquired property is dealt with. It can be included within the general property pool or dealt with on a separate basis. [34] One pool, or two pools. To my mind this will be a question of degree. After-acquired property worth only $10,000 can be dealt with easily with a general pool; if it was worth $500,000 it may be better to use a separate pool.

6. In *Holland* the trial judge made the mistake that is not uncommon in negotiations, solicitor correspondence, and outlines of argument. The inheritance was excluded as an asset from the property pool, the trial judge indicating that it would be regarded as a "financial resource".

7. The Full Court gave this guidance [35]

> *... the nature of a particular interest ... in property and when and how it was acquired, utilized, improved or preserved may be very relevant to each or all of three central questions: should a s. 79 order be made at all; whether contributions should be assessed "globally" or "asset by asset" or by reference to two or more "pools"; and what is the nature and extent of each party's contributions. However, there is no basis for excluding from consideration any property in which the parties have an existing legal or equitable interest.*

8. Harking back to the decision in *Calvin* the Full Court also said [36]

> *... it is important to emphasise that the categorization of property as "an inheritance" or as "after-acquired" property often leads to an erroneous argument that unless contributions to that property can be established the property should be "excluded from consideration".*

[34] Reasons at paragraph 51
[35] Reasons at paragraph 31
[36] Reasons at paragraph 52

Wallis v Manning [2017] FamCAFC 14
Anson v Meek (2017) 57 Fam LR 23; FLC 93-816

(or, the range, what range?)

1. In a paper I delivered to the NQLA conference in 1999 entitled "Pre-Relationship and Early Contributions" you can read a complaint by me. I had surveyed a number of decisions of the Full Court concerning cases where one party had brought into the relationship significant assets. In *MH & MZ* [37] the marriage was of 11 years; and at its commencement the contribution of property was about 85% by the husband and 15% by the wife. There were 2 children. Carmody J assessed contributions 75% to the husband at trial. On appeal the Full Court [38] said that an appropriate assessment

   'ought not have exceeded 67.5% on behalf of the husband'

2. I complained that by use of the language 'ought not have exceeded 67.5%" the Court signalled that this was the upper end of the range and that the facts permitted the allocation of a lesser contribution to the husband. But was it 65% or 63.5% or 61.75%? We were not told. We might infer that if 67.5% is the upper limit of the 'generous ambit of discretion' then if the trial judge had selected say 62.5% as the husband's contribution then his decision would have been correct; as would any percentage between say 62.5% and 67.5%.

3. In my view we continue to struggle with problems such as that illustrated.

4. In order to understand the December 2017 decision of the Full Court in *Anson v Meek* you ought to first go back and read the earlier (January 2017) decision of the Full Court in *Wallis v Manning*. [39] There, a Full Court constituted by their Honours Thackray, Ainslie-Wallace and Murphy set aside a decision of Judge Demack concerning a property settlement made after a 27-year relationship.

5. Her Honour had made the usual assessment that in the course of a long relationship it was not possible to distinguish between the contributions made by each party save in respect of one matter. The husband had brought into the relationship a property and associated water licences gifted by his father. He contended this required a 70% contribution assessment in his favour; the wife contended for only 55%. Her Honour accepted the husband's contention, though making a 10% adjustment having regard to the matters set out in s. 75(2).

6. The wife appealed on several bases and on one of them was successful; for my purposes I am concentrating on a criticism that the contribution assessment was outside the range reasonably available.

[37] [2005] FamCA 287 now reported as *Hunt v Zuryn* (2005) 34 Fam LR 169
[38] Kay, May and Boland JJ
[39] [2017] FamCAFC 14

7. The unanimous decision of the Full Court may be summarised as follows:

> *64. In our view, each of the High Court and the Full Court of this court has postulated a role both for guidelines in the "generality of cases or a particular class of cases" and a role for comparable cases for determining what is just and appropriate in a particular case. Much more recently, in the discretionary context earlier described, the judgment of the plurality in Barbaro again provides, in our respectful view, powerful guidance in respect of the use of comparable cases for the exercise of the s 79 discretion*
>
> *67. While recognising the fact that no two cases are precisely the same, we are of the view that comparable cases can, and perhaps should far more often,* [40] *be used so as to inform, relevantly, the assessment of contributions within s 79.*
>
> *68. The word "comparable" is used advisedly. The search is not for "some sort of tariff let alone an appropriate upper and lower end of the range of orders which may be made". Nor is it a search for the "right" or "correct" result: the very wide discretion inherent in s 79 is antithetical to both. The search is for comparability — for "what has been done in other (more or less) comparable cases" with consistency as its aim.*
>
> *72. To the extent that comparable cases can be said to have been cited to her Honour, the four decisions relied upon by then counsel for the wife are preceded by a submission which asserts merely: "Attached to these submissions are four judgments where there have been significant contributions during a long-term marriage". Thereafter the dot-pointed facts of the cases are listed and their respective assessments, but no submissions seek to compare the instant case with those instanced.*
>
> *73. No argument was made to her Honour as to any consistency emerging from those authorities, nor is there any attempt to canvass a number of different authorities, particularly any from the Full Court, so as to seek to establish any such comparability.*
>
> *74. We are unable to see how arguments were advanced to her Honour as to the comparability of any decided cases such that her Honour can be said to have erred either by ignoring the same as a relevant consideration or so as to produce a result that is "plainly wrong".*

8. Having allowed the appeal (on another basis) the Full Court set about re-exercising the discretion. After initially concluding that the contributions of the husband were greater than that of the wife, [41] the Full Court referred to a list of 10 cases that had been provided

[40] My emphasis
[41] Reasons at paragraph 126

by counsel for the husband and to another 5 cases that the Full Court had separately considered. [42] The Full Court then embarked upon an extensive consideration of them. [43]

9. Informed by that process the Full Court concluded that contributions should be assessed at 57.5% in favour of the husband. But no guidance was given as to the range.

10. *Anson v Meek* concerned a case where the assets consisted of a valuable farming property in Australia and cash and assets in "country T" – all owned by the husband – he held 96.5% of the property pool as at the date of cohabitation. It was a relationship of not more than 8 years, the parties meeting later in life. There were no children. The wife gave up not insignificant employment to move from Australia to be with the husband in "East Asia". The trial judge adopted a "two pools" approach, the foreign assets being in a separate pool.

11. The Full Court consisted of their Honours Murphy, Aldridge and Cleary; thus, only Murphy J was common to *Wallis v Manning* and *Anson v Meek.*

12. The identifiable error of the trial judge (with which all the Full Court agreed) was to apparently conclude that the increase in value of the Australian farming property from the date of cohabitation to trial was the result of the equal contributions of husband and wife. This flew in the face of the joint expert who had given evidence that almost all of the value of the farm was attributable to the per hectare value of the land and almost none to any improvements on the land. [44]

13. The first of the reasons was written by Murphy J, and it was his reasons concerning the matters set out in paragraph 12 above that Justices Aldridge and Cleary agreed.

14. However, commencing at paragraph 94 of the reasons of Justice Murphy, using the title "The range" His Honour embarked upon a contribution analysis similar to that undertaken by the plurality in *Wallis v Manning.* His Honour concluded that the trial judge was in error for failing to account of relevant considerations which included

> *The assessment of contributions in cases comparable with the present.* [45]

And

> *I also consider … that in exercising her discretion Her Honour … failed to take account of a relevant consideration namely the assessment of just and equitable outcomes in cases comparable with the present.*

[42] See paragraphs 127 – 129 of the reasons
[43] Reasons at paragraphs 131 – to 154
[44] There was also a separate error by the trial judge concerning the s, 75(2) analysis but that it no relevant for present purposes
[45] Reasons at paragraph 115

15. One can discern from the reasons of Murphy J that His Honour considered that comparable cases demanded that a higher contribution assessment ought to be have been made in favour of the husband than that determined by the trial judge. However, because His Honour ultimately concluded that it was appropriate to remit the matter for further trial there is no guidance as to how significant was the error of the trial judge.

16. By contrast Aldridge and Cleary JJ specifically disagreed with Murphy J as to his analysis that appears from paragraph 94 onwards stating, in summary that

> *We do not consider that the existing authorities obliged the primary judge to consider the comparable cases at all, let alone obliged her to conduct an analysis of the comparable cases so as to identify both the factors that indicate a lack of comparability and those that do not.* [46]

17. The majority surveyed various decisions of the Family Court and other Courts and reached conclusions which included

> *In addition to rejecting the concept of establishing a norm or a range, the passages emphasised seem to us to speak directly against the express consideration of comparable judgments at all.* [47]
>
> *These passages again would seem to point away from the ready use of comparable judgments, to set a norm or a range, particularly those placed before the Court by the parties.* [48]
>
> *These passages indicate that the point of looking at comparable sentencing cases is to seek consistency in the proper application of principle and not to achieve some kind of numerical or mathematical equivalence.*
>
> *Thus, if the point of Wallis was that comparable cases could be looked at so as to derive a consistency in the application of principle then we would agree. However, their Honours did not say so or identify how the use of comparable cases would lead to consistency. As we have already observed, if the aim of consistency is consistency of results, then we would suggest that this aim focuses on mathematical equivalence ...* [49]
>
> *In our opinion, the fact that two different judges acting upon the same evidence may properly reach different conclusions greatly diminishes the value of comparable cases. This is especially so in this jurisdiction where there is almost an infinite variation in the rich factual detail that attend both parenting and property cases. The concern is amplified when the Court is proffered just a selection of*

[46] Reasons at paragraph 126
[47] Reasons at paragraph 132
[48] Reasons at paragraph 146
[49] Reasons at paragraph 150 - 151

*cases said to be comparable as opposed to an analysis of **all** cases that could be said to be comparable.* [50]

The submissions before us did not challenge the manner in which Wallis should be approached but we have felt it necessary to express our views which, perhaps, may be of assistance at some stage in the future. As can be seen, we do not wholly embrace the reasoning in that case.[51]

18. Their Honours ultimately concluded the case not by reference to comparable cases but because

Quite simply, the result is disproportionate to the facts. [52]

19. Whilst I might find the reasoning of the majority intellectually satisfying this may be of no comfort to practitioners. It is difficult enough to advise clients concerning the application of the phrase "just and equitable", especially when you are confronted with a new judge or a temporary visitor to these far shores in northern Australia, but the process followed by the Full Court in *Wallis v Manning* might be, at the least, practically helpful. Consistency in "advice giving" is as, indeed more important than, consistency in decision-making.

20. Particularly where "*the fact that two different judges acting upon the same evidence may properly reach different conclusions"*, it highlights the necessity to "know your judge" when preparing a property case for trial. As was expressed by the American jurist Oliver Wendell Holmes

The prophecies of what the Courts will do, in fact, and nothing more pretentious, are what I mean by the law. [53]

21. When an appellate court says that the decision of a trial judge at say a 65% contribution is "out of the range" but 50% is "within range" it begs the question of what the range might have been. Was the trial judge "out of range" by a factor of 2%, 5%, or 7%? When the Full Court re-exercise the discretion and picks 50%, did the judges pick a figure "in the middle" of the range or for reasons not elucidated pick a figure at the top or bottom of what they considered to be the range?

22. It is important to bear in mind that it can be difficult to find cases that are properly comparable given the tremendous variability in the facts of individual cases. The decision in *Wallis v Manning* stresses that if comparable cases are to be used then a sound analytical approach is required. [54]

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[50] Reasons at paragraph 158
[51] Reasons at paragraph 163 – the emphasis
[52] Reasons at paragraph 183
[53] Holmes "The Path of the Law" 10 Harv. L Review 457, 461
[54] Reasons at paragraphs 72 and 73

23. Much of the jurisprudence referred to by their Honours in the majority concerns the use of comparable sentencing decisions in criminal cases. The High Court having concluded that this was inappropriate, the legislative response was swift. In Queensland, for example, Part 2A of the *Penalties and Sentences Act* 1992 now provides a code by which "guideline judgements" can be used in the imposition of penalties in criminal cases.

24. Clearly enough there is room for further guidance from the Full Court (or the High Court) concerning the difference between the approach of the plurality in *Wallis v Manning* and the majority in *Anson v Meek.*

23. At the date of finalisation of this paper (week of 23rd April 2018) there is no subsequent decision of the Family Court which grapples with this difference.

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26/4/18