ANDERSON & MCINTOSH

(2013) FLC ¶93-568

Family Court citation: [2013] FamCAFC 200

In the Full Court of the Family Court of Australia at Brisbane

Judgment delivered 13 December 2013

Family law — Appeal — Leave to appeal — Where proposal involves consideration of whether Family Law Act 1975 (Cth) s 44(3) applies to applications made under s 79 where parties have been divorced overseas — Property settlement — Statutory interpretation — Where the parties were divorced and property settlement orders were made overseas in relation to foreign property but not in relation to property in Australia — Where wife's application for property settlement was filed more than 12 months after foreign divorce — Family Law Act 1975 (Cth), s 44(3) .

The appeal involved consideration of whether s 44(3) of the *Family Law Act 1975* (Cth) applied to applications made under s 79 where the parties had been divorced overseas.

The parties were divorced and orders for property settlement were made overseas in relation to foreign property but not in relation to property in Australia. The wife's application for property settlement in the Family Court of Australia was filed more than 12 months after the date of the foreign divorce.

The trial judge determined that the wife did not need leave.

The husband sought that the wife's application be dismissed as she had not obtained leave pursuant to s 44(3).

Held: Appeal dismissed.

Bryant CJ, May and Thackray JJ

1. We consider leave should be granted since the proposed appeal involves consideration of an alleged error of principle on an important issue (*Rutherford* & *Rutherford* (1991) FLC ¶92-255).

2. No part of the legislation, including the definition of "matrimonial cause", would lead to the conclusion that the term "divorce order" should apply to a divorce obtained overseas by order or otherwise. The term "divorce order" is used consistently throughout the legislation — pertaining to Australian divorces exclusively.

3. The Act clearly has provided a limitation period only for Australian divorces.

4. It cannot be accepted that, on an ordinary construction of the relevant sections of the Act, an application for property settlement in circumstances where there is a foreign divorce recognised pursuant to s 104, requires leave after the expiration of time provided by s 44(3).

[Headnote by the CCH FAMILY LAW EDITORS]

[87616]

Appearances: Mr D Jackson of Queens Counsel with Ms C Carew of Counsel (instructed by South & Geldard) appeared for the appellant; Mr P Dunning of Queens Counsel with Mr M Alexander (instructed by Duffield & Associates) appeared for the respondent.

Before: Bryant CJ, May and Thackray JJ

Full text of judgment below

Bryant CJ, May and Thackray JJ:

ORDERS

(1) Leave to appeal against the order made by the Honourable Justice Murphy on 20 March 2013 be granted.
(2) The appeal be dismissed.
(3) There be no order as to costs.

Bryant CJ & Thackray J:

INTRODUCTION

1. This is an application for leave to appeal, and if leave is granted, an appeal against an order made by Murphy J on 20 March 2013. The effect of the order was that leave was not required under s 44(3) of the *Family Law Act 1975* (Cth) ("the Act") for the respondent ("the wife") to commence property proceedings more than 12 months after the granting of a divorce where that divorce was granted overseas.

2. Section 44(3) provides that where a "divorce order" has been made, proceedings for property settlement shall not be instituted (except with leave of the court or the consent of both parties) after the expiration of 12 months following the order coming into effect.

3. The facts are set out in the judgment of May J but, in short, the parties had lived in Country B since 2006 and were divorced there in 2010. They reached agreement as to their property in Country B and the agreement was approved by the Country B Court as part of the divorce. No orders were made in relation to property owned in Australia. In July 2012, the wife filed an application pursuant to s 79 of the Act seeking an equal division of the assets of the parties.

4. His Honour was required to determine whether s 44(3) applies to applications for property settlement in cases where the parties were divorced overseas. If it does, then the wife's application is out of time and leave will be required before she can continue the proceedings.

5. Murphy J's decision turned on his view that the Act distinguishes (and has always done so, albeit with different nomenclature) between the concepts of a "divorce order" and a "divorce". His Honour concluded that "divorce order" encompasses only orders made by an Australian court, whereas "divorce" is not so confined and includes, relevantly for present purposes, overseas divorces. Hence, his Honour found that leave was not required for the wife to institute proceedings for property settlement under the Act.

6. The appellant ("the husband") contends that, as a matter of law, his Honour's conclusion was wrong.

7. Previous decisions add to the controversy. One of them, *Savage and Hodgson* (1982) 46 ALR 198, was the subject of an appeal in which the Full Court agreed with remarks made by a trial judge to the effect that leave was **not** required where the divorce was granted overseas. Since then, single judge decisions have

both followed that decision (*Cain & Cain* (1987) FLC ¶91-808) and distinguished it on account of subsequent amendments to the Act (*Taffa & Taffa (Summary Dismissal)* [2012] FamCA 181).

8. Murphy J expressed agreement with what had been said by the Full Court in *Savage and Hodgson*, and said he was bound by it. The husband contends that the decision is not binding, and in the alternative, if it is binding, it should be reconsidered.

9. We agree with Murphy J that leave was not required and the following are our reasons for so concluding.

THE CONTROVERSIAL PROVISION

10. It will assist understanding if we begin by setting out the provision which is at the heart of this appeal. Although the focus of the appeal is on s 44(3), we agree with the trial Judge that it is important it not be seen as a "self-contained section of the Act" but rather as forming part of s 44.

11.

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Section 44 of the Act relevantly provides:

> **44 Institution of proceedings**
>
> (1) Except as otherwise prescribed by the regulations or by the applicable Rules of Court, proceedings under this Act shall be instituted by application.
> (1A) Proceedings under this Act for:
>
> (a) a divorce order in relation to a marriage; or
> (b) a decree of nullity of marriage;
>
> may be instituted by either party to the marriage or jointly by both parties to the marriage.
>
> …
> (3) Where, whether before or after the commencement of section 21 of the *Family Law Amendment Act 1983*:
>
> (a) a divorce order has taken effect; or
> (b) a decree of nullity of marriage has been made;
>
> proceedings of a kind referred to in paragraph … (ca) … of the definition of *matrimonial cause* in subsection 4(1) … shall not be instituted, except by leave of the court in which the proceedings are to be instituted or with the consent of both of the parties to the marriage, after the expiration of 12 months after:
> (c) in a case referred to in paragraph (a) — the date on which the divorce order took effect; or
> (d) in a case referred to in paragraph (b) — the date of the making of the decree.

REASONS OF THE TRIAL JUDGE

12. The trial Judge, in his careful analysis of the legislation, determined that "what is (or is not) a "divorce order" as used in s 44(3) is plainly central to the operation of the section and its interpretation" (Reasons at [15]).

13. Endeavouring to do justice to the comprehensive reasons of the trial Judge, we summarise his conclusions as follows:

• When the Act commenced in 1976 there was no provision for applications for property settlement to be made other than in relation to an Australian divorce and s 44(3) therefore had no application to overseas divorces.
• An amendment made in 1983 enabled an application for property settlement to be made in relation to an overseas divorce and s 44(3) was also amended to extend the time in which an application could be made for property settlement from 12 months following the granting of a decree nisi to 12 months following the granting of a decree absolute, but nothing suggests the two amendments were connected.
• Amendments made in 2005 altering terminology in the Act from "dissolution of marriage" to "divorce", and "decree nisi" and "decree absolute" to "divorce order" maintained the differences between the two concepts that have always existed.
• The difference between the two concepts remains crucial to the interpretation of s 44(3) in its current form.
• Properly construed, s 44(3) has no application in cases involving overseas divorces.

LEAVE TO APPEAL

14. As the order made on 20 March 2013 is a prescribed decree within the meaning of s 94AA of the Act, leave to appeal is required.

15. The husband relied on four factors in support of his application for leave:

a) The application of s 44(3) to proceedings under s 79 following foreign divorces is a question of general importance;
b) The approach adopted by the trial Judge did not give sufficient attention to the relevant provisions of the Act in its present form;
c) The finding that *Savage & Hodgson* was binding should be reconsidered because s 44(3) and other relevant sections have been substantially amended since that decision;
d) Serious injustice would arise if leave is not granted because the wife is seeking in effect, to re-open final property orders in circumstances where she was legally represented and received a significant payment.

16. Without conceding the point, Senior Counsel for the wife acknowledged that the question of whether *Savage & Hodgson* remains binding has created a controversy between two single judges about the proper

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construction of s 44(3). Accordingly, the wife neither consented to, nor opposed a grant of leave.

17. We consider leave should be granted since the proposed appeal involves consideration of an alleged error of principle on an important issue (*Rutherford & Rutherford* (1991) FLC ¶92-255).

GROUNDS OF APPEAL

18. The grounds of appeal are as follows:

1. The primary Judge erred:

(a) in holding that the term "divorce order" used in s 44 of the *Family Law Act 1975* applied only to divorces made under the Act;
(b) in holding that the limitation period prescribed by s 44(3) did not apply where the parties were divorced in an overseas jurisdiction and the divorce was recognised in Australia pursuant to s 104 of the *Family Law Act*;
(c) in finding that he was bound by the Full Court's decision of *Savage and Hodgson* (1982) FLC ¶91-281 and in failing to construe the relevant provisions of the *Family Law Act* by reference to their form at the time of determining the matter before him.

2. In the alternative to Ground 1(c), that *Savage and Hodgson* be reconsidered.

19. Prior to addressing these grounds, we consider it will be helpful to discuss the development of the legislation insofar as it is relevant to this appeal.

THE STATUTORY FRAMEWORK AND ITS HISTORY

20. Before considering the Act as it now stands, it is useful to consider, as the trial Judge did, the origins of the current provisions, the subsequent amendments and the relevant explanatory memoranda. As the High Court said in *CIC Insurance Ltd* v *Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408:

> … the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy …

21. In giving context to s 44(3), it is important to recognise the jurisdictional limitations imposed by the Act – see in particular ss 8(1), 31(1) and 39(1). The effect of these is that certain proceedings, including those for settlement of property, can be instituted only if they constitute a "matrimonial cause".

22. Prior to amendments made in 1983, "matrimonial cause" was relevantly defined in s 4(1) of the Act to mean (our emphasis):

> (a) proceedings between the parties to a marriage for a decree of —
>
> (i) dissolution of marriage; or
> (ii) nullity of marriage;
>
> (b) proceedings for a declaration as to the validity of a marriage or of the dissolution or annulment of a marriage by decree or otherwise;
> (c) …
> (ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or of either of them, being proceedings in relation to concurrent, pending or completed proceedings **for principal relief** between those parties …

23. Importantly, the term "proceedings for principal relief" was defined in s 4(1) as "proceedings **under this Act** of a kind referred to in paragraph (a) or (b) of the definition of 'matrimonial cause' in this sub-section" (our emphasis).

24. The meaning of "parties to a marriage" was to be found in s 4(2), which provided as follows:

> A reference in this Act to a party to a marriage includes a reference to a person who was a party to a marriage that has been dissolved or annulled, in Australia or elsewhere.

25. Prior to amendments made in 1983, s 44(3) relevantly provided:

> Where a decree *nisi* of dissolution of marriage or a decree of nullity of marriage has been made, proceedings of a kind
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>
> referred to in … paragraph (ca) of the definition of "matrimonial cause" in sub-section 4(1) … shall not be instituted after the expiration of 12 months after the date of the making of the decree or the date of commencement of this Act, whichever is the later, except by leave of the court in which the proceedings are to be instituted.

26. It will be seen that the only matrimonial cause dealing with property settlement required the proceedings to be related to proceedings for principal relief instituted under the Act. There was no matrimonial cause dealing with property settlement proceedings relating to overseas divorces. Accordingly, the reference in s 44(3) to "a decree *nisi* of dissolution of marriage" could only be construed as a reference to a decree granted in proceedings under the Act.

27. As Murphy J observed, the lacuna in the Act in cases involving an overseas divorce was overcome by the device of seeking a declaration of validity of the foreign divorce to found a jurisdictional basis for making an application for property settlement. It was accepted that s 44(3) **did not apply** to an application for property settlement filed after a declaration of validity had been made (*Savage and Hodgson* and *Espie & Espie* (1983) FLC ¶91-347).

28. Recognition of foreign divorces was governed by s 104 of the Act. This section referred to "a dissolution or annulment of a marriage", rather than "a decree *nisi* of dissolution of marriage or a decree of nullity". Furthermore, s 104(10) provided:

> The preceding provisions of this section apply in relation to dissolutions and annulments effected whether by decree, legislation or otherwise, whether before or after the commencement of this Act, and, for the purposes of this section, any decree, legislation or other process by which it is established that a purported marriage was or is to become void shall be deemed to be an annulment of the marriage.

29. It will be seen that a distinction was observed in the Act when describing the outcome of the process by which marriages were terminated. Section 44(3) described the outcome as a "decree *nisi* of dissolution of marriage or a decree of nullity of marriage", whereas s 104 spoke more generally of "dissolutions and annulments effected whether by decree, legislation or otherwise".

THE 1983 AMENDMENTS

30. The definition of "matrimonial cause" relating to property settlement was amended by the *Family Law Amendment Act 1983* (Cth), which replaced the original definition with the following:

> (ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings —
>
> (i) arising out of the marital relationship;
> (ii) in relation to concurrent, pending or completed proceedings between those parties for principal relief; or
> (iii) in relation to the dissolution or annulment of that marriage or the legal separation of the parties to that marriage, being a dissolution, annulment or legal separation effected in accordance with the law of an overseas country, where that dissolution, annulment or legal separation is recognized as valid in Australia under section 104.

31. The insertion of subparagraph (ca)(iii) created a matrimonial cause authorising proceedings with respect to property in relation to overseas dissolutions, annulments or legal separations, provided they are valid under s 104. This obviated the need to seek a declaration as to the validity of a foreign process.

32. Section 44(3) was also amended in 1983 by the same legislation. Thereafter, it relevantly provided as follows:

> Where, whether before or after the commencement of section 21 of the *Family Law Amendment Act 1983* —
>
> (a) a decree *nisi* of dissolution of marriage has become absolute; or
> (b) a decree of nullity of marriage has been made,

> proceedings of a kind referred to in paragraph … (ca) … of the definition of 'matrimonial cause' in sub-section 4 (1) … shall not be instituted, except by leave of the court in which the proceedings are to be instituted, after the expiration of 12 months after —
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>
> (c) in a case referred to in paragraph (a) — the date on which the decree nisi became absolute; or
> (d) in a case referred to in paragraph (b) — the date of the making of the decree.

33. The Explanatory Memorandum recorded that s 44(3) was being amended:

> to extend the period during which financial proceedings between parties to a marriage may be instituted without the leave of the Court to, where the parties have been divorced, 12 months from the date on which the decree nisi becomes absolute …

34. Two things emerge from this. First, there was no mention in the Explanatory Memorandum that proceedings commenced pursuant to the new matrimonial cause created by (ca)(iii) were to be subject to the limitation period in s 44(3). Secondly, the legislation still differentiated between:

> • "decree nisi of dissolution of marriage" and "decree of nullity of marriage", which continued to be used in s 44(3); and
> • "dissolution or annulment", which continued to be used in s 104 when referring to recognition of foreign processes (and was also the expression used in the new matrimonial cause created by (ca)(iii)).

THE 2005 AMENDMENTS

35. The differentiation in terminology in s 44(3) and s 104 was maintained when further amendments were made by the *Family Law Amendment Act 2005* (Cth).

36. The 2005 Act introduced new terms "divorce order" and "divorce". "Divorce order" replaced "decree nisi" and "[decree] absolute", and "divorce" replaced "dissolution" and "dissolution of marriage".

37. The term "divorce" was defined as follows:

> ***divorce*** means the termination of a marriage otherwise than by the death of a party to the marriage.

38. The term "divorce or validity of marriage proceedings" was also defined:

> ***divorce or validity of marriage proceedings*** means:
>
> (a) proceedings between the parties to a marriage, or by the parties to a marriage, for:
>
> (i) a divorce order in relation to the marriage; or
> (ii) a decree of nullity of marriage; or
>
> (b) proceedings for a declaration as to the validity of:
>
> (i) a marriage; or
> (ii) a divorce; or
> (iii) the annulment of a marriage;
>
> by decree or otherwise.

39. Section 4(2) was repealed and the following provision substituted:

> A reference in this Act … to a party to a marriage includes a reference to a person who was a party to a marriage that has been:
>
> (a) terminated by divorce (in Australia or elsewhere); or
> (b) annulled (in Australia or elsewhere) …

40. The Revised Explanatory Memorandum recorded that the new provisions were:

> intended to replace outdated and legalistic terms in the Act relating to the termination of marriage with more modern language including the use of the term divorce.
>
> 'Decrees nisi' and 'absolute' are replaced by the term 'divorce order' …
>
> The term 'dissolution of marriage' is replaced by the concept of 'divorce'.

41. Neither the amendments themselves nor the Revised Explanatory Memorandum evinced an intention to change the substantive law. Paragraph 49 of the Memorandum said:

> This item repeals the current definition of decree and inserts a substitute. The purpose of replacing this definition is not to change the meaning but rather the terminology of the concept. The change is from 'decree *nisi*' to the more generic term 'order'. This is consonant with other changes to the Act to replace legalistic terminology with language that gives a more accessible meaning to concepts, effects and procedures relating to divorce under the Act.

42. The Revised Explanatory Memorandum went on, at paragraph 50, to explain the intended effect of the insertion of the definition of "divorce". Murphy J at [28], properly in our view, placed emphasis on the final sentence, which explicitly recognises that the new

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definition was designed to cover overseas divorces:

> This item inserts a definition of divorce, which has not been previously included in the Act. The effect is to make a distinction between divorce and annulment, to emphasise that divorce refers to a termination of a marriage rather than declaring a purported marriage void. Having a definition of divorce provides clarity for greater understanding of the effect of the Act and the concept itself. **This is an expansive definition of divorce, and is intended to cover divorces obtained overseas in circumstances where the marital status of the parties is relevant to proceedings under this Act.**

43. The changes to the wording of the Act were set out in the 2005 amending legislation under a heading "Terminology relating to divorce and principal relief". Although in some instances, "divorce" was used and in others "divorce order", only the former was defined. No definition was given for the composite term "divorce order", even though it appears in important provisions of the legislation, of which the following are but three examples:

> **48 Divorce**
>
> (1) An application under this Act for a divorce order in relation to a marriage shall be based on the ground that the marriage has broken down irretrievably.
> …
>
> **55 When divorce order takes effect**

(1) Subject to this section, a divorce order made under this Act takes effect by force of this section:

(a) at the expiration of a period of 1 month from the making of the order; or
(b) from the making of an order under section 55A;

whichever is the later.

…

93 No appeal after divorce order takes effect

An appeal does not lie from a divorce order after the order has taken effect.

44. Consistent with the purpose of the 2005 amendments, the new terminology was also applied to the definition of "matrimonial cause", which thereafter has relevantly provided (our emphasis):

(a) proceedings between the parties to a marriage, or by the parties to a marriage, for:

(i) a **divorce order** in relation to the marriage; or
(ii) a decree of nullity of marriage; or

(b) proceedings for a declaration as to the validity of:

(i) a marriage; or
(ii) **a divorce**; or
(iii) the annulment of a marriage;

by decree or otherwise; or

…

(ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:

(i) arising out of the marital relationship;
(ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or
(iii) in relation to the **divorce** of the parties to that marriage, the annulment of that marriage or the legal separation of the parties to that marriage, being a **divorce**, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that **divorce**, annulment or legal separation is recognised as valid in Australia under section 104 …

45. Section 44 of the Act was also amended to reflect the changed terminology. These amendments also brought that section into its current form, as recited at the commencement of our reasons. Examination of the provision will show, as the trial Judge stressed, that only the composite term "divorce order" is used.

46. It will also be seen that the entire operation of s 44(3) is dependent on being able to identify when a "divorce order" takes effect. As his Honour observed, that date can be readily ascertained by reference to s 55, whereas there is no provision in the Act dealing with the date on which a "divorce" takes effect.

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The Revised Explanatory Memorandum said, in explaining the change to s 44(3)(a):

This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the

> phrase 'a decree *nisi* of dissolution of marriage has become absolute' with 'a divorce order has taken effect' which provides a clearer explanation of the same process, consonant with other changes to the Act relating to terminology.

48. Similarly, in relation to the amendment of s 44(3)(c), the Revised Explanatory Memorandum said:

> This item repeals the current provision and inserts a substitute. The purpose of replacing this provision is not to change the operation but rather the terminology of the provision. This change replaces the phrase 'date of the making of a decree *nisi* became absolute' with 'date on which the divorce order took effect'.

49. In dealing with the changes to s 104, the Revised Explanatory Memorandum recorded that the amendments simply replaced "dissolution" with "divorce".

GROUNDS 1(a) AND 1(b) — The interpretation of "divorce order" and the application of s 44(3) to cases involving overseas divorces

50. The essence of the husband's argument is that there is no warrant in the Act for giving "divorce" and "divorce order" different meanings, and the trial Judge was therefore not justified in confining s 44(3) to those cases where an Australian "divorce order" had been made. In one sense, however, stating the proposition exposes the difficulty. Why use different terminology if there is to be no difference between the terms "divorce order" and "divorce"?

51. Senior Counsel succinctly outlined his analysis of s 44(3) in the following paragraphs of his written submissions, which bear repeating in their entirety:

> 17. When considering the relevant statutory provisions in their present form, and making the assumption that the [Country B] divorce is recognised under section 104:
>
> (a) It seems clear from paragraph (ca)(iii) of the definition of "matrimonial cause" that proceedings between the parties to a marriage which has been terminated by a foreign divorce with respect to the property of the parties to the former marriage, or one of them, fall within paragraph (ca). There is a clear analogy between "completed divorce" in paragraph (ca)(ii) and "divorce. effected" in paragraph (ca)(iii). Further the term "parties to a marriage", as used in paragraph (ca) includes the persons who were parties to a "marriage terminated by divorce (in Australia or elsewhere)": section 4(2).
> (b) Proceedings of the nature referred to in (a) appear to be, to use the words of section 44(3), "proceedings of a kind referred to in paragraph. (ca). of the definition of *matrimonial cause* in subsection 4(1)".
> (c) The parties to the marriage were divorced by an order of a court.
>
> 18. Accordingly, it is submitted that the very words used in section 44(3), as defined, contemplate its application to a foreign divorce order.

52. Attractive though the argument at face value may be, it does not take account of the legislative history and, in particular, the fact that, at the commencement of the Act, the only proceedings encompassed by paragraph (ca) of the definition of matrimonial cause were those in relation to proceedings for principal relief under the Act — and therefore property settlement proceedings relating to overseas divorces were not within the contemplation of s 44(3). We can find no indication in the subsequent amending statutes of an intention to bring foreign divorces within the scope of s 44(3) and hence to impose the one year limitation period on cases which historically have been exempt from it.

53. We agree with Senior Counsel for the wife that it is significant that proceedings for "a divorce order" were expressly made a "matrimonial cause", and as such may only be instituted under the Act (see s 8(1)). We also agree that, when enacting provisions concerning overseas divorces, the legislature has quite

deliberately adopted language other than "divorce order" — see not only the definition of "matrimonial cause" in (ca)(iii) but also s 69ZH(3)(b)(iii).

54. We also consider the words "completed divorce" in (ca)(ii) of the definition of matrimonial cause cannot be read in the way the husband's submissions suggest. Those words do not stand alone, but form part of the wider expression "completed divorce or validity of marriage proceedings", which is defined to include an application for a "divorce order". The "proceedings" referred to can only be proceedings under the Act, given the definition of "divorce or validity of marriage proceedings", and the expression is always used in that sense — see ss 92(1), 92(1A) and 98.

55. In our view, the trial Judge correctly described the scheme of the Act when he said, at [37], (original emphasis):

> The term "divorce" is used in the Act now in connection with a termination of the marriage that may occur by order under the Act *and* that which might occur in accordance with an overseas process, including, it might be said, a process that does not involve a court order. By way of contrast, the term "divorce order" is used only by reference to a process involving termination of marriage by an order under the Act.

56. The sections of the legislation which we cited at paragraph 43 above, and all others referred to in the course of argument, show a consistency of approach in maintaining a clear distinction between "divorce" and "divorce order" — see, for example, ss 55A, 56, 57, 58, 90C, 90D, 91(1A), 98A and 123(1)(n). As Senior Counsel for the wife observed, nowhere in the Act is the term "divorce order" unequivocally used to include a divorce obtained overseas.

57. Subsection 104(10), which deals only with recognition of foreign processes, provides weight to the interpretation advocated by the wife and adopted by the trial Judge. It indicates that the other provisions of s 104 have application:

> … in relation to divorces, annulments and legal separations effected whether by decree, legislation or otherwise …

58. This wording acknowledges that divorces may be obtained in other countries by means other than an order of a court, but may nevertheless be recognised here (provided the conditions in s 104 are met). This acknowledgement that overseas divorces may be granted by legislative or other means, provides a basis for understanding why use of the term "divorce order" has been restricted to Australian divorces, while the more generic expression "divorce" includes both Australian and overseas divorces.

59. In coming to his decision, the trial Judge properly made reference to dicta in *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355, where McHugh, Gummow, Kirby and Hayne JJ said at [69] and [70]:

> The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW)* v *Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
>
> A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise from the language of particular provisions, the conflict must be alleviated, so far as possible, by adjusting the meaning of the

> competing provisions to achieve that result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions. Reconciling conflicting provisions will often require the court "to determine which is the leading provision and
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> [87624]
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> which is the subordinate provision, and which must give way to the other". Only by determining the hierarchy of the provisions will it be possible in many cases to give each provision the meaning which best gives effect to its purpose and language while maintaining the unity of the statutory scheme.
>
> (Footnotes omitted)

60. Senior Counsel for the husband recognised the need to reconcile all relevant provisions. He therefore squarely addressed the fact that s 44(3) refers only to divorces granted by order, when s 104 contemplates divorces being granted overseas by other means. He dealt with this in his argument in these terms:

> 19. Whilst section 104 contemplates that foreign divorces may take place in a number of ways — by decree, by legislation or otherwise — a plausible explanation for the use of the expression "order" in "divorce order" in section 44(3) is that it is intended to comprehend all those possibilities (After all the divorce, in order to be recognised in Australia, has to be one which would be recognised under the common law rules of international law: s 104(4)). On the other hand, if the term "divorce order" in section 44(3)(a) does not refer to some of the forms of foreign divorce referred to in section 104(1), that does not seem a very substantial reason for excluding from the operation of section 44(3)(a) those which do. And the Act seems to recognise, hardly surprisingly, that very many divorces will be effected by the orders of courts.

61. With respect to Senior Counsel, we do not consider it plausible that Parliament intended that the word "order" be used in the loose way suggested. The structure of the legislation demonstrates careful differentiation between "divorce order" and "divorce" and there is no warrant for treating them as if they are interchangeable. This view is supported by the Revised Explanatory Memorandum to the 2005 amendments, which makes clear that when an "expansive definition" is desired to encompass divorces obtained overseas, "divorce" is used as a stand-alone word (although where it is necessary to remove doubt that might otherwise have existed, this is further spelled out — for example in s 4(2) — by the addition of the words, "in Australia or elsewhere"). In our view, had the legislature intended to do away with the different meanings historically attached to different terms used in the legislation, then the 2005 amendments would been the perfect vehicle to do so.

62. As for the alternative proposition of Senior Counsel for the husband, it would seem to us strange indeed if there was some differentiation intended in s 44(3) between foreign divorces which were made by way of order and those which were made by legislative or other arrangement. In relation to the former there would be a time limit on the institution of proceedings, and in the latter there would not. There does not appear to be any basis for such a dichotomy and we consider such a construction would be inconsistent with the principles in *Project Blue Sky Inc* v *Australian Broadcasting Authority*.

63. This point is further emphasised when regard is had to the pre-2005 provisions, which relied upon the expressions "decree nisi" and "decree absolute". The interpretation for which the husband contends would presumably have seen the s 44(3) time limit applied only to divorces in countries where the concepts of "decree nisi" and "decree absolute" formed part of the domestic law. Again, nothing in the legislation suggests such an outcome was contemplated, nor would this have achieved the "harmonious goals" mentioned in *Project Blue Sky Inc* v *Australian Broadcasting Authority*.

64. Senior Counsel for the husband acknowledged in his oral argument that the term "divorce order" is used in various sections of the legislation to describe proceedings under the Act for an Australian divorce, but submitted that, in the absence of a definition, the term, "divorce order" means nothing more than "an order effecting a divorce". He drew particular attention to s 44(1A) where there is an express link between "divorce

order" and "proceedings under this Act", which he observed provided the necessary context. However, by contrast, when "divorce order" is used in s 44(3), the words "proceedings under the Act" are not used. Senior Counsel for the husband submitted that

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the absence of these words provided the necessary context to show that the intention was to include overseas divorces, as well as those under the Act.

65. We are unable to accept this proposition. Given the careful differentiation to be found elsewhere in the Act between "divorce order" and "divorce", we consider that s 44(3) could only carry the meaning propounded by Senior Counsel for the husband if the same formulation was used as is employed in s 4(2) — i.e. by the addition of, "in Australia or elsewhere" after "divorce order". In our view, the necessary context for s 44(3) is found within the earlier subsections of s 44, where the references to "divorce order" are, either expressly or by necessary implication, related to proceedings under the Act.

66. Senior Counsel for the husband further submitted in oral argument that acceptance of the trial Judge's interpretation of s 44(3) would lead to a curious result because the subsection would not apply in cases where a divorce was granted overseas, but would apply in cases where a decree of nullity was granted overseas. We do not accept this is the case. The Act has always maintained a differentiation in language in dealing with annulments which precisely mirrors the difference we consider has existed between "divorce" and "divorce order" and their predecessor terms. The more generic word "annulment" is used in a way that captures both Australian and foreign processes, whereas the specific expression "decree of nullity of marriage" is reserved for use when dealing with proceedings under the Act.

67. In his oral submissions, Senior Counsel for the husband also referred to the often cited proposition of Griffith CJ in *The Commonwealth* v *Baume* (1905) 2 CLR 405 at 414 that it is:

> … a known rule in the interpretation of Statutes that such a sense is to be made upon the whole as that no clause, sentence, or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent.

68. Senior Counsel for the husband contended that an interpretation which would exclude cases involving an overseas divorce from the ambit of s 44(3) would infringe the rule in *The Commonwealth* v *Baume* because s 44(3) expressly says it applies to proceedings of a kind referred to in paragraph (ca) of the definition of matrimonial cause which, of course, incorporates subparagraph (iii) of (ca), which deals with cases involving an overseas divorce.

69. Again with respect to Senior Counsel, we are unable to accept that any part of s 44(3) is rendered "superfluous, void or insignificant" by the interpretation adopted by the trial Judge, since the reference to "paragraph (ca)" has effect in applying the limitation period to proceedings commenced pursuant to subparagraph (ca)(ii) of the definition of "matrimonial cause". It is true that s 44(3) could have been amended in 1983 to refer expressly only to subparagraph (ca)(ii), but such specificity was unnecessary, given what we have found to be the intention, emerging from analysis of the text, that s 44(3) applies only where a divorce order had been made under the Act. (It is important to recognise here, contrary to the slip made in oral argument by Senior Counsel for the husband, that the reference to subparagraph (ca) in s 44(3) was not introduced by the 1983 amendments — it was already in place).

70. In our view, the amendment made in 1983 to allow property settlement proceedings to be commenced in cases where there has been a divorce overseas, sits happily with the time limit in s 44(3) continuing to apply only to proceedings where a "divorce order' is made in Australia. Those who approach the courts in this country seeking a divorce can be assumed to know the law of this country, including that there is a limitation period on making application for property settlement after the divorce is granted. Furthermore, s 56 of the Act requires a certificate to be prepared after a divorce order takes effect and such certificates give notice to those who receive them of the existence of the limitation period.

71. Parties to a marriage who obtain a divorce overseas are not to be taken to have these advantages. True it is that an application for property settlement might therefore be made in a particular case many years after an overseas divorce, but, if that occurs the other party would not necessarily be without a remedy (*Bevan & Bevan* (2013) FLC ¶93-545). And if it is considered that the application of different rules to parties who have divorced overseas to those who have been divorced locally leads to unjust results, then it would be a simple matter for Parliament to amend the law.

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72. Accordingly we find no merit in grounds 1(a) and 1(b).

GROUND 1(c) AND GROUND 2 — Whether Savage and Hodgson was binding and whether the trial Judge erred by failing to construe s 44(3) in its present form

73. Senior Counsel for the husband submitted that the trial Judge erred in finding that the 1983 amendments had effected no "substantial change" to the law. He contended that his Honour's conclusions seemed:

> a) to give insufficient weight to the ordinary meaning of the words *now* used in the statute;
> b) [to rely] on a view as to intention of the legislature at various times in circumstances where the 'mischief' addressed by the various amendments did not relate to time limitations for foreign divorces; and
> c) to give an unnaturally limited meaning to the words "divorce order" in section 44(3).

74. It was further contended that the approach taken by the trial Judge was erroneous because it failed to apply the test that emerges from *Commissioner of Stamps (SA)* v *Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 at 463 where it was said by Brennan CJ, Dawson and Toohey JJ that:

> … both the Act which is amended and the amending Act are to be read together as a combined statement of the will of the legislature. Thus the effect of the amending Act may be to alter the meaning which remaining provisions of the amended Act bore before the amendment.

75. To like effect, McHugh and Gummow JJ said in the same case, at 479:

> … the better view is that under modern practice it is the intention of the legislature when effecting textual amendment of an Act to produce a revised text which thereafter and as to subsequent events is to be construed as a whole.

76. It was submitted that the trial Judge appeared to have adopted earlier versions of the Act as a starting point, rather than construing the Act in its current form, and had relied excessively on the terms of the 2005 Explanatory Memorandum.

77. We have already dealt with some of the propositions advanced by the husband in dealing with the earlier grounds. However, we do not accept that the trial Judge treated earlier versions of the Act as a starting point rather than seeking to construe the Act in its current form. In order to consider the context in which the controversial provision appears, it was necessary to have regard to the "mischief" which the amendments were intended to remedy (*CIC Insurance Ltd* v *Bankstown Football Club Ltd*). The trial Judge's reference to the Explanatory Memorandum made it clear that the 2005 amendments were not intended to effect changes to the substantive law, making it all the more appropriate for his Honour to refer back to earlier iterations of the Act in order to give meaning to the words now used in the Act.

78. The views we have expressed about the proper interpretation of the legislation make it unnecessary to consider in any detail the complaint about the way in which the trial Judge treated the decision in *Savage and Hodgson*. In deference to the argument put to us by Senior Counsel for the husband, we record that we accept that the observations made at first instance in that case (and which were approved on appeal without

further comment by the Full Court) were obiter. We also accept that the legislation has been amended in material respects since the decision was delivered. The decision was therefore not binding on the trial Judge, although what was said was clearly of some persuasive value.

79. To the extent the trial Judge accepted that *Savage and Hodgson* was binding on him, we would respectfully disagree. However, our consideration of his Honour's reasons indicates that he was not saying the decision in that case was binding on him in the formal sense. Rather he said he was bound by it because it arrived at the same result as he had reached by his own independent analysis of the legislation in its current form (Reasons [69] and [70]).

80.

[87627]

For these reasons, we consider there is no merit in these grounds. Therefore, while we would grant leave to appeal, we would dismiss the appeal itself.

COSTS

81. The wife sought an order for costs in the event the appeal was dismissed. It was submitted on behalf of the husband that there should be no order as to costs by reason of s 117(1) of the Act and because the appeal involved substantial questions requiring decision.

82. As the trial Judge acknowledged, his decision was in conflict with that previously given by one of his brethren. His Honour also acknowledged that the interpretation of the legislation which he favoured has been doubted by the learned authors of leading texts.

83. Given this divergence in authority, it was desirable for the matter to be the subject of consideration by the Full Court. Therefore, although the husband has been wholly unsuccessful, we would make no order as to costs.

May J:

INTRODUCTION

84. This is an application for leave to appeal. The appeal is against an order where Murphy J decided that leave was not required for the wife to commence property proceedings under section 44(3) of the *Family Law Act 1975* (Cth) ("the Act"). The particular features of this case are that the parties' divorce occurred in a jurisdiction outside Australia (Country B), and that the wife's application for property settlement was filed in Australia more than 12 months after the date of the divorce.

85. The parties married in Australia in 1988 and separated in Country B in December 2009. They had been living there since 2006. A divorce was granted in Country B in December 2010.

86. The parties have three children, two under the age of 18. The wife has largely lived in Country B with two of the children since the parties separated. The husband lives in Australia with the other child. Orders made in Country B provide that the wife has custody of the children.

87. The parties reached an agreement as to their property in Country B. A property settlement agreement was made in May 2010 and approved by the Country B Court, as part of the decree of divorce, in December 2010. The property agreement made in Country B was only in respect of property in that country. No order has been made affecting the parties' Australian property interests.

88. The wife filed an application for property settlement in the Family Court of Australia on 10 July 2012 seeking final orders for equal division of the parties' Australian property.

89. The husband filed a response on 24 September 2012 asking that the wife's application be dismissed on the basis that she had not sought leave, as it was suggested by the husband was required, prior to filing.

90. On 20 March 2013 Murphy J dismissed that response. It is from that order that this application for leave to appeal is brought.

91. After filing the application for property settlement on 14 December 2012 the wife filed an application asking:

> 1. That a case stated to the Full Court of the Family Court of Australia be settled by the Family Court of Australia in the following terms:—
>
> > *"Does the Applicant require leave pursuant to s44 (3) of the Family* [sic] *Act 1975 and the relevant authorities, in relation to the Divorce Order made by a foreign country?"*
>
> 2. That the Respondent pay the Applicant's costs of and incidental to this Application.

92. When the matter came before his Honour he was asked to determine the question. Murphy J decided that the wife's application for property settlement did not need leave. In my opinion Murphy J was correct.

LEAVE TO APPEAL

93. Leave to institute this appeal is required. It is contended in the written submissions on behalf of the appellant that leave should be granted for the following reasons (at paragraph [7]):

> (a) The application of section 44(3) to applications under section 79 made
>
> [87628]
>
> following foreign divorces is a question of general importance;
> (b) The approach taken by the primary Judge did not give sufficient attention to the relevant provisions of the Act in its present form;
> (c) The finding that *Savage & Hodgson* was binding should be reconsidered because section 44(3) and other relevant sections have been substantially amended since that decision;
> (d) Serious injustice would arise if leave is not granted because the wife is seeking to, in effect, re-open final property orders in circumstances where she was legally represented and received a significant payment.
> (footnote omitted)

94. Although not conceded, it was acknowledged in the respondent's submissions that the decision in *Savage & Hodgson* (1982) FLC ¶91-281 "creates a controversy between two single judges of this Court as to the proper construction of *the Act* and the applicability of a decision of the Full Court of this Court, the wife neither consents nor opposes a grant of leave" (at [5], original emphasis).

95. In these circumstances, leave should be granted.

GROUNDS OF APPEAL

96. Assuming the grant of leave, the grounds of appeal relied upon are as follows:

> 1. The primary Judge erred:
>
> > (a) in holding that the term "divorce order" used in s.44(3)(a) of the *Family Law Act 1975* applied only to divorces made under that Act;
> > (b) in holding that the limitation period prescribed by s.44(3) did not apply where the parties were divorced in an overseas jurisdiction and the divorce was recognized in Australia pursuant to s.104 of the *Family Law Act*;

(c) in finding that he was bound by the Full Court's decision of *Savage and Hodgson* [1982] FLC ¶91-281 and in failing to construe the relevant provisions of the *Family Law Act* by reference to their form at the time of determining the matter before him.

2. In the alternative to Ground 1(c) that *Savage and Hodgson* be reconsidered.

THE STATUTORY FRAMEWORK

97. It was submitted by counsel for both parties that this appeal is essentially concerned with statutory interpretation.

98. The provisions imposing statutory limitations on the time in which applications under the Act may be brought are contained in s 44 of the Act.

99. The relevant parts of the provision are as follows:

44 Institution of proceedings

(1) Except as otherwise prescribed by the regulations or by the applicable Rules of Court, proceedings under this Act shall be instituted by application.
(1A) Proceedings under this Act for:

(a) a divorce order in relation to a marriage; or
(b) a decree of nullity of marriage;

may be instituted by either party to the marriage or jointly by both parties to the marriage.
(1B) An application for a divorce order in relation to a marriage shall not, without the leave of the court granted under subsection (1C), be filed within the period of 2 years after the date of the marriage unless there is filed with the application a certificate:

(a) stating that the parties to the marriage have considered a reconciliation with the assistance of a specified person …

…
(3) Where, whether before or after the commencement of section 21 of the *Family Law Amendment Act 1983*:

(a) a divorce order has taken effect; or
(b) a decree of nullity of marriage has been made;

proceedings of a kind referred to in paragraph (c), (caa), (ca) or (cb) of the definition of ***matrimonial cause*** in subsection 4(1) (not being proceedings under section 78 or 79A or proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) shall not be instituted, except by

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leave of the court in which the proceedings are to be instituted or with the consent of both of the parties to the marriage, after the expiration of 12 months after:

(c) in a case referred to in paragraph (a)--the date on which the divorce order took effect; or
(d) in a case referred to in paragraph (b)--the date of the making of the decree.

The court may grant such leave at any time, even if the proceedings have already been instituted.
…
(4) The court shall not grant leave under subsection (3) or (3A) unless it is satisfied:

> (a) that hardship would be caused to a party to the relevant marriage or a child if leave were not granted; or
> (b) in the case of proceedings in relation to the maintenance of a party to a marriage — that, at the end of the period within which the proceedings could have been instituted without the leave of the court, the circumstances of the applicant were such that the applicant would have been unable to support himself or herself without an income tested pension, allowance or benefit.

100. It can immediately be seen that an order for divorce made pursuant to the Act is described in s 44 as a "divorce order".

101. In the section providing for the definition of terms used in the Act (s 4(1)), divorce is defined as follows:

> ***divorce*** means the termination of a marriage otherwise than by the death of a party to the marriage.
>
> ***divorce or validity of marriage proceedings*** means:
>
> (a) proceedings between the parties to a marriage, or by the parties to a marriage, for:
>
> (i) a divorce order in relation to the marriage; or
> (ii) a decree of nullity of marriage; or
> (b) proceedings for a declaration as to the validity of:
>
> (i) a marriage; or
> (ii) a divorce; or
> (iii) the annulment of a marriage;
>
> by decree or otherwise.

102. The other reference to divorce in s 4 provides:

> **4(2)** A reference in this Act, the standard Rules of Court or the related Federal Circuit Court Rules [formerly the Federal Magistrates Court Rules] to a party to a marriage includes a reference to a person who was a party to a marriage that has been:
>
> (a) terminated by divorce (in Australia or elsewhere); or
> (b) annulled (in Australia or elsewhere); or
> (c) terminated by the death of one party to the marriage.

103. There is no definition of "divorce order".

104. The expression "divorce order" was introduced into the Act as Part 10 of the *Family Law Amendment Act 2005* (Cth) ("the 2005 Amendment Act"). Reference to that Part reveals the separate sections into which the expression was inserted and those which were not. I would add the following provisions of the Act where reference is made to divorce order for completeness:

> **48 Divorce**
>
> (1) An application under this Act for a divorce order in relation to a marriage shall be based on the ground that the marriage has broken down irretrievably.
> …
>
> **55 When divorce order takes effect**

(1) Subject to this section, a divorce order made under this Act takes effect by force of this section:

(a) at the expiration of a period of 1 month from the making of the order; or
(b) from the making of an order under section 55A;

whichever is the later.
…

93 No appeal after divorce order takes effect

An appeal does not lie from a divorce order after the order has taken effect.

105. Counsel for the respondent drew our attention to other provisions of the Act where

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the words "divorce" and "divorce order" are used. It is appropriate to set out some of those provisions:

79 Alteration of property interests

…
(1B) The court may adjourn property settlement proceedings, except where the parties to the marriage are:

(a) parties to concurrent, pending or completed divorce or validity of marriage proceedings; or
(ba) parties to a marriage who have divorced under the law of an overseas country, where that divorce is recognised as valid in Australia under section 104; or
(bb) parties to a marriage that has been annulled under the law of an overseas country, where that annulment is recognised as valid in Australia under section 104;

…

90C Financial agreements during marriage

(1) If:

(a) the parties to a marriage make a written agreement with respect to any of the matters mentioned in subsection (2); and
(aa) at the time of the making of the agreement, the parties to the marriage are not the spouse parties to any other binding agreement (whether made under this section or section 90B or 90D) with respect to any of those matters; and
(b) the agreement is expressed to be made under this section;

the agreement is a ***financial agreement***. The parties to the marriage may make the financial agreement with one or more other people.
(2) The matters referred to in paragraph (1)(a) are the following:

(a) how, in the event of the breakdown of the marriage, all or any of the property or financial resources of either or both of the spouse parties at the time when the agreement is made, or at a later time and during the marriage, is to be dealt with;
(b) the maintenance of either of the spouse parties:

(i) during the marriage; or
(ii) after divorce; or
(iii) both during the marriage and after divorce.

…

90D Financial agreements after divorce order is made

(1) If:

(a) after a divorce order is made in relation to a marriage (whether it has taken effect or not), the parties to the former marriage make a written agreement with respect to any of the matters mentioned in subsection (2); and
(aa) at the time of the making of the agreement, the parties to the former marriage are not the spouse parties to any other binding agreement (whether made under this section or section 90B or 90C) with respect to any of those matters; and
(b) the agreement is expressed to be made under this section;

the agreement is a ***financial agreement***. The parties to the former marriage may make the financial agreement with one or more other people.

106. It is useful to add s 60F(2):

A reference in this Act to a child of a marriage includes a reference to a child of:

(a) a marriage that has been terminated by divorce or annulled (in Australia or elsewhere); or
(b) a marriage that has been terminated by the death of one party to the marriage.

107. Essential to the argument of the appellant is s 4, defining *matrimonial cause*, especially (ca)(iii). It is necessary to set out those parts of the section which are of potential relevance in understanding the meaning of "divorce order":

matrimonial cause means:

(a) proceedings between the parties to a marriage, or by the parties to a marriage, for:

(i) a divorce order in relation to the marriage; or
(ii) a decree of nullity of marriage; or

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(b) proceedings for a declaration as to the validity of:

(i) a marriage; or
(ii) a divorce; or
(iii) the annulment of a marriage;

by decree or otherwise; or

…

(ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings:

(i) arising out of the marital relationship;
(ii) in relation to concurrent, pending or completed divorce or validity of marriage proceedings between those parties; or
(iii) in relation to the divorce of the parties to that marriage, the annulment of that marriage or the legal separation of the parties to that marriage, being a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under section 104; or

108. In the part headed "**Part XII — Recognition of decrees"**, s 104 of the Act provides for recognition of an overseas divorce as valid in Australia. There is no suggestion in this case that the divorce in Country B would not be regarded as valid in Australia. Section 104(10) which is of some significance provides:

> The preceding provisions of this section apply in relation to divorces, annulments and legal separations effected whether by decree, legislation or otherwise, whether before or after the commencement of this Act, and, for the purposes of this section, any decree, legislation or other process by which it is established that a purported marriage was or is to become void shall be deemed to be an annulment of the marriage.

REASONS FOR JUDGMENT

109. The primary judge referred at the outset to the wife's contention that the provisions of s 44(3) requiring leave to institute proceedings for property settlement did not apply, as the divorce was not pronounced in Australia.

110. His Honour summarised the contentions of the parties as follows:

> 16. The expression is, accordingly, central to the arguments advanced on this application on behalf of each of the parties. The wife contends that the expression "divorce order" as used in s 44, and s 44(3) in particular, is confined to orders for divorce made under the Act. If she is right, the limitation period provided for in that section does not apply. The husband contends that the term "divorce order" embraces foreign divorces recognised as valid in Australia. If that is right, the limitation period applies and it is necessary for the wife to apply for leave to institute her proceedings for settlement of property.

111. His Honour decided that leave is not required in the case of a foreign divorce, based on general principles of statutory construction applied to the relevant sections. In addition to those reasons at [70] he said:

> As a result, I consider that the principle expressed by the Full Court in *Savage* earlier quoted applies, without limitation, to (the current) s 44(3) and that, accordingly, I am bound by it.

112. The primary judge referred to the need for a proper construction of the applicable sections in context and "in particular, the distinction between 'divorce' and a 'divorce order'" (at [12]). His Honour said:

> 20. The task is to give to s 44(3) and, relevantly, "divorce order", "… the meaning that the legislature is taken to have intended them to have."[6] In doing so, the context of the statutory provision is crucial and:
>
> > …the modern approach to statutory interpretation (a) insists that the context be considered in the first instance, not merely at some later stage when ambiguity might be thought to arise, and (b) uses "context" in its widest sense to include such things as the existing state of the law and the mischief which, by legitimate means such as those just mentioned, one may discern the statute was intended to remedy.[7]

113.

[87632]

Murphy J considered the relevant amendments to the Act and Explanatory Memorandum, together with the history of the legislation.

HISTORY OF THE RELEVANT LEGISLATION

114. Counsel referred to the history of the amendments to the Act. The appellant submits that the *Family Law Amendment Act 1983* (Cth) ("the 1983 Amendment Act") which included sub-section 4(ca)(iii) in *matrimonial cause* demonstrate that the time limit in s 44(3) was intended to include overseas divorces.

Section 4 — "Matrimonial cause"

115. Prior to the commencement of the 1983 amendments, "matrimonial cause" was relevantly defined in s 4(1) of the Act to include (at sub-section (ca)):

> [P]roceedings between the parties to a marriage with respect to the property of the parties to the marriage or of either of them, being proceedings in relation to concurrent, pending or completed proceedings for principal relief between those parties.

116. "Proceedings for principal relief" was defined in s 4(1) of the Act as "proceedings under this Act of a kind referred to in paragraph (a) or (b) of the definition of "matrimonial cause"; namely proceedings for a dissolution of marriage, nullity or a declaration of validity of the marriage or validity of the dissolution of the marriage.

117. Section 3 of the 1983 Amendment Act commenced on 28 October 1983. Section 3 amended the definition of "matrimonial cause" by omitting the earlier definition contained in sub-section 4(1)(ca) and inserting the following:

> (ca) proceedings between the parties to a marriage with respect to the property of the parties to the marriage or either of them, being proceedings-
>
> (i) arising out of the marital relationship;
> (ii) in relation to concurrent, pending or completed proceedings between those parties for principal relief; or
> **(iii) in relation to the dissolution or annulment of that marriage or the legal separation of the parties to that marriage, being a dissolution, annulment or legal separation effected in accordance with the law of an overseas country, where that dissolution, annulment or legal separation is recognized as valid in Australia under section 104 …**
>
> (own emphasis)

It is sub-section 4(1)(ca)(iii) which is of particular relevance to the present appeal.

118. As the primary judge records at [7] of his reasons for judgment, the authors of *Australian Family Law and Practice* Broun, M, CCH Australia, Sydney 2005 describe the effect of the new paragraph (ca)(iii) definition as allowing "a person divorced overseas to apply under s 79 for division of property situated in Australia". The authors go on to state that "[i]t is arguable that, since the inclusion of (ca)(iii), the device of granting a declaration of validity of foreign divorce is no longer necessary to fill a jurisdictional gap."

119. The definition of "matrimonial cause" was further amended by s 3 of the 2005 Amendment Act, which came into effect on 6 July 2005. Section 3 provides that "[e]ach Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms". Part 10 of Schedule 1 of Act concerns 'Terminology relating to divorce and principal relief' and came into effect on 3 August 2005. Item 42 of that Schedule amended section 4(1)(ca)(iii), by repealing the earlier definition and inserting the following:

(iii) in relation to the divorce of the parties to that marriage, the annulment of that marriage or the legal separation of the parties to that marriage, being a divorce, annulment or legal separation effected in accordance with the law of an overseas jurisdiction, where that divorce, annulment or legal separation is recognised as valid in Australia under section 104; or

120. The above was the operative definition at the date of hearing before Murphy J and before us.

[87633]

Section 44(3) — Institution of proceedings

121. Prior to the commencement of the 1983 Amendment Act, section 44(3) was expressed in the following terms:

Where a decree *nisi* of dissolution of marriage or a decree of nullity of marriage has been made, proceedings of a kind referred to in sub-paragraph (c) (i) or paragraph (ca) of the definition of "matrimonial cause" in sub-section 4 (1) (not being proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) shall not be instituted after the expiration of 12 months after the date of the making of the decree or the date of commencement of this Act, whichever is the later, except by leave of the court in which the proceedings are to be instituted.

122. Section 44(3) was amended by s 21 of the 1983 Amendment Act, which commenced on 25 November 1983. Section 21 inserted a new s 44(3), which stated:

(3) Where, whether before or after the commencement of section 21 of the *Family Law Amendment Act* 1983 —

(a) a decree nisi of dissolution of marriage has become absolute;

or
(b) a decree of nullity of marriage has been made,

proceedings of a kind referred to in paragraph (c) or (ca) of the definition of "matrimonial cause" in sub-section 4 (1) (not being proceedings under section 78 or 79A or proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) shall not be instituted, except by leave of the court in which the proceedings are to be instituted, after the expiration of 12 months after-
(c) in a case referred to in paragraph (a)-the date on which the decree nisi became absolute; or
(d) in a case referred to in paragraph (b)-the date of the making of the decree.

123. Section 44(3) was further amended by the 2005 Amendment Act. Item 55 of Part 10 of Schedule 1 of that Act repealed sub-section 44(3)(a) and substituted the following:

(a) a divorce order has taken effect; or

Item 56 of Part 10 of Schedule 1 of that Act repealed sub-section 44(3)(c) and substituted the following:

(c) in a case referred to in paragraph (a) — the date on which the divorce order took effect; or

124. Thus at the date of hearing before the primary judge s 44(3) was, in its entirety, expressed in the following terms:

> (3) Where, whether before or after the commencement of section 21 of the *Family Law Amendment Act 1983*:
>
> > (a) a divorce order has taken effect; or
> > (b) a decree of nullity of marriage has been made;
>
> proceedings of a kind referred to in paragraph (c), (caa), (ca) or (cb) of the definition of ***matrimonial cause*** in subsection 4(1) (not being proceedings under section 78 or 79A or proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings with respect to the maintenance of a party) shall not be instituted, except by leave of the court in which the proceedings are to be instituted or with the consent of both of the parties to the marriage, after the expiration of 12 months after:
>
> > (c) in a case referred to in paragraph (a) — the date on which the divorce order took effect; or
> > (d) in a case referred to in paragraph (b) — the date of the making of the decree.
>
> The court may grant such leave at any time, even if the proceedings have already been instituted.

CONSIDERATION OF THE GROUNDS — APPELLANT'S CASE

125. It is convenient to follow the headings in the written submissions as they were presented to us.

Grounds 1(a) and (b) — In holding that the term "divorce order" applies only to divorces made under the Family Law Act the Primary Judge erred

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126. In the written submissions on behalf of the appellant it is submitted that:

> [10] The central question arising in relation to section 44(3) is whether, in the present case, the order made in [Country B in] December 2010 effecting a divorce between the parties was a "divorce order" for the purpose of section 44(3)(a).

127. After referring to the relevant provisions of the Act it was submitted:

> [17] When considering the relevant statutory provisions in their present form, and making the assumption that the [Country B] divorce is recognised under section 104:
>
> > (a) It seems clear from paragraph (ca)(iii) of the definition of "matrimonial cause" that proceedings between the parties to a marriage which has been terminated by a foreign divorce with respect to the property of the parties to the former marriage, or one of them, fall within paragraph (ca). There is a clear analogy between "completed divorce" in paragraph (ca)(ii) and "divorce. effected" in paragraph (ca)(iii). Further the term "parties to a marriage", as used in paragraph (ca) includes the persons who were parties to a "marriage terminated by divorce (in Australia or elsewhere)": section 4(2).
> > (b) Proceedings of the nature referred to in (a) appear to be, to use the words of section 44(3), "proceedings of a kind referred to in paragraph.(ca). of the definition of *matrimonial cause* in subsection 4(1)".
> > (c) The parties to the marriage were divorced by an order of a court.

128. The submissions in relation to *matrimonial cause* are clearly correct. However, it is then submitted:

> [18] Accordingly, it is submitted that the very words used in section 44(3), as defined, contemplate its application to a foreign divorce order.

129. There can be no doubt that applications for property settlement may be brought when there has been a foreign divorce. However, in my view it is not clear that the words used in s 44(3) contemplate its application to a foreign divorce as the words refer to a "divorce order". It is said on behalf of the appellant that the explanation for this is as follows (at paragraph [19]):

> Whilst section 104 contemplates that foreign divorces may take place in a number of ways — by decree, by legislation or otherwise — a plausible explanation for the use of the expression "order" in "divorce order" in section 44(3) is that it is intended to comprehend all those possibilities (After all the divorce, in order to be recognised in Australia, has to be one which would be recognised under the common law rules of international law: section 104(4)). On the other hand, if the term "divorce order" in section 44(3)(a) does not refer to some of the forms of foreign divorce referred to in section 104(1), that does not seem a very substantial reason for excluding from the operation of section 44(3)(a) those which do. And the Act seems to recognise, hardly surprisingly, that very many divorces will be effected by the orders of courts.
>
> (footnotes omitted)

130. It was submitted further at paragraph [21]:

> …on the ordinary construction of the Act as it is presently framed, section 44(3) has the effect that a party to a foreign divorce which is recognized pursuant to section 104 requires leave to commence property settlement proceedings under section 79 after the expiration of the time provided for by section 44(3).

131. The appellant's submission is not supported by the Explanatory Memorandum, especially the purpose of the amendments being to discard the previous words of "decree nisi" and "absolute" and to have more modern language.

132. In oral submissions particular reliance was placed on the following paragraphs of *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355:

> 69 The primary object of statutory construction is to construe the relevant provision so that it is consistent with the
>
> [87635]
>
> language and purpose of all the provisions of the statute. The meaning of the provision must be determined "by reference to the language of the instrument viewed as a whole". In *Commissioner for Railways (NSW)* v *Agalianos*, Dixon CJ pointed out that "the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed". Thus, the process of construction must always begin by examining the context of the provision that is being construed.
> 70 A legislative instrument must be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. …
>
> (footnotes omitted)

Ground 1(c) and Ground 2 — In finding that *Savage and Hodgson* was binding and in failing to construe the relevant provisions by reference to their form at the time of determining the matter

before him, the learned primary Judge erred. Alternatively, if *Savage and Hodgson* is binding then it should be reconsidered

133. Prior to dealing with the decision of *Savage and Hodgson*, in the written submissions, there are three main points. The first is contained in paragraph [23], after reference to the reasons of the primary judge finding that s 44(3) did not apply:

> One is the reference in provisions of section 44 and other sections other than section 44(3) to the fact that the proceedings being referred to are those *under the Family Law Act*. See e.g. sections 44(1), (1A), (1B), (1(c)), (2). So much may be accepted, but it does not deal with the fact that section 44(3) and (3A) include references to paragraph (ca) of the definition of "matrimonial cause" in section 4(1), which in subparagraph (iii) refers specifically to foreign divorces.
>
> (original emphasis)

134. The second is that the primary judge was wrong in observing that the 1983 Amendment Act had effected "no substantial change" (at [24]):

> … It is submitted that the difficulty with such an approach, and with the conclusions reached at paragraphs 48 and 49 of the Reasons is that it seems:
>
> > (a) to give insufficient weight to the ordinary meaning of the words *now* used in the statute;
> > (b) relies on a view as to intention of the legislature at various times in circumstances where the 'mischief' addressed by the various amendments did not relate to time limitations for foreign divorces; and
> > (c) to give unnaturally limited meaning to the words "divorce order" in section 44(3).
> >
> > (original emphasis)

135. In support of this second proposition it is submitted that the primary judge did not apply the correct test. Reference is made to *Commissioner of Stamps (SA)* v *Telegraph Investment Co Pty Ltd* (1995) 184 CLR 453 where Brennan CJ, Dawson & Toohey JJ said at 463:

> … both the Act which is amended and the amending Act are to be read together as a combined statement of the will of the legislature. Thus the effect of the amending Act may be to alter the meaning which remaining provisions of the amended Act bore before the amendment.

Further where McHugh and Gummow JJ said at 479:

> … the better view is that under modern practice it is the intention of the legislature when effecting textual amendment of an Act to produce a revised text which thereafter and as to subsequent events is to be construed as a whole.
>
> (footnotes omitted)

136. It is emphasised that it is essential to construe the Act in its current form. This is no doubt correct. In addition it is submitted at [26]:

> … The Judge's view in the second sentence of [37] involved…a preconception and leaves out of account the fact that s.44(3) includes reference to paragraph (ca) of the definition of "matrimonial cause".

137. It was also submitted that the primary judge's reliance on the terms of the Explanatory

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Memorandum to the 2005 Amendment Act was excessive.

138. The third submission referred to the authority *Savage and Hodgson*, that the primary judge was wrong insofar as he considered himself bound by that decision. Reference was made to the first instance decision (1982) FLC ¶91-222 and the decision of the Full Court (1982) FLC ¶91-281. Before referring to that case in any detail, reference should be made to the following submissions:

> [29] Prior to 1983, proceedings for property settlement could not be commenced in the Family Court unless they were in relation to concurrent, pending or completed 'proceedings for principal relief'. 'Proceedings for principal relief' were (relevantly) defined as proceedings under the *Family Law Act* for dissolution of marriage or proceedings for a declaration as to the validity of the dissolution of marriage. Accordingly, where parties were divorced overseas but had property in Australia, the practice developed of applying for a declaration as to the validity of the overseas dissolution of a marriage, thus providing the necessary jurisdictional nexus.
> [30] This practice was the subject of some judicial criticism where there was in truth no issue as to the validity of the divorce.
> [31] In 1982 section 44(3) provided as follows:
>
> > *"Where a decree nisi of dissolution of marriage or a decree of nullity of marriage has been made, proceedings of a kind referred to in sub-paragraph (c)(i) or (ii) of the definition of 'matrimonial cause' in sub-section 4(1) … shall not be instituted after the expiration of 12 months after the date of making of the decree or the date of commencement of this Act, whichever is the later, except by leave of the court in which the proceedings are to be instituted."*
>
> [32] At that time, proceedings of a kind referred to in sub-paragraph (c)(i) and (ii) were proceedings relating to maintenance and property settlement.
> [33] Further, there was no reference to overseas divorces in the definition of matrimonial cause in section 4(1) as there now is in subsection 4(1)(ca)(iii).
>
> (footnotes omitted)

139. The 1983 amendments were subsequent to *Savage and Hodgson*.

140. Section 44(3) as currently framed begins with this reference: "[w]here, whether before or after the commencement of section 21 of the *Family Law Amendment Act 1983*". The significance is that prior to that amendment, the 12 month period ran from the decree nisi rather than the decree absolute.

141. As already mentioned, also by the 1983 Amendment Act paragraph (ca) of the definition of *matrimonial cause* was substituted and provided that a *matrimonial cause* included:

> [P]roceedings between parties to a marriage with respect to the property of the parties to the marriage or either of them being proceedings —
>
> > (i) arising out of the marital relationship;
> > …
> > (iii) In relation to the dissolution … of that marriage … being a dissolution … effected in accordance with the law of an overseas country, where that dissolution … is recognized as valid in Australia under section 104.

142. The submission contained in paragraph [37] about the effect of this amendment – that the necessity for applying for a declaration as to the validity of an overseas dissolution of marriage in order to found the

jurisdiction to commence proceedings for property settlement is removed – is correct. In my view it is not so clear that the effect was also to import specific reference to overseas divorces in s 44(3).

143. Returning to the authority of *Savage and Hodgson*, we were correctly reminded of the facts and procedural history of that case, and that the remarks in relation to s 44(3) were obiter dicta both by the trial judge and the Full Court. It is submitted that *Savage and Hodgson* is not binding. The submissions at [45] and [46] are to that effect:

> It is submitted that *Savage and Hodgson* is not an authority binding the primary judge in the present case as a) the observations
>
> [87637]
>
> about section 44(3) were obiter and b) the reference in the section to (ca) of the definition of matrimonial cause as it then applied did not include the specific reference to overseas divorces.
>
> If the primary Judge was bound by *Savage and Hodgson*, it is submitted, that as it was a case decided before the amendments made in 1983 it should be reconsidered in light of those amendments.

144. Submissions were made to the contrary by counsel for the respondent. In any event, although *Savage and Hodgson* is no longer binding, that does not remove the difficulty that s 44(3) as it is presently drafted only refers to a "divorce order".

RESPONDENT'S SUBMISSIONS

145. Commencing with the central issue, that being the dichotomy in the Act itself of "divorce" and "divorce order" as distinct *matrimonial causes* in the definition of s 4(1) of the Act, it is submitted that the primary judge was correct in recording that these descriptors are simply the modern expressions for what were previously referred to as a decree nisi and a dissolution of marriage. It was emphasised that a divorce order is a concept involving a process of termination of marriage by an order under the *Family Law Act*. In particular, at paragraph [18] it is submitted:

> A consideration of the use of the expression within *the Act* and the deliberate choice by the legislature to use other words when clearly referring to divorces occurring outside Australia or divorces whether in Australia or outside supports the construction that the expression 'divorce order' is intended to apply only to an order for divorce under *the Act*.
>
> (original emphasis)

146. It is submitted at paragraph [26] that it is clear that where the legislation allows for property settlement in relation to divorces which occurred overseas, language other than "divorce order" is used (see definition (ca)(iii) and (cb)(iii)). Further "[t]hat the change in language is deliberate and intended is reinforced by consideration of s.69ZH(3)(b)(ii) and (iii)."

147. At paragraphs [27] and [28] it was submitted:

> It is further reinforced by consideration of Part VI of *the Act* and in particular the use of the expression 'divorce order' in ss.55A, 56, 57 and 58.
>
> There are a number of other provisions within *the Act* and in other parts of *the Act* where 'divorce order' is used in a context confined to proceedings under *the Act*, for example, s.91(1A), s.93, s.98A and s.123(1)(n).
>
> (original emphasis)

148. It is of some significance in my opinion, that nowhere is "divorce order" used in a section which unequivocally is intended to include a divorce obtained overseas.

Grounds 1(c) and Ground 2

149. As to whether his Honour applied the correct test, the submission of the respondent at paragraphs [42] and [43] is no doubt correct, that the primary judge:

> … embarked upon significant and through [sic] comparison of the respective versions of *the Act* for the purpose of elucidating the intention of the legislature, including why such changes were wrought.
>
> To do so, his Honour also had regard to the explanatory memorandum to the 2005 Act. His pursuits in such regard were not, as is submitted, excessive. Further, the use of such extrinsic material in this case is greatly different and significantly less than that in *Pilbara Infrastructure Pty Ltd* v *Australian Competition Tribunal and ors*, to which the Appellant refers.
>
> (footnote omitted)

CONCLUSIONS

150. In my view, the legislation is clear. "Divorce order" relates to a divorce obtained pursuant to the *Family Law Act*. The statutory limitation in relation to property settlement applies only to parties to a divorce order.

151. No part of the legislation, including the definition of "matrimonial cause", would lead to the conclusion that the term "divorce order" should apply to a divorce obtained overseas by order or otherwise. The term "divorce order" is

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used consistently throughout the legislation – pertaining to Australian divorces exclusively.

152. It may seem to be an anomaly, that foreign divorces recognised under Australian law do not have the same temporal limitations imposed where the parties seek a property settlement in this country. There is no doubt that a divorce may be obtained in another country with different administration and different limitation periods. The Act clearly has provided a limitation period only for Australian divorces.

153. For these reasons it cannot be accepted that, on an ordinary construction of the relevant sections of the Act, an application for property settlement in circumstances where there is a foreign divorce recognised pursuant to s 104, requires leave after the expiration of the time provided by s 44(3).

154. The appeal should be dismissed.

COSTS

155. Counsel for each party sought a certificate pursuant to the *Federal Proceedings (Costs) Act 1981* (Cth) should the appeal be allowed.

156. Counsel for the respondent sought an order for costs should the appeal be dismissed. It was submitted on behalf of the appellant that there should be no order as to costs by reason of the provisions of s 117(1) of the Act and that this appeal involved some substantial questions to be decided.

157. The only feature which would attract any justification of a costs order is that the appeal has not succeeded.

158. In my view, it was proper for the appellant to bring the application for leave and to seek to appeal as the questions raised have not been otherwise determined in light of the current legislation. The matter is not an appeal against discretionary orders. I would make no order as to costs.

Footnotes

6 *Project Blue Sky Inc* v *Australian Broadcasting Authority* (1998) 194 CLR 355 at 384 per McHugh, Gummow, Kirby and Hayne JJ.

7 *CIC Insurance Ltd* v *Bankstown Football Club Ltd* (1997) 187 CLR 384 at 408 per Brennan CJ, Dawson, Toohey and Gummow JJ.