HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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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)
Eighth Respondent

APPELLANT'S SUBMISSIONS

PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: CONCISE STATEMENT OF THE ISSUES

2. Having regard to the disclosure made by trial Counsel for the First Respondent (**Counsel**) in her letter to the Appellant's solicitors dated 22 May 2018 (**Letter**), as well as the circumstances of the disclosure made therein, might a "fair-minded lay observer" reasonably apprehend that the trial Judge might not have brought an impartial mind to the resolution of the proceedings?

3. In circumstances where orders altering interests in property have been made on a final basis and some, but not, all of those orders are set aside on appeal without any order remitting the matter for re-hearing, can another judge exercise the power to alter interests in property for a second time?

PART III: SECTION 78B NOTICES

4. The appellant has considered whether any notice should be given in compliance with section 78B of the *Judiciary Act 1903*, and considers that no such notice is required.

PART IV: CITATIONS

5. Family Court of Western Australia (Walters J): *Charisteas and Charisteas* [2015] FCWA 15 ('***Interpretation Judgment***'). Family Court of Western Australia (Walters J): *Charisteas and Charisteas* [2017] FCWA 183. Full Court of the Family Court of Australia (Alsterglen CJ, Strickland and Ryan JJ): *Charisteas & Charisteas and Ors* [2020] FamCAFC 162; (2020) FLC ¶93–971; 354 FLR 167; 60 Fam LR 483.

PART V: STATEMENT OF FACTS

6. The appellant commenced proceedings in 2006 for orders altering interests in property. By her response, the first respondent sought to set aside various transactions pursuant to s 106B of the ***Family Law Act 1975*** (Cth).

7. The s 106B matters were listed to be determined on a preliminary basis and heard by Crisford J in July 2008. Crisford J delivered her judgment on 18 December 2008 concluding, inter alia, that the appellant was not the "controller and owner" of the Trust and that the appellant's father was the "ultimate controller and patriarch" of the Trust. Her Honour so found notwithstanding that the appellant had treated the assets of the Trust as his own from time to time. Crisford J declined to set aside the transactions that the first respondent sought to set aside.

8. The first respondent appealed. The appeal was heard on 22 October 2009 by a Full Court of the Family Court of Australia (comprising of Warnick, Boland & Thackray JJ). The Full Court delivered its judgment on 29 March 2010.[1] The first respondent's appeal was partially allowed in relation to some, but not all, transactions on the basis

[1] ***VC & GC and Ors*** [2010] FamCAFC 62.

that the s 106B matters should not have been dealt with as a preliminary issue but should have been dealt with as part of the trial of the substantive s 79 proceedings.

9. The matter then proceeded to a trial of all issues before Crisford J in February and March 2011. Crisford J delivered her judgment and made orders on 9 December 2011 ('**2011 Orders**').[2]

10. The second to fourth respondents appealed certain of those orders. The appellant also filed a cross appeal. The first respondent did not appeal. The appeal was heard on 26 and 27 March 2012 by a Full Court of the Family Court of Australia (comprising of Bryant CJ, Finn and Strickland JJ). On that day, orders were made by consent disposing of the appellant's cross appeal.[3]

11. On 11 April 2013, the Full Court allowed the appeal by the second to fourth respondents and made orders setting aside paragraphs 2, 3 and 4 of the 2011 Orders. There was no order remitting the proceedings for re-hearing.

12. On 12 June 2013, the First Respondent filed a further initiating application in the Family Court of Western Australia[4] seeking relief including orders pursuant to section 79A(1)(b) of the Act; and that certain paragraphs of her amended response, as encapsulated by a minute of orders sought filed 21 February 2011 "*be remitted for rehearing*".

13. On 1 October 2013 a series of disputed issues were ordered to be heard.[5] The issues were set out in an annexure to the orders made on that day.[6] Relevantly:

(a) paragraph 2 sought a "…*declaration that no final Order is in existence under section 79 of the Family Law Act and the matter be remitted for rehearing…*";

(b) paragraph 3, expressed in the alternative, sought a declaration that the power to make further orders pursuant to s 79 of the Act "…*has not yet been exhausted and an order that the matter be remitted for rehearing…*"; and

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[2] Appellant's Book of Further Materials ('**AFM**') 5.
[3] AFM 24.
[4] AFM 10 - 16.
[5] AFM 17 - 23.
[6] AFM 20 - 23.

(c) paragraph 4, also expressed in the alternative, sought an order setting aside various of the orders made by Crisford J pursuant to s 79A(1)(b) of the *Family Law Act 1975* (Cth) and a rehearing of those issues.

14. The disputed issues were heard on 22 and 23 January 2014 by Walters J[7]. On 10 February 2015[8] Walters J delivered his judgment dismissing the applications for relief as sought in, inter alia, paragraphs 2, 3 and 4 of the disputed issues as referred to in the preceding paragraph. Notwithstanding, Walters J held that the power of the Court to make orders pursuant to s 79 was not exhausted or spent.[9] His Honour also held that if he was wrong in that conclusion that the orders would be liable to be set aside pursuant to s 79A(1)(b) of the *Family Law Act 1975* (Cth).[10]

15. The matter thus thereafter proceeded to trial before Walters J. The matter was heard 3 August and 17 August 2016. Closing submissions were ordered to be filed in writing and a day was set aside for oral closing argument on 13 September 2016.

16. On 9 September 2016, the second, third, fourth and eighth respondents filed an application that the primary judge recuse himself. The appellant supported that application and adopted the submissions made on behalf of the second, third, fourth and eight respondents. The application was heard on 13 September 2016. The primary judge dismissed that application on the same day,[11] stating in general terms the basis for the dismissal and stating that reasons would be delivered at a future date.[12] His Honour's reasons were subsequently delivered on 14 November 2016.[13]

17. An appeal in relation to the orders made by the primary judge on 13 September (including the dismissal of the recusal application) was heard in April 2017 by a Full Court of the Family Court of Australia (comprised of Bryant CJ, Ryan & Moncrieff

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[7] Crisford J having become disqualified on account of chairing a judicial conference.
[8] [2015] FCWA 15; Core Appeal Book ('**CAB**') 117 – 178.
[9] [152] - [153]; [155], CAB 163.
[10] [176], CAB 168.
[11] ***Charisteas & Charisteas*** [2016] FCWA 106; CAB 179.
[12] ***Charisteas & Charisteas*** [2016] FCWA 106 at [15]; CAB 183 – 184.
[13] CAB 179.

JJ). The Full Court delivered its judgment on 30 June 2017. The appeal on the issue of disqualification was dismissed.[14]

18. The primary judge delivered reasons from the trial on 12 February 2018.[15] The appeal in relation to the trial reasons was heard on 13 March 2019 with judgment being delivered on 10 July 2020.

PART VI: ARGUMENT

Ground 1: Apprehension of Bias

Question

19. The question raised by this ground is that set out in paragraph 2 above.

Answer

20. The appellant submits that the question is properly answered in the affirmative.

Analysis

21. The appellant refers to and respectfully adopts the Reasons for Decision of Alstergren CJ at [6]-[24].[16]

22. That conclusion is reinforced by the further fact that, between the conclusion of the evidence and final submissions, an application was made to the trial Judge to recuse himself on the basis of apprehended bias. When that application was heard on 13 September 2016, both the trial Judge and Counsel were aware of those of the matters set out in Counsel's Letter that had then occurred, and on any objective basis would have known that such matters would have been further matters relied upon by the parties making and supporting the application had those matters been known to them. The failure of the trial Judge and Counsel for the wife to disclose such matters at that time and in those circumstances is, with respect, inexcusable.

The majority were in error

Contract prior to judgment being reserved

23. The majority erred with respect to their approach and findings as to the Letter[17], specifically with respect to how a "fair-minded lay observer" would consider the

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[14] ***XYZ Pty Ltd & Anor and Charisteas and Ors; ABC Pty Ltd and Charisteas & Ors*** [2017] FamCAFC 112; FLC ¶93–782; CAB 207 – 250.
[15] ***Charisteas & Charisteas*** [2017] FCWA 183; CAB 252 – 454.
[16] CAB 541 – 544.
[17] [164]-[165]; CAB 585.

issue of contact prior to judgment being reserved through the prism of the Letter and the disclosure made therein.

24. The majority approached the Letter as an exercise of "proper interpretation"[18] for the purpose of making findings of fact. The majority erred in doing so. The proper approach is to read and consider the Letter as a "fair-minded lay observer" would do. The "fair-minded lay observer" would take the Letter at face value. The "fair-minded lay observer would note the matters identified by the Chief Judge at [48] to [53]. The "fair-minded lay observer" would not undertake the sort of analysis undertaken by the majority at [164] to [167].

25. The terms and extent of the disclosure (i.e. whether full or partial disclosure, whether transparent or opaque) are matters which are to be taken into account in determining what a "fair-minded lay observer" might conclude. For example, an incomplete and opaque disclosure will obviously elevate any apprehension held by the "fair-minded lay observer" as compared to a complete and transparent disclosure (in a similar way as whether or not the disclosure was volunteered would be taken in account).

26. Put another way, there is no reason to make findings of fact as to what in fact happened beyond what is stated in the Letter. If the Letter permits of the possibility of a meeting having occurred during the trial (as even the majority recognised it did on its face), the "fair-minded hypothetical observer" would not seek to go beyond that (i.e. to determine whether it should be inferred a meeting did or did not take place). Rather, the "fair-minded hypothetical observer" would simply proceed on the basis that Counsel was not able to exclude the possibility that such a meeting took place. That is what would be factored into the "fair-minded hypothetical observer's" consideration of the matter.

27. In the alternative, if the majority's approach of "proper interpretation" is upheld, the inferences drawn and conclusions reached by the majority in regard to the Letter are in any event unsustainable.

28. First, there is no reason why the Letter should be read other than on a "literal" basis. This was an important communication written by a relatively senior legal

[18] [165]; CAB 585.

practitioner. It is to be inferred that the words used were chosen with care, not in haste, and that what was said (and not said) was intentional and considered.

29. Secondly, as for "personal contact" during the trial, unlike subparagraph (c) of the Letter, subparagraphs (a) and (b) are not divided into three parts. Paragraph 3(a) therefore does not differentiate between the periods referred to in paragraph 3(c). As noted by the majority[19], paragraph 3(a) "on a literal reading" does not exclude the possibility that there was "personal contact for a drink or coffee" during the trial. Had Counsel intended to exclude that possibility, she could have easily done so. A "fair-minded hypothetical observer" would conclude that given that Counsel could have easily done so, but did not do so, this was intentional and therefore would not exclude the possibility[20] that such a meeting in fact took place.

30. Thirdly, the assertion that "*it makes no sense to interpret the clause as meaning that the interlocutors ceased the most private form of communication but possibly continued to meet or speak to each other where they could be seen or might be overhead*" does not fairly follow from the Letter or the circumstances referred to above.

31. The same comments apply to [167] of the Reasons for Decision of the majority. In particular:

(a) for the reasons set out above, no proper basis exists for the statement that there was a "self-imposed embargo on contact during the trial itself" (to the extent that the expression "the trial itself" includes the period between the close of evidence and final submissions);

(b) even if there had been, it was wrong to "think it highly unlikely that there was any private communication between the close of evidence and when judgment was reserved". This is because:

(i) it was Counsel who, for reasons unexplained, in her Letter divided the period "from June 2016 to February 2018" into two parts, namely 20 June 2016 to 15 September 2017 and then from 15 September 2017 to 12 February 2018;

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[19] [164]; CB 585.

[20] "real and not remote": ***Ebner v Official Trustee in Bankruptcy*** [2000] HCA 63; 205 CLR 337, [7].

(ii) although there were no text communications between 2 August 2016 to 16 August 2016, the period of "numerous" communications extended to 15 September 2017 and continued from that date to 12 February 2018 (albeit on an "occasional" basis);

(iii) accordingly, the proper (indeed only) conclusion to be drawn is that from 19 August 2016 (when the period of "no (text) communication" ended) to 15 September 2017 (when the frequency of text messages reduced from "numerous" to "occasional"), text messages were exchanged between the trial Judge and Counsel for the wife (and they were "numerous"). In other words, the period from 19 August 2016 (being 2 days after the close of evidence on 17 August 2016) until judgement was reserved on 13 September 2016 is within the period for which Counsel has stated that "numerous" text messages passed between the trial Judge and Counsel.

32. There is a further problem with the analysis of the majority at [166]-[167]. The majority inferred that the cessation of text messages between Counsel and the trial Judge prior to and during the hearing of evidence "points to them being aware that the standards of judicial and professional practice required that there be no private communications between them once the trial was underway. Furthermore, it shows that each of them took these standards seriously and were determined to comply".

33. Whether or not that be so, it does not justify the further finding that "the primary Judge and Counsel alike would have understood that the trial was not finished until final addresses were given and judgment was reserved, and thus, the approach adopted during the evidence phase of the trial would have continued until judgment was reserved". That is because another (and more likely) inference to be drawn from Letter (assuming for the purpose of argument that, contrary to the appellant's submissions, the majority's finding that "there was no private communication of any kind between the primary Judge and Counsel for the wife from 2 August 2016 until 19 August 2016, which is when evidence was taken" is upheld), is that the trial Judge and Counsel considered that any cessation of private communications of any kind between them did not need to extend beyond the taking of evidence.

34. That inference is reaffirmed by the undisputed fact that the trial Judge and Counsel engaged in private communications during the period in which judgment was reserved.

35. Nor does the majority address the matters rightly identified in paragraphs by Alstergren CJ at [48] to [53], all of which would be matters to which regard would be had by the "fair-minded lay observer". Indeed, rather than focus on the extent of the disclosure made by Counsel, the majority criticised the conduct of the legal representatives of the appellant.[21] There is no onus upon the appellant to clarify or seek further "particulars" of the disclosure made by Counsel. If the extent of disclosure is unsatisfactory, that is a matter which the "fair-minded lay observer" will take into account in considering the matter. The "fair-minded lay observed" would also take into account the fact that it was always open to the respondent to request Counsel to provide a clearer and/or more detailed disclosure and that this did not occur.

Contact after judgment was reserved

36. Even on the majority's analysis it was accepted that the Letter established contact between the trial Judge and Counsel after judgment was reserved and that the same satisfied the first limb of *Ebner*.[22]

37. At [172] to [175], the majority dealt with the issue of non-disclosure by the trial Judge. It is submitted that the majority erred by not attributing sufficient weight to the non-disclosure by the trial Judge. First, at [174] the majority stated "A failure to disclosure may affect the ultimate question of reasonable apprehension of bias, but in and of itself, does not give a litigant any right to have the Judge stand aside or the decision set aside for want of procedural fairness". Reference is then made to *Whalebone*. However, what the majority did not do was to refer to the observations of Merkel J in *Aussie Airlines*[23] to the effect that a "failure to disclose, of itself, can

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[21] See, for example, "If the hypothetical observer had any residual disquiet about this, they would recall that Counsel for the wife readily answered the husband's solicitor's enquiry and would accept that Counsel would answer any request for further particulars. The onus for establishing a basis for recusal lies with the husband and **his failure to clarify Counsel's answers cannot undermine the integrity of the information which was given**" (emphasis added): [178]; CAB 588.

[22] [167]-[170]; CAB 585 – 586.

[23] ***Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd and Another*** (1996) 135 ALR 753, 758-759.

be one of the circumstances which together with others may give rise to a reasonable apprehension of bias" and that such a failure may lead to an impression that something was "wrong about it all".

38. Secondly, and more fundamentally, the majority reasoned that "the primary judge did not appreciate that the strictures against private communication which applied when the hearing was underway continued until judgment was given"[24] and that the hypothetical observer would accept that the "judge may hold genuinely mistaken views about the application of these principles".[25]

39. With respect to the majority, there was no evidence about whether the trial Judge 'understood' the strictures against private communication or not. It is equally as likely that the trial Judge did understand the strictures but that neither he nor Counsel elected to seek consent or disclose the fact first.

40. Further, where there is a failure to disclose or seek consent it begs many questions, most significantly "why?". It might be that the judge fears that consent will be withheld. If that is so, it says a lot about the importance of the relationship between the trial Judge and Counsel if there is a fear that consent will be withheld which then leads to consent not being sought. That the judge might have had such a fear is a logical conclusion in this case. There had already been one unsuccessful application that the judge disqualify himself and that decision was subject of an appeal. However, it leaves the hypothetical observer with a situation where – knowing that it should not occur – both the trial Judge and Counsel elected to do so in secret anyway. That, combined with inferences about why consent might not have been sought, squarely brings into focus the impression referred to by Merkel J in *Aussie Airlines* referred to above.[26]

41. In order to reach a position whereby the majority could approve of the conduct of the trial Judge and Counsel, the majority has, in particular at [177], significantly raised the bar for disqualification for apprehended bias. The practical effect of the majority's reasoning is that where there is undisclosed communication – even in

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[24] ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162, [175]; CAB 587.
[25] ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162, [175]; CAB 587.
[26] ***Aussie Airlines Pty Ltd v Australian Airlines Pty Ltd and Another*** (1996) 135 ALR 753, 758 – 759.

violation of the strictures against such communication – that it will only result in disqualification if either one, or both, of the judge or counsel admit impropriety. If that is to be the case, one begins to wonder what the purpose of those strictures actually is?

42. The majority referred to *Taylor v Lawrence*[27] as support for the proposition that "the hypothetical observer is able to tolerate private face-to-face communication between the judge and the legal representative of only one party, even when the fact of the meeting was not disclosed".[28] Taylor not only relates to a different test for apprehended bias, but relates to a professional situation not a personal relationship.

43. The majority also relied on *Royal Guardian*, to support a proposition that a hypothetical observer would "be willing to tolerate some degree of private communication between a judge and legal representative of one party only".

44. With respect, the majority's reliance on *Taylor* and *Royal Guardian* was misplaced. In both cases, there had been some measure of disclosure. The fact that there was no disclosure was, and always has been, a significant plank of the applicant's case for apprehended bias. In this matter, there was no disclosure by either Counsel or the trial Judge, not even when faced with an application for disqualification. Such a failure is even more egregious when it is clear that the contact was not fleeting or incidental and when disclosure was eventually made it was "hardly candid" (Reasons [48]).

45. Whilst the applicant does bear the onus of demonstrating an apprehension of bias, it has been observed that "when a claim of apprehended bias is so made the basic facts should almost always be uncontroversial in the sense that, between them, the parties and the judge under challenge, should have laid out all of the relevant matters and facts that he or she can recall, for the decision whether they establish the relevant apprehension".[29] The majority's criticism of the applicant's 'failure to clarify counsel's answers'[30] was unwarranted. The onus ought to have been on Counsel to

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[27] ***Taylor v Lawrence*** [2003] QB 528 ('*Taylor*').
[28] ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162, [145] – [146]; CAB 579.
[29] ***Ebner v Official Trustee in Bankruptcy*** [2000] HCA 63; 205 CLR 337 at [185].
[30] ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162, [178]; CAB 588.

'lay bare' what transpired and on the trial Judge, if the matter was able to have been properly raised at first instance.

46. The effect of the reasons of the majority, particularly paragraphs [175] – [179], is that it is the party who is kept in the dark about private communication that has to demonstrate impropriety. Inadequacies in the material that was before the Court about the nature of the communications between the trial Judge and Counsel were held against the appellant. In such circumstances, this Court should recognise a general principle that once undisclosed private communication in breach of the relevant 'strictures' has taken place the onus that exists is to dispel any apprehension of bias. Such a principle is an extension of the principle that matters which might entitle a party to make an application to disqualify ought to be properly disclosed by the judge.

47. Moreover, the majority appears to have accepted[31] that there was *some* discussion about the case privately, albeit nothing that "pertained to the adjudication and determination."[32] Despite concluding that a hypothetical observer would give "anxious consideration" to the communication, the majority concluded that the unsworn statement that the communication did not involve the 'substance' of the case would be accepted by the hypothetical observer. Such a conclusion moves the hypothetical observer from being not unduly sensitive or suspicious to a person willing to uncritically accept statements made by counsel. That would seem to move the test from one of whether there is an apprehension of bias to whether there is actual proof of *ex parte* representations.

48. The conclusion that "neither the primary judge nor counsel for the wife had an interest in the outcome of the case, pecuniary or otherwise"[33] ignores that, absent (and perhaps even with) a successful outcome, the respondent was hopelessly insolvent with a personal liability to her litigation funder far exceeding her personal assets by a significant magnitude.[34] There was no evidence before the Full Court about the fee arrangements involving Counsel were or whether she had been paid.

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[31] ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162, [176]; CAB 587.
[32] See also ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162, [53] (Alstergren CJ); CAB 552.
[33] ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162, [179]; CAB 588.
[34] ***Charisteas & Charisteas & Ors*** [2020] FamCAFC 162, [110] - [111]; CAB 565 - 569.

That conclusion – or rather assumption – was in error. Again, it demonstrates that the majority were intent on shoehorning the hypothetical observer into the conclusion that they had determined.

49. In essence, the judgment of the majority poses a standard somewhat less rigorous than the standard in *Ebner* and *Johnson* (and other decisions of this Court).

Conclusion in relation to Ground 1

50. On any view, the trial Judge and Counsel failed to observe well-established/well-known "*strictures against private communication*" which are fundamental to our system of justice which requires not only that justice be done, but that it is seen to be done.

51. In this case:

(a) the conduct of the trial Judge and Counsel:

(i) was not disclosed prior to judgment, even though an application had been made for the trial Judge to recuse himself;

(ii) was disclosed by Counsel (but not the trial Judge) only after enquiries had been made of her by the solicitors for the appellant;

(b) the disclosure actually made was incomplete and far from transparent;

(c) given that the trial Judge made no disclosure, and given that the limited disclosure made by Counsel did not refer to it, there is no assertion by either of them of being under some misunderstanding about the extent of the strictures. Nor did Counsel's Letter state that she and the trial Judge did not discuss the case at all, but rather qualified her disclosure with the word "substance" (which of course begs the question, then what did they discuss about the case?).

52. This conduct is the anthesis of what the judicial system requires in a democratic society: it strikes at its very foundation.

53. The majority's endeavour to minimise the conduct was in error. This is particularly so where the majority inferred various matters which could have but were not stated

by the trial Judge or Counsel, and where other inferences are at least equally open (if not more so).

54. At the end of the day, the rhetoric question must be asked: given such an egregious breach of the strictures, including the absence of voluntary disclosure and the unsatisfactory nature of the disclosure made by one of the parties to the communications, if such a violation of the strictures is to be countenanced (as the majority have done), why bother with the strictures at all?

Grounds 2 - 4: Jurisdiction and Power of the Family Court of WA

Questions

55. The principal question raised by these grounds is: was it within the power of the primary judge to, in effect, substitute his final orders for the final orders that had been made by Crisford J on 9 December 2011?

56. The subsidiary question is: if it was not within the power of the primary judge to do so, by not seeking to appeal the "*Interpretation Judgment*" did the appellant waive his right to now take the point?

Answer

57. The appellant submits that both questions are properly answered in the negative.

Analysis

58. On 9 December 2011, Crisford J made final orders pursuant to the power contained in section 79 of the *Family Law Act 1975* (Cth) ('**FLA**'). Those orders, inter alia, provided for a sale of the former matrimonial home and for distribution of the net proceeds thereof[35]; obliged the first respondent to transfer her shares in a company to the appellant[36]; effected a 'superannuation split'.[37]

59. Those orders also obliged the trustee of the Trust to: appoint a vesting date for the trust[38]; pay $338,000 to the fourth respondent;[39] and otherwise distribute the trust

[35] AFM 5 – 9, paragraph 5 – 6.
[36] AFM 5 – 9, paragraph 7.
[37] AFM 5 – 9, paragraphs 8 – 12.
[38] AFM 5 – 9, paragraph 2.
[39] AFM 5 – 9, paragraph 4.

fund and distribute the capital and income of the trust in accordance with the terms of the trust deed[40] (the '**Trust Orders**').

60. The Trust Orders were stayed when they were made.[41] An appeal in relation to those other orders was successful and they were set aside.[42] The appeal succeeded on the basis that the fourth respondent, as a general beneficiary, was not afforded procedural fairness in the making of the orders.

61. The Full Court noted that neither the appellant or the first respondent appealed any of the orders of Crisford J and with the result that "…*there is nothing that we can do about the remaining orders.*"[43] The Full Court suggested that a course *'open'* to the first respondent would be to make an application pursuant to s 79A(1)(b).

62. Following the delivery of the Interpretation Judgment, the primary judge expressly dismissed the first respondent's application for orders pursuant to s 79A(1)(b). The first respondent did not appeal that order.

63. When making the orders on 12 February 2018, Walters J did not expressly 'set aside' any of the orders made by Crisford J on 9 December 2011. However, the orders are obviously premised on the basis that the orders made by Crisford J are of no effect. That conclusion is readily demonstrated by the inconsistency between the two sets of orders. For example, the orders made by Walters J ordered a superannuation split with the effect that one or the other of the spouses will retain the entire superannuation fund[44] as compared to the orders of Crisford J where the Wife is to receive 50% of the relevant superannuation fund.[45] Both orders, which are both expressed to bind the trustee, cannot be simultaneously complied with.

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[40] AFM 5 – 9, paragraph 3. The effect of this order was the distribution of capital and income would be to the five specified beneficiaries in equal shares. The five specified beneficiaries are the appellant, first respondent and their three children.
[41] AFM 5 – 9, paragraph 16.
[42] ***AC and Ors & VC and Ors*** [2013] FamCAFC 60; (2013) FLC ¶93–540; 275 FLR 299; 49 Fam LR 276
[43] ***AC and Ors & VC and Ors*** [2013] FamCAFC 60; (2013) FLC ¶93–540; 275 FLR 299; 49 Fam LR 276 at [102].
[44] Paragraphs 25 – 26 of the orders of Walters J; CAB 489 - 491. See also reasons for decision at [659] – [660]; CAB 391 – 392. Which spouse was to retain the fund depended on how other payments were made (or not made) as the case may be.
[45] AFM 5 – 9, paragraphs 8 – 12.

64. The jurisdiction and power of the Family Court of Western Australia is that which is expressly and impliedly conferred on it by the statute.[46] It has state jurisdiction conferred upon it by the *Family Court Act 1997* (WA) and is invested with federal jurisdiction pursuant to the FLA. Section 79 of the FLA permits a court exercising jurisdiction under the FLA to make an order altering the interests of parties to a marriage in property to which one or both of those parties is or are entitled.[47]

65. It has been held that the power to alter interests in property can be exercised on an interim basis or a final basis.[48] It has also been held that the exercise of power under s 79 remains one single exercise, although it can be made through a succession of orders until the power is exhausted.[49] The single exercise of power may similarly be effected in a series of clauses in an order relating to particular items of property.[50]

66. There can be no real contest that in making orders on 9 December 2011, Crisford J was doing so on a final basis and intended on 'exhausting' the s 79 power. That some of the orders were subsequently set aside on appeal cannot sensibly operate to retrospectively change the intention or characterisation of the orders which were made by Crisford J.

67. There is otherwise no reason to read into the words of s 79 an express or implied power to set aside what are otherwise final perfected orders made by another judge in the exercise of that power.[51]

68. Indeed, the only statutory basis that might have been available to set aside the orders of Crisford J which were not disturbed by the Full Court would have been s 79A of the FLA. As already referred to, insofar as the first respondent sought relief pursuant to s 79A that application was dismissed.

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[46] ***ASIC v Edensor Nominees Pty Ltd*** (2001) 204 CLR 559 at [64]
[47] ***Stanford v Stanford*** (2012) 247 CLR 108, 112 at [1] (French CJ, Hayne, Kiefel and Bell JJ).
[48] Reading section 79 with section 80(1)(h) of the ***Family Law Act 1975*** (Cth). ***Gabel v Yardley*** (2008) 40 FamLR 66, FLC 93-386; ***Strahan v Strahan (Interim Property Orders)*** [2009] FamCAFC 166.
[49] ***Gabel v Yardley*** (2008) 40 FamLR 66, FLC 93-386.
[50] ***Hickey & Hickey & the Attorney-General for the Commonwealth of Australia (Intervener)*** (2003) FLC 93-143 at [48].
[51] There was no notice of contention that the primary judge had any other source of power to set aside the orders made by Crisford J, for example the various matters referred to in ***Clone Pty Ltd v Players Pty Ltd (in liq)*** [2018] HCA 12; 264 CLR 165 at [52] – [60].

Waiver

69. By s 94 of the FLA, an appeal could only lie against a "decree" made by the Family Court of Western Australia. It is well settled that the words "*a judgment, decree or order*" have the same meaning as the words "*all judgments, decrees, orders…*" in s 73 of the Constitution.[52] Judgment, decree or orders refer to the formal orders which the court may make.[53] It follows that an expression of reasons does not give rise independently to a right of appeal.[54] Relevantly, "judgments" refers only to operative judicial acts, and is not used, as it often is in other contexts, as a convenient abbreviation for reasons for judgment.[55]

70. There was no decree, within the meaning of s 94 that the appellant could have appealed. The only decrees that the appellant could have appealed were the decrees dismissing the Wife's applications for declarations and for orders pursuant to s 79A of the FLA. If anything, it was the first respondent that ought to have appealed the dismissal of those aspects of her case. It follows from there being no decree which the appellant could have appealed, that question of whether it was reasonable to require the appellant to seek leave to appeal[56] at that time does not arise.

71. What the primary judge did was give a ruling on a point of law which was raised. Where a judge gives such a ruling, that does not conclude the rights of the parties before the hearing of the case is complete.[57] For that reason, erroneous for the majority to conclude that the reasons "*finally concluded an important question of law*"[58]. Such a conclusion is against the weight of authority of this Court.[59]

Appeals from interlocutory decisions after final judgment

72. In the alternative, it is noted that in *Gerlach*[60], this Court referred to the observations of Griffith CJ in *Nolan v Clifford*[61]: "[o]*n an appeal from a final judgment, all points*

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[52] ***Moller v Roy*** (1975) 132 CLR 622 at 625; ***AH Toy v Registrar of Companies*** (1985) 10 FCR 280.
[53] ***Moller v Roy*** (1975) 132 CLR 622 at 625 (Barwick CJ).
[54] ***Driclad Pty Ltd v Federal Commissioner of Taxation*** (1968) 121 CLR 45 at 64.
[55] ***Driclad Pty Ltd v Federal Commissioner of Taxation*** (1968) 121 CLR 45 at 64.
[56] Reasons 212; CAB 599.
[57] ***Commonwealth v Mullane*** (1961) 106 CLR 166 at 169.
[58] Reasons at 211; CAB 599.
[59] ***Commonwealth v Mullane*** (1961) 106 CLR 166 at 169.
[60] ***Gerlach v Clifton Bricks Pty Ltd*** [2002] HCA 22; 209 CLR 478 ('**Gerlach**').
[61] (1904) 1 CLR 429 at 431.

raised in the course of the case are open to the unsuccessful party. If a point is decided against him on an interlocutory application, there is no need for him to keep on raising it." The exception to the principle referred to in *Gerlach*, was expressed by reference to *O'Toole*[62] and *Fidelitas Shipping Co Ltd*[63]. In *Fidelitas*, Diplock LJ said (at 642): "[w]*here the issue separately determined is not decisive of the suit, the judgment upon that issue is an interlocutory judgment and the suit continues. ...*".

73. It cannot be said that the decision fell within the category of being decisive of the suit such as to engage the exceptions referred to by the majority[64]. The primary judge still had to consider, inter alia, whether it was just and equitable to make any order (or further order) altering interests in property.[65] ***Michael Wilson & Partners v Nicholls***[66] is authority for the proposition that a dismissal of a recusal application will constitute a final determination that no apprehension exists and that a party who fails to challenge the refusal by seeking leave to appeal should be held to have given up the point.[67] That was a question which was divorced from the substantive dispute between the parties and is sound reason for it being treated in a different manner.

74. Indeed, the situation is closer to a situation where liability is determined separately from damages. It is entirely competent for an appellant to appeal the decision on liability only after damages have been assessed.[68]

75. The majority erred in focusing on the 'importance' of the decision, in determining whether an appeal ought to have been brought. Most decisions on a question of law which will affect the final result could be said to be important. A finding on liability, in advance of damages would be important. However, the majority has expanded the definition of decree in the FLA beyond what is set out in the authorities of this Court to also include reasons for decision *if* the Full Court considers that the reasons determine 'an important question of law affecting the final result'. Such an approach

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[62] ***O'Toole v Charles David Pty Ltd*** (1991) 171 CLR 232 at 245 per Mason CJ ('**O'Toole**')
[63] ***Fidelitas Shipping Co Ltd v V/O Exportchleb*** [1966] 1 QB 630 at 642. ('**Fidelitas**')
[64] Reasons, 210; CAB 598 - 599
[65] ***Stanford v Stanford*** (2012) 247 CLR 108.
[66] (2011) 244 CLR 427
[67] See generally ***Durolek v Pier (WA) Pty Ltd [No 2]*** [2019] WASCA 138 at [81] - [84] (Quinlan CJ, Mitchell and Vaughan JA).
[68] ***Smith v Tabain*** (1987) 10 NSWLR 562, 565, 566; followed in *Pioneer Industries Pty Ltd v Baker* [1997] 1 Qd R 514 and cited with approval by Kirby and Callinan JJ in ***Gerlach*** at [48] (footnote 93).

will lead to fragmented appeals, lest a party be found to have waived the right to appeal those interlocutory rulings.

76. In any event, the application of waiver was misplaced. If the s 79 jurisdiction had been exhausted, the jurisdiction to make further orders could not be conferred on him by consent,[69] concession[70] or estoppel[71]. By extension of those principles, it could not be conferred on his Honour by the 'waiver' of a right to appeal.

Conclusion in relation to grounds 2 – 4

77. The primary judge had no power pursuant to s 79 to set aside or vary the orders made by Crisford J on 9 December 2011. He had expressly dismissed an application to set those orders aside pursuant to 79A following the Interpretation Judgment.

78. The Interpretation Judgment was not a decree which was amendable to appeal. Even if it was, the Interpretation Judgment was an interlocutory decision affecting the final result which the appellant was entitled to challenge after final judgment had been delivered.

PART VII: ORDERS SOUGHT

1. Appeal allowed.

2. Set aside orders 1 and 2 of the Full Court of the Family Court of Australia made on 10 July 2020 and, in their place, order that:

   (a) the appeal be allowed; and

   (b) the orders of the primary judge be set aside and, in their place, it be ordered that the first respondent's application for orders pursuant to s 79 of the *Family Law Act 1975* (Cth) further, or in addition to, to the final orders made by Crisford J made on 9 December 2011, be dismissed.

3. Alternatively, set aside orders 1 and 2 of the Full Court of the Family Court of Australia made on 10 July 2020 and, in their place, order that:

   (a) the appeal be allowed; and

   (b) the orders of the primary judge be set aside and, in their place, it be ordered that the first respondent's application for orders pursuant to s 79 of the

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[69] ***Thomson Australian Holdings Pty Ltd v Trade Practices Commission*** [1981] HCA 48; (1981) 148 CLR 150 at 163 (Gibbs CJ, Stephen, Mason and Wilson JJ.)
[70] ***National Parks and Wildlife v Stables Perisher Pty Ltd*** (1990) 20 NSWLR 537, 585.
[71] ***Welch v Nagy*** [1950] 1 KB 455; ***J & F Stone Lighting & Radio Ltd v Levitt*** [1947] AC 209

Family Law Act 1975 (Cth) further, or in addition to, to the final orders made by Crisford J made on 9 December 2011, be remitted to the Family Court of Western Australia for re-hearing.

4. The first respondent do pay the appellant's costs:

   (a) of the appeal to this Court, including the application for special leave to appeal to be assessed if not agreed;

   (b) of the appeal to the Full Court of the Family Court of Australia to be assessed if not agreed; and

   (c) in the event an order in terms of paragraph 2(b) above is made, of the first respondent's said application in the Family Court of Western Australia to be assessed if not agreed.

PART VIII: TIME ESTIMATE

79. The Appellant estimates that 1.5 hours will be required for its oral argument.

Dated: 15 April 2021

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ANNEXURE

List of statutes and statutory instruments referred to in submissions

Title	**Provisions / sections**	**Date**
Family Law Act 1975 (Cth)	Section 4, 79, 79A, 94	Current