IN THE SUPREME COURT OF NEW ZEALAND SC 9/2011

[2012] NZSC Trans 6

BETWEEN **GARY OWEN BURGESS**

Appellant

AND **SUSAN NATALIE BEAVEN**

Respondent

Hearing: 23 April 2012

Court: Elias CJ
Blanchard J
Tipping J
William Young J
Chambers J

Appearances: Appellant appears in person
S J Shamy and A Corry for the Respondent

CIVIL APPEAL

ELIAS CJ:

Yes, Mr Burgess, you are appearing for yourself?

MR BURGESS:

Yes,your Honour.

ELIAS CJ:

Mr Shamy, for the respondent?

MR SHAMY:

Yes for Ms Beaven, assisted by my learned friend Ms Corry.

ELIAS CJ:

Thank you, Ms Corry. Yes, Mr Burgess, do you want to address us? If so would you like to go to the, I don't know what it is, it's a stage really isn't it?

MR BURGESS:

I've never fancied myself as an actor, your Honour.

ELIAS CJ:

Now we've read your submissions and it does seem to me that the sensible starting point, although you may reasonably differ on this, but the sensible starting point is whether the Court of Appeal was right to take the date of separation as the correct date to value the matrimonial property – relationship property, I should say. I think we would be assisted if you would start by addressing that matter first, if you want to add anything further to the written submissions we have.

MR BURGESS:

I think I've covered those issues in my written submissions as best I can, your Honour.

ELIAS CJ:

Yes.

MR BURGESS:

And I do thank this Court for giving me the opportunity to be heard.

ELIAS CJ:

Yes.

MR BURGESS:

I'm aware it's exceptionally unusual for a layman to have entry to this Court.

ELIAS CJ:

We've had some very successful lay litigants in the past Mr Burgess.

MR BURGESS:

I hope I don't let the side down, then, your Honour. Simply, your Honour, the best I can do is just summarise what I had to say in my submissions and that is the Judge of first instance, Judge Strettell chose to use the separation date and found – sorry, found that the hearing date was the appropriate date to make division and found no reasons to depart from that date. Justice Hansen did not depart from that. The Court of Appeal hasn't departed from it but it seems to have done so contrary to principle in that the difficulties caused have resulted in the amount of time taken really don't – aren't a principled basis for changing from a separation, from a hearing date to a separation date, and that the Court of Appeal has failed to take a major step that it outlined for itself in *M v B* (economic disparity) [2006] NZFLR 641, [2006] 3 NZLR 660 (CA) in that it failed to ascertain whether changing from hearing date to separation date actually provided a just division in vesting of the property between the parties and that to me, your Honour, is the critical point on that. There's something now in excess of thirty years of precedent. The hearing date should be adopted unless there is sound reasons for moving to a hearing date and those reasons should be articulated in the judgment, but the Court of Appeal simply seems to have adopted a separation date as a more convenient date for it and failed to look at whether it actually achieves justice in the facts and circumstances of this case.

TIPPING J:

Are you saying effectively that they did it for pragmatic reasons rather than in the interests of justice?

MR BURGESS:

It appears from their expressed wording that they were looking for a pragmatic approach but in adopting what to them seemed a pragmatic approach that they have overlooked that they may in fact be doing an injustice in the process. I think as there is plenty of material and I have put several cases in my submissions, that a Court must operate on principle and it is the interests of justice which must be paramount but I do have to accept that in this case, given the length of time, there are going to have to be some compromises but that particular compromise, which not only used the separation date, but ring fenced a large chunk and in effect all the surviving assets for the other party, I do not see how that can possibly achieve justice and meet the objectives of the Property (Relationships) Act.

ELIAS CJ:

Sorry when you say that it effectively ringfenced all the other property, do you want to elaborate on that? You mean that it effectively treated the property that you held as – I'm sorry, would you like to just elaborate on what you mean by that?

MR BURGESS:

I just would like to get my copy of the document.

ELIAS CJ:

Yes. Are you taking us to the judgment now?

MR BURGESS:

I'm trying to find the right paragraph in the judgment and it's the judgment of the Court of Appeal, substantive judgment. Sorry, at page 38, your Honour, and at paragraph 49, where the Court of Appeal has said that adopting a separation date with my ex-wife has somewhat reduced value of her share of the relationship property but retains the benefits of all post-separation proceeds of the sale of Woodbury Street, which was the family home but as has been noted by Mr Shamy in his primary submissions to this Court, those gains were purely inflationary and it is contrary to sections 8L and other provisions and past precedent of the Act that an inflationary gain should be credited to one party only.

However, this decision of the Court of Appeal gives my ex-wife the benefit of the proceeds of the family home and any subsequent increases on it. It was absolutely silent as to what I am to receive. It makes no mention or in no way that I am to receive the value of the family farm, either in the farm or as it had disappeared by this stage, that I should have had a cash equivalent. There is in fact no relationship property in terms of the Court of Appeal decision that is reserved for me, to be vested in me as my share of the distribution.

WILLIAM YOUNG J:

Well it pre-supposes, doesn't it, that Medbury's been vested in you, at a value of $165,000?

MR BURGESS:

It does appear to, Sir, but all the other decisions, including the leave decision of this Court and the litigation in the other streams, the B and the C streams, also make it clear that it was not vested in me as my separate property but it was, the title was,

transferred to me as trustee for and I was holding that for the benefit of my ex-wife. So I have never received the vesting of that property. All I've actually had vested in me was the sheep, tractor and a shipping container and that's where one of the fundamental problems comes, going right back to Judge Strettell's first two decisions. I was, in terms of Judge Strettell's second decision, to receive the vesting of the farm but when my ex-wife was offered the $36,250 that was the judgment sum required in terms of that judgment, she refused to accept it and insisted on retaining the property as relationship property.

WILLIAM YOUNG J:

What happened to the proceeds of sale of the farm? How much was left after the mortgagee's share?

MR BURGESS:

I was expecting that question and hoping it would not be asked. The answer, your Honour, is indeterminate. The TSB Bank is claiming that there was a loss on the sale. There are proceedings between the TSB Bank and myself to which I have, or am endeavouring to join my ex-wife as third party, and in terms of their statement of claim figures they have provided for the value of the sale and the disbursements from the sale show that there was actually a profit but a very small profit but, however, the TSB Bank sold the property and pocketed all the proceeds.

BLANCHARD J:

You say that the property was transferred to you subject to a trust in favour of your wife?

MR BURGESS:

Yes, Sir.

BLANCHARD J:

Can you take us to the basis for that statement? Is it an order or an agreement?

WILLIAM YOUNG J:

It's the judgment of Judge Somerville, isn't it?

MR BURGESS:

It is, initially from the memorandum for consent orders, that were signed by Ernest Tait and Angela Corry.

TIPPING J:

Is it a trust or is it simply that it was recognised she could register a notice of claim or caveat?

BLANCHARD J:

That's what I was getting at.

MR BURGESS:

It was expressed in there in one paragraph of that, that I am holding the property on trust.

BLANCHARD J:

Can we have a look at that?

ELIAS CJ:

This is Strettell's –

MR BURGESS:

Judge Strettell's, sorry, Judge Somerville's decision. I think you'll find it's attached too, your Honour, there should be another copy elsewhere in the bundles.

WILLIAM YOUNG J:

Page 53, is it?

TIPPING J:

Is it paragraph 16? The first sentence sort of introduces the idea. The transfer of the property, that's into your name, therefore needed to be accompanied by some safeguards for Ms Beaven.

MR BURGESS:

Yes Sir, Judge Somerville, when he released his decision, it appended the –

TIPPING J:

Wasn't it a form of security?

MR BURGESS:

There was several different things going on in that document, your Honour, but –

CHAMBERS J:

It may be paragraph 17, is it?

TIPPING J:

Yes, yes, I think so, but that's very clumsily expressed.

MR BURGESS:

The document I was looking for, your Honour, was that when Judge Somerville released his judgment he appended the memorandum to the back of it and it was part of his judgment and that is not in this case book, and it was in that memorandum itself, it expressly had the phrase that I was to hold the property as trustee for my ex-wife, or it said for my ex-wife and myself.

BLANCHARD J:

But it was never intended that she have a beneficial interest, to any greater extent, than the sum that you happened to owe, or might be found to owe her. In other words, if the property doubled in value it wasn't intended that she would get a share of that doubling in value.

WILLIAM YOUNG J:

The memorandum's at page 104 of volume 1 of the case. It was an interest by way of security, effectively, I think.

BLANCHARD J:

So it's like a mortgage, effectively, although the amount might not be known for some time so it's really not a situation where she continued to have a beneficial interest of any normal sort. It was your property, subject to you paying her out.

MR BURGESS:

But she did make those claims in letters to people, such as the bank and to the firm's accountants, that the land remained relationship property, your Honour.

BLANCHARD J:

Well, she may have, but that doesn't mean those claims were right.

TIPPING J:

Well, it was simply a pragmatic way, as I read it, of securing to her, out of the proceeds of sale, what she was owed. Is it any more complicated than that?

MR BURGESS:

It has appeared to have operated in a more complex –

TIPPING J:

Well, never mind how it operated, I mean it's –

MR BURGESS:

But you're saying as a point of law, Sir?

TIPPING J:

Well, the way any ordinary person would read it, in the context was – because it talks about safeguards. It was securing to her, against the title, whatever you ended up owing her.

CHAMBERS J:

And if you'd paid her $45,000 the next day the security would not have been needed.

MR BURGESS:

But in effect, Your Honour, she did receive that 36,000, roughly, which –

WILLIAM YOUNG J:

She received the amount she was due under the judgment but not the costs, is that right?

MR BURGESS:

She received the amount that she had – yes, yes, Your Honour, but that's an amount which, of course, she has since been found not to be entitled to.

WILLIAM YOUNG J:

Right, okay.

MR BURGESS:

So she had, in fact, received from me, at that time, more money than her entitlement to costs.

BLANCHARD J:

But she wasn't really an owner of the property, in beneficial terms. She was in the same position as somebody who had a mortgage over the property and could be paid out. The complication, I agree, was that the amount that was owing was in dispute or variable but she wasn't an owner of the property.

MR BURGESS:

But she claimed to be an owner of the property, Sir.

BLANCHARD J:

Well, she might have claimed to be but she clearly wasn't.

MR BURGESS:

Well, that's where one of the problems in this matter has come in, in that because I had that hanging over my head I was unable to deal with the property as if I had clear title to it.

TIPPING J:

You could have paid her out, got rid of the notice of claim, on a basis that was under protest as to a certain amount and that any issue, as to final amount, could be brought into the ultimate accounting. It would have been as – I can't see the problem here.

MR BURGESS:

The problem, Sir, is that she was offered the payment with the 36,000 –

TIPPING J:

Yes, but not with the nine –

MR BURGESS:

The nine –

TIPPING J:

You would have said, here's the 36 and the 9 and if the 9 changes we'll take that difference into account in the ultimate wash-out, could you not, or have I misunderstood it? I may have misunderstood it, Mr Burgess, but to me –

WILLIAM YOUNG J:

Mr Burgess has complained that you did pay the nine but your solicitor took a lien over it, is that right?

MR BURGESS:

The funds were –

TIPPING J:

Oh I see, oh dear.

MR BURGESS:

The funds – no, he never took a lien over it, he just whipped it out of the trust account without authority. The money –

ELIAS CJ:

But that's not, that's not relevant to the issue that we have to look at here

MR BURGESS:

No.

ELIAS CJ:

No. Is your argument that the relationship property regime did not or had not crystallised, that this wasn't an interim determination under that regime, irrespective of the property interests in it?

MR BURGESS:

I had considered the matters had crystallised, that the argument from the other party, because I had appealed to have that requirement of unequal distribution set aside, was that they had not, and it was continuing as a relationship property situation until the ruling of the Court of Appeal crystallised the entitlements. And, on that basis, it was claimed that the property at Medbury was still relationship property. And that has been the view that I think both Judge Sullivan and Justice French have also followed.

TIPPING J:

Mr Burgess, what do you say about the last part, the second sentence in para 21 of the same judgment of Judge Somerville? It's on page 57 of the casebook. Volume 1.

MR BURGESS:

Sorry, Sir, that paragraph was paragraph 23, was it?

TIPPING J:

21.

MR BURGESS:

The interest had in fact been paid, Your Honour, and the Court had been incorrectly advised by her counsel that it had not, and that was the entire –

TIPPING J:

Well, the 9000 certainly hadn't been.

MR BURGESS:

The 9000 certainly hadn't been, Sir. However, the –

TIPPING J:

Wasn't this an express agreement? You can hardly complain about the non-removal of the notice of claim when you hadn't observed the terms of the setup.

MR BURGESS:

The 9000 itself, Sir, was agreed as a cap on the costs and to be on - the amount to be actually paid was the amount appropriate when the appeal was finally determined.

TIPPING J:

Because all of this is leading in an underpinning, isn't it, of the proposition you raise that she's really responsible for the mortgagee sale. Because you were hogtied by this notice of claim.

MR BURGESS:

I was in fact, Your Honour, hogtied by the notice of claim, and at the time the notice of claim happened, according to the information I had from the other party, from her lawyers, was that they were still claiming that the property was relationship property, so it wasn't – the rest – if it was still relationship property, I'm not solely responsible for the sustenance and maintenance of that property. But I was also denied access to the capital that I had, whether as trustee or in my own right in that capital, to borrow further sums in order to put in a fresh crop and to keep the mortgage current. Now, I'd taken those steps but I was, I was in fact hogtied by this notice of claim. Yet if you go back to Judge Strettell's second decision, I was entitled to the outright ownership of that property for the payment of the 36,000. My ex-wife, in contempt of that judgment, refused to accept that payment and make the transfer, and because there was a pending mortgagee sale, I – the Southland Building Society – I was forced into this agreement. So this was an agreement that has stemmed from the contempt of a ruling of the Family Court when my ex-wife refused to implement it.

CHAMBERS J:

Well, if that was so you could have gone to the Family Court and there would have been various mechanisms by which that transfer could have been made to take place. Appointing of an attorney to sign the transfer document. No doubt there are other methods as well.

TIPPING J:

In the notice of claim –

CHAMBERS J:

I just cannot accept you were hogtied in the way in which you assert.

MR BURGESS:

Sir, that is the path I have been trying to get an explanation, or a similar path, from which I have tried to get an explanation from Ernie Tait, my then-lawyer, as to why that option was not taken and why, instead, he negotiated this document with Ms Corry, and also why I was not warned of the pitfalls in the document. However, that –

ELIAS CJ:

But that, that's for another day –

MR BURGESS:

Not a, not a –

ELIAS CJ:

– and another party. We're concerned about –

MR BURGESS:

Yes. Yes, Your Honour, and the point I was about to make is that that is a live issue in two other proceedings. First of all there is the Part 6 applications I have made to the Family Court, which were made last September and are still stalled in that Court, to have that, this agreement declared a nullity for non-compliance with statute and on the grounds that the outcome of it gives a division or an outcome as regards –

TIPPING J:

But look, you were bound by this agreement vis-à-vis your ex-wife. The fact that you may have suffered a loss as a result of entering into it is quite a different matter.

MR BURGESS:

The loss, I think, could be seen as inevitable when the agreement was entered into, but as Her Honour pointed out, these are matters for another Court and these are matters which are actually live in two other Courts, one in the Family Court and in proceedings in the High Court between myself and the bank which my ex-wife is...

WILLIAM YOUNG J:

Mr Burgess, these are, sort of – well, we've sort of, in a sense, got into the middle or latter parts of the dispute. I wonder if it's possible to start, unconventionally, at the beginning. Just – let us assume that you're right and that there should have been a hearing date approach. Can I just go through with you the primary items of asset and liability just to see that we're on common ground, or where the common ground is? The Medbury property, that's treated as having a gross value of 252,000, I think by the Court of Appeal anyway. Is that – that's an agreed figure?

MR BURGESS:

That figure, Your Honour, came from a valuation obtained –

WILLIAM YOUNG J:

From North Canterbury?

MR BURGESS:

– by, by the respondent. I had a slightly earlier valuation of 250,000. It is basically as concrete and reliable a figure as you can get.

WILLIAM YOUNG J:

All right, well you say, you say 250, she says 252.

MR BURGESS:

There's no essential difference.

WILLIAM YOUNG J:

Okay. The Medbury stock, there was a rural livestock valuation of 5,405. Is that an accepted figure or not?

MR BURGESS:

I obtained that valuation, so that is the value of the actual stock, but it was a concession made by Ms Corry at the Family Court hearing and accepted by Judge Strettell that I should have the increase in the value on that stock, so it was actually to be brought into account at I think it was 2118, which was the separation date value. It's –

BLANCHARD J:

I'm sorry, I'm not following that. What are you saying?

MR BURGESS:

The value that...

ELIAS CJ:

The separation date value was 2118, but you accept that if a date of hearing valuation was accepted, it would be 5405, do you?

MR BURGESS:

Those were the figures from the valuations and from the records, but I was just making the point that the other party made a concession on the increase in the value.

BLANCHARD J:

Do you accept the figure of 5405?

MR BURGESS:

Yes, yes, Your Honour.

BLANCHARD J:

Good.

ELIAS CJ:

That's for date of hearing valuation?

MR BURGESS:

Date of hearing.

ELIAS CJ:

Yes.

WILLIAM YOUNG J:

And what's the reason for the difference? Just more stock, or more value or what?

MR BURGESS:

The accounts are in the books, Your Honour, but without actually checking the – what – how much change there's been in stock values, which I don't think they've been great. It was the result that I'd bred up the stock numbers.

WILLIAM YOUNG J:

All right. Medbury vehicles and plant, that's a figure which is referred from the accounts as 10,533. You say approximately 10,000. So that's – in your submission, I think.

MR BURGESS:

That sounds correct, Your Honour.

WILLIAM YOUNG J:

Now we're really getting into the nitty gritty here, the caravan which was purchased for $1500, was that still extant at the separation – at the hearing date?

MR BURGESS:

Not at Medbury, Your Honour. I believe my ex-wife had it somewhere else.

WILLIAM YOUNG J:

So it's in her possession?

MR BURGESS:

As I understand it, Your Honour.

BLANCHARD J:

But is the figure of $1500 accepted?

MR BURGESS:

We have no other figures for that. That was the purchase price.

WILLIAM YOUNG J:

That was the purchase price, wasn't it? Yes.

MR BURGESS:

And it's been used throughout, and I don't see a $1500 figure as worth arguing, whether it's right or not.

WILLIAM YOUNG J:

Now, the net proceeds of sale of Cranford Street, two different figures are given and I'm not quite sure how they correlate to the debts owed back to Ms Beaven's mother, but sometimes 166,000, sometimes 175,000. Do you – can you help on that, or not?

MR BURGESS:

Not greatly. We didn't get the affidavit, as best I recall, on those figures until the morning or actually during, at the start of the second hearing of Judge Strettell and I have a gut feeling that the difference between the 175 and the 168 might be the real estate commission but no I cannot be –

BLANCHARD J:

So we should take the lower figure?

MR BURGESS:

I think you should take the lower figure Your Honour.

ELIAS CJ:

166,113?

MR BURGESS:

Yes.

WILLIAM YOUNG J:

Now I suppose everywhere, it's slightly more complex in the first of the Judge Strettell decisions, but after the Cranford Street property is sold Ms Beavan acquires property in Geraldine and there are quite a lot of advances from her parents or a parents' family trust and the clock seems to stop running with the Cranford Street property. What do you say about that?

MR BURGESS:

My understanding is the Geraldine property was bought while she was living at the Cranford Street property. It was actually bought quite early in the piece after separation or at least the deposit on it with, subject to title, was very early on in the piece but yes there's been a horrendous mix up where she's mixed the proceeds of the family home and funds from the family trust.

WILLIAM YOUNG J:

It wouldn't matter much if there wasn't any inflationary increase in the Geraldine property. Do you know if there was or do we just now know?

MR BURGESS:

The best of the information I can get to you is in the Real Estate Institute published figures and that would show there was a modest inflationary increase in that property which I believe I've detailed somewhere in my submissions and the source documents for that are in the original material for the Family Court which are in the case book.

WILLIAM YOUNG J:

All right. The submissions from Mr Shamy acknowledge $12,050 as the surplus from the sale of the Woodbury Street property after allowing for everything that went into Cranford Street. Do you have a comment on that figure or not?

MR BURGESS:

I've done my calculations and put them in my submissions. I don't have a comment off the top of my head.

WILLIAM YOUNG J:

Yes, the two sets of calculations are a bit like ships passing in the night. They're not – I'm looking at your calculations, page 22 of your submission, page 22, page 23. I think these are actually figures that I've referred to one way or another in those calculations.

MR BURGESS:

Sorry which paragraphs?

WILLIAM YOUNG J:

Page 22 of your submissions.

MR BURGESS:

Oh sorry. I can't actually locate my figures for the calculations on that.

WILLIAM YOUNG J:

Page 22.

MR BURGESS:

Yes.

WILLIAM YOUNG J:

It's got "Effective Different Dates of Division" as the heading.

MR BURGESS:

Yes Sir.

WILLIAM YOUNG J:

And then under that “Division at separation” and then over the page “Division at the first Family Court hearing date”.

MR BURGESS:

Sir I’ve got the part here where I’ve calculated there was $122,000 net on the sale of the family home net value but I understood you were asking a question about the surplus on the sale of Cranford Street.

WILLIAM YOUNG J:

Yes.

MR BURGESS:

And those figures don't appear to be in this part. They are in there somewhere but I can’t remember where.

WILLIAM YOUNG J:

All right. The debt over Medbury, there was a separation date debt at around 72,000.

MR BURGESS:

Yes Your Honour.

WILLIAM YOUNG J:

Now there isn’t actually a precise figure that I’ve seen in the evidence or the judgments for the hearing date indebtedness but you, I think, give a figure of 84,000 here. Yes 173, I think, and I think Mr Shamy says 70 – just relies on the separation date figure and by going back through the figures that Judge Strettell uses for his net figure, I get around 71,000. So what happened to the mortgage between separation and the hearing date? You made payments off it but more money was borrowed was it?

MR BURGESS:

Sir, the mortgage had a cap of 75,000 and I was trying to keep the mortgage below that by making payments but I also did use some money to buy seed and do various other things on the property to try and make it slightly more self-supporting.

WILLIAM YOUNG J:

Okay, so it will be somewhere between 70 and 75,000?

MR BURGESS:

The hearing date valuation is in there somewhere Your Honour and it's approximately 74,000 and some hundreds.

TIPPING J:

So if we took a round 75 we wouldn't be far off?

MR BURGESS:

You would be very close Your Honour.

WILLIAM YOUNG J:

Now the money owing to Ms Beavan's mother, that's 40,000, that's separate from the net proceeds of sale of Cranford Street. So Cranford Street is say 166 or 175, practically the net equity is around 133 or something of that sort.

MR BURGESS:

Yeah.

WILLIAM YOUNG J:

Now other adjustments, Ms Beavan was given an allowance of $4000 for damages over the contract for the relocatable homes. So is that an accepted figure that she's paid? Although I think it might've come from the proceeds of sale of Woodbury Street.

MR BURGESS:

It has been accepted and I think it was about $3800 but 4000 is a near enough figure.

WILLIAM YOUNG J:

And does – but you probably, because we're already into the detail, you don't know if that has come out of the 12,000 figure that's been recognised by Mr Shamy for balance of Woodbury Street proceeds?

MR BURGESS:

You would have to ask that question of Mr Shamy. However my understanding would be that the 12,000 would be after that figure and I think the 12,000 is

somewhat on the low myself without finding my right passage but I have, I'm sure, addressed that in written submission.

WILLIAM YOUNG J:

And now Judge Strettell made an allowance in his first judgment of $35,000 in your favour for poor standard of living and mortgage reductions.

MR BURGESS:

No Your Honour.

WILLIAM YOUNG J:

All right, okay well let's have a look at what he said and then you tell me where he's wrong. It's para 104 of his first judgment.

MR BURGESS:

Sorry Sir, the point is that that was solely for financial contributions, it had no component for my living conditions.

WILLIAM YOUNG J:

Okay, let's have a look at it. I'm not sure what page of the case it is, 163 is the judgment. Okay, no you're right sorry, page 186. So that's an allowance for what you paid against the mortgage, the rates you paid less the allowance and what are the maintenance payments? Money you spent on the farm?

MR BURGESS:

Yes, Sir.

BLANCHARD J:

So are those – as far as they go, are those figures at issue or are they, are they seen as good enough of what...

MR BURGESS:

I have never understood, Your Honour, where the figure for actual maintenance payments of 15,000 came from and where that – and why the figure of 35,000, because during the transcript in the cross-examination it was actually agreed that the amount spent was I think approximately 45,000, or it may have been 42,000. So why

Judge Strettell discounted an agreed figure in his judgment, I am – never been aware of, and I've always considered the lack of reasons an issue.

BLANCHARD J:

Were any part of those payments capital payments?

MR BURGESS:

No, Sir. The mortgage was an interest-only –

BLANCHARD J:

No, I was thinking about the, what is said to be a maintenance payment. Over and above maintenance payments, was that – is that maintenance of your former wife or is it –

WILLIAM YOUNG J:

No, it's the property.

BLANCHARD J:

– or is maintenance of the property?

MR BURGESS:

Perhaps you would have been better if you could see the sustenance of the property, Your Honour, that it – because that is what it was payments were covering.

WILLIAM YOUNG J:

So you think that there's, somewhere in the evidence, there's an agreement that that should be 45,000?

MR BURGESS:

It is in the transcript and I have made the reference in my written submissions to the location in the transcript. It immediately followed, as best I recall, lunchtime on the second day. So that's in one of these bundles.

WILLIAM YOUNG J:

Does the Judge deal with how he's calculated those figures in the detail of his judgment?

MR BURGESS:

No, Your Honour. He's –

TIPPING J:

Whatever the figure is, the accounting is of only half the figure, isn't it?

WILLIAM YOUNG J:

Yes. I think it is.

TIPPING J:

Well, the Judge has taken 65% because that was his apportionment, but now it's 50/50. It should be only a half.

MR BURGESS:

Yes, Sir, and to jump ahead to what –

TIPPING J:

Yes. I know what's coming.

MR BURGESS:

– the Court, the Court of Appeal did, they simply, not from this decision but from Judge Strettell's second decision, just lifted the figures out straight and didn't do that adjustment to change –

TIPPING J:

Say it's 45. The accounting is 22 and a half.

MR BURGESS:

In round terms, Your Honour, yes.

TIPPING J:

Not the full 45.

MR BURGESS:

No, of course, Your Honour.

TIPPING J:

Of course. Yes.

MR BURGESS:

And I believe I made that point in my submissions.

TIPPING J:

There's a suggestion, isn't there, that the Court of Appeal fell into the trap of ordering accounting for the whole.

MR BURGESS:

Well, the suggestion is, Your Honour, that the Court of Appeal did make that trap and Mr Shamy and, I think, in her prior submissions, Ms Corry made that suggestion, but what – they've fallen in a trap themselves in that they have taken that as being the gross figure to be taken in, whereas in fact it was a figure that had already been discounted in the prior judgment. So when they are arguing that the –

TIPPING J:

But the 45 wasn't the discounted figure, it was the whole.

MR BURGESS:

It was the whole. Judge Strettell, for whatever reason, discounted it to 35. That was adjusted slightly lower in his second decision, which the Court of Appeal picked up, and now Mr Shamy wants to halve that figure that's already been discounted twice before.

TIPPING J:

Well, we'll obviously be hearing about that, but you say that it's already been done and the other side is seeking to do it again so as to create a quarter, not a half.

MR BURGESS:

In essence, Your Honour, yes. But there has, and this is one point on which I think both parties are in agreement, is that the Court of Appeal's handling of that particular aspect of their judgment is fundamentally in error. It's just that we don't agree on what the error is.

TIPPING J:

And how to rectify it.

MR BURGESS:

Exactly, Your Honour.

TIPPING J:

Yes. All right, that's helpful, thank you.

WILLIAM YOUNG J:

Can I just – I see at para 189 of your submissions you make the reference that evidence references to the agreement of 43,000 was spent on property post-separation, "and 5000 additional paid by friends of mine."

MR BURGESS:

Yes, Your Honour. And that gives the reference to the transcript which –

WILLIAM YOUNG J:

Oh, I see. But his figure, you say, of this figure of 48,000, the Judge only allowed 25,000 of rates, mortgage, and 15,000 for maintenance expenses.

MR BURGESS:

Yes, Sir. And while you'll probably say this is an item that is so small that, really, the Supreme Court shouldn't trifle with it –

WILLIAM YOUNG J:

Well, the trouble is we've got to deal with it. It's a case that's made up of lots of little small items, really.

MR BURGESS:

Yes, Sir.

TIPPING J:

And if we adopt a hearing date valuation, we've then, in effect, got to do an exercise that the Court of Appeal obviously didn't have to do.

ELIAS CJ:

Or send it back.

TIPPING J:

Or send it back, but...

MR BURGESS:

I would rather, I would rather –

ELIAS CJ:

You'd rather it's dealt with.

MR BURGESS:

I would rather think, Your Honour, that given your responsibilities and that of the Court of Appeal and the lower Courts, that it could quite happily be remitted back right down the chain to either the High Court or the Family Court. It seems to have to do all these fine calculations is a task you don't normally expect of the Supreme Court. I thought you were here to deal more with the questions of principle and interpretation of the law.

ELIAS CJ:

That's a refreshing submission.

TIPPING J:

Well, it's really whether it's fair to just send it right back. I mean, if we've got it all before us, and it's slightly unusual, but, frankly, I would with respect to any view, we would have thought we could relatively easily sort it out.

CHAMBERS J:

So would I.

MR BURGESS:

It wouldn't cause me any great heartbreak, Your Honour. That would cause me no heartbreak, Your Honour.

TIPPING J:

Good, good.

ELIAS CJ:

Sorry, could you just remind me, because I was behind, what paragraph in your submissions you were then referring to?

CHAMBERS J:

189.

MR BURGESS:

But the point I was going to make, and I was saying as being a trifling issue in how Judge Strettell calculated his, or how he assessed, evaluated, whatever words you want to use, compensation for my post-separation financial contributions, is that he deducted the income from the stock sales, which, of course, was income that was earned partly from the capital in the stock that I took over and to a large extent by my efforts to look after, look after the stock and breeding them. But elsewhere he has said that my labour was valueless, so it's something that grates with me, and, as I say, it's not a great financial item, but... Particularly when elsewhere, having conceded by the other party that the increase in stock value was to be credited to me, to then have that, most of that taken back away again, seems a little inconsistent as well.

WILLIAM YOUNG J:

His reason for not, for limiting your contribution seems to be that the gains made on the domestic residential property of your former wife really counterbalanced that. That's 101, I think, of his judgment. That seems to be what, what he – the reason he's given.

MR BURGESS:

Yes, Sir, and he does describe it as a purely – has been conceded in Mr Shamy's submissions to be a purely inflationary gain and Judge Strettell classed it as entrepreneurial. That really flies against 30 years precedent, and I would refer to cases such as *Meikle v Meikle* [1979] 1 NZLR137. And there are a large number of cases and quite a lot of material in *Fisher*, which I've referenced in my submissions. Inflationary or passively earned gains are normally divided equally between the parties. And what he's totally overlooked on the basis of increasing the pool of relationship property, is that my sacrifices and efforts to sustain Medbury, from my labour and my own post-separation income to support the mortgage, have also resulted in a massive increase in the capital value of the property. There's some 75,000 additional relationship property were available as a result of my efforts.

TIPPING J:

That's the increase between separation and hearing and the value of Medbury.

MR BURGESS:

Yes Sir.

TIPPING J:

Approximately 75,000.

MR BURGESS:

I believe it's approximately 75,000.

TIPPING J:

And you say that that is attributed, at least in significant part, purely to inflation?

MR BURGESS:

No.

ELIAS CJ:

No, the opposite.

TIPPING J:

Sorry, the opposite I beg your pardon.

ELIAS CJ:

Entrepreneurial effort.

TIPPING J:

Has any attempt been made to separate out that?

MR BURGESS:

Sir, I've obviously worded myself badly, what I am saying –

TIPPING J:

No it's probably entirely my fault.

MR BURGESS:

What I am saying is that Judge Strettell credited, as a post-separation contribution as a positive element, my ex-wife increasing the pool of relationship property on the proceeds of the relationship home by buying Cranford Street and making a gain on it but there was a larger gain made on Medbury in that time as a result of my supporting the mortgage out of my post-separation earnings and my efforts put in to sustain the property and maintain it as an existing relationship property.

TIPPING J:

But of the total of 75, was any attempt made to apportion that between active and passive to use the *Meikle* terminology.

MR BURGESS:

Sir no effort and as far as I'm aware it is from the – both valuations that were obtained, one from my side and one from the other but it can be seen as a reflection of general property movements in the district.

ELIAS CJ:

What, both valuers agreed that the move was attributable to property rises?

MR BURGESS:

Yes Sir, sorry yes Madam.

ELIAS CJ:

That's all right it happens all the time.

TIPPING J:

Well did they mean by that inflation? They must have, mustn't they?

MR BURGESS:

Just inflation or the general market had moved up.

TIPPING J:

Well that's usually the –

MR BURGESS:

And I believe – I don't actually know if you have both values.

TIPPING J:

But these cases in my limited recent experience are bedevilled often by trying to work out the cause of the increase in value as between the active and the passive. I was counsel in *Meikle* so I am familiar with the *Meikle* jurisprudence but you say that was not really addressed here?

MR BURGESS:

As far as I'm aware there was, as regards the farm Sir and since I was there doing work, I was attempting to improve the pasture but maintain the property in as best I could in a comparable position to what it was at separation date. I didn't set out to make any dramatic increase in its value or make any capital contribution to that but then again until I actually received the vesting of my share of the property and could draw on my capital I didn't have the funds to do it either.

TIPPING J:

No, understood you're being –

MR BURGESS:

So I was just trying to maintain it for a speedy and efficient resolution and division that the Family Court was meant to have made and in the hope that when the property did become mine that I could then draw down on the capital and make the improvements. I didn't want to make the improvements because I was aware of what problems that could cause.

TIPPING J:

So if one simply took the view and I'm not saying this is my view, but if one took the view that 50% active, 50% passive, that if anything would be favourable to you by the sound of things?

MR BURGESS:

Well it would be favourable to me Sir but I don't quite see how that squares with the law.

TIPPING J:

Well it might, if it's all purely passive, then the law says she's entitled to half of it.

WILLIAM YOUNG J:

What you're saying is the argument I think you're making that it wouldn't have been able to be held on to unless you had been living there, working there in not entirely satisfactory circumstances.

MR BURGESS:

Yes Sir but the gain itself being inflationary, general movement in the market, is not apportionable. The piece where that part of my efforts should have been recognised would've come under section 18B but Judge Strettell has said that my living conditions and my labour were essentially worthless and yet they were used to sustain –

TIPPING J:

Well I can understand the argument that you can't say this was wholly attributable to inflation, I'm trying to get a feel for how much on each side of the passive/active divide.

MR BURGESS:

I might be shooting myself in the foot but as far as I can see Your Honour the evidence that has been before all the Courts right the way through is that the gains on the relationship property held by each party were the result of general moves in inflation.

TIPPING J:

I think you are shooting your own foot to that extent.

MR BURGESS:

But if you were to ask me what part of that gain on Medbury was actively produced post-separation by my efforts and then ask me to produce – point to the evidence, I would have to say to Your Honour that there is no evidence there and I didn't seek to have any evidence because I was not and I am not of the opinion that I actually did anything that particularly increased the evidence as regards putting up the building or putting in new fencing.

TIPPING J:

But you should be allowed something for sustenance in a sense, post-separation sustenance?

MR BURGESS:

So yes Sir, I'm saying that those factors in law should be coming in under section 18B, not under the apportionment section that you are talking about.

WILLIAM YOUNG J:

Just pausing there. I see that the concession that was made about stock is recorded at 97 of Judge Strettell's judgment, that's that the stock should be dealt with at hearing date – at separation date I'm sorry.

MR BURGESS:

Yes Sir, that wasn't something I sought that was offered. It seems 3000 for a couple of years' labour seems a rather parsimonious, particularly when 5000 is clawed – the other 5000 is clawed back.

WILLIAM YOUNG J:

The sales.

MR BURGESS:

The sales. Well that was an increase – that was lambs that I'd bred up and sold off, so that was an increase in stock. But more particularly Judge Strettell in assessing post-separation contributions based his starting point on the unequal division in that I had the use of my ex-wife's capital without compensation to her and that seems to have coloured his entire approach to post-separation contributions, yet now that this Court in its leave decision has found correctly that due to the lack of evidence of any – that there was no evidence to support my ex-wife's counter-claim for a greater share of the property, that assumption that Judge Strettell started in his evaluation of post-separation contributions that I was using my ex-wife's capital without compensation can be shown to be plainly wrong. It is plainly wrong because the facts are that I wasn't using her capital. That is something that has taken six years before the Courts to get a recognition of, that there was no evidence to support the claim of unequal contributions.

The entire matter to me, it seems to have some features in common with the Court of Appeal decision in *Hyde v Hyde* CA48/2008 [2009] NZCA 125 in that this matter miscarried on the facts at the first Court hearing and we now unfortunately have a snowball effect of matters also through the different streams of litigation which have

all built on that one decision which miscarried on the facts and that was creating – and the length of time this has taken has led to all sorts of other issues that should never have occurred and how the Courts deal with those sorts of issues I really don't know.

ELIAS CJ:

Where do you want to take us to now? Does that really wrap up the submissions you want to make to us Mr Burgess? You'll have a right of reply when you've heard what Mr Shamy has to say.

MR BURGESS:

I do have a couple of points but I just want to check on what we've covered so far.

ELIAS CJ:

Yes.

MR BURGESS:

One point, or perhaps a series of points, related points, is Mr Shamy at one stage has said that my ex-wife's conduct of her case has been entirely reasonable throughout which is a matter which I do disagree with. She's put forward a – when I applied to the Family Court for equal distribution, she put forward a counter-claim for the greater share and failed to put forward any evidence to support that and has very assiduously maintained that right through the Courts and was still trying to have that matter dealt with in her application to this Court for leave. This whole matter was a simple matter right at the start where the parties reach an agreement between themselves that would have –

CHAMBERS J:

Well do we need to go into this though Mr Burgess because the grounds on which leave have been given are very precise and that doesn't seem to me to help one way or the other.

ELIAS CJ:

Well it may turn out to have some relevance but your point is simply that you're resisting any suggestion that you have been unreasonable in the conduct of these proceedings.

MR BURGESS:

I have made mistakes Your Honour, lawyers acting for me have made mistakes but I think on the whole that we were reasonably correct in the approach that we took that there were grounds for equality of division and that even if you took the value of the properties that both parties contributed at the separation date you still got to a position of rough equality, just as you did at the start and that's on what evidence was available which wasn't great evidence but there was a whole failure in Judge Strettell's level to recognise that there actually has to be evidence before you got to that step of calculating contributions and there was never from day one evidence of a greater contribution but the next part from that is I made a series of applications to the Family Court to try and get control of the property so that I could see it was sustained and properly looked after and those applications, one way or another, have never been heard and somehow got tangled up in the process following a series of oppositions from my ex-wife.

I've done everything I could, that I was aware of was possible, to try and sustain this property and keep it in existence until the Courts can make a final ruling saying this is how things are to be divided but the length of time and the number of decisions this has got to go through and there does seem to have been a series of errors in the decisions as they've gone through the system and I have been denied my right to have some of these matters heard outright, particularly the interlocutory applications and I am baffled and confused that you can make an application to a Court under urgency to sustain property and have that application just basically buried somewhere in the depths and never even a proper decision made, let alone having a hearing.

ELIAS CJ:

Do we have details of those interlocutory applications in front of us?

MR BURGESS:

Those are in the bundles Your Honour.

ELIAS CJ:

Right thank you.

MR BURGESS:

Those are the applications that Mr Shamy has in his letter said he didn't think should be in the bundle but I actually thought that they were a critical part and the other point is that my ex-wife ran her case before Judge Strettell in the second hearing on the basis that I was to pay her the 36,000 and thereafter I was to take full responsibility for the property and I was to have effective clear title bar my financing and yet as soon as that decision came in and she was offered the money, she then claimed more and refused to make the transfer. Now we've already covered part of that earlier but I have done what I could within the limits of the opposition to try and preserve property and I have been knocked back at every step. There were any number of occasions on which my ex-wife could have transferred the outright ownership of the property to me with a reservation that there was to be a wash up by the Courts of a sum of money backwards and forwards to anybody as appropriate at the end of the decisions.

The only other matter I wish to address is the costs in the lower Courts. It is solid principle that costs follow the event. The event is that Judge Strettell and Justice Hansen have been found to be wrong in principle. The Court of Appeal ought to have followed the Court of Appeal's own precedent in *Reid v Fire Service* [2010] NZCA 761/2009 and overturned and reversed those cost decisions. They have, I think, in *Reid v Fire Service* said that they have the power to do that under rule 48 and they also have the power to make any consequential adjustments to the decisions that their granting an appeal may – where their granting of an appeal may create problems or an injustice with other parts of the decision. They have to look at the flow on effects of their decision and adjust the rest of the judgment accordingly and they just simply failed to do that in this case. Most particularly with that sum of 36,000 that had been paid to my ex-wife but which the Court of Appeal failed to order the refund of and unlike Mr Shamy's submission that that was taken into account in their calculations, there is nowhere in the Court of Appeal judgment that even acknowledged that that payment was made. They don't take it into account whatsoever.

And as the point I made in my closing address in the Court of Appeal, this is what happens when the bank sold the property over four and a half thousand of mortgage arrears and the finding of the Court is that my ex-wife actually owed me more money than that as at that date and that is what happened in the Court of Appeal. My ex-wife was holding the monies that I needed to avoid the mortgagee sale. I have been – that put me in an entire catch 22 when I couldn't pay the bank because my ex-wife

had the money that was rightfully mine. It's not just that - I've been put throughout this matter in a complete catch 22 situation.

ELIAS CJ:

So you take issue with the characterisation of your stance as seeking to fund the litigation out of the proceeds?

MR BURGESS:

Sorry Your Honour you've lost me on that one.

ELIAS CJ:

Well somebody says that you were seeking payment out in order to fund your litigation.

MR BURGESS:

I sought payment of part of my funds, what I saw as being rightfully my part of the relationship property, partly to fund the litigation in the Court of Appeal and partly to keep the property in existence until the Court of Appeal or, unfortunately as it turns out this Court, makes the final determination but my financial resources from my separate – from my personal sources post-separation simply became exhausted.

ELIAS CJ:

Right, thank you.

MR BURGESS:

Thank you Your Honours.

ELIAS CJ:

Thank you Mr Burgess. Mr Shamy.

MR SHAMY:

Mr Burgess' submissions both written and oral began and ended with the issue of the mortgagee sale of the Medbury property, consequently the major issue put forward by Mr Burgess is whether Ms Beavan should bear the loss, if any, associated with this mortgagee sale. He contends effectively that she did not transfer the Medbury property to him in terms of the Family Court orders, notwithstanding the fact he says she should've, even though he was appealing those orders. As part of the ongoing

progression of this matter, Mr Burgess sought a stay of the Family Court orders, and the terms which he put forward for that stay were recorded in the minute of Judge Strettell at page 108 of the casebook, where the learned Family Court Judge said, "The stay is granted on two conditions. Firstly, that the applicant prosecutes his appeal with diligence and, secondly, that he undertakes to pay all existing outgoings in relation to Medbury, including rates, insurance and mortgage," that being dated July 2008.

In terms of the response on behalf of Ms Beaven to Mr Burgess' contentions, I can put it perhaps no better than Justice French did at page 49 of the casebook, where Mr Burgess was contending then, as he is now, that this agreement he signed was unfair and in some way has led to the loss of the Medbury property. At paragraph 44, Her Honour said, "The agreement which he now seeks to impugn was proposed by his own lawyer as a means of enabling Mr Burgess to get what he wanted at the time, which was legal title of the property as well as a stay. Ms Beaven could have refused to entertain an agreement, which would have forced Mr Burgess to make a choice," and then it continues on. "The terms were clear and unequivocal and they were relied upon. The agreement has been part performed, each party acting on the agreement and each taking benefit from it."

In my submission, it would be very much contrary to the principles of the Act for this Court to entertain any submission that Ms Burgess, now coming up – Ms Beaven, now nine years after separation, would be bearing the brunt of the loss of the Medbury property.

ELIAS CJ:

What do you say is the effect of the agreement? What – it didn't dispose of the matrimonial property issues. It was simply a staging post along the way, it seems to me. In other words, I don't think it – did it have any effect, or were matters still all at large?

MR SHAMY:

Matters were all at large to the extent, as Justice French said, Mr Burgess wanted a stay and he wanted to get some more money to continue his battle. He therefore entered into an agreement to allow that to happen and effectively Ms Beaven retained an interest in the property to the extent that she was allowed under the judgment of the Family Court or any later Court, so I think the phrase has been used

that it was, “like a mortgage,” and it was, to an extent. There was some portion of the property, or some value of the property, more precisely, to which she had an interest, and really that, this memorandum of consent, was really just safeguarding –

TIPPING J:

Her interest, I would have thought, was by way of security, not beneficial.

MR SHAMY:

Well, the words, the words used are that she has an interest.

TIPPING J:

Yes, I know, but as my brother Blanchard said, it was rather, sort of, loosely expressed.

BLANCHARD J:

But somebody drew attention to paragraph 21 of Judge Somerville’s decision, which actually talks about security.

TIPPING J:

Yes.

MR SHAMY:

Yes. So effectively it was a security document that, on the one hand, Ms Beaven has security. She’s not going to have the case that the Medbury will be sold off to a third party, the money will go south somewhere and she’ll never see it again, and on the other hand, Mr Burgess gets to refinance, borrow more money, and do what he likes. And so that’s really the upshot of it. So effectively it was a security document.

I’ve set out more fully in my response submissions the concerns in respect of this stance about the Medbury mortgagee sale, but unless the Court has any particular enquiries about that particular issue, I don't presume to go through those again. They can simply be encapsulated that, one, there’s simply no evidence before the Court about this mortgagee sale, why it happened or why it was let to happen so long on and the point I’ve already made is that the effect of what Mr Burgess is seeking is to have this Court remit everything nine years later back to the Family Court for another revaluation and the tracing of material in a forensic accounting exercise in

respect of a matter which is relatively modest in its scope. So I can't go too much further than I've already put in my written submissions.

That being the case, I'll turn to the substantive submissions which were filed on behalf of Ms Beaven, and I can perhaps begin by just confirming a couple of evidential matters. There was an enquiry as to what was the amount owed to the Southland Building Society at separation date. That's to be found at page 530 of the casebook, which is a printout from the Building Society showing as at that date of separation what the amount was that was owed. Secondly, there was some discussion about the amount received from Cranford Street.

WILLIAM YOUNG J:

Sorry, sorry, we've got the separation value of the debt.

MR SHAMY:

Oh, sorry, the hearing date value. My apologies. Yes, the hearing date value.

WILLIAM YOUNG J:

And what is the hearing date value?

MR SHAMY:

It's at page 530.

ELIAS CJ:

What volume is that?

MR SHAMY:

It would be volume 3, I think. Volume 3. 530 is a printout.

BLANCHARD J:

Virtually 75,000.

MR SHAMY:

Virtually, yes.

BLANCHARD J:

Well, if we took a figure of 75,000 –

MR SHAMY:

Just to confirm, yes.

WILLIAM YOUNG J:

So it is 75,000?

MR SHAMY:

Near enough, yes. And there was some discussion about the various figures in respect of the sale of Cranford Street. The Dawson Innes trust account statement in respect of the sale, which is dated 3 November 2006, is at page 704 of the casebook.

TIPPING J:

Finding 4.

MR SHAMY:

Yes, and that shows the, the figure which I've quoted in my submissions of a net figure after 8000-odd commission and the various rates and legal fees, that the balance was 116,113.09.

WILLIAM YOUNG J:

All right. The balance of Woodbury Street, you acknowledge 12,050

MR SHAMY:

Yes. It's – unfortunately, things aren't terribly clear cut in terms of what happened to those proceeds, and it's probably appropriate that I take the Court through it. If we go to volume 4 of the case on appeal, at page 892.

WILLIAM YOUNG J:

Must be volume 5, I think.

MR SHAMY:

May be 5, sorry. Yes, it is volume 5. She talks there at paragraph 8, as the copy of the settlement statement, which shows, which is at –

WILLIAM YOUNG J:

This is your client's affidavit?

MR SHAMY:

This is my client's affidavit. And that is at page 599, that exhibit, which is volume 4. Sorry, that's the, that's the letter saying that this is going unconditional. It's, it's of interest to see that Woodbury Street was sold well prior to separation and went unconditional before separation, but the sale itself settled after separation. At page 610 is the bank statement for Ms Beaven showing the amount of 147,280.55 going into her bank. What happened is that the sale proceeds of 156,642.11 were deposited in two separate ways; there was 8,161.56 went into her Westpac account, which was on the 21st of May and then the major deposit is showing here on the 6th of June, going into her account then.

So, what we have then, is that balance to the account which is made up of pre-existing funds of 5000-odd dollars and then the 147. Then the paper trail shows us that $20,000 was withdrawn from this account on the 12th of August and this was used as the deposit for the Cranford Street property and then a further 90,580 was taken on the 8th of September.

So we have two accounts, really, in which the proceeds of Woodbury have been deposited; we have a National Bank account, which effectively is used for the purchase of the Cranford Street property and then there's the other $8000 is left sitting in this Westpac account. Now, so, it's a little bit difficult because there's pre-existing funds in each of these accounts, it's very hard to say exactly what interest is earned and the like.

Then on the 21st of July –

WILLIAM YOUNG J:

Is the 12,050 the figure that's referred to in paragraph 15 of the affidavit?

MR SHARMY:

Yes, what we're looking at is the 166-odd thousand or 156, sorry, odd thousand net from Woodbury less the 110 paid for Cranford and then she uses money herself. Now, –

WILLIAM YOUNG J:

So that leaves 46,000?

MR SHARMY:

Yes, so that the nice point that was raised, although it doesn't seem to have been resolved anywhere is, at this stage, is the 40-odd thousand sitting there, is that taken as being put towards the debt to the mother, in terms of the – because the net proceeds of Woodbury are the 156 less the 40.

WILLIAM YOUNG J:

Well it's kind of important because if it's the 40 – all right, just – why isn't she credited with $46,000 then?

MR SHAMY:

Well the debt to the mother at separation date is accepted to be 40,000.

WILLIAM YOUNG J:

Yes, I know that but you've sought a separate allowance for the debt to the mother, haven't you?

MR SHAMY:

Yes.

WILLIAM YOUNG J:

So don't we have to ignore that?

MR SHAMY:

Well, it becomes relevant later on, when we're dealing with the Geraldine property because –

WILLIAM YOUNG J:

What would be wrong with saying $156,000 is received. Does four get paid on the – for damages?

MR SHAMY:

Langs, yes for the houses, yes.

WILLIAM YOUNG J:

So, 156 minus four minus 110 so that's 114, so that's about what, 42,000?

MR SHAMY:

Yes.

WILLIAM YOUNG J:

Why wouldn't that be treated as an asset?

MR SHAMY:

Well the issue is how one is going to deal with this contingent debt to the mother of $40,000.

WILLIAM YOUNG J:

What say we allow for that separately?

MR SHAMY:

Well if we allow for that separately –

WILLIAM YOUNG J:

Well it doesn't matter, it's either 2000, if you net it off against the debt or it's 42,000 less a debt of 40.

MR SHAMY:

And the only time it becomes significant is when you're dealing with the Geraldine property, which she buys, in fact, settles a few years later. It doesn't settle until 12 May 2006 but there's suggestion in Mr Burgess' submissions that look, a little bit of this proceeds of Woodbury was used towards the purchase of Geraldine.

WILLIAM YOUNG J:

Well it was wasn't it?

MR SHAMY:

Yes but then it was repaid.

WILLIAM YOUNG J:

Can't we ignore Geraldine? Can't we just simply start with 156 minus the four minus the 110?

MR SHAMY:

That's what I'm saying, yes, I just really wanted to cover that point because if we just stick with the Cranford Street as being relationship property and then deal with the $40,000, that's pretty much how I've set out my calculations.

WILLIAM YOUNG J:

But I get a quite different figure from you.

MR SHAMY:

I'll have to have a look.

WILLIAM YOUNG J:

I get a figure of 42,000 from which I would allow for the debt of 40. You get a figure of 12,000 from which you claim a debt of 40, don't you? Perhaps I've got it wrong.

MR SHAMY:

I think I was taking that, actually, from the decision of Judge Strettell. Well it's probably academic, it depends whether we treat – at what stage we deal with the $40,000.

WILLIAM YOUNG J:

Right.

MR SHAMY:

That's really it.

WILLIAM YOUNG J:

So if you ignore – if we just take the 40,000 out of all calculation and don't allow for it later, it's $2000?

MR SHAMY:

Yes.

WILLIAM YOUNG J:

Okay, thank you.

TIPPING J:

Isn't that the simpler way?

MR SHAMY:

Certainly. And there certainly seems to be very simple ways of dealing with this. So in terms, if I could now come back to the major question upon which leave was granted valuation date, it seems that in lieu of there being some other reason, the two alternatives are either the date of the first instance hearing or separation date. The Court of Appeal, I think the word used by Justice Tipping said may have been slightly pragmatic in their approach and it certainly is a lot easier to deal with things before there's 140-odd thousand dollars from the trust going into various accounts and coming out and properties being purchased and sheep being sold and sheep being bred and all that sort of thing. The Court of Appeal, effectively, were utilising the principles of the Act about simply efficiently and speedily dealing with matters. At the end of the day I've set out two alternative calculations, one as at separation date, one as at the date of first hearing. There isn't a huge amount, in terms of adjustment, between them. Depending on how much one takes into account post-separation contributions.

Now to clarify post-separation contributions there was quite some cross-examination at the first hearing.

TIPPING J:

Is that all you're – I'm not inviting you to go further but is that all you're proposing to say on the principle, if you like, as to whether or not the Court of Appeal was entitled, for the reason it gave, to depart from the – I know it doesn't matter much from your client's point of view but this is really why we've given it leave.

MR SHAMY:

Certainly, well the starting point has always been that one makes the decision wherever there's a discretion involved, in terms of the other principles of the Act. This Act has inserted many more provisions than were under the old Act, in terms of post-separation adjustments, valuation issues and the like, so the more recent authority appears to be that, certainly at Court of Appeal level, that the presumption is for hearing date.

BLANCHARD J:

Isn't that what the statute says?

MR SHAMY:

Well the Court's given a discretion as to whether it can go to another date, it isn't quite as open –

BLANCHARD J:

But the starting point is the hearing date.

MR SHAMY:

Certainly, certainly. But, of course, the touchstone is always one end, simply, efficient, speedy and a just outcome, in terms of the principles of the Act and one of those principles, I think, is set out in *Fisher on Property* about not tying each other together, effectively, for longer than necessary and so what I'm saying is that it was open to the Court of Appeal to go for a separation date valuation, there were relatively unusual circumstances here, there was a gap of nearly four years between separation and hearing, there was a number of different aspects involved and in order to do justice between the parties, in terms of the principles of the Act, it was quite open to the Court to accept a separation date valuation.

TIPPING J:

I was going to say didn't the original trial Judge take date of hearing?

MR SHAMY:

Yes, yes he did.

TIPPING J:

Now what grounds did the Court of Appeal have for departing from that on appeal because that, in itself, was a quaser, if I may be forgiven, discretionary determination by the trial Judge who simply must have been satisfied there was insufficient to depart from the normal starting point.

MR SHAMY:

Certainly. Certainly Judge Strettell adopted a hearing point – a hearing date valuation, however two points are relevant. Firstly, he did that in the context of an unequal division decision but secondly, and perhaps more importantly, the Court have seen that throughout the Family Court judgment Judge Strettell was struggling with post-separation movements and contentions.

WILLIAM YOUNG J:

They're not difficult though are they really? I mean I would've thought just looking through it you've got a good value for Medbury, you've got a good value – you've got an accepted value for the livestock, you've got values for the plant, there's the caravan which is probably neither here nor there but there's the net proceeds of sale of Cranford Street and there's the balance of the Woodbury house less the debt owed to Ms Beavan's mother and there's the debt over Medbury and that's it. I mean it's pretty simple.

MR SHAMY:

I must say, I mean I'm supporting the Court of Appeal decision but I'm saying it was open to them. I can't go more than there.

BLANCHARD J:

Well actually unless there's significant post-separation contributions you're rather better off with a hearing date.

WILLIAM YOUNG J:

Well no because there are even on the Family Court Judge's post-separation contributions you would wind up owing Mr Burgess a little bit plus a refund of the 36,000.

MR SHAMY:

Well on a hearing date valuation, you see between hearing date – between separation date and hearing date we are going with Medbury from 175 to a 252, so if Mr Burgess is retaining that asset which has appreciated by between 70 and $75,000, even if he has spent 21,000 on the mortgage or the like, the balance or the ledger would still have to be, if it's an inflation driven increase, would still have to be in favour of Ms Beavan.

WILLIAM YOUNG J:

Well my very rough figures and they're really rough, on the basis of the figures we've been given, is that before adjustments Mr Burgess owed Ms Beavan about $10,000 if you took the Judge's 35,000 she'd wind up owing him $7000 plus now a refund of 36,000. Well that's the sort of scope of it. It's not –

TIPPING J:

So is her prima facie advantage of having that inflationary increase to her account as well as his, overtaken if you like by certain contrasts, that I have to confess Mr Shamy I don't have a firm grip of the intricacies of the figures but you would have thought prima facie it would be to her advantage to have a hearing date valuation because of the uplift of Medbury.

MR SHAMY:

Yes well that's what I've set out in my calculations in my first set of submissions because of this inflationary adjustment. What both valuations speak of is that this, with respect to everybody involved, is a rundown piece of land. There's been frosts and whatever, the vineyard isn't working, there's a nutter which isn't selling anything. This property is pretty basic and that can be seen from the figures that it's running at a loss, it's not selling anything. There's more money going into it than is coming out but because of inflationary pressures the land, being the land itself, is increasing in value.

TIPPING J:

Is this the Medbury up near Harden?

MR SHAMY:

Yes, yes. And one can see one of the mistakes that the Court of Appeal was to say that the starting figure was 144,000 and comparing it to the 175, 144 was including GST, it was 122 was what it was paid for and at separation date it was 175 plus GST. So the problem for the Court of Appeal is (a) apples and oranges, including GST, excluding GST and (b) not taking account of what else there was to be retained by Mr Burgess; the stock, the container, the tractor, whatever else there was which patently wasn't included in the valuation. So that's the complaint effectively on Ms Beavan's behalf in terms of the Court of Appeal calculation.

CHAMBERS J:

What I can't follow Mr Shamy is if the trial Judge in the exercise of his discretion and following the default position under the Act chose date of hearing, how one can justify the Court of Appeal's moving from that, given that one, the fact of Judge Strettell working on unequal contributions vis-a-vis the Court of Appeal's position, doesn't actually seem to me to help one way or the other on that and two, the claim for pragmatism as a justification seems to me also to fall away when as Justice William

Young has put to you the figures actually aren't that difficult to do on a date of hearing, making appropriate adjustments for post-separation conduct, using the other mechanisms which are available under the Act, what is one left with, therefore, in justifying the Court of Appeal's decision to vary Judge Strettell exercise of discretion?

MR SHAMY:

Well I must confess it is difficult to support it and it's in light of the fact also that of course throughout the other hearings Ms Beavan was contending for a hearing date valuation.

ELIAS CJ:

And it's not entirely correct to say it was a discretion exercise by Judge Strettell because he simply followed the statutory default position. So that's a more powerful – it would require surely more powerful justification for the Court of Appeal to depart from it.

MR SHAMY:

Certainly and I think I'd have to concede that there are significant problems in the Court of Appeal judgment and obviously a point that's been picked up by Mr Burgess is there's never been any reason set out as to why to effectively overturn that starting point, apart from perhaps it's easier but I can't take that any further on that basis.

TIPPING J:

Because the old Act had no express provisions for post-separation. The Courts had to fashion a mechanism, if you like, which *Meikle* was the beginning but now, as I understand it, as my brothers have said, there are specific sections referring to giving the Courts powers to do this post-separation either plus or minus adjustments.

MR SHAMY:

Certainly, certainly and one of the problems with the Court of Appeal calculation is that they changed the valuation date but kept the same adjustment figures.

TIPPING J:

Yes.

MR SHAMY:

Which don't work. So I suppose if one accepts a hearing date valuation then certainly, as Justice Young has said, 90% of the figures are quite certain and I've, in my submissions, tried to go to the primary sources in the casebook because the figures in the various judgments of the various Courts appear to be rounded up, down and all over the place, so I've tried very much to go to those figures. I suppose then the only issue, if a hearing date valuation is adopted, is how much in the way of relevant date contributions it is appropriate to award Mr Burgess in terms of his sustaining the property?

TIPPING J:

Is this the passive/active dichotomy?

ELIAS CJ:

I was going to say perhaps you'd like to address that after we take the morning adjournment if that's suitable.

COURT ADJOURNS:11.39 AM

COURT RESUMES: 11.56 AM

MR SHAMY:

I was just about to start on the issue of post-separation contributions by Mr Burgess during the relevant period as defined in the Act, and I think the starting point in the evidence is at page 751 of the case on appeal. And this is the affidavit of –

ELIAS CJ:

Sorry, what page?

MR SHAMY:

751. This is Mr Burgess' affidavit of 31 March 2006, and it sets out more detail in terms of his claims in respect of the property post-separation. And at 5.5 is the figure of 24,261.38 being the post-separation financial contributions.

WILLIAM YOUNG J:

Sorry, what figure did you say?

MR SHAMY:

This is at paragraph 5.5.

WILLIAM YOUNG J:

24,261?

MR SHAMY:

Yes. Yes. It can be seen that Mr Burgess is saying also in terms of labour that he was working, but when he wasn't working in paid employment he was working on Medbury, and he's also making a claim for his work on Medbury.

The issue of post-separation contributions by Mr Burgess was also dealt with at the Family Court hearing in cross-examination, and I'm now looking at page 806 of the case on appeal, where Mr Burgess is being cross-examined and a number of points are made, including, of course, that the business runs at a loss so he claims back the GST refunds, and that he says, in terms of the $25,000 figure, "I don't have the figure in front of me. It sounds slightly low but not far off." That's at line 12. And cross-examination on the issue of post-separation contributions continues through to 812, which, again, this $25,000 figure comes up at line 25, and the transcript reads, "Can

you at this point give a ballpark figure of what you say your total expenditure has been since 2004? There's the figure of 42,201.41, of which 25 comprises rates and insurance. Correct." And rates insurance, that's the figure that's been talked about. There's talk then of things like expenses on the tractor, there's motor vehicle expenses which are the subject of cross-examination, and I won't go into the figures because they're not terribly significant, but it seems that a lot of the 42,000, over and above the 25, is expenses and running costs for the business. The issue then comes back then to how much the Court would allow of that and, again, that is a discretion to be used by the Court. It certainly isn't a, "You get every cent of what you spend back," and, indeed, contributions are explicitly defined, not just financial contributions but other types, and it can be seen that Ms Beaven obviously also has used her endeavours to preserve the Cranford Street address, and that's increased in value.

WILLIAM YOUNG J:

Well, what did she do to preserve the Cranford Street property?

MR SHAMY:

Well, I'm obviously a little hamstrung by those who've gone before me, but I think it could be accepted that she's obviously had to pay rates and insurance and the like on the house. But, unfortunately, I don't – there's nothing in the affidavits as to a figure. But I don't think it could be disputed that obviously she's had the place for a few years, she's had to pay rates and keep it up. And to see that it's increased in value significantly, she must have at least looked after it. I don't think there's a – is too long a bow. So both of them have made contributions and both properties, Cranford Street and Medbury, have increased in value respectively, due to inflation by the look of it, although Medbury to a greater amount.

So the end result is that, as Justice Young has recognised, the figures for a hearing date valuation are not terribly complicated. I have set out in my primary submissions firstly what would be a half share as at hearing date, and this is at page 6 of my submissions, where I've taken the Medbury property. I've taken the hearing date valuation figure, although I must say I hadn't understood at that stage that there was a concession in the Family Court that only the 2000-odd separation date figure of 2118 would be taken into account. I've taken the farm, motor vehicles and plant, the caravan, the net proceeds of Cranford Street, that $12,000 figure, and got a total gross assets, deducted the liabilities –

WILLIAM YOUNG J:

So that the – just so that there's no misunderstanding, that $12,000 figure is wrong. It should really be 2000, approximately?

MR SHAMY:

Well, it depends, really, whether one is notionally deducting its 40,000 or not.

WILLIAM YOUNG J:

Let's notionally deduct. Let's deduct.

MR SHAMY:

Well, it would be two, I think, yes. Ms – just on that point, and I think I need to clarify it, Ms Beaven, before the second Family Court hearing, swore another affidavit, which is in the case on appeal, and what she does there is she speaks about the movements in the money, and I won't go through it in detail, but it's at 977 of the Court's records. She then sets out, effectively, what happened to the money in terms of proceeds of sale.

So we reach there, subject, as I say, to the stock figure changing by $3000 and subject to the $10,000 figure I've just spoken about with Justice Young, our figure then would be approximately 437,000, less those three liabilities.

WILLIAM YOUNG J:

What are the three liabilities?

MR SHAMY:

There's the 72, the 40,000 –

WILLIAM YOUNG J:

So we don't take the 40,000 off, because you've already taken it off.

MR SHAMY:

Correct, yes.

TIPPING J:

Yes, that has to come out.

MR SHAMY;

I think it, it probably needs to be taken into account at a later stage, in terms of having come out of Ms Beaven's account, but I think for a hearing date valuation it's not significant. So a half value is approximately 116. Sorry, a half value is 300 and – is 165,488. That's at page 7. And then the issue comes back to what had the parties respectively retained? What does that add up to? And then, what sort of adjustments need to be undertaken in terms of post-separation contributions. And I've set that out at page 12 of my submissions.

TIPPING J:

But if we've taken out the 40, Mr Shamy, we have to adjust the 165, then. That's come back to 145.

MR SHAMY:

So this is at page 6.

TIPPING J:

Oh, no it wouldn't come back. It would go up. Because there's 40,000 worth less debt on the hypothesis that we're discussing.

MR SHAMY:

I'll just go to paragraph 29 of Judge Strettell's judgment, which deals with the 12,000 which gave rise to this.

WILLIAM YOUNG J:

Sorry, whose judgment?

MR SHAMY:

Judge Strettell's judgment.

ELIAS CJ:

At page what?

MR SHAMY:

At paragraph 29 and at page...

ELIAS CJ:

45?

MR SHAMY:

Page 169. So I may have been unclear about this $12,050.

WILLIAM YOUNG J:

Well, I think it just, we just ignore it. It's – from what we should – from basic –

MR SHAMY:

I don't think it cancels out though the $40,000 loan to the mother.

WILLIAM YOUNG J:

Well, my calculations were that, from based on what you've said, that the proceeds of sale from the Woodbury Street property involved $156,000. If you take off $4000 for the relocatable homes and $110,000 for Cranford Street, that leaves $42,000. Take another $40,000 off, that leaves $2000, so we just never mention the mother's debt again and we have an asset there of $2000.

MR SHAMY:

I'll just reason that through. So we had $156,000.

WILLIAM YOUNG J:

We start with $165,000.

MR SHAMY:

We take four off.

WILLIAM YOUNG J:

Because we know that that's gone to the damages. That's a joint responsibility. We take 110,000 off, because that goes to Cranford Street, and we –

MR SHAMY:

Certainly.

WILLIAM YOUNG J:

– bring that in later.

MR SHAMY:

Right.

WILLIAM YOUNG J:

And that leaves 40,000, $42,000, which Ms Beaven's had the advantage of. We take $40,000 off that for the loan to her mother and that leaves a net balance of 2000.

MR SHAMY:

Yes. So, effectively that is the exercise I've set out at the beginning of page 6, up at the top.

WILLIAM YOUNG J:

Yes, we take –

MR SHAMY:

We just divide it.

WILLIAM YOUNG J:

The assets are $10,000 less than you've allowed for and the debts are $44,000 less.

MR SHAMY:

That, though, is separation date figures.

WILLIAM YOUNG J:

This is hearing date figures, really.

TIPPING J:

It's 5.7 is hearing date valuation.

MR SHAMY:

Yes, but up, up above that where we're talking about the proceeds of Woodbury, where we're dealing with this exercise as Justice Young said, Woodbury is sold shortly after separation. So we're talking about then there's this 110 that's going into Cranford, and we're not taking account of the 40,000. Yes, I follow that. Yes, I do follow that.

WILLIAM YOUNG J:

What do you say in terms of the allowance that Judge Strettell made of a little over $35,000 for post-separation contributions? Too much, too little, or just right? Or close enough?

MR SHAMY:

Well, effectively it has to be –

TIPPING J:

Seems to cover the ground.

MR SHAMY:

I don't think there are many other options available. I think, in fairness to Mr Burgess, during his stewardship of Medbury it increased in value by $75,000. He'd have to get some recognition for the fact he's preserved an appreciating asset, and the effect would be to say, well, it's a balancing, isn't it because on the one hand, he has made contributions, but on the other hand, he has had the benefit of living on the land for three years. So it can't be as simple, "You get everything."

WILLIAM YOUNG J:

But your client had the benefit of living in a relationship property house for the same period of time.

MR SHAMY:

They probably cancel each other out. At the end of the day, it doesn't appear untoward to allow Mr Burgess that amount, that sort of figure, because he has been preserving the land. He hasn't –

ELIAS CJ:

What sort of figure are you talking about, sorry?

MR SHAMY:

I think the figure from Judge Strettell –

WILLIAM YOUNG J:

Is $35,100 and something dollars.

CHAMBERS J:

But that was purely mortgage reductions, wasn't it?

MR SHAMY:

No.

CHAMBERS J:

Oh it wasn't?

MR SHAMY:

No. This –

WILLIAM YOUNG J:

It's mortgage interest, mortgage capital, rates for which your client is entitled to some sort of offset plus what he's called maintenance.

MR SHAMY:

It's set out at page 186 on the case on appeal. There wasn't any real mortgage reduction because by –

ELIAS CJ:

What section is he purporting to deal with this under?

MR SHAMY:

I think he's dealing with it under the post-separation contribution section in the relevant period. There wasn't any meaningful reduction in mortgage principal because the mortgage was still about $75,000 at hearing date and in any event if Mr Burgess is taking the property subject to the mortgage he is going to get the benefit of that to an extent anyway.

TIPPING J:

The table the Judge sets out on page 186 uses the word "actual" which led me to think that these were demonstrable cash payments to maintain or sustain. It didn't seem to me that included anything in the nature of general allowance for effort et cetera

WILLIAM YOUNG J:

He declined to give that sort of allowance that one –

TIPPING J:

Yes. So he must have been able to demonstrate arithmetically if you like, because it's a very precise figure.

ELIAS CJ:

$5,000?

TIPPING J:

No, no 15,112.

ELIAS CJ:

Sorry the 15,112, yes sorry.

WILLIAM YOUNG J:

I suspect it comes out of that passage around page 800 and following that she took us to somewhere.

TIPPING J:

I mean it's the 25,000 looks like a sort of award of general damages which is an odd thing for a mortgage and rates.

MR SHAMY:

Yes it is a precise figure. My learned junior tells me that the 15,112 came out in a cross-examination as a figure contained there.

TIPPING J:

But the 25,000 was that just a sort of an estimate?

MR SHAMY:

Well that was in the cross-examination for mortgage and rates and that was the point that I took the Court to.

BLANCHARD J:

Page 812, that's where the figure comes from.

MR SHAMY:

Yes. The figure I'm being shown at page 814, at the beginning, there's cross-examination about that. Again that figure it's about $25,000 and it leaves – there's a question here at line 10, "$17,000 spent on the farm according to you." And it goes, "Yes", "And of that sum a certain amount represents GST", "Yes", "So if you take it from me that the GST is $1800-odd, so it's $15,000". It looks like that's where the – that may be the figure he's talking about. This $15,000 it seems, on my understanding, is the figures from the books of account for the money spent on the land, things like petrol for the car, all that sort of stuff that was claimable in a tax return and I understand that's where these figures were coming from. But certainly in the scheme of this there's a certain balancing up because of course as the Court of Appeal didn't do, it's necessary to take into account that what Mr Burgess was retaining was not just the land itself but everything else on the land. The improvements but also the sheep and everything else which is another $10,000-odd worth. So at the end of the day I can't say that this $35,112 figure being on the property for two years and keeping it going when it's increased in value by $75,000 is out of the way and I don't have any principled basis upon which to say there shouldn't be some allowance for that.

WILLIAM YOUNG J:

Can I ask you two more trivial questions? The caravan, was that retained by your client?

MR SHAMY:

As I understand it, what happened was it was repossessed and the land at Geraldine was a blank section and she lived in the caravan at Geraldine.

WILLIAM YOUNG J:

Sorry?

MR SHAMY:

The land at Geraldine was a vacant section and the caravan was put on that as I understand it.

WILLIAM YOUNG J:

And the container, that was acquired after separation was it? It's referred to in the affidavit, the affidavit you took us to about, "I spent another $13,000 including buying a container" or is that included in the valuation anyway?

MR SHAMY:

I think that the valuation – well the containers are dealt with in the financial statements I think for the business. There's a container showing, this is at page 361, volume 3, showing in the books of the account, original cost 2860, opening book value, then there's depreciation.

WILLIAM YOUNG J:

Sorry what page, sorry?

MR SHAMY:

This is page 361, volume 3.

WILLIAM YOUNG J:

Is that included in the plant valuation?

MR SHAMY:

In the plant valuation as opposed to the land valuation?

WILLIAM YOUNG J:

Yes.

MR SHAMY:

Well I can only go on the fact that it's headed, "Plant and equipment".

WILLIAM YOUNG J:

Yes, so it presumably is, okay. Well there was I think effectively an agreed plant figure of around $10,000, $10,500 or something.

BLANCHARD J:

Yes well Mr Shamy's got the container included on page 6, tractor, mower and container.

WILLIAM YOUNG J:

Okay, all right, so we don't need to worry about that.

MR SHAMY:

Yes the breakdown seems to be, in terms of the books, there's plant and equipment and then there's the motor vehicles and I've simply lifted those figures from the statements of account.

WILLIAM YOUNG J:

All right, okay thank you.

MR SHAMY:

Unless the Court has any particular enquiries, those would be my submissions. Are there any other figures in terms of a calculation of a hearing date valuation that the Court would like to discuss? It seems that the only – everything seems reasonably clear in terms of sale proceeds, Cranford Street, value of Medbury, caravan, what was on Medbury, the debts and the contributions. I can't see there's anything that's unclear.

ELIAS CJ:

Thank you Mr Shamy. Mr Burgess do you want to respond to anything? Yes, please come forward.

MR BURGESS:

Yes Your Honours, the question has, with Mr Shamy, been dealt on the question of hearing date versus the separation date and as also the same issue arises with the decision of Judge Strettell in the amount that he set for financial contribution, in both Courts decisions have been made where there is really an inadequacy of reasons for exercising discretion if reasons have been given at all and the Court of Appeal just seems not to have given a reason for exercising its powers under section 2G. In fact it hasn't even mentioned that it is using 2G, it has just simply said we're going to a separation date and I believe the questions from the bench have indicated the view that I take, that the Court shouldn't depart from a judgment at first instance without providing some sound reasons as to why that action is in the interests of justice. There's nothing been showing to be wrong with Judge Strettell's use of a hearing date valuation.

Mr Shamy has mentioned the discretion the Court has under section 18B toward post-separation contribution but again that's a discretion that must be exercised after an evaluation as to whether there is evidence showing that post-separation contributions have been made and should be compensated for and the discretion as

to what to award must be made on a principle basis and that principle basis should be articulated in the judgment yet we simply have bald figures given by Judge Strettell. There is no basis, anywhere, to find out how he got to that very precise figure of 15,000 and, I think, it's $112. It's just a figure that he appears to have plucked from somewhere and put in his judgment.

And there is no material there for this Court to actually look at that figure and say well, how did he get there and did he get there on the correct basis in fact of law. There's a clear error on his part but whether there is any material for you to actually look at it and say yes, he's wrong, no, he's not wrong or what the real figure should be, I don't know, because we just don't know how he got to that figure. And certainly, he can reduce the amount that was agreed in cross-examination to have been spent but he must do so on a reasonable and principled basis and there is simply nothing to let anybody knowing, including myself, what that reasoned and principled basis was.

Now, Mr Shamy has said that the two parties living on the properties, or something, it will effectively cancel out. Well, I was living in a shack and my ex-wife – with no mains power. My ex-wife was living in a properly built dwelling, in a unit, in a block. There is decided disparity in the standard of living and I think to say that those just simply cancel out as being equal benefits is a little ludicrous. It fails to recognise the reality of the different standards of accommodation that were available.

BLANCHARD J:

The $15,112 is 17,000 minus GST, it's on page 814.

MR BURGESS:

If that's, in fact, where he got his figure from, Sir, but he doesn't actually say so in his judgment.

BLANCHARD J:

Well it must be, I mean, it works out precisely. It leaves $17,000 spent on the farm, according to you, and of that sum – this is the question, and of that sum, $1888 represents GST, doesn't it, and you accept that.

MR BURGESS:

That was part of the cross-examination, Sir, and you may have put your finger on a point that's been eluding me for the last four or so years, as to exactly where his figure came from.

BLANCHARD J:

Well that's certainly where it's come from.

MR BURGESS:

But the only other point I wish to raise at the end is that, going back to page 105 of the bundles in the first volume, is what is stated there under paragraph 7, where it is stated the transfer to me is not to be taken at this stage as a complete transfer of Ms Beaven's beneficial ownership of the property. Mr Burgess will be holding the property, on trust, for himself and Ms Beaven. So I think to say that the property was vested in me at that date is – I do not see it as being correct. Your Honours may take a different view but she is asserting, in that paragraph, that she is retaining partial ownership of the property, not that she is having an interest in the property limited to the value of costs due to her.

Your Honours, the only remark I can make in closing is a point that I have made earlier and that is that the Act requires a fair and just division and distribution of the relationship property. The – We're near at the stage where there has been a decision that it is equal shares, so that part of matters is taken care of but the question really is, is has there been an equal distribution or vesting of the property in the situation where my ex-wife took the cash at the start and was free to do whatever she wanted with it and has done so, whereas I've been given, or assigned, a property which throughout has had her name, either as joint owner or as a caveator on the title where I have not had the same freedom to access my share of the assets, as she has had to access hers.

Mr Shamy is saying that I must take the consequences if – detrimental consequences that have followed from the lack of control I've had when I – my ex-wife has insisted on retaining involvement, in one form or another, on the property. What has happened, I see, with my share of the property violates the clean break principle and I should not have had these problems where I've had to, even with the refinancing of the TSB loan, seek the loan from SBS with a new one from TSB, of having to seek my ex-wife's approval. To have to do that flies in the principles of the clean break principle and the concept that I have had the property vested in me to do

with and use as my own separate property. I have had these issues hanging over me, with my wife's involvement, the full time. I have had this involvement and interference from my ex-wife with my, what is supposed to have been my share of the property, the whole time. There is disparity between the control that the parties have had of the property that has been respectively assigned to them. Mine has not been unfettered, hers has and I think you have to ask does that, in fact, achieve the objectives and principles of the Act and one of the Judges and I'm sorry, I don't have the right reference and I believe it is in my written submissions, is pointed out that the role of the Courts continue not just to deciding division but until that division is finally implemented. In this case that final implementation never really seems to have taken place, not from my perspective. I have not had property vested in me solely under my control, as my separate property.

Thank you Your Honours.

ELIAS CJ:

Thank you Mr Burgess and thank you Mr Shamy and Ms Corry for your submissions. We will take time to consider our decision. Thank you.

COURT ADJOURNS:12.29 PM