IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No M137 of 2019

BETWEEN **HSIAO**
Appellant

and **FAZARRI**
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1 These submissions are in a form suitable for publication on the internet.

Part II: Issues

2 The issues on this appeal arise in the following circumstances. After not having complied with orders for the preparation of a trial in the Family Court of Australia, the appellant appeared on the first scheduled day of that trial to seek an adjournment. The application was refused. No appeal was brought from that decision. The appellant elected not to appear at the trial thereafter. On appeal to the Full Court, she sought to adduce further evidence that she conceded that she had had the opportunity to file prior to trial, yet she had deliberately withheld it. She also conceded before the Full Court that no different finding as to her contributions to the marriage or to the acquisition, conservation or improvement of any property would flow from the admission of that evidence. In those circumstances, the discretion under sec 93A(2) of the *Family Law Act 1975* (Cth) (**the Act**) to admit that further evidence was exercised against the appellant by the Full Court. The appellant seeks to re-agitate that issue in this Court in a further attempt to disturb the finality of the judgement made at trial. The appellant also criticises the approach of the trial judge and the Full Court as to sec 79 of the Act, and as to the application of the principles elucidated by this Court in *Stanford v Stanford* (2012) 247 CLR 108. But, at trial, the appellant also sought an order pursuant to sec 79 of the

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Act altering the parties' property interests. Whatever differences may be identified in the approach of the trial judge and the Full Court, so as to seek to invoke this Court's appellate intervention, it will be said that they are not attended by error.

3 The appellant characterises the various grounds of appeal by reference to two issues identified in the Appellant's Amended Submissions paras 2-3 (**ASA** 2-3).

4 The ***first*** concerns the application of *Stanford* and whether a finding that the appellant had pressured the respondent to transfer 40% of a property to her {Reasons of the Primary Judge, 19th June 2018; *Fazarri v Hsiao (No 2)* [2018] FamCA 447 (**J**) [51]: Core Appeal Book (**CAB**) 15}, such finding having been upheld by the Full Court {Reasons of the Full Court, 5th March 2019 (**FC**) [66], [72]: CAB 78-79}, ought be set aside. And, related thereto, the appellant contends that the resultant order made by the trial judge was attended by error.

5 The ***second*** issue is whether the Full Court ought to have received, pursuant to sec 93A(2) of the Act, further evidence upon questions of fact.

6 The delineation of the issues in this way assumes importance. That is, the appellant conflates consideration of the first issue with the second by relying on the assistance she says she would receive if further evidence was able to be called in her aid. For the reasons which follow, she errs in so doing, and the Full Court was correct to proceed in the manner it did in the (unique) circumstances of this case.

Part III: Notice under sec 78B of the *Judiciary Act 1903* (Cth)

7 Consideration has been given to the question whether notice pursuant to sec 78B of the *Judiciary Act 1903* (Cth) should be given, with the conclusion that this is not necessary.

Part IV: Statement of material facts

8 The findings of fact made by the trial judge (Cronin J), and left undisturbed by the Full Court (Strickland, Kent and Watts JJ), are as follows.

9 At the date of the trial, the appellant was 44 years of age and the respondent 58 years of age {J [36]: CAB 13; FC [7]: CAB 65}.

10 Their intimate relationship commenced in August 2012. After the respondent separated from his former wife in March 2013, the respondent leased premises for himself

and the appellant remained in her apartment. The parties spent nights at one another's home {J [38]-[39]: CAB 14; FC [7]: CAB 65}.

11 In August 2016, the parties married. The marriage lasted for 23 days {J [61]: CAB 17, FC [14]: CAB 66}.

12 At first instance, in assessing the nature and extent of the parties' relationship, the trial judge found that the only conclusion open to him was that it was short and made up of intermittent periods when the parties were together {J [62]: CAB 17; FC [7]: CAB 65}. The evidence, taken as a whole, enabled his Honour to find that the relationship was "hardly one that would satisfy the definition of a de facto relationship" {J [39]: CAB 14}.
10 The appellant contends that the evidence she was refused leave to adduce on appeal bears on this issue, and that the trial judge ought to have found otherwise than he did.

13 The main issue at trial, and that which is the subject of this appeal, is the treatment by the trial judge of a property (**G Street**), which was purchased by the respondent in April 2014 {J [48]: CAB 15; FC [11]: CAB 65}.

14 There is no controversy that: (a) G Street was purchased for $2.2 million; (b) the funds for its purchase were provided exclusively by the respondent, including by way of borrowings from ANZ; and (c) the obligation to repay those borrowings fell to the respondent alone (and not the appellant) {J [48]: CAB 15}. The appellant and respondent never lived together at G Street, as renovations were performed on it after purchase and
20 the respondent remained in rental premises {J [39], [53]: CAB 14, 16}.

15 It is also not in issue on this appeal that, at the time of settlement of G Street, the respondent gifted an interest in it as tenant in common as to 10% to the appellant {J [49], [85]: CAB 15; FC [11]: CAB 65}. It is this interest in G Street, characterised as a contribution by the appellant, which explains the basis of the order made against the respondent to pay an amount to the appellant at the conclusion of the trial {J [104]-[105]: CAB 23}. But no complaint is made by the respondent now, nor was any complaint made by him before the Full Court, about this issue. That is, the respondent accepts the trial judge's characterisation of the appellant's 10% interest in G Street as being a gift made by the respondent to the appellant.

30 **16** Later, in December 2014, while in hospital with a suspected heart attack, the respondent signed a transfer of a further 40% interest in G Street to the appellant, the result of which was that they were joint tenants as to 50% of G Street. The trial judge accepted that the appellant pressured him at the relevant time to transfer the property

{J [51]: CAB 15}. And, as already noted, that finding was upheld by the Full Court {FC [66], [72]: CAB 78-79}. And, so, it followed that, unlike the 10% interest in G Street that was given on settlement, this 40% transfer was found not to be a gift {J [51]: CAB 15}. The appellant contends that the Full Court erred in failing to admit further evidence as to that question. That evidence would, she contends, be such that the trial judge ought to have found, contrary to the respondent's sworn evidence, that he was not so pressured.

17 There is one further factual matter which assumes importance. In March 2015, a deed was executed under which the appellant's siblings were each to be provided with $500,000 if the appellant died before the respondent {J [54]: CAB 16} (**the Deed**). Importantly, the Deed was expressed not to have legal effect in the event that, relevantly, the parties no longer owned G Street as joint tenants {J [56]: CAB 16; FC [68]: CAB 78}.

18 The proceeding was commenced by the respondent in the Federal Circuit Court of Australia on 22 November 2016. Both parties sought property settlement orders pursuant to sec 79 of the Act.

19 On 14 February 2017, the Federal Circuit Court made an interim property order and required, *inter alia*, the parties to file and serve further affidavit material and for the parties to make discovery of various documents.

20 The proceeding was later transferred to the Family Court of Australia.

21 On 26 April 2018, the trial judge made orders requiring, *inter alia*, the appellant to file and serve all affidavits of evidence on which she intended to rely by 6 June 2018.

22 Despite being represented throughout the proceeding, and until 7 June 2018, by a number of different firms of solicitors, and by counsel at each interlocutory hearing {*Fazarri v Hsiao* [2018] FamCA 446 (**Adjournment Judgement**) [38]: Respondent's Book of Further Materials (**RBFM**) 26}), the appellant did not avail herself of the opportunity to file any evidence. (The appellant's solicitors filed a notice of ceasing to act on 7 June 2018, a week before the trial, and appeared before the trial judge to formally ask to be permitted to withdraw {Adjournment Judgement [2]: RBFM 21}).

23 On the first scheduled day of the trial, the appellant appeared unrepresented and made an application for the trial judge to recuse himself on the basis of apparent bias, and made an application for an adjournment {FC [4]: CAB 64}.

24 The application for the trial judge to recuse himself was refused, as was the adjournment application. His Honour's reasons for so doing were set out in a separate judgement, namely the Adjournment Judgement. As the Full Court noted {FC [45]: CAB 74}, no appeal was brought from the Adjournment Judgement. The Adjournment Judgement is relevant insofar as it demonstrates that, as at the date of the trial, the appellant had been given adequate opportunities to prepare for trial, and to pursue any interlocutory issues that she wished {Adjournment Judgement [55]-[57], [59]-[61], [64]-[65], [84]: RBFM 32, 32-33, 33-34, 37}. In the judgement from which the appeal was brought to the Full Court, the trial judge had noted that he had separately ruled on the adequacy of disclosure, that being a reference to the Adjournment Judgement {J [21]}. What was said there, to which further reference is made below, ought inform this Court's treatment of the second issue.

25 The appellant did not appear on the day after the refusal of her adjournment application, and the trial proceeded undefended.

26 Ultimately, the trial judge ordered the transfer of that part of the appellant's interest in G Street from the appellant to the respondent, ordered that the respondent pay the appellant $100,000 (over the respondent's objection), and rejected the respondent's application for an adjustment of the unused portion of the $80,000 litigation funding previously paid by the respondent to the appellant {J [107]: CAB 23-24; see also, the Orders of the Primary Judge, 19th June 2018: CAB 27-28}.

27 The appellant was represented by solicitors and counsel on the appeal to the Full Court.

28 The appellant's attempt to re-frame the case by describing "facts which, while not admitted in the Court below, are proved by the evidence which the Court below refused to receive" {ASA 7; see also, 13, 15-18, 20-25, 28} ought to be rejected. There is no basis to say that those matters are proved, in the absence of their proper testing by way of cross-examination in the usual way at trial. And, further, that submission misunderstands the role of this Court as an ultimate appellate court, inviting this Court to proceed to determine a case by reference to facts not found below.

29 If, and only if, this Court were to determine the second issue in favour of the appellant (which is resisted, for the reasons explained at paras 55-68 below) do the appellant's (asserted) facts matter. And, in any case, it would not be appropriate for this Court to engage in an analysis of that material, containing facts asserted by the appellant,

without them being properly tested in evidence and as to which the respondent would be able to provide answers.

Part V: Argument in answer to the argument of the appellant

30 The respondent addresses the two issues identified by the appellant in the same order as she has in the ASA: see further, paras 3-5 above.

The first issue: application of* Stanford *247 CLR 108

31 The appellant contends that the approach of the trial judge, which was approved by the Full Court, was inconsistent with the approach countenanced by this Court in *Stanford* 247 CLR 108.

32 Neither the appellant, nor the respondent, takes issue with the principles set out by the High Court in *Stanford*. And, so, it is trite that, in a case such as the present, where a division of property is sought under sec 79 of the Act, the Court is to be guided by three "fundamental propositions": *Stanford* 247 CLR at 120 [36], 121-122 [41] per French CJ, Hayne, Kiefel and Bell JJ {J [77]: CAB 19}. (The appellant no longer points, as she did in her special leave application, to other cases in the Full Court of the Family Court that she had contended suggested error in the general application of the *Stanford* principles in other cases in that court.)

33 The three "fundamental propositions" are as follows.

34 ***First***, a "consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties in the property. So much follows from the text of sec 79(1)(a) itself": *Stanford* 247 CLR at 120 [37] (emphasis in original).

35 ***Second***, "although sec 79 confers a broad power on a court exercising jurisdiction under the Act to make a property settlement order, it is not a power that is to be exercised according to an unguided judicial discretion": *Stanford* 247 CLR at 120 [38].

36 ***Third***, "whether making a property settlement order is 'just and equitable' is not to be answered by beginning from the assumption that one or other party has the right to have the property of the parties divided between them or has the right to an interest in marital property which is fixed by reference to the various matters (including financial and other contributions) set out in sec 79(4). … To conclude that making an order is 'just and

equitable' only because of and by reference to various matters in sec 79(4), without a separate consideration of sec 79(2), would be to conflate the statutory requirements and ignore the principles laid down by the Act": *Stanford* 247 CLR at 121 [40].

37 There can be no real complaint about the trial judge's invocation of sec 79 of the Act in the circumstances of this case. Not only did the respondent seek such an order, but the appellant had, by her response to the original application in the Federal Circuit Court, sought a division of property on the basis that she receive one half of the respondent's assets. It appears that this later changed, her counsel conceding at an interlocutory hearing that this was "not a 50 per cent case" {J [20]: CAB 11}. But whatever position she advanced, it is plain that she too, invoked, sec 79 of the Act; yet the appellant appears now to suggest it ought never have been invoked by the trial judge {cf. ASA, 48}. That it was not invoked in her favour is not surprising given the length of the relationship, the fact that the respondent had assets of $9 million and the appellant had only minimal assets, and the finding that the contributions of the respondent were overwhelmingly greater than those of the appellant, whose were small {J [61]-[62], [68], [69]: CAB 17, 18; FC [10], [14], [15], [36]: CAB 65, 66, 73}. But that is beside the point for present purposes; what matters is that she, too, invoked sec 79 of the Act. And so her submission that "absent pressure as a ground of avoidance of the transfer, there is simply no basis for making the property settlement order" {ASA, 48} is contrary to the way she put her case. As will be seen below, there was (plainly) a basis for invoking sec 79 of the Act, and the reasoning in support of that approach by the trial judge and the Full Court ought be upheld.

38 Consistently with what is required, his Honour adhered to the first "fundamental proposition" set out in *Stanford* 247 CLR at 120 [37], carefully analysing the facts and identifying the respective interests of the parties in the various properties. That analytical process is seen in the trial judge's treatment of G Street and the other assets of the parties at [48]-[72] {CAB 15-18}. In particular, it is clear from the trial judge's rejection of the respondent's submission as to the existence of a resulting trust {J [52]: CAB 15-16} that the trial judge was cognisant of the need to identify, according to ordinary common law and equitable principles, the *existing* legal and equitable interests of the parties in G Street: see further, para 34 above.

39 Aggrieved by some of those findings as she may be, absent the adduction of further evidence (which is proposed by the second issue), the analysis must start from that point.

40 It was then that his Honour considered whether it was "just and equitable" to make an order under sec 79. Not only did his Honour identify the need for separate consideration of sec 79(2), but his Honour also analysed the relevant factors prescribed by sub-sec (4). While he acknowledged, at various junctures {J [94]-[95], [97]: CAB 21, 22}, the difficulty in so doing (by reason of the paucity of evidence from the appellant and her absence at the trial), it cannot be said – and it does not appear to be said – that there was a failure to discharge that exercise of judicial power.

41 That (unimpeachable) approach having been taken by the trial judge, what the appellant appears to be contending is not an error of legal principle, nor a mis-application of that (settled) legal principle. Rather, all that remains of the appellant's argument, in essence, is a failure by the trial judge to consider the Deed (which had been executed in March 2015). This is the gravamen of ground 3A below, and ground 2(c) in this Court.

42 There are a number of answers to that contention.

43 ***First***, it is unsurprising that, where the trial judge had identified, and extracted part of, the Deed {J [54]-[57], [65]: CAB 16, 17}, the Full Court found that there was "no basis to suggest that the primary judge failed to take the [D]eed into account" when making his relevant findings as to the pressure exerted on the respondent {FC [72]: CAB 79]. A factual finding ought only concern this Court where it was glaringly improbable or contrary to compelling inferences: see eg *Fox v Percy* (2003) 214 CLR 118 at 128 [28]-[29] per Gleeson CJ, Gummow and Kirby JJ; *Robinson Helicopter Company v McDermott* [2016] HCA 22; (2016) 90 ALJR 679 at 686-687 [43] per French CJ, Bell, Keane, Nettle and Gordon JJ.

44 The finding as to the circumstances of the transfer in December 2014 is not so glaringly improbable or contrary to compelling inferences, even having regard to the existence of the Deed. That is, the trial judge heard evidence about the circumstances in December 2014, particularly that the respondent was then in hospital with a suspected heart attack, and found that the appellant had, indeed, exerted pressure on the respondent to sign the transfer at a vulnerable time. And so there was no failure to consider the Deed, as the appellant alleges by her grounds 2(a) and 2(b).

45 ***Second***, to the extent that the appellant contends that, by reason of a failure by the trial judge and, in turn, the Full Court to consider the Deed (which is demonstrably wrong, for the reasons in the preceding two paragraphs), there was a failure to comply with the first of the "fundamental propositions" in *Stanford*, that argument ought also be rejected. As set out above, the trial judge properly considered, in the manner required of him, the existing legal and equitable interests of the parties. And, while the Full Court's approach appears to have differed, it resulted in the same outcome: see paras 51-52 below.

46 ***Third***, on the trial judge's analysis, the resolution of the ownership of G Street was part of the very analysis that underlay the legal effect of the Deed. His Honour found that, by reason of the resolution of that issue (that is, by reason of the fact that the parties were no longer to be joint tenants {J [57]: CAB 16}), the legal effect of the Deed, consistently with clause 7 of it ({J [56]: CAB 16}), was at an end {J [57]: CAB 16}.

47 As the Full Court observed in relation to this issue, the trial judge's analysis is correct {FC [80]: CAB 79}. Both parties sought severance of the joint tenancy {FC [80]: CAB 79}. And so it follows necessarily, on both parties' case, that the effect was the bringing to an end of the Deed. The relevant clause (cl 7) of the Deed had that effect {J [56]-[57]: CAB 16; FC [68]: CAB 78}. That is, by reason of the court's intervention, cl 7 had the effect that the Deed will have "no application" because at the time of the appellant's death, the parties would not own G Street as joint tenants, that tenancy having been severed by the court {J [57]: CAB 16}.

48 ***Fourth***, to the extent that it was said (and appears to be maintained in this Court by ground 2(b)) that the trial judge erred in not having regard to the Deed, by refusing to award the appellant half of the value of the property, that overlooks the operation of the Act. As the Full Court identified {FC [82]: CAB 80}, sec 71A of the Act permits parties to enter into agreements that oust the jurisdiction of the Court under sec 79. But the facility for parties to a marriage to do so is very narrowly prescribed. That ought to be taken as settled family law: see eg *Woodland v Todd* [2005] FamCA 161; (2005) FLC 93-217 at [38]; *Stanford* 247 CLR at 122 [41] per French CJ, Hayne, Kiefel and Bell JJ. It is therefore misconceived for the appellant to rely on the Deed in the manner she so contends. The Deed neither binds the Court nor ousts its jurisdiction in any way.

49 ***Fifth***, all that remains is an allegation of an error of law by the trial judge in coming to the conclusion that he did – namely, that the appellant exerted pressure on the respondent while he was in hospital in December 2014, the result of which was that the

respondent transferred 40% of G Street to the appellant. But that is a factual finding plainly open to the trial judge, the appeal from which was rightly rejected by the Full Court: see further, *Fox* 214 CLR at 128 [28]-[29]; *Robinson* [2016] HCA 22; 90 ALJR 679 at 686-687 [43], to which reference was made at para 43 above.

50 And, if one accepts that factual finding (which it is submitted one must), the analysis of the trial judge was not only consistent with the first "fundamental proposition" in *Stanford*, but it also conclusively answers the appellant's contention that the trial judge failed to take into account that the appellant had 50% of the legal interest in G Street prior to the marriage: cf. ground 2(d). On that analysis, that very contention is not open to her. And, for fear of repetition, the finding of the pressure exerted on the respondent by the appellant in December 2014 was open to the trial judge.

51 ***Sixth***, and finally, the Full Court also identified (albeit as part of its analysis of the second issue) an alternative pathway to the same outcome as that reached by the trial judge {FC [26]-[29]: CAB 70-71}. That is, the Full Court interpreted the trial judge's conclusion as to the appropriate property settlement order as one which followed from taking "all of the considerations under sec 79(4) of the Act into account and [making] an order for the adjustment of property of the parties pursuant to sec 79 of the Act" {FC [27]: CAB 70-71}. That conclusion, the Full Court explained, followed even if the first "fundamental proposition" yielded an answer that the appellant retained the 40% share in G Street. And, if one were to adopt that approach (which is implicit in those of the appellant's grounds of appeal which seek to impugn the finding as to the transfer of 40% of G Street), the Full Court was right to reason that the same property settlement order would have been made anyway. That reasoning was explained as follows {FC [29]: CAB 71}:

> What the primary judge was bound to do, as part of making a determination under sec 79 of the Act, was to assess contributions to the acquisition, conservation and improvement of G Street. The primary judge concluded that the appellant could only claim the most moderate non-financial contributions and that the respondent had made the overwhelming financial contributions to the acquisition, conservation and improvement of G Street during a short relationship and a very short marriage. When considering sec 79(4)(d)-(f), the primary judge was cognisant of the respondent's financial position and earning capacity as compared to those of the appellant. The primary judge made the property settlement order after considering the relevant evidence in light of the statutory requirements.

52 And, so, if that analysis is adopted, the circumstances in which the appellant obtained a 40% interest in G Street (in December 2014) and the Deed (executed in March 2015) are properly described as "distractions" {FC [29]: CAB 71}. They simply do not matter at all to an analysis which starts with the appellant having an existing interest in G Street of 50%, and which is grounded thereafter in the consideration of sub-secs (2) and (4) of sec 79, including an assessment of the contributions of each of the parties and the relevant sec 75(2) factors, such as the parties' respective financial positions and earning capacities.

53 Whatever approach is taken, the result would be the same. Grounds 2(a)-(e) ought be dismissed.

54 Insofar as this issue is predicated on the appellant's success in having further material before the trial judge, it must fail if the appellant fails on the second issue, to which we now turn.

The second issue: adduction of further evidence pursuant to s 93A(2) of the Act

55 As to what the appellant identifies as the second issue – that further evidence ought to have been permitted to be adduced in the Full Court – that intermediate appellate court considered each of the documents not discovered in the proceeding and properly refused its admission. The Full Court's conclusion to refuse to exercise the discretion to admit evidence is not surprising. The appellant conceded before the Full Court that almost all of the documents and items of evidence were in her possession or available to her as at the date of the trial but were not adduced before the primary judge because the appellant had not complied with orders for the preparation of, nor participated in, the trial {FC [6], [19]: CAB 64-65, 67}. Although the Full Court recorded that four of the documents were not obtained by the appellant until after trial, "it is not controversial that apart from [a medical report] the other three documents could have been obtained by the appellant prior to the trial" {FC [19]: CAB 67}.

56 Indeed, fatally, "counsel for the [appellant] conceded that the [appellant] had the opportunity, prior to the trial before the primary judge, to file the evidence upon which she now seeks to rely and that she deliberately withheld doing so" {FC [47]: CAB 74}. The significance of this concession cannot be understated, and the appellant does not – because she cannot – resile from it in this Court. And so, as McHugh, Gummow and Callinan JJ explained in *CDJ v VAJ* (1998) 197 CLR 172 at 203 [116] "[w]here the

evidence has been deliberately withheld, the failure to call it will ordinarily weigh heavily in the exercise of the discretion".

57 That ought be the end of the analysis. That is, having (properly, and responsibly) made that concession, the appellant's invocation of this Court's jurisdiction to disturb the Full Court's treatment of this issue is without merit.

58 However, even if that concession does not settle the issue, a further, detailed analysis, such as that undertaken by the Full Court, leads to the same result. The respondent respectfully adopts that analysis. And there is nothing in the Full Court's (more detailed) analysis which warrants this Court's intervention.

59 The discussion by the Full Court commenced with an identification of sec 93A(2) of the Act and the principles relating thereto enunciated in *CDJ* 197 CLR 172 at 200 [104], 201 [109], 201-202 [111], 204 [113]-[116] per McHugh, Gummow and Callinan JJ; see also, *Werth v Pacapelli* [2018] FamCAFC 106 at [58] per Kent J {FC [17]: CAB 66]}.

60 No challenge is made to those principles.

61 It is unclear how it is said by the appellant that the (broad) discretion under sec 93A(2) of the Act has miscarried. She does not – because she cannot – identify an error of the type identified in *House v The King* (1936) 55 CLR 499. The appellant's attempt to identify error in the ASA at paras 54-56 is perfunctory and must be rejected. Each of those matters, directed as they are to the respondent's credibility, overlooks the deliberate withholding of material by the appellant that she now says could have assisted her in cross-examining the respondent at a trial that she elected not to attend.

62 Having set out the (unchallenged) applicable principles, the Full Court then applied those principles to the facts, dividing the discussion of the documents into four categories {FC [18]: CAB 66-67}, and then dealing with each of those categories in turn {FC [20]-[30], [31]-[37], [38]-[39], [40]-[46]: CAB 67-71, 71-73, 73, 73-74}. This is an orthodox and unremarkable application of settled principles to the facts. Indeed, it is entirely consistent with the nature of the exercise of judicial power explained by this Court in *Nicholas v The Queen* (1998) 193 CLR 173, and other cases, to which the appellant refers at ASA, 62.

63 But it also relevant to consider, as the Full Court did {FC [36]-[37]: CAB 73}, what effect, if any, the further evidence would have had on the outcome at trial. In the Court below, the appellant (fairly) "conceded that even if the primary judge had made an error in relation to how the parties were 'living together', no contribution finding would

flow from that evidence" {FC [36]: CAB 73}. That is not a surprising concession in circumstances where, as the trial judge found, "the contributions [are] easily identifiable" {Adjournment Judgement [87]: RBFM 37-38}. It had been a short relationship, and the respective financial and non-financial contributions of each of the appellant and the respondent, carefully analysed by the trial judge {J [60]-[68]: CAB 17-18}, were such that, even if a different finding had been made as to when the relationship commenced, the resolution of the case would have been no different. Indeed, the trial judge explained of the finding as to the duration of the relationship, that it "is irrelevant save that it sets the parameters of the focus of the court on what each did" {J [62]: CAB 17]. And so, as the Full Court explained, "[t]he admission of this evidence would not demonstrate that [the trial judge] erred in making the paragraphs of the order under appeal" {FC [37]: CAB 73}. The submissions of the appellant at paras 64 and 67-69 of the ASA are contrary to the concessions made by her before the Full Court. They are also mere speculation, in circumstances where the appellant's inability to cross-examine the respondent on such issues is entirely of her own making, particularly where she deliberately withheld the material upon which she now relies, and she did not participate in the trial. To say that the Full Court denied, or failed to identify, the possibility of a different result arising from the further evidence {ASA, 63-64} is also contrary to the concessions made by the appellant before the Full Court. And, in any case, it would be unprincipled for this Court to do as the appellant asks and opine on such matters absent the respondent being tested on these issues and afforded the opportunity to answer to the criticisms here made of him by the appellant.

64 To the extent that the further evidence may have been "useful" (as submitted by the appellant to the Full Court), that is, of course, insufficient to engage the discretion to adduce the further evidence, where (as here) the appellant could not – and cannot – demonstrate that the evidence would achieve a different outcome upon a re-trial {FC [37], citing *CDJ* at 203 [113]: CAB 73}.

65 The inutility of having had the further evidence before the trial judge points very strongly against the adduction of any further evidence.

66 Further, in circumstances where the appellant had every opportunity to present her case before the trial judge and to adduce all except one document at first instance, considerations of finality in litigation are significant: *CDJ* at 200 [104]; see also, 203 [114]. Not only was the decision of the Full Court to reject the application to adduce

evidence a proper one, in that it was not attended by error and was reasonably open, but to have decided otherwise would have been to condone the conduct of the appellant in not putting material she considered relevant before the court at trial. Permitting the appellant to adduce further evidence on appeal in those circumstances would have been antithetical to the court's mandate to quell, finally and conclusively, controversies between litigants. In this respect, it is a decision consistent with the case management and other principles articulated by this Court in *Aon Risk Services Australia Limited v Australian National University* (2009) 239 CLR 175 {J [19]: CAB 11; Adjournment Judgement [42]-[44]: RBFM 29}. Accordingly, this Court should, in those circumstances, be very slow to interfere with such decision.

67 And, finally, it was plain, in the circumstances of this case, that the conduct of the appellant was such that it did not warrant the exercise of the Court's discretion in her favour under sec 93A(2) of the Act. The trial judge (rightly) pointed to the various opportunities available to the appellant to seek further discovery and pursue her case before trial {Adjournment Judgement [48], [77], [84]: RBFM, 30, 36, 37; see also, [55]-[65]: RBFM 32-34}. In those circumstances, whatever (untested) allegations are said by the appellant to find support in the further evidence, it is not in the interests of justice in this case for that material to be adduced: cf. *Clone Pty Ltd v Players Pty Ltd (In Liq)* (2018) 264 CLR 165 at 190-191 [50] per Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ; see also, *Commonwealth Bank of Australia v Quade* (1991) 178 CLR 134 at 142-143 per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

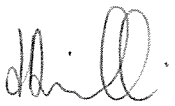
68 And so grounds 2(f)-(g) fail to identify any error of the type necessary to justify the intervention of this Court.

69 The appeal ought be dismissed.

Part VI: Time estimate

70 The respondent would seek no more than one and a half hours for the presentation of the respondent's oral argument.

9 January 2020



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IN THE HIGH COURT OF AUSTRALIA
MELBOURNE REGISTRY No M137 of 2019

BETWEEN **HSIAO**

Appellant

and **FAZARRI**

Respondent

ANNEXURE - RELEVANT LEGISLATIVE PROVISIONS

Family Law Act 1975 (Cth), secs 71A, 75(2), 79, 93A(2)

No. 53 of 1975

Compilation No. 89

Note Sch 6 (items 42-47, 47A, 47B, 47C, 48-52, 52A 53-55) of the *Civil Law and Justice Legislation Amendment Act 2018* and *Family Law Amendment (Family Violence Cross-examination of Parties Act) 2018* do not apply. None of these provisions touch on the provisions of the principal Act which are relevant to this case.

Registered 8 May 2019

Filed on behalf of the Respondent
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