ROBERT GLADE-WRIGHT
FOUNDER, AUTHOR, SENIOR EDITOR
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Family law judgments

SUMMARY DISMISSAL – denial of procedural fairness and natural justice – matter decided on issues not raised in hearing – husband not provided the opportunity to be heard on issues relevant to trial judge's conclusion

In *Ritter & Ritter and Anor* [2020] FamCAFC 86 (20 April 2020) the Full Court (Ainslie-Wallace, Aldridge & Rees JJ) considered a husband's appeal from Judge Obradovic's decision to summarily dismiss his application to set aside a final consent property order made on 16 July 2012 ("the 2012 order").

The second respondent was the parties' adult daughter. The 2012 order provided for the wife to retain her share of a property jointly owned by the husband and the wife ("Property C") and for the husband's share to be transferred to the daughter.

The parties married in 1988, separated in 2009 and divorced in 2012. The husband served a term of imprisonment in 2007 and was required to pay the NSW Crime Commission $100 000. He commenced a second term of imprisonment on 28 March 2012 and was released on 27 December 2013. The husband alleged that in June 2012 his daughter visited him in prison and said the Crime Commission were seeking further funds as they were aware that he had an interest in Property C. He signed a document saying he'd sell his interest in the Property C to the daughter for $1. She told him she'd sell Property C and buy another property in his name.

After selling Property C for $540 000 in July 2013, the wife and daughter purchased two other properties, Properties A and B. After his release from prison the husband moved into Property B as the daughter told him he owned it and she had taken out a $50 000 mortgage to purchase the property. The husband paid the daughter rent. The property was registered in the name of the daughter and she evicted him from Property B. He issued proceedings seeking the 2012 order be set aside on the basis that the daughter materially misled him. The wife and the daughter sought summary dismissal of the application.

The crux of the husband's appeal was that Judge Obradovic failed to afford him procedural fairness, broadly in relation to two issues: (1) the illegality of the husband's motives in transferring Property C to the daughter; and (2) whether the husband's application had reasonable prospects of success.

The Full Court said (from [38]):

"The first matter to be observed here is that this issue, the husband's motive in transferring his interest to his daughter or, put another way, whether the husband had "clean hands" so as to entitle him to the exercise of the discretion of the Court, was not raised in the hearing before the primary judge either by counsel for wife, solicitor for the daughter or her Honour. The first time that this issue emerged was in the judgment.

[39] …[H]ad her Honour raised this issue with the parties, her Honour may have had the benefit of argument on the point and of course the husband would then have been on notice of her Honour's concerns and been able to respond.

[40] … [H]er Honour's characterisation and application of the principle is wrong as a matter of law. It would be hoped that had her Honour raised this issue with the parties the correct legal principles could have been considered.

[41] The law on the equitable principle of "unclean hands" is quite well known. The Full Court in *Andrews & Andrews* [2007] FamCA 562 adopted the following principle:

'56. The maxim "he who comes into equity must come with clean hands" is discussed in Meagher RP, Heydon JD and Leeming MJ, Meagher, Gummow and Lehane's Equity: Doctrines and Remedies (Sydney: Butterworths, 4th ed, 2002) at [3-110] as follows:

"It means that when a plaintiff whose conduct has been improper in a transaction seeks relief in equity that relief will be refused. … [i]t is an historical reflection of the fact that courts of equity began with courts of conscience".

(See *Cory & Gertcken* (1816) 2 Madd 40; 56 ER 250; *Cawthorn & Cawthorn* (1998) FamCA 37).

[42] … [T]he maxim is not of universal application and only applies where the improper conduct of the plaintiff has "an immediate and necessary relation to the equity sued for" (see *Meyers & Casey* [1913] HCA 50; *Dewhirst & Edwards* [1983] 1 NSWLR 34 at 51).

(…)

[47] … [H]aving found that the husband had an arguable case under s79A of the Act, her Honour then continued and concluded that a court would not exercise its discretion in the husband's favour because of his attempt to "pervert the course of justice when he had no reason to do so" (at [69]).

[48] Her Honour's own reasoning shows that she considered the husband's case to be arguable, albeit weak. That a case is said to be weak is insufficient to justify its summary dismissal (see *Coe & The Commonwealth* [1979] HCA 68; *Wickstead & Browne* (1992) NSWCA 272). … [B]ut for her Honour's consideration of the husband's conduct, the application for summary dismissal should not have been dismissed."

The Full Court continued (from [51]):

"Natural justice requires that anything relied upon by a court in reaching its decision be made known to the parties to the proceedings prior to the making of the decision, so that parties may oppose reliance upon it, produce evidence in relation to it and/or make submissions about it. Reliance upon material which does not emerge in that manner amounts to appealable error.

[52] Of course, not every denial of procedural fairness will be sufficient to establish appellate error, critical consideration needs to be given to the consequence of the denial and whether it is material (see *Stead & State Government Insurance Commission* [1986] HCA 54; *Taylor & Taylor* (1979) HCA 38).

(…)

[53] … [H]er Honour's conclusion that the husband was attempting to, in effect, profit by his own fraud was significant to her ultimate decision and we are of the view that by failing to raise the issue with the husband, or at all during the proceedings, her Honour denied him procedural fairness.

[54] This failure of itself is sufficient to cause the appeal to be allowed. This is because a denial of procedural fairness in relation to a material matter strikes at the validity and acceptability of the trial process and its outcome. Where a defect in the administration of justice has been found to have occurred the orders must be remedied (see *Concrete Pty Ltd & Parramatta Design & Developments Pty Ltd* [2006] HCA 55)."

The second ground for the argument as to lack of procedural fairness was the conclusions reached by Her Honour in relation to the sufficiency of the husband's evidence in support of his application and that this misapplied the principles of summary dismissal.

The Full Court said (from [63]):

"… [T]he husband having no notice of her Honour's intention to traverse the evidence before her to see whether he could make good his claim to orders pursuant to s79A, failed to afford him procedural fairness in circumstances where the failure had a material effect on her Honour's orders."

the Full Court continued (from [66]):

"The determination of the issue must only take into account the material on which the respondent seeks to make out the case, or as often expressed takes the respondent's case "at its highest" unless the respondent's version is inherently incredible or unreliable …

[67] It is plain that her Honour did not take the husband's evidence at its highest and in the context of these principles. Her Honour did not find that the husband's account of the circumstances in which he came to sign over his interest in Property C was inherently incredible or unreliable and thus there was no basis for not accepting it for these purposes."

The appeal was allowed. The Full Court re-exercised the court's discretion, refusing the application for summary dismissal and ordering the respondents to pay the husband's costs equally.

PROCEDURE – interim application – litigation funding sought from second respondent (not a party to the marriage)

In *Edson & Whitney and Anor* [2020] FamCA 184 (25 March 2020), Rees J considered an application by a husband in property proceedings for litigation funding from three sources: the second respondent (the wife's mother); the wife by way of lump sum paid by the wife obtaining a mortgage over her real property; and the wife by way of "dollar for dollar order". To enable the wife to obtain a mortgage, the husband sought that the second respondent waive her security over the wife's property.

The husband and wife were married in 2001 and separated in 2018. The two children of the marriage, aged 17 and 15 years lived with the wife. The wife's case was that pursuant to two Deed of Loans, she owed her mother $3 616 000 and almost $350 000. The loans most likely exceeded the value of the assets of the marriage and were secured over real property registered solely in the wife's name.

The wife's application was that the husband retain his superannuation of approximately $429 000 and there be no adjustment of property between the parties.

The court said (from [6]):

"There is no doubt that there is power to make an order for costs against a third party, in this case the 2nd respondent.

[7] In *Knight & FP Special Assets Ltd* [1992] HCA 28, Mason CJ and Dean J stated:

'For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made.'

[8] *The Full Court of the Family Court in McAlpin & McAlpin* [1993] FamCA 71, having considered those and other authorities stated:

'We do not think that we should conclude our discussion of the matter, however, without saying that we think that the approach taken by his Honour in this case, is one that should be taken with great caution. It is one thing for a family or organisation to stand behind a party in proceedings under the *Family Law Act*, either by paying their costs or supporting them in the course of the litigation, but it is quite another matter, in most cases, to make orders against an impecunious

party in the expectation that such other person or persons will discharge the orders on their behalf.'

The wife's evidence was that she had a loan from her brother for legal fees in the sum of $110 000.

Except for the superannuation, the husband had no other substantial assets. The court declined to make the order that the second respondent waive her security to allow the wife to borrow $180 000 and advance that sum to the husband for legal fees.

The court continued (from [37]):

"[T]here is no possibility that, if the 2nd respondent were required to waive her security to allow the wife to borrow $180 000, thus diminishing the security for her asserted loan, and if the husband's challenge is not successful, the 2nd respondent can ever be compensated by the husband for her loss.

(…)

[39] It would not be just and equitable to interfere with the security where the beneficiary of the security could not be compensated for any loss occasioned."

The husband's application for litigation funding was dismissed.

PROPERTY – interim hearing – forum non conveniens – stay – anti-suit injunction – enforceability of overseas order

In *Scarffe & Obannon* [2020] FamCA 77 (18 Feb 2020) Wilson J considered the husband's application for an anti-suit injunction against the wife pursuing an application for property settlement in the Family Justice Courts in Singapore, and the wife's application for a dismissal or stay of the proceedings in the Family Court of Australia.

The wife issued proceedings in Singapore in 2019. The husband's application in Singapore to restrain the court in Singapore from hearing the matter and to stay those proceedings was dismissed.

On 21 March 2019 the husband filed an initiating application in the Family Court of Australia. The wife filed her response on 18 September 2019 seeking the proceedings in Australia be dismissed, stayed, that the husband be restrained from taking any steps in the proceedings and for costs.

The husband's position was that the majority of assets were in Australia and that the Singaporean litigation wouldn't fully determine all property issues between the parties.

The husband and wife met in 1995-1996, commenced cohabitation in Australia in 1997 and married in 2014. There were three children of the marriage aged 15, 13 and 10 years. Save for six months in the UK, from 1997 – 2014 the family lived in Australia then moved to Singapore in 2014 before the parties separated in 2016. At separation the husband left the family home and in 2018 he relocated to Australia. The wife and the children remained living in Singapore.

The Australian asset pool was at least $3.4m but likely more due to assets which were not valued including the wife's inheritance in Australia of approximately $5m. The Singaporean assets consisted of the wife's funds in a bank account and her company.

After considering the applicable law in Singapore, His Honour considered the wife's position that Australia was the clearly inappropriate forum.

The court said (from [52]):

"In *Hillam & Barret* [2019] FamCA 193,between [40] to [64] I undertook an extensive examination of the authorities relevant to the principles that apply to the grant of an anti-suit injunction. While lengthy, it is utile to re-state those principles here. There I said the following:

'[40]The legislative power to make an order in the nature of an anti suit injunction has been said to be reposed in s 34 of the *Family Law Act* or in the inherent jurisdiction of this court conferring upon it power to make necessary and appropriate orders to avoid injustice. That view was espoused in *Hunt & Hunt* [2005] FamCA 849. In *CSR Ltd & Cigna Insurance*

Australia Ltd (1997) 189 CLR 345 the High Court of Australia held (eight years earlier) that the power to grant an anti suit injunction is not restricted to confined or closed categories and is to be exercised when the administration of justice requires or where such an order is necessary for the protection of the court's own proceedings or process.

[42] It seemed to me that two main issues fell for consideration in my determination of the husband's application for an anti suit injunction. The first related to this court's power to make such an order. The second was whether the jurisdiction should be exercised in the circumstances of this case.

[43] …[A]n abundance of authority exists to the effect that it is within power for this court to restrain a party to a proceeding in this court from conducting a proceeding raising similar issues in another court. …

[44] In 1997 the High Court of Australia pronounced upon aspects of the anti-suit injunction in *CSR Ltd & Cigna Insurance Australia Ltd* (1997) 189 CLR 345. … After determination by a single judge then by the Court of Appeal of the Supreme Court of New South Wales, the High Court made a collection of observations about the anti suit injunction. Those may be synthesised in the following manner:

a) an order enjoining a party from commencing or pursuing a proceeding in a foreign court which has jurisdiction to determine the same controversy can only be exercised where an equity arises entitling one party as against the other to an injunction to restrain the other from proceeding in the foreign court;

b) it is not possible determine in advance the circumstances that give rise to such an equity…;

c) such an equity arises when it would be unconscionable for the party enjoined to proceed in the foreign tribunal;

d) as was held in *Castanho & Brown & Root* (UK) Ltd [1981] AC 557 the jurisdiction to issue an anti-suit injunction is not directed against the foreign court but against the party who would invoke that court's jurisdiction and the order is made "where it is appropriate to avoid injustice";

e) the making of an order restraining a person within the jurisdiction from pursuing a remedy in a foreign court where that person has a cause of action must be approached with caution because such an order is an interference with the process of justice in that foreign court, as was held in British Airways Board; *British Caledonian Airways Ltd & Laker Airways Ltd* [1985] AC 58;

f) the power to grant an anti suit injunction should not be exercised without the court concerned first considering whether its own proceeding should be stayed and, in determining whether its own proceeding should be stayed, the test is as stated in *Voth & Manildra Flour Mills Pty Ltd* [1990] HCA 55 and in *Oceanic Sun Line Special Shipping Co Inc & Fay* [1988] HCA 32, namely, a stay will only be granted if the Australian court is a clearly inappropriate forum;

g) the counterpart of the court's power to prevent its process from being abused is its power to protect the integrity of those processes once set in motion … ;

h) the inherent power to grant an anti suit injunction is not restricted to defined or closed categories … ;

i) the power to grant an anti suit injunction is to be exercised when the administration of justice so demands or where necessary for the protection of the court's own proceedings or processes; and

j) if the Australian court decides that it is clearly an inappropriate forum, that will be the end of its involvement in the occasion for considering whether to grant an anti suit injunction or other relief or, if the Australian court reaches the opposite conclusion, namely, that it is not a clearly inappropriate forum, then it must go on to determine whether to require the applicant to seek a stay or dismissal of the foreign proceeding or to grant an anti suit injunction.

(…)

The court continued (from [64]):

"Self-evidently, it is undesirable for a proceeding to be on foot in Singapore in which the precise subject matter is being addressed as is being addressed in this court. The financial cost, personal toll to the litigants and inconvenience, to say nothing of the risk of inconsistent decisions of the two courts is manifest. …"

The court concluded (at [66]):

"[66] In my view, in this case it cannot be said that the precise same litigation is on foot in Singapore as it is in this court. While true, the Singapore court has power to grant orders in personam against both parties. Yet those orders are likely to be of little utility having regard to the fact that the majority of the property is in Australia. Enforcing any orders made by the Singapore court will be problematic in Australia whereas an order of this court is enforceable according to its terms without more."

The court dismissed the wife's application and granted the husband's anti suit injunction.

PARENTING – contravention – COVID-19 – reasonable excuse – variation of primary order

In *Kardos & Harmon* [2020] FamCA 328 (7 May 2020) McClelland DCJ considered a contravention application by a father in relation to a parenting order made in 2018 ("the 2018 order").

The 2018 order provided for the three year old child ("X") to spend four days per month with the father. The mother was to deliver X to the father at Darwin Airport or, provided 90 days written notice is given to the mother, Brisbane Airport. The father was too return the child to the mother at Adelaide Airport at the end of his time. The mother and child lived in Adelaide. The father lived in the Northern Territory and relocated to Brisbane in January 2020. At that time he notified the mother of his relocation and the parties agreed that in March and April 2020, the child would spend time with him in Brisbane.

The child had not spent time with the father in March or April 2020 due to the mother's concerns associated with the COVID-19 pandemic. The father argued that the mother had no reasonable excuse for failing to deliver the child to Brisbane. The mother said that due to the mother's concern for the child's health and the effect of border restrictions which, according to the mother would require the mother and child to remain in self isolation for 14 days after their return to South Australia, she had a reasonable excuse.

The court held that the father had not discharged his onus of proof to establish that he had provided 90 days' written notice that he required the mother to deliver the child to Brisbane and therefore that he was unable to establish the contravention of the 2018 order.

The court continued on to examine whether the mother had a reasonable excuse for contravening the 2018 order.

The court took judicial notice of a number of publicly available documents in relation to COVID-19.

McClelland DCJ said (at [66]):

"I … accept that the restrictions imposed by the Queensland Government to restrict cross-border movements of persons into that State, during the period of the COVID -19 pandemic, do not restrict the mother from travelling with the child from Adelaide to Brisbane in order for the child to spend time with the father. However, that finding does not displace the mother's concerns that clearly relate to the health of the child.

(…)

[76] Having regard to that publicly available information, I am satisfied that the mother believes "on reasonable grounds" that not allowing the child to spend time with the father, on the dates which are the subject of the Contravention Application, was necessary to protect the health of the child and the mother. This is because the mother would not have been able to maintain safe social distancing during the period of the aircraft travel and there was an unacceptable risk that the child would come into close contact with a person infected by the virus during the course of the aircraft travel. …

(…)

[77] In terms of the broader operation of s 70NAE(5)(b) of the *Family Law Act*, it was also contended, by the mother, that the border restrictions imposed by the South Australian Government would require both the mother and the child to self-quarantine for a period of 14 days after their return from Brisbane to Adelaide.

(…)

[81] …[I]t has been unnecessary for me to determine this issue in light of the finding that I have made that the mother has a reasonable excuse for not having delivered the child to the father in the months of March and April 2020 as result of the reasonable concerns she has for the child's health. However, had it been necessary to determine this issue, I would have determined it in favour of the mother …"

The mother sought the variation of the 2018 order to enable the child to spend time with the father in Adelaide and for make up time to occur in Adelaide. The father sought that the 2018 order be varied to enable the child to spend a longer period each month with him in Brisbane to make up for any time lost.

The court continued (from [113]):

"A useful discussion of risk in the context of the Court balancing the two primary considerations of the child having a meaningful relationship with both parents as against risks associated with the current COVID-19 pandemic is set out in the Canadian Family Court of the Superior Court of Justice in the matter of *Ribeiro & Wright 2020 ONSC 1829*; [2020] *CarswellOnt 4090*. In that decision, Pazaratz J noted, at [6] that, as is the case in Australia, "the health, safety and well-being of children and families remains the court's foremost consideration during COVID-19".

[114] His Honour further noted, at [8], that, as in Australia, "directives from government and public health officials make it clear that we are in extraordinary times; and that our daily routines and activities will for the most part have to be suspended, in favour of a strict policy of social distancing and limiting community interactions as much as possible".

[115] His Honour stated, at [10], that, while many aspects of our social interactions will be placed on hold as a result of the directives from government, "children's lives — and vitally important family relationships — cannot be placed 'on hold' indefinitely without risking serious emotional harm and upset". His Honour observed that, unless circumstances dictated otherwise, in these "troubling and disorienting times, children need the love, guidance and emotional support of both parents, now more than ever" and that "a blanket policy that children should never leave their primary residence — even to visit their other parent — is inconsistent with a comprehensive analysis of the best interests of the child".

[116] His Honour, at [17], noted that each family will have its own unique issues and complications, and, at [21], each case will have to be determined on a case-by-case basis. In considering concerns raised in respect to the impact of the current COVID-19 pandemic, Pazaratz J, at [21], held that:

'The parent initiating an urgent motion on this topic will be required to provide specific evidence or examples of behaviour or plans by the other parent which are inconsistent with COVID-19 protocols.

The parent responding to such an urgent motion will be required to provide specific and absolute reassurance that COVID-19 safety measures will be meticulously adhered to — including social distancing; use of disinfectants; compliance with public safety directives; etc.'

[117] That approach is one that is of assistance in this case. …[D]espite the existence of the COVID-19 pandemic, it is important that all reasonable efforts are made for children to spend time with both parents consistent with taking a responsible approach in respect to mitigating against risks associated with the presence of the COVID-19 virus in the community and, specifically, the child coming into close contact with a carrier of the virus."

The contravention application was dismissed and the 2018 order was varied to facilitate the father spending the ordered time with the child in Adelaide and if that was not possible, for the child to spend make up time in Adelaide with the father.

PROCEDURE – interlocutory application – restraint on solicitor acting – breach of confidence – duty of loyalty – solicitor potential witness in proceedings – effect of delay in bringing application

In *Harlen & Hellyar* [2020] FamCA 21 (28 January 2020), McEvoy J considered an interlocutory application by a wife to restrain the husband's solicitors from acting on the basis that the wife had imparted confidential information to the husband's solicitor ("Mr Da Gama") about her affairs when they acted for her.

The substantive proceedings involved the wife's application to have a s 90UC financial agreement declared void or set aside, and the husband's application to enforce the financial agreement.

The wife immigrated to Australia in 2008 with her then husband Mr A. The husband and wife met in 2011. They commenced a relationship in January 2012 whilst they were both married to other people, and in February 2012 and March 2012 ended their pre-existing marriages. The husband and wife commenced living together in a de facto relationship in 2012 and separated in 2017.

In August 2012 the husband and wife went to see Mr Da Gama for advice in relation to her separation from Mr A and visa issues. The wife alleged that at the time of the meeting with Mr Da Gama, the husband had discussions with Mr Da Gama about the preparation of a document which would set out what the husband and wife would each receive if their relationship was to end. The wife said that on 14 October 2012, the husband and wife attended upon Mr Da Gama's offices and signed such a document. An interpreter was present and a Mr F (another solicitor) also attended and explained the main paragraphs to the wife with the assistance of an interpreter. The husband allegedly told the wife that Mr F was a good friend of Mr Da Gama.

The wife alleged that Mr Da Gama continued to act for her in relation to her marriage to Mr A, and she and the husband attended Mr Da Gama's office many times in relation to her issues with Mr A. Mr Da Gama acted for the wife in her application for an intervention order against Mr A.

The husband denies that the parties entered into a financial agreement in 2012. The wife says she was provided with a copy on the day of signing but the husband subsequently took it from her and she no longer had a copy.

The wife alleged that a second financial agreement was signed in 2014 at the offices of Mr Da Gama and that it was only Mr Da Gama and the husband present when she signed, but she was told that other people would sign later. The husband alleges that the wife was represented by Mr F in relation to this agreement and that there was an interpreter present. The wife says she did not understand the agreement and signed where she was told.

The court said (from [28]):

"Much of the written and oral submissions made by senior counsel for the applicant focused upon the alleged confidentiality of information imparted by the applicant to VDG. The applicant submits that the fact that VDG had information of hers which she asserts is confidential provides a sufficient basis for the Court to enjoin VDG from continuing to act …

[29] Although at one level this submission is not without force, the difficulty lies in identifying the information said to be confidential, whether it is in fact confidential by reason of the fact that it appears to be common ground that any information disclosed by the applicant to VDG was disclosed in the presence of the respondent, and whether any information disclosed is actually relevant to the subject matter of the current proceeding…

(…)

[31] It may be accepted that the applicant's contention that VDG is in possession of confidential information of hers which is of significance for the purposes of this proceeding is attended by, at least, problems of definition. Were this to be the only basis of the present application difficult questions in relation to the confidentiality of the relevant information, its relevance, and whether any confidentiality had been waived, would require determination. On the existing state of the evidence an application on this basis alone may be difficult to sustain.

(Footnotes Omitted)

[32] … [T]he applicant also contends that in all the circumstances there is no question but that Mr Da Gama would need to be called as a witness in relation to the circumstances in which she signed the 2014 Agreement. It is submitted that it is difficult to conceive of a case where a solicitor could be more involved in the subject matter of the litigation, and his conduct the subject of greater criticism and attack, than that of Mr Da Gama in this case. The applicant submits that a primary issue in the proceeding is how many financial agreements there were — the applicant says two; the respondent (and, it may be presumed, Mr Da Gama) say there was one. Senior counsel for the applicant contended at the hearing of this application that Mr Da Gama drew the 2014 agreement and on the applicant's case witnessed the applicant sign it and arranged for Mr F and the interpreter to provide the necessary certifications after the fact.

(…)

[35] In circumstances where there is highly contradictory evidence, involving issues as to the credibility and the professional conduct of Mr Da Gama and the propriety of the respondent's conduct, the applicant invokes the Court's inherent jurisdiction to restrain a solicitor from acting in a particular case as an incident of its inherent jurisdiction over its officers and to control its process in aid of the administration of justice: Kallinicos & Hunt [2005] NSWSC 1181; Grimwade & Meagher [1995] 1 VR 446, 452; Osferatu [2015] FamCAFC 177. The applicant says that a fair-minded, reasonably informed member of the public would conclude that the proper administration of justice requires that VDG should be prevented from acting, in the interests of the protection of the integrity of the judicial process and the due administration of justice, including the appearance of justice.

[36] … [T]he respondent says that it would be oppressive to remove his solicitor and that the applicant has waited too long to seek to do so. (…) The respondent refers to Miller & Martin [2019] VSCA 86, at [60] on the significance of a delay in bringing an application such as the present one, and to a decision in Davey & Silverstein [2019] VSC 302 where an Associate Justice of the Supreme Court of Victoria also considered the late stage at which a removal application had been made.

(…)

[38] …[T]he respondent refers to the recent decision of the Full Court in *Sellers & Burns and Anor* [2019] FamCAFC 113, where the Full Court reversed a decision of a trial judge that a solicitor should be restrained from acting because there was a "real possibility of the solicitor being required to give evidence". In *Sellers & Burns* the Full Court took the view that while it might be that evidence from the solicitor could cast light on particular facts, that evidence would not be determinative. In this sense the solicitor was not regarded as a material witness. The Full Court allowed the appeal in circumstances (unlike the present) where the husband had indicated that he would not call his solicitor.

(…)

[42] …[I]n my view, a fair-minded, reasonably informed member of the public would conclude that the independent objectivity of Mr Da Gama as a solicitor in the case and/or a witness could be compromised by conflicts between his obligation of loyalty to his client, his role and knowledge as a witness of material facts, and his potential personal interest. Thus, the proper administration of justice requires that Mr Da Gama should be prevented from acting, in the interests of the protection of the integrity of the trial process and the due administration of justice, including the appearance of justice.

(Footnotes omitted)

[43]… I do not accept that the fact that there has been some delay in the bringing of the application is a factor which, in the exercise of my discretion, should prevent Mr Da Gama from being restrained from acting…"

The court ordered that the respondent's solicitors be restrained from acting.

PROCEDURE – application to discharge referral to arbitration – family violence – withdrawal of consent to arbitration – non-arbitrable disputes

In *Palgrove* [2020] FCCA 846 (27 March 2020) Judge Harman considered an application by a wife to discharge a referral to arbitration, largely for reasons related to the wife's ability to be present in the same location as the husband.

The financial dispute between the parties was referred to arbitration pursuant to s 13E of the *Family Law Act 1975* (Cth) ("the Act") on 18 June 2019 with the consent of the parties.

The court said (from [15]):

"In the absence of any settled precedent, at least in the field of family arbitration within Australia, (and noting the current limitations of arbitration to financial proceedings), it could be argued that disputes are not arbitrable if the dispute relates to or will involve a finding of fact relating to a matter in which there is a public interests such as:

a) The perpetration of fraud by a party (whether upon the other party or a third party such as the Office of State Revenue of ATO);

b) Relief that will impact third parties;

c) Allegations of criminal conduct. This may include allegations of family violence, whether prosecuted as a criminal offence or otherwise;

d) Cases involving significant allegations of family violence."

(Footnotes omitted).

The court indicated it would make orders requiring the arbitration to be conducting by video conferencing facilities and in response to the withdrawal of consent to the arbitration, the court continued (from [30]):

"It would seem that the parties are relatively agreed in their position that the referral to arbitration should be discharged and the parties, instead, referred to a conciliation conference…

[31] I do not intend to take that path, even though both parties consent.

[32] As discussed in *Loomis & Pattison* [2020] FCCA 345 and the authorities referred to therein, the Court should be loath to interfere in the arbitration process, other than its facilitation and support once it is ordered. That is not to suggest that there are not circumstances where it is impossible or inappropriate for the Court to interfere. I am not, however, satisfied that this is such a case.

[34] The outcome the parties desire to achieve can be achieved through the prescriptive order I have referred to. It was possible for it to be achieved, subject to the consent of the parties, as part of negotiation of the arbitration agreement.

(…)

[36] Whilst consent is purported to be withdrawn, I am not satisfied that I should simply accept that position and return the matter to the Court's jurisdiction. There are a number of reasons for that. Firstly, the arbitrator is clearly seized of the matter. The arbitration has commenced. There was a contested application for adjournment of the arbitration, both parties and their counsel having presented for the purpose of the arbitration proceeding. The parties have already expended time, effort and funds in procuring that process and have commenced it.

[37] It would be more cost effective for the arbitration to proceed on the basis proposed, by video, subject to the dispute remaining arbitrable and both parties being sufficiently supported in the process to feel safe.

[38] Secondly, the delay that these parties will face, if the matter returns before the Court, is extreme. … That disadvantage to the parties, when it can be cured through a prescriptive order as to how the arbitral process should proceed and thus that disadvantage avoided, should play some significant role in determining the issue.

(…)

[40] There is certainly a public interest in ensuring that aberrant behaviour such as family violence is addressed and appropriately addressed through judicial

process. Arbitration is private and results in a confidential determination and thus "privacy" as to findings of fact. Judicial process, on the other hand, is open, transparent and published (albeit in anonymised form using non-identifying pseudonyms).

[41] In the context of this individual case, the evidence not yet tested and the arbitration ready to proceed, I am satisfied that the matter can be safely arbitrated with prescription as to process. That is particularly so as there is no suggestion that the Kennon claim was not crystallised and apparent before the parties each provided their consent for referral to arbitration. (Footnote omitted) Each party was legally represented and advised at the time the referral to arbitration was made. I am not satisfied that mutual consent to a discharge of the referral should dictate the outcome."

The court made prescriptive orders in relation to the conduct of the arbitration and dismissed the application in a case.

CHILDREN – child abduction – Hague Convention – requesting parent with significant criminal history permanently banned from Australia – unmanageable grave risk of family violence and an intolerable situation if return ordered

In *Walpole & Secretary, Department of Communities and Justice* [2020] FamCAFC 65 (25 March 2020) the Full Court (Ryan, Aldridge & Watts JJ) heard a mother's appeal from a decision of Ainslie-Wallace J under the Hague Convention on the Civil Aspects of International Child Abduction requiring her to return to New Zealand with her two children.

The proceedings at first instance were brought by the Secretary of the Department of Communities and Justice (NSW) as the central authority and the mother the respondent.

The mother was born in Australia in 1987 and the father was born in 1973 in New Zealand. The father was convicted in New Zealand of a number of offences, including multiple assaults, drink driving, possession of cannabis and resisting arrest between March 1991 and February 1997. After arriving in Australia in 1999/2000 the father was convicted of assault, damaging property and other offences between 2001 – 2003. In 2006 father was convicted of further offences the result of which was that he was sentenced to eight months' imprisonment. In 2010 the father was convicted of assault and sentenced to further imprisonment and in 2012 he was convicted of contravening an ADVO and was again sentenced to imprisonment.

The parties met in 2004, commenced a relationship in 2007 and commenced cohabitation a few years later. The father had six children to previous relationships and the mother one (born in 2005). The parties separated in 2019.

The first child of the relationship 'X' was born in 2016 in Australia.

There was a history of domestic violence incidents between the parents and the records revealed that there was a history of the mother refusing to co-operate with police in having the father charged and securing domestic violence orders.

The father was deported to New Zealand in 2017. The mother subsequently moved to New Zealand with the father and 'Y' was born in New Zealand in August 2017. There were further reports of family violence in New Zealand.

On 10 May 2019 the mother obtained orders for the children to live with her and she and the children departed New Zealand the same day.

Accepting the mother's evidence that she had permanently separated from the father, Ainslie-Wallace J found that the children were not at grave risk if they return to New Zealand. The mother argued that if they were returned to New Zealand, that the children would be exposed to a grave risk of physical or psychological harm.

Focusing on the "grave risk" and "intolerable situation" defence to a return application, the Full Court said (from [59]):

"The leading authority on these issues is *DP v Commonwealth Central Authority* (2001) HCA 39. There, Gaudron, Gummow and Hayne JJ explained at [40] that:

'So far as reg 16(3)(b) is concerned, the first task of the Family Court is to determine whether the evidence establishes that "there is a grave risk that [his or her]

return … would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation". If it does or if, on the evidence, one of the other conditions in reg 16 is satisfied, the discretion to refuse an order for return is enlivened. There may be many matters that bear upon the exercise of that discretion. In particular, there will be cases where, by moulding the conditions on which return may occur, the discretion will properly be exercised by making an order for return on those conditions, notwithstanding that a case of grave risk might otherwise have been established. Ensuring not only that there will be judicial proceedings in the country of return but also that there will be suitable interim arrangements for the child may loom large at this point in the inquiry. If that is to be done, however, care must be taken to ensure that the conditions are such as will be met voluntarily or, if not met voluntarily, can readily be enforced.'

[59] … The predicted risk must have reached such a level of seriousness as to be characterised as grave. Although the word 'grave' characterises the risk rather than the harm, 'there is in ordinary language a link between the two' (Wolford at [57] and [62] citing In *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27 …).

[60] The mother carries the onus of proof in establishing the defence.

[61] As we consider this issue, it needs to be remembered that the focus must be on the children (*Harris v Harris* (2010) FamCAFC ("Harris")). But the children's primary carer's circumstances are highly relevant. In Harris the Full Court adopted remarks by Hale LJ … in her dissenting judgment in *TB v JB (Abduction: grave risk of harm)* [2001] 2 FLR 515, who explained the situation thus:

43. It is important to remember that the risks in question are those faced by the children, not by the parent. But those risks may be quite different depending upon whether they are returning to the home country where the primary carer is the 'left behind' parent or whether they are returning to a home country where their primary carer will herself face severe difficulties in providing properly for their needs. Primary carers who have fled from abuse and maltreatment should not be expected to go back to it, if this will have a seriously detrimental effect upon the children. We are now more conscious of the effects of such treatment, not only on the immediate victims but also on the children who witness it…

…

56. But it cannot be the policy of the Convention that children should be returned to a country where, for whatever reason, they are at grave risk of harm, unless they can be adequately protected from that harm. Usually, of course, it is reasonable to expect that the home country will be able to provide such protection. But in this particular case, it is the totality of the situation in which the children found themselves, a combination of serious psychological and economic pressures, which creates the risk. A protection order, were it to be readily available, would not solve all their problems…

…

58. … It would require more than a simple protection order in New Zealand to guard the children against the risks involved here …"

The return order was set aside. Watts J agreed with the conclusion of Aldridge and Ryan JJ but provided his own reasons.

OTHER ROUTINE PROCEDURES – appeal – denial of procedural fairness – unwarranted judicial interventions – judge expressing a preliminary view – counsel unable to properly conduct cross-examination

In *Finch* [2020] FamCAFC 60 (20 March 2020) the Full Court (Ryan, Aldridge & Tree JJ) heard a wife's appeal of a decision of Willis J dividing the net property pool of the husband and the wife equally between them.

The wife and husband were aged 56 and 58 years respectively. They commenced cohabitation in 1987, married in 1991 and separated in 2013 (a relation of 26 years). There was one adult child of the relationship. The trial took place over three days in 2018.

The wife appealed on the basis of procedural unfairness, specifically claiming five matters the primary one being alleged excessive judicial intervention during the hearing. The wife alleged that the

number, frequency and duration of Willis J's interventions, together with the nature of the exchanges and the tone of voice from time to time demonstrated that the interventions were excessive.

The Full Court summarised the legal principles, saying (at [14]):

"In *Galea v Galea* (1990) 19 NSWLR 263 at 281–282 … , Kirby A-CJ (with whom Meagher JA agreed) summarised the relevant principles in relation to excessive judicial interference, as follows:

'1. The test to be applied is whether the excessive judicial questioning or pejorative comments have created a real danger that the trial was unfair. If so, the judgment must be set aside: see *E H Cochrane Ltd v Ministry of Transport* [1987] 1 NZLR 146 (NZCA).

(…)

3. Where a complaint is made of excessive questioning or inappropriate comment, the appellate court must consider whether such interventions indicate that a fair trial has been denied to a litigant because the judge has closed his or her mind to further persuasion, moved into counsel's shoes and "into the perils of self-persuasion"

(…)

4. The decision on whether the point of unfairness has been reached must be made in the context of the whole trial and in the light of the number, length, terms and circumstances of the interventions. It is important to draw a distinction between intervention which suggests that an opinion has been finally reached which could not be altered by further evidence or argument and one which is provisional, put forward to test the evidence and to invite further persuasion: (citations omitted)

5. It is also relevant to consider the point at which the judicial interventions complained of occur. A vigorous interruption early in the trial or in the examination of a witness may be less readily excused than one at a later stage where it is designed for the legitimate object referred to in Jones, namely of permitting the judge to better comprehend the issues and to weigh the evidence of the witness concerned.

(…)

[16] Further, the following principles may be distilled from the previous authorities in relation to excessive judicial intervention:

(a) … [E]xcessive judicial intervention leading to a lack of procedural fairness is a separate basis of appealable challenge (*RPS v The Queen* (2000) HCA 3; *Royal Guardian Mortgage Management Pty Ltd v Nguyen* [2016] NSWCA 88 ('Royal Guardian') at [35]–[39] and Jorgensen [2019] FCAFC 113 at [95]);

(b) A failure to assert a want of procedural fairness at the trial does not preclude it being first raised on appeal (Royal Guardian at [30]–[33] and [255]);

(c) The evaluation of whether interventions are excessive involves an assessment and balancing of the appropriate role and limits of judicial engagement and management, with the need for the appearance of detachment, and the provision of fairness (Royal Guardian at [18]; Royal Guardian … and Jorgensen at [102]);

(d) Inept representation may justify greater judicial intervention, in order to ensure the proper use of court resources, and avoid delay or unnecessary prolongation of the hearing (Royal Guardian at [38]);

(e)Nonetheless the judge must not assume the role of advocate, or be unduly intimidatory, interventionist or directionist, nor unduly press so-called "preliminary views" (Royal Guardian at [220] … ; and

(f) The number, frequency and duration of the judicial interventions will be relevant, as will their nature and context (including the stage of the trial), content and manner of delivery (including tone of voice) (Royal Guardian at [164] citing Galea).

Upon a review of the transcript of the cross examination of the husband, the Full Court identified that the cross examination of the husband occupied one hour and 59 minutes and Willis J's interventions occupied in excess of 35 minutes of that cross examination.

The Full Court commented (from [23]):

"Factoring those sorts of matters into account, we are confident that in fact, counsel was precluded from undertaking cross-examination for at least an hour of the nearly two hours it notionally occupied.

[24] It is informative that, if one deducts the 35 minutes which the impugned interventions took from the length of the cross-examination of one hour and 59 minutes, there was a total of no more than 84 minutes of cross-examination, but it was interrupted by impugned interventions 45 times, thereby meaning that counsel, on average, was interrupted nearly every two minutes. Given there were many benign interventions, the reality is that the interval was, on average, much less. This frequency of intervention is borne out by a review of the transcript; the longest period counsel was able to proceed without interruption saw him ask 15 questions; often, the number of questions was much less.

[25] The number, frequency and duration of the primary judge's interventions during the husband's evidence are of serious concern. Counsel for the wife was significantly impeded in conducting his cross-examination, even, as we have noted, from his very first question."

The Full Court further said (from [59]):

" … [W]e conclude that frequent hallmarks of the impugned interventions were, as the wife contended, wholly unwarranted, unduly personalised, demonstrated an unfortunate entry by the primary judge into the arena, and did not adequately undo the consequences of the very forceful initial expression of a "preliminary view" by the primary judge.

[60] It is no exaggeration to say that, during his cross-examination of the husband, virtually every time counsel for the wife commenced questioning on an issue, the primary judge's response was to either berate him by questioning the length of time it might take, the competence of the structure of his questions, or their relevance, or sought to impugn his integrity.

[61] During the wife's evidence, it was largely the same, albeit the primary judge's interventions often took an even more personalised form and were exclusively directed to the wife herself.

(…)

[65] The primary judge's nigh incessant interruption of the wife's counsel's cross examination of the husband, and to a lesser extent, the wife herself during her evidence, by interventions which were often unwarranted, wrong, unduly personalised, and which evidenced intermittent entry into the arena, compel the conclusion that they were excessive. The tone of voice in which they were sometimes undertaken only serves to reinforce that conclusion.

(…)

[66] Of themselves, the excessive interventions created not merely the appearance of procedural unfairness, but also the actuality of it. We are well satisfied that counsel for the wife was unable to properly conduct cross-examination of the husband in the face of the barrage of unwarranted interventions; we are less confident, but nonetheless persuaded, that the wife was precluded from properly giving her evidence under cross-examination by virtue of them also. There is a real danger that the trial was therefore unfair, and hence miscarried."

The orders of Willis J were set aside and the matter remitted for hearing before a different judge.

Property – summary dismissal refused – security for costs refused due to applicant's parlous circumstances

In *Gregg & Gregg and Ors [2019] FamCA 927* (5 December 2019) Tree J heard an interim application brought by the husband and eight other respondents (being the husband's family members and a corporate trustee of a family trust) for the wife's application for property settlement to be summarily dismissed and for a security for costs order.

The wife brought an application for property settlement asserting that she and the husband had an equitable interest in a crop farming business conducted by the husband's business. In a complex fact scenario, she asserted that in addition to properties owned by the husband, other properties owned by the husband's parents

and other members of the family were held on trust for the members of the family involved in the farming business.

The husband and wife met in 1997 when the husband was 19 years of age and the wife 16. The husband had already started working in the farming business at age 17 and continued to do so. The parties married in 2000 and separated on 4 September 2017. The parties had six children, three of whom at the time of the hearing lived with the husband and had no relationship with the wife.

The wife's evidence was that the farming business provided accommodation, electricity, telephone and petrol for the working family members, with no salary for the first two years of employment and then a very low wage, such that the family members qualified for Centrelink benefits. The wife further claimed that properties were purchased in names of family members after they had been working in the business for two years, without the registered proprietor making any financial contribution to the acquisition of the property and that the proprietor didn't necessarily live in the property. The husband and wife lived in "Q Street" for most of the relationship, which was registered in the name of one of the husband's brothers (who did not live in the property).

The husband and the respondents sought the summary dismissal of the wife's application under r10.12 *Family Law Rules 2004* (Cth).

Reviewing the authorities, Tree J said (from [37]):

"In *Pelerman v Pelerman* (2000) FamCA 881 at [46], the Full Court said in relation to the test for summary dismissal as follows:

'The gravamen of the appeal is that the trial judge erred in the exercise of the discretionary power to summarily dismiss the application. It is well established that the following principles apply as were recently reviewed and stated in *Bigg v Suzi*:

(a) The power for summary dismissal is a discretionary one.

(b) Relief "is rarely and sparingly provided".

(c) The parties seeking summary dismissal must show that the application is "doomed to fail" or as has been otherwise described "that the opponent lacks a reasonable cause of action or is advancing a claim that is clearly frivolous or vexatious".

(d) A weak case or one that is unlikely to succeed is not "sufficient to warrant termination".

(e) "If there is a serious legal question to be determined, it should ordinarily be determined at a trial."

(f) "If notwithstanding the defects of pleadings, it appears that a party may have a reasonable cause of action which it has failed to put in proper form, a Court will ordinarily allow that party to reframe its pleadings."

(Citations omitted)

After reviewing the authorities, Tree J said (at [41]):

"The starting point must be that, insofar as the application for summary dismissal is brought pursuant to the *Family Law Rules 2004* (Cth) ("the Rules"), the language of the applicable rule will determine the relevant test. Under Rule 10.12, the test is that there is "no reasonable likelihood of success." (I leave to one side whether there is any residual inherent jurisdiction to dismiss, notwithstanding there being a rule).

(…)

[43] I have formed the view that, although the other articulations help to provide sounding boards as to whether the test under Rule 10.12 has been met, ultimately the standard that must be demonstrated is that there is 'no reasonable likelihood of success.' That is the test which I will apply here."

Tree J dismissed the applications for summary dismissal saying (at [54]):

"The question then is whether I am presently persuaded that there is no reasonable likelihood of success on the part of the wife, including in relation to any cause of action presently not articulated by her in proper form (for example, equitable compensation). Upon balance, I am not so satisfied,

at least at this point in time, particularly given the infancy of the proceedings, the lack of clarity as to whether Mr B and Ms C concede that the husband has any equitable interest in the farm properties in his sole or joint name, and the wife's late made concession that she would not eschew equitable relief other than a remedial constructive trust. It therefore follows that both applications for summary dismissal fail."

Turning to the application for security for costs, wherein a total of $240 000 was sought by the husband and the respondents, Tree J said (from [56]):

"During the course of the oral submissions, I raised with all counsel whether or not s 117 of the *Family Law Act 1975* (Cth) ("the Act") governed costs in these proceedings, insofar as they involve the parties to the wife's equitable claim. Ultimately, helpful written submissions were provided by the wife and the respondents other than the husband, which conceded that s117 of the Act did govern the application, albeit they correctly identified that there is a lack of uniformity among the authorities as to the exact reason why that is so. … [C]ounsel for the respondents other than the husband, noted the lack of cohesion in the jurisprudence relating to this issue, and suggested that 'this application provides the Court with the opportunity to provide clarity and a principled approach to the operation of s117 of the Act where third parties are joined to litigation between parties to a marriage. … I am disinclined to seize the alleged opportunity, which more properly seems to raise an issue requiring the attention of the Full Court, rather than yet another single judge sitting in the General Division adding potentially even further discordant reasoning to the present jurisprudential melee.

(…)

[59] In *Luadaka & Luadaka* (1998) FamCA 1520 ("Luadaka") at [62] the Full Court (Ellis, Finn and O'Ryan JJ) said:

'The purpose of an order for security is to secure justice between the parties by ensuring that an unsuccessful party does not occasion injustice to the other. In considering whether or not to make an order, apart from those referred to in s117(2A), matters which may be relevant include the following…'

[60] Their Honours then set out a number of matters, which were later helpfully summarised by Mullane J in *Richards, Duff, Patient & DoCS* [2002] FamCA 223 … at [19] as follows:

(1) The means of the respondent to the application to satisfy an order for costs if he or she is unsuccessful

(2) The prospects of the respondent to the application succeeding in the proceedings

(3) Whether the claim in the proceedings of the respondent to the application "is made bona fide, whether is genuine or not trivial, vexatious or a sham."

(4) Whether an order for costs would be "oppressive or stifle the litigation"

(5) Whether or not the litigation may involve a matter of public importance.

(6) Whether or not there has been delay in bringing the application, causing prejudice to the respondent to the application

(7) The amount of costs likely to be incurred

(8) Any difficulties likely enforcing an order for costs.

(…)

Reviewing the wife's financial circumstances, Tree J said (from [69]):

"… I observe as follows:

2. The wife will not be able to satisfy an order for costs if she does not significantly succeed in the principal litigation;

3. It is too early to make any definitive assessment of the wife's overall prospects of success, but I have already identified that her claim for a remedial constructive trust faces many obstacles, although they are not necessarily insurmountable, and any claim by her for lesser equitable relief faces less difficulties;

4. There is no suggestion that the wife, in asserting her claim, is not acting bone fide;

5. It is conceded that, if an order for security for costs were made, it would stifle the litigation;

6. The litigation does not involve any question of public importance;

7. There has been no delay in the bringing of the applications for security;

8. The amount of costs claimed are significant, in the total sum of $240 000. There is no reason to doubt that estimate is accurate, and indeed, perhaps conservative; and

9. The only difficulty in enforcing any order for costs that might ultimately be made against the wife, is that there are at present virtually no assets, and very little income, against which any order might be enforced.

[70]

(…)

I should make it plain that, if it later transpires that the wife's prospects of success in relation to any equitable claim can be definitively assessed as weak, then different considerations, or at least the weight given to them, might apply.

The applications for security for cost were dismissed.

CHILDREN – contravention – several contraventions proven – costs order against applicant who had been at least substantially unsuccessful – contravention application petty and unwarranted

In *Adam & Tan* [2019] FamCA 964 (13 December 2019), Carew J heard a contravention application by a father against a mother alleging a number of contraventions of final consent parenting orders made on 20 March 2019.

The mother and the 11-year-old child lived overseas. The father (who lived in Australia) and the child communicated via an App each Sunday. The father alleged that the mother contravened the final orders by failing to facilitate the required telephone contact with the father without reasonable excuse and failing to provide the father 60 days' notice of the child's proposed international travel from Country B (where the child lived) to Country D for a weekend. The mother provided email notification two hours prior to the departure, despite obtaining a visa for the travel two weeks earlier.

The court found that the mother contravened the order in relation to the 60 days' notice of international travel without a reasonable excuse and that on a number of occasions, the mother contravened the orders by not ensuring the child was available for telephone contact as required on several Sunday evenings. Despite finding a number of contraventions occurred without reasonable excuse, the court did not accede to the father's request for a costs order against the mother, a fine, or variations of the existing orders.

Carew J said (at [40]):

"I have found that the mother contravened paragraph 34(b) of the primary order without reasonable excuse by failing to provide the required notice prior to travel. However, I do not intend to impose any sanction … The application by the father was, in my view, petty and unwarranted.

[41] I have found that the mother contravened paragraph 25 of the primary order without reasonable excuse on 2 June 2019 by failing to ensure the child was made available for the father's communication. However, I do not intend to impose any sanction. The mother was told by the child that the father had not called her (although she was mistaken) and, upon becoming aware of the father's difficulties with contacting the child, the mother has taken steps since 16 June 2019 to remedy the situation. The child now calls the father on Sundays … In my view this application was also petty and unwarranted.

(…)

[43] The father has been substantially unsuccessful. While two counts of contravention have been found in his favour I have not imposed any sanction or made any order.

(…)

[44] The father also opposed the mother giving her evidence by

electronic means, which required a separate hearing and the father's objection was dismissed.

(…)

[47] I consider that an order for costs against the father is warranted in the circumstances of this case. … [T]he father has been at least substantially and arguably wholly unsuccessful in that not only were most of the alleged contraventions dismissed, the two that were established did not attract any sanction against the mother nor variation to the March 2019 order. I have found the father's conduct in relation to the proceedings to have been petty and unwarranted.

The court ordered the father pay $2750 towards the mother's costs.

PROPERTY – expert evidence – interim issue – Family Law Rule 15.49 appointing another expert – disagreement with the expert evidence insufficient to support appointment of another expert

In *Salmon & Salmon and Ors (No. 2)* [2019] FamCA 910, Carew J heard an interim application by a husband under r15.49 *Family Law Rules 2004* for the appointment of another expert in circumstances where a single expert had already been appointed and had undertaken a valuation of the subject property.

The proceedings were between the wife's estate (the wife had died during the proceedings), the husband and a number of entities in which the parties and the husband's family have interests is. A single expert ("Mr F") was appointed earlier in the proceedings to value the parties' interests in a number of entities and trusts including a self-managed superannuation fund. At the time of the interim hearing Mr F had prepared three reports, the most recent of which was dated 18 July 2019. The husband had engaged another expert, "Mr W" who had prepared a report dated 22 August 2019. The husband sought to tender the report prepared by Mr W on the basis that there existed in the report a substantial body of opinion contrary to the opinion given by the single expert witness, that the contrary opinion is necessary for determining several issues relevant to the matter and that there was another special reason for adducing evidence from another expert witness under r15.49(2)(c). Questions had not been provided to the single expert in accordance with r 15.65 and there had been no joint conference with the single expert pursuant to r15.64B.

Carew J said (at [18]):

"While the rules place restrictions on the use of another expert's report in proceedings, a party is not precluded from obtaining a report from another expert per se and in order to better inform themselves in the conduct of their litigation. As Murphy J in *Simonsen & Simonsen* [2009] FamCA 698 observed:

'12. The general thrust of the Rules has been referred to by the Full Court in *Bass & Bass* [2008] FamCAFC 67; … As the court in that case made clear, the adducing of evidence from an additional expert, is not something which ought occur in the usual course, or simply by application made by a party. In simple terms, the word "special" as used in rule 15.49 has real meaning.

13. It is important to understand that Part 15.5 of the Rules does not preclude a party from obtaining on their own behalf expert evidence, nor does it preclude a party from obtaining such expert evidence, (including from more than one expert, should they so choose), in respect of all matters relevant to the proceedings before a court, and all matters relevant to a report and/or evidence produced by a single expert.

14. Thus, expert evidence obtained by a party on their own account can be used, for example, to significantly inform the cross-examination of a single expert witness at a trial. The restriction inherent in the rules is a restriction related to the adducing of evidence from the expert or experts retained by a party.'

[19] The appointment of a single expert places restrictions on all parties in the manner in which they can communicate and inform the single expert. While the interests of justice must ultimately be the overarching consideration, if one party is permitted to reply upon another expert it necessarily leaves open the very real prospect of yet a third expert being involved; all of which defeats the purpose of the single expert rules. As Kent J

in *Royce & Donovan* [2012] FamCA 168 observed:

82. In any case where a single expert has been appointed, allowing another party to tender evidence from another expert on the same issues creates an imbalance. That is, only one party may have what may be described as an adversarial expert, whilst the other party has only the evidence of the single expert who has acted within the constraints, in terms of instructions, as provided for in the Rules. The further possibility is the other party seeking to have their own expert to redress that perceived imbalance.'

After reviewing the husband's complaints in relation to Mr F's report, and noting that the husband had not exercised the options provided under the *Family Law Rules 2004* to ask questions of or have a conference with the single expert, the Court said (at [27]):

"Whilst it is certainly apparent that Mr W disagrees with Mr F on a number of issues, that is not a sufficient basis to support the appointment of another expert."

The husband's application was dismissed and the court extended the time limits contained in r15.65 to enable the parties to attend a conference with Mr F or enable the husband to submit a list of questions to Mr F.

PROPERTY – application to set aside consent orders – fraud perpetrated by the parties – referral to the DPP (Cth)

In [2019] FamCA 942 Gill J heard an application by a husband to set aside consent orders entered into between he and the wife.

The parties married in 1986 and separated under the one roof in June 2014. There were three children of the relationship aged 22, 20 and 14 at the time of final hearing. The consent orders provided for an equal division of the property pool and that each party retained their own superannuation. The wife was to retain the family home subject to the mortgage plus interests in companies. The husband was to be liable for a debt to U Bank in his name. The husband was to pay the wife $5000 per month spousal maintenance, which was purportedly also in lieu of child support.

The husband proposed two alternatives for dealing with his application: (1) a review of the consent orders under r18.08 of the *Family Law Rules 2004* (Cth); or (2) that the orders be set aside under s79A(1)(a) of the *Family Law Act 1975* (Cth).

The husband's application centred around an alleged "fraud" committed by he and the wife when entering into the orders, ostensibly to minimise their exposure to the debt in the husband's name to U Bank of $503 000. The husband asserted that their intention was to revisit the arrangement set out in the orders following the debt being compromised ("the collateral agreement"). The husband also alleged that the parties misrepresented their assets and liabilities in the application for consent orders. The wife denied the alleged collateral agreement.

The husband sought the net proceeds of sale of the family home be applied to the U Bank debt, plus other payments amounting to $170 000, with the balance of the proceeds of sale going to the wife. The wife sought that the husband's application be dismissed, but that if it was successful, she receive the net proceeds from the sale of the family home, along with spousal maintenance of $500 per week, adult child maintenance of $400 per adult child per week and a child support departure order of $415 per week.

As to the husband's application to seek relief from the court where he was one of the perpetrators of the fraud, Gill J said (from [147]):

"The Wife therefore points to these circumstances having come about by virtue of the Husband's admitted fraud upon the court process. She asserts that this is a reason to refuse relief to the Husband, on the basis that he does not come with clean hands in seeking relief.

[148] The Husband is seeking relief where he has perpetrated the fraud that he complains of. He falls within the description given in *Meyers v Casey* [1913] HCA 50 in which Isaacs J said:

'It is altogether different from the cases where the right relied on, and which the Court of equity is asked to protect or assist, is itself to some extent brought

into existence or induced by some illegal or unconscionable conduct of the plaintiff, so that protection for what he claims involves protection for his own wrong. No Court of equity will aid a man to derive advantage from his own wrong, and this is really the meaning of the maxim.'

[149] Here, the husband is reliant on his deception of the Court to found the relief that he seeks. In that respect it is an unattractive claim for relief.

[150] However, the circumstances here are somewhat different to those in Meyers, particularly given the role of the wife in the procuring of the orders.

[151] It was wrong of the parties to represent to the Court that the orders they sought were intended by them to finalise their financial matters, when they did not so intend. It was wrong of the parties to provide false information to the Registrar in support of those orders. It is a further wrong of the wife to permanently retain the benefits of the orders where, central to the entry into those orders was the representation and intention that they would be no more that temporary.

[152] The circumstances are then that neither party comes with clean hands to the court, and yet the wife seeks to retain benefits that were never intended to remain solely hers. Those benefits were only procured on the basis that they would be temporary, yet she seeks to hold them permanently. Denying the husband relief under those circumstances adds a further wrong.

[153] Despite not coming with clean hands, the husband should not be refused relief on that basis.

[154] To deny the husband relief on the basis that it is his wrongdoing is to protect for the wife the fruit of her wrongdoing."

The husband's application for a review and an extension of time was successful.

The court said in relation to the husband's alternate ground (from [164]):

"The Husband stated that should his application for review of the Registrar's decision be unsuccessful, the consent terms should be set aside pursuant to s79A(1)(a). It should be immediately observed that s79A is directed to orders made under s79, not spousal maintenance orders made under s74 of the Act.

(…)

[167] *Badawi & Badawi* (2017) FamCAFC 129 emphasised that s79A(1) 'is particularly directed to the integrity of the judicial process.'

[168] Section 79A is designed to overcome miscarriages of justice. It is to be construed liberally to give effect to its intended purpose (see In the *Marriage of Gilbert v Estate of Gilbert (decd)* (1989) FamCA 95).

[169] While dealing particularly with fresh evidence, the more general significance of fraud upon the judicial process was dealt with by Barwick CJ J in *McDonald v McDonald* [1965] HCA 45.

'The Court's conclusion upon the fresh evidence before it that the verdict was obtained by fraud, by surprise, or that witnesses were suborned, is sufficient to justify setting aside the verdict and ordering a new trial. Whether or not the Court does so must finally depend on the Court's view as to whether or not the interests of justice, either particularly in relation to the parties or generally in relation to the administration of justice, require such a course.'

(…)

[171] McDonald emphasises the strong effects of a fraud that goes to the root of a trial which in turn indicates the significance of such a fraud in determining the exercise of the discretion under s79A. Such a fraud itself, even without demonstration that it affected the outcome of the trial, because of its impact on the integrity of the trial, is indicative of a miscarriage of justice.

[172] While there is reason to think that the focus in *Gallo v Dawson* is on the justice as it stands between the parties, miscarriage of justice, as referred to in s79A and McDonald incorporates considerations that relate to the administration of justice more generally.

[173] In this case the fraud went to the heart of the orders being made. Even if it did not result in property orders that were

manifestly unjust, the fraud upon the court processes is indicative of a miscarriage of justice.

[174] Again the issue arises of the Husband seeking relief where he has perpetrated the fraud that he complains of. I adopt what I said in relation to this aspect in respect of the application for an extension of time for review of the Registrar's decision.

[175] If it were necessary to resort to s79A, then I would have granted relied under that provision.

The Court ordered that the judgement, consent order material and the trial material be forwarded to the Director of Public Prosecutions (Cth) for consideration.

CHILDREN – interim unilateral relocation of infant reversed – unacceptable risk not established – courts power to make coercive orders

In *Tandy & Eastman* [2020] FCCA 541 (19 February 2020) Young J heard an application by a father for the return of a 20 month old ("X") who was removed from Darwin to City B by the mother. In the event the mother and the child returned to Darwin, the father sought live with orders on a 2 or 3 day rotation. If the mother did not relocate, the father sought orders for the child to live with him.

The mother sought to remain in City B with the child and the child spend time with the father over four nights every two months in blocks of two nights each, separated by one night, plus time if the father travelled to City B.

The father was 38 years old and the mother 33. The parties commenced a long distance relationship in May 2014 and the mother relocated to Darwin to live with the father in 2015. The parties married in 2017 and X was born in 2018. The parties separated in August or September 2019. The father was in business with another health care worker. Save for a period of not working when the child was born the mother was employed in an executive role. The mother was working 4 days per week.

The mother was the primary caregiver of the child post separation, however the child spent substantial time in the father's care. The mother claimed there was family violence both during the relationship and post separation. As to the mother's allegations, Young J said (from [23]):

"…[T]he mother has also annexed parts of SMS conversations between her and the father and in those SMS conversations some of the father's language is boorish, immature and angry and might be interpreted as him reflecting his feelings about the parties' relationship breakdown. However, the language was not threatening.

[24] … I consider that the mother's family violence claims are not particularly forceful or compelling. Most of her evidence rests on interpretations of events and attaching meanings to events which might be seen as ambiguous or statements which might appear to be ambiguous. It may be that she has interpreted what has happened in that way. It may be her interpretation is wrong. I do not know. I do not propose to make any findings about that. As I say, many of her claims relate to the father's language, which I have made some remarks about.

[25] I am not suggesting that language cannot be coercive or controlling and cannot constitute family violence but every case involving words and conversations involves some assessment or some interpretation. While I accept that there have been unpleasant and distressing exchanges and verbal exchanges between the parties I am not satisfied that there is any unacceptable risk of harm to the mother or to the child resulting from family violence."

As to the court's power to make coercive orders for a parent to move their residence, Young J said (from [30]):

"I was referred to *Adamson & Adamson* (2014) FamCAFC 232 where this question was discussed by the Full Court. At paragraph [35] the Court indicated that there was a power to make such a coercive order requiring a parent to move. That case did not concern interim orders, as is the case here. It was said in another case I was referred to, *Oswald & Karrington (2016)* FamCAFC 152 … that such a coercive order is at the extreme of the Court's discretionary power and is 'rare' and 'extreme. I accept that is the case.

[31] *Oswald & Karrington* made it clear that there must be a consideration of alternatives before making a coercive order of

the kind sought here. In my view, the only alternative offered is the one I have described, that is, that the mother and child travel to Darwin every two months and the child would spend four days with the father over a period of five days in blocks of two nights. I do not consider that that alternative is likely to be one in the best interests of this very young child at a sensitive developmental stage, as I have already mentioned."

The court ordered the return of the mother and child to Darwin

and otherwise did not make orders for time, concluding that the parties should discuss the time arrangements themselves.

…

DE FACTO RELATIONSHIP – section 4AA(2) of the *Family Law Act 1975* – mutual commitment to a shared life – duration of relationship

In *Meyvans & Kempton* [2019] FCCA 1845 (9 July 2019), Judge Howard considered competing applications for declarations as to the duration of a de facto relationship. The applicant sought a declaration the parties had been in a de facto relationship for three years and one month. The respondent argued that the parties had been in a de facto relationship for approximately nine months.

The parties met via an online dating forum in 2014. They met in person in 2014 and commenced a sexual relationship that evening, with the applicant being introduced to the respondent's friend and her husband the next evening.

The applicant asserted that after the first meeting of the parties, he spent approximately six nights per week living at her property and that a de facto relationship commenced at that point.

The respondent's evidence was that the parties were spending three to four nights per fortnight together from when they met and asserted that a de facto relationship existed for the period the parties were living together in a property at A Street from November 2016 until 10 August 2017.

The court reviewed the evidence, including that from the 2014 date, the respondent gave the applicant his own set of keys for her property, that the applicant commenced transporting the respondent's children to and from school and kindergarten, the parties started holidaying together (both with and without the respondent's children), the inclusion of the respondent and her children on the applicant's health insurance from 31 October 2014, the respondent changing her postal address to the same P.O. Box as the applicant from October 2014. The applicant also stopped leasing an apartment and commenced leasing a three-bedroom townhouse ("the C Street property") in anticipation of the respondent and her two sons moving in with him, which they did in November 2014.

The respondent asserted that cohabiting with the applicant in 2014 was because of her straitened financial circumstances. This evidence was not accepted by the court.

The court said (from [26]):

"At no point in time during the course of the proceedings did the respondent concede that she was in a de facto relationship with the applicant during the period of time that she and her two sons lived with the applicant at the C Street property. The respondent's position in this regard was approaching the absurd. The overwhelming weight of the evidence and the consideration of the circumstances listed in s4AA(2) of the Act leave the Court in no doubt that the parties were indeed living in a de facto relationship from the time that the respondent and her two children moved into the C Street property at the beginning of November 2014. The applicant has argued that the de facto relationship in fact began in July 2014. In examining the evidence and weighing the various considerations in s4AA(2) I have come to the conclusion that the step taken by the respondent in moving herself and her two young children into the C Street property at the beginning of November 2014 amounted to unequivocal evidence of a mutual commitment (between the parties) to a shared life. It is at that point in time, I find, that the de facto relationship between the parties commenced (i.e. the beginning of November 2014).

[27] There is no doubt that the parties had a volatile relationship. At times their relationship was tense, strained, and uneasy. There were instances of family violence. On more than one occasion, the respondent bit the applicant.

(…)

[28] Notwithstanding their arguments and disagreements — the parties maintained a de facto relationship from the beginning of November 2014."

The respondent and her children moved from the C Street property to another property ("Suburb E property") in August 2015. The respondent conceded that during this time, the applicant was sleeping at the Suburb E property three or more nights per week. The court heard evidence from the parties' counsellor ("Ms Q") that the parties advised her they were temporary separated from 22 September 2015. The court inferred from the evidence that the temporary separation lasted one week.

Despite the applicant continuing to lease the C Street property, working from those premises and sleeping there sometimes, the court said [at 42] that it was possible to maintain two residences and for parties to still be in a de facto relationship.

The parties became engaged in April 2016 whilst the Respondent was living in the Suburb E property.

In June 2016 the respondent and her children moved into another property ("the Suburb B property"). From November 2016 until August 2017, the parties lived in the Suburb B property together with the respondent's children.

The court continued (from [58]):

"In *Dahl & Hamblin* [2011] FamCAFC 202 the Full Court of the Family Court of Australia confirmed that Part VIII AB of the Act ("Financial Matters Relating To De Facto Relationships") "certainly envisages that two or more periods can be aggregated for the purpose of determining the required two year period of a de facto relationship." …

[59] Even though I have come to the conclusion that there was a temporary separation between these parties in September 2015 it will be apparent from these reasons for judgment that an aggregation of the periods of the de facto relationship in this case well and truly exceeds the required two years (s90SB (a) of the Act)."

The court declared that a de facto relationship existed between the parties from 1 November 2016 until 22 September 2015 and then from 29 September 2015 until 10 August 2017.

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The parties met via an online dating forum in 2014. They met in person in 2014 and commenced a sexual relationship that evening, with the applicant being introduced to the respondent's friend and her husband the next evening.

The applicant asserted that after the first meeting of the parties, he spent approximately six nights per week living at her property and that a de facto relationship commenced at that point.

The respondent's evidence was that the parties were spending three to four nights per fortnight together from when they met and asserted that a de facto relationship existed for the period the parties were living together in a property at A Street from November 2016 until 10 August 2017.

The court reviewed the evidence, including that from the 2014 date, the respondent gave the applicant his own set of keys for her property, that the applicant commenced transporting the respondent's children to and from school and kindergarten, the parties started holidaying together (both with and without the respondent's children), the inclusion of the respondent and her children on the applicant's health insurance from 31 October 2014, the respondent changing her postal address to the same P.O. Box as the applicant from October 2014. The applicant also stopped leasing an apartment and commenced leasing a three-bedroom townhouse ("the C Street property") in anticipation of the respondent and her two sons moving in with him, which they did in November 2014.

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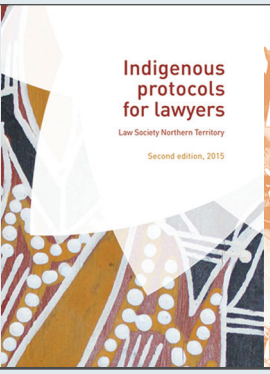

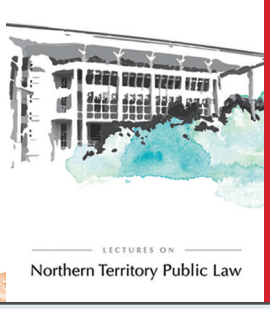

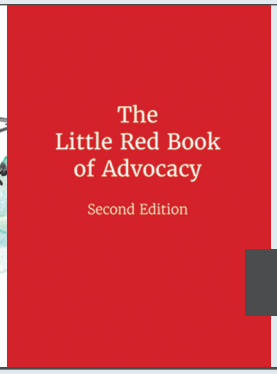

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