Managing Limitation Periods and Applications to Proceed out of Time in Family Law Proceedings

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***** *Thank you to our paralegal* ***Ted Clenaghan*** *for his extensive assistance with research and preparation of this paper.*

Introduction

1. The *Family Law Act 1975* ("the Act") provides a time limit for the initiation of proceedings for property settlement and maintenance.

2. The statutory requirement for applications relating to maintenance and property proceedings for married couples is outlined in section 44(3) of the Act, and provides that a party to a marriage may apply for orders for property settlement or maintenance if an application is filed within:

   a) **12 months of the date of the divorce; or**
   b) In cases where a decree of nullity of marriage has been made - within 12 months from the date of the making of the decree.

   Proceedings may be instituted out of time by consent, or with leave of the Court.

3. Section 44(3B) provides that in cases where a divorce order has taken effect or a decree of nullity of marriage has been made AND a financial agreement between the parties to the marriage has been set aside under section 90K or found to be invalid under section 90KA, proceedings for property settlement and maintenance may be instituted

   a) within the period of 12 months after the later of:

      (i) the date on which the divorce order took effect or the date of the making of the decree of nullity, as the case may be; or

      (ii) the date on which the financial agreement was set aside, or found to be invalid, as the case may be; or

   b) with the leave of the court in which the proceedings are to be instituted;

   and not otherwise.

4. Beware that there is no limitation period if the parties were divorced overseas. In the matter of *Anderson & Mcintosh* [2013] FamCAFC 200, the Full Court of the Family Court held that section 44(3) had no application to a foreign divorce.

5. The statutory requirement for applications relating to maintenance and property proceedings for de facto couples is outlined in section 44(5) of the Act, and provides that a party to a de facto relationship may apply for orders for property settlement and/or maintenance if an application is filed within **2 years of the end of the de facto relationship**, or 12 months after a financial agreement between the parties to the de facto relationship was set aside or found to be invalid, or both parties consent to the application.

6. It is critical that instructions are promptly taken from all new clients about the date of divorce if the parties are divorced, or the end of the de facto relationship, and advice given about limitation periods. If the parties were in a de facto relationship, it is important to tease out why the client says the relationship ended at a certain point in time, for example, is this when one of the parties moved out of the joint residence, or the bedroom they shared? There are a multitude of arguments surrounding the existence of a de facto relationship, or the start and end dates of these relationships that lead to various jurisdictional questions under 90RD of the FLA. This paper will not address these issues.

7. The sections of the Act dealing with limitation periods for both married and de facto couples state that the Court may give leave to a party to apply out of these timeframes if the Court is satisfied that, firstly, hardship would be caused to a party to the marriage or de facto relationship or a child if leave were not granted, and that, in the case of proceedings in relation to the maintenance of a party to a marriage or de facto relationship, at the end of the period within which the proceedings could have been instituted without leave of the court, the circumstances of the applicant were such that the applicant would have been unable to support himself or herself without an income tested pension, allowance or benefit[1].

8. The question then arises, what constitutes "hardship"? Hardship is not defined in the Act, so it has been left to the Court to determine.

[1] S 44(4) & S 44(6) Family Law Act. Also note use of the words "*shall not grant leave under subsection (3) or (3A)*" in s 44(4) and "*may grant …leave to apply after the end of the standard application period*" in s 44(6) of the Act.

Leave out of time and Hardship

9. The application for leave to apply out of time is an interlocutory application in nature[2].

10. What constitutes hardship has been considered in a number of authorities. When reading some of the earlier authorities, be mindful that section 44 of the Act has been amended over the years.

11. A helpful summary of the various and relevant interpretations of hardship is found in the 2011 Full Court decision in *Sharp & Sharp*[3] at paragraphs 123 to 134 as outlined below (with important points noted in bold):

> *123. Section 44(4) states that the Court shall not grant leave unless it is satisfied pursuant to subsection "(a) that hardship would be caused to a party to the relevant marriage... if leave were not granted". The learned Federal Magistrate set out the relevant provisions of the Act and then referred to the decision of McDonald & McDonald [1977] FamCA 93; (1977) FLC 90-317 at 76,688 where Evatt CJ (Ellis and McGovern JJ agreeing) held that* ***s 44(3) requires an applicant to establish (in summary); a prima facie case which is in the circumstances substantial, that to deny the applicant the right to commence substantive proceedings would cause hardship in the sense referred to in s 44(4), and that there is an adequate explanation for the delay in commencing the claim.***
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> *124. At the time of that decision s 44(3) and (4) of the Act, incorporating amendments to 11 October 1977, stated:*
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> *(3) Where a decree nisi of dissolution of marriage or a decree of nullity of marriage has been made, proceedings of a kind referred to in sub-paragraph (c)(i) or paragraph (ca) of the definition of "matrimonial cause" in sub-section 4(1) (not being proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) shall not be instituted after the expiration of 12 months after the date of the*

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[2] *Sharp & Sharp* (2011) FamCAFC 150.

[3] Ibid

making of the decree or the date of commencement of this Act, whichever is the later, except by leave of the court in which the proceedings are to be instituted.

(4) The court shall not grant leave under sub-section (3) unless it is satisfied that hardship would be caused to a party to a marriage or to a child of the marriage if leave were not granted.

125. *Subsequent to the decision of McDonald (supra) s 44(4) was amended by the Family Law Amendment Act 1987 (Cth) and took its current form (see s 19 of the Family Law Amendment Act 1987 (Cth), No. 181 of 1987, as in force 1 April 1988). Comparatively, s 44(3) has been amended on a number of occasions since McDonald (supra) was decided and as Boland J observed in Hedley & Hedley [2009] FamCAFC 179; [2009] FLC 93-413, at paragraphs 70 to 71, the proper interpretation of that section has been the subject of a number of authorities and* ***"in considering the authorities... it is essential to bear in mind the wording of the Act at the time the case was decided".*** *In view of the fact that s 44(4)(a) has remained in substantially the same form since McDonald (supra) was decided her Honour's concerns do not take on the same significance in this appeal as in the matter that was then before the Full Court.*

126. *However, although the decision of the Full Court in McDonald (supra) states a number of factors to be considered in an application under s 44(3),* ***subsequent decisions of the Full Court have drawn a very clear distinction between the establishment of hardship in s 44(4)(a) (which includes a consideration of whether the applicant has a prima facie claim) and a consideration of the factors relevant to the exercise of discretion to grant leave, following that preliminary determination****: see Hall & Hall [1979] FamCA 50; (1979) FLC 90-679 at 78,627; Whitford & Whitford [1979] FamCA 3; (1979) FLC 90-612 at 78,144.*

127. *Recent decisions of the Full Court have considered and applied the decisions of Whitford (supra), Hall (supra), Frost v Nicholson [1981] FamCA 45; (1981) FLC 91-051 and Althaus & Althaus (1982) FLC 91-233 in determining the meaning of "hardship" pursuant to s 44(4)(a) and what must be demonstrated by the applicant to establish hardship: see Tamaniego & Tamaniego [2010] FamCAFC 254 at [155] to [159] per O'Ryan J; Hedley & Hedley [2009] FamCAFC 179; [2009] FLC 93-413 at [131] per Finn, Boland and Cronin JJ; Oxenham &*

Oxenham [2009] FamCAFC 167 per O'Ryan J; Richardson & Richardson [2008] FamCAFC 107 at [11] to [15], and [23] per Finn, Warnick and Boland JJ.

128. *In Whitford (supra) the Full Court at 78,144 to 78,145, in addition to the passages cited in the reasons of May and Ainslie-Wallace JJ above, specifically considered the meaning of hardship as stated in s 44(4)(a). The Full Court observed that:*

> ***In our view the meaning of "hardship" in subsec. 44(4) is akin to such concepts as hardness, severity, privation, that which is hard to bear or a substantial detriment.*** *Cf. the meanings assigned to "hardship" in the Shorter Oxford Dictionary and in Webster's New International Dictionary. See also In the Marriage of Mackenzie (1978) FLC 90-496...*
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> *...*
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> *In ordinary parlance, hardship means something more burdensome than "any appreciable detriment". We consider that in subsec. 44(4) the word should have its usual, though not necessarily its most stringent, connotations.* ***It is impossible to lay down in advance what particular facts may or may not amount to hardship in the relevant sense.***

129. *Similarly, in Hall (supra) at 78,627 the Full Court stated that the authorities:*

> ***...have considered what is meant by the term "hardship" in this context, and the term "substantial detriment" seems to be the generally accepted interpretation of that word.***

130. *It follows from the discussion in Whitford (supra) at 78,144, and Hall (supra) at 78, 627, that in the context of s 44(4)(a) hardship has a broad meaning and, as identified by the majority,* ***although the mere loss of a prospective entitlement to pursue a substantive claim may not of itself constitute hardship, it is the consequences attending the loss of the right "with which the subsection is concerned".*** *However, in Whitford (supra) it is important to note that the Court observed at 78, 145 that:*

> ***Hardship may be caused to an applicant if leave were not granted to institute proceedings, although the applicant is not in necessitous circumstances. Whatever the financial situation of an applicant may be, his or her loss of a prospective entitlement to property including money,***

or his or her inability to have the financial and property relations of the parties adjusted or resolved, may constitute hardship. *In some cases, where a resolution of the property or financial relationships of the parties is desired,* ***it might be, that the applicant would receive no more or even less, than he or she already owns at law or in equity.*** *Nevertheless, hardship might be caused to the applicant if leave were not granted so as to facilitate such resolution...*

131. *From the observations in Whitford (supra) and Hall (supra), and in view of the recent authorities of the Full Court on the subject of hardship,* ***it is apparent that an assessment of hardship requires the Court to consider whether the applicant would suffer a substantial detriment as a consequence of the loss of the right to institute the proceedings, although that detriment, in the circumstances of a particular matter, may not be entirely related to financial considerations. In my opinion, it is not possible nor desirable to define exhaustively what will, in all the circumstances of a particular application, constitute hardship for the purposes of s 44(4)(a). However, in undertaking the exercise the Court should have regard to the nature of the jurisdiction exercised by the Family Court and the power should be "exercised liberally in order to avoid hardship, but nevertheless in a manner, which would not render nugatory the requirement that proceedings should be instituted within a year from the decree nisi"*** *per Whitford (supra) at 78,146.*

132. *In undertaking an assessment of hardship the Court is required to consider whether* ***the applicant has established a prima facie claim*** *and in Hall (supra), at 78,627, the Full Court stated that:*

Fundamental to [a finding of hardship] is a determination of the quality or character of the potential claim. *In relation to that different cases have used somewhat different phrases to describe it so that it has become something of a matter of semantics to describe in different ways what is really the same basic concept. For example in Swallow's case (unreported Emery J, 16 September 1977; referred to in McDonald's case) it was said to be "a prima facie case which is in the circumstances substantial"; the Full Court in McDonald's case differed from that by stating that it ought to be "a reasonable prima facie case". In Mackenzie's case it was described as being "a probability of success", and in Whitford's case the distinction was said to be that the applicant would need to show that she would "probably succeed" to be contrasted with a situation where*

she had "no real probability of success". In Perkins' case [1979] FamCA 4; (1979) FLC 90-600 Lindenmayer J described it as "a reasonable probability of the claim being successful in some measure".

These varying phrases may tend to suggest different shades of meaning whereas in reality they are directed to the same fundamental inquiry which basically is in the context ***whether on the applicant's material he or she has a reasonable claim to be heard by the court...***

133. *In Althaus (supra) at 77,267 the Full Court similarly observed that "[t]he exercise is to determine whether there is a reasonable claim to be heard.* ***That is the essence of the inquiry into whether hardship will be suffered by denying the applicant the right to litigate that claim."***

134. *More recently in Hedley (supra) at paragraph 215, Cronin J cited the Full Court decision of Richardson (supra) at paragraph 14, in which Finn, Warnick and Boland JJ stated and affirmed the principles set out by the primary judge who observed that "****it is not a decision about whether the claim will succeed but whether there is a reasonable claim to be heard****".*

12. In light of the authorities discussed in *Sharpe*, below is a list of important points to be deduced on the topic of leave and hardship:

- On an application for leave under s 44 (4) or 44 (6), two broad questions arise. The first being, whether the Court is satisfied that hardship would be caused to the applicant or a child of the marriage if leave were not granted. If the Court is not so satisfied, that is the end of the matter. If the court is satisfied, then the second question arises. That is, whether in the exercise of its discretion the Court should grant leave to institute proceedings out of time.[4]

- Hardship must be established, that is "*a determination of hardship is what enlivens the discretion to grant leave. The discretion can only be exercised after a determination of hardship is made*."[5]

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[4] *Marriage of Whitford* (1979) FLC 90-612.

[5] *Lagioia & Rapino* (2020) FamCA 11, at 13.

i. Accordingly, the party must first demonstrate that they would suffer hardship if their application for leave were not granted.

ii. If they do so, they then must persuade the Court to exercise its discretion in their favour.

- As per McHugh J in *Gallo v Dawson* (1990) HCA 30 (application for extension of time to file a notice of appeal) "*The discretion to extend time is given for the sole purpose of enabling the Court to do justice between the parties*".

- Section 44(4) does not provide that leave must be granted if the Court is satisfied that hardship would be caused. Rather, in determining whether or not to exercise discretion, matters such as the length and reason for the delay, prejudice to the respondent by reason of the delay, the strength on the merits of the applicant's case, and the degree of the hardship which would be suffered unless leave were granted, need to be considered and these matters are not necessarily the only ones.[6]

Discretion to Grant Leave

13. There are a number of well-established, guiding principles as to the exercise of discretion stemming from the High Court decision in *Gallo v Dawson* [1990] HCA 30. These principles have been distilled by the Court as[7]:

- The grant of an extension of time is not automatic.
- The object is to ensure that Rules which fix times do not become instruments of injustice.
- Since the discretion to extend the time is given for the sole purpose of enabling the Court to do justice between the parties, the discretion can only be exercised upon proof that strict compliance with the Rules will work an injustice upon the applicant.
- When determining whether the Rules will work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the

[6] *Whitford* (1979) FLC 90-612 at 78, 145-6.

[7] Rafter & Rafter [2011] FamCAFC 46 at [10], citing Clivery & Conway [2007] FamCA 1435.

nature of the litigation, and the consequences for the parties of the grant or refusal of the application for extension of time.

- When considering an application for extension of time in which to file an appeal or an application, it is necessary also to consider the prospects of success of that appeal or application.

14. In a leading High Court authority on limitation periods, *Brisbane South Regional Health Authority v Taylor* (1996) 186 CLR 541, Dawson, McHugh and Kirby JJ were all of the view that limitation periods served legitimate purposes and ought prima facie to be observed. They should only be breached when it could be proven that the interests of justice, to all parties, required a departure from the statutory norm; broad considerations of justice govern the grant of leave to bring proceedings after a limitation period has expired. These considerations include an examination of the conduct of the applicant for leave and the reasonableness of the explanation for delay[8]. Much of what was said in this case has been regarded as of general application as a leading authority, although the case itself turned on specific provisions of the *Limitations of Actions Act* 1974 (QLD).

15. The Family Court has adopted similar considerations in deciding whether to grant leave; in particular consideration of "*… the length of delay, the reasons for the delay and prejudice occasioned by the respondent by reason of the delay, and the strength of the applicant's case, and the degree of hardship which would be suffered unless leave was granted.*"[9]

16. It is therefore essential to "*approach the statutory discretion having regard to the context in which it appears and the purposes for which it is provided."*[10] It is trite to observe the object of sections 44 (3) and 81 of the FLA demonstrate a policy that the financial relationship between the parties should, wherever possible, be brought to an end within a reasonable time.

17. Thus, as stated in *Mackenzie & Mackenzie*[11]:

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[8] (1996) 186 CLR 541 at 544 per Dawson J, 552 per McHugh J, 564 per Kirby J.

[9] *Whitford* (1979) FLC 90-612 at 78,145-6

[10] *Salido v Nominal Defendant* (1993) 32 NSWLR 524 at 536 per Kirby P.

[11] (1978) FLC 90-496.

"*The court should exercise* [the power to grant leave under s 44(3)] *liberally, but only if it is satisfied that hardship would be caused to an applicant or a child of a marriage if he or she were barred from making a claim… As against this, the court cannot ignore the policy underlying s 44(3) which is that ordinarily proceedings should not be commenced within a year from the date of the Divorce Order*."[12]

Case Law

Leave granted to proceed 23 years after divorce

18. In ***Ordway & Ordway***[13] the wife sought an order under section 44(3) of the Act for leave to file property proceedings out of time, 23 years after divorce. The parties agreed that rather than having the matter heard in two parts (namely, a threshold hearing on leave to apply out of time and, if successful, a section 79 hearing), they would proceed on the basis that all issues would be heard and addressed at trial.

19. The wife and the children remained living in the former matrimonial home after separation in 1983. The home was in the husband's sole name. The husband continued to financially support the wife and the children post separation. The parties entered into a Deed in 1987 in respect of the wife's continued use and occupation of the former matrimonial home, motor vehicle and maintenance, which the husband was to continue to provide. The wife undertook some renovations on the property. The husband used the equity in the home as security. The wife continued to work in the husband's business until after the proceedings were initiated in 2009.

20. The Court held:

> *183. They, through their lack of action, continued to collaborate in what could be called a joint endeavour whereby the husband had the use of the equity in this property while the wife had the use of the property itself for the 26 years that followed before the wife took action to determine her share in the assets.*

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[12] Ibid at 77,581.

[13] [2012] FMCAfam 624 (13 July 2012)

184. Each in their own way contributed and I have addressed that above. However, neither party's contributions were such as to either completely eclipse the other or justify the results they seek. Neither sought to claim their equity in what is the central asset of this pool and each permitted the use of it by the other.

185. The wife, in addition to being the primary caregiver for the children until they left home in 1999, continued to participate in the financial contributions to the acquisition, conservation and improvement of the property through her maintenance of the [H] property and the use of its equity in the husband's business dealings. (Equity that she was unable to access given that the home was registered in the husband's name.)

186. The contribution of the husband, particularly post 1999, can and should be balanced against that of the wife. He continued to work in the business and the income he received assisted with the servicing of the loans on the properties he had acquired. Those assets were however shared with his current wife and it is only his portion that is brought to account.

187. …

188. There is little or no information about what the assets were worth at the date of separation, how the proceeds of sale were disbursed and how any subsequent assets were acquired. The husband says he has looked for the documents without success. He also says he is unable to remember the exact detail of how the finance was arranged. He concedes at one point the debt exceeded $500,000. I have noted the difficulty I have with his evidence.

189. Whilst there is an argument that the contributions of each party to the other's assets were at best nominal, that argument ignores the central asset of this pool, which the wife used, maintained and preserved and whose equity was used by the husband. Its role in allowing each party to acquire further assets (for without it, would the wife have been able to purchase, for example, the [M] property or would she have been forced to use her funds for accommodation) cannot be ignored.

190. There is also some weight to the submission that the wife was kept in a "financial cocoon" being unable to access her equity, which was at the same time exposed to the risk of the husband's business enterprise.

21. At the conclusion of the hearing, Counsel for the husband conceded that the wife had in all probability satisfied the first step of this process, namely that she would suffer hardship if denied the ability to bring proceedings of property settlement. She would, in effect, be left with nominal assets and would be subject to hardship.

22. The Court took into account the fact that the wife had an informal financial arrangement with the husband, and she had feared disrupting the status quo by instituting proceedings:

> "*It is obvious when considering the parties' financial circumstances that there was a significant power imbalance. She was able to continue to reside in the house and rely on the husband for limited financial support. When she subsequently became employed within his business, I accept that she had concerns that if she pushed the issue too far, she would lose her job.*
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> *She offers no explanation as to why she did not seek legal advice at that time and did not seek legal advice until 2009. I accept however, her understanding that she had an agreement with the husband and did not need to do so.*
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> *I also accept that neither party was willing to disrupt the status quo. I consider the explanation for the delay is made out and that upon matters being clarified in 2009, appropriate steps were taken.*"[14]

Leave granted to proceed 18 years after divorce

23. In ***Slocomb & Hegewood***[15], the Wife sought leave to commence property proceedings 18 years out of time. The primary judge refused to grant leave to the wife to proceed out of time. The wife appealed to the Full Court. Be aware that leave is required to appeal a refusal to grant leave to institute property proceedings out of time.

24. Background facts in this case were not controversial. The parties commenced living together and subsequently married in 1989. The parties separated in January 1994, the children of the marriage were then aged four, three and less than two years old. The parties were divorced on 1 September 1995. Prior to divorce the wife consulted

[14] Ibid at 86.

[15] [2015] FamCAFC 219

solicitors who on 23 September 1994 wrote a letter to the husband, in which they said that the assets at the date of separation consisted of the former matrimonial home with a net equity of $15,000, furniture valued at $10,000 and a car valued at $12,000. The wife took possession of the car when the parties separated and subsequently sold it and retained the proceeds.

25. It was proposed in the letter that the wife receive a number of items of furniture (which she asserts she did not receive), and proposed that in return for the car and furniture the wife would transfer to the husband the matrimonial home. The wife instructed she wanted "*sole custody and sole guardianship orders, with you to have reasonable access*". No agreement was reached, no orders were made by the Court.

26. At the time of the hearing, the only asset of significance was the former matrimonial home valued in the vicinity of $350,000, owned by the parties as joint tenants. The monies owing to the bank secured by a mortgage in joint names of the parties as at the date of the hearing before the judge were $43,000. The house was owned by the husband and wife as joint tenants and they are jointly liable under the mortgage.

27. At the time the parties separated, the wife left the home with the children returning for short periods. The children remained living with the wife, with limited financial support from the husband. The husband continued to have the benefit of living in the house but he also paid the outgoings, reduced the mortgage and made improvements.

28. The trial Judge found that while the wife had established the requisite hardship, and that she had a case that had reasonable prospects of success, but she had not provided an adequate explanation for the 18-year delay. The trial judge found that prejudice would be suffered by the husband if leave were granted out of time, as a result of the significant contributions he had made to the home and his reliance on the fact that no future property claim would be brought against him.

29. The finding of hardship was not challenged on appeal by the husband.

30. The Full Court found that there was some reasonable explanation for the wife's delay and that the husband had been just as inactive as the wife in protecting his rights.

31. In relation to the wife's knowledge of the time limitation, the wife explained that she represented herself in the application for divorce. Despite a notation as to the time

limitation on the *decree nisi* document, the wife said that the first she knew of the time limit was in January 2013 when she consulted her current solicitor.

32. The Full Court held that while "*it is essential for the proper operation of a system of justice for time limitations to be imposed*", in appropriate cases the interests of justice might overcome long delay and on occasions an inadequate explanation for the delay, which is only one factor to be considered in determining an application for leave pursuant to s 44(3) of the Act. The Full Court referred to the well-known passage in *Jacenko and Jacenko* [1986] FamCA 25:

> *The issues then before his Honour were those which have been established in this Court as long ago as 1977 in McDonald and McDonald [1977] FamCA 93. The applicant must establish three principal matters: first, a reasonable prima facie case for relief, had she instituted proceedings in time; secondly, that denial of the wife's claim would cause her hardship; and thirdly, an adequate explanation as to her delay.*
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> *That third requirement must now be read, subject to the decisions of the Full Court in Althaus and Althaus (1982) FLC 91-233; (1979) 8 Fam. L.R. 169, and Howard and Howard [1979] FamCA 54; (1982) FLC 91-234; (1979) 8 Fam. L.R. 178 which indicate that in appropriate cases the degree of hardship to be suffered by the applicant may well outweigh an inadequate explanation of delay.*
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> *If those three elements are satisfied, the Court should further, in determining whether to exercise its discretion to grant relief, consider the question of prejudice which the respondent would suffer by reason of the delay in bringing the application.*

33. In view of the lengthy time that had expired from the date of the divorce to the filing of the application, the Full Court held that the trial judge was correct to consider the prejudice to the husband, and referred to *Sharp & Sharp* [2011] FamCAFC 150 where the Full Court held at [57]:

> *Merely because the respondent to an application for leave does not point to particular prejudice that might arise if leave were granted, does not dispose of the question. The law presumes prejudice to flow to a person sought to be joined in litigation after the effluxion of the relevant time limits. Even if the Court came to the view that there was no significant prejudice to the*

respondent, the Court may consider whether in all of the circumstances of the case, it is just and reasonable to grant the extension sought.

34. Although the delay in this case was significant the Full Court found that leave should be granted in the interests of justice, as "*the prospect of the parties' legal position remaining as it is seems unjust. That either of them could make an application to a State Court does not ameliorate the hardship to the wife. In such an application, a State court could not exercise discretion to apportion the proceeds of sale of the home to the wife by taking into account her contribution to the children during and including post separation, and other relevant matters"* [at 48-49].

Analysis of the threshold of hardship and the legal test to be applied

35. In ***Skelton & Lindop***[16] the parties were in a de facto relationship from late 2009 or early 2010, and separated in March 2016 on the de facto wife's case, and in February 2014 on the de facto husband's case. In November 2018, the de facto wife sought leave to apply for a property settlement out of time.

36. The primary judge considered that the de facto wife's contributions, both financially and non-financially, were minimal and that she failed to prove on the balance of probabilities that the deprivation of the opportunity to bring a claim out of time would cause her hardship. The parties adduced evidence about the likely costs of the substantive proceedings, the de facto wife said litigation would cost her $100,000, and the de facto husband said it would cost him $110,000. The de facto wife also joined a third party (the de facto husband's sister) to the proceedings.

37. The primary judge determined the de facto wife failed to demonstrate she will suffer hardship if precluded from bringing her substantive claim:

> *82. The Court accepts that, on the [appellant's] own evidence, her contribution, both financially and non-financially, would be regarded as so minimal that it would be, therefore, difficult, on the balance of probabilities, to establish any hardship.*
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> *...*

[16] [2022] FedCFamC1A47.

85. The [respondent] maintained that the costs of the [appellant] in pursuing her application compared to the contributions made by her in the relationship, would exceed that which she is likely to receive on any property adjustment. The Court accepts that submission.

...

87. ... Accordingly, noting the [appellant's] costs of pursuing any such an entitlement would likely outweigh any award, in consideration of the assistance provided by the [respondent] in terms of the repairs and improvements to the Town A property and the provision of the motor vehicle, as referred to in paragraph 100, below, the Court is of the view that the [appellant's] prima facie claim does not have a real probability of success.

38. Two of the grounds of appeal attacked the above conclusions, contending they were not reasonably open. In considering the contrasting positions of the parties, the appeal judge (Austin J) outlined that the de facto wife was physically disabled and unemployed as a 60-year-old and that the de facto husband was 58, self-employed and owned significant assets. Given the de facto wife's relative penury, the deprivation of a claim was found to occasion her hardship.

39. The appeal Judge made important reference to the incorrect test used by the trial judge in considering the prospects of the substantive claim "*on the balance of probabilities*" and considering "*a reasonable probability of success*" of the claim, rather than the correct test which is the "*sufficient likelihood of success*". His Honour held:

17. In this jurisdiction, one strand of authority speaks of the need for the applicant to demonstrate his or her claim has a real probability of success, as the pre-requisite to the demonstration of hardship (Marriage of Whitford [1979] FamCA 3; (1979) FLC 90-612 at 78,144). Another strand of authority speaks of the need for the applicant to only demonstrate his or her prospective claim is reasonable or arguable (Arcand & Boen [2021] FamCAFC 155; (2021) FLC 94-046 at [12]- [13]; Gadzen & Simkin at [37]; Althaus & Althaus at 77,266-77,267). Still other cases attempt to homogenise the two concepts (Edmunds

& Edmunds [2018] FamCAFC 121; (2018) FLC 93-847 at [17]- [24] and [47]-[48]; Sharp & Sharp [2011] FamCAFC 150; (2011) 50 Fam LR 567 at [18]).

18. In Beecham Group Ltd v Bristol Laboratories Pty Ltd [1968] HCA 1; (1968) 118 CLR 618 at 622–623, the High Court of Australia said that, for the purposes of an interlocutory application in which it is necessary for an applicant to demonstrate a prima facie case:

The first [inquiry] is whether the [applicant] has made out a prima facie case, in the sense that ***if the evidence remains as it is*** *there is a* ***probability*** *that at the trial of the action the [applicant] will be held entitled to relief.*

How strong the probability needs to be depends*, no doubt, upon the nature of the rights the [applicant] asserts and the practical consequences likely to flow from the order the [applicant] seeks. (Emphasis added)*

19. The Full Court has previously affirmed that principle binds the determination of interlocutory applications under s 44 of the Act (Edmunds & Edmunds at [19]–[20]).

20. In Australian Broadcasting Commission v O'Neill [2006] HCA 46; (2006) 227 CLR 57 (at [65] and [69]), the High Court of Australia said this to explicate the test established in Beecham:

> *65. ... By using the phrase "prima facie case", their Honours* ***did not mean that the [applicant] must show that it is more probable than not that at trial the [applicant] will succeed****; it is sufficient that the [applicant] show a* ***sufficient likelihood of success*** *to justify [the interlocutory relief].*
>
> *...*
>
> *69. ...it [is]* ***not necessary for the [applicant] to show*** *that is [is]* ***more probable than not*** *that the [applicant] [will] succeed at trial. (Emphasis added)*

21. It may be in this case the primary judge was saying no more than that the appellant did not demonstrate her case had "sufficient likelihood of success" to prove hardship, which would be the correct test, but his Honour's reference in the reasons for judgment to not being satisfied "on the balance of probabilities" (at [82]), nor that the appellant's claim has "a real probability of success" (at [87]), has the flavour of demanding more from the appellant than she needed to give. She certainly did not have to prove it was more probable than not that her claim for property settlement relief would succeed if allowed to proceed.

22. The respondent contended the test applied by the primary judge was not the subject of any ground of appeal. Even so, as the respondent was bound to accept, that does not obviate the need to correct any frank error which is identified in an appeal conducted by way of re-hearing (Warren v Coombes [1979] HCA 9; (1978) 142 CLR 531 at 553; Minister for Immigration and Border Protection v SZVFW [2018] HCA 30; (2018) 264 CLR 541 at [30]–[32]).

23. It is unnecessary to find error in the test applied by the primary judge because, even it be assumed the correct test was applied, the result was incongruent. The reasonable prospects enjoyed by the appellant's claim for property settlement relief, taking into account the factors prescribed by both ss 90SM(4) and 90SF(3) of the Act, were manifest from the evidence, as the following short summary should reveal.

24. The parties lived in a de facto relationship for eight years, during which time the appellant made many noteworthy financial and non-financial contributions. The respondent did not deny she had, but rather contended her contributions paled by comparison with his.

25. The appellant was 60 years of age and unemployed. Her physical disability, verified by medical evidence, hindered her capacity to obtain or perform any gainful employment. She was effectively destitute. She had no assets and was reliant upon welfare payments to survive.

26. By comparison, the respondent was 58 years old, self-employed and owned assets which he admitted were worth more than $1 million. The appellant contended his assets were worth much more, but that was an adversarial issue for any subsequent trial.

27. Despite a multitude of prospective factual disputes between the parties, the appellant had a reasonably arguable case on the evidence before the primary judge for a proportional share of the respondent's property, given her contributions over eight years and her comparatively superior future needs.

28. It will be remembered the specific relief sought by the appellant was entitlement to a 20 per cent share of the Suburb M property (at [1]), which property the respondent admitted was unencumbered and worth at least $850,000. Therefore, the appellant quantified her claim for relief at $170,000, which sum was a quite modest proportion of the overall value of the respondent's assets – about 16 per cent thereof on his estimate of value at $1.079 million, but an even lesser percentage if the respondent's overall assets were worth more than he admitted (as the appellant alleged). On any objective view, the claim was not disproportionately audacious. Given her relative penury, the appellant's deprivation of any claim at all was likely to occasion her hardship, let alone her deprivation of a claim worth that amount.

29. The primary judge accepted the respondent's submission that the value of any relief obtained by the appellant would likely be subsumed by the legal fees she would expend to acquire it, but that finding was not reasonably open. It was possible her legal fees would exceed the value of any relief she obtained, but it could not be reasonably said to be probable. The relief sought, readily quantifiable on the evidence at $170,000 (but perhaps a little more if the appellant was vindicated about the greater value of the Suburb M property), well exceeded the costs of $100,000 which the appellant expected to incur conducting the litigation.

30. Assuming no costs orders between the parties at the end of any substantive proceedings, then of course the costs incurred by the appellant would off-set the value of the remedy she stood to receive. But, on the other hand, if the appellant succeeded with her claim and was then able to demonstrate the respondent's unreasonable defence of it by, for example, rejecting her reasonable offers of compromise, she might even be able to improve her position with a costs order against him. Though that is speculative, it illustrates why it was an error to assume it was probable the appellant's claim for relief would be overwhelmed by her own costs.

31. The respondent can have no complaint about such speculation as he sought to defend the primary judge's speculation about the appellant's

prospective liability to Ms C for costs, which factor counted against the appellant being granted leave to proceed (at [86]). However, since the appellant did not seek any relief which would impinge upon Ms C's retention of her one-half interest in the Suburb M property, it is difficult to see how Ms C could ever seek a costs order against the appellant, even if her claim ultimately failed. The assumption of a costs order likely being made against the appellant in favour of Ms C was unduly conjectural, so the attack upon the primary judge's reliance upon that consideration as an influential factor (Ground 3) was also substantiated.

39. For the reasons already canvassed, the appellant has demonstrated she will suffer hardship if deprived of the chance to bring her reasonably arguable substantive property settlement claim against the respondent. In the exercise of discretion, she should be permitted to do so. That discretionary decision is motivated by these considerations: the appellant's claim appears reasonably arguable; the respondent was on notice of the appellant's intention to pursue a claim against him before the limitation period expired; the claim was brought eight months later, which delay was not substantial; and the respondent could not point to any prejudice he would suffer in having to meet the claim out of time which he would not have otherwise suffered if the claim was brought within time.

Confirmation of legal test to be applied, and approach to applicant's evidence

40. In ***Hardwick & Hardwick (No 2)***[17], the Full Court (McClelland DCJ, Riethmuller & Strumm JJ) confirmed the appropriate test to be applied:

> *28. As recently noted by Austin J in Skelton and Lindop [2022] FedCFamC1A 47; (2022) 64 Fam LR 617 ("Skelton and Lindop") at [16]–[21], there is differing authority as to the test to be applied in determining the prospects of success. Those tests range from the need to establish "prima facie claim" to the need to establish "a real probability of success." We respectfully acknowledge and adopt the reasoning of Austin J that the appropriate test to*

[17] [2022] FedCFamC1A 216 (19 December 2022)

*apply is whether the applicant for relief had "**sufficient likelihood of success**" to prove hardship.*

29. In the event of the trial judge finding that the applicant for relief would suffer hardship if an extension of time was not granted, it is then necessary for the trial judge to consider those matters going to the exercise of discretion. In V and S, Thackray J noted at [7] that, in addition to prospects of success, other potentially relevant considerations to the exercise of discretion may include the following:

- *The extent of the delay and the reasons (or absence of reasons) for the delay: Althaus & Althaus (1982) FLC 91-233;*
- *The extent of the hardship the applicant would experience if leave were not granted: Carlon & Carlon [1982] FamCA 60; (1982) FLC 91-272; and*
- *The extent of the prejudice that would be caused to the respondent if leave were granted.*

…..

APPROACH

31. Applications seeking an interlocutory order under s 44(3) of the Act are generally dealt with on the basis that the applicant's evidence is presumed to be correct "unless it is inherently unbelievable or contradictory" (Jacenko & Jacenko [1986] FamCA 25; (1986) FLC 91-776 at [14]; Skelton & Lindop at [36]). It is important to appreciate that it is only in the event of leave being granted that the Court, at final hearing, will make a determination in respect to the accuracy or otherwise of the parties' competing factual contentions.

Significant unexplained delay, but leave to proceed out of time not granted

41. The primary judge in ***Welland & Hawthorn***[18] dismissed an application pursuant to s 44(6) of the Act, filed 21 months after the expiration of the limitation period. The applicant appealed from that order claiming the primary Judge misdirected herself when identifying the issues for determination and the relevant discretionary factors.

42. There was a considerable dispute between the parties as to the length of the relationship and when it broke down, which had a bearing on just how late the

[18] [2021] FedCFamC1A 43.

application was filed, adequacy of the explanation for the delay and the extent of hardship she may suffer if deprived of leave to bring the application for substantive relief out of time. The application for leave to proceed out of time was heard as a discrete issue. The respondent came into the relationship with significantly higher assets than the applicant. Within months of cohabitation, the respondent purchased a property in his sole name which became the family home. The respondent was arrested in 2010, and in 2011 sentenced to imprisonment for 9 years. The parties had two children, which lived with the applicant from June 2010, but with the respondent upon his release. The applicant first consulted solicitors in 2015 and was advised of the limitation period. She engaged other solicitors between 2017 and 2019 for the purpose of bringing proceedings, but did not bring her application until November 2019, when she was already out of time. The trial judge was not satisfied with the applicant's explanation for delay and her application for leave to proceed out of time was dismissed.

43. The Full Court affirmed that the application of s 44(6) of the Act entails satisfaction of its criteria by sequential steps (Arcand & Boen [2021] FamCAFC 155) First, the applicant must demonstrate hardship and, if that hurdle is surmounted, must still persuade the exercise of discretion in his or her favour to extend time:

16. The Full Court recently had occasion to affirm that the application of s 44(6) of the Act entails satisfaction of its criteria by sequential steps (Arcand & Boen [2021] FamCAFC 155; (2021) FLC 94-046). First, the applicant must demonstrate hardship and, if that hurdle is surmounted, must still persuade the exercise of discretion in his or her favour to extend time. As the Full Court said:

> *12. The [applicant] bore the onus of demonstrating to the primary judge's satisfaction that, supposing leave to bring the property settlement claim out of time was denied, the deprivation of his reasonable chance of success in those prospective proceedings would occasion him hardship (Gadzen & Simkin [2018] FamCAFC 218; (2018) FLC 93-871 ("Gadzen") at [29]–[31]).*
>
> *13. In assessing whether the [applicant] discharged the onus, the primary judge merely needed to be satisfied the prospective property settlement claim was **reasonable or arguable**, with such assessment made summarily without a detailed hearing on the merits (Gadzen at [33]–[37]; Edmunds & Edmunds [2018] FamCAFC 121; (2018) FLC 93-847 ("Edmunds") at [16]–*

[17]; Althaus and Althaus (1982) FLC 91-233 ("Althaus") at 77,267).

...

38. Section 44(6) of the Act stipulates that the court may grant an extension of time if the applicant demonstrates hardship through deprivation of the chance to bring proceedings for substantive relief, meaning the application to extend time might still not be granted. The onus rests with the applicant to demonstrate why discretion should be exercised to grant the extension of time; not with the respondent to demonstrate why the application should be refused (Brisbane South Regional Health Authority v Taylor [1996] HCA 25; (1996) 186 CLR 541 ("Brisbane South")).

39. The demonstration of hardship, if deprived of the right to pursue remedy under Pt VIIIAB of the Act, was a threshold issue before the primary judge (Gadzen at [29]). Having decided it against the [applicant], there was no need for the primary judge to go further, but his Honour nevertheless did so by proceeding to canvas another issue pertaining to the exercise of discretion: the delay in bringing the proceedings.

40. Supposing hardship is demonstrated, numerous factors can influence the exercise of residual discretion, including the length of the delay, the adequacy of reasons for the delay, and the prejudice the respondent would suffer if the application for extension of time was granted. ...

44. The Full Court cited *Arcand & Boen* (at [38]), in which that Full Court referred to *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25, where the High Court emphasised how a statutory provision conferring the discretion to extend a limitation period is the discretion to grant an extension, not the discretion to refuse an extension, and the onus of persuading the favourable exercise of such discretion rests on the applicant.

45. The explanation for delay was found to be inadequate, not least because the applicant admitted receiving legal advice about the need to bring proceedings before the limitation period lapsed and then, after it had lapsed, the need to immediately bring an application for leave to proceed to avoid the accrual of any further delay. The

applicant admitted ignoring that legal advice for a period of about two years between late 2017 and late 2019.

46. On the facts of this case, the primary judge found the applicant would indeed suffer some degree of financial hardship were she not granted an extension of time, though not to the extent she claimed (at [47]), but the explanation she offered for the delayed commencement of proceedings was inadequate (at [61]). When weighing those two competing considerations, the primary judge concluded the applicant had failed to satisfy the Court the discretion to extend time should be exercised in her favour (at [62]). The finding was open on the evidence and so the exercise of discretion did not miscarry. The appeal was dismissed.

Significant benefit already received by the de facto wife, leave to proceed out of time not granted

47. In **Gadzen & Simkin**[19], the de facto wife, Ms Simkin brought an application for property settlement and spousal maintenance, seven years out of time. The trial judge concluded that the de facto wife would suffer hardship within the meaning of section 44 (6) of the FLA if leave were not granted for her to bring property settlement and maintenance proceedings against the de facto husband.

48. The de facto husband filed an application for leave to appeal from those orders, and if leave is granted, for the orders to be set aside, contending that the trial judge failed to apply the correct legal test in determining the question of 'hardship'. The de facto husband did not pursue any challenges directed to any discretionary matters falling for consideration under section 44(6) if hardship is established.

49. In granting the leave to appeal and allowing the appeal the Full Court held:

"It is fundamental to such a determination that consideration is given to whether an applicant for leave demonstrates a prima facie or arguable case of substance having regard to all the circumstances of the case, taking into account the likely cost to be incurred by the applicant in pursuing the claim. Here, as will be discussed, the trial judge did not undertake that consideration. The trial judge focussed upon the applicant's evidence as to her current financial circumstances, and relied upon that

[19] [2018] FamCAFC 218.

evidence, without undertaking the fundamental consideration to which we have referred, in making a finding of hardship."[20]

50. By way of background facts, the parties cohabited for 8 years. The were no children of the relationship, and at the commencement of the relationship the de facto husband had assets worth $4,750,000 and the de facto wife had assets worth approximately $83,000. During the relationship the parties lived in properties owned by the husband, to which the de facto wife made no direct or indirect financial contribution to the acquisition, conservation or improvement of those properties. During the relationship the de facto husband also owned substantial commercial properties and held numerous corporate and trust interests, to none of which the de facto wife made any direct or indirect financial contribution.

51. The de facto husband contributed about $100,000 to the de facto wife's superannuation account during the relationship. Post-separation the de facto husband paid the de facto wife's rent for a period of time, and thereafter paid a $100,000 deposit towards the purchase of a property in the de facto wife's name and paid the interest only mortgage repayments for that property.

52. Approximately 4.5 years following separation, the de facto wife moved into her new husband's property and commenced receiving rent from the property purchased in her name by the de facto husband, without making any contributions to the mortgage.

53. The undisputed affidavit evidence of the de facto husband was that he made post separation payments/ contributions to the applicant or for her benefit of $467,121. The de facto wife presently held $134,600 in net assets. The de facto wife's prospective legal costs in pursuing her claim were estimated to be between $100,000 to $150,000.

54. The Full Court held:

40. However, having expressed her acceptance that it is fundamental to determining the question of hardship to consider "the quality or character of the potential claim" nowhere in the reasons can it be seen that the trial judge undertook that consideration. After those references to authority in the reasons the trial judge

[20] Ibid at 3.

immediately moved to discuss the discretionary considerations of delay and prejudice to the de facto husband.

41. In then addressing the topic "[h]ardship" under that heading commencing at [30] of the reasons her Honour simply quoted paragraphs 23 to 25 of the de facto wife's affidavit in full which are directed only to the de facto wife's current income and expenses and the fact that the de facto husband ceased paying the mortgage payments on her Suburb B property. Immediately after referring only to those paragraphs of the de facto wife's affidavit the trial judge concluded:

> *31. I consider **this evidence** is sufficient to demonstrate hardship...*
>
> *(Emphasis added)*

42. It would appear to be unavoidable to conclude that by "this evidence" the trial judge was referring solely to the current financial circumstances of the de facto wife as deposed to in the three paragraphs of her affidavit the trial judge quoted in full. However, that could not "demonstrate hardship". An analysis of the potential claim of the de facto wife was necessary to determine whether or not hardship would be occasioned to the de facto wife if she were not granted leave to pursue that claim. Further, as the authorities to which reference has been made demonstrate, an essential element is to consider the prospective legal costs of pursuing the identified or identifiable claim. Obviously, the prospective costs may render the conclusion that no hardship would be occasioned to an applicant to pursue an uncommercial claim. The trial judge gave no consideration to this essential element and was therefore in error.

43. We accept the submissions of the de facto husband that having recited the evidence of the de facto wife as to her current financial circumstances the trial judge wrongly found that such evidence was "sufficient to demonstrate hardship" without addressing or otherwise referring to the nature or quality of the de facto wife's potential claim.

55. The de facto husband sought that the Full Court re-exercise the discretion in relation to the de facto wife's application and dismiss it. The Full Court proceeded to do so.

56. In refusing to grant the de facto wife leave, the Full Court found that it was: "*unable to see how [her] potential claim in property settlement proceedings could conceivably*

approach, let alone exceed, that which she holds together with that which she has received."

57. *It bears emphasis that, as the Full Court observed in Edmunds at [18], "an applicant for leave is not required to establish their final case on the leave application. Similarly, the Court is not to approach the application on that basis". However, to establish "hardship" within the meaning of s 44 an applicant for leave must demonstrate a prima facie or arguable case of substance, having regard to all the circumstances of the case, taking into account likely costs. A striking feature of this case is that the de facto wife has received very significant benefits post-separation, including the product of the de facto husband's significant contribution to her superannuation during the relationship.*

58. *We give full weight to the de facto wife's homemaking contribution (from which she benefited equally with the de facto husband in the household with no children); her role in Company L; her involvement to some extent in the de facto husband's tenancies in commercial premises in the Northern Territory; and her assistance to the de facto husband in planning and designing the Suburb D home (in which the parties lived for about 18 months up until their separation).*

59. *Yet, this was an approximate eight year relationship which produced no children. …the de facto wife has received $467,121 in post-separation benefits (including the superannuation contribution of $100,621 made in 2007).[23] She holds net property interests worth $134,600.[24] She estimates that she will expend approximately $150,000 pursuing her claim. We are unable to see how the de facto wife's potential claim in property settlement proceedings could conceivably approach, let alone exceed, that which she holds together with that which she has received.*

60. *In arriving at that conclusion we repeat the unchallenged evidence to which we have earlier referred, which includes the following:*

- *The direct financial contributions made by the parties at the commencement of the relationship, expressed in percentage terms, is 98.3 per cent by the de facto husband and 1.7 per cent by the de facto wife. There can be little doubt that the respective direct contributions is an overwhelmingly important factor in*

the circumstances of this case and all the more so because of the amounts received during and after the relationship by the de facto wife;

- *The parties separated nine years ago. They have been separated longer than they cohabited. In that time the de facto husband's assets (including superannuation) have diminished by approximately $1.75 million;*

- *The de facto wife cannot be seen to have made any contribution of any kind to the de facto husband's assets. For his part, the de facto husband's continuing contributions are not only to the conservation of his own assets but contributions to the de facto wife and her principal asset which have already been discussed;*

- *The de facto wife entered the relationship with assets (predominantly unvested superannuation) of approximately $83,000. She currently has total property interests worth $470,600 and liabilities of $336,000 – net $134,600. She received from the de facto husband contributions to her superannuation of approximately $100,621 during the relationship. She now discloses no superannuation. There is no accounting for the contributions received by her; and*

- *The de facto husband has paid to or for the benefit of the de facto wife a total of $467,121 since separation (including the superannuation contribution made during the relationship).*

61. *Counsel for the de facto wife's contention that some or all of the payments made to the de facto wife might be characterised as maintenance must be rejected. The de facto wife could not, on the evidence, establish the required need. From separation in 2009 until mid-2013 the de facto wife was earning employment income in the de facto husband's company at $54,000 per annum. At about the time she ceased employment she commenced living in a home owned by her current husband. The de facto wife received from the de facto husband's self-managed superannuation fund $213,118 in 2015, the use of which goes unexplained. From mid-2013 the de facto wife rented out the Suburb B property and retained the rental proceeds without having to pay the mortgage, which was being paid by the de facto husband.*

62. To the extent that the de facto wife's prospective claim might be seen to rest more upon s 90SF(3) factors than a contributions based entitlement, a potentially significant matter is the difference in wealth between the parties. Yet, a greater disparity existed at the start of the relationship and, to repeat, the parties' current financial circumstances arise in a post-separation period greater than the length of the relationship. Otherwise, reference to the relevant s 90SF(3) factors does not admit of any conclusion supportive of the asserted hardship.

63. For these reasons we are not satisfied that the de facto wife establishes hardship within the meaning of s 44(6) of the Act. It follows that her Initiating Application filed in the Federal Circuit Court on 25 January 2018 must be dismissed.