RE-EXERCISE OF DISCRETION

62. We are persuaded for the reasons given earlier, that leave should be granted and the appeal allowed.

63. In the exercise of our discretion, we would permit the husband to rely upon another expert as it is established that there is another special reason for appointing another expert. Our reasons for finding that there is another special reason are:

(1) that as between the single expert and Mr D, they each have adopted an alternate methodology, which in part leads to a significantly different conclusion as to value;

(2) that there are matters known to Mr D that were not known to the single expert, which in part lead to a significantly different value; and

(3) that in circumstances where the wife seeks a cash payment and the husband will be left holding the properties, the consequences of the significant difference in value may more adversely impact the husband than the wife.

COSTS

64. Both parties sought a costs certificate pursuant to the *Federal Proceedings (Costs) Act 1981* (Cth) in the event that the appeal succeeded. Given that the appeal has succeeded on a question of law, such certificates are appropriate.

65. We will make orders accordingly.

[¶94-080] Kartal & Templeman
(2022) FLC ¶94-080
Medium neutral citation: [2022] FedCFamC1A 46
Federal Circuit and Family Court of Australia (Division 1) Appellate Jurisdiction at Newcastle
4 April 2022

Family law — Leave to appeal — Property — Where wife seeks leave to appeal against interim orders for sale of former family home and use of sale proceeds to pay off debt — Where wife seeks interim orders granting her sole ownership of home — Discussion of interim property distribution — Where orders are found to be interlocutory and not final — Where no sufficient error is demonstrated to warrant grant of leave — Leave to appeal is refused — Costs order is made against wife — Family Law Act 1975 (Cth), ss 45A, 60CA, 65AA, 75, 79, 114.

The husband and the wife were engaged in property settlement proceedings. The principal asset was the former matrimonial home, which was currently occupied by the wife and the parties' 2 children. The mortgage and other debts of the parties risked overwhelming the parties' net equity in the property. The wife sought interim orders granting her sole title in the property and allowing her to re-finance the mortgage by entering into a loan agreement with a relative. The husband opposed these orders and wanted the property sold.

Interim orders made in the Magistrates Court of Western Australia provide that the property be sold, and the sale proceeds used to pay off debt. The wife sought leave to appeal. She also argued that leave was not required because the orders were final, not interlocutory in nature.

The primary grounds of the wife's proposed appeal argued that:

- **The magistrate made several errors of fact, including as to the market value of the former matrimonial home. She wished to adduce further evidence on this matter.**
- **The magistrate erred in principle by making orders for the sale of the property because those orders usurp the wife's chance to make good on her application for final relief, whereby she sought sole ownership of the property.**
- **The orders were unenforceable or unjust because they lacked detail about the procedure and conditions of the sale.**

- **The magistrate erred by ordering the sale of the home without first being satisfied that the parties had the financial capacity to pay for suitable alternate accommodation for the wife and the children.**
- **The magistrate erred in the exercise of discretion by failing to take into account the effect of the orders on the children's mental health.**

Held: application for leave to appeal dismissed.

1. ''The wife considers the sale orders are final because their execution would preclude her from pressing her application for orders granting her sole proprietorship of the former family home at the upcoming trial. While it is true the sale orders render otiose her application for final relief in respect of the former family home, that consequence does not convert interlocutory orders into final orders.

The orders are not 'final' because they do not exhaust the Court's statutory power and are not dispositive of the parties' respective applications for relief under Pt VIII of the Act. The essence of finality is disposition of the justiciable dispute.'' [17], [18]

2. ''The wife contends she will suffer the substantial injustice of her enforced removal from, and deprivation of, the home in which she wishes to continue living with the children, but the argument is not as strong as she perceives. If the former family home is sold according to the orders, nothing stops the wife from purchasing the property on the open market with the aid of the same financial assistance she had envisaged using to privately acquire the husband's one-half share. While she would then experience the disadvantage of having to compete with other prospective purchasers, any price increase caused by such competition will be mollified by her receipt as a joint vendor of one-half of the increased capital gain.'' [22]

3. ''The more recent appraisals and valuations to which the wife referred were not produced until two business days before the appeal hearing. Even if they are accepted as being probative, such documents tend to prove the current value of the former family home is in the range between $1.2 and $1.35 million – similar to the value of $1.237 million for which the wife contended before the magistrate. The documents do not demonstrate any erroneous finding by the magistrate, nor gainsay the certainty of the expanding debt whilst ever the wife remains in occupation of the home without meeting the secured loan repayments.

The prime purpose of adducing further evidence in an appeal is to demonstrate appealable error and produce a different result (CDJ v VAJ (1998) 197 CLR 172 at [109], [111], [140]–[151] and [169]). Here, there is no error to correct because the magistrate abstained from making any finding or 'assessment' about the value of the former family home . . .'' [35], [36]

4. ''. . . nor did the magistrate fall into legal error by making the interim sale orders merely because they are contrary to the final relief for which the wife currently applies. The wife's application for interim relief was similarly repugnant to the form of property settlement relief ultimately sought by the husband, but she had no compunction about prosecuting it. The wife apparently identified no inconsistency in that situation.

To succeed in the appeal, the wife must establish some material error in the manner the magistrate determined the dispute; not just point to what she perceives to be the adverse consequences of an otherwise correct decision. The orders do no more than enable the current net value of the parties' interests in their most substantial asset to be extracted. The wife may yet still successfully prosecute her application for an ultimate entitlement to 70 per cent of the parties' assets and superannuation but, whatever proportional share she eventually acquires, it will not comprise the former family home *in specie*.'' [51], [52]

5. ''As can be seen, the wife's application entailed an interim adjustment of the parties' property interests, but the husband's did not. His application was merely facilitative of the parties' extraction of the net value of their existing equal proprietary interest in the former family home.

Since only the wife sought an interim order adjusting their property rights, she bore the onus of demonstrating how and why her application should be granted in accordance with established legal principles. Her claim depended exclusively upon an interlocutory exercise of discretionary power under s 79 of the Act. She did not pitch her claim as being one for spousal maintenance or as a costs order.'' [55], [56]

6. ''What then, it may be rhetorically asked, brought the wife's application for an interim alteration of property interests within legal principles? Why should she have been able to pre-empt the outcome of the adjustment proceedings at trial by acquiring exclusive title in the single asset of any substance, particularly when it would necessarily force her to re-structure debt? Why should the husband have been deprived of access to his share of the net equity in the family home, absent any application by the wife for an interim injunction granting her exclusive occupation of the property and thereby preventing its sale? These were questions she did not answer, but had to answer persuasively if she was seeking to properly invoke established principles. Ground 3 fails because no error of principle by the magistrate was identified.'' [60]

7. ''. . . To resolve the dispute between the parties, the magistrate made orders which compelled them to sell the former family home. The magistrate foresaw the parties might not be able to reach compromise over the finer details to implement the sale and so granted them liberty to return to Court for further consequential orders if needed . . .'' [63]

8. ''. . . This was an interim financial dispute conducted under Pt VIII of the Act. It was only the wife who sought a property adjustment order and so she bore the burden of demonstrating why her application should be granted. Absent any property adjustment order (and none was made), or an injunction granting the wife exclusive possession of the former family home (which she did not seek), the husband was entitled at law to extract his one-half share of the equity in it.'' [72]

9. ''The paramountcy principle only applies to parenting proceedings under Pt VII of the Act. The wife's application was brought under Pt VIII of the Act and the asserted fragility of the children's psychological state was a factor which *need not* (even under s 75(2)(o) of the Act) have informed the magistrate's decision about whether or not there ought to be an interim adjustment of the parties' property rights in accordance with the principles espoused in both *Gabel v Yardley and Strahan*. But since the appealed orders do not entail any *adjustment* of the parties' rights under Pt VII of the Act, the asserted fragility of the children's psychological state *could not* have affected the decision because s 75(2) of the Act had no application.

Even if the children's psychological state had been a pertinent factor, the wife's uncorroborated lay opinion about the adverse effect upon the children of being forced to vacate the former family home did not then, and would not now, carry any persuasive probative weight.'' [77], [78]

[*Headnote by the Wolters Kluwer editors*]

Mr Hannan (Lavan Legal) for the applicant.

Mr Klimek (KDK Family Law) for the respondent.

Before: Austin J.

Full text of judgment below

Austin J:

THE COURT ORDERS THAT:

1. The Application in an Appeal filed on 15 March 2022 is dismissed.

2. The Application in an Appeal filed on 25 March 2022 is dismissed.

3. Leave to appeal is refused.

4. The Amended Notice of Appeal filed on 11 February 2022 is dismissed.

5. The applicant shall pay the respondent's costs of and incidental to the appeal, fixed in the sum of $8,823.

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

Note: This copy of the Court's Reasons for judgment may be subject to review to remedy minor typographical or grammatical errors (r 10.14(b) *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 10.13 *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth).

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

Austin J:

1. By an Amended Notice of Appeal filed on 11 February 2022, the wife appeals from interim orders made on 13 October 2021 by a magistrate of the Magistrates Court of Western Australia.

2. Although the parties are in dispute over the net value of the property which is ultimately available for distribution between them, on any view, their assets are modest and their debts are significant. Their principal asset is the former family home, which is jointly owned and heavily encumbered. The wife and the parties' two children occupy the property, but she is not servicing the secured loan and so the debt is increasing. At the time of the hearing, the parties' net equity in the former family home was at risk of being overwhelmed by the mortgage and many other debts the parties had jointly and individually accumulated.

3. As an interim measure, the wife wanted to acquire sole title in the former family home and to re-finance the secured debt by entering into a loan agreement with a relative. The husband instead wanted the former family home sold to salvage whatever joint equity remained. The magistrate ordered that the property be sold and the sale proceeds used to retire debt.

4. The wife appeals from the orders, subject to the grant of leave to do so. The husband opposed the grant of leave to appeal but, if granted, opposed the appeal.

5. For the reasons which follow, leave to appeal should be refused.

Background

6. Proceedings between the parties under the *Family Law Act 1975* (Cth) (''the Act'') were commenced by the husband in March 2021.

7. The parties each seek relief under Pt VII and Pt VIII of the Act in respect of their children and property, but the proceedings are yet to be fixed for trial.

8. Importantly for present purposes, both parties sought interim relief and their respective applications were fixed for hearing in September 2021.

9. By the time of the interim hearing, the husband sought the orders set out in the Minute of Orders he had circulated on or about 6 September 2021 and the wife sought the orders set out in the Response she filed on 17 June 2021.

10. The hearing occurred on 13 September 2021 and was adjourned to 17 September 2021 for the delivery of judgment. However, on 16 September 2021, the day before judgment was to be delivered, the wife filed an application to re-open and adduce more evidence. Judgment was not delivered on 17 September 2021. Instead, the parties were ordered to file updating applications and evidence and the hearing was adjourned to 8 October 2021. In effect, the wife was granted leave to re-open and both parties were permitted to update their positions, though the order confirming such leave was not formally made until later.

11. By the time of the next hearing date, the husband sought the orders set out in the Response to an Application in a Case he filed on 5 October 2021 and the wife sought the orders in the Minute of Orders she circulated and handed up in Court at the hearing.

12. In effect, the husband sought the sale of the former family home and the use of its net sale proceeds (after discharge of the mortgage and payment of attendant sale expenses) to pay other specified debts. He also proposed the partial distribution of the residual proceeds between the parties by way of interim property settlement: $25,000 to him and $50,000 to the wife.

13. Conversely, the wife sought the transfer to her of exclusive title in the former family home and an order compelling her to enter into

a loan for $900,000 with her relative (''Mr P'') secured by mortgage over the former family home, which money she would then use to discharge the existing mortgage and certain other debts. The wife alternatively proposed that she enter into a loan for $300,000 with another relative (''Ms L''), though it was not made plain how that alternative plan could be advantageous, since the quantum of the mortgage and other debts the wife wanted to pay with the loan far exceeded $300,000.

14. The hearing resumed on 8 October 2021, at which time each party made fresh submissions. At the conclusion of the hearing, judgment was reserved until 13 October 2021, when the orders were pronounced and reasons for judgment were delivered orally.

15. The appealed orders made provision for the sale of the former family home, though not until January 2022 (Orders 1 and 5), the use of the sale proceeds to discharge the existing mortgage and to pay the sale expenses and certain other debts (Order 2), and the parties' restraint from using any of the residue sale proceeds without the other's consent or pursuant to Court order (Order 3). Some other orders were made, but they are not the subject of the appeal.

Leave to Appeal

16. The wife contends that she can ''appeal as of right'' because the magistrate's orders are ''final rather than interlocutory'', but the submission is rejected.

17. The wife considers the sale orders are final because their execution would preclude her from pressing her application for orders granting her sole proprietorship of the former family home at the upcoming trial. While it is true the sale orders render otiose her application for final relief in respect of the former family home, that consequence does not convert interlocutory orders into final orders.

18. The orders are not ''final'' because they do not exhaust the Court's statutory power and are not dispositive of the parties' respective applications for relief under Pt VIII of the Act. The essence of finality is disposition of the justiciable dispute (*Licul v Corney* (1976) 180 CLR 213).

19. The wife cited *Porter Street Investments Pty Ltd v Nellbar Pty Ltd* [2022] WASCA 33 at [75]–[80] in support of her claim that the orders are final, but mistakenly so. The subject orders made in that case for the buy-back of certain assets by one party from another were held to be final because ''they dispose finally or the rights *inter se*'' of the parties' interests in the assets covered by the orders and thereby resolved the litigious cause between the parties. Here, no such thing occurred. The orders for sale of the former family home do not resolve the parties' proprietary claims to the property, but rather crystallise their existing rights in it. Nor can it be said the orders dispose of the justiciable cause between the parties under Pt VIII of the Act.

20. Since the orders are interlocutory in nature and do not relate to a ''child welfare matter'', leave to appeal from them is required (s 28(1)(b) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth) (''the FCFCA Act''); reg 4.02 of the *Federal Court and Federal Circuit and Family Court Regulations 2012* (Cth)).

21. Typically, the grant of leave requires the applicant to show the decision at first instance is attended by sufficient doubt to warrant appellate review and that substantial injustice would result if leave were refused, supposing the decision to be wrong (*Medlow & Medlow* (2016) FLC ¶93-692 at [44]–[57]).

22. The wife contends she will suffer the substantial injustice of her enforced removal from, and deprivation of, the home in which she wishes to continue living with the children, but the argument is not as strong as she perceives. If the former family home is sold according to the orders, nothing stops the wife from purchasing the property on the open market with the aid of the same financial assistance she had envisaged using to privately acquire the husband's one-half share. While she would then experience the disadvantage of having to compete with other prospective purchasers, any price increase caused by such competition will be mollified by her receipt as a joint vendor of one-half of the increased capital gain.

23. More importantly though, the wife cannot demonstrate that sufficient doubt attends the decision to warrant the grant of leave to appeal, even with the aid of the further evidence

she proposed to adduce. The ensuing discussion elaborates the lack of merit in the appeal.

Applicant's applications to adduce further evidence

24. On 15 March 2022, the wife filed an Application in an Appeal seeking permission pursuant to s 35(b) of the FCFCA Act to adduce further evidence in the appeal, which application was supported by her simultaneously filed affidavit and another filed on 25 March 2022.

25. In summary, the wife sought leave to adduce in evidence:

(a) her affidavit sworn on 7 September 2021 (relevant to Grounds 1, 2 and 5);

(b) her affidavit filed on 25 October 2021 (relevant to Ground 5);

(c) an affidavit of the husband filed on 17 January 2022 (relevant to Ground 8);

(d) an unexecuted mortgage between her and Mr P (relevant to Ground 7);

(e) an unexecuted loan agreement between her and Ms L (relevant to Ground 7); and

(f) a valuation and some appraisals as to the current value of the former family home, attached to her affidavit filed on 25 March 2022 (relevant to Grounds 1 and 2).

26. In view of the refusal of leave to appeal, there is no appeal within which to adduce any further evidence and so the wife's application will be dismissed, as the husband sought. The proposed further evidence is discussed in conjunction with the pertinent grounds of appeal.

27. However, the parties agreed several documents omitted from the Appeal Book were before the magistrate and should therefore form part of the material in the appeal. They were:

(a) the wife's affidavit sworn on 7 September 2021 (referred to above);

(b) the wife's financial statement filed on 17 June 2021;

(c) the husband's financial statement filed on 30 March 2021; and

(d) the affidavit of Ms L filed on 8 September 2021.

28. The wife filed a second Application in an Appeal on 25 March 2022, supported by another lengthy affidavit, seeking permission to adduce even more evidence in the appeal, which the husband opposed. This application and the accompanying affidavit were filed late, in breach of r 13.39 of the *Federal Circuit and Family Court of Australia (Family Law) Rules 2021* (Cth), without any satisfactory explanation for the lateness. Without intending to trivialise the wife's evidence, she blamed the delay upon stress caused by ongoing litigation and her pre-occupation caring for the parties' two children. This application is dismissed for lateness but, besides, the relevance of the evidence is not established. The documents the wife wants to adduce (being corporate searches and banking documents) were destined to support her attempt to prove in the appeal that the husband failed to fully and frankly disclose his financial circumstances prior to the hearing before the magistrate. She deposed such evidence advanced her claims under Grounds 1, 2 and 6, but it is difficult to see how that could possibly be so. The magistrate did not, and was not expressly asked to, make any finding about the father's financial disclosure.

29. During submissions about this application, the wife conceded the evidence did not advance any of the existing proposed grounds of appeal and so made an oral application to amend the grounds of appeal to incorporate an additional ground in these terms and to then instead adduce the further evidence in support of it:

> The learned magistrate erred by failing to make a finding as to whether or not the respondent had given adequate [financial] disclosure and should have held there was a serious question as to the adequacy of such disclosure and exercised discretion against making an interim property settlement order on that basis.

30. The husband opposed the grant of leave to amend the appeal grounds and the application was refused with reasons to follow. These are those reasons.

31. The proposed ground of appeal is flawed because, as will be later elaborated, the magistrate did not make any interim order to adjust the parties' property rights. The magistrate refused the wife's application to do so. The appealed orders preserved and crystallised the parties' existing property rights.

There was no ''interim property settlement'' – merely orders to realise an asset.

32. Before the magistrate, there was a factual dispute over whether the husband had given full and frank financial disclosure. The wife alleged he had not, but the husband asserted he had. Being an interim hearing, the evidence was untested and so no definitive factual finding could have been made on such evidence to settle the dispute. It is axiomatic the evidence the wife now wants to adduce in the appeal to try and prove the husband's deficient disclosure is controversial, which dispute only arises due to her belated attempt to re-caste the terms of the appeal. Understandably, the husband was not ready to meet the new argument and the prejudice occasioned to him by having to meet it on the run, or by alternatively seeking the reprieve of an adjournment to do so with the attendant extra cost, was more significant than any prejudice suffered by the wife in having to adhere to the grounds of appeal she has already amended once in February 2022.

Grounds 1 and 2

33. Ground 1 contends the magistrate made several errors of fact on the available evidence, which Ground 2 asserted would be demonstrated by the further evidence the wife intended to adduce in the appeal, so Ground 2 is not a separate ground of appeal.

34. The wife desired to adduce further evidence to correct what she asserted to be the magistrate's erroneously low assessment of the market value of the former family home. However, the proposed further evidence adds nothing new to the evidence and submissions before the magistrate. The husband gave evidence of an appraisal of the former family home's value being in a range up to $1.2 million. The wife initially gave evidence that, in her opinion, it was worth $1 million, which estimate she later revised to $1.237 million at the hearing in reliance upon real estate appraisals she received and produced.

35. The more recent appraisals and valuations to which the wife referred were not produced until two business days before the appeal hearing. Even if they are accepted as being probative, such documents tend to prove the current value of the former family home is in the range between $1.2 and $1.35 million – similar to the value of $1.237 million for which the wife contended before the magistrate. The documents do not demonstrate any erroneous finding by the magistrate, nor gainsay the certainty of the expanding debt whilst ever the wife remains in occupation of the home without meeting the secured loan repayments.

36. The prime purpose of adducing further evidence in an appeal is to demonstrate appealable error and produce a different result (*CDJ v VAJ* (1998) 197 CLR 172 at [109], [111], [140]–[151] and [169]). Here, there is no error to correct because the magistrate abstained from making any finding or ''assessment'' about the value of the former family home, saying only this:

> Although the Court has little by way of formal valuation evidence as only appraisals are currently before the Court – the parties appear to agree that, at the present time, the equity in the property may be in the vicinity of $230,000.
>
> (Transcript of reasons for judgment 13 October 2021, p.4 lines 3–7)

37. For the purpose of Ground 1, the errors of fact were alleged to be these:

> (a) the finding the asset pool would decrease unless the former family home was sold;
>
> (b) the finding the asset pool was better preserved by the sale of the former family home, the discharge of the mortgage and the payment of other outstanding debts; and
>
> (c) the finding that neither party could afford to retain the former family home.

38. The wife does not attack the accuracy of the observation made by the magistrate to the effect that, in light of the parties' conflicting evidence, the net value of their property interests was quite unclear. The magistrate said this:

> The wife seeks a 70 per cent adjustment in her favour. **What is not agreed, and what is not currently clear to the Court is the extent or the size of the asset pool**. The husband argues that, at best, the equity in the asset pool is reflected in the modest equity in the former matrimonial home. Although the Court has little by way of formal valuation evidence as only appraisals are currently before the Court – the parties

> appear to agree that, **at the present time, the equity in the property may be in the vicinity of $230,000. There is however dispute between the parties about various liabilities. The wife's position is that the asset pool may, in fact, be a negative asset pool** because she claims there are outstanding loans which remain owing to extended family members.
>
> (Emphasis added)
>
> (Transcript of reasons for judgment 13 October 2021, p.3 line 44 to p.4 line 11)

39. It was therefore common ground that the net value of the parties' property was modest at best.

40. Against that background, the magistrate made findings in these terms:

> The husband argues that an order for the sale of the property is essential to preserve the very modest equity that may still exist in the matrimonial asset pool. **The position is that substantial mortgage arrears have accrued, as the wife has not been able to make all mortgage repayments during the time, she and the two children of the marriage have occupied the property.**
>
> . . .
>
> **The position is that neither party have financial capacity at the present time to make payments towards their outstanding financial liabilities**. The wife is currently dependent on income-tested government pension payments and the husband is presently unable to work because of medical issues. **There is no capacity of either party to service the significant accrued debt.**
>
> . . .
>
> The husband argues that it is critical for the Court to order the sale of the property to secure the remaining equity and preserve what remains of the asset pool. The wife, for her part, argues an order for sale of the home will leave her and the children homeless and the cost of obtaining suitable rental accommodation in an area in proximity to the children's private school would cost, approximately, $700 per week. She claims that overall, there is no net financial advantage to the parties by selling the property.
>
> . . .
>
> The wife however is not able to clearly indicate whether, ultimately, there is any possibility she can retain the property on a final basis.
>
> . . .
>
> The husband does not accept that there is any financial advantage to the parties in accepting Mr P's offer as, essentially, the debt will continue to accrue and the equity in the property will continue to erode.
>
> . . .
>
> **I remain concerned that the conditions and terms of the loan mean that interest will continue to accumulate in circumstances where the wife does not suggest that she has any capacity to meet the interest payments pending the determination of the proceedings or resolution at trial**.
>
> **(Emphasis added)**
>
> (Transcript of reasons for judgment 13 October 2021, p.2 line 49 to p.3 line 4, p.3 lines 33–39, p.4 lines 13–22, 28–30 and p. 5 lines 26–29)

41. The wife cannot dispute such findings. She gave evidence the former family home was, in her opinion, worth $1.237 million and encumbered by two bank loans with a combined debit balance of not less than $732,000. More than a decade after the parties bought the former family home, the bank debt still exceeds the sum they initially borrowed from the bank to buy it. By the time of the hearing in October 2021, the wife admitted the bank loan arrears approximated $140,000. In addition, rates and utilities of about $34,000 were outstanding in respect of the property and private school fees of $88,000 were still owed. The wife deposed to other loans of around $180,000. In her overall view, the parties' liabilities exceeded the value of their assets by $135,000, though it must be said the revision of her opinion about the increased value of the former family home from $1 million to $1.237 million would necessarily mean her revision of the balance sheet and thereby leave the parties

with a marginal degree of positive equity. Plainly enough though, if there was any equity left, it was still eroding because neither party could service the debt.

42. The $900,000 the wife intended to borrow from Mr P was not enough to discharge all of the debt, but was barely even sufficient to cover the secured loans and the overdue rates, utilities and school fees. In any event, her plan was for Mr P's loan to be secured against the former family home, for the interest to accrue at less than commercial rates, and for all repayments to be suspended, with the loan and interest being repayable in full in five years. Consequently, the debt would continue to increase through accrued interest (though it would be owed to Mr P instead of the bank and other agencies) and the value of the parties' equity in the former family home would continue to erode.

43. The wife seemed in denial about that reality, as her counsel had this discussion with the magistrate:

> [COUNSEL FOR THE WIFE]: Okay. My respectful submission to your Honour is that by not selling the property and taking up one or both of those options then my client's preference is that the first proposal be taken up and that is Mr P's proposal, **and the benefit of that proposal is that it pays off all the debts associated with the house, the arrears – nothing – it is then an unencumbered property**. There's no intention, there is no power, there is not a –
>
> HER HONOUR: **It's not an unencumbered property. It will still carry the debt of $900,000 on it.**
>
> [COUNSEL FOR THE WIFE]: **There is a loan that my client needs to account for, but there is an unencumbered property**
>
> . . .
>
> . . .
>
> HER HONOUR: But how does this proposal mean that your client is going to be able to retain the property? I mean –
>
> [COUNSEL FOR THE WIFE]: That is – your Honour, that's an issue for her and her family. What I mean – neither of the proposals are looking for interest. The house is still in the asset pool when it comes to trial. And the issue of how those loans from either her relatives are going to be treated is a matter down the line.
>
> . . .
>
> HER HONOUR: Well, let's just read what - **this proposal just restructures the debt, doesn't it. So the debt is still there.**
>
> [COUNSEL FOR THE WIFE]: **Well, it pays off the debt which was** –
>
> HER HONOUR: **Restructures it, because the debt is still there, and there will be a $900,000 debt. . . . Well, you keep saying it's unencumbered. It won't be unencumbered.**
>
> [COUNSEL FOR THE WIFE]: **It's unencumbered** –
>
> HER HONOUR: You still have a –
>
> [COUNSEL FOR THE WIFE]: **It's unencumbered to a financial institution**.
>
> . . .
>
> (Emphasis added)
>
> (Transcript 8 October 2021, p.15 lines 9–23, p.22 lines 31–40, p.23 lines 1–8 and 38–46)

44. The artifice of the wife's position then became apparent. Despite the evidence establishing how Mr P would only advance the wife a loan on commercial terms with security, her counsel then tried to suggest the loan would never be enforced, saying:

> [COUNSEL FOR THE WIFE]: . . . [Y]our Honour, I think one could reasonably infer that given the generosity of both my client's family members that they're hardly likely to call that in fully. . . . And I don't think there's any likelihood that given the generosity of both of her relatives now that they would simply force that situation.
>
> (Transcript 8 October 2021, p.23 lines 47–49, p.24 lines 5–8)

45. In the face of the evidence and the submissions, it was plainly open for the magistrate to find the parties could not service their debts and the sale of the former family home would enable the parties to extract whatever equity they then enjoyed in it, thereby averting the escalation of secured debt, but that conversely, the wife's acquisition of sole title in

the property with Mr P's loan would continue to deplete the net value of the parties' property.

46. As was then open, the magistrate determined to dismiss the wife's proposal and expressed the reasons thus:

> I am persuaded on the face of the evidence as it is currently available to me, that the parties' debts are significant and it is not appropriate to await the outcome of a final defended hearing for the consideration of how to address the very significant debt level.
>
> Notwithstanding the generosity and kindness of the offer made by Mr P, I cannot be persuaded, on the available evidence, that it is appropriate to make an order on an interim basis to transfer to the wife's sole name the husband's interest in the former matrimonial home.
>
> . . .
>
> I am persuaded that to permit the wife to remain in occupation of the home will cause further erosion in what is a very modest asset pool – rather, than any modest asset pool if, indeed, any equity exists. I am not persuaded it is an appropriate exercise of the powers under section 79 to order a transfer of the husband's interest in the property to the wife's sole name on an interim basis, in circumstances where the debt is, simply, being restructured at a lower interest rate, but the equity will continue to erode.
>
> (Transcript of reasons for judgment 13 October 2021, p.5 line 41 to p.6 line 2, p.6 lines 11–20)

47. There were no errors of fact. Ground 1 fails.

Grounds 3 and 4

48. Ground 3 contends the magistrate ''erred in principle'' by making orders for the sale of the former family home because such interim orders usurp the wife's chance to make good on her application for final relief, which includes an application for her to acquire sole proprietorship of the former family home. Ground 4 alleges the orders therefore amounted to the summary dismissal of the wife's application for final relief pursuant to s 45A of the Act.

49. Ground 4 can be immediately rejected. The husband did not seek to invoke the power of summary dismissal under s 45A of the Act, nor did the magistrate purport to exercise it. In fact, neither party's application for final relief was even before the magistrate for consideration. The only dispute entertained by the magistrate was the parties' applications for interim relief. Both parties' applications for final relief still remain undetermined and are yet to be fixed for trial.

50. The practical effect of the interim sale orders is to render nugatory the wife's claim for sole proprietorship of the former family home, meaning she will need to amend the form of orders she seeks by way of final relief, but that does not mean her application for property settlement under Pt VII of the Act was dismissed.

51. As for Ground 3, nor did the magistrate fall into legal error by making the interim sale orders merely because they are contrary to the final relief for which the wife currently applies. The wife's application for interim relief was similarly repugnant to the form of property settlement relief ultimately sought by the husband, but she had no compunction about prosecuting it. The wife apparently identified no inconsistency in that situation.

52. To succeed in the appeal, the wife must establish some material error in the manner the magistrate determined the dispute; not just point to what she perceives to be the adverse consequences of an otherwise correct decision. The orders do no more than enable the current net value of the parties' interests in their most substantial asset to be extracted. The wife may yet still successfully prosecute her application for an ultimate entitlement to 70 per cent of the parties' assets and superannuation but, whatever proportional share she eventually acquires, it will not comprise the former family home *in specie*.

53. As recently explained in *Sarto & Sarto* [2022] FedCFamC1A 16 (at [14]–[24] and [27]–[30]), unless and until spouses' existing property rights are adjusted pursuant to discretionary order made under Pt VII of the Act, their existing individual and joint property rights and interests are established according to common property law. Furthermore, unless

restrained by an injunction made under s 114(1) of the Act, the spouses may each exert the full measure of their property rights against third parties and one another.

54. Here, the parties jointly own the former family home. In view of the wife's objection to its sale, the husband could have sought an order compelling the parties' sale of the property (ss 126 and 127 of the *Property Law Act 1969* (WA)), but no State proceedings were necessary when the matrimonial cause was pending before the magistrate. There was no need for the wife to seek an injunction restraining the husband's sale of the former family home because, as she is a joint proprietor, he could not do so without her concurrence. But neither party was content with the stalemate and so each sought interim relief by way of orders made under the Act. The husband sought an order compelling the parties to sell the former family home, whereas the wife sought an order transferring exclusive title in the former family home to her.

55. As can be seen, the wife's application entailed an interim *adjustment* of the parties' property interests, but the husband's did not. His application was merely facilitative of the parties' extraction of the net value of their *existing* equal proprietary interest in the former family home.

56. Since only the wife sought an interim order adjusting their property rights, she bore the onus of demonstrating how and why her application should be granted in accordance with established legal principles. Her claim depended exclusively upon an interlocutory exercise of discretionary power under s 79 of the Act. She did not pitch her claim as being one for spousal maintenance or as a costs order.

57. It is well accepted that the exercise of statutory power under s 79 of the Act may be fragmented until the power is entirely spent (*Gabel v Yardley* (2008) FLC ¶93-386; *Strahan & Strahan (Interim Property Orders)* (2011) FLC ¶93-466), though it is clearly preferential for there to be only one exercise of power at final trial (*Strahan* at 85,640–85,641 and 85,657).

58. It is not necessary for the applicant to establish compelling circumstances in order to secure interim financial relief (*Strahan* at 85,641–85,646, 85,649–85,650 and 85,656), but there must be some principled reason for fragmenting the process. An application for interim property settlement is not granted just because an applicant earnestly wants it. Such relief is usually granted to meet the applicant's costs of pursuing the litigation and to level the litigious playing field (*Strahan* at 85,635), which is why three considerations are always relevant to the inquiry (*Strahan* at 85,633–85,634 and 85,655–85,656): first, the respondent's position of relative financial strength; secondly, the respondent's capacity to meet his or her own litigation costs; and thirdly, the applicant's inability to meet his or her litigation costs.

59. The parties' capacity to continue funding the litigation was irrelevant here because each party enjoyed an existing legal entitlement to the net proceeds which could be derived from the sale of the former family home, after discharge of the mortgage and payment of the attendant sale expenses. The wife's application was to stop the sale by acquiring exclusive legal title in the property. Her aim was to preserve the home for herself; not to acquire cash with which to pay her legal fees. Neither party enjoyed a position of financial superiority over the other.

60. What then, it may be rhetorically asked, brought the wife's application for an interim alteration of property interests within legal principles? Why should she have been able to pre-empt the outcome of the adjustment proceedings at trial by acquiring exclusive title in the single asset of any substance, particularly when it would necessarily force her to re-structure debt? Why should the husband have been deprived of access to his share of the net equity in the family home, absent any application by the wife for an interim injunction granting her exclusive occupation of the property and thereby preventing its sale? These were questions she did not answer, but had to answer persuasively if she was seeking to properly invoke established principles. Ground 3 fails because no error of principle by the magistrate was identified.

Ground 8

61. This ground asserts the sale orders are either ''unenforceable'' or ''have the potential

to work serious injustice to the [wife]'' on account of the lack of detail in the orders about the sale price, the sale contract conditions, the listing agent, and the sale and marketing expenses.

62. The wife sought leave to adduce the husband's affidavit filed on 17 January 2022 as further evidence in support of this ground. Her purpose was to prove the arrangements currently being made by the husband for the sale of the former family home, which she simply deposed were ''relevant'' to the disposition of the appeal. Absent any explanation at all from the wife about why the details of such arrangements were ''relevant'' (and there was none), the submission is rejected and the affidavit is superfluous.

63. This ground is without merit. To resolve the dispute between the parties, the magistrate made orders which compelled them to sell the former family home. The magistrate foresaw the parties might not be able to reach compromise over the finer details to implement the sale and so granted them liberty to return to Court for further consequential orders if needed in these terms:

> 5. Both parties have liberty to apply in relation to the terms and conditions of the sale of the property.

64. The prospective need for parties to return to Court for consequential orders to facilitate the implementation of earlier substantive orders is not exceptional (*Molier & Van Wyk* (1980) FLC ¶90-911; *Ravasini & Ravsini* (1983) FLC ¶91-312; *Pera v Pera* (2008) FLC ¶93-372).

65. When given the chance by the magistrate to be heard about the probity of an order granting the parties liberty to apply for consequential orders, the wife's counsel agreed it was proper, as the excerpt of the transcript reveals:

> HER HONOUR: There will be an order granting liberty to the parties to apply in respect of the terms and conditions of the sale of the said property [to counsel for the wife].
>
> [COUNSEL FOR THE WIFE]: Sorry. Yes. No issue with that. . . .
>
> (Transcript 13 October 2021, p.8 lines 36–40)

66. The wife cannot complain on appeal about an order with which she said she was content. If she is dissatisfied with the arrangements being made for the sale of the former family home, her remedy is to re-list the proceedings before the magistrate pursuant to Order 5 and seek consequential orders which she considers appropriate.

Ground 6

67. The ground asserts the magistrate ''erred in principle'' by ordering the sale of the former family home and the use of the sale proceeds to pay debt without first being satisfied that the parties, or either of them, had the financial capacity to pay for suitable alternate accommodation for the wife and children.

68. In support of this ground, the wife submitted it was obligatory for the magistrate to have made a finding about the ''availability and cost of suitable alternate accommodation for [her] and [the] children'' and, because the magistrate did not do so, appealable error is exposed. The submission is rejected for two reasons.

69. First, the magistrate accepted the wife's submissions about the availability and cost of suitable alternate rental accommodation, saying this:

> The wife, for her part, argues an order for sale of the home will leave her and the children homeless and the cost of obtaining suitable rental accommodation in an area in proximity to the children's private school would cost, approximately, $700 per week.
>
> (Transcript of reasons for judgment 13 October 2021, p.4 lines 15–20)

70. Secondly, the wife's argument about the availability and cost of alternate accommodation had to be and was balanced against the husband's contention that her proposal to acquire exclusive title in the former family home did not offer the parties any tangible financial advantage. It was common ground the wife, being the children's primary carer, would continue to accommodate them using the parties' assets and income as the means to do so. Her earnest desire to remain in occupation of the former family home did not foreclose the prospect of it having to be sold

and the net proceeds of sale being used to pay her rent elsewhere.

71. The wife submitted this:

> 53. The Husband, as the moving party on the Form 2A application, bore at least a forensic onus to convince the Magistrate that suitable alternate accommodation for the Wife and Children: (1) was available; & (2) could, having regard to the parties' financial circumstances, be paid for. See *AMS v AIF* [1999] HCA 26; (1999) 199 CLR 160 at [243]. The evidence did not support that finding.
>
> (Citations omitted)

72. The submission is rejected. The wife wrongly cited *AMS v AIF* (1999) 199 CLR 160 at [243] as authority for the proposition, when it is not. That case concerned parenting orders made under Pt VII of the Act. This was an interim financial dispute conducted under Pt VIII of the Act. It was only the wife who sought a property adjustment order and so she bore the burden of demonstrating why her application should be granted. Absent any property adjustment order (and none was made), or an injunction granting the wife exclusive possession of the former family home (which she did not seek), the husband was entitled at law to extract his one-half share of the equity in it.

Ground 5

73. This ground of appeal asserted the magistrate's discretionary error by the failure to take into account the effect of the sale orders upon ''the mental health of the [two] children''.

74. To make good on this ground, the wife wanted to lead further evidence in the form of an affidavit she filed on 25 October 2021 (after the hearing before the magistrate) concerning the younger child's consultation with a paediatric psychiatrist. But such evidence would add nothing significant to the evidence placed before the magistrate and would not help the wife to demonstrate appealable error and produce a different result.

75. The wife adduced evidence before the magistrate that the two children were both undergoing counselling with a trauma specialist and were unwilling to see the husband, and further, she was concerned the children would be ''devastated'' if they were forced to vacate the former family home. Evidence to similar effect is contained within her affidavit sworn on 7 September 2021.

76. The wife contended the psychological state of the children was a material consideration, not taken into account by the magistrate because her former lawyers failed to emphasise the issue. The submission is rejected, regardless of whether or not the wife's former lawyers gave the point sufficient emphasis. The wife's submissions in the appeal concerning the children's best interests and the paramountcy principle found within ss 60CA and 65AA of the Act were misconceived.

77. The paramountcy principle only applies to parenting proceedings under Pt VII of the Act. The wife's application was brought under Pt VIII of the Act and the asserted fragility of the children's psychological state was a factor which *need not* (even under s 75(2)(o) of the Act) have informed the magistrate's decision about whether or not there ought to be an interim adjustment of the parties' property rights in accordance with the principles espoused in both *Gabel v Yardley* and *Strahan*. But since the appealed orders do not entail any *adjustment* of the parties' rights under Pt VII of the Act, the asserted fragility of the children's psychological state *could not* have affected the decision because s 75(2) of the Act had no application.

78. Even if the children's psychological state had been a pertinent factor, the wife's uncorroborated lay opinion about the adverse effect upon the children of being forced to vacate the former family home did not then, and would not now, carry any persuasive probative weight.

Ground 7

79. This ground is pleaded in these terms:

> 7. The learned Magistrate exercised the discretion to make orders for interim property settlement for the sale of the Matrimonial Home by reference, in significant part, to the uncertainty of the loan arrangements between the Wife and members of her family. If the Wife is permitted to adduce further evidence on appeal, then the Wife can show that she has new loan documents in place with members

> of her family which do not have the features about which the learned Magistrate expressed concern. The Wife will seek leave, under section 35 (b) of the *Federal Circuit and Family Court of Australia Act 2021* (Cth), to adduce such evidence.

80. As can be seen, this is not a ground of appeal at all. Rather, it is simply the wife's opinion about the factor which principally motivated the magistrate's exercise of discretion and her assertion of how further evidence in the appeal, if she were permitted to adduce it, would diminish the importance of that consideration.

81. The wife should not be permitted to now adduce more and better evidence about the terms and conditions of the prospective loans from Mr P and Ms L, particularly when the only purpose is to support an imputed submission that the magistrate should have been attracted to her proposal in respect of the former family home.

82. One affidavit of Mr P and two affidavits of Ms L were already relied upon by the wife in evidence before the magistrate. She now wants to adduce more elaborate and precise details of her prospective arrangements with them about the terms under which they would be willing to advance money to her on loan to pay out some existing debt. The wife is bound to accept she could have led such further evidence about the loan conditions at the hearing before the magistrate. In fact, the magistrate already gave her a second chance to lead additional evidence by granting her application to re-open the evidence after the dispute was first heard on 13 September 2021. Although the hearing was by then already complete, the wife was permitted to lead fresh evidence and the dispute was re-heard on such evidence on 8 October 2021. In effect, the wife now wants a third chance to lead the evidence she must realise could and should have been led at the two hearings in September 2021 and October 2021.

83. This is an appeal and, although it is conducted by re-hearing, there are well recognised limits to the reception of evidence not led at first-instance. The subject further evidence was available and could reasonably have been obtained at the time of the hearing before the magistrate. Its reception would tend to obliterate the distinction between original and appellate jurisdiction (*CDJ v VAJ* at ([55], [111], [114], [116] and [186.9]). An appeal is the chance to review whether the primary judge fell into appealable error; not to run a better case than could and should have been run at first-instance.

Conclusion

84. Leave to appeal is refused and the Amended Notice of Appeal filed on 11 February 2022 is dismissed.

85. Since leave to appeal is refused, there is no appeal within which to adduce further evidence and so the wife's Application in an Appeal filed on 15 March 2022 is dismissed. The dismissal of her second Application in an Appeal filed on 25 March 2022 has already been explained.

86. In the event of refusal of leave or dismissal of the appeal, the husband sought an order compelling the wife to pay his party/party costs of and incidental to these proceedings in the sum of $8,823.44. The wife resisted such an order as her financial circumstances are so modest, but she willingly incurred liability to her own lawyers for costs to prosecute these proceedings, quantified at the surprisingly large sum of $41,624.14. Implicitly, she must have some asset or resource readily available to her to meet the liability.

87. The application for leave to appeal was wholly unsuccessful and, in some respects, completely misconceived. The husband was needlessly put to the expense of defending the magistrate's orders and should have his reasonable party/party costs by way of reimbursement. The wife's financial resources are apparently not so parlous as to preclude such an order. She did not dispute the reasonableness of the husband's costs, but they are rounded to the nearest dollar.