Family Court of Australia - Full Court

Bulow & Bulow [2019] FamCAFC 3 (18 January 2019)

Last Updated: 24 January 2019

FAMILY COURT OF AUSTRALIA

BULOW & BULOW ***[2019] FamCAFC 3***

APPEAL – PROPERTY – SUPERANNUATION – Where the trial judge ordered that the parties' superannuation interests be equalised – Where the husband had a defined benefit interest – Where the wife had an accumulation interest – Where the trial judge made a splitting order pursuant to s 90XT(1)(a) – Where the trial judge allocated a base amount of the husband's superannuation to the wife – Where it is necessary to refer to the defined benefit fund's trust deed to determine the effect of any splitting order – Where the fund's trust deed will dictate the nature form and characteristics of the superannuation interests – Where evidence is lacking there is an obligation to seek evidence regarding matters plainly in issue and relevant – Where the trial judge did not mention the nature form and characteristics of the parties' superannuation interests – Where the trial judge did not mention the potential effect of any proposed splitting order – Where the trial judge failed to take into account direct financial contributions made by the husband to his superannuation – Where there was appealable error – Appeal allowed – Remitted for rehearing – Costs certificates.

APPLICATION IN AN APPEAL – Where the husband filed an application after the appeal hearing – Where each of the parties were given an opportunity to be heard in respect of the application – Where the application was only relevant if the Full Court re-exercised the discretion – Application dismissed.

Civil Law and Justice Legislation Amendment Act 2018 (Cth)

Family Law Act 1975 (Cth) ss 75(2), 79, 81, 90XS, 90XT

Superannuation Act 1990 (Cth) s 4
Family Law (Superannuation) Regulations 2001 (Cth) reg 5

Superannuation Industry (Supervision) Regulations 1994 (Cth) reg 1.03AA, 7A.04, Part 7A

Public Sector Superannuation Scheme Trust Deed Part 16
Federal Circuit Court Rules 2001 (Cth) rr 15.01, 15.04, 15.09, 24.03

Allesch v Maunz (2000) 203 CLR 172; [2000] HCA 40

Coghlan and Coghlan (2005) FLC 93-220; [2005] FamCA 429

Ferraro and Ferraro (1993) FLC 92-335; [1992] FamCA 64

Garrett and Garrett (1984) FLC 91-539; [1983] FamCA 55

Guthrie & Rushton [2009] FamCA 1144

Hayton & Bendle (2010) 43 Fam LR 602; [2010] FamCA 592

Perrin & Perrin (No 2) [2018] FamCAFC 122

Stead v State Government Insurance Commission (1986) 161 CLR 141; [1986] HCA 54

Surridge & Surridge (2017) FLC 93-757; [2017] FamCAFC 10

Tate v Tate (2000) FLC 93-047; [2000] FamCA 1040

Trask & Westlake (2015) FLC 93-662; [2015] FamCAFC 160

T & T (Pension Splitting) (2006) FLC 93-263; [2006] FamCA 207

Weir and Weir (1993) FLC 92-338; [1992] FamCA 69

Welch & Abney (2016) FLC 93-756; [2016] FamCAFC 271

APPELLANT:	Mr Bulow			
RESPONDENT:	Ms Bulow			
FILE NUMBER:	ADC	1674	of	2014
APPEAL NUMBER:	SOA	3	of	2018
DATE DELIVERED:	18 January 2019			
PLACE DELIVERED:	Brisbane			
PLACE HEARD:	Adelaide			

JUDGMENT OF:	Strickland, Murphy and Kent JJ
HEARING DATE:	27 August 2018; Application in an Appeal filed 4 October 2018; Submissions received on 26 November and 10 December 2018
LOWER COURT JURISDICTION:	Federal Circuit Court of Australia
LOWER COURT JUDGMENT DATE:	22 November 2017
LOWER COURT MNC:	[2017] FCCA 2657

REPRESENTATION

FOR THE APPELLANT:	Unrepresented
FOR THE RESPONDENT:	Unrepresented

IT IS ORDERED THAT

(1) The time for the husband to file his Summary of Argument be extended *nunc pro tunc* to 20 August 2018.

(2) The husband's Application in an Appeal filed 14 August 2018 be dismissed.

(3) The husband's Application in an Appeal filed 24 August 2018 be dismissed.

(4) The husband's Application in an Appeal filed 4 October 2018 be dismissed.

(5) The appeal be allowed.

(6) Paragraphs 1(a) and 2 of the orders made by Judge Heffernan on 22 November 2017 be set aside.

(7) The matter be remitted for rehearing before Judge Heffernan or such other Judge of the Federal Circuit Court of Australia as might be allocated.

(8) Each party bear their own costs of and incidental to the appeal.

(9) The Court grants to the appellant a costs certificate pursuant to s 9 of the *Federal Proceedings (Costs) Act 1981* (Cth) being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the appellant in respect of the costs incurred by him in relation to the appeal.

(10) The Court grants to the respondent a costs certificate pursuant to s 6 of the *Federal Proceedings (Costs) Act 1981* (Cth) being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to the respondent in respect of the costs incurred by her in relation to the appeal.

(11) The Court grants to each of the parties a costs certificate pursuant to the provisions of s 8 of the *Federal Proceedings (Costs) Act 1981* (Cth) being a certificate that, in the opinion of the Court, it would be appropriate for the Attorney-General to authorise a payment under that Act to each of the parties in respect of the costs incurred by the appellant and respondent in relation to the rehearing.

IT IS NOTED

1. An order that the husband pay the wife's costs in the sum of $11,889 was not the subject of a specific order by Judge Heffernan but rather was incorporated within Paragraph 1(a)(i) of the orders made on 22 November 2017. The order for costs remains undisturbed by these orders.

Note: The form of the order is subject to the entry of the order in the Court's records.

IT IS NOTED that publication of this judgment by this Court under the pseudonym *Bulow & Bulow* has been approved by the Chief Justice pursuant to s 121(9)(g) of the *Family Law Act 1975* (Cth).

Note: This copy of the Court's Reasons for Judgment may be subject to review to remedy minor typographical or grammatical errors (r 17.02A(b) of the Family Law Rules 2004 (Cth)), or to record a variation to the order pursuant to r 17.02 Family Law Rules 2004 (Cth).

THE FULL COURT OF THE FAMILY COURT OF AUSTRALIA AT ADELAIDE

Appeal Number: SOA 3 of 2018

File Number: ADC 1674 of 2014

Mr Bulow

Appellant

And

Ms Bulow

Respondent

REASONS FOR JUDGMENT

1. The husband appeals final property orders made by Judge Heffernan on 22 November 2017.
2. His Honour adopted the so-called "two pools" approach, considering separately contributions to the parties' non-superannuation assets and to their respective superannuation interests. The parties' interests in their nonsuperannuation assets were altered so as to reflect an assessment that they be divided 60 per cent to the wife and 40 per cent to the husband. Separately, his Honour ordered that the parties' superannuation entitlements be "equalised"[1] and, so as to effect the same, made a splitting order pursuant to s 90XT(1)(a) of the *Family Law Act 1975* (Cth) ("the FLA").[2] That order allocated a base amount of $173,154 to the wife.
3. The self-represented husband's challenges to his Honour's orders are embraced by 30 grounds of appeal. Many are, with respect, insufficiently particularised, repetitive and mask the true nature of the husband's central challenges. The Court sought to reframe those challenges into recognisable appealable error.
4. The husband's challenges fall into two broad categories. The first category is comprised of an attack on his Honour's splitting order and the process by which it was arrived at. Those issues form the main focus of the appeal.
5. The second category comprised a collection of disparate complaints that comprise, broadly described, asserted factual errors; errors in the exercise of discretion; errors in the assessment of contributions; and error in a finding of nondisclosure by the husband. The husband also appeals orders by which the husband was ordered by his Honour to pay the wife's costs of three interim applications heard and determined prior to the trial.
6. The husband asserts that his Honour failed to take into account "the significant detrimental effect" the splitting order had on the husband's present and future superannuation entitlements. Expressed in the language of discretionary error, Grounds 28 and 29 are to the effect that his Honour failed to take into account a crucially relevant consideration, namely the nature, form and characteristics of the husband's superannuation interests and the impact of the same on the splitting order proposed to be made and, in turn, the impact of that order in assessing the justice and equity of the s 79 orders as a whole.
7. The reasons which follow seek to explain why there is merit in that challenge and why the appeal should be allowed accordingly. These reasons also seek to explain why there is no merit otherwise in the husband's appeal.

FAILURE TO TAKE INTO ACCOUNT RELEVANT CONSIDERATIONS

The Superannuation Splitting Order sought and made

8. The parties were married in December 1993 and separated in November 2012. The property trial occurred four years later in November 2016. The parties' four children were aged 18; 17; 15 and 14 when the parties separated. All were adults at the time of trial.

9. The wife was aged 51 years at trial. She has an interest in both the K and P superannuation funds. Both interests are accumulation interests in the growth phase. The superannuation interests were accrued while the wife was employed as a registered nurse. The value[3] of the wife's funds was not in dispute.[4] The combined value was $289,705.

10. The husband was aged 54 years at trial. He was trained as an Engineer in Country H and commenced working for the Australian Government in late 1995. At this time he began accruing superannuation in the Commonwealth Public Sector Superannuation Scheme ("the PSS fund"). At that time, the fund was a defined benefit scheme and the husband has a defined benefit interest in the growth phase in that fund.

11. It was apparently agreed before his Honour that, at the time of separation, the PSS fund was "valued" at about $386,000.[5] Although it is not entirely clear from the record, that "value" appears to have been arrived at by reference to the mandated method for determining its amount.[6] A significant increase in that amount occurred when, during three of the four years between separation and trial, the husband increased his employee contributions from 2 per cent of his salary to 10 per cent.

12. A report provided in November by the wife's expert, Mr E, (which was attached to the wife's affidavit filed about a week before the trial) valued the PSS fund at $636,013. The wife sought that this figure be adopted as the value, and that the parties' superannuation be "equalised" by reference to it.

13. The husband's position as to the value of his superannuation interest which should be adopted by his Honour shifted during the course of the proceedings. Ultimately, he adopted a primary position and a secondary position:

1. The husband's primary position was that the value of the PSS fund for s 79 purposes, should be as at the time of separation (that is, about $386,000), and that the wife should not share in any increase postseparation.

2. The secondary position was that, for s 79 purposes, the agreed value of the PSS fund of $578,309 as at November 2015 should be adopted, minus $66,100 – that is, $512,209.

14. The secondary position refers to an agreed value as at November 2015 whereas, as has earlier been mentioned, the wife sought to rely upon a value as at November 2016. The latter was ultimately adopted by his Honour. As will be seen, the introduction of evidence from the wife's expert as to that value is the subject of challenge by the husband. The amount of $66,100 referred to in the 'secondary position' is "the portion of the Family Law value of the [husband's interest] ... attributable to the husband making contributions at the rate of 10% of salary, rather than 2% of salary, over the period from 20 November 2012 to 20 November 2015".[7]

15. Separate from his contentions as to the value of his interest, the husband opposed the making of any splitting order and sought that any imbalance in the entitlements of the parties be adjusted from non-superannuation assets.[8] The husband's position was taken into account by his Honour (at [3] and [38]), but rejected.

16. His Honour made a splitting order reflecting the wife's contentions; the intention clearly being to leave the parties with an equal amount in their respective superannuation funds (at [89]).

The Nature of the parties' superannuation interests

17. Speaking generally, where the superannuation interests of both parties to family law proceedings are accumulation interests, few difficulties are usually encountered. However, an accumulation interest in the growth phase (as held by the wife in this case) and a defined benefit interest in the growth phase (as held by the husband in this case) differ in several important respects.

18. Those differences include the method by which the ultimate benefit is calculated; the risk to the member inherent in each and, very importantly, the effect of a s 90XT(1)(a) order (an order which allocates a base amount to the non-member spouse). Each and all of those differences can, and very often do, have a dramatic impact upon the justice and equity of a proposed splitting order and, in turn, its place within just and equitable orders for settlement of property.

19. The FLA provides, relevantly, for splitting orders to be made with respect to when splittable payments become payable — that is, when the member spouse satisfies a condition of release. The FLA does not provide for the underlying superannuation interests themselves to be split. That work is left, in the more usual course, to Part 7A of the Superannuation Industry (Supervision) Regulations 1994 (Cth) ("SIS Regulations"). The SIS Regulations allow the creation of a new superannuation interest in the name of the non-member spouse such that their interest is separated from the interest of the member spouse within the fund. Finality in the financial relationship of the parties, as required by s 81 of the FLA, occurs through a combination of both the FLA and the SIS Regulations.

20. Crucially, however, defined benefit funds[9] are not regulated by Part 7A of the SIS Regulations.[10] It is therefore fundamental to a consideration of any proposed splitting order that the Court consider the governing rules of such funds contained within their specific trust deeds. It is those rules which will determine the effect of any splitting order on the underlying interest within that particular fund. As an example, within a defined benefit fund the fund's rules can dictate that a splitting order has significant effects on the formula by which a member's ultimate entitlement is calculated.

21. The PSS fund is established by the *Superannuation Act 1990* (Cth) ("the Super Act"). Section 4 of the Super Act establishes the Public Sector Superannuation Scheme Trust Deed ("the PSS Deed") which governs the PSS fund. Part 16 of the PSS Deed is entitled, and governs, "Family Law Superannuation Splitting". It is the PSS Deed, and Part 16 in particular, to which specific regard must be had before it is possible to determine the effect of any splitting order made applicable to the husband's superannuation interest.

22. By reason of the matters just discussed, it is an error both to fail to consider the specific requirements and ramifications of the PSS Deed's provisions and to assume that the effect of a s 90XT(1)(a) order upon the husband's defined benefit interest is the same as it would be if the husband held an accumulation interest. It is also an error to assume that the effect of a splitting order for the non-member spouse is the same as it would be in respect of an accumulation interest.

23. The terms of the scheme-specific PSS Deed will dictate the variables by which the husband's present and future benefit will be calculated subsequent to any mooted splitting order. So, too, the PSS Deed will dictate the nature, form and characteristics of the interest which the wife will

acquire subsequent to any such order. The justice and equity of any proposed splitting order cannot be considered without reference to both. Axiomatically, those matters are crucially relevant considerations in the exercise of a trial judge's discretion in the making of a splitting order.

24. In addition, those same matters can have an impact, and will usually need to be considered, in the exercise of the broader discretionary considerations once the proposed splitting order takes its place among any other orders to be made pursuant to s 79(4).

25. The nature, form and characteristics of the interests held by each of the parties consequent upon the proposed splitting order; the future benefits for each party upon vesting; when the respective interests might vest and the form in which any benefits might (or must) be taken at that time, are all likely to be relevant in assessing the s 75(2) factors. As an example, in this case the husband asserts before this Court that the splitting order made by his Honour restricts the amount he can contribute from salary and, thereafter, his ultimate potential benefit.[11]

The Absence of evidence and elucidation of the relevant issues

26. Despite the fundamental issues inherent in the different types of interest held by each of the parties in this case, no specific evidence led before his Honour, including any expert evidence, sought to highlight and explain those differences and their ramifications.

27. The husband asserted before this Court[12] that the Rules of the PSS fund were annexed to his affidavit in the proceedings before his Honour. They were not. What was annexed is a print out of a webpage from the PSS fund government website, providing members with general information about the PSS fund.

28. While each of the parties adduced expert evidence before the trial judge, their respective short reports express opinions solely on the value of the parties' respective superannuation interests by reference to the relevant statutorilymandated valuation methodology.[13] Neither expert provided an opinion on the nature, form and characteristics of the husband's superannuation interest nor how any splitting order sought by the wife (or any other splitting order) might impact upon that interest.

29. The husband told this Court that he had: "asked them directly personally and they declined to do that because they said ... 'there are legal implications to this and we are counting [(sic) accounting] experts, but we are not legal experts'".[14] Later, the husband said he had "asked them both individually" and that he was "very concerned" about the effect of a splitting order and he had "tried to get expert advice, but I couldn't get it from anyone".[15]

30. If that be the fact, it does not remove the necessity for the Court to have evidence directly relevant to a determination of a central issue before it. Whether or not the particular experts were not prepared to, or qualified to, provide that evidence, it is by no means true to assert that it is not otherwise available; the daily experience of both first instance courts, and of this Court, plainly indicates otherwise.

Discretionary Error

31. A conclusion that the absence of evidence crucial to determining the justice and equity of the splitting order (and the s 79(4) orders more broadly) is a discretionary error should also be informed by a conclusion that the appeal should be allowed notwithstanding that his Honour sought to determine the case on the issues and evidence as presented by the parties and in doing so gave, with respect, comprehensive reasons.

32. The fact that particular considerations apply to defined benefit interests is, or should be, notorious as is the fact that the effects of splitting orders on those interests are fund-specific. While the PSS fund Rules were not otherwise referenced or expanded upon, nor the subject of expert evidence, a link to those Rules was contained in a Family Law Information document attached to an annexure in the husband's affidavit. As has already been said, the Rules are contained in the PSS Deed which is a statutory instrument and publicly available.

33. Where a trial judge is, or should be, aware that evidence of matters central to the task of doing justice and equity is not before the Court, the relevant rules of court contemplate receiving that evidence. The Federal Circuit Court Rules 2001 (Cth) ("the FCC Rules") contemplate the Court calling evidence on its own motion[16] and, specifically, contemplate the Court of its own motion appointing an expert to prepare a report.[17]

34. In short, the obligation to arrive at a judicial determination that a proposed splitting order is just and equitable includes an obligation to seek evidence in respect of matters plainly in issue and relevant, but where evidence is lacking.

35. Against that background, the warrant for appellate intervention arises because the single most significant consideration in seeking to achieve justice and equity in an alteration of the parties' superannuation interests and, in turn, s 79 orders as a whole, is the nature, form and characteristics of the particular interests involved and what consequences and effects flow from the same.[18] The relevance of those matters is measured by the fact that a decision about justice and equity cannot be made without a consideration of them.

36. Despite the difficulties confronted by the trial judge, this is, in our view, a case where it can plainly be said that "having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error".[19]

37. His Honour made no mention of the nature, form and characteristics of the parties' respective interests in superannuation. There is no reference in the reasons to the wife having superannuation interests of one type and the husband having a superannuation interest of a very different type. His Honour did not refer to the husband's interest being a defined benefit interest governed by scheme-specific rules. His Honour also made no mention of the potential effect/s of any proposed splitting order upon the husband's interest or, indeed, upon the interest that would be created for the wife by reason of the splitting order to be made.[20]

38. Further, his Honour's reasons do not contain any finding, or other reference, from which it might be inferred that his Honour was aware of, and considered, any of those matters.

39. The error the subject of Grounds 28 and 29 is established.

The Husband's post-separation contribution to the superannuation "pool"

40. Grounds 19 and 20 are in these terms:

19. The learned Trial Judge erred in discounting the evidence filed by both parties (Applicant's Affidavit filed 20 September 2016) as the "Joint Statement of Experts" signed by Mr Q on instructions from husband and Mr E on instructions from Wife.

20. The learned Trial Judge erred in failing to consider in his determination of the superannuation pool contributions and distribution that "Mr Q and Mr E agree that the amount of $66,100 is the portion of the Family Law value of the husband's PSS superannuation interest that as 20 November 2015 that is attributable to the husband...".

41. The Joint Statement of Experts, having corrected an error made by the husband's expert, agreed that:[21]

> ...the amount of $66,100 is the portion of the Family Law value of the husband's PSS superannuation interest as at 20 November 2015 that is attributable to the husband making contributions at the rate of 10% of salary, rather than 2% of salary, over the period from 20 November 2012 to 20 November 2015.

42. That is, the experts apparently agree that the husband made a direct financial contribution that had the direct result of increasing the "amount" of superannuation derived by the statutorily-mandated calculation between separation and the date of their statement.
43. His Honour does not make specific reference in the reasons to this amount nor to its primary importance to the husband's case. There can be no doubt that it occupied such a place. The only apparent reference to the same in his Honour's reasons is to be implied from [43], where his Honour says:

> I am satisfied that it is appropriate in the circumstances to include the value of the [husband's] post-separation contribution as to superannuation in the assets pool. I accept the submission that the wife's actions amount to a contribution towards the husband's ability to accumulate superannuation both during the marriage and post-separation.

44. Apparently specific to this paragraph of the reasons, Ground 27 also contends:

> The learned Trial Judge erred in failing to nominate or exemplify which of the "wife actions amont to a contribution towards the husband's ability to accumulate superannuation... post-separation" (paragraph 43.)
>
> (As per original)

45. That ground and the arguments that attend it assume, wrongly, that the only contributions that should be considered are direct financial contributions. The husband makes no mention of the fact that, in the paragraphs preceding [43], his Honour found, for example:
1. The wife had the care of the two youngest children after separation (at [15]);
2. The wife incurred rental and relocation expenses when she vacated the former matrimonial home (at [15] and [55]);

100. The wife continues to pay $275 per week towards the living expenses of one of the daughters residing in Sydney (at [33]);

4. The wife has paid telephone expenses for all four children in the amount of about $33.75 per week (at [33]);
5. The husband's income reduced by about $20,000 without explanation and resulting in a reduction in his child support payments (at [34]);
6. The wife's evidence was that "since separation she has met the vast majority of the extra-curricular and co-curricular and health expenses of the children ... in addition to contributing to

their living expenses and paying health insurance for them from the date of separation" (at [35]); and

7. The wife's evidence was that "she has paid $66,986.24 towards the expenses for all four children, excluding health insurance" (at [35]).

46. The specific error contended for in Ground 27, and contentions made to similar effect in respect of other grounds, exemplify contentions by the husband that seek to attach predominant importance to direct financial contributions and to ignore contributions made, for example, to the welfare of the family. In that respect, the notion that "the contribution of the homemaker and parent ceases upon the separation of the parties" involves "a serious misreading of s79(4)(c)"[22] and all the more so because the assessment of contributions is "a matter of judgment and not of computation".[23]

47. The statements of principle just referred to are made within the context of global assessments of contributions. Here, his Honour determined to assess contributions by reference to the so-called "two pools approach". That approach recognises explicitly that the interests in property in one "pool" have a different nature, form and characteristics from the superannuation interests in the separate "pool" (which are to be treated as property: s 90XS(1) of the FLA). Contributions of all types made by each party across the entire relationship, including in the post-separation period, must be assessed. Equally, however, the contributions made by each of the parties to the superannuation "pool" might be of a different nature and have different characteristics from those made by the parties to the property in the other "pool".

48. Within that rubric where, as here, one of the superannuation interests in that "pool" is a particular defined benefit interest, the particular form and characteristics of that interest will often however demand particular attention being paid to the effect of particular direct financial contributions. How those contributions might be weighed and assessed is, of course, ultimately a matter of discretion, but it must be apparent that a trial judge is cognizant of, and has considered, contributions that have particular relevance to an interest of that type.

49. Here, the Joint Statement of Experts made clear that the direct financial contributions made by the husband had a direct impact upon specific variables which in turn impacted directly on an increased value of the fund. The relevant values were derived statutorily for the specific purpose of family law proceedings.[24]

50. It may well be that, having considered that specific direct financial contribution and its specific effects, his Honour considered other contributions by the wife to be of equal or greater importance within an "holistic" assessment of contributions across the entire relationship up to trial. But, without any reference at all to the particular nature of the husband's interest; the specific evidence about the increase in the value of that fund; the derivation of that increase; and any specific comparison between that contribution and specific contributions made by the wife, a consideration of those highly relevant matters cannot be implied from what was said at [43] of the reasons. There is otherwise nothing within his Honour's reasons to suggest that consideration has been given to these highly relevant matters.

51. Grounds 19, 20 and 27 also have merit.

Other asserted errors in relation to the superannuation "pool"

52. Grounds 25 and 26 also assert specific errors that might be seen to embrace issues similar to those just discussed. To the extent that they do otherwise, they are no more than challenges to

the attribution of weight or proceed on the erroneous premise that the assessment of contributions is a mathematical or accounting exercise, which it is not. To that extent they have no merit.

THE WIFE'S EXPERT REPORT AND PROCEDURAL UNFAIRNESS

53. Grounds 21 to 24 assert various errors relating to his Honour receiving the updated valuation report of Mr E and, conversely, failing to rely upon the Joint Statement of Experts.
54. To the extent that those grounds as argued elucidate possible appealable error, they can be summarised as asserting that his Honour failed to accord the husband procedural fairness in relying on the November 2016 valuation report provided by Mr E.

The Circumstances surrounding receipt of Mr E's Report

55. At [29] his Honour said:

> At the commencement of the trial, the husband indicated that he did not wish to cross-examine the superannuation expert, [Mr E]. His dispute is not with Mr E's valuation, but rather, the husband submits that his postseparation contributions to superannuation should be excluded from the assets pool.

56. Later, his Honour says at [42]:

> The report of Mr E states that the [husband's] interest in the [PSS fund] was valued as at 11 November 2016. As I have noted, the husband chose not to cross-examine Mr E. The interest was valued by Mr E as being $636,013.00.
>
> (Footnotes omitted)

57. The husband contends that his Honour should have relied on a Report given by Mr E in November 2015 ("the 2015 Report"), the value of which was jointly agreed by the respective experts. The husband asserts that his Honour's reliance upon the November 2016 Report ("the 2016 Report") is procedurally unfair to him because:
1. The 2016 Report failed to disclose the Form 6 information and was not verified by an affidavit from Mr E;
2. His Honour should have specifically identified that he was referring to the 2016 Report, when he asked the husband whether or not he disputed the 2016 Report and wished to cross-examine Mr E;

100. The 2016 Report had not yet been prepared when the husband was first asked by solicitors for the wife if he wished to cross-examine Mr E.

58. The husband is correct in asserting that the updated Report did not annex a Form 6 and was not itself annexed to an affidavit of Mr E. Rather, the 2016 Report was annexed to the wife's affidavit. Notably, the 2015 Report, which the husband sought to rely on, was presented in the same way. The

(self-represented) husband did not object to the 2016 Report being received as evidence at trial, nor, earlier, to the 2015 Report being introduced as evidence in that fashion.

59. The events which follow, all leading up to the 2016 Report being introduced as evidence at trial, are central to the husband's challenge.

60. On 8 November 2016 the wife, through her solicitors, enquired of the husband whether he required Mr E for cross-examination at the trial which was to start two weeks later. The husband did not ever respond to that letter. The question of whether the husband required Mr E was not re-addressed until his Honour posed the question on the first day of trial (23 November 2016).

61. It is important to understand that, at no time prior to 16 November 2016 at the very earliest, was there any reason why the husband would reasonably want to cross-examine Mr E. The value of his superannuation interest had been earlier agreed and, crucial to the case which the husband sought to run at trial, the experts had also agreed to a figure representing the increase in the amount of the husband's interest said by him to be attributable to his post-separation contributions to it.

62. If there was an ostensible reason for the husband to cross-examine Mr E, it presented itself only after the wife had obtained and served an updated value of the husband's interest — something that had not been agreed.

63. The wife requested that update on 15 November 2016. Notably, that was one week after the enquiry had been made as to whether Mr E was required for cross-examination and a week prior to the commencement of the trial. There is no evidence of any further enquiry having been made of the husband after the obtaining of the new valuation, nor does the record reveal that the obtaining of that valuation was foreshadowed to him.

64. Mr E's updated valuation was annexed to an affidavit of the wife filed one week prior to the start of the trial. The record does not indicate when it was served. However, the wife's written submissions on the appeal assert that the husband received the affidavit about a week prior to trial. That is not specifically contested by the husband. Both that affidavit filed on 16 November 2016 and the wife's Case Outline filed on 22 November 2016 refer to the updated value when setting out the wife's contentions as to the parties' respective superannuation interests and the values for which she contended.

65. The husband filed an affidavit on 20 November 2016 that is not in its terms responsive to the wife's affidavit filed four days previously. However, noting the wife's contention that the husband received her affidavit about a week prior to the trial, the husband's Case Outline filed on the first day of trial appears to be a "copy and paste" version of the wife's Case Outline but substituting the figures for which he contended (relevantly, the 2015 valuation of his superannuation interest less the $66,100).

Is there injustice to the husband?

66. The fact that a self-represented party receives an updated expert's report (apparently without prior notice) a week prior to the commencement of a trial and after he had been asked whether he wished to cross-examine that expert on a report that had informed an agreed statement of experts, raises real concerns about procedural unfairness. We are not, however, persuaded that injustice is demonstrated.[25]

67. The husband was asked at the commencement of the trial whether he wished to cross-examine Mr E. It is true that his Honour did not at any time refer specifically to the updated

valuation when that question was posed. But, on any view, it was plain that the wife was relying upon the 2016 value. The form of the husband's Case Outline earlier referred to pertains.

68. The husband's case was that the agreed earlier value should be taken to be the value of the interest (less the $66,100 which was, in turn, an agreed figure). The husband, although self-represented, is plainly intelligent and evidences a good lay understanding of his superannuation. He sought to litigate issues before his Honour which remained the same both before and after the 2016 value was obtained.

69. The value of the interest at trial was obviously central to the dollar value of the order ultimately made, but that value did not impact upon any aspect of the husband's case. The updated valuation did not provoke the necessity to obtain or call any evidence identified by the husband. The updated value was derived through the application of a scheme-specific formula the components of which are not in issue and with which the husband's own expert had earlier agreed.

70. Counsel for the wife correctly indicated to his Honour that the valuation issue was a matter for submissions, the parameters of which had not been altered by the 2016 value.[26] The submissions sought to be advanced by the husband were not at all impeded by the updated valuation nor was it suggested that it should impact at all upon those submissions.

71. No error embraced by Grounds 21 to 24 is established.

THE ASSERTED SALARY SACRIFICE AND CHILD SUPPORT ERRORS

72. Grounds 14 to 16 relate to asserted errors premised on an assertion that his Honour found as a fact that the husband had salary sacrificed into superannuation thereby reducing his taxable income. It is said his Honour erred as a consequence in taking into account a consequently reduced liability for child support.

73. It is convenient to quote Ground 16, the terms of which are instructive (and, indeed, illustrative of many of the grounds of appeal as drafted):

> The learned Trial Judge erred in failing to consider the evidence and recognise that the Child support Agency (CSA) is the sole Authority in establishing the child support needs in the best interest of the children, that the CSA made the determination of the child support contributions that the husband was required to make, that the husband fulfilled entirely his obligations accordingly, and that the CSA investigated the complaint from the wife in 2013, based on full disclosure that the husband provided in relation to salary sacrifice and taxation, and based on full access to the husband's personal information provided to the CSA by the Taxation Office, the [Government] Pay Office and the SmartSalary.

74. In his trial affidavit, the husband annexed (apparently without objection) a copy of a page from the PSS fund's website, which contained the following information:

. Members "can contribute between 2% and 10% ... of [their] super salary, or at a 0% rate".

. Members' "contribution rate is based on [their] gross fortnightly salary and is deducted from [their] **after-tax** pay.

. Members' "Benefit Multiple (part of the set formula to determine [their] PSS benefit) accrues according to [their] rate of contribution. It actually grows each fortnight with each contribution [the member is] due to make".

. "**Salary sacrifice contributions** into PSS are **not allowed** under the scheme's rules".

(Emphasis added)

75. Two payslips attached to the husband's trial affidavit (one dated 2006 and the other dated 2010), and the payslips which the husband disclosed pursuant to orders made by his Honour on 28 September 2016, make clear that the husband's personal contributions came out of the husband's **after-tax** fortnightly payments.

76. His Honour referred to the wife's case, relevantly, in these terms:

34. On the [wife's] case, the [husband] had reduced his liability for making child support payments by making voluntary contributions towards his superannuation entitlements and leasing two motor vehicles as part of his salary package. By way of illustration, the [wife's] trial affidavit asserts that in March 2013, the [husband] had an income for child support assessment purposes of $120,915, whereas her income was $107,502. Because of measures taken by the [husband] to reduce his level of income, at the end of October 2015, his income was assessed as being $99,005. As far as the [wife] is aware, the [husband] has since separation remained employed in the same position. This was not disputed by the [husband].

35. The trial affidavit of the [wife] includes a detailed schedule of child support assessments made since separation. It also includes a table of the log for minimum payments between February 2013 and October 2015 and a further table as to the actual payments she says the [husband] has made. I will not set those tables out here. On her case, between 26 February 2013 and 28 October 2015, the [husband] had paid $3,985.76 less than the required minimum payments during that time. The [wife] says that since separation she has met the vast majority of the extra-curricular and co-curricular and health expenses of the children. This is, she says, in addition to contributing to their living expenses and paying health insurance for them from the date of separation. In total, minus health insurance, to the date of swearing her trial affidavit of April 2016, her evidence is that she has paid $66,986.24 towards the expenses for all four children, excluding health insurance but including some amounts expended for the children after they have attained the age of 18 years. During the corresponding period, she asserts that the [husband] has made only one payment of $491 towards the children's needs and this related to dental expenses.

77. Importantly, however, his Honour referred to the husband's evidence in these terms at [39]:

> In [the husband's] summary of argument, he asserts that he accumulated over half of his superannuation since separation, as opposed to the wife, the majority of whose entitlements were accumulated during the marriage. He submits that his higher superannuation accumulation was as a result of contributing 25% of his after tax salary into superannuation. He submits that he has limited time in which to further accumulate superannuation.

78. It is clear both that the wife had no evidentiary foundation for asserting that the husband salary sacrificed into superannuation and that he could not have done so even had he wanted to. Equally clearly, and contrary to the husband's assertion, his Honour did not make a finding that he had done so.

79. As the terms of Ground 16 effectively concede, and as the evidence before his Honour plainly revealed, the husband did salary sacrifice, albeit not into superannuation. The evidence before his Honour also revealed that the husband's taxable income was reduced as a consequence of his salary sacrificing and, as is clear from the relevant legislative provisions, his reduced taxable income reduced his formula-dependent child support obligations accordingly.

80. Undisputed documentary evidence revealed that the husband's taxable income had reduced by some $20,000 per annum in the post-separation period. Despite the husband's protestations to the contrary, the criticism by his Honour of his disclosure and the relevant consequential findings is each warranted. For example, payslips ultimately disclosed by the husband had been redacted by him. The obligation of disclosure in financial proceedings is ongoing, including up to the point when orders are made.[27] Equally importantly, as authority has consistently emphasised, disclosure must be both "full and frank".[28] It is for that reason that, additionally, the premise for Ground 18, which asserts that his Honour "erred in ordering ... further disclosure on personal use of his salary based income" is wrong and the ground unsustainable.

81. The fact that, as the husband asserts, his child support assessment was correctly made by reference to his taxable income does not derogate from the point being made by his Honour. His Honour was entirely correct in finding that the husband's child support assessment, reduced by reason of the husband's taxable income having been reduced, was directly relevant to an assessment of the contributions made by both parties in the post-separation period and, indeed, to an assessment of the s 75(2) factors.

82. Grounds 7 to 9, which refer to car lease payments, assert an effectively identical error and should be rejected for the same reason. The fact that, as the husband argues, cars were always leased during the relationship has no bearing on his Honour taking into account the entirely relevant consideration that by (an unsatisfactorily-disclosed) salary sacrifice, which apparently involved or included car leases, the husband reduced his taxable income and child support assessments accordingly.

83. No error is established in respect of Grounds 7 to 9; 14 to 16; and 18.

84. Ground 17 would appear to be directed to the same, or directly related, issues. Again, its terms are illustrative of the comment made at the outset of these reasons as to the grounds more generally:

> The learned Trial Judge erred in failing to consider the evidence that in the Divorce Order dated Friday 03 Oct 2014 at paragraph (5.) that: "The Court by order declared that it was satisfied that the only child /children of the marriage who has/have not attained the age of 18 years is/are the child/children specified in the order and the proper arrangements in all circumstances have been made for the care, welfare and development of the child/children" and that no financial case or financial litigation were raised by either party in relation to the children's care that should impact on a determination in this property settlement case.

85. This ground appears to assert that, because a court was satisfied that proper arrangements had been made for the children for the purposes of a divorce order and his Honour failed to mention the same, his Honour failed to take account of a relevant consideration.

86. The ground has no merit.

THE REMAINING ASSERTED ERRORS IN THE PROPERTY ORDERS

87. The remaining grounds of the husband's appeal pertaining to his Honour's orders for settlement or property raise no issues of principle or injustice. They will be dealt with briefly.

88. The Full Court said in *Trask & Westlake*:[29]

> The distinction between, on the one hand, a trial judge making a finding without an evidentiary foundation or failing to take account of a relevant matter and, on the other hand, failing to accord sufficient weight to a relevant matter is extremely important: as to which see the often-cited passage of Stephen J in *Gronow v Gronow* [1979] HCA 63; (1979) 144 CLR 513 at 519. Great care should be taken in making assertions of the former type when, in truth, the assertion is the latter. The former assertion ought not be made unless the reasons reveal the omission complained of.

89. It is also important to emphasise that a trial judge need not refer to every piece of evidence in coming to his or her discretionary conclusion and nor need the same be reflected in the reasons. Rather, the obligation is to consider all of the evidence and to explain which of that evidence is materially relevant to the discretionary conclusion. The task of an appellant is not to identify matters to which he or she would have preferred the judge to consider or give greater or less weight; rather it is to show that what was not considered was **materially** relevant to the exercise of the discretion or that a matter which was considered was **materially** irrelevant to that conclusion.

90. The grounds, and the submissions of the husband, subject his Honour's reasons to an almost line-by-line analysis and, despite the terms in which the husband's contentions are expressed, seek to highlight what are no more than assertions that his Honour should have taken a different view of the evidence than he did or should have attached more or less weight to evidence than what he did.

91. Grounds 2, 3, 4, 5 and 6 each fall into that category. Each has no merit.

92. Other grounds assert, in terms, a failure to consider relevant considerations but, in reality, are contentions as to the attribution of weight.

93. Examples are Grounds 10 and 11. The former contends that his Honour failed to take into account the unfinished state of a piece of real property at the time of separation and erred in his finding as to the estimated value of the wife's equity in that property at the time of marriage. Ground 11 asserts that his Honour failed to take into account that the mortgage over that real property was serviced solely by the husband between 1994 and 1996 and for one year by the wife prior to the parties' marriage.

94. To repeat, his Honour's reasons are comprehensive and exhibit, with respect, close attention to the evidence. The issues the subject of these grounds were of marginal relevance to the holistic assessment of contributions required to be made by his Honour in the context of a period of 24 years between cohabitation and trial.

95. Paragraph 1 of the husband's Summary of Argument (which appears to be directed towards providing further clarification on Ground 1 in the husband's Notice of Appeal) contends:

> The learned Trial Judge erred in exercising his discretion outside the bounds outlined with clarity by the litigants at the trial, and the decision to apportion a 60:40 division of the non-superannuation assets of the parties in favour of the wife is *plainly wrong* and *exceeds the reasonable exercise of discretion*.
>
> (As per original)

96. The "bounds" which the husband says limits the exercise of his Honour's discretion, are those contained in each parties' proposals.[30] The husband asserts that those proposals dictated the possible range of outcomes available to his Honour in making a decision. That is plainly incorrect.

The Court's discretion must be informed by the relevant statutory considerations but is otherwise at large. The discretion is in no sense fettered by the parties' proposals.

97. Ground 2 of the husband's Notice of Appeal asserts that his Honour failed:

> ... to assess holistically all contributions under Section 79 of the Family Law Act (Full Court in Petruski & Balewa [(2013) 49 Fam LR 116]), erred in failing to evaluate on merit the extent of the contributions of all types made by each of the parties in the context of a long marriage of 19 years, and erred in failing to acount for the effect of the independent financial decisions and contributions made by the parties on the asset pools over the extended four years litigation period since separation.
>
> (As per original)

98. In truth, the ground and its attendant arguments assert no more than that his Honour did not accept arguments advanced by the husband. It is sufficient to say that his Honour's discussion of the parties' evidence and contributions is, with respect, detailed and sound.

99. We had difficulty understanding the error asserted by the husband in Ground 12. In his oral submissions before us we sought to clarify the error asserted, and the husband submitted that "[t]he complaint is that if the liabilities listed for the house, the value of the house should be listed as well".[31] The house referred to is a property purchased by the wife after separation using funds received from a partial property settlement. At [44] of his Honour's reasons it can be seen that both the partial property settlement and mortgage secured over the property were included in "the property of the parties to the marriage or either of them". It can also be seen at [104] to [106] that the mortgage was attributed solely to the wife and not borne by the husband at all. We can see no error in his Honour's approach.

100. Ground 13 asserts that his Honour "erred in the interpretation of the [wife's] statement at paragraph (32.) in the Reason for Judgement (sic)". That paragraph states:

> The orders made for the sale of the property included that it be professionally cleaned at the joint expense of the parties. The [wife] says that the [husband] refused to contribute towards the cost and that as a result she incurred an expense of $1,000.

101. The husband does not elaborate on this ground in his submissions. The wife's trial affidavit appears to agree with that paragraph of his Honour's reasons. In any event, the amount referred to is so small in the scheme of things as not to warrant further consideration.

THE PRIMARY JUDGE'S ORDER FOR COSTS

102. Ground 30 asserts error in his Honour's conclusion that the husband should pay the wife's costs in the amount of $11,889.

103. His Honour's order comprises the total of three separate orders for costs directed in turn to interim orders made in the course of the proceedings. The first relates to what was found to be the husband's unreasonableness in respect of orders for sale of the former matrimonial home; the second relates to an application for an order described as "interim property settlement" in which the husband was wholly unsuccessful and the third relates to further disclosure in which, again, the husband was wholly unsuccessful.

104. His Honour was plainly aware of the "general rule" prescribed by s 117(1) of the FLA and of the need to find circumstances justifying the making of an order for costs. His Honour 's reasons for ordering costs can be seen summarised at [116] of the reasons:

> As a general rule, parties to proceedings under the *Family Law Act* must bear their own costs [*Family Law Act 1975* (Cth) s 117(1)]. However, if the Court is of the opinion that there are circumstances justifying it doing so, it may, subject to subsection (2A) make such order as to costs as it considers just. Section 117(2A) relevantly requires the Court to have regard to the financial circumstances of each of the parties and the conduct of the parties to the proceedings including the approach they have taken to discovery and whether the proceedings were necessitated by a party to the proceedings to comply with the previous orders of the Court. Finally the Court must take into account whether a party to proceedings has been wholly unsuccessful in the proceedings. The term proceedings includes an incidental proceeding in the course of or in connection with the overall proceedings [*Family Law Act 1975* (Cth) s 4]. I have considered the application for costs having regard to the matters identified in s.117(2A). I am satisfied that the opposition of the [husband] to the perfectly orthodox approach proposed by the wife for the sale of the former matrimonial home was unreasonable and caused her to incur unnecessary costs. I am satisfied that the [husband] unreasonably opposed the orders sought by the wife for partial property settlement and caused her to incur unnecessary costs. I am satisfied that the approach of the husband to disclosure and discovery was little short of obstructive. It caused the wife to incur unnecessary costs. He was wholly unsuccessful in his opposition to each of those applications.

105. Nothing to which we have been taken by the husband suggests any error having been made by his Honour. The orders were each justified for reasons which his Honour gave. No error in the exercise of the discretion is established.

CONCLUSIONS AND ORDERS

106. The form of his Honour's orders saw each of the parties retaining property in their respective ownership or possession; a cash sum payable from the proceeds of sale of the former matrimonial home being paid to the husband and the balance of proceeds paid to the wife. Separately, as has been seen, a splitting order was made in respect of the husband's superannuation interest. We consider that error attends the assessment of contributions applicable to the latter.

107. However, as we have sought to explain, that error, which pertains to the nature, form and characteristics of the husband's superannuation interest, has ramifications for the totality of the s 79 orders. A consideration of the same impacts potentially upon any splitting order but also, by reason of the schemespecific provisions in respect of any splitting order, upon an assessment of the relevant s 75(2) factors.

108. As a consequence, both paragraph 2 of his Honour's orders and paragraph 1(a) of those orders must be set aside.

109. In light of our conclusion that his Honour was not favoured with evidence as to the ramifications of the proposed, or any, splitting order, it is not possible for this Court to contemplate re-exercising the discretion; the evidence before us does not permit of that outcome. Unfortunately for the parties, the matter must be remitted for rehearing.

110. We see no reason why the remitted proceedings cannot be reheard by Judge Heffernan. Indeed, it might be thought expeditious that his Honour does so. However, our orders will leave that issue for the Federal Circuit Court of Australia.

111. We hasten to point out that nothing we have said suggests that any different splitting order, or other order, must necessarily be made. Rather, the parties' respective contentions must be seen in light of evidence that permits a court to understand the effects for both parties of any splitting order and the ramifications of the same within a consideration of s 79 as a whole.

112. We also point out that his Honour did not separately order that the husband pay the wife's costs in the amount awarded but, rather, deducted the same from the cash amount otherwise ordered to be paid to the husband. Thus, there is no specific order for costs made by his Honour which can be preserved specifically by the orders we make. However, we make it clear that the wife should receive $11,889 in costs in accordance with his Honour's orders independently of any orders for settlement of property made upon the remitter.

THE HUSBAND'S VARIOUS APPLICATIONS IN AN APPEAL

113. Prior to the appeal, the husband filed three Applications in an Appeal. The first sought to adduce further evidence on appeal; the second sought leave to file the husband's Summary of Argument in the appeal (which was five minutes out of time); and the third sought that orders made by Strickland J on 8 August 2018 be set aside.

114. There was no objection to the husband filing his Summary of Argument and this Court indicated its intention to make an order allowing the application accordingly.

115. Subsequent to the hearing of the appeal and while this judgment was reserved, the husband filed a further Application in an Appeal seeking to adduce further evidence.

Application Filed 14 August 2018

116. An application filed by the husband on 14 August 2018 sought to adduce further evidence in the appeal. The evidence sought to be adduced is listed at paragraph 9 of the husband's supporting affidavit and includes the following documents:

1. The wife's "personal bookkeeping notes of expenditure" between 2002 and 2006 referred to at paragraph 26 of his affidavit filed 20 November 2016.

The husband's affidavit refers to him seeking to adduce those documents at trial, but there was no attempt to have them read before the trial judge.

2. "Draft orders 26 March 2015 – Handwritten by ... solicitor for the Applicant Wife case ADC1674 of 2014".

The orders which were actually made on that day were interim orders related to the sale of the former matrimonial home. Those orders were not appealed. The draft orders are said to be relevant to the husband's appeal against the costs orders made against the husband as referred to above. We cannot see how those draft orders are relevant to his Honour's determination as to the costs payable to the wife.

100. Transcripts of procedural hearings on various dates.

Again, the husband said that those transcripts were relevant "to the matter of costs awarded at the trial"[32] and that they clarified how the orders made on 22 November 2016 were arrived at. Again, we do not see how they are relevant to any issue on appeal and to the exercise of his Honour's discretion to award costs.

4. The husband's Tax Returns 2013-14, 2014-15, 2015-16.

The husband was ordered to provide his tax returns "for the financial years ending 30 June 2013, 30 June 2014 and 30 June 2015" on 28 September 2016 (nearly two months before the trial). The husband failed to do so and instead lodged Notices of Assessment. The husband said at trial that he understood the difference[33] and that "[t]hey were not available at that time".[34] Those tax returns are not attached to the husband's supporting affidavit. Furthermore, the husband says that the evidence is only relevant "to demonstrate that [his disclosure] was in full and there was no more information available".[35] We cannot see how any of those documents are relevant to the husband's submissions on the appeal, nor do they impact upon the matters already discussed.

117. The application also seeks leave to rely on a supplementary appeal book. We have made reference in these reasons to a Joint Statement of Experts which is contained in that supplementary book. However, that Joint Statement of Experts was annexed to the trial affidavit of the wife filed on 16 November 2016. That affidavit is contained in the appeal books.
118. The remaining documents are said to be relevant to the issue of costs. We have read each of those documents. Those documents do not elucidate anything beyond what his Honour already took into account in the making of costs orders against the husband, nor were they referred to by the husband during the course of his oral submissions in the substantive appeal.
119. The application must be dismissed.

Application Filed 24 August 2018

120. This application was dismissed at the hearing of the appeal with the formal order to be made and the reasons to be delivered within these reasons.
121. The application sought to set aside an order made by Strickland J, sitting as a Judge of Appeal, that the husband pay the wife's costs of and incidental to her Application in an Appeal filed 11 July 2018 and fixed in the amount of $5,000. That application by the wife sought security for costs in relation to the appeal and was ultimately dismissed by his Honour.
122. As was explained during the appeal hearing, any remedy the husband might have against that order lies in seeking special leave from the High Court; it cannot be the subject of the husband's application to this Court.
123. The application also sought that the husband's Application in an Appeal and Response to an Application in an Appeal both filed on 7 August 2018, and the wife's Application in an Appeal and accompanying affidavits filed on 11 July 2018, be adduced as evidence at the appeal hearing. That evidence is not relevant to any issue on the appeal.

Post-Hearing Application filed 4 October 2018

124. Following the appeal hearing, the husband filed an Application in an Appeal on 4 October 2018 and accompanying affidavit. That application and the consequent opportunity afforded to each of the parties to be heard in respect of it delayed the delivery of these reasons.

125. Subsequent to the filing of the application, an email was sent to the wife from the Appeals Registrar on 30 October 2018 asking for the wife to confirm receipt of that application and attaching affidavit. The wife confirmed that "correspondence was received 8th October". Orders were subsequently made setting out a timeline for the wife to file a response in respect of that application, and for the husband to file any further affidavit in response. Each of the parties filed their responses on 26 November 2018 and 10 December 2018, respectively.
126. The husband deposes that he sent an email to the family law unit of his superannuation fund on 22 August 2018 to "accord procedural fairness to the trustee" in relation to the orders he seeks upon his appeal being successful and this Court re-exercising for itself the relevant discretions.
127. Whatever else might be said about the appropriateness of the filing of the application or its merits, the determination of it only becomes necessary if this Court were to reexercise the discretion which, as we have indicated, this Court cannot.
128. The application must be dismissed.

COSTS OF THE APPEAL

129. Both parties were self-represented at the hearing of the appeal.
130. Despite that, the husband seeks an order for costs in the event of success contending that he incurred costs in the form of advice and assistance and also incurred relevant disbursements.
131. We are of the opinion that the circumstances do not justify an order for costs. The husband has enjoyed success in respect of some grounds but not in respect of most. The husband's success emanates from an error of the trial judge resulting from an absence of evidence put before him by both parties. The matters prescribed in s 117(2A) of the FLA do not otherwise justify an order for costs being made.
132. Each of the parties seek costs certificates pursuant to the provisions of the *Federal Proceedings (Costs) Act 1989* (Cth). The error is one of law; no order for costs is made by reason of the provisions of the FLA. It is appropriate to grant certificates.

I certify that the preceding one hundred and thirty-two (132) paragraphs are a true copy of the reasons for judgment of the Honourable Full Court (Strickland, Murphy and Kent JJ) delivered on 18 January 2019.

Associate:

Date: 18 January 2019

[1] The term used in the wife's submissions and by his Honour.

[2] The superannuation provisions referred to in this judgment are in accordance with the amendments made to the FLA pursuant to the *Civil Law and Justice Legislation Amendment Act 2018* (Cth).

[3] FLA ss 90XT(2)(a), 90XT(2A).

[4] There was a difference between the values given by the husband and wife to the wife's superannuation. The difference is negligible and not relevant to the issues on this appeal.

[5] There was a difference of about $109 between the value given by the wife's expert and the value given by the husband's expert. That difference is not relevant for the purposes of this appeal.

[6] Section 90XT(2)(a) of the FLA refers to an "amount" arrived at by the mandated method for calculating the same and for that amount to be ascertained before making a splitting order. The amount so calculated is taken to be the value for s 79 purposes (s 90XT(2A)). The value so arrived at may differ from values attributed to the interest using different methodologies for purposes other than the making of a splitting order. See more generally, *Welch & Abney* [2016] FamCAFC 271; (2016) FLC 93-756 at [31]*ff*.

[7] Joint Statement of Experts dated 6 June 2016 at paragraph 12.

[8] Husband's Case Outline filed 23 November 2016; Transcript, 24 November 2016, p 17 ln 5–34.

[9] See, definitions contained in the SIS Regulations reg 1.03AA; and the Family Law (Superannuation) Regulations 2001 (Cth) reg 5.

[10] See, reg 7A.04 of the SIS Regulations.

[11] Appeal transcript, 27 August 2018, pp 40–41. That specific assertion is not the subject of evidence and is used only as an illustrative example of issues that might arise.

[12] Appeal transcript, 27 August 2018, p 36 ln 18–42.

[13] The wife's expert, Mr E points out, and it is not disputed, that the PSS "has had a separate set of valuation factors approved under the *Family Law (Superannuation) (Methods and Factors for Valuing Particular Superannuation Interests) Amendment Approval 2003*".

[14] Appeal transcript, 27 August 2018, p 37 ln 34–40.

[15] Appeal transcript, 27 August 2018, p 38 ln 6–11.

[16] FCC Rules r 15.04; see also r 15.01.

[17] FCC Rules r 15.09. For an example of where a similar step was taken in Family Court proceedings involving a superannuation interest, see *Guthrie & Rushton* [2009] FamCA 1144.

[18] See, eg, *Perrin & Perrin (No 2)* [2018] FamCAFC 122; *Surridge & Surridge* [2017] FamCAFC 10;

(2017) FLC 93-757; *Welch & Abney* [2016] FamCAFC 271; (2016) FLC 93-756; *T & T (Pension Splitting)* [2006] FamCA 207; (2006) FLC 93-263; *Guthrie & Rushton* [2009] FamCA 1144; *Hayton & Bendle* [2010] FamCA 592; (2010) 43 Fam LR 602. See also the reference to the discussion by the Full Court in *Coghlan and Coghlan* [2005] FamCA 429; (2005) FLC 93-220 as to the "real nature" of the superannuation interest under consideration.

[19] *Allesch v Maunz* (2000) 203 CLR 172 at 180 [23] (Gaudron, McHugh, Gummow and Hayne JJ), citing *CDJ v VAJ* (1998) 197 CLR 172 at 201–202 [111] (McHugh, Gummow, Callinan JJ).

[20] In the PSS fund, an "associated preserved benefit": see, r 16.3.1 of the PSS Deed.

[21] Joint Statement of Experts dated 6 June 2016 at paragraph 12.

[22] *Ferraro and Ferraro* [1992] FamCA 64; (1993) FLC 92-335 at 79,568.

[23] *Garrett and Garrett* [1983] FamCA 55; (1984) FLC 91-539 at 79,372.

[24] Joint Statement of Experts dated 6 June 2016 at paragraphs 9 and 11.

[25] *Stead v State Government Insurance Commission* [1986] HCA 54; (1986) 161 CLR 141 at 145 (Mason, Wilson, Brennan, Deane and Dawson JJ): "not every departure from the rules of natural justice at a trial will entitle the aggrieved party to a new trial."

[26] Transcript, 23 November 2016, p 2.

[27] See, eg, *Tate v Tate* [2000] FamCA 1040; (2000) FLC 93-047 at [50]–[52] (Nicholson CJ, Kay and Waddy JJ).

[28] FCC Rules r 24.03. See also, *Weir and Weir* [1992] FamCA 69; (1993) FLC 92-338 at 79,593.

[29] [2015] FamCAFC 160; (2015) FLC 93-662 at 80,388 [21].

[30] See, eg, Appeal transcript, 27 August 2018, p 16 ln 15–19.

[31] Appeal transcript, 27 August 2018, p 33 ln 15–16.

[32] Appeal transcript, 27 August 2018, p 5 ln 21.

[33] Transcript, 23 November 2016, p 33 ln 1–12.

[34] Appeal transcript, 27 August 2018, p 6 ln 31–33.

[35] Appeal transcript, 27 August 2018, p 6 ln 5–7; p 7 ln 32–41.