

FAMILY LAW PROPERTY Interim Where the wife seeks some 66 separate interlocutory or interim orders and file extensive material Where the Wife seeks orders for the sale of the former matrimonial home Where the wife seeks orders for interim spousal maintenance and adult child maintenance Where the wife seeks orders for litigation funding by way of lump sum as well as orders for disclosure, injunctive relief and costs Where there was no prospect of all of the applications being able to be heard and determined within the two hour hearing time for interim or procedural applications prescribed by rule 5.10 of the Family Law Rules 2004 Where the Court resolved to hear those parts of the Application having the most priority and which could be heard within two hours (in addition to reading time) with the balance of the Application to be adjourned to be heard and determined in a subsequent duty list.

FAMILY LAW PROPERTY Litigation funding Exercise of power under s 79 and s 80 Whether an appropriate case for order to be made.

FAMILY LAW SPOUSAL MAINTENANCE Interim Nature of interim order for limited period of time Degree of evidence required Circumscribed hearing with no cross-examination. Family Law Act 1975 (Cth) Income Tax Assessment Act 1936 (Cth) Family Law Rules 2004 (Cth) F and F (1982) FLC91-214 Marlowe-Dawson & Dawson [2012] FamCA 702 Redman and Redman [1987] FamCA 2; (1987) FLC 91-805 Stanford v Stanford [2012] HCA 52; (2012) 247 CLR 108 Strahan & Strahan (Interim Property Orders) (2011) FLC93-466

APPLICANT: Ms Nowing RESPONDENT: Mr Nowing

FILE NUMBER: BRC 3243 of 2013 DATE DELIVERED: 21 October 2014 PLACE DELIVERED: Brisbane PLACE HEARD: Brisbane JUDGMENT OF: Kent J HEARING DATE: 13 October 2014

REPRESENTATION COUNSEL FOR THE APPLICANT: Dr Brasch SOLICITOR FOR THE APPLICANT: Hopgood Ganim COUNSEL FOR THE RESPONDENT: Mr Kirk QC SOLICITOR FOR THE RESPONDENT: Barry Nilsson

ORDERS IT IS ORDERED UNTIL FURTHER ORDER THAT:

The X Property The Wife and Husband will do all acts necessary and sign all necessary documents to place the real property situated at Brisbane in the State of Queensland (the X property) on the market for sale as agreed to and failing agreement as follows: (a) on or before 1 December 2014, the X property be listed for sale with such agent as agreed between the Wife and Husband and failing agreement, the Wife shall appoint the agent of her choice and the Husband shall appoint the

agent of his choice. Both agents are to be instructed to market the property jointly; (b) the sale price of the X property is to be as agreed between the Wife and Husband and failing agreement, the value attributed to the property by P Valuers in their report dated 14 February 2014, being \$6,250,000.00; (c) the Wife and Husband shall co-operate in every way with the agent/s including without limiting the generality of the foregoing: (i) making the key available for the agent/s; (ii) allowing inspection of the X property at all reasonable times requested by the agent/s; (iii) doing or saying nothing to hinder or prevent the sale being effected; (iv) ensuring that the property, including the grounds, are in neat and clean condition at the time of inspection by the agent/s and prospective purchasers; and (v) signing all documents requested by the agent/s in relation to the listing for sale of the properties except a contract or agreement for sale which has not been authorised by the parties solicitors; (d) in the event that the X property has not been sold within nine (9) months of the listing date, then the Wife and Husband shall have liberty to apply to the Court for further Orders in relation to the sale of the property. From 24 October 2014, the Wife is at liberty to relocate to the X property and have sole use and occupancy of the property until seven (7) days prior to the settlement of the sale of the X property provided: (a) upon the giving of twenty-four (24) hours written notice, the Wife provide the Husband access to the X property to allow him or his agent to inspect the property; (b) the Wife is responsible for the payment of all costs associated with the X property save for: (i) repayments for the Westpac mortgages (account numbers ...856 and ...106) and N Pty Ltd overdraft (account number ...993); (ii) rates, water/sewerage and house and contents insurance expenses; (iii) gardening and pool maintenance expenses; (iv) agreed general repair and maintenance expenses; (v) cleaning costs of a maximum of three (3) hours per week; and (vi) security (back to base alarm system). The Husband shall pay, or cause to be paid, the expenses listed in paragraph 2(b) above. Upon the sale of the X property, the gross proceeds of sale are to be appropriated in the following order and manner: (a) all costs and expenses of sale including legal costs and disbursements, agents fees and commission, including marketing and advertising costs; (b) payment of the Westpac mortgages (account numbers ...856 and ...106) and N Pty Ltd overdraft (account number ...993) and any other encumbrance affecting the property; (c) the balance to be divided as follows: (i) 33% to

the Wife; (ii) 33% to the Husband; and (iii) the balance then transferred to the trust account of Barry Nilsson. Lawyers and invested in the name of the Wife and Husband in an interest bearing account pending written agreement between the parties or an Order of the Court. If either party refuses or neglects to sign any document or do anything as may be reasonably required to give effect to these Orders within forty-eight (48) hours of the service of a demand upon him or her to sign the document or to do the thing, a Registrar of the Family Court of Australia be appointed, pursuant to s 106A of the Family Law Act 1975 (Cth), to execute all documents and do all acts and things necessary in the name of the defaulting party to give validity and operation to these Orders and the affidavit of the solicitor for the non-defaulting party shall be sufficient evidence of such non-compliance. The defaulting party shall be responsible for the payment of the non-defaulting party's costs associated with the appointment of the Registrar on an indemnity basis.

Litigation Funding Each party do all acts and things reasonably required, including signing any necessary documents, so as to cause monthly redraws to be made (commencing October 2014 and each month thereafter) from the Westpac bank overdraft redraw facility secured by the X property, so that each party receives as and by way of partial property settlement \$20,000.00 each month up to a total of \$300,000.00 for each party provided that such redraws shall cease upon settlement of the sale of the X property or further order.

Interim Spousal Maintenance Pending the Wife's receipt of her share of the net proceeds of sale of the X property and commencing in the week beginning 20 October 2014 and weekly thereafter the Husband shall cause to be paid to the Wife as and by way of interim spousal maintenance: (a) the sum of \$2,178.00 (net of tax); (b) the Wife's gap medical and dental expenses provided that in any week such payments shall be reduced by the amount of net income from employment derived by the Wife, as to which the Wife is to keep the Husband advised.

IT IS FURTHER ORDERED BY CONSENT UNTIL FURTHER ORDER THAT:

The Husband reduce his loan drawings from N Pty Ltd to \$1,500.00 per week. In the event that M Pty Ltd obtains an unconditional contract for the sale of the property at B Street, the Husband shall request the approval of the board of that company to release to the Wife the information and documents the Wife has requested of the Husband with respect to such sale. On the 10th day of each

month the Husband shall provide to the Wife copies of the previous months bank statements for all accounts in respect of which the Husband has authority to provide. Within ten (10) days of completion, the Husband will provide to the Wife copies of the quarterly general ledgers and quarterly management accounts for N Pty Ltd. IT IS FURTHER ORDERED THAT: The Wife have liberty to re-list her Application in a Case filed on 21 July 2014, to the extent that orders are sought for disclosure, injunctions, adult child maintenance or other orders sought not dealt with by these Orders, to a future duty list for interim applications. The requirement that the parties attend a Conciliation Conference with a Registrar of this Honourable Court is dispensed with. The Conciliation Conference listed before the Registrar at 9.00 am on 29 October 2014 be vacated, and the substantive proceedings proceed as if such a Conciliation Conference had been held. Each party's costs of the Wife's Application in a Case filed 21 July 2014 be reserved. IT IS NOTED that publication of this judgment by this Court under the pseudonym Nowing & Nowing 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 BRISBANE FILE NUMBER: BRC 3243 of 2013 Ms Nowing Applicant And Mr Nowing Respondent REASONS FOR JUDGMENT Ms Nowing (the wife) and Mr Nowing (the husband) are engaged in substantive property settlement proceedings pursuant to s 79 of the Family Law Act 1975 (Cth) (the Act) following the breakdown of their marriage. By an Application in a Case filed on 21 July 2014 the wife seeks an array of interim orders including, inter alia, orders for sale of the former matrimonial home and consequential orders as to the disposition of the proceeds of sale; an order for the lump sum payment of litigation funding for her legal fees in the substantive proceedings; interim spousal maintenance; adult child maintenance; orders for disclosure; injunctive orders and costs. By her Application the wife seeks some 66 separate interlocutory or interim orders and in support of her Application has filed in excess of 450 pages of material. Rule 5.10 of the Family Law Rules 2004 (Cth) prescribes the hearing time for an interim or procedural application. Subparagraph (1) of that Rule provides: The hearing of an interim or procedural application must be no longer than two hours. I also note in passing that in apparent recognition of subparagraph (2) of r 5.10 (which provides that exceptional circumstances must be shown to allow for cross-examination to

occur at any interim hearing), neither party sought cross-examination and thus disputed issues of fact could not be resolved. I record that notwithstanding spending some hours reading the wife's material, such reading could not be completed prior to embarking upon the hearing of the Application as a duty matter on Monday 13 October 2014. I record that there was never any realistic prospect of all of the applications being able to be heard and determined within the two hour hearing time prescribed by the Rule referred to. In the circumstances I resolved to hear those parts of the Application apparently having the most priority and which could be heard within two hours (in addition to reading time) with the balance of the Application to be adjourned to be heard and determined in a subsequent duty list, if that proves necessary. By way of brief background, the husband is currently 55 years of age and is employed as a company director within what may conveniently be referred to as the N Group which comprises some 27 entities in the form of companies or trusts. The wife is currently 53 years of age and is currently a homemaker. The parties met in 1981 whilst studying at University; commenced cohabitation in 1982; married in 1985 and finally separated in November 2010. The parties' divorce was pronounced on 18 January 2014. Each party is now in a new relationship with a de facto partner. The parties' relationship of some 28 years produced four now adult children namely: D Nowing born in 1988, currently aged 25 years; W Nowing born in 1991, now aged 23 years; G Nowing born in 1992, currently aged 21 years; and O Nowing born in 1994; now aged 19 years. Following the parties' separation in November 2010 and until March 2014 the informal financial arrangements between the parties included that each party and to some extent the children were supported via the N Group. However on or about 10 March 2014 the husband caused the cash amount paid directly to, or being received by, the wife to be reduced to a sum of \$2,119.00 per week for living expenses (plus health insurance and all gap medical expenses) and this level of support of the wife has continued to date. The N Group In about 1992 the husband entered into a partnership with four brothers conveniently referred to as the Z brothers. The husband deposes that he holds a 20 per cent interest and the Z brothers hold an 80 per cent interest in the company M Pty Ltd (the M Group). The M Group along with its subsidiary company M Properties Pty Ltd own a number of commercial properties.[1] Based upon the chronology contained in the husband's affidavit filed 24

September 2014, in April 2014 the valuers, C Valuers undertook a valuation of the eight commercial properties in which the parties have an interest via the interests referred to and placed a combined value on those commercial properties of approximately \$108 million. I note in passing that the wife disputes this valuation on the basis that the previous valuers instructed by a bank were not provided with the same information as C Valuers. The husband summarises his employment as a company director and the nature of the relevant business interests at [7.5] to [7.7] of his affidavit filed 24 September 2014. Relevantly he deposes as follows: 7.5 I am the sole director of [[N] Pty Ltd]. My primary business is [property development]. We also have a 20 per cent interest in the entity, [M] Pty Ltd ([M] Group). The primary purpose of the [M] Group is property investment but it has also engaged in joint venture developments with [N Pty Ltd]. 7.6 The company, [N Pty Ltd] derives two main types of income, from property management services and developments. Property management income provides the company with contracted and consistent ongoing monthly income which contributes to the overheads of the business. The riskier but more profitable property development activities are dependent on the economy and the property industry, resulting in a cyclical and spasmodic injection of income on completion of developments on an ad hoc basis. The injection of larger amounts of income contributes to the balance of business overheads, repays the overdrafts and other loans which have grown during the course of the cycle and provides profits. 7.7 Due to the cyclical nature of the [N Pty Ltd] and Business outlined above, the increasing loan facilities fund both the business overheads, costs of developments being undertaken, holding costs for joint properties, and finally the personal living expenses of our family. The husband also deposes that historically the parties have spent in excess of the cash income derived from the business interest on items including overseas travel, renovations to the former matrimonial home, being the property at Brisbane known and referred to as the X property, and living expenses. This is said to have resulted in the parties having incurred substantial loans to N Pty Ltd in both their personal capacities and via a corporate entity A Nominees Pty Ltd as trustee for the N Family Trust. As at 8 September 2014 the balance of these loan accounts was \$8,246,810.00. The parties' business interests also extend into the hospitality industry. In 1995 the parties acquired an equal partnership interest in a

hospitality business known as F. Further, just prior to separation in 2010, the parties established K which the wife managed and developed as a prestige hospitality business until March 2013 when she ceased all involvement in that business. At that time the husband took over the management of K and he deposes to having re-branded the business in March-May 2013. The husband continues to manage the business to date. A central contention in the husband's evidence is that in the period following separation there has been a significant change in the parties' financial circumstances owing to a number of factors including the global financial crisis which has resulted in the husband being unable to continue meeting the wife's, unfettered expenses as he describes them. [2] The husband contends that following separation the financial circumstances that existed prior to separation remained unchanged, that is, he was entirely responsible for the financial support of the wife and children until 10 March 2014 being three years, three months and twenty-one days after separation. In note in passing that such a contention would seem to discount the wife's historical involvement in the business including her management of and involvement in the hospitality businesses referred to. It also seemed to be the uncontested evidence of the wife that the termination of the parties' involvement in W was due to a resumption of the land and building by the local authority and litigation has ensued with respect to that resumption in which compensation is claimed. The uncontested evidence of the wife is that she has taken a primary role, as between the parties, in pursuing the claim for compensation. As earlier noted, on 10 March 2014 the husband began causing the wife to be paid \$2,119.00 per week for her living expenses (plus all gap medical and dental expenses) which the wife has continued to receive. The husband has deposed in his material to his agreement to reduce his loan drawings from N Pty Ltd to \$1,500.00 per week. This will result in the husband receiving a weekly income of \$4,038.00 comprising of his net weekly wage of \$2,538.00 and loan drawings from N Pty Ltd of \$1,500.00 per week. [3] The husband deposes that following separation in November 2010 and up until August 2014 he has, paid or caused to be paid, the sum of \$1,039,349.35 to the wife or for her benefit. The husband deposes, that equates to an average of over \$23,000.00 per month. [4] At paragraph 6.2 of his affidavit filed 24 September 2014 the husband includes a table which breaks down the total paid of \$1,039,349.35 into groups of

expenses. Further, at [7.4] of that same affidavit, the husband includes a table showing a breakdown of how he says payments to the wife have been funded. Further, the husband deposes that the wife has also received the benefit of funds from other sources including sale proceeds of \$43,493.00 from the liquidation of an investment and the sale of a horse and float for a combined total of \$36,000.00. In summary, it is the husband's position that since separation the wife has received or had the benefit of a total of \$1,118,842.35. Current financial circumstances of the adult children: D is financially independent and currently resides in the United Kingdom. W is studying at University and lives between rental accommodation with friends on the Gold Coast and in Brisbane. There is a factual dispute between the parties as to where W stays when he comes to Brisbane. The wife claims he lives with her for approximately four nights per week. The husband disagrees and maintains that when W has been staying in Brisbane he has been residing in the X property. G lives full-time with the wife in Brisbane and has deferred her university studies by reason of ill health. The extent of G's ill health appears to be a matter in dispute. O lives in the X property with her boyfriend and is currently studying at university. O also works part-time for some three days per week in the business of N Pty Ltd. Sale of the X property and disposition of the proceeds: It was ultimately not in issue as between the parties that the former matrimonial home being the real property situated at Brisbane, known and referred to as the X property ought be placed on the market for sale. Nor was it in issue that the wife should be entitled to occupy the property pending its sale given that both parties recognise that there may be a significant sale period involved given the nature and value of the subject property. The wife's current lease of her current rental premises expires at the end of this month. She therefore sought the opportunity to commence occupation of the X property in advance of the expiration of her lease. The husband's starting position was that the date upon which the wife's occupation of the property ought commence ought be 29 October 2014. However, in the end it seemed that 24 October 2014 was a date acceptable to both parties as such a date would allow the husband sufficient opportunity to relocate his personal effects from the X property and give the wife sufficient time in advance of the expiration of the lease of her current rental premises to facilitate her taking up occupation in the X property. Whilst the wife's application sought an order for the X property to

be immediately listed for sale, in the end there did not seem to be opposition by the wife to the husband's proposal that the listing occur, on or before 1 December 2014. In any event in circumstances where the wife is to relocate to that property from 24 October 2014 and in circumstances where she will have the use and occupation of that property from then until sale, it would not seem to disadvantage either party for the listing to be on or before 1 December 2014 given the potential need for the property to be readied for sale. The parties were at odds in terms of the mechanism for sale. The wife sought that the sale price be as agreed by the parties and failing agreement as to be determined, by the nominee of the Chief Executive Officer for the time being of the Real Estate Institute of Queensland. In circumstances where it is clear the parties are unable to agree on a listing price the husband sought that if the parties could not agree on a price the listing price be \$6,250,000.00 being the valuation for the property attributed to it by the single expert valuers in their valuation report dated 14 February 2014. It is obviously in the interests of both parties for the sale of the X property to be maximised. I consider it reasonable to infer that the husband, given the nature of his business and experience in the property industry, would not urge the setting of the price in accordance with the expert valuation if he considered that price to reflect some kind of undervalue of the property, even at the current time. Moreover, the mechanism proposed by the wife would result in a real estate agent nominated by the Real Estate Institute of Queensland setting a price and that would not necessarily be the product of a formal valuation expertise guided by, inter alia, reference to comparable sales. In my judgment and in all the circumstances it is reasonable to adopt the husband's approach of setting the price in accordance with the single expert valuation that has been obtained. In the course of hearing there appeared to be some debate as to which costs associated with the X property would be met by one or other of the parties pending its sale. In the result the husband's proposed orders were expanded to include house and contents insurance expenses and the husband also agreed to meet costs associated with security for a back to base alarm system with respect to the X property. I will incorporate those adjustments to the orders proposed by the husband handed up during the course of the hearing. A further issue at the outset of the hearing was the time period for the X property to be listed for private sale before proceeding to an

auction, if not sold. In the result, during argument both parties seemed to be accepting of the proposition that if the X property has not been sold within nine months of the listing date then if either party has liberty to apply to the Court for further orders in relation to the sale including it proceeding to sale by auction, that would address any relevant concerns, and that is the order I propose to make. The remaining dispute on this topic concerned the disbursement of proceeds of sale of the X property. Whilst both parties agreed that the proceeds should be first used to discharge the Westpac mortgages and overdrafts secured upon the property and the usual liabilities associated with sale, the wife sought an order that the balance sale proceeds be retained in the trust account of her solicitors to be invested in her name in an interest bearing account, pending written agreement of the parties or order of the Family Court. For his part, the husband sought an order that after paying costs of sale and mortgage/overdraft debt, 33 per cent of the net proceeds be paid to each party, with the balance then remaining to be invested in the joint names of the parties in an interest bearing account. By reference to a balance sheet appearing as one of the annexures to her material the wife contends that the overall pool of property available for distribution, including superannuation interests, has a value in the order of \$16 million. In the substantive property proceedings, the wife contends that final orders should be made which see the husband receiving 40 per cent of the parties joint and respective property interests overall. In broad terms, on the evidence as it stands, allowing for costs of sale of the X property and repayment of relevant mortgage and overdraft facilities currently in the amount of about \$1.5 million, there would remain something in the order of about \$4.5 million available by way of net proceeds of sale. No good reason was demonstrated on behalf of the wife as to why the whole of such sum should remain invested pending determination of the substantive proceedings as compared with the husband's proposition that 33 per cent of the net sum should be invested while each party receives as and by way of partial property order 33 per cent. Even with the increase to the debt by reason of redraws upon the facility up to \$300,000.00 each as discussed later in these Reasons there would remain substantial proceeds available to the parties. Moreover I accept the submission by Mr Kirk of Queens Counsel for the husband that there is an obvious inter-relationship, given the discussion which follows, between receipt of such a partial property

settlement (if granted) and ongoing spousal maintenance being paid to the wife. I have set out below under the topic of Litigation Funding the relevant principles and considerations in this case as to the making of interim property orders and I adopt that discussion here without replicating it. I accept that it is reasonable and appropriate to make partial property settlement orders with respect to the distribution of the proceeds of sale of the X property as contended for on behalf of the husband, subject to the discussion below concerning litigation funding. I therefore with respect to this issue make orders in accordance with the draft orders handed up on behalf of the husband during the course of the hearing but with the amendments to those orders as either discussed in the hearing or outlined in the foregoing discussion. Litigation funding The wife seeks litigation funding in the form of a \$100,000.00 lump sum payment now to fund her legal costs to what is described as the mediation/conciliation conference stage of these proceedings and then a further \$200,000.00 lump sum payment to fund her litigation expenses to trial if the matter does not resolve at the mediation/conciliation conference stage. The wife relies on the evidence provided by her solicitor Ms Wigan setting out estimates of the legal costs (including outlays) it is anticipated that the wife will need to meet through the stages referred to. There did not seem to be any concerted challenge by the husband as to the estimates of costs provided by Ms Wigan. Whilst counsel for the husband submitted at the hearing that the husband's solicitors had estimated that the husband would only expend approximately \$30,000.00 up to mediation stage, and he was thus unsure why the wife needed \$100,000.00, counsel ultimately observed that was a matter for her. During the course of the hearing reference was made to the balance sheet earlier referred to for the purpose of outlining how far apart the parties were as to the value of the net pool of assets available for division. In particular, the husband there refers to the parties' loan accounts with private companies and the operation of Division 7A of the Income Tax Assessment Act 1936 (Cth) for such amounts to attract tax payable upon deemed dividends. During the course of the hearing it became clear that neither party nor their respective legal representatives reposed much confidence in the substantive property issues being resolved at a Conciliation Conference. Indeed, both ultimately sought that the Conciliation Conference be dispensed with on the basis that if and when the parties reached the

stage that a settlement conference or mediation is likely to be worthwhile they can arrange that for themselves. I therefore include as one of the orders an order dispensing with the need for a conciliation conference. Taken from her Application in a Case the wife seeks litigation funding by way of partial property settlement and thus relies upon s 79 and s 80(1)(h) of the Act as the source of power for the making of such an order. It was submitted on behalf of the husband that both parties have a need for funds for their legal expenses of these proceedings with the only present source of those funds being via borrowing on the security/equity of the X property. As already noted, the parties have a \$3,000,000.00 overdraft facility with Westpac, guaranteed by the wife and secured against the X property. Currently the business overdraft has a debit balance in the order of about \$1,500,000.00. It was also submitted on behalf of the husband that he would agree to a form of dollar for dollar order, or to take the parties past the mediation step, would agree to each receiving \$100,000.00 from the overdraft facility. I have earlier outlined my acceptance of the husband's contention that from the sale of the X property each party ought receive 33 per cent of the net proceeds by way of interim property with the balance to be invested. I have earlier outlined, by reference to the husband's sworn affidavit, that the N Group has historically funded the needs of the family via loans or the subject overdraft facility through the cycle the husband deposes to. Plainly in circumstances where the X property is said to have a value in the order of \$6,250,000.00 and the overdraft facility stands currently at about \$1,500,000.00 there is substantial equity in the property. I would also observe at this point that on one level there is something of an internal inconsistency in the husband's case. On the one hand it was submitted on behalf of the husband, by reference to the balance sheet earlier referred to, that the existing net asset pool, after making allowance for the Division 7A tax issues might be only \$538,455.00 net. That contention, taken also with the husband's contention in the substantive proceedings that the property interests of the parties pursuant to s 79 ought ultimately be divided 65 per cent/35 per cent in his favour, is not readily reconciled with the husband's contention that each party should receive 33 per cent of the net proceeds of sale of the X property referred to as and by way of partial property settlement. In terms of the adjectival or procedural step or the first step referred to by the plurality in Strahan &

Strahan (InterimProperty Orders) (2011) FLC 93-466 (StrahansCase), I am satisfied that this is a proper case in all thecircumstances for an interim property settlement order to be made. Thosecircumstances include the following: Self-evidentlythere is significant complexity about the financial affairs of the parties. There are numerous entities involved inthe N Group and a complexity about thefinancial transactions and arrangements as between those entities. Thedifference betweenthe parties of potential Division 7A issues is but oneexample evidencing the complexity of the affairs involved; It isappropriate in order to do justice to the parties that they each have access tocapable legal representation and accountingexpertise in pursuing theircompeting claims in the substantive proceedings, if injustice is to beavoided; Theparties have now been separated for almost four years and each apparentlyagitates issues, each in themselves of some complexity,concerning expendituresand use of funds in the post-separation period; Thehusband has maintained, and continues to maintain, financial control over whatmay be described as the parties corporateor business interests andentities. There would be inherent unfairness to the wife if the husband wereable to exert that controlo fund his own expenses of this litigation whilstthe wife has no commensurate ability. Turningthen to the second step referred to in Strahans Caseas to whether it is just and equitable and appropriate to make an order, thereis no issue in this case in circumstances where bothparties seek orders forproperty adjustment after the end of a marriage of some 28 years, which producedfour children, that thejust and equitable requirement in s 79(2) is fulfilled. It is readily apparent by reference to what was said by the plurality inStanford v Stanford [2012] HCA 52; (2012) 247 CLR 108 at [42] that the end of themarriage here also brought an end to common use of property and a range ofassumptions underlying the partiesmarriage relationship whilst itsubsisted. Inthe course of argument the Court raised with the parties the appropriateness oforders being made that rather than lump sums inthe amount sought by the wifebeing drawn that a monthly sum in the order of \$20,000.00, pending receipt byeach party of their 33per cent share of net settlement proceeds of the Xproperty, might be redrawn on the mortgage facility over the X property so thateach party might fund their litigation expenses pending receipt of thosesettlement proceeds. No good reason was advanced to mysatisfaction as to why lump sums rather than

periodical payments were necessary. Given the issues involved and the disputed issues of fact on this application it is not possible for the Court to resolve in any concluded way the likely identification and value of the net property interests of the parties. As already noted, by reference to the subject balance sheet, the wife contends that the combined property and superannuation interests of the parties amounts to about \$16,000,000.00 whilst the husband contends that after making allowance for Division 7A tax the existing net asset pool is calculated at only \$538,455.00. I have already noted some inconsistency between that contention and the order the husband proposes with respect to distribution of the proceeds of sale of the X property. Plainly it would be relevant to the clawback issue or reversibility of the effect of an interim property order if indeed it was ultimately demonstrated that the net pool was to be taken at a calculation in the order of \$500,000. However, I infer from the husband's approach with respect to the orders sought with respect to the distribution of proceeds of the X property that this aspect can be addressed. The wife will receive capital from the sale proceeds of the X property (as will the husband) and it is to be reasonably assumed that each party will invest that capital in other assets. Certainly it is clear that from the wife's perspective, by reference to expert accounting evidence, there is an issue of significance raised by her as to the quantum of any Division 7A loans issue in these proceedings in calculating the net divisible pool. I am therefore satisfied that it is more likely than not that any reversibility or clawback issue can be addressed in the final determination of the s 79 proceedings if the litigation funding proposed for each party is allowed for. That is, whilst I cannot reach any firm conclusions as to the ultimate likely net asset value I am satisfied that it is more likely than not, on the evidence currently available, that the parties' joint and respective net property interests will be of sufficient magnitude to address this issue in the final determination of s 79 orders, even if interim property orders are now made for litigation funding. In terms of contribution as identified in s 79(4)(a), (b) and (c) there cannot be any doubt that over a 28 year relationship producing four now adult children; and having regard to the chronology of relevant events submitted by each party; that each has made substantial financial and non-financial contributions to the property of the parties or either of them and to the welfare of the family constituted by the parties and their children. None of the other matters in s 79(4) including the

factors in s 75(2) would stand in the way of the appropriateness of an order now being made for partial property settlement to fund each party's litigation expenses. In circumstances where the litigation funding is to be provided from, in effect, the parties' equity in the X property pending its sale from the redraw facility; with that debt to be repaid from the proceeds of sale; an interim property order in the proposed form of monthly draws simply gives the parties access to property to fund litigation from the equity in the X property. Given the orders to be made with respect to the disbursement of the net proceeds of sale of the X property I am satisfied that it is appropriate to order by way of interim property orders that each party be able to re-draw the amount of \$20,000 per month from that facility, pending each party receiving their share of net sale proceeds, up to a limit of \$300,000.00 each. Obviously if the X property sells in a matter of a few months or less that limit will not be approached let alone reached, but allowing for the prospect that, as the parties contemplate, the X property may be difficult to sell and take many months (and may indeed need to proceed to an auction after some nine months hence) it is reasonable to facilitate each party's litigation funding by this means, with the limit referred to being set. I am thus satisfied that this is a proper case for interim property orders to be made for litigation funding and I am satisfied that in all the circumstances the proposed orders for the funding of each party's litigation expenses is appropriate.

Interim spousal maintenance

The wife's Application in a Case sought an order for spousal maintenance of \$3,097.00 (net of tax) per week plus gap medical and dental expenses. The husband deposed to his agreement to pay \$1,000.00 (net per week) plus her gap medical and health insurance premiums.^[5] In her schedule of expenses at [78] of her affidavit filed 21 July 2014 the wife deposes that the cost of the relevant Bupa health insurance premium is \$119.00 per week. Notwithstanding that she had read the husband's affidavit filed 24 September 2014 in which he deposed to his agreement to permit the wife sole use and occupation of the X property pending sale the wife, by her affidavit filed 3 October 2014, maintained the position of seeking a weekly cash sum of \$3,097.00 (net of tax) by way of maintenance, plus payment of gap medical and dental expenses. The wife there contended that the weekly rent saving of \$1,150.00 was offset by: removal costs to relocate to the X property; food expenses for [O] and her boyfriend ... of at least \$400.00 per week

for both of them; electricity expenses for the X property in the order of \$4,000.00 per billing period (quarterly); and then need to again relocate once the X property is sold and to pay a bond and future weekly rent. As to the last of these matters, plainly if each party receives capital from the sale of the X property as and by way of partial property settlement such an expense may be unnecessary or at least not fall in the category of a need. During the course of argument it was acknowledged by counsel for the wife that it would not be legitimate as and by way of spousal maintenance to claim the costs for the food expense of an adult daughter and her boyfriend. In the course of argument the wife's claim for a cash sum was modified from the amount of \$3,097.00 per week to \$2,178.00 per week. That was in circumstances where, aside from the question of food expenses for the adult daughter and her boyfriend, no evidence was proffered in the wife's case as to the amount of any removal expenses. In respect of the wife's revised claim of \$2,178.00 net per week there was no challenge on behalf of the husband as to this amount reflecting the wife's reasonable needs. Nor was any case mounted by the husband to the effect that capacity to meet such a claim was an issue. That is unsurprising given the historical level of support derived by both parties from the N Group including the level of that support even to date in respect of the wife; and the level of support the husband draws for himself from that source. The husband's challenge to the claim was in two respects. One aspect was the contention that the wife has an earning capacity which she chooses not to exercise to meet her own reasonable needs. Second it was contended that because the wife has been in a de facto relationship since separation, a period of almost four years, there ought be no order for interim spousal maintenance; or at least any order beyond the amount conceded by the husband. Given that each party will receive substantial capital by way of partial property settlement via the 33 per cent share of net proceeds of sale of the X property (even allowing for the redraw facility debt to increase in the meantime to fund litigation expenses), any interim order for spousal maintenance should operate only until such receipt. Where an interim order is in contemplation, that is, an order for a limited time it is well settled that the evidence in support of such an order need not be so extensive, nor the findings of the Court so precise, as would be required with respect to a final maintenance hearing. Those authorities recognise that the Court should in matters such as this have

a greater degree of flexibility than in cases where maintenance may last for an indefinite period and which can only be varied under s 83 of the Act. Thus the Full Court observed in *Redman and Redman* [1987] FamCA 2; (1987) FLC 91-805 at 76,081: ... this was an interim order. Whilst we agree with the view expressed in *Ashton* that in principle such an order is one under sec. 74, to which the principles of sec. 72 ... may be applicable ... the very fact that the order is limited in time imports certain different considerations. One of these is that such an order is intended to be reconsidered, quite apart from a variation under sec. 83. ... Another consequence is that on an application for interim maintenance, the court conducts not as final or exhaustive a hearing as would be the case if one were hearing the matter finally: *Williamson and Williamson* (1978) FLC 90-505 at p. 77,650 per Fogarty J. The evidence need not be so extensive and the findings not so precise. Having regard to those factors, and the general injunction of sec. 97(3), the court should in such matters have a greater degree of flexibility than it possesses in applications for maintenance which are intended to last for an indefinite period and can only be varied under sec. 83. That decision was cited with approval by the Full Court per Nygh J in *Wilson & Wilson* (1989) FLC 92-033 at 77,454. It bears repeating that these proceedings were necessarily truncated as an interim hearing without cross-examination of any relevant witness. In [41] to [47] of *Marlowe-Dawson & Dawson* [2012] FamCA 702 delivered on 2 August 2012 I summarised the relevant statutory provisions and applicable law as follows: 41. Section 72(1) of the Act provides that: A party to a marriage is liable to maintain the other party, to the extent that the first-mentioned party is reasonably able to do so if, and only if, that other party is unable to support herself or himself adequately... 42. Section 72(1) sets out the three circumstances which may cause the need for maintenance to arise and, relevantly here, provides in sub-paragraphs (a) and (b): (a) by reason of having the care and control of a child of the marriage who has not yet attained the age of 18 years; (b) by reason of age or physical or mental incapacity for appropriate gainful employment; ... having regard to any relevant matter referred to in subsection 75(2). In *Bevan & Bevan* (1995) FLC 92-600, the Full Court of this Court set out the process for assessing a spousal maintenance claim as: Taken together then, we would state the law as being that an award of spousal maintenance requires: 1. A threshold finding under s 72 [now s

72(1)]; 2. Consideration of s 74 and s 75(2); 3. No fettering principle that pre-separation standard of living must automatically be awarded where the respondents means permit; 4. Discretion exercised in accordance with the provisions of s 74, with reasonableness in the circumstances as the guiding principle. The first question is whether the Wife is unable to support herself adequately. In *Nutting & Nutting* (1978) FLC 90-410, Lindenmayer J interpreted adequately within the meaning of s 72 of the Act as importing: A standard of living which is reasonable in the circumstances, including the circumstance that the parties are no longer husband and wife and that the assets and resources which were formerly available to them both in common have now been divided between them. In *Saxena & Saxena* [2006] FamCA 588; (2006) FLC 93-268, Coleman J set out the four steps that the Court should follow as: 1. To what extent was the Wife unable to support herself? 2. What were the Wife's reasonable needs? 3. What capacity did the Husband have to meet an order, if one were made? 4. If steps 1 to 3 favoured the Wife, what order would be reasonable having regard to s 75(2) of the Act? The Full Court of this Court, in *M & M* [2006] FamCA 868; (2006) 36 Fam LR 97, addressed the threshold proposition in the following terms: [31] ...The question whether an applicant can support his or herself adequately is not to be determined by reference to any fixed or absolute standard but by having regard to the matters referred to in s 75(2): *Mitchell* (above at Fam LR 59; FLR 306; FLC 81,995). [32] The question is not to be determined upon a subsistence level but upon consideration of whether the applicant can support himself or herself adequately importing a standard of living reasonable in the circumstances: *Mitchell* (above); *Evans and Evans* (1978) FLC 90-435; *Brady and Brady* (1978) FLC 90-513 at 77,701; *Gamble and Gamble* (1978) FLC 90-452; *Wilson and Wilson* (1989) 13 Fam LR 205; FLC 92-033; and *Bevan and Bevan* (1993) 19 Fam LR 35; (1995) FLC 92-600. [33] It is not necessary for an applicant for maintenance to use up all of his or her assets and capital in order to satisfy the requirement that he or she is unable to support him or herself adequately: *Mitchell*, above. The husband points to the feature that the wife holds the degree of Bachelor of Business in Public Administration and enjoys a good reputation in the hospitality industry and is experienced in that industry for the proposition that the wife has the capacity for gainful employment to meet her own needs. In juxtaposition, the husband also deposes to the wife being

unable to manage the F business without management staff; and an asserted inability of the wife to properly manage the K business.[6] The wife's evidence that she was the primary carer of the four children of the marriage and managed the home during the relationship may be accepted. It may also be accepted that the wife assisted the husband in the property business forming part of the N Group and managed and operated the F business until September 2012 and the K business until March 2013. The wife sets out in her affidavit filed on 21 July 2014 certain difficulties with each of the children leading to her not undertaking paid employment outside of the family since March 2013. In particular, with respect to G there is medical evidence supporting the proposition that G has confronted significant health difficulties including significant psychological issues. That evidence includes a medical report dated 11 September 2014 confirming current difficulties for G of significance related to a range of diagnosed conditions. That report confirms the need for G to have close supervision by her mother. I also accept the wife's evidence as to the need to attend to these matters, and in particular G's needs. Whilst 72 makes specific reference to a child of the marriage who has not yet attained the age of 18 years there cannot be any doubts 75(2) matters, in particular s 75(2)(o), embracing this as a relevant consideration. I also accept the wife's evidence that she has been primarily responsible with the legal proceedings surrounding the resumption of the land and business of F and that she continues to be engaged in that activity up to one day per week. I also accept the wife's evidence that she has suffered some health concerns of her own as set out in her affidavit. The wife herself accepts a capacity for future employment. To that end during 2013 she established the company SS Pty Ltd with a view to establishing a consultancy business in the food and hospitality industry. However, the wife advances evidence that this industry currently faces financial challenges and the wife did not advance that business or new consultancy at that stage in the climate being faced. Importantly the wife records, I also needed funds to invest that I currently do not have and will not have until my property settlement is resolved with [the husband]. Plainly, funding will be necessary for the wife to meaningfully advance a new business. The wife has also attempted some small business marketing and has investigated courses she might undertake, but which require costs to be paid. I am satisfied that at least in the short-term the wife does not have the capacity to

meet her current needs within the meaning of s 72(b) of the Act. I am satisfied that she has need of the support she claims. Counsel for the husband contended to the effect that by reason of the longstanding and established nature of the wife's de facto relationship this was of itself sufficient to preclude the wife's entitlement to interim spousal maintenance. Plainly the fact that the wife is in such a relationship is irrelevant under s 75(2)(m) and can be also taken into account within the meaning of s 75(2)(o). However, the wife details the financial circumstances of her cohabitation which include the feature that her de facto partner's business is not substantial and is not currently financially provident beyond being a source of financial support for her de facto partner's own support. I find on the wife's evidence that her de facto partner currently has no realistic financial capacity to contribute to the wife's support. In *F and F (1982) FLC 91-214*, a case to which the husband's counsel referred, Fogarty J at 77,149 (having referred to the relevance of a de facto relationship) addressed different considerations which may apply where, inter alia, the other person concerned has no financial capacity to contribute. I am satisfied that at least until the wife receives the partial property order made with respect to the sale proceeds of the X property, she has the need for the claimed spousal maintenance on an interim basis and the husband's capacity to meet that payment is not in issue. It is plainly relevant as a s 75(2)(o) matter at least that the source from which this will be met is from the N Group and related entities to which the wife has made substantial contributions over the length of the marriage and in the circumstances of the marriage producing four now adult children. Moreover, it is obviously relevant that the husband himself will continue to draw substantial weekly sums via that source. Thus pending settlement of the sale of the X property the husband shall cause the wife to be paid \$2,178.00 per week plus gap medical and dental expenses. This should be subject to qualification, as sought by the husband, to the extent that the wife is able to derive some employment income to contribute to her needs and I frame the order to reflect that. Other orders sought The husband deposes to his agreement to reduce his loan drawings from N Pty Ltd to \$1,500.00 per week and an order to that effect can be made by consent. The husband also records that in the event M Pty Ltd obtains an unconditional contract for the sale of property at B Street the husband will request the approval of the board of M Pty Ltd to release the information that has been requested by the wife.

The husband also deposes to his agreement to immediately inform the wife and keeper informed in relation to negotiations and/or discussions relating to the sale of any properties which are personally owned or majority-owned by N Pty Ltd or associated entities. At [18.5] of his affidavit filed 24 September 2014 the husband deposes to his agreed disclosure concerning bank statements and quarterly general ledgers and quarterly management accounts for N Pty Ltd. On that basis orders by consent can be made with respect to those issues but as to the balance of the wife's Application she will have liberty to seek to re-list the applications, if she chooses to pursue them, on a further date and I will order to that effect. The husband has deposed to his historical support of the now adult children which is continuing and implicitly will continue. Obviously it is a matter for the wife if she chooses to further pursue her application for adult child maintenance. I certify that the preceding ninety-nine (99) paragraphs are a true copy of the reasons for judgment of the Honourable Justice Kent delivered on 21 October 2014. Associate: Date: 21 October 2014 [1] See husband's affidavit filed 24 September 2014 [4.1] see page 5 of chronology entry dated 1992. [2] Paragraph 8 of husband's affidavit filed 24 September 2014. [3] Paragraph 3.3 of husband's affidavit filed 24 September 2014. [4] Paragraph 6.1 of husband's affidavit filed 24 September 2014. [5] Paragraph 3.1 of husband's affidavit filed 24 September 2014. [6] Paragraphs 8.4 to 8.6 of the husband's affidavit filed 24 September 2014. AustLII: Copyright Policy | Disclaimers | Privacy Policy | Feedback URL: <http://www.austlii.edu.au/au/cases/cth/FamCA/2014/888.html>

