

FAMILY LAW PROPERTY Settlement in relation to marriage Where the contributions at separation were equal Where the wife had sole physical care of the children post-separation Where the wife had the entire financial burden of the children for seven months post-separation Where the husband had to pay rent Where it was appropriate to assess contributions 53 per cent to the wife and 47 per cent to the husband Where the wife significantly increased the balance of the mortgage and credit card indebtedness post-separation Where the Court does not accept the wife's explanation for the disbursement of substantial funds Where the wife has had the benefit of paid legal fees by way of credit card indebtedness and loans Where the wife will have the ongoing care for the younger children Where a modest s 75(2) adjustment is appropriate in favour of the wife Where the wife receives 56 per cent and the husband receives 44 per cent of the available property and superannuation Family Law Act 1975 (Cth) ss 75(2), 79, 79(1), 79(2), 79(4) Stanford v Stanford [2012] HCA 52; (2012) FLC 93-518 APPLICANT: Ms Selim RESPONDENT: Mr Selim FILE NUMBER: PAC 4152 of 2013 DATE DELIVERED: 3 October 2014 PLACE DELIVERED: Parramatta PLACE HEARD: Parramatta JUDGMENT OF: Johnston J HEARING DATE: 30 September, 1 & 2 October 2014 REPRESENTATION COUNSEL FOR THE APPLICANT: Mr Wong SOLICITOR FOR THE APPLICANT: Taylor & Scott Lawyers COUNSEL FOR THE RESPONDENT: Mr Dura SOLICITOR FOR THE RESPONDENT: McAuley Hawach Lawyers ORDERS That within 56 days from the date of these Orders, and conditional upon the Wife complying with Order 2 herein, the Husband shall transfer to the Wife all his right title and interest in the jointly owned property known as and situate at... I Street, Suburb C in the State of New South Wales, being the whole of the land contained in Certificate of Title Folio Identifier ... (the property). That simultaneously with the transfer by the Husband to the Wife in accordance with Order 1 herein, the Wife shall: (a) Do all acts and things and sign all such documents necessary to discharge the mortgage to National Australia Bank Limited secured against the property (registered no. ...) (the Mortgage); (b) Pay to the husband the total sum of \$355,902 by way of a bank cheque drawn in his favour (the Capital Sum); and (c) Indemnify and keep indemnified the Husband in relation to any and all encumbrances, debts, taxes, imposts, outgoings and/or utilities secured against or in relation to the property. That the parties are to

pay all outstanding rates on the property in the proportions 65.278 per cent by the wife and 34.722 per cent by the husband at settlement. That in respect of any costs incurred as a result of, or incidental to, the discharge of the Mortgage and/or transfer of the property, such as stamping fees, Department of Lands registration fees and the like are to be borne by the parties in equal shares, but to the exclusion of solicitor fees, if any, incurred by either party which are to be borne by the parties respectively. That should the wife fail to pay the Capital Sum or discharge the mortgage within the time: (a) The parties shall do all things and sign all documents necessary to list for sale and sell the property at a price as agreed between the parties or in default of agreement for a period in excess of 14 days at a price fixed to be a fair market value of the property by a valuer jointly appointed by the parties or in default of agreement by them, appointed on application by either of them, by the President or other senior office bearer for the time being of the NSW Division of the Australian Property Institute or its successors acting as an expert and not as an arbitrator. Upon completion, the parties shall, after adjustment for Municipal Council rates and Metropolitan Water Sewerage and Drainage Board rates, distribute the proceeds of sale as follows: (i) In discharge of the mortgage secured upon the property; (ii) In payment of real estate agents commission, legal and other costs on sale; (iii) In payment to the wife of 65.278 per cent of the balance and 34.722 percent thereof to the husband; That except as otherwise specified in these orders, each party be declared the sole owner in law and equity of all items of property and financial resources presently in their respective names, possession or control and that this term shall be taken to include all superannuation entitlements and life insurance policies presently in their respective names. In the event that either party refuses or neglects to execute any deed or instrument required to give effect to these orders, the registrar of this Court is appointed pursuant to Section 106A of the Family Law Act 1975 to execute such deed or instrument in the name of such party and do all acts and things necessary to give validity to the operation of such Deed or instrument. That all exhibits are released. That both parties have leave to re-list these proceedings on 14 days notice in relation to the implementation of these orders. IT IS NOTED that publication of this judgment by this Court under the pseudonym Selim & Selim (No. 2) has been approved by the Chief Justice pursuant to s

121(9)(g) of the Family Law Act 1975 (Cth). FAMILY COURT OF AUSTRALIA AT PARRAMATTA
FILE NUMBER:PAC 4152 of 2013 Ms Selim Applicant And Mr Selim Respondent REASONS FOR
JUDGMENT MrSelim, 52 years of age (the husband) and Ms Selim, 46 years of age(the wife) met in
Egypt in August1985. The husband came toAustralia in August 1986 and he and the wife married in
Australia in August1986. Theyhave five children, three who are adults, Mr S Selim (male) born in
1987, Ms RSelim born in 1991, Mr D Selim born in 1994 (20years), E born in 1999 (almost15 years)
and F born in 2001 (almost 13 years). Theyseparated under the same roof in approximately May
2012 and the husband movedout of the former matrimonial home in May 2013. The wife remained
living in thehome with the four youngest children. Theparties have been unable to resolve their
property dispute and have asked theCourt to do this. APPLICATIONS Thewife seeks orders to the
following effect:- Thatthe husband transfer to her his interest in the former matrimonial home
atSuburb C in return for the payment by her to him ofthe sum of\$180 767; Thatthere be a
superannuation splitting order which would in effect split\$50 000 from the wifes First State Super
interestin favour of thehusband; Thatotherwise the parties be declared the sole owners respectively
of all otherproperty and superannuation in their possession and/orcontrol. Onthe other hand, the
husband seeks orders to the following effect: Thathe transfer his interest in the said home to the
wife upon payment by her to himof the sum of \$600 000; Thatin default of such payment the said
home be sold and from the net proceeds he bepaid the \$600 000 with the balance paid to thewife; 3.
That there be no superannuation splitting order; and Thata similar order be made in relation to
remaining property and superannuation asthat sought by the wife. BACKGROUND Thebackground
facts are as follows. Atthe commencement of their marriage the parties lived with the wifesparents at
their home. Inapproximately December 1986 they moved to live in a rented apartment at SuburbA.
Theparties separated in March/April 1987 with the wife returning to live with herparents until
approximately April 1988. Then sheand the husband reconciled andlived at an apartment at Suburb
G for six weeks when the apartment becameflooded. The parties thenmoved to an apartment at
Suburb H. But four monthslater the apartment was broken into so the parties moved to live in a
grannyflat at Suburb J. They purchased land at K Street, Suburb L and contractedCompany M to

construct a home on the land. The cost of this property was \$39 000. This was funded from the parties savings and a loan of \$31 000. They moved into their new home in 1990. In July 1998 the parties purchased the property at N Street, Suburb C for \$405 000. They borrowed \$380 000 to assist funding the purchase and used savings to pay the balance. They demolished the home on this land and built a new home thereon. This cost approximately \$400 000 funded from savings and a second mortgage with Select Credit Union for \$382 519. The parties rented their new home out for approximately 12 months, continuing to live in their Suburb L property. Then they moved into Suburb C. They sold Suburb L for approximately \$292 500 and applied the net proceeds of sale to reduce the loan on Suburb C. In 2004 the husband's father died and the husband inherited a 1/6 interest in his father's home in Egypt. His three brothers all live at this property with their families. In 2006 the parties purchased the property at I Street, Suburb C for \$1.4M. They sold their N Street, Suburb C property for approximately \$1.266M. The net proceeds of sale were approximately \$257 630. As indicated above, in May 2012 the parties separated under the same roof. In June 2012 the husband commenced a relationship with Ms B with whom he commenced living after leaving the former matrimonial home in May 2013. They remain living together. CREDIT The wife The wife was not very responsive to questions in relation to her financial circumstances. It is clear that she has drawn down substantial funds from the mortgage and that she has established numerous credit card accounts since the husband left the former matrimonial home. Yet the wife has not been able to provide a convincing explanation for how a considerable amount of the funds involved have been dealt with. She is the person who has the knowledge about these matters. Yet time and again when asked about specific transactions on her various accounts she replied I don't know or it was a long time ago or my guess would be. Her attitude to the important financial transactions following physical separation of the parties is exemplified by her attitude to the serious matter of preparing her first financial statement sworn by her as being true on 26 September 2013 and filed the following day. In this important document she failed to make any reference to any funds in any bank account. Almost incredibly in my view, she said that she left the preparation of the financial statement to her previous solicitor and that she did not read the document when she signed it. Information contained in her affidavit in chief,

her recent financial statement and her oral evidence during cross-examination is in conflict with information in the earlier financial statement. I shall refer in more detail to these inconsistencies below. Suffice it to say that I have serious reservations about the wife's truthfulness and consider her evidence where not supported by documents as being unreliable. The husband. On the other hand, the husband was reasonably responsive in his answers to questions but not on all occasions. He made concessions and was much more balanced in his assessment of the wife's contributions than the wife was about his. Generally where their evidence is in conflict, I prefer the evidence of the husband to that of the wife.

FINANCIAL MATTERS SINCE SEPARATION

There is a major issue concerning significant increase in the balance of the mortgage, and also in the state of the wife's indebtedness on credit cards, since separation. It is common ground that at the time the husband left the former matrimonial home the outstanding mortgage balance was approximately \$680,000. It is now \$795,000. I also accept that the total of outstanding balances on the wife's credit cards at separation was \$3,284.77 comprising \$713.42 on the ANZ Visa Card and \$2,571.35 on the HSBC card. Current outstanding credit card balances are a total of \$92,965. I shall first refer to the issue about the liabilities alleged by the wife other than the mortgage. The wife alleges that she has the following such liabilities: \$ 1. Macquarie Bank Visa 19,836 2. Westpac Bank Visa 13,278 3. Woolworths Ltd Mastercard 6,900 4. Citibank Visa 14,769 5. St George Bank Master Card 3,298 6. ANZ Amex (No 1) 19,947 7. ANZ Amex (No 2) 14,937 Personal loan from Ms O (wife's sister) 7,000 Personal loan from Ms R Selim 42,500 _____ Total \$142,465 Since the husband left the former matrimonial home in May 2013 the wife has established each of the credit card accounts except the ANZ Amex account (No 1) which is a re-generated account from the ANZ credit card account in long time use by the wife. I am satisfied that the outstanding liabilities on these accounts are as stated above. There were strong submissions on behalf of each of the parties about these liabilities. It was submitted on behalf of the husband that the Court should simply disregard these as liabilities solely attributable to the wife. Learned counsel for the husband undertook detailed analysis of the credit card movements looking at cash withdrawals, transfers and BPay internet payments. For the calendar year 2013 the total of these transactions was \$221,560. But this included

the approximately \$55 000 drawdowns referred to above as well as approximately \$45 000 of money which the wife said was Ms R Selim's money about which there was considerable issue. A similar analysis was undertaken by those representing the wife and similar figures were arrived at. What is clear is that the wife has spent a lot of money and incurred a substantial level of indebtedness. It was said on behalf of the wife that after the husband left the former matrimonial home in May 2013 the wife struggled to make ends meet and relied on her credit cards. She even established new credit cards to avail herself of lower interest rates and charges for new customers and did balance transfers from the old accounts. It was said that with children going to university her costs increased and she was shouldering the entire burden of supporting the children for seven months until the husband started paying child support in January 2014. I accept the latter part of this. On the other hand it was submitted on behalf of the husband that when the parties were together under the same roof the husband paid the mortgage payments of \$700- \$800 per week and the wife paid the living costs. They were able to have a good standard of living and credit card debts were only approximately \$3500. When the husband left, he no longer paid the mortgage payments but neither did the wife and she negotiated the moratorium with the Bank. It was submitted therefore that nothing really changed and the wife should have been able to pay the living costs of herself and the children without having to accumulate credit card debts of anything like the magnitude of what has occurred. I must say I think this is too simplistic an approach. It is clear to me that one thing that has occurred to increase the wife's costs is that she has been paying a lot of money towards the parties' daughters who are attending university. She has been funding their HECS fees, books and other costs and she has been giving them money. The difficulty is that one cannot be entirely clear about the appropriateness of all the wife's expenditure because she has not given a full account. Doing the best I can in these difficult and frustrating circumstances I find the outstanding credit card liabilities and the liability to Ms R Selim to be:

1. Macquarie Bank Visa	19,836
2. Westpac Bank Visa	13,278
3. Woolworths Ltd Mastercard	6,900
4. Citibank Visa	14,769
5. St George Bank MasterCard	3,298
6. ANZ Amex (No 1)	19,947
7. ANZ Amex (No 2)	14,937
Personal loan from Ms R Selim	27,500
_____ Total	\$120,465

I have disallowed the \$7000 alleged remnant of the alleged loan to

the wife's sister and I have removed from the alleged loan to Ms R Selim of \$42 500 the \$15 000 to leave a liability of \$27 500 which is for the legal fees of the wife paid by Ms R Selim. I shall discuss these matters further below. In relation to the alleged liability of the wife to her sister Ms O for \$7000, the wife said that upon the death of their mother the wife's sister loaned her roughly \$37 000 being her sister's inheritance from their mother's estate. The wife said that this money was given in cash. In my view there are several difficulties with this assertion. Firstly, the wife made no mention of this alleged liability in her affidavit in chief. The wife did mention the liability in her first financial statement sworn on 26 September 2013 deposing that she then owed her sister \$10 000. But during cross-examination the wife said that such a reference was incorrect and that at the time she owed her sister \$27 000. Subsequently the wife said that she had repaid her sister \$17 000 which consisted of one payment of \$8000 and another payment of \$9000, the wife asserting that she had paid these amounts to friends who had taken the money to her sister in the US in August 2013 and February 2014. If this was correct, on the basis that \$17 000 had been repaid from \$27 000 this would leave a current liability of \$10 000 not \$7000 as claimed. In any event, the figures given by the wife did not appear to be consistent which did not inspire confidence about the truth of the wife's assertions. In addition, it was common ground that the wife never informed the husband about this alleged loan. She said that they were not speaking. Further, as I remarked upon during submissions, the wife could have filed an affidavit by her sister about this and she did not. I draw the inference that such an affidavit would not have assisted the wife. Given all these matters and the poor regard generally I have for the wife's evidence, I am far from persuaded that there was any such loan and that the wife's assertions in this regard should not be applied to adjust the pool of available property as against the husband. If I am wrong in this regard the wife will just have to account to her sister from her own resources. The wife also asserts that she owes the parties' daughter Ms R Selim \$42 500. She said that in 2009 or 2010 she borrowed \$15000 from Ms R Selim. The wife said that recently she borrowed two additional amounts to a total of \$27 500 from Ms R Selim to pay her solicitors. There was no mention of these matters in the wife's affidavit in chief. The husband said he had no knowledge about any loan in 2009/2010 from Ms R Selim to her mother. I think it more probable than not that the \$27 500

Ms R Selim paid to the wife's solicitors came from Ms R Selim's own sources. But on the other hand the wife has failed to persuade me about \$15 000 in loans she said were made in 2009/2010. She bears the onus of proof. She cannot point to any document to support her assertions. Learned counsel for the husband said that one might have the sensitivity not to expect an affidavit to be filed by Ms R Selim. But at least the wife should have arranged for documents to be available at Court to prove these loans. I agree and reject the wife's assertion about owing Ms R Selim \$15 000. As I said above, at the time the husband left the former matrimonial home in May 2013 the outstanding balance on the home loan was approximately \$680 000. It is now \$795 000. I accept that during earlier years both the husband and the wife had been contributing to the mortgage. The wife said that from late 2010 the family's living costs paid by her were such that she did not have sufficient funds to contribute to the mortgage. She did assert that she made the occasional mortgage repayment after this date but the documentary evidence does not support such an assertion. I am satisfied that the husband paid the entirety of the mortgage repayments for the period at least 18 months prior to the time he left in May 2013. But he did not make any mortgage payments after this time. The wife negotiated with the bank for a moratorium on mortgage repayments on the basis that interest only would accrue on the loan because she said she did not have the funds to pay. This ongoing increase in the parties' indebtedness on their home loan was exacerbated by the wife drawing down on the mortgage twice in August 2013. The first drawdown was \$30 000 on 2 August 2013 and a further \$25 564 was drawn down on 23 August 2013. These drawdowns and what the wife did with the money have been a longstanding issue between the parties. On 10 December 2013 an order was made by the registrar to the effect that on or before 24 January 2014 the wife provide to the husband details of any funds drawn down on the home mortgage from 1 July 2013 to date including full particulars as to how such funds were applied or otherwise expended. The wife failed to comply with this order. Indeed the first information the wife gave the husband about this was by a letter from the wife's previous solicitors dated 27 March 2014. But as learned counsel for the husband submitted, most of the information provided with the letter related to the period prior to the wife's drawdowns. In her affidavit at paragraph 31 the wife provided the following explanation

about how the funds were expended. I spent the said money I drew down as follows: (a) \$8,000 in August 2013 ANZ credit card (b) \$2,300 in October 2013 HSBC credit card (c) \$8,000 in August 2013 part payment to repay loan from my sister, [Ms O] (d) \$9,000 in March 2014 part payment to repay loan from my sister, [Ms O] (e) \$5,400 [Ms R Selih] HECS (Semester 1, 2009 and Semester 2, 2012) (f) \$8,000 legal fees (Barclays Law) (g) \$12,099 [Ms R Selih] HECS (Semester 1, 2014) (h) \$3,000 [Ms R Selih] HECS (Semester 1, 2014) Total \$55,799 There are numerous difficulties with this explanation. One difficulty is that it appears that the wife did not undertake much analysis of relevant bank and credit card account statements but relied on her memory. It has been clear during cross-examination that her memory failed her many times in relation to matters of detail. So far as the \$12,099 said to have been paid for Ms R Selih's HECS, in fact this was paid from one of the credit cards. It is clear that the wife did not consult the husband about the withdrawals nor the manner in which she expended the funds. So far as the alleged expenditure of \$8,000 and \$9,000 to repay the alleged loan to the wife's sister is concerned, I have already indicated that I am not persuaded about the existence of such loan. The \$8,000 legal fees I accept and I regard this as the wife using matrimonial property to pay her legal costs. So this is really an advance of property. A total of at least \$20,499 has been used by the wife to pay part of the HECS fees for Ms R Selih and Ms D Selih. The husband was not consulted. I can see no reason why he should be expected to shoulder this cost. This is a total of \$45,499 (\$8,000 + \$9,000 + \$8,000 + \$20,499 = \$45,499). I do not accept the wife's explanation for approximately \$45,000 of the alleged \$55,799. I regard this money, therefore, as an advance of matrimonial property in favour of the wife and I shall take it into account when considering relevant matters pursuant to s 75(2) of the Act. THE APPLICABLE LAW Sub-section 79(1) of the Family Law Act 1975 (Cth) (the Act) provides to the effect that in property settlement proceedings the Court may make such order as it considers appropriate altering the interests of the parties to the marriage in the property. Sub-section 79(2) provides that the Court shall not make an order under this section unless it is satisfied that, in all the circumstances, it is just and equitable to make the order. Sub-section 79(4) sets out various matters which must be taken into account in considering what order (if any) should be made under the section. These matters included direct and

indirect contributions, financial and otherwise by or on behalf of a party or a child to the acquisition, conservation or improvement of any property of the parties, contributions by a party to the welfare of their family including as a homemaker or parent, relevant matters referred to in s 75(2) and the other matters referred to in s 79(4). The operation of s 79 was the subject of consideration by the High Court in the case of *Stanford v Stanford* [2012] HCA 52; (2012) FLC 93-518. In *Stanford* the majority said (at page 86,640) in referring to ss 79(2) and 79(4) as follows: ...the requirements of the two sub-sections are not to be conflated. In every case in which a property settlement order under s 79 is sought, it is necessary to satisfy the court that, in all the circumstances, it is just and equitable to make the order. The expression just and equitable is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. ... while the power given by s 79 is not to be exercised in accordance with fixed rules, nevertheless, three fundamental propositions must not be obscured. The High Court said that the first of these propositions is for the court to identify, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property. The second is that although s 79 confers a broad power on the court, it is not a power that is to be exercised according to an unguided judicial discretion. It must be exercised in accordance with legal principles, including the principles which the Act itself lays down. The High Court said that the third fundamental proposition is that the question of whether the order is just and equitable is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters set out in s 79(4). To conclude that making an order is just and equitable only because of and by reference to various matters in s 79(4), without a separate consideration of s 79(2) would be to conflate the statutory requirements and ignore the principles laid down by the Act. And the High Court majority went on to say (at page 86,642) as follows: ...The fundamental propositions that have been identified require that a court have a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their stated or unstated assumptions and agreements about property interests during

the continuance of the marriage. In my view, there is a principled reason for making an order to alter the parties' interest in their property in this case because they purchased their home for their mutual use. Given the financial history particularly since separation and the respective needs of the parties it would be unfair to leave them simply with their legal interests in property. Accordingly, in my view, it would be just and equitable to make an order, pursuant to s 79(2) of the Act.

THE PARTIES EXISTING LEGAL AND EQUITABLE INTERESTS IN PROPERTY

The parties' interests in property and superannuation are as follows:

Assets	\$	
Street, Suburb C, NSW	1,820,000	Husband's property
in Egypt	37,000	Husband's Holden motor vehicle
	7,500	Husband's boat
	250	Husband's household contents
	2,000	Wife's IAG shares (1,341)
	8,287	Wife's Toyota Camry motor vehicle
	3,000	Wife's household contents
	1,000	
	\$1,879,037	Liabilities
\$		NAB Mortgage over Suburb C property
	795,000	Wife's Macquarie Bank Visa
	19,836	Wife's Westpac Bank Visa
	13,278	Wife's Woolworths Ltd MasterCard
	6,900	Wife's Citibank Visa
	14,769	Wife's St George Bank MasterCard
	3,298	Wife's ANZ Amex (No 1)
	19,947	Wife's ANZ Amex (No 2)
	14,937	Wife's personal loan from Ms R Selih
	27,500	
	\$915,465	Superannuation
\$		Husband's Care Superannuation
	110,356	Husband's Australian Super
	34,412	Husband's AMP
	3,977	Wife's First State Super
	140,858	
	\$289,603	The total property and superannuation has a value of

\$1,253,175.

CONTRIBUTIONS

Neither party had any property of significant value at the commencement of their marriage and cohabitation. The wife was 18 years of age and working as a trainee manager. The parties lived at the wife's parents home. Upon arriving in Australia the husband undertook a six month course in learning English. He worked in a manual labouring position. In 1987 the husband commenced working at Company P at Suburb Q. From approximately 1989 the husband worked as a metalworker at Business T six days per week for approximately five years. From 1998 the husband has worked for Business U, his current employer. Apart from periods around the birth of the children, the wife has been in full time employment. From 1989 to 1990 she worked as a driver but then moved into administrative positions in a government agency. For many years she has worked in her current position in a communications role. There are differences between the parties' respective accounts of the contributions they have made to renovating and building homes.

The wife has given a very detailed account of her involvement in these projects including having procured building materials and fittings, provided supervision to various tradespersons and particularly having undertaken painting. She has put in issue some of the husband's claims, for example that he built a fence and the husband has made concessions in respect of some of the contributions claimed in his affidavit. What became clear during the hearing is that each of the parties committed themselves as fully as possible to these projects around the demands of their respective paid employment positions and of course the demands of the children. They took the same approach in relation to their responsibilities to the welfare of the family unit and as homemakers and parents. The wife has worked shift work and when she was doing this at night the husband became solely responsible for the children. But the wife's shift work also provided her with opportunity to undertake housework through the day time. Similarly, there were times when the wife was working and the husband was at home caring for the children. This was a long marriage and a marriage during which five children have been raised, three now to adulthood. It is somewhat trite to observe that the demands on the parents of providing for, and raising, five children must be huge indeed. To the parents' credit, they have risen to this challenge and the children are all making out very well in life. The clear view this Court has is of two parents who have worked very hard, not only at their paid employment, but also in the home as well as in building and renovating properties. Neither of them has been lazy, or irresponsible or other than committed to do their very best for their family. Neither of them has been unemployed, apart from the relatively brief periods the wife has taken leave from her paid work around the times of the births of each of the children, quite properly, to concentrate on their times of greatest need for care by her. But she has rejoined the paid workforce in a timely way. No doubt the considerable financial cost of such a large family has concentrated her focus on the need to resume her income-producing work without undue delay. So taking account of all the evidence about all the contributions by each of the parties up to the time that the husband left the home my clear view is that they have been equal. At the time the husband left the home in May 2013 the four youngest children remained in the home in the wife's care. I accept that this became a much more difficult time for the wife, especially financially. She did not pay the mortgage. As

previously said, she negotiated with the Bank for it to accept the situation that repayments would not be made and the outstanding mortgage balance would increase on the basis of payment of interest only. This is of course a significant component in the current increased outstanding amount of the mortgage compared with the balance as at May 2013. As was submitted on behalf of the husband, the wife did have the benefit of living in the former matrimonial home without paying mortgage payments. But the wife had the sole physical burden of the children from May 2013. And she had the entire financial burden of them until the husband commenced paying child support in January 2014. On the other hand, the husband was living apart from the family and with his partner, no doubt removed from the day to day demands which had in fact increased on the wife by virtue of her sole care of the children. But the husband had to pay rent for his accommodation and from December 2013 he commenced paying child support. In my view, given the wife's sole care of the children since May 2013 unassisted by child support for in excess of seven months, it is appropriate to assess her contributions since separation to have been greater than those of the husband. In all these circumstances, therefore, in my view, the proper assessment of the parties' contributions overall is that those of the wife have been 53 percent and those of the husband have been 47 percent.

S 75(2) MATTERS The wife is 46 years of age and she is in reasonable health. Her income is \$2000 per week from her full time employment in a communications role with a government agency. In addition the wife receives a share dividend of \$16 per week, family tax benefits of \$119 per week and \$368 child support per week paid by the husband. On all current indications the wife can be expected to be able to continue to earn income and accumulate superannuation at her present rate. The wife has the care and control of the four youngest children of the parties but two are adults. Ms R Selim is studying at university and anticipates several more years at university although this would be for higher and additional degrees. Ms R Selim is also studying at university and proposes undertaking a Masters degree in 2015. So it is the younger two children who are at secondary school, E in Year 9 and F in Year 8. They are respectively almost 15 and 13 years of age. The wife has superannuation with First State Super with a value of \$140,858. I have referred to the wife's property. On the other hand, the husband is 52 years of age and he is also in reasonable health. His income is \$2000 per

week from his position in a supervisory role with Business U. The husband has been employed by his present employer now for a long period. In my view, he can be expected to continue in his present or similar position for the foreseeable future. The husband does not have the primary care of either of the two younger children. The husband has superannuation with Care Super, Australian Super and AMP, his benefits having a total value of \$148 745. The husband is cohabiting with Ms B who shares some living costs with the husband. Her means are modest. She is unemployed and in receipt of government benefits in the amount of approximately \$320 per fortnight. The husband has paid \$2500 legal costs and I take this into account. He will be paying his outstanding legal costs from his share of the property. The wife will continue to have the physical and financial responsibility for E and F for quite some years yet and this is a significant matter to take into account. It was submitted on her behalf that there should be a 10 per cent adjustment in the wife's favour on account of s 75(2) matters. In my view, even if the only relevant s 75(2) matter was this matter, 10 per cent would be a little high given the ages of the children and the wife's capacity for employment, and her age. But in any event I need to take account of the fact that I am unable to accept the wife's explanation for disbursement of the major part of approximately \$55 000 drawdowns on the loan and, as I have said, I propose to consider an appropriate adjustment for this. I also must take into account the fact that the wife has had the benefit of almost \$60 000 having been paid towards her legal fees on the basis as indicated above, largely the indebtedness I accept on credit cards and the \$27 500 liability to Ms R Selim. The wife has also had the benefit of \$21 000 paid in legal costs to her previous solicitors although the source of such money is not clear. So these matters have to be taken into account against the adjustment which would otherwise be just and equitable for consideration of the responsibility the wife will likely have for the younger children. Taking account of all relevant matters therefore, including the fact that the wife is a little ahead of the husband in relation to contributions, in my view, while it is clear there needs to be an adjustment in her favour to achieve a just and equitable order, that adjustment can only be modest. In my view, it is 3 per cent.

CONCLUSION AND FOURTH STEP

The wife will have 56 per cent of the property and superannuation available for division between the parties. This is property and superannuation with a value of \$701 778. The wife has

the following: \$ IAG shares 8,287 Toyota motor vehicle 3,000 Household contents 1,000
 Superannuation 140,858 _____ \$153,145 But the wife has the following liabilities
 (as adjusted): \$ Macquarie Bank Visa 19,836 Westpac Bank Visa 13,278 Woolworths Ltd MasterCard
 6,900 Citibank Visa 14,769 St George Bank MasterCard 3,298 ANZ Amex (No 1) 19,947 ANZ Amex
 (No 2) 14,937 Personal loan from Ms R Selim 27,500 _____ \$120,465 Accordingly, the wife
 has net property and superannuation with a value of \$32,680 ($\$153,145 - \$120,465 = \$32,680$).
 To achieve property and superannuation with a value of \$701,778 the wife would require property
 with a further value of \$669,098 ($\$701,778 - \$32,680 = \$669,098$). This would come from the former
 matrimonial home. If the home was sold this would produce \$1,820,000 on the evidence before the
 Court. There is no evidence of sale or legal costs and I do not take such into account in this exercise.
 But there is \$795,000 owing on the mortgage. This would be equity of \$1,025,000 ($\$1,820,000 - \$795,000 = \$1,025,000$).
 The wife is to have \$669,098 (or 65.278 per cent) thereof which would leave \$355,902 or 34.722 per cent for the husband. On the other hand, the husband is to have 44 per cent of the
 available property and superannuation which is \$551,397. The husband has the following: \$
 One-sixth interest in the property in Egypt 37,000 Holden motor vehicle 7,500 Boat 250
 Household contents 2,000 Superannuation 148,745 _____ \$195,495 To achieve property with
 a value of \$551,397 the husband would require additional property with a value of \$355,902 ($\$551,397 - \$195,495 = \$355,902$). This would have to be either by a payment in this amount from the wife
 or an appropriate portion of the net proceeds of sale of the former matrimonial home (34.722 per
 cent). The wife is most desirous to pay the husband for his interest in the home. She said she had
 approval to assume sole responsibility for the existing mortgage of \$795,000. She also said that her
 brother and sister would be prepared to loan up to \$250,000 to her for this purpose. And, as indicated
 above, the wife would seek a superannuation splitting order to adjust in the husband's favour \$50,000
 from the wife's interest in her superannuation. But to achieve a just and equitable order, the wife
 would have to pay to the husband the sum of \$355,902. In my view, on the evidence before the Court
 this would be well beyond the capacity of the wife to do. In any event, there are other difficulties for
 her. Her evidence was clear that after the husband left the home she did not have the capacity to

pay the mortgage. She has asserted that her financial situation was so tight that she needed to keep increasing her credit card indebtedness. So on her history, this Court would not be confident that the wife could maintain such a high level of mortgage repayments. And she still has significant liabilities. There is another difficulty for her. This is that I would not regard it fair to the husband to require him to take an interest in the wife's superannuation by way of a superannuation splitting order. He does not want this and wishes to avail himself of as much of the matrimonial property as possible. For all these reasons, in my view, it would not be appropriate to make orders other than for a sale of the home. Upon sale of the home the wife would have her property and superannuation as referred to above as well as a fund of approximately \$669 098. But she has significant liabilities. The wife will be able to use the major part of this towards financing a more modest home for herself and the children. Or she could apply it towards renting a home. On the other hand, upon sale of the home the husband will have his property and superannuation as referred to above as well as a lump sum of approximately \$355 902. He would be able to use this as a deposit on a home or apply it towards rent, subject to paying his legal costs. The orders I propose will not affect either party's capacity to earn income.

RATES There is one remaining matter which needs to be addressed. The rates on the former matrimonial home have not been paid for some years. The parties will have to pay these in the proportions 65.278 per cent thereof by the wife and 34.722 percent thereof by the husband.

RECONSIDERATION / ORDERS After concluding the oral judgment above, there was an application by learned solicitor for the wife to the effect that the Court provide the wife with the opportunity to pay the husband the sum of \$355 902 as required by the judgment. Learned solicitor tendered email communications by the wife's sister Ms O and her brother Mr O in which the sister indicated that she would provide \$150 000 to the wife and the wife's brother indicated that he would provide her with \$200 000. It was also clear that the wife was negotiating with a mortgage broker on behalf of a financier to refinance the existing outstanding mortgage. In all these circumstances, notwithstanding my views expressed above, I formed the view that it would be fair to each of the parties to provide the wife with the opportunity to pay the husband as required under the judgment for a period of 56 days. In my view, it would be in the husband's interest to receive payment in this manner as distinct from

having to wait for an indeterminate time to receive his payment from a sale of the property. I certify that the preceding one hundred and thirty-three(133) paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Johnston delivered on 3 October 2014. Associate: Date: 8 October 2014 AustLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/855.html>

