HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA

PERTH REGISTRY

BETWEEN:

G CHARISTEAS
Appellant

and

Z V CHARISTEAS
First Respondent

YWB Pty Ltd
Second Respondent

L W Bandy
Third Respondent

A CHARISTEAS (by her Case Guardian R Elias)
Fourth Respondent

E A CHARISTEAS
Fifth Respondent

K A SOTIROSKI
Sixth Respondent

S M MANOLAS
Seventh Respondent

L W BANDY & A CHARISTEAS (as Executors of the Estate of D Charisteas)
Eight Respondent

FIRST RESPONDENT'S SUBMISSIONS

Part I: CERTIFICATION

1. The first respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II: CONCISE STATEMENT OF THE ISSUES

2. As to apprehended bias:

   (a) whether a hypothetical fair-minded lay observer would reasonably fear that the learned trial Judge might not decide the case on its legal and factual merits as a consequence of social contact between the judge and trial counsel, in the face of an uncontested denial that they had discussed the substance of the case;

(b) whether the appellant waived the right to object to the learned trial Judge hearing and determining the matter by not raising the issue of the social relationship between the Judge and trial counsel despite it being known to then senior counsel for the appellant.

3. As to whether the learned trial Judge had jurisdiction to hear and determine the matter in the absence of a retrial order from the Full Court or an order under s. 79A of the *Family Law Act 1975* (Cth) (the **Act**):

(a) whether, following the first Full Court decision setting aside part of the orders from the first trial, the Court's power under s. 79 of the Act was spent;

(b) whether, if the Courts below erred in holding that the s. 79 power was not spent, no material injustice arises because the orders would inevitably have been set aside under s. 79A(1)(b) of the Act and a retrial conducted;

(c) whether the appellant waived the right to object to the retrial by neither appealing the learned trial Judge's decision that the s. 79 power was not spent, nor seeking a writ of prohibition to prevent the retrial.

Part III: SECTION 78B OF THE *JUDICIARY ACT 1903*

4. The first respondent does not consider that s. 78B notices are required in this appeal.

Part IV: MATERIAL FACTS IN CONTEST

5. The first respondent notes the following minor matters arising from the statement of facts in Part V of the appellant's submissions:

(a) as to [7], Crisford J first dealt with the s. 106B matters on a preliminary basis in January 2008 and dismissed an application for summary dismissal on 10 April 2008;[1]

(b) as to [9], Crisford J delivered reasons for judgment on 18 October 2011 and allowed the parties time to consider the reasons and orders, before the orders were pronounced on 9 December 2011;[2]

(c) as to [15], the trial dates included the dates between 3 and 17 August 2016;[3]

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1 *Charisteas & Charisteas* [2015] FCWA 15 [25] –[26], CAB 129.
2 *Charisteas & Charisteas* [2015] FCWA 15 [58] –[61], CAB 138.
3 *Charisteas & Charisteas* [2017] FCWA 183, CAB 252 – 470.

(d) as to [18], the appeal to the Full Court was heard on 13 and 14 March 2019.[4]

Part V: ARGUMENT

Preface

6. This case for division of the marital property of the appellant and the first respondent has been on foot for 15 years. In that time, there have been 21 first instance and appellate judgments delivered[5] and more than 1,000 days of reserved judgment time incurred in the two judgments leading to this appeal alone.[6] In this Honourable Court, the appellant now seeks to discharge the most recent first-instance judgment on two bases:

(a) that the judgment is vitiated by an apprehension of bias arising out of a social relationship and contact between the Judge and trial counsel for the first respondent, which relationship was apparently known to then senior counsel for the appellant as long ago as February or March 2016,[7] but which was never raised with the Judge at first instance; and

(b) that the Judge proceeded to try and to determine the matter, in effect without jurisdiction, in the absence of an order for retrial and without the earlier orders having been set aside under s. 79A of the Act, notwithstanding that the appellant took no steps to challenge the Judge's decision[8] to so proceed (whether by appeal or writ of prohibition).

7. For the reasons set out below and in the first respondent's notice of contention (subject to extension of time being granted to file that notice), the appeal should be dismissed.

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4 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162; CAB 534 – 620.
5 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [63]; CAB 553 – 554.
6 *Charisteas & Charisteas* [2017] FCWA 183, heard 3-17 August & 13 September 2016, judgment delivered on 12 February 2018, 517 days; CAB 252 – 470; *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, heard 14 March 2019, judgment delivered on 20 July 2020, 484 days; CAB 534 – 620.
7 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162 [185] (CAB 590); CAB 531.
8 *Charisteas & Charisteas* [2015] FCWA 15; CAB 117 – 178.

Ground 1 – Apprehended bias

The applicable test

8. The first respondent does not challenge the test for apprehended bias as expressed by this Court in *Ebner*,[9] and the two-step approach to its application;[10] alternatively expressed as a three-step approach by Gageler J in *Isbester*,[11] although his Honour's third step of testing reasonableness might also be explained as a merely being a necessary attribute of the hypothetical fair-minded observer making the logical connection required by the second step.

The evidence

10 9. As this Court noted in *Isbester*,[12] the question of whether a fair-minded lay observer might reasonably apprehend a lack of impartiality is largely a factual one, albeit one to be considered in the legal statutory and factual context. It is therefore necessary to start with the evidence that was before the Full Court on this issue. That evidence was very limited, and was confined to the affidavit affirmed by the appellant on 24 October 2018 and the correspondence annexed thereto.[13] The first respondent emphasises the following matters arising from that evidence:

(a) the appellant does not disclose when he first became aware of the existence of a social relationship between the learned trial Judge and trial counsel for the first respondent;

20 (b) the appellant expressly states that his instruction to his solicitors to send their letter of 8 May 2018 was based at least in part on "[his] observations of [the learned trial Judge's] behaviour and comments during the Trial (to everyone other than on 'the Wife's side'"[14] – i.e. his personal apprehension as to the learned trial Judge's impartiality arose in the course of the trial (and indeed the appellant joined in support of both the September 2016 recusal application[15] and the appeal therefrom[16]);

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9 *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337.
10 *Ebner v Official Trustee in Bankruptcy* [2000] HCA 63; (2000) 205 CLR 337, 345 [8].
11 *Isbester v Knox City Council* [2015] HCA 20; (2015) CLR 135, [59].
12 *Isbester v Knox City Council* [2015] HCA 20; (2015) CLR 135, [20].
13 CAB 519 – 523.
14 CAB 520, [9].
15 *Charisteas & Charisteas* [2016] FCWA 106; CAB 179 – 206.
16 *XYZ Pty Ltd & Anor & Charisteas & Ors* [2017] FamCAFC 112; CAB 207 – 250.

(c) the appellant's solicitors say, in their letter of 8 May 2018,[17] that they had been told, "by at least 5 practitioners" of the social relationship and "engage[ment] outside of court" between the learned trial Judge and trial counsel for the first respondent, and that they had taken advice from senior counsel about it, but they do not say when they first became aware of it;

(d) trial counsel for the first respondent asserted that "gossip amongst family law practitioners in relation to [the learned trial Judge] and [herself] … commenced in early February 2016", and that she had first been approached by then senior counsel for the appellant in "February/March 2016", through a junior practitioner, inquiring about the nature of that relationship;[18]

(e) trial counsel for the first respondent frankly disclosed that she had been in social contact with the learned trial Judge both before and after the trial, but expressly stated that she "[was] not and never [had] been in an intimate relationship with [the learned trial Judge]",[19] and that her "communications [with the learned trial Judge] did not concern the substance of the … case";[20]

(f) there was no evidence by which those express statements by trial counsel for the first respondent have ever been disputed; and

(g) then senior counsel for the appellant has never disputed the assertion that he knew of the existence of a social relationship between the learned trial judge and trial counsel for the first respondent.

The hypothetical fair-minded observer

10. The real issue in this ground of appeal is whether the hypothetical fair-minded observer, with knowledge of all relevant facts, and on the basis of the evidence led by the appellant, would reasonably fear that the learned trial Judge might not decide the case on its merits. The application of the *Ebner* steps to determine that issue is discussed below.

11. The hypothetical fair-minded observer is taken to be aware of the context in which the trial was conducted and the circumstances leading to judgment,[21] including the nature of the proceedings, a degree of knowledge of the circumstances and structure

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17 CAB 524 – 525.
18 CAB 531.
19 CAB 531, [2] (first occurring).
20 CAB 532, [4].

within which the law is being administered by the Court, and the manner in which proceedings are dealt with under the Act.[22] In the present case, those circumstances include:

(a) the history of the proceeding from 2006 to September 2016 (when the trial was concluded), or February 2018 (when judgment was delivered);

(b) the role of judicial officers, including that the learned trial Judge had taken an oath of office under s. 13 of the *Family Court Act 1997* (WA) on his Honour's appointment to the Court and could be expected to abide by that oath in the discharge of his judicial functions;

(c) the fact that judicial officers are drawn from the legal profession, and particularly from the independent bar, and they necessarily therefore have connections, associations and contact with members of the legal profession outside of Court;[23]

(d) the fact that judicial officers are to be assumed to be able to put irrelevant material out of their minds;[24]

(e) the role of members of the independent bar such as trial counsel for the first respondent;

(f) the professional conduct rules binding both members of the legal profession generally,[25] and members of the independent bar specifically;[26] and

(g) the fact that in the specialised area of property settlements in family law, there are currently only 18 members of the WA Bar Association, two of whom are Victorian senior counsel[27] - that is to say that it is such a small professional community that personal professional and social relationships and contact, including between current barristers and former barristers who have been appointed to the Court, are almost inevitable.

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21 *Isbester v Knox City Council* [2015] HCA 20; (2015) CLR 135, [23].
22 *O'Sullivan v Medical Tribunal of New South Wales* [2009] NSWCA 374 [40] – [41].
23 *Markan v Bar Association of Queensland* [2013] QCA 379 [19].
24 *O'Sullivan v Medical Tribunal of New South Wales* [2009] NSWCA 374 [40]; *Vakauta v Kelly* [1989] HCA 44; (1989) 167 CLR 568, 584 – 585.
25 *Legal Profession Conduct Rules 2010* (WA).
26 *Western Australian Barristers' Rules.*
27 See https://www.wabar.asn.au/find-a-barrister/.

Applying the Ebner test – the first step

12. The first step is to identify what it is that, on the appellant's case, is said might have led the learned trial Judge to decide the case other than on its merits.

13. The Full Court below, and the appellant in this case, address this question by focussing on the specific instances of contact between the learned trial Judge and trial counsel for the first respondent. On behalf of the hypothetical fair-minded observer, the inference is drawn by Alstergren CJ,[28] in dissent in the Full Court, and on whose reasoning the appellant relies, that the learned trial Judge may have considered extraneous information as a consequence of his contact with trial counsel.

14. However, in the face of the express denial by trial counsel for the first respondent that her communications with the learned trial Judge concerned the substance of the case, which has never been contested, this case cannot be approached on the basis that it is one in the fourth category described by Deane J in *Webb v The Queen,*[29] as if the learned trial Judge had, in the course of the contact, received extraneous information from trial counsel for the first respondent outside of the trial process.[30] There is simply no evidentiary or procedurally fair basis, consistent with the rule in *Browne v Dunn*[31] and the *Briginshaw*[32] standard of proof, on which it could be inferred by a fair-minded observer, let alone concluded, that trial counsel was lying in that regard and was guilty of gross professional misconduct. In particular, the statement by Alstergren CJ[33] that, "The contact here was protracted, premeditated and contrary to the ethical obligations each individual owed to the Court" is, with great respect to his Honour, not one that should have been expressed without first putting that allegation to them, identifying the specific ethical obligation alleged to have been infringed (noting that it is not one contained in either the *Legal Profession Conduct Rules 2010* (WA) or the *Western Australian Barristers' Rules*), and giving an opportunity to answer the allegation.

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28 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [60]; CAB 553.
29 *Webb v The Queen* [1994] HCA 30; (1994) 181 CLR 41, 74.
30 As happened, for instance, in *Re JRL; ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342.
31 *Browne v Dunn* (1893) 6 R 67.
32 *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336.
33 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [58].

15. Nor is it open to infer, as Alstergren CJ does,[34] and the appellant says was rightly so,[35] that there is anything sinister in the lack of detail or the use of the word "substance" in trial counsel's letter:

(a) in the appellant's solicitor's letter to trial counsel, she was only ever asked to "outline the circumstances of your dealings with him"[36] (emphasis added), and that was precisely what she did in reply – she was never asked for details or for "further and better particulars";[37] and

(b) privately communicating with a court about the "substance" of a proceeding is precisely that which is prohibited by the applicable professional conduct rules,[38] which are consistent with what was said by Gibbs CJ in *Re JRL; ex parte CJL* about communications "with a view to influencing the conduct of the case"[39] – there is no prohibition on all private communications howsoever unrelated to the case they may be, which appears to be what the appellant is contending for.[40]

16. Both Alstergren CJ in the Full Court, and the appellant in this Court, contend that that there was a duty on trial counsel for the first respondent to provide far greater disclosure of the extent of her dealings with the learned trial Judge than she was ever asked to provide and that her disclosure was "unsatisfactory"[41] for not doing so. The source of this alleged duty of greater disclosure is not identified.[42] There is no reason to suggest that trial counsel would not have provided more details had she been asked. There is no basis to suggest deliberate concealment – contact between the learned trial Judge and trial counsel seems to have been in public for coffee and drinks and to have been widely known in the profession.

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34 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [48], [53]; CAB 551 – 552.
35 App Sub [35], [40], [45].
36 CAB 525.
37 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [54], CAB 552.
38 *Western Australian Barristers' Rules,* rule 53; *Legal Profession Conduct Rules 2010* (WA), rule 37(6).
39 *Re JRL; ex parte CJL* [1986] HCA 39; (1986) 161 CLR 342, 343.
40 App Sub [41] – [44].
41 App Sub [35].
42 To the extent that the appellant suggests at [45] that the duty arises from what this Court said in *Ebner*, that passage relates to disclosure after a claim of apprehended bias has been made. Here, trial counsel was only asked to "outline" her dealings and no allegation of apprehended bias had been raised. She was never asked, and nor was the (by then retired) Judge, to give any disclosure after the apprehended bias allegation was raised.

17. This is a case properly described as being one in Deane J's third category in *Webb*, namely disqualification by association, such as was considered in *Smits v Roach*,[43] save that in the present case, the relevant association is one between the learned trial Judge and trial counsel, as opposed to an association with a party. As in *Smits v Roach*, the real basis for concern is not that there was social contact between the learned trial judge and trial counsel for the first respondent before and after the trial; rather, the nature and frequency of contact was merely evidence of the closeness of the relationship between them, and it is the closeness of the learned trial Judge's relationship to a person "interested" in the case, and the nature of that "interest", that is what might be thought, by a fair-minded observer, to lead to a risk of the case being decided other than on its merits.[44]

18. Two things flow from this: first, if the real problem is the relationship, not the contact, then it was already known to then senior counsel for the appellant well before the trial began, and that gives rise to the question of waiver discussed in Part VI below; and, secondly, the fair-minded observer must consider what (if any) residual interest counsel from the independent bar has in a case after all evidence and submissions have closed. It is submitted that the "interest" of trial counsel in the outcome of a case after close of evidence and submissions is so tenuous as to be, without more (e.g. a contingency fee arrangement), incapable of requiring disqualification by association – it is a far lesser interest than that of the trial Judge's brother, who was a named defendant in *Smits v Roach*, and where 5 of the 6 members of this Court thought it to be insufficient.[45]

Applying the Ebner test – the second step

19. The second step in the *Ebner* test is to articulate the logical connection between the identified factor – in this case either the learned trial Judge's contact with, or social relationship with, trial counsel for the first respondent – and the feared deviation from a decision on the merits; or, to use Gageler J's formulation in *Isbester*, how the relationship might cause that deviation (emphasis added).

20. It is here that the appellant's case breaks down, because in the absence of any extraneous information having been communicated, and in the absence of trial counsel having any pecuniary interest in the outcome after evidence and submissions

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43 *Smits v Roach* [2006] HCA 36; (2006) 227 CLR 423.
44 *Smits v Roach* [2006] HCA 36; (2006) 227 CLR 423, [99] - [100].
45 *Smits v Roach* [2006] HCA 36; (2006) 227 CLR 423, [54], [60].

had closed, all that a hypothetical observer could point to as a factor that might cause the case to be decided otherwise than on the merits is some reluctance on the part of the Judge to disagree with counsel's submissions merely because of their social interactions. That cannot possibly be enough.

21. Lawyers, by their very nature and training, are accustomed to disagreeing with each other all the time without regard to their personal relationships with each other. Barristers, in particular, frequently find themselves on opposite sides of a case with chambers colleagues; and then may well find themselves on the same side of another case the very next day. Judges at all levels, including on this Court, regularly disagree with each other and yet still maintain interpersonal relationships. The hypothetical fair-minded observer of the legal profession would understand that it would matter not one iota to trial counsel if the learned trial Judge decided the case against her client, and nor would she expect the learned trial Judge to do anything other than to decide the case on its merits. Likewise, most (if not all) trial Judges would be shocked by the suggestion that he or she would not decide the case on the merits merely because he or she had a social relationship with one of the counsel in the case. The benefits of contact out of court between bench and bar are noted by the Court of Appeal of England and Wales in *Taylor v Lawrence*[46] at [61] – [63], which the first respondent adopts.

22. Only Kirby J, dissenting alone, in *Smits v Roach*[47] was prepared to impute to the hypothetical observer the degree of scepticism necessary to sustain a connection between the type of association in the present case and a fear of a decision not being made on the merits. Allowing such a degree of scepticism to be taken into account highlights the need for Gageler J's third step in *Isbester* – whether the apprehension of the deviation from a decision on the merits being caused by the relationship is reasonable. It is submitted that it is not reasonable on the evidence in this case.

Conclusion on Ground 1

23. The appellant's contentions would, if accepted, result in almost an absolute prohibition on private contact between judicial officers and counsel who regularly appear before them. That is undesirable from a policy perspective as it would significantly contribute to judicial isolation and judicial stress,[48] particularly in

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46 *Taylor v Lawrence* [2002] EWCA Civ 90.
47 *Smits v Roach* [2006] HCA 36; (2006) 227 CLR 423, [116].
48 Kirby, *Judicial Stress*, (1995) 13 Aust Bar Rev 101.

smaller jurisdictions and practice areas where judicial officers are drawn from a small, and usually close, group of practitioners. It is also unnecessary for the preservation of public confidence in the administration of justice. To the contrary, an absolutist approach to avoiding contact makes any innocent contact look all the more suspicious. It undermines, rather than promotes, public confidence that judicial officers and practitioners can be trusted, as professionals who have sworn oaths, to abide by their professional responsibilities. It would likely lead to more spurious recusal applications, such as that in *Markan*.[49] It feeds the tabloid and irrational sceptic fringes, and departs from the view of a reasonable hypothetical observer.

10 24. This ground should be dismissed.

Grounds 2 – 4 Jurisdiction and power of the Family Court of WA

25. The appellant contends that the learned trial Judge had no power under s. 79 with which to, in effect, substitute his final orders for the orders made by Crisford J on 9 December 2011, which were not disturbed by the 2013 appeal.[50]

26. On its face, that position is contrary to the decision of the plurality of the Full Court of the Family Court of Australia in *Gabel*,[51] and so the question before this Court is whether the plurality below properly applied *Gabel*[52] to the facts in this case.

27. In *Gabel*, the appellant wife applied:

20 (a) to set aside s. 79 orders which were made almost 6 years earlier; and

(b) for further orders under s. 79 in relation to her husband's superannuation.

She was entitled to do so as in August 1999, her s. 79 application was adjourned specifically for that purpose pursuant to orders made under s. 79(5).

28. On appeal in *Gabel*, the Full Court considered whether certain orders under s. 79 could be varied or reversed other than by consent or without recourse to an appeal or s. 79A. The plurality held that the Court was so empowered, provided the s. 79 power had not been "spent" or "exhausted".[53]

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49 *Markan v Bar Association of Queensland* [2013] QCA 379 [19].
50 App Sub [55].
51 *Gabel v Yardley* (2008) FLC 93-386.
52 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [194] – [196]; CAB 592 – 593.
53 *Gabel v Yardley* (2008) FLC 93-386 [72].

29. The plurality explained, by reference to *Hickey*[54], that logically until "one exercise of power under s. 79" has been completed by the making of orders with respect to the totality of the parties' property, the power has not been spent or exhausted.[55] There might well be partial or interim orders made along the way as contemplated by s. 79(6).

30. Said another way, s. 79 orders do not all have to be made at once and can be expressed by a succession of orders. This was supported by the plurality below at [194] and [195].[56]

31. Significantly, in circumstances where the s. 79 power has not been spent, the plurality in *Gabel*[57] concluded, in effect, that without an ability to revisit or alter previous orders made under s. 79, the Court may not be able to exercise its powers in a "just and equitable" manner as required by s. 79(2). That being the case, it would therefore defy rationality if further orders could not be made with respect to property the subject of earlier orders.

32. Helpfully, the plurality in *Gabel* addressed[58] the potential obstacle of this Court's decision in *Mullane*[59] where it was said that there was only the ability to "set aside or vary" an order under s. 79 by the circumstances set out in s. 79A. That decision can be distinguished as the issue in that case was whether a particular order had the effect of altering the interest of parties to a marriage, rather than the nature of the s. 79 power and whether it had been exhausted.[60]

33. The plurality in *Gabel* went on to say that it is only once the s. 79 power has been exhausted or spent that further orders can only be made pursuant to s. 79A.[61] That is not inconsistent with *Mullane.*

Application of Gabel

34. In the appeal before the Full Court in this case, the plurality observed at [195][62] that while the facts in this case and *Gabel* differed (in *Gabel* the application was

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54 *Hickey and the Attorney-General for the Commonwealth of Australia (Intervenor)* (2003) FLC 93-143.
55 *Gabel v Yardley* (2008) FLC 93-386 [67].
56 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [194] – [195]; CAB 592 – 593.
57 *Gabel v Yardley* (2008) FLC 93-386 [68] - [69].
58 *Gabel v Yardley* (2008) FLC 93-386 [75].
59 *Mullane v Mullane* [1983] HCA 4; (1983) 158 CLR 436.
60 *Gabel v Yardley* (2008) FLC 93-386 [76].
61 *Gabel v Yardley* (2008) FLC 93-386 [76].

adjourned and no orders were set aside on appeal), in both cases the orders made pursuant to s. 79 failed to deal with the totality of the property.

35. It is the failure to deal with the entirety of the property which is critical to the assessment of whether there remains power which can be exercised under s. 79.[63]

36. The appellant submits at [66] that Crisford J's intended her orders of 9 December 2011 to exhaust the s. 79 power. Her Honour's intention in this context cannot be relevant. The outcome is binary: the orders either dealt with the entirety or the spouses' property, or they did not.

37. For the reasons articulated in detail by the learned trial Judge in his interpretation judgment,[64] Crisford J's orders did not deal with the entirety of the property. Setting aside the issue of waiver, these findings specifically were not and are not challenged by the appellant. The corollary of the learned trial Judge's findings was that the s. 79 power was not spent or exhausted.[65]

38. Consistent with *Gabel* and as correctly held by the learned trial Judge and the majority, the Court (irrespective of the 2013 appeal[66]) was empowered to vary or set aside Crisford J's orders as it deemed fit,[67] and, in effect, the 2016 trial was a continuation of the 2011 trial.

39. The appellant also submits[68] that the orders set aside on appeal cannot retrospectively change the intention of Crisford J to exhaust the s. 79 power, nor the characterisation of her orders. No authority has been provided for that proposition and it cannot be accurate given the existence of s. 79A(1)(b) and the suggestion by the Full Court in the 2013 appeal to utilise that provision when it recognised the impracticability of the remaining orders.[69] The appeal clearly changed the "characterisation" of Crisford J's orders.

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62 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [195]; CAB 592 – 593.
63 *Gabel v Yardley* (2008) FLC 93-386 [60].
64 *Charisteas & Charisteas* [2015] FCWA 15, [129] – [155]; CAB 160 – 164.
65 *Charisteas & Charisteas* [2015] FCWA 15, [160]; CAB 165.
66 *Charisteas & Charisteas* [2015] FCWA 15, [106]; CAB 154.
67 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [193] – [195]; CAB 592 – 593.
68 App Sub [66].
69 *Charisteas & Charisteas* [2015] FCWA 15, [161]; CAB 165.

Waiver

40. As correctly identified by the plurality below, the issue to determine is whether the appellant waived his right to challenge the learned trial Judge's reliance on s. 79 to set aside and make further property settlement orders.[70]

41. It is uncontroversial that the purpose of the learned trial Judge's 2015 interpretation judgment was to explain the effect of the 2013 appeal judgment.[71] It is also not in dispute that the interpretation judgment was not the subject of any appeal at that time, nor was any application made for leave to appeal.

42. The relevant questions in respect of ground 4 are:

10 (a) whether the learned trial Judge's ruling in the interpretation judgment that the s. 79 application was still on foot and would continue was a decree for the purposes of s. 94 of the Act*;* and

(b) if so, did the appellant waive his right to appeal or seek leave to appeal that ruling by not challenging that ruling once the learned trial Judge had delivered his reasons.

43. It is clear on any reading of the interpretation judgment, that the learned trial Judge concluded that the power under s. 79 had not been exhausted or "spent" and so those proceedings were still on foot. Notwithstanding that no formal order was made, it was stated in his reasons on no less than 11 occasions.[72]

20 44. In *Gerlach*[73], this Court observed that there are circumstances where an interlocutory decision can finally conclude an issue between the parties. When a final conclusion is made, it follows that it is at that time that an appeal must be made.

45. It is not in dispute that the interpretation judgment was an interlocutory decision which affected the final outcome.[74] Importantly though, it was correctly identified below as an interlocutory decision which *concluded* an issue between the parties, namely that the way forward was to continue with the first respondent's application under s. 79 (as opposed to an application under s. 79A) as the power under that section was not spent.[75] That is of course what occurred in 2016.

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70 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [206]; CAB 597.
71 *Charisteas & Charisteas* [2017] FCWA 183; [164], CAB 300 – 301.
72 *Charisteas & Charisteas* [2015] FCWA 15, [153] – [155], [158], [160], [163] (CAB 163 – 165), [173], [176], [177], (CAB 168) [188], (CAB 171), [218] (CAB 176).
73 *Gerlach v Clifton Bricks Pty Ltd* [2002] HCA 22; 209 CLR 478.
74 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [207]; CAB 597.
75 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [210]; CAB 598 – 599.

46. By s. 94 of the Act an appeal to the Full Court of the Family Court lies in a decree. "Decree" for the purposes of the Act, expressly includes a refusal to make a decree or order.[76]

47. In this case, the learned trial Judge in his interpretation judgment found it unnecessary to make a formal declaration (by way of an order) in respect of the validity of Crisford J's remaining orders.[77]

48. That failure did not render the learned trial Judge's determination a decision which could not be appealed, as the decision could be implied. As the plurality identified, there is clear authority within other jurisdictions that a determination of an issue before a final hearing may be implied as a decision from which an appeal will lie.[78] None of the authorities have been impugned by the appellant in this appeal.

49. That being the case, the time to challenge the learned trial Judge's conclusion in relation to the powers remaining under s. 79 was following the delivery of the interpretation judgment.[79] It was open and correct for the plurality to conclude as such at [213].[80]

50. The majority were thereby correct in concluding that the appellant waived his right to appeal the interpretation judgment as he did not appeal or seek leave to appeal in 2015 when his right to appeal was triggered.[81] Of course the presiding Chief Justice had no need to make any such conclusion, as he upheld the appellant's appeal in respect of the apprehension of bias ground.[82]

Conclusion on grounds 2 - 4

51. Grounds 2 – 4 should be dismissed.

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76 s 4(1) of the *Family Law Act 1975* says as follows:
decree means decree, judgment, or order and includes:
(a) an order dismissing an application; or
(b) a refusal to make a decree or order.

77 *Charisteas & Charisteas* [2015] FCWA 15, [155] – [156]; CAB 164.

78 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [210]; CAB 598 – 599; *Cramer v Geraldton Building Co* (2004) 29 WAR 410, 418 – 419; *Landsal Pty Ltd (in liq) and Ors v REO Building Society* (1993) 113 ALR 643; *Town v Australian Telecommunications Commission* (1983) 47 ALR 137.

79 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [211]; CAB 599.

80 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [213]; CAB 600.

81 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [213]; CAB 600.

82 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [1], [2]; CAB 540.

Part VI: NOTICE OF CONTENTION

52. The first respondent has applied for an extension of time to file and serve a notice of contention. The following submissions address that notice of contention subject to an extension of time being granted.

Ground 1

53. The issue raised by this ground of the first respondent's notice of contention, namely whether the appellant waived the right to raise apprehended bias on the part of the learned trial Judge, was also raised in the first respondent's submissions in the Full Court below.[83] The first respondent adopts the legal principles as to waiver discussed by this Court in *Smits v Roach.*[84]

54. Alstergren CJ did not address the first respondent's contention at all, but given his Honour's focus on the content of trial counsel's letter, it can safely be assumed that his Honour would not have accepted this ground. Notwithstanding that it was unnecessary to do so in light of their findings on the apprehended bias ground of appeal, Strickland and Ryan JJ addressed the contention at [185] – [186].[85] Their Honours accepted that there had been a waiver in relation to communications before the start of the trial, but not in relation to private communications after the trial commenced.

55. As submitted above, the focus on private communications is, with respect, misplaced. Once it is accepted that any such communications were not in relation to the case, as it must be in the face of trial counsel's uncontradicted statement, then the communications cannot be the potentially influencing factor for the purposes of the first step in the *Ebner* test; likewise, nor can the contact. Rather, these are merely evidence of the relationship between the learned trial Judge and trial counsel. That relationship subsisted before and after the trial, and it was known to then senior counsel for the appellant. Senior counsel's knowledge binds the appellant.[86]

56. There was ample opportunity for then senior counsel for the appellant to have raised the issue with the learned trial Judge, particularly in the course of the 2016 recusal application,[87] at which time the appellant was already concerned as to the Judge's

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83 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [185] – [186]; CAB 590.
84 [2006] HCA 36; (2006) 227 CLR 423 [43], [137].
85 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [185] – [186]; CAB 590.
86 *Smits v Roach* [2006] HCA 36 [45] – [48].
87 *Charisteas & Charisteas* [2016] FCWA 106; CAB 179 – 206.

impartiality was extant.[88] Having failed to complain to the trial Judge about his relationship with trial counsel for the first respondent before the trial, or in the course of the 2016 recusal application, or at any other time before judgment, the appellant cannot complain about the very same relationship after an adverse judgment.[89]

Ground 2

57. In the interpretation judgment, the learned trial Judge said that if he was wrong in concluding that the power under s. 79 was not spent, he was satisfied that s. 79A(1)(b) would apply.[90]

58. That finding was not and has not been challenged by the appellant. The appellant's third ground only alleges an error in law in concluding that s. 79A(1)(b) could be invoked absent an application.

59. Senior counsel for the appellant conceded on the appeal below that the learned trial Judge was entitled to apply s. 79 via s. 79A but contended, correctly, that he did not do so.[91] In effect, the appellant contended that any orders should have been made under the power provided under s. 79A.

60. In the context of the learned trial Judge's earlier finding that s. 79A(1)(b) would have applied and senior counsel's concession, it therefore follows that it was inevitable that, whether the learned trial Judge proceeded under s. 79 or 79A the same result would have occurred. In the circumstances, it was open to the Full Court to hold, and it should have held, that no miscarriage of justice has occurred.

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88 CAB 520, [9].

89 It should also be noted that the judgment was critical of both the husband and the wife, and ruled against them both on important issues suggesting a high degree of impartiality. In particular, the learned trial Judge rejected the wife's submission that the XYZ Trust "belonged" to the parties, and found that it belonged to the appellant's mother. The learned trial Judge also declined to include in the asset pool the sum of $280,000 held in the account of AW Pty Ltd, despite the appellant admitting in cross-examination that this sum was part of the proceeds of sale of a retail business owned by the parties (trial judgment [237] – [243]). The first respondent cross-appealed these matters (Full Court [64]), but later withdrew. Despite having applied and appealed for recusal of the learned trial Judge in 2016-17, then represented by current senior counsel for the appellant, the successful additional parties in relation to these issues have not supported the appellant's apprehended bias claims in this Court.

90 *Charisteas & Charisteas* [2015] FCWA 15, [163]; CAB 165.

91 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [187] (CAB 591), [204] (CAB 596).

Ground 3

61. As an alternative to seeking leave to appeal the interpretation judgment, it was open to the appellant to seek a writ of prohibition in respect of the decision to proceed with the s. 79 application. The appellant never took that opportunity. Instead, he continued to participate in the proceedings and the trial was programmed.

62. It is significant that the appellant actively participated in the trial of the s. 79 application which occurred in 2016. Evidence alone took 11 days.[92]

63. The plurality, correctly, set out 11 factors which it described as pertinent in deciding whether it was reasonable to require the appellant to seek leave to appeal. Notably, their Honours said:

    (a) the appellant even went as far as to propose orders pursuant to s. 79 that were different to the orders of Crisford J; and

    (b) his senior counsel agreed that s. 79(1)(d) was available to make a property order for the benefit of the children.[93]

64. In the circumstances described at [212],[94] it was open the Full Court to hold, and it should have held, that the appellant waived his right to challenge the learned trial Judge's decision to proceed with the trial of the s. 79 application in 2016.

Part VII: TIME ESTIMATE

65. The first respondent estimates that 1.5 hours will be required for oral submissions.

Dated 14 May 2021

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92 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [94]; CAB 562.
93 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [212]; CAB 599.
94 *Charisteas & Charisteas & Ors* [2020] FamCAFC 162, [212]; CAB 599.

ANNEXURE

List of statutes and statutory instruments referred to in submissions

Title	**Provisions / sections**	**Date**
Family Law Act 1975 (Cth)	ss. 4, 13, 79, 79A(1)(b), 94	Current
Family Court Act 1997 (WA)	s. 13	Current
Legal Professional Conduct Rules 2010 (WA)	Rule 37(6)	Current
Western Australian Barristers' Rules	Rule 53	Current