Case Notes

Evans v Marmont (1997) DFC 95-184

I) Introduction

On the 1 July 1997 a specially constituted New South Wales Court of Appeal comprising five judges delivered the decision in *Evans v Marmont.*[1] The Court of Appeal was afforded the opportunity of clarifying the correct approach to the interpretation of s.20(1) of the *De Facto Relationship Act 1984* (NSW). This section provides as follows:-

"On an application by a de facto partner for an order under this Part to adjust interests with respect to the property of the de facto partners or either of them, a court may make such an order adjusting the interests of the partners in the property as seems just and equitable having regard to-

(a) the financial and non financial contributions made directly or indirectly by or on behalf of the de facto partners to the acquisition, conservation or improvement of any of the property of the partners or either of them or to the financial resources of the partners or either of them; and

(b) the contributions, including any contribution made in the capacity of homemaker or parent, made by either of the de facto partners to the welfare of the other de facto partner or to the welfare of the family constituted by the partners and one or more of the following namely:-

(i) a child of the partners;

(ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners."

[1] Gleeson CJ, McLelland CJ (in Eq), Meagher JA, Mason P and Priestly JA.

The vexed question facing the court was the extent of the power granted under s.20. When making an order for the adjustment of property is the court limited to only those factors mentioned in the section, or are those the fundamental factors to be taken into account? If the court concludes that those are the fundamental matters to be considered, what other matters are relevant and what is the relationship between those factors and an order which seems just and equitable?

II) The Facts

The parties met while in their middle forties and were in a de facto relationship for 15 years from 1977 to 1992. There were no children of the relationship although the de facto wife's two children from her marriage lived with the parties for a few years. At the commencement of the relationship the de facto wife (the wife) had few assets while the de facto husband (the husband) had assets of significance. They included an encumbered house at Croydon Park (Croydon Park), a share portfolio, a number of insurance policies and a superannuation policy. The husband had been employed in the insurance industry since 1951. From this time he had contributed to a superannuation scheme as well as accumulating a number of endowment policies. Both parties worked throughout the relationship and there was no real disparity between their income earning capacities. During the subsistence of the relationship the parties planned carefully for their retirement. The Master found that by agreement between them, the wife contributed most of her income to the general household expenditure, with the husband paying the council and water rates. The husband used most of his income to pay the premiums on the insurance policies. The proceeds of these policies were used to discharge the mortgage over Croydon Park, as well as the mortgage on another property acquired at Swansea (Swansea). Swansea was purchased for $28,000.00 and by agreement between them registered in the husband's name alone. The wife was to receive a pension at age 60 and the parties wanted to avoid this asset diminishing these entitlements. Swansea was regarded as belonging to them both and the wife contributed $14,014.00 from her own funds towards the mortgage repayments.

At the end of the relationship the husband's assets amounted to $759,383.00 and were made up as follows:-

Croydon Park	$ 180,000.00
Swansea	$ 115,000.00
Share portfolio	$ 53,404.00
Insurance Investments	$ 410,426.00
Cash	$ 555.00
Total	$ 759,383.00

On his retirement in 1989 the husband received approximately $200,000 as part of his superannuation entitlements. This amount was included under the heading 'insurance investments'. The Master found the wife played no part in the building up of the these entitlements and that a large portion of the amount received related to contributions which predated the relationship.
The wife's assets were valued at $53,336.00 and were comprised as follows:-

Motorcar	$ 9,000.00
Furniture	$ 3,000.00
Savings	$ 800.00
Insurance Policy	$ 31,000.00
Share Portfolio	$ 2,400.00
Cash Management Account	$ 7,136.00
Total	$ 53,336.00

The Master ordered that the husband pay to the wife an additional $110,000.00. This amount together with the wife's existing assets represented approximately 20% of the total asset pool. The wife appealed against this order.

III) The Previous Law

The very issue facing this specially constituted Court of Appeal had come before the NSW Court of Appeal on a number of occasions. The interpretation given to s. 20 largely depended on how the Court of Appeal was constituted. Two strands of thought were evident, the one encompassing a broad interpretation of the section and the other a more restrictive interpretation.

On the first occasion that the Court of Appeal was faced with this issue in *Black v Black*[2] the court unanimously favoured a wide interpretation. It was decided that the contributions enumerated in s.20 were not the only relevant factors to be taken into account. These matters were of fundamental concern, but for a court to make an order which seems just and equitable other considerations such as the length of the relationship and the parties' needs were also important.

In *Dwyer v Kaljo*[3] the Court of Appeal followed and expanded upon this broad interpretation The defendant husband was a wealthy businessman. During the period of cohabitation the plaintiff wife undertook the administration of the defendant's household. She acted as the defendant's social secretary organising and hosting dinner and other

[2] (1991) DFC 95-113. Per Clarke JA, Kirby P and Handley JA concurring.
[3] (1992) DFC 95-127 Per Handley JA with Priestley JA concurring.

parties. She also assisted in looking after the defendants teenage son. During the relationship the plaintiff received valuable gifts and overseas trips. Her contributions were limited to homemaker and to a lesser extent parent.

The court placed emphasis on the words 'just and equitable' and that they were not synonymous. In making such an order the court was entitled to remedy any injustice which may be suffered because of 'his or her reasonable reliance on the relationship (the reliance interest) or his or her reasonable expectation from the relationship (an expectation interest). The section would also authorise orders which restored the applicant benefits rendered to the other partner during the relationship or their value (the restitution interest).' In adopting this approach concepts regarded as strictly commercial were incorporated into the realm of family law.[4]

Mahoney JA delivered a strong dissent relying on the specific wording of the section as a basis for taking only those particular factors mentioned into account. A just and equitable order required the court to consider the totality of the contributions of both parties, and then to balance them against each other.[5] Mahoney JA however approved Hodgson J's judgment at first instance, where his Honour had found that while the court can only take into account the contributions set out in s20(1)(a) and (b), in determining what is just and equitable the court may take into account other factors. However these other factors were only relevant 'as subsidiary factors' in so far as they were 'just and equitable having regard to the plaintiff's contributions.'[6] His Honour required a nexus between such other factors and the contributions of the parties.

The majority found Hodgson J's order that the defendant pay the plaintiff $50,000.00 was inadequate and failed to meet the plaintiffs reliance and expectation interests. The order was increased and the husband was ordered to pay the wife $400,000.00. The defendant husband sought special leave from the High Court to appeal against this decision but leave was refused.[7] Although judges at first instance followed this decision, many had difficulty marrying the commercial with the family law principles.[8] A number of cases suggested that this decision should be limited to its particular facts; such as where the husband is a wealthy man.[9] In *Green*

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4 (1992) DFC 95-127 at 76,598.Handley JA referred to the decision of the High Court of Australia in *The Commonwealth v Amman Aviation Pty Ltd (1991) 66 ALJR 123* which was concerned with the amount of compensation payable by the Commonwealth to Amman Aviation following its wrongful repudiation of a contract.

5 (1992) DFC 95-127 at 76,589.

6 (1987) DFC 95-053 at 75,600 per Hodgson J.

7 See unreported decision of The High Court of Australia 12th February 1993

8 *Williamson v Williamson* (1992) DFC 95-128 where Cohen J interpreted this judgment as indicating that the words 'but not limited to' ought to be inserted before 'having regard to'. See also Young J in *Parker v Parker* (1993) DFC 95-139 who adopted both pre and post *Dwyer* guidelines. See also Renaud J in *Street v Bell* (1993) DFC 95-144.

9 *Parker v Parker* (1993) DFC 95-139 per Young J , Master McLoughlan *Campbell v Campbell* (1995) DFC 95-162 and Mahoney J A *Wallace v Stanford* (1995) DFC 95-165. More recently Cohen AJA *Keene v Harkness* (1997) DFC 95-179.

v Robinson[10] the core issue before the court was the relevance of superannuation entitlements to property settlement. Cole JA and Powell JA candidly disapproved of *Dwyer* and favoured a more restrictive approach to s.20. Kirby P approached the situation more cautiously but noted that *Dwyer* had attracted some criticism. As neither party had sought leave to reargue the correctness of *Dwyer*, both Powell JA and Kirby P held they were obligated to follow this decision.

Shortly thereafter in *Wallace v Stanford*[11] a differently constituted Court of Appeal was given the opportunity of clarifying the correct approach to the interpretation of s.20. The parties lived in a de facto relationship for 14 years. During the relationship they built and lived in a house on land owned by the husband's parents. Towards the end of the relationship, the husband's mother died leaving him this property subject to a charge of $10,000.00 in favour of his brother and sister. The central issue for determination was whether in adjusting property interests the wife was entitled to a portion of the asset which the husband inherited. The Master awarded the wife $30,000.00 which included $10,000, the wife's share of a bank account from which the parties had discharged the charge over the property.

The court utilised this case as an opportunity to revisit how property settlement should be approached and most importantly what factors should be taken into account. Three separate judgments were delivered, Sheller JA substantially concurring with Mahoney JA and Handley JA dissenting.

Mahoney JA confirmed and expanded upon his dissenting judgment in *Dwyer*. He reiterated that the power given to the court pursuant to s.20 'is not at large' and is confined to making an order which is just and equitable by reference to the particular contributions set out in the section. Mahoney JA set out a four tier test which he suggested should be considered when determining property disputes between de facto spouses.[12]

A. What have been the contributions of each party ?
B. What is the balance between those contributions ?
C. What account is to be taken of property to which one or the other has not made relevant contributions?
D. Taking into account 1-3 above, what order is just and equitable?

The Appeal was dismissed. Mahoney and Sheller JJA found the wife was not entitled to an interest in the husband's inherited property. Handley JA dissented. The wife sought leave from the High Court to appeal against this decision but leave was refused.[13]

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10 (1995) DFC 95-159.
11 (1995) DFC 95-165.
12 *Wallace* (1995) DFC 95-165 at 77,400.
13 (1996) 70 ALJR 56

Following *Wallace*[14] it looked as though a restrictive interpretation to s.20 was well and truly entrenched. However, in an effort to unravel a ratio from the various decisions, Chisholm J in *Griffith v Brodigan*[15] concluded with some difficulty, that *Dwyer* had not been overruled by *Wallace,* and as a primary judge he was bound to follow the 'broad approach' reflected in *Black*[16] and *Dwyer.* In refusing leave to appeal from both *Dwyer* and *Wallace* the High court indicated its reluctance to deal with the correct statutory interpretation of s20.[17] This issue was to be resolved by the NSW courts. A special. five judge Court of Appeal comprising Gleeson CJ, Mason P, Priestley JA, Meagher JA and McLelland CJ in Eq heard the appeal.

IV) The Decision

a) The Majority Judgments

Gleeson CJ McLelland CJ (in Eq) and Meagher JA comprised the majority. judgments. The Chief Justices delivered a joint judgment while Meagher JA delivered a separate judgment.

Gleeson CJ and McLelland CJ (In Eq) referred to and agreed with Hodgson J's judgment at first instance in *Dwyer.*[18] The Chief Justices found that the contributions of the parties were the:

> "...focal points by reference to which the discretionary judgment as to what seems just and equitable must be made...It is by having regard to those matters that the court may adjust interests in a just and equitable manner.'[19]

However when determining whether a proposed order is just and equitable the parties' contributions cannot be looked at "...in isolation from the nature and incidents of the relationship as a whole." According to the Chief Justices Hodgson J's judgment was endorsed by Mahoney JA in *Dwyer* and affirmed by his Honour in *Wallace.* Their Honours approved this approach and conclusively rejected *Dwyer.*[20]

While Mahoney JA agreed with Hodgson J in *Dwyer,* in *Wallace* he formulated an approach based strictly on the contributions of the parties.[21] It is submitted that the Chief Justices' formulation is similar to Mahoney JA's approach in *Dwyer* but not as literal as *Wallace.* A nexus between the contributions made and other relevant factors must be established before such

[14] Above note 11.
[15] (1996) DFC 95 - 177.
[16] (1991) DFC 95-113.
[17] Ibid notes 7 and 13.
[18] *(1987) DFC 95-053.*
[19] *Evans v Marmont* (1997) DFC 95-184 at 77,610.
[20] See (1997) DFC 95-184 at 77,609.
[21] See (1995) DFC 95-165 at 77,400.

factors may be taken into account and an order made which is just and equitable. In approving Mahoney JA's approach in *Wallace,* Gleeson CJ and McLelland CJ (in Eq) expressly approved that there must be an accountability; a weighing up between what a party has contributed and what has been received in return. The termination of a de facto relationship will not automatically signal a need for property adjustment. The relationship may have "...involved shared activities or reciprocal benefits not giving rise to any disproportionate burden which it would be just and equitable to satisfy by an adjustment of interests in property."[22]

Meagher JA adopted a strict approach. According to his Honour only those contributions mentioned in s20(1) and no other considerations may be taken into account in adjusting property, "...the court may have regard to each of the two factors and not any other factors...".[23] His Honour however joined with the Chief Justices in comprising the majority. They found that the Master had not taken sufficient account of the parties' plans for their retirement and the contributions which the wife had made to bring such plans to fruition. The amount payable by the husband to the wife was increased from $110,000.00 to $175,000.00, indicating a split of approximately 72% of the assets in the husbands favour.

b) The Minority Judgments

Mason P and Priestley JA delivered separate dissenting judgments. Mason P adopted a similar interpretation to that adopted in *Black.* His Honour concluded that the words "...having regard to...[connotes]...primacy but not exclusivity...", while "...just and equitable involves a consciously open ended but not unfettered discretion...". The discretion is fettered by the words 'having regard to'. These words indicate that the factors set out in the section must be regarded 'as matters of fundamental importance' but that other matters were not necessarily 'irrelevant or inconsequential'. In addition the judge's discretion "...is controlled by the scope and purpose of the legislation and... by the ensuing judicial duty to exclude extraneous factors."[24] Such matters include the negation of equality as a starting point and the recognition of the homemaker parent contribution in a substantial way.[25]

Priestley JA while adhering to the views of Handley JA in *Dwyer,* adopted a similar approach to that enunciated by Mason P.

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[22] (1997) DFC 95-184 at 77,607.
[23] (1997) DFC 95-184 at 77,624.
[24] (1997) DFC 95-184 at 77,614 and 77,616.
[25] See (1997) DFC 95-184 at 77,605-77 where the Chief Justices recognised that there are certain aspects of s.20 which are no longer in dispute e.g. there is no assumption of equality in a property dispute or that the homemakers contribution must be recognised in a substantial way, rather than on the basis of market rates for domestic labour.

"The subsection requires a court to give principal weight to the matters referred to in those paragraphs but that other matters which are relevant to what is just and equitable can be taken into account."[26]

In adopting this interpretation Priestley JA also clearly supports the broad interpretation endorsed in *Black*. Both judges held that the husband should pay the wife an additional $250,000.00.

c) The Use of Extrinsic Evidence

The judgments also differed in their approaches to the use of extrinsic evidence and more specifically The New South Wales Law Reform Commission *Report on De Facto Relationships* to assist in the interpretation of the section.[27]

Meagher JA relied on the specific wording of the section and did not use extrinsic evidence. Mason P relied almost exclusively on the interpretation of the specific wording of the section, and gave limited weight to *the Report* and the differences in the wording between the *NSW Defacto Relationships Act (the NSW Act)* and the *Family Law Act*.[28] Priestley JA recognised that the wording of the section was open to a number of interpretations and therefore extrinsic evidence was required. He referred directly to other sections within the *NSW Act* to support a broader interpretation.[29]

The Chief Justices embarked upon an analysis of the *NSW Act* and its history. Their interpretation of the section was based upon the language, structure and purpose of the act. *The Report* was referred to extensively and it was recognised that the intention of the New South Wales Law Reform Commission was not to equate de facto relationships with legal marriages and was moreover to preserve the institution of marriage.[30]

V) Some Comments

In the case of *Green v Robinson*[31] the husband had a contingent right to

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[26] (1997) DFC 95-184 at 77,622.

[27] *(the Report)* In 1983 the New South Wales Law Reform Commission produced a report which recommended widespread reforms to property adjustment and maintenance claims between parties living or formally living in a de facto relationship. As a direct result the *De Facto Relationship Act 1984* (NSW) was passed and came into operation on the 1 July 1985. This act followed closely the recommendations of the Report.

[28] When making an order for property settlement s. 79(4) of the *Family Law Act* 1975(Cth) specifically requires the court to take into account the means and needs of the parties as well as their contributions.

[29] (1997) DFC 95-184 at 77,620-77,622.

[30] (1997) DFC 95-184 at 77,611.

[31] Above note 10.

superannuation entitlements payable on retirement approximately 15 years after the hearing. One of the main grounds of the wife's appeal was the Master's disregard of the parties superannuation entitlements when determining property adjustment. All three judges concurred that superannuation entitlements should be taken into account in determining property adjustment, However Powell and Cole JJA found, as neither party had contributed to the others' superannuation entitlements, no further adjustment was required.[32] Kirby P found such entitlements should be regarded as both parties' contributions.[33]

In *Evans v Marmont*[34] the majority placed significant emphasis on the Master's failure sufficiently to take into account the parties' joint plans for their retirement and the frugal lifestyle the parties enjoyed so as to provide for their old age. The Master's failure adequately to take into account these plans permitted the court on appeal to interfere with the his discretion. It is therefore settled that at least when superannuation entitlements have vested, such entitlements should be regarded as the property of the parties. In these circumstances they should be regarded as joint savings to which both parties have contributed.[35]

The question remains what is the correct approach to the interpretation of s. 20? Within the majority Meagher JA adopted a strict approach based only on the contribution of the parties. The Chief Justices preferred a broader approach, incorporating elements of the 'adequate compensation' approach, which evolved from the early decisions under the legislation. In *D v McA* [36] Powell J formulated a four step analysis to the interpretation of s20. This formulation included an assessment of the contributions, of the parties, whether such contributions had been sufficiently recognised, and if not, what order is called for so that the contributions would be sufficiently recognised.[37] The Court of Appeal conclusively rejected the 'adequate compensation approach' in *Dwyer*.[38] However, Mahoney JA's concept of accountability between the parties, which was accepted in *Marmont*, is a direct development of this approach.[39] Mason P and Priestley JA endorsed a wider interpretation of the section not limited to the contribution of the parties. No clear majority is discernible either as to the extent of the discretion granted to the court under the section or the means of ascertaining that extent.

What can be extracted from *Marmont* is the express rejection of *Dwyer*.

[32] (1995) DFC 95-159 at 77,330 and 77,337.
[33] (1995) DFC 95-159 at 77,325.
[34] (1997) DFC 95-184
[35] See also *King v Kemp* (1996) DFC 95-171 where the Full Court of the Family Court in interpreting similar provisions under the *De Facto Relationship Act* 1991 (NT) all the judges concurred that where the entitlements were contingent the court was obliged to take them into account when determining property settlement.
[36] (1986) DFC 95-030
[37] See (1986) DFC 95-030 at 75,356.
[38] (1992) DFC 95-127.
[39] (1997) DFC 95-184 at 77,607.

by the majority. In addition, Mason P indicated his reservation concerning the helpfulness of the contractual analogies in resolving property disputes. In affirming his support of Handley JA's judgment in *Dwyer* only Priestley JA still adhered to this decision. However, in doing so, he distanced himself from commercial principles and based his justification on the consequences of parties living in a permanent relationship.[40]

While the majority are not uniform in their interpretation of s.20, there is an acceptance of a strict interpretation of the section. The Chief Justices, and the dissenting judges Mason P and Handley JA, agree that the contributions of the parties are the pivotal factors to be taken into account. However they and the dissenting judges disagree on the interrelationship between these considerations and an order which is just and equitable. According to the Chief Justices, provided there is a nexus between the other factors and the contributions made, such considerations may be regarded as relevant. 'Fault, needs maintenance, compensation, expectation damages, reliance damages or quasi equitable damages' are precluded.[41]

It is difficult to determine with mathematical precision how the majority calculated the amount payable to the wife. No indication is given as to the value of the husband's assets at the date of the commencement of the relationship, nor of the value of the husband's superannuation entitlements or his contributions to superannuation at this time. The majority emphasised that at separation, according to equitable principles, the wife would arguably have been entitled to a half interest in the Swansea property. The effect of the Master's order was to award the wife $110,000.00, being the value of this property, in addition to her retaining her existing assets of $53,336.00.[42] This amount reflected approximately 20% of the entire asset pool as against the majority judgments order which comprised approximately 28% and the minority judgments proposed order which reflected approximately 37% of the total asset pool.

The comments of Mason P ring true that 'the difference between the competing views as to the meaning of s.20 may be considerably narrower than might be suggested by a headnote proclaiming *Dwyer* is overruled and *Wallace* is followed.'[43] However the practical application of the different approaches indicate a large discrepancy which is reflected in the orders made and those suggested by the minority.

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[40] (1997) DFC 95-184 at 77,623.
[41] (1997) DFC 95-184 at 77,624.
[42] The Swansea property was valued at $115,000.00 but the Chief Justices thought this amount close enough to the amount awarded to draw an analogy.
[43] (1997) DFC 95-184 at 77,617.