IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY

No. M137 of 2019

BETWEEN

HSIAO

Appellant

and **FAZARRI**

Respondent

10 **RESPONDENT'S OUTLINE OF ORAL SUBMISSIONS**

Part I: Certification

This Outline is in a form suitable for publication on the internet.

Part II: Outline of propositions

20 ***The first issue: application of Stanford***

1 The relevant principles are not in dispute.

- *Stanford v Stanford* (2017) 247 CLR at 120-121 [37]-[40].

2 Both the appellant and the respondent sought to invoke sec 79 of the *Family Law Act 1975* (Cth): J [20]: CAB 11; FC [84]: CAB 80.

- Respondent's submissions, para 37.

3 Both the primary judge and the Full Court were cognisant of the first "fundamental proposition" in *Stanford*, and the need to identify, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties, including in relation to G Street: J [48]-[72], [75]: CAB 15-18; FC [29]: CAB 71; FC [73], [76]: CAB 79.

30 **4** The primary judge identified the existing legal and equitable interests and, in so doing, that the parties were the joint tenants of G Street (cf. AS [32]). As the Full Court found, his Honour did not "set aside" the joint tenancy or, in the appellant's words, consider it "voidable because procured by undue influence": FC [27]: CAB 70 (cf. AS [33]).

5 Rather, the primary judge correctly identified that the parties were joint proprietors of G Street, noting that: (a) by the 40% transfer, the respondent intended the appellant "become the owner of the whole undivided property with him and the sole proprietor if he pre-deceased her"; and (b) the respondent did not "dispute the joint proprietorship": J [52]: CAB 15.

6 The primary judge then considered whether it was "just and equitable" to make an order under sec 79, identifying the need for separate consideration of sec 79(2) and the relevant

40 factors prescribed by sub-sec (4): J [79]: CAB 19.

7 First, his Honour concluded that it was "just and equitable", identifying the "principled reason" for interfering with the existing legal and equitable rights (cf. AS [41]) as the

assumption on which G Street was acquired was "a long term relationship" as a place to "share their lives", and that expectation of a "de facto or married life relationship" had come to an end: J [76]: CAB 18-19. This was a (proper) basis for the adjustment of the property interests.

- *Stanford v Stanford* (2012) 247 CLR 108 at 122 [42].

8 Second, his Honour analysed the various factors prescribed by sub-sec (4), acknowledging at various junctures the difficulty in doing so by reason of the appellant's deliberate absence at trial: J [94]-[95], [97]: CAB 21-22.

9 The circumstances of the 40% interest being obtained by the appellant were correctly described as a distraction, and subsidiary to the real issue, being the assessment of contributions:
10 FC [29]: CAB 71. Absent the finding as to "pressure", the same property settlement would have been made: FC [29]: CAB 71.

- Respondent's submissions, para 52.

10 This follows from:

(a) the appellant only being able to claim the most moderate non-financial contributions; and

(b) the respondent having made the overwhelming financial contributions to the acquisition, conservation and improvement of G Street: J [67]: CAB 18; J [104]: CAB 23; FC [29]: CAB 71.

11 As concerns the Deed, the primary judge extracted part of it: J [54]-[57]: CAB 16.
20 The Full Court correctly found there was "no basis to suggest that the primary judge failed to take the [D]eed into account": FC [72]: CAB 79.

- Respondent's submissions, paras 43-50.

The second issue: adducing further evidence pursuant to s 93A(2) of the Act

12 The principles applicable to the exercise of discretion under s 93A(2) are not in dispute.

- *CDJ v VAJ* (1998) 197 CLR 172 at 200 [104], 201 [109], 201-202 [111], 203-204 [113]-[116].

13 Almost all of the documents and items of evidence were in the appellant's possession or available to her as at the date of the trial but were not adduced, because the appellant had not
30 complied with orders for the preparation of, nor participated in, the trial.

- FC [6], [19]: CAB 64-65, 67.
- See also, Adjournment Judgment, [48], [77], [84]: Respondent's Book of Further Materials, 30, 36, 37.

14 The remaining four were not obtained by the appellant until after trial, but, apart from one medical report, could have been: FC [19]: CAB 67.

15 The appellant conceded in the Full Court that she had the opportunity to file the evidence upon which she sought to rely and yet deliberately withheld doing so: FC [47]: CAB 74.

- *CDJ v VAJ* (1998) 197 CLR 172 at 203 [116].

16 Permitting the appellant to adduce further evidence on appeal necessitating a new trial would have been inimical to the case management principles and the decision to refuse the application discloses no error in the exercise of the discretion.

- *House v The King* (1936) 55 CLR 499 at 505.
- *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 at 211 [92]-[93].
- Respondent's submissions, para 61.

17 In any event, the only different finding which could have flown from admission of the instrument of transfer was that the parties were "living together" before marriage. No different contribution finding would flow from that evidence; so much was conceded by the appellant: FC [36]: CAB 73.

- Respondent's submissions, para 63.

18 The admission of the evidence would, therefore, not demonstrate error in the trial judge's orders. It is not enough that it may have been "useful": FC [36]: CAB 73. The inutility of having had that evidence before the trial judge points strongly against the exercise of the discretion to admit it as fresh evidence on appeal.

- *CDJ v VAJ* (1998) 197 CLR 172 at 203 [113].
- Respondent's submissions, paras 64-65.

Dated: 7 August 2020.

BRET WALKER

ALBERT DINELLI

NAOMI WOOTTON