HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY AND HAYNE JJ

ERNEST FRANZ ALLESCH APPELLANT

AND

BRIGITTE MAUNZ RESPONDENT

Allesch v Maunz [2000] HCA 40
3 August 2000
C15/1999

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the Full Court of the Family Court dated 26 November 1998.*

3. *Remit the matter to the Full Court of the Family Court for further hearing and determination in accordance with the reasons of this Court.*

4. *Each party to bear his or her own costs of the proceedings in this Court.*

On appeal from the Family Court of Australia

Representation:

Appellant appeared in person

M D Broun QC for the respondent (instructed by Ken Cush & Associates)

CATCHWORDS

Allesch v Maunz

Family Law – Family Court of Australia – Appeals – Nature of an appeal to the Full Court of the Family Court – Discretion to set aside an order made in the absence of a party – Miscarriage of justice where a party suffers effect of an adverse order and that party's absence adequately explained.

Family Law – Family Court of Australia – Appeals – Appeals by way of rehearing from discretionary judgments – Appellate court seeking to re-exercise discretion by reference to circumstances as they presently exist – Parties must be given an opportunity to adduce evidence as to circumstances as they presently exist in such cases.

Practice and Procedure – Appeal – Discretion to set aside order made in absence of a party.

Words and Phrases – "miscarriage of justice".

Family Law Act 1975 (Cth) s 79A, s 93A(2), s 94

1 GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. This is an appeal from a decision of the Full Court of the Family Court of Australia (Lindenmayer, Kay and Brown JJ) dismissing an appeal from a decision of Finn J. Her Honour had dismissed an application to set aside orders for property settlement in proceedings between the appellant ("the husband") and his former wife ("the wife"), the respondent to this appeal.

History of proceedings

2 So far as concerns this appeal, the history of the proceedings begins on 18 May 1995 when an officer from the Registry of the Family Court delivered a letter to the husband's home informing him that, if he did not appear or arrange to be represented at a directions hearing the next day, 19 May, the wife's application for final property settlement orders could well be listed as an undefended matter. The husband, who did not then have legal representation, did not appear. In consequence, on 19 May, Finn J ordered that the wife's application be listed for an undefended hearing on 14 June 1995. Her Honour also ordered that a copy of the orders then made be served on the husband.

3 The orders made on 19 May were served on the husband on 22 May. When the matter came on for hearing on 14 June 1995, an affidavit of service disclosed that the husband had informed the person who served the orders that he was "very sick" and, also, had ordered that person out of his house. Inquiries revealed that the husband had not made any contact with the Registry of the Family Court since 22 May and the hearing proceeded on the basis that Finn J would "allow a short period of time to elapse after service of the orders on the husband in which he could apply to have the orders set aside".

4 At the conclusion of the hearing on 14 June 1995, Finn J reserved her decision. Her Honour's decision was handed down on 10 July 1995. In consequence of that decision, there was to be a division of the property of the husband and wife, which property was found to have a nett value of $735,000, with 55% being awarded to the wife and 45% to the husband. Orders were made giving effect to that decision on 10 August 1995 ("the property settlement orders"). The orders were expressed to take effect seven days after service of them together with a copy of the reasons for judgment delivered on 10 July 1995 upon the husband.

5 The property settlement orders required the husband to transfer his interest in two properties to his wife, to pay her the sum of $87,513 and, also, to pay the costs of various proceedings, including the proceedings of 14 June 1995 ("the primary orders"). On payment of all moneys due to the wife under the primary orders, she was to transfer to the husband her interest in EBMA Investments Pty

Limited. Orders were also made as to the means to be employed by the husband to give effect to the primary orders and the steps to be taken if he failed to comply ("the secondary orders").

6 The property settlement orders made on 10 August were served on the husband on 17 August 1995 and on 24 August, he applied for them to be set aside. In his affidavit in support of that application, the husband swore that he had been in hospital in Canberra with a myocardial infarct for approximately two weeks from 1 May 1995 and had no recollection of receiving the notice served on 22 May notifying him of the hearing on 14 June. He also swore that he was admitted to hospital in Sydney on 3 June 1995 and had had a triple valve bypass on 5 June. He was discharged from hospital prior to 10 July, but according to his affidavit, was still recuperating on 14 June. The husband also made various claims in his affidavit as to the value and extent of the property owned by him and his former wife and as to his reduced earning capacity.

7 The husband's application to set aside the property settlement orders was heard by Finn J on 6 September 1995 and judgment was delivered on 18 September. Her Honour varied the property settlement orders so that they took effect from 18 September but otherwise dismissed the application.

8 On 4 October 1995, a notice of appeal was filed in respect of the decision of Finn J refusing to set aside the property settlement orders. The appeal was listed for hearing on 28 May 1996. There was no appearance by or on behalf of the husband on that day and the appeal was taken to have been abandoned. On 20 May 1998, the appeal was reinstated. It came on for hearing on 24 September 1998 and was dismissed on 26 November 1998.

9 Between September 1995, when Finn J dismissed the husband's application to set aside the property settlement orders, and November 1998, when the Full Court dismissed the appeal from her decision in that regard, there were other proceedings between the husband and wife. As a result of those proceedings, the wife obtained possession of the matrimonial home, one of the two properties which, pursuant to the primary orders, were to be transferred to her. It is not clear whether there were proceedings with respect to the other property but it seems that both properties have since been sold.

10 The husband did not pay the wife the sum of $87,513 as required by the primary orders and it seems that he did not take the steps required by the secondary orders to make that payment. In consequence, Finn J ordered, by consent, that a property at Fyshwick, owned by EBMA Investments Pty Limited, be sold. On 18 March 1998, Finn J ordered that the proceeds of that sale be

preserved in an interest bearing account pending the husband's application to have his appeal reinstated. Apparently, the proceeds have not yet been disbursed.

The decisions of Finn J and of the Full Court

11 In her decision refusing to set aside the property settlement orders made on 10 August 1995, Finn J accepted the evidence of the husband as to his illness. Her Honour also accepted the submission that:

> "if all, or perhaps even some, of the evidence which the husband ... wishe[d] to put before the Court regarding his financial affairs, was accepted by the Court in a re-hearing of the wife's property settlement application, then the result of that application may well be substantially different than that embodied in the [property settlement] orders of 10 August 1995."

In that context, her Honour indicated that, but for two other matters, she may well have taken the view that "the interests of justice required the matter to be re-opened". The other two matters were "the wife's state of health, and the protracted nature ... of the property settlement proceedings".

12 Finn J noted that the matter, which was commenced in August 1993, had been listed for final hearing in September 1994 but could not proceed until June 1995 because of action taken by the husband and, also, because of his failure to appear on two separate occasions. Her Honour also noted that there was evidence from the wife's treating doctor that the "protracted proceedings ... '[were] having a detrimental effect on her mental health'" and indicated that she accepted and gave "great weight" to that evidence.

13 Although Finn J indicated the countervailing matters to be taken into account were the wife's health and the protracted nature of the proceedings, she also expressed the view that an important consideration was the husband's explanation for his non-appearance. In that regard, her Honour repeated an earlier conclusion that, although she accepted that "the husband was seriously ill", she was not "satisfied that he did *not* have the capacity to take the necessary steps to obtain an adjournment of the proceedings on account of his ill-health at some time in the period 1 May 1995 to 14 June 1995".

14 Ultimately, Finn J expressed the view that the husband's application to set aside the property settlement orders presented:

> "a choice *between* permitting, on the grounds of the husband's ill-health in May/June 1995, a re-hearing ... in which the husband's foreshadowed

> evidence might be accepted, thus resulting in a significantly different property settlement, *and* a decision that this protracted litigation should now be held to have been finalized in the interests of the wife's mental health and ... also of the general public interest in the finalization of litigation."

Against the background of her lack of satisfaction that "it was not possible for the husband to take the relatively small step of applying in the proper way for an adjournment of his case", her Honour concluded that the interests of justice were best served by dismissing his application.

15 In the Full Court, Kay and Brown JJ pointed out in their joint judgment that, although the power to set aside orders made in circumstances in which a party has not been heard is discretionary, "once a reasonable excuse has been proffered for non-attendance and it is clear that there may well be a significantly different result achieved if the matter is reheard, then the discretion is a severely narrowed discretion." In their Honours' view, Finn J fell into error in treating the proceedings as unusually protracted, in making reference to the ease with which the husband could have sought an adjournment and in giving undue emphasis to the wife's mental health when the evidence was not specific in that regard.

16 The majority in the Full Court approached the disposition of the appeal to that court on the basis that it was for it to exercise, afresh, the discretion to set aside the property settlement orders made by Finn J on 10 August 1995. In this regard, their Honours identified a number of matters which they said "militate[d] *against* the exercise of the discretion in favour of setting aside her Honour's orders of 10 August, 1995, at [that] time." Essentially, those matters were the husband's unexplained delay in the prosecution of his appeal, the fact that the property settlement orders had been substantially executed and that costs orders had been made in favour of the wife. Their Honours were of the view that the costs orders were orders which "should not [then] be set aside, and which the wife [was] entitled to have satisfied."

17 So far as concerns the execution of the property settlement orders, their Honours noted:

> " It is not possible for us to make orders which reinstate the parties back to the position they were in prior to 10 August 1995. Thus simply setting aside the orders will leave behind a trail of confusion. The best that could be achieved would be to remit for hearing before a single judge the question of the extent to which it is just and equitable and appropriate to make an

> order under s 79 [of the *Family Law Act* 1975 (Cth)[1]] dividing the property of the parties as exists as at the date of that retrial by a fresh application of the criteria set out in s 79(4) of the Act. There is no certainty that such a course would lead to a different result than that arrived at by Finn J. It may be that a fresh application of such principles would result in orders which have the identical effect to the orders which have now been carried into force or it may be that the existing property of the parties would be divided in some other manner. We would only be speculating in predicting which result was more likely."

18 The third member of the Full Court, Lindenmayer J, was of the view that the appeal should be dismissed because it had not been demonstrated that Finn J erred in exercising her discretion to refuse the husband's application to set aside the property settlement orders but indicated that, had he concluded otherwise, he would dismiss the appeal for the reasons given by Kay and Brown JJ.

The issue in the appeal

19 As no Notice of Contention was filed, the only issue in this appeal is whether the Full Court was correct to dismiss the husband's appeal to that Court on the basis of the unexplained delay in its prosecution, the costs orders which had been made in favour of the wife, and the fact that the parties could not be put back in the position they were in prior to 10 August 1995. The answer to that question necessitates a consideration of the nature of the appeal to the Full Court and, also, the nature of the discretion which it purported to exercise.

The nature of the appeal to the Full Court

20 The nature of the appeal to the Full Court is to be discerned from s 93A(2) of the *Family Law Act* 1975 (Cth) ("the Act"), which was considered by this Court in *CDJ v VAJ*[2] and in *DJL v Central Authority*[3] and, also, from s 94 of the Act. Section 93A(2) provides that, subject to s 96, which is concerned with appeals from courts of summary jurisdiction:

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1 Section 79(1) of the *Family Law Act* 1975 (Cth) empowers the Family Court to "make such order as it considers appropriate altering the interests of the parties in [their] property".

2 (1998) 197 CLR 172.

3 (2000) 74 ALJR 706; 170 ALR 659.

> "... in an appeal the Family Court shall have regard to the evidence given in the proceedings out of which the appeal arose and has power to draw inferences of fact and, in its discretion, to receive further evidence upon questions of fact, which evidence may be given by affidavit, by oral examination before the Family Court or a Judge or in such other manner as the Family Court may direct."

21 Section 94(1)(a)(i) provides that, subject to s 94AA, which is not presently relevant, an appeal lies to a Full Court of the Family Court from "a decree[4] of the Family Court, constituted otherwise than as a Full Court, exercising original or appellate jurisdiction ... under [the] Act". And s 94(2) provides:

> " Upon such an appeal, the Full Court may affirm, reverse or vary the decree or decision the subject of the appeal and may make such decree or decision as, in the opinion of the court, ought to have been made in the first instance, or may, if it considers appropriate, order a re-hearing, on such terms and conditions, if any, as it considers appropriate."

22 The majority in *CDJ v VAJ* proceeded on the basis that an appeal under s 94(1) of the Act is an appeal by way of rehearing[5]. That is undoubtedly correct. So much is to be discerned from the terms of s 93A(2), in particular its conferral of power to receive further evidence[6]. That is not a power possessed by appellate courts whose jurisdiction is confined to appeals in the strict sense and whose function it is simply to determine whether the decision under appeal was or was not erroneous on the evidence and the law as it stood when the original decision

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4 By s 4(1) of the Act, "decree" is defined to mean "decree, judgment or order, and [to include] a decree *nisi* and an order dismissing an application or refusing to make a decree or order."

5 (1998) 197 CLR 172 at 201-202 [111] per McHugh, Gummow and Callinan JJ.

6 See *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267 at 272, 274 per Deane, Gaudron and McHugh JJ; *CDJ v VAJ* (1998) 197 CLR 172 at 185 [52] per Gaudron J, 200-201 [107] per McHugh, Gummow and Callinan JJ.

was given[7]. And an appeal under s 94(1) is, as s 93A(2) indicates, to be distinguished from an appeal under s 96 which is a hearing de novo[8].

23 For present purposes, the critical difference between an appeal by way of rehearing and a hearing de novo is that, in the former case, the powers of the appellate court are exercisable only where the appellant can demonstrate that, having regard to all the evidence now before the appellate court, the order that is the subject of the appeal is the result of some legal, factual or discretionary error[9], whereas, in the latter case, those powers may be exercised regardless of error. At least that is so unless, in the case of an appeal by way of rehearing, there is some statutory provision which indicates that the powers may be exercised whether or not there was error at first instance[10]. And the critical distinction, for present purposes, between an appeal by way of rehearing and an appeal in the strict sense is that, unless the matter is remitted for rehearing, a court hearing an appeal in the strict sense can only give the decision which should have been given at first instance whereas, on an appeal by way of rehearing, an appellate court can substitute its own decision based on the facts and the law as they then stand[11].

24 In the present case, the Full Court found error on the part of Finn J in the exercise of her discretion to set aside the property settlement orders – a finding which is not challenged – and proceeded to exercise, for itself, the discretion

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7 See *Mickelberg v The Queen* (1989) 167 CLR 259; *Eastman v The Queen* (2000) 74 ALJR 915; 172 ALR 39.

8 Section 96(4) of the Act expressly provides that an appeal from a court of summary jurisdiction is to be a hearing de novo, as does s 96(6) in the case of appeals referred to the Full Court under s 96(5).

9 See *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111] per McHugh, Gummow and Callinan JJ.

10 See *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267.

11 See *Werribee Council v Kerr* (1928) 42 CLR 1 at 20-21 per Isaacs J; *Victorian Stevedoring and General Contracting Co Pty Ltd and Meakes v Dignan* (1931) 46 CLR 73 at 107 per Dixon J; *Mickelberg v The Queen* (1989) 167 CLR 259 at 278 per Deane J, 298 per Toohey and Gaudron JJ; *Re Coldham; Ex parte Brideson [No 2]* (1990) 170 CLR 267; *Quilter v Mapleson* (1882) 9 QBD 672 at 676 per Jessel MR; *Ponnamma v Arumogam* [1905] AC 383 at 390 per Lord Davey, delivering the judgment of the Privy Council.

originally reposed in her Honour. As it was entitled to do, the Full Court proceeded to exercise that discretion as at the time it disposed of the appeal. If there was error on the part of the Full Court, it was in the manner in which it then exercised that discretion. Before turning to that question, however, it is convenient to say something of the nature of the discretion to set aside an earlier order made in the absence of a party to the proceedings.

The discretion to set aside an order made in the absence of a party

25 There was discussion in the majority judgment of the Full Court as to whether the discretion to set aside the property settlement orders arose under the property settlement orders, themselves, pursuant to s 79A of the Act, or pursuant to the inherent power of the Family Court identified by this Court in *Taylor v Taylor*[12]. Section 79A has been amended since the decision in *Taylor* and, by sub-s (1)(a), the Family Court may now, in its discretion, set aside a property settlement order, if satisfied that "there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance"[13]. There can be no doubt that the expression "any other circumstance" is wide enough to encompass the situation in which an order has been made in the absence of a party. Accordingly, s 79A must now be construed as applicable to that situation.

26 Given that s 79A(1)(a) now confers power on the Family Court to set aside an order made in the absence of a party, it may be doubted whether there is any longer any scope for the exercise of inherent power in that regard. And even if the husband's application to set aside the property settlement orders was made pursuant to those orders rather than pursuant to s 79A of the Act, the orders could not be set aside on any basis other than that directed by that section, namely, that the Court was satisfied that there had been a miscarriage of justice. However, nothing turns on the nature of the application or the source of the discretion which Finn J was called to exercise and which the Full Court exercised in dismissing the appeal from her Honour's judgment. That is because there is nothing in s 79A of the Act to suggest that the discretion thereby conferred is to

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12 (1979) 143 CLR 1. See further, as to the inherent powers of the Family Court, *DJL v Central Authority* (2000) 74 ALJR 706; 170 ALR 659.

13 Section 79A was inserted into the *Family Law Act* 1975 (Cth) by Act No 63 of 1976, s 26 and was further amended by Act No 23 of 1979, s 13. The present sub-s (1)(a) was introduced into the legislation by virtue of subsequent amendment, namely, Act No 72 of 1983, s 37.

be exercised on any different basis from that applicable in the case of an inherent discretion.

27 In *Taylor*, Gibbs J, with whom Stephen J agreed, and Mason J, with whom Aickin J agreed, each viewed the discretion to set aside an order made in the absence of a party as a corollary to the requirement that, before a person can be adversely affected by a judicial order, he or she must be afforded an adequate opportunity of being heard[14]. In that case the party's failure to appear was due to no fault of his own and Mason J expressed the view that the discretion to set aside the order made in his absence should have been approached "on the footing that it was prima facie the right of each party to have the proceedings heard in his or her presence and that justice to both parties required that each party should be entitled to present his or her case."[15] Murphy J saw the discretion to reopen as an aspect of federal judicial power which was to be exercised "only with caution."[16] The factors to be considered, in his Honour's view, were "the presence or absence of some real explanation for failure to use the opportunity to be heard, delay, acquiescence, [and] prejudice to the other party."[17] However, nothing presently turns on whether the inherent power to set aside an order made in the absence of a party is a corollary to the right of a party to be heard or is an aspect of federal judicial power.

28 The consideration which informs the power conferred by s 79A of the Act is that the court be satisfied that there was "a miscarriage of justice". And whether exercising inherent power or a power of the kind conferred by s 79A of the Act, a court will, ordinarily, be satisfied that there has been a miscarriage of justice if a person has suffered an adverse order in circumstances where his or her failure to appear is adequately explained unless it also appears that no different result would be reached on a rehearing or that a rehearing would work an irremediable injustice to the other side. In this last regard, it should be noted that injustice will often be capable of remedy by the imposition of terms as to costs[18].

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14 (1979) 143 CLR 1 at 4 per Gibbs J referring to *Cameron v Cole* (1944) 68 CLR 571 at 589 per Rich J; *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395 per Dixon CJ and Webb J; *Grimshaw v Dunbar* [1953] 1 QB 408 at 416 per Jenkins LJ; at 15-16 per Mason J.

15 (1979) 143 CLR 1 at 15-16.

16 (1979) 143 CLR 1 at 21.

17 (1979) 143 CLR 1 at 21.

18 See *Grimshaw v Dunbar* [1953] 1 QB 408 at 416 per Jenkins LJ.

However, where, as here, orders have been carried into effect, injustice may not be capable of remedy except on terms that those orders stand and that the matter be reopened only to a limited extent.

The Full Court's exercise of the discretion to set aside the property settlement orders

29 As earlier mentioned, the Full Court, itself, proceeded to exercise the discretion to set aside the property settlement orders made by Finn J and to do so by reference to circumstances as they appeared at the time of the disposition of the appeal, rather than by reference to the facts found by Finn J. In this regard, it is sufficient to note that Finn J found that, if the husband's evidence were accepted there might be a substantially different outcome, whereas the Full Court proceeded on the basis that, given the intervening events, there was no certainty that a fresh application of the principles governing property settlement to the property then owned by the husband and wife "would lead to a different result than that arrived at by Finn J."

30 Although, on an appeal by way of rehearing from a discretionary judgment, an appellate court may, itself, exercise the discretion in question by reference to circumstances as they then exist, it is not bound to do so. It may, instead, set aside the order under appeal and remit the matter for rehearing or, in terms of s 94(2) of the Act "order a re-hearing, on such terms and conditions, if any, as it considers appropriate." And where circumstances have or are likely to have changed between the original hearing and the disposition of the appeal, it is not uncommon for an appellate court to remit the matter for rehearing rather than, itself, exercise the discretion in question.

31 If on an appeal by way of rehearing from a discretionary judgment an appellate court is minded to exercise the discretion in question by reference to circumstances as they exist at the time of the appeal, it is necessary that the parties be given an opportunity to adduce evidence as to those circumstances. It is not entirely clear that that happened in the present case, particularly as the Full Court indicated that it could only speculate as to the likely outcome of a fresh application of the principles governing property settlement to the property then owned by the parties.

32 Whether or not the parties were afforded an opportunity to lead evidence as to the circumstances as existing at the time of the Full Court's decision in this matter, the Full Court erred in its exercise of the discretion to set aside the property settlement orders. The matters taken into consideration by the Full Court were relevant to the question whether a rehearing would occasion the wife some injustice that could not be remedied by the imposition of terms, but that

question was not answered. Nor did the Full Court determine whether a rehearing might result in some different outcome. These were issues which should have been determined if the Full Court was, itself, to exercise the discretion to set aside the property settlement orders by reference to circumstances as they then existed. They are not questions which this Court can now determine[19]. Accordingly, the matter must be remitted to the Full Court.

Orders

33 The appeal should be allowed, the orders of the Full Court set aside and the matter remitted to that Court for further hearing and determination in accordance with these reasons. Each party should bear its own costs of the proceedings in this Court.

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19 cf *CDJ v VAJ* (1998) 197 CLR 172 at 223 [168] per McHugh, Gummow and Callinan JJ.

34 KIRBY J. This appeal concerns the approach proper to the appellate disposition of a matter when it is decided that a primary decision has miscarried because a party was excusably absent from court when an order complained about was made.

The principle to afford a hearing

35 It is a principle of justice that a decision-maker, at least one exercising public power, must ordinarily afford a person whose interests may be adversely affected by a decision an opportunity to present material information and submissions relevant to such a decision before it is made. The principle lies deep in the common law. It has long been expressed as one of the maxims which the common law observes as "an indispensable requirement of justice"[20]. It is a rule of natural justice or "procedural fairness"[21]. It will usually be imputed into statutes creating courts and adjudicative tribunals[22]. Indeed, it long preceded the common and statute law. Even the Almighty reportedly afforded Adam such an opportunity before his banishment from Eden[23].

36 The rule is also implicit in international principles of human rights[24]. It is inherent in the proper conduct of judicial proceedings in a court of law[25]. It may even be an implied attribute of the Judicature established under, and envisaged

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20 *Re Brook and Delcomyn* (1864) 16 CB (NS) 403 at 416 per Erle CJ [143 ER 1184 at 1190]. The maxim is *audi alteram partem, audiatur et altera pars*. See Broom, *A Selection of Legal Maxims*, 10th ed (1939) at 65; cf *Cameron v Cole* (1944) 68 CLR 571 at 589; *The Commissioner of Police v Tanos* (1958) 98 CLR 383 at 395-396.

21 *Kioa v West* (1985) 159 CLR 550 at 583.

22 *R v The Chancellor, Masters and Scholars of the University of Cambridge* ("*Dr Bentley's Case*") (1723) 1 Str 557 [93 ER 698]; *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 [143 ER 414]; *Hopkins v Smethwick Local Board of Health* (1890) 24 QBD 712.

23 This point was made by Byles J in *Cooper v Wandsworth Board of Works* (1863) 14 CB (NS) 180 at 195 [143 ER 414 at 420] with reference to Genesis III:11.

24 *International Covenant on Civil and Political Rights*, Art 14.1.

25 *Taylor v Taylor* (1979) 143 CLR 1 at 4, 16; *Re JRL; Ex parte CJL* (1986) 161 CLR 342 at 350 per Mason J; *Dick v Piller* [1943] KB 497 at 499; *Grimshaw v Dunbar* [1953] 1 QB 408 at 412.

by, the Constitution[26]. So deeply ingrained is the principle that more recent times have seen its extension, with certain exceptions[27], to administrative tribunals[28] and other decision-makers[29]. The principle governed the Family Court of Australia in determining the rights of the present parties.

37 The foregoing provides the context of principle and of law within which the problem presented by this appeal must be resolved. That context is not contested. It occupied no time either in the Family Court of Australia or in this Court. It is a given. But it affords the starting point for legal analysis.

The acceptance of the error of the primary judge

38 The facts and issues are set out in the reasons of Gaudron, McHugh, Gummow and Hayne JJ ("the joint reasons")[30]. Having regard to the circumstances in which the initial proceedings took place in the absence of Mr Allesch (the appellant), it is worth emphasising that the principle just described does not require that the decision-maker actually hear (or receive the submissions of) the party potentially liable to be adversely affected. Sometimes, through stubbornness, confusion, misunderstanding, fear or other emotions, a party may not take advantage of the opportunity to be heard, although such opportunity is provided[31]. Affording the opportunity is all that the law and principle require.

39 Decision-makers, including the courts, cannot generally force people to protect their own rights, to adduce evidence or other materials, to present submissions or to act rationally in their own best interests. This consideration

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26 *Taylor v Taylor* (1979) 143 CLR 1 at 20 per Murphy J; cf *Leeth v The Commonwealth* (1992) 174 CLR 455 at 487, 502-503.

27 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1; *Ridge v Baldwin* [1964] AC 40.

28 *Dickason v Edwards* (1910) 10 CLR 243; *Ridge v Baldwin* [1964] AC 40 at 79.

29 *O'Rourke v Miller* (1985) 156 CLR 342 at 352; *Kioa v West* (1985) 159 CLR 550 at 583; cf *Testro Bros Pty Ltd v Tait* (1963) 109 CLR 353 at 369; *Twist v Randwick Municipal Council* (1976) 136 CLR 106 at 109; *Salemi v MacKellar [No 2]* (1977) 137 CLR 396; *R v MacKellar; Ex parte Ratu* (1977) 137 CLR 461; *Johns v Australian Securities Commission* (1993) 178 CLR 408.

30 Joint reasons at [2]-[19].

31 *Vestry of St James and St John, Clerkenwell v Feary* (1890) 24 QBD 703 at 709 per Lord Coleridge CJ; *Sydney Corporation v Harris* (1912) 14 CLR 1 at 15.

may be especially relevant in relation to the Family Court where emotions, often engendered by the highly personal issues involved, can sometimes cloud rational thought.

40 Nor are courts obliged to delay proceedings indefinitely because one party, although proved to be on notice of the proceedings, refuses or fails to appear in person or to be represented by a lawyer or some other individual permitted to speak for them who can explain the need for an adjournment. The rights of other parties are commonly involved. In the Family Court, the rights of non-parties (especially children) may be affected. Additionally (as this Court has itself accepted[32]), the rights of the public in the efficient discharge by courts of their functions must be weighed against unreasonable delay in concluding litigation.

41 Nevertheless, mistakes occur[33]. In legal proceedings, they sometimes occur because of defaults on the part of lawyers which, in a particular case, ought not to be visited on an innocent client[34]. In the present litigation, it is worth noting that at the original hearings on 19 May 1995 and 14 June 1995 before the primary judge, Finn J, which the appellant did not attend, he could have been represented by a lawyer or some other person authorised to speak for him. Such a person could have sought an adjournment and explained the appellant's circumstances. At least on 14 June 1995, that person could have placed before the primary judge evidence of the appellant's recent cardiac surgery.

42 In considering the application to set aside the property settlement orders of 10 August 1995, it was the foregoing consideration of what it was reasonable to have expected of the appellant in the circumstances that caused Finn J to conclude that the appellant ought reasonably to have taken "the relatively small step of applying in the proper way for an adjournment of his case"[35]. The dissenting judge, Lindenmayer J, in the Full Court of the Family Court ("the Full Court") considered that such a view was clearly open to the primary judge. Lindenmayer J held that no error had occurred in the exercise of the primary

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32 *Sali v SPC Ltd* (1993) 67 ALJR 841 at 849; 116 ALR 625 at 636; *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 153, 168; cf *Doherty v Liverpool District Hospital* (1991) 22 NSWLR 284 at 296.

33 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 154, 172; *Jackamarra v Krakouer* (1998) 195 CLR 516 at 541 [66].

34 *Jackamarra v Krakouer* (1998) 195 CLR 516 at 542 [66].

35 *Allesch v Maunz* unreported, Family Court of Australia, 18 September 1995 at 19 per Finn J.

judge's discretion based on that view[36]. However, the majority in the Full Court, Kay and Brown JJ ("the majority"), held otherwise. They concluded that in refusing the application to set aside the orders made in the absence of the appellant, the primary judge had fallen into error[37]. In this Court, the conclusion of the majority was not challenged. No notice of contention was filed to support the minority view of Lindenmayer J.

43 No attempt having been made to justify the outcome of the proceedings before the Full Court (and hence its orders) upon a basis different from that expressed in the reasons of the majority, this Court, in this appeal, is obliged to consider whether the reasons of the majority sustain the orders of the Full Court. In doing so, this Court must consider whether, after having reached a conclusion that the primary decision was flawed, the majority's reasons indicate an erroneous approach to the performance by the Full Court of its functions.

The statutory provisions governing the appellate court

44 The appeal from the primary judge to the Full Court was by way of rehearing[38]. But in a legal proceeding loosely described as an "appeal"[39], such a "rehearing" does not involve a complete reconsideration *de novo* of all of the matters determined by the primary judge. Error must be shown. It is then for the appellate court, within its own statutory powers, to decide whether to set aside the orders which it finds to have been made in error and, if so, whether to remit the matter for redetermination at first instance or, on the materials ultimately before it, to re-exercise the discretion for itself.

45 The considerations which govern a re-exercise of a discretion by an appellate court are those established by law. The Family Court does not have inherent powers. It has powers expressly conferred upon it by legislation and

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36 *Allesch v Maunz* unreported, Full Court of the Family Court of Australia, 26 November 1998 at 2.

37 *Allesch v Maunz* unreported, Full Court of the Family Court of Australia, 26 November 1998 at 12.

38 *Family Law Act* 1975 (Cth), ss 93A, 94; cf *CDJ v VAJ* (1998) 197 CLR 172 at 201-202 [111]; *DJL v Central Authority* (2000) 74 ALJR 706 at 715-716 [39]-[42]; 170 ALR 659 at 671-672.

39 *Turnbull v New South Wales Medical Board* [1976] 2 NSWLR 281 at 297-298 per Glass JA; cf *Builders Licensing Board v Sperway Constructions (Syd) Pty Ltd* (1976) 135 CLR 616 at 621-622; *Clarke & Walker Pty Ltd v Secretary Department of Industrial Relations* (1985) 3 NSWLR 685 at 690-692; *Eastman v The Queen* (2000) 74 ALJR 915 at 959-962 [248]-[259]; 172 ALR 39 at 98-102.

powers that may be implied from the terms of such legislation. The latter include the implications that derive from the nature of the Family Court as a "court"[40]. However where, as here, the Parliament has expressly provided in extremely broad but specific language for the setting aside of an order made in the absence of a party, there would appear to be no room for, nor need of, additional implied powers. The express powers are large enough. For the provision of relief, those powers require, in their terms, a demonstration that the error identified has occasioned a "miscarriage of justice".

46 Section 79A(1) of the *Family Law Act* 1975 (Cth) ("the Act") provides, relevantly:

> "Where, on application by a person affected by an order made by a court under section 79 in proceedings with respect to the property of the parties to a marriage or either of them, the court is satisfied that:
>
> (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance;
>
> …
>
> the court may, in its discretion, vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside."

The dual considerations for reopening: explanation and utility

47 It has been suggested that there is a particular rule that governs the setting aside of a judicial order made in the absence of a party (or perhaps a witness) where that absence is adequately explained and promptly brought to the notice of the court concerned[41]. In such a case it is said justice ordinarily "demands" a rehearing.

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40 *DJL v Central Authority* (2000) 74 ALJR 706 at 712 [25], 728 [105]; 170 ALR 659 at 667, 689. It should be noted that the majority referred to the supposed "inherent power" of the Family Court to set aside orders: see *Allesch v Maunz* unreported, Full Court of the Family Court of Australia, 26 November 1998 at 9. The expression "inherent jurisdiction" was used in *Taylor v Taylor* (1979) 143 CLR 1 at 5-8 per Gibbs J, 10 per Stephen J, 16 per Mason J.

41 eg *Grimshaw v Dunbar* [1953] 1 QB 408 at 414-415. Special rules are also propounded where a judgment or order is made by consent or where it is tainted by

(Footnote continues on next page)

48 I am not inclined to approach the matter as if a special rule of law, universally applicable, solves the problem presented by every such case. First, the ultimate duty of a court, where a legislative provision exists which governs the circumstances of reopening, is to conform to that provision. The court must endeavour to fulfil the expressed requirements and the implications derived as to the purposes for which the power has been provided[42]. Secondly, the considerations that inform a decision permitting, as here, repair of a "miscarriage of justice" are so many and varied that it is impossible to narrow them down to the "demands" of a single consideration unless it be that connoted by the very phrase used in the statute itself. Thirdly, it is desirable, as it seems to me, to treat the considerations applicable to such decisions conceptually and to classify them as impinging upon the two criteria that have for a very long time been viewed as critical to an affirmative decision to set aside a judicial order made in default of the appearance of a party. These are:

(1) that an explanation, reasonable to the circumstances, is provided for the party's absence or other default; and

(2) that the party in default has a material argument which, if heard and decided on its merits, might reasonably affect the determination of the rights and duties of the parties in a way different from that in the impugned order[43].

49 If no reasonable explanation is given for the default, it is not an injustice to deny the party in default a second opportunity to be heard. That opportunity is taken to have been waived or forfeited. Nowadays, the consideration of the reasonableness of an explanation will take into account the legitimate interests of any other party affected by the court's order (including any innocent third parties) as well as the general public. The interests at stake include a general respect for the finality of judicial orders[44] and for the efficient management of judicial

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fraud or illegality: *Coles v Burke* (1987) 10 NSWLR 429; *Paino v Hofbauer* (1988) 13 NSWLR 193; *Spies v Commonwealth Bank of Australia* (1991) 24 NSWLR 691.

42 cf *Jackamarra v Krakouer* (1998) 195 CLR 516.

43 *Vacuum Oil Pty Co Ltd v Stockdale* (1942) 42 SR (NSW) 239; *Rosing v Ben Shemesh* [1960] VR 173; *Surfers Paradise International Convention Centre Pty Ltd v National Mutual Life Association of Australasia Ltd* [1984] 2 Qd R 447; cf *Macquarie Bank Ltd v Beaconsfield* [1992] 2 VR 461.

44 *DJL v Central Authority* (2000) 74 ALJR 706 at 724-725 [90]; 170 ALR 659 at 684.

proceedings that is consistent with their fundamental objectives, including the attainment of justice[45].

50 Similarly, there will be no miscarriage of justice if the party affected by the impugned order cannot demonstrate an arguable case that reopening the matter might reasonably produce a materially different result which is more favourable to that party. If the process by which that order is made is flawed, but it is not shown that the outcome might reasonably be materially different, the party offended by the process may be upset by a sense of procedural injustice. However, upon analysis, that feeling will not find reflection in the ultimate disposition of the rights and duties of the parties with which the law is finally concerned. Correction concentrates on any supposed error in the ultimate judicial orders and not exclusively on the procedures leading to, or reasons given for, those orders.

Appellate consideration of the explanation for default was accurate

51 The majority, having concluded that the primary decision in question here was flawed by legal error, correctly turned to consider whether they should exercise the discretion for themselves. They properly addressed a question plainly relevant to the first criterion. They asked whether "a reasonable excuse has been proffered for [the appellant's] non-attendance"[46]. Accepting that it was, the majority concluded that it would[47]:

> "take very unusual circumstances indeed to suggest that an unrepresented party who has failed to attend at a hearing held within two weeks of that party undergoing major open heart surgery should be required to do any more than simply draw that fact to the attention of the Court to be able to obtain a rehearing of an action that occurred in his or her absence".

52 There was then a proper reference to the way in which "costs orders are available to compensate for any damage caused by the non-appearance"[48]. Similarly, there was an appropriate mention of the need for the appellant to have

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45 *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146 at 172.

46 *Allesch v Maunz* unreported, Full Court of the Family Court of Australia, 26 November 1998 at 11.

47 *Allesch v Maunz* unreported, Full Court of the Family Court of Australia, 26 November 1998 at 11.

48 *Allesch v Maunz* unreported, Full Court of the Family Court of Australia, 26 November 1998 at 12; cf *R T Co Pty Ltd v Minister of State for the Interior* (1957) 98 CLR 168 at 170.

acted promptly, once aware of the orders affecting his rights, to set those orders aside[49]. This was something which it may be inferred was decided in favour of the appellant, although a contrary view might have been taken on the evidence.

53 I do not regard it as irrelevant in this context for attention to have also been addressed to the consequences of reopening for the physical and mental condition of the respondent, Ms Maunz[50]. In judging whether the excuses offered by the appellant for non-attendance were reasonable in the circumstances it is, in my opinion, relevant and permissible to consider "the extent of the detriment" to the person who would lose the protection of the previous court order. Such detriments are not confined to formalities. They include (at least in a case of this kind) consideration of each party's health and mental state[51]. As it happens, the majority were not convinced that such detriment would have been irreversible in the case of the respondent. The appellant therefore sufficiently passed the first criterion.

Appellate consideration of the utility of reopening was flawed

54 The foregoing still left to be considered the second criterion of whether a materially different result might arguably follow from permitting a reopening. It is here, with respect, that I consider that the majority fell into error. Upon this issue it was certainly appropriate for the majority to have had regard, as they did, to the time that had elapsed after the orders had been made and the fact that, in the interim, those orders had been substantially executed[52]. The difficulty or impossibility of reinstating the parties to the respective positions they were in prior to the order that was made on 10 August 1995 was clearly a proper consideration to be given weight in this regard.

55 But then the reasoning of the majority stumbled. The options open to them were to remit the matter to a single judge for rehearing, or to re-exercise the discretion as to whether to set aside the orders of 10 August 1995 given the absence of the appellant, by then explained to the satisfaction of the majority. It is not clear from the reasons of the majority why they did not remit the matter to a single judge. They explicitly acknowledged that such a rehearing would

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49 *Allesch v Maunz* unreported, Full Court of the Family Court of Australia, 26 November 1998 at 12; cf *Shocked v Goldschmidt* [1998] 1 All ER 372 at 381.

50 *Allesch v Maunz* unreported, Full Court of the Family Court of Australia, 26 November 1998 at 12.

51 *CDJ v VAJ* (1998) 197 CLR 172 at 231-232 [186].

52 *Allesch v Maunz* unreported, Full Court of the Family Court of Australia, 26 November 1998 at 16.

involve a fresh application of the criteria set out in s 79(4) of the Act. The majority then conceded that "[t]here is no *certainty* that such a course would lead to a different result than that arrived at by Finn J"[53] (emphasis added) and that it may result in orders to the same effect, or the property may be divided in some other manner. The majority acknowledged that they would "only be speculating in predicting which result was more likely"[54].

56 In this part of the majority's reasons, their Honours erred to the extent that they applied a test of "certainty" to whether a different order could be achieved by the appellant. This was too onerous. Certainty does not represent the obligation which the law places upon a person in the position of the appellant[55]. In litigating any complex issue, predictive certainty is hard to attain. In the nature of applications to set aside otherwise binding court orders and to reopen cases, it is a mistake to apply a test of certainty. In the nature of such applications, it is often impossible, or inappropriate, for the applicant to adduce all of the evidence which, if reopening were allowed, that party would then later adduce. To impose such an obligation on the applicant would involve an inefficient use of the court's time because, in the quest for certainty, it would virtually always enlarge a procedural application into the final determination of the issue[56]. All that the applicant need show in such a circumstance is that a materially different result might arguably follow from permitting a reopening.

57 The second error of the majority lay in their Honours' consideration of the most relevant matters for determination in deciding whether or not to remit the matter. Clearly, the majority did not adjourn the appeal to permit the reception of further evidence by the Full Court, a course which would have been permissible in the circumstances under the Act[57]. They did not suggest that the parties take the opportunity to adduce further evidence to reflect accurately the position as it stood at the time of the appeal disposition. Despite the failure to make this suggestion or explicitly to permit further evidence to be adduced, the majority took into account four matters, all of which had occurred after the orders were made by Finn J on 10 August 1995: there had been a two year delay

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53 *Allesch v Maunz* unreported, Full Court of the Family Court of Australia, 26 November 1998 at 16.

54 *Allesch v Maunz* unreported, Full Court of the Family Court of Australia, 26 November 1998 at 16.

55 cf *Grimshaw v Dunbar* [1953] 1 QB 408 at 414.

56 cf *Jackamarra v Krakouer* (1998) 195 CLR 516 at 539-543 [66].

57 *Family Law Act* 1975 (Cth), s 93A(2). See *DJL v Central Authority* (2000) 74 ALJR 706 at 715 [41]; 170 ALR 659 at 671.

in the husband's prosecution of his appeal; enforcement orders had been made in relation to the orders of 10 August 1995; some of these enforcement orders had been executed; and a number of costs orders were made against the appellant during the period of delay[58]. They viewed these considerations as militating against the exercise of the discretion in favour of setting aside Finn J's order of 10 August 1995.

58 The words used in a recent case are applicable here, although the obstacle on that occasion was a time default, not the absence of a party when judgment was given[59]:

> "If the Full Court considered that the application ... should have been converted, in effect, into a hearing of the appeal on its merits, the proper course was to notify the parties, to require the provision of the full transcript and, if asked, to afford the parties time to prepare for argument of a significantly different proceeding than that which they had come to prosecute."

59 The same applies to further evidence. Either the Full Court should have remitted the matter to a single judge or it should have notified the parties of its intention to proceed to re-exercise the discretion for itself and of their right to present further evidence. What the Full Court could not do was to decide against the former course on the ground of a lack of certainty in the result, and then exercise the discretion as to whether to set aside the orders for itself without giving the appellant an effective opportunity to adduce further evidence. The same conclusion might not follow if the appellant had been legally represented before the Full Court or where evidence was unavailable to, or not adduced before, the Full Court because of a tactical decision or a failure to present the appeal properly.

60 Because the foregoing two errors vitiate the reasoning of the majority, the orders which their Honours adopted (and which became those of the Full Court) cannot stand. The appeal must be allowed.

Costs in a successful appeal

61 I have sympathy in this case for the conclusion, which the joint reasons express, that each party should bear his or her own costs of the proceedings in this Court. As a consequence of the prolonged litigation, the erosion of the

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58 *Allesch v Maunz* unreported, Full Court of the Family Court of Australia, 26 November 1998 at 17.

59 *Jackamarra v Krakouer* (1998) 195 CLR 516 at 544-545 [71].

property of the former marriage, which is still to be divided in some way between the parties, is most unfortunate. But the fact remains, that it was necessary for the appellant to come to this Court to secure the relief that he has been seeking since orders were made in default of his appearance.

62 In the circumstances of proof of her former husband's cardiac surgery, the respondent might have consented to the reopening of the orders of Finn J, which would have short-cut radically the litigation that has ensued. Prudent advice at the time might have suggested such a course. However, she did not do so. Instead, she resisted the appellant's attempts to be reinstated so as to have a hearing on the merits about the distribution of their matrimonial property. It was the respondent's perfect legal right to take this stand. But as her position has not ultimately been vindicated in law, and as it required the intervention of this Court to correct the Full Court's orders, the application of proper principle requires that the respondent should pay the appellant's costs in this Court. Because the appellant appeared without legal representation, the only consolation would be that the appellant's costs would, by law, be extremely modest[60].

Orders

63 The appeal should be allowed with costs. The orders of the Full Court of the Family Court of Australia should be set aside. It should be ordered that the matter be remitted to that Court for disposition in accordance with the reasons of this Court.

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60 *Cachia v Hanes* (1994) 179 CLR 403; cf *Cachia v Hanes* (1991) 23 NSWLR 304 at 314-315.