

## What is Just and Equitable?

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1. The phrase “just and equitable” occurs surprisingly often in legislation. It has a long history. One of the dangers of specialisation is that it is easy to overlook the history, significance and a full understanding of words which are familiar and even hackneyed in a particular context, but which have in fact been chosen by the legislative drafter against a background of previous use and established application in other contexts. Similarly, the increasing specialisation of modern practice contains the hazard that we may lose sight of the relevance of ongoing developments in related fields.
2. In, *Winding Up on the Just and Equitable Ground*,<sup>1</sup> Frank Callaway said,

“The expression ‘just and equitable’ may be regarded as an example of statutory hendiadys, the reference to equity being not by way of an additional test but for the purpose of ensuring that the justice to be applied will be equitable justice, ‘the justice of the individual case’. Accordingly justice and equity are referred to herein as one criterion, not two criteria.”
3. History shows that the available application of the phrase is always constrained by the statutory context and purpose in which it is set, but equally, the phrase has a definite and fairly constant meaning. It does not relegate the disposition of claims to subjective and uncontrolled discretion.
4. ‘The justice of the individual case’ refers to *justice* objectively and consistently evaluated and applied according to law and established principles, upon definite grounds, but also, to the technique of equity in moulding the application of principle to the particular circumstances and consciences of individual persons.
5. This method was described by J C Campbell as follows:

“... equity acts in personam. It looks at the situation in which an individual defendant finds himself, in all its factual complexity, and decides what the

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<sup>1</sup> (LBC, 1978), at p. 5

application of the broad standards of conduct that are equity's generative principles requires of that person in that situation.

"... if it comes to the decision that there has been a departure from those standards of conduct, it then fashions a remedy that is inherently discretionary. The remedy is inherently discretionary because it represents the judge's view of what practical course of conduct should be adopted, in the circumstances of the particular case, to redress or make good the departure that there has been from the standards of conduct required by equity, in so far as redress is in practical terms possible.

"This very fact-specific methodology is quite different to a legal methodology that, code-like, formulates rules, of fairly specific content, and then applies those rules to the facts of the case at hand to arrive at an outcome in a way that seems to have as its model deductive reasoning."<sup>2</sup>

6. This introduces the element of judicial discretion, but properly understood, this is at the stage of *application* of the established rules and principles to the particular facts and grounds found. The *identification* of a claim to justice remains an *evaluative*, not a discretionary, exercise. The framing of *relief or redress* for that claim of justice is discretionary, in the sense that reasonable minds may differ as to the precise way to *give effect in remedial orders* to the claim of justice that has been found by evaluation, applying in a regular and consistent way established principle to particular circumstances that supply the *grounds* for relief.
7. The phrase 'just and equitable' is not a formula for disposing of the need for a cause of action. Neither is it a recipe for idiosyncratic notions of what is a fair outcome to be imposed according to the judge's personal view, rather than according to established statutory, legal and equitable principles consistently applied.
8. So, the Court's discretion is to be exercised 'by a sound induction from all the relevant circumstances'.<sup>3</sup> *Sound* induction to the exercise of discretionary power means according to the rational application of principle to the facts.

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<sup>2</sup> J C Campbell QC, *Access by trust beneficiaries to trustees' documents, information and reasons*, (2009) 3 Journal of Equity 97, at 141.

<sup>3</sup> Callaway, p. 4; *Loch v. John Blackwood Ltd* [1924] AC 783 at 788

9. Likewise, “the facts established by the evidence must be such as to provide a proper objective basis upon which the opinion referred to ...” in the statutory condition “can reasonably be entertained”.<sup>4</sup> A *proper objective basis* again refers to the consistent application of settled principle, without which no factual enquiry can have proper direction and focus.
10. This means that it is misleading to describe claims to a statutory remedy conditioned on a just and equitable ground as ‘discretionary’. Such remedies are discretionary at the final step, but the grounds must always be first identified according to regular rules and principles, and established by evidence according to ordinary rules and principles of fact finding, and then the justice of the claim *evaluated*, before the final stage of determining whether to grant and how to frame relief, in order to best vindicate according to the particular circumstances that claim to justice that has already been evaluated to exist. Doing justice is not discretionary. It is mandatory. Framing the relief that does justice is where reasonable minds may differ and so discretion comes in at that point.
11. It is no accident that the references I have taken from Mr Callaway’s classic work on winding up companies on the just and equitable ground come from chapter 1. This is the starting point. The burden of his work is then to explicate, in the rest of the book, how according to settled principles such grounds may arise and in what circumstances a winding up can be ordered on the just and equitable ground. The work may fairly be summarised as a classic exposition of how a cause of action for winding up a company on the just and equitable ground may arise. The various factors are described and their relationship to legal principle is developed. It is all about identifying a cause of action according to settled principle.
12. In identifying the cause of action, consideration of the statute is not only vital: it is the starting point. It is a truism that satisfaction of a condition that something be “just and equitable” must begin with the terms of the power itself. What is it that the statute confers power to do? What is it that the statute says must be “just and equitable” before that power can be exercised?

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<sup>4</sup> Callaway, p. 4; *Re W A Swan & Sons Ltd* [1962] SASR 310 at 325

13. From that starting point, one turns to consider the purpose for which the power was conferred. Sometimes these objects are expressly stated in the statute. When they are not expressly stated, or not stated exhaustively, “they must be determined by implication from the subject matter, scope and purpose of the Act.”<sup>5</sup>
14. This will generally be a process of construction or inference from the following factors:
- a. The objects that can be gleaned from the terms of the statute, in terms of the mischief that it addresses, and the policies that it discloses in terms of outcomes that the statute is evidently designed to promote.
  - b. The nature and terms of the power itself – the effects that its exercise is capable of having, and the nature of the subject matter or underlying rights to which it is capable of being applied or operative.
  - c. Other conditions prescribed for the exercise of the power.
  - d. Any factors which are prescribed as relevant to consideration of the exercise of the power – not merely for their direct application, but also derivatively, for the insight that they give into the purpose for which the power has been conferred by the legislature upon the decision maker.
15. So, to take the example of winding up companies, the starting point is that unless its Constitution provides otherwise (which I have never seen) members of a company do not have a right to wind up the company at will. Once they subscribe their investment, they are bound to its fortunes, unless they can transfer the shares. The company has a perpetual life of its own, which can only be terminated for cause. Various causes are prescribed in the legislation.<sup>6</sup> Only prescribed classes of people have standing to apply.
16. All these matters inform the starting point. It will therefore not be “just and equitable” to wind up a company just because one member wishes to terminate the association. The starting point is that members became members on the basis that they would have a continuing association in the company for the purposes for which they established it.
17. So, generally, a frustration of the original purpose for which the members established a company, or non-consensual departures from it, will normally be a good basis for a just

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<sup>5</sup> Minister for Aboriginal Affairs v. Peko-Wallsend Ltd (1986) 162 CLR 24 at 40-41 (Mason J).

<sup>6</sup> See, e.g., Corporations Act, 2001 (C’th), ss. 233, 459P, 461

and equitable winding up: because the plaintiff joined up for an agreed purpose, which is being defeated or frustrated – and never agreed to become captive to a quite different form of venture. The plaintiff in such a case (if there is no memorandum or other express objects provision) is asking to be relieved of the corporate contract comprised in the company’s constitution, and for that to be just and equitable, the plaintiff must show that the consensual assumptions or conditions, upon which that contract was entered into have broken down in some way, to such an extent that it is no longer just that he or she be held to the original bargain.

18. There is here a distinct analogy with contractual principles – with concepts of contractual frustration or repudiation. Sometimes the objects are express, and the departure from them is itself a fundamental breach of express terms of the corporate contract – in which case the grounds for winding up emerge more clearly.
19. These matters illustrate the point that the application of the “just and equitable” concept is ambulatory – according to the nature of the subject matter to which it has to be applied.
20. A striking contrast in the effects deriving from a difference of subject matter is to compare the case of the partnership at will. Here there is no contractual obligation or commitment to continue the venture. It is the acknowledged legal right of any partner to terminate the association at will. Thus, in such case a just and equitable winding up is to be had for the asking.
21. Another illustration is the power to wind up life insurance companies. In *Insurance Commissioner v Associated Dominions Assurance Society Pty Ltd* [1953] HCA 94, (1953) 89 CLR 78, Fullagar J had to consider an application to wind up a life insurance company under s. 59 of the *Life Insurance Act, 1945 (C’th)*. His Honour entertained a debate as to the grounds upon which application might be made, observing that that section, conferred,

“the power as a discretionary power, which is not controlled by any express condition ...”

save that the application could only be made by the Commissioner, or by the company itself, and that in the case of the Commissioner, it could only be made if the Commissioner was of opinion that it was necessary and proper to apply, by reason of conclusions arrived at by him as a result of an investigation under s. 55 of the Act.

22. Fullagar J observed that, “the Court could not, of course, entertain an application by the commissioner unless it were satisfied that he had made an investigation under s. 55 and was genuinely of opinion, as a result thereof, that it was necessary or proper to make the application.” For the rest, his Honour said, “s. 59, so far as its express terms go, leaves the discretion of the Court entirely at large,” contrasting it with the familiar provisions of the Companies Acts of the States.
23. His Honour went on to derive from the terms of s. 55 – its grounds for initiating an investigation – derivatively the grounds which may arise for exercising the winding up power under s. 59 in the case of an application by the Commissioner. It is a good illustration of how the statutory context identifies the subject matter to which the “just and equitable” concept then applies. To illustrate how the concepts are applied, it is worth setting out what his Honour said:

“I cannot say that I have felt any serious difficulty as to the general principles which should guide the Court in exercising its discretion under s. 59. With regard to the ultimate discretion, I think the general conception to be applied is that which is inherent in the words “just and equitable” in the Companies Acts. Those words are wide and vague, but they have become very familiar, and they have been judicially considered on many occasions. The Act, however, contemplates that certain matters are to be established before a question of discretion arises. When the application under s. 59 is made by the commissioner, it can only be after he has made an investigation under s. 55, and if he is of opinion that the results of the investigation warrant the making of the application. The grounds which justify the making of an investigation are stated in s. 55, and I have set them out above. They are seven in number. Six of them are specific, and the seventh is of a general nature. What might be included within the seventh need not now be considered. The six which are specific indicate, in my opinion, grounds which may justify the Court in making either a winding-up order or an order for judicial management. It does not follow from the establishment of any one or more of the grounds mentioned that either order should be made. The Court has still to exercise a discretion, and it should, in my opinion, make one or other order if, but not unless, it is satisfied that to do so is

“just and equitable”. It will be just and equitable if to do so appears likely to be in the best interests of all concerned. In saying this, I have it in mind that the prime intention of the Act is to protect policy holders—they, as Mr. Macfarlan said, borrowing from legislation on another subject, should be the “first and paramount consideration”—but I do not regard this as meaning that the interests of shareholders or others are always to be ignored. The grounds which may, under s. 55, support an investigation by the commissioner and an application under s. 59 are intrinsically of varying degrees of seriousness, and the facts of any particular case which falls within any one of them may be of varying degrees of seriousness. If any one of those grounds is established, the making of either of the orders authorized by s. 59 is still a matter of discretion. No rule should, or can, be laid down. The case must depend on all the circumstances. But, so far as grounds (a) and (b) in s. 55 are concerned—and these are the most important for the purposes of the present case—it may be said that, generally speaking, if there appears to be no reasonable prospect of the position being remedied and the company's business being placed in the near future on a sound basis, a winding-up order should be made. If it appears likely to be a case of mere temporary embarrassment, no order should be made. If the position is in doubt, and the Court thinks that, although a serious position is disclosed, further investigation and experiment would be desirable—perhaps that the company ought to be given a chance to see what it can do—then an order for judicial management of the company may well be thought appropriate.

24. It is of interest to note that in the *Life Insurance Act*, s. 59 the phrase “just and equitable” did not appear – and yet was held to be a condition of the exercise of power. Grounds had to be established – those identified derivatively from s. 55 and without them no winding up order could be made. But even if they were established, the Court was not justified in making a winding up order unless it were “just and equitable” to do so, and, if that were established, then the Court “should” do so. This is described as the exercise of a discretionary power, but one can see how the discretion is controlled by principle. It is really an evaluative exercise where the Court is *obliged* to act in a proper case and *unable* to proceed if the “just and equitable” condition is not met.

25. The language of ‘discretion’ has unfortunately become rather loose and the sense in which I have described its use is often lost sight of. At this stage, it might be better to cease using it, and turn to what seems to me to be a more accurate term: *evaluation*, which is not loaded up with the assumed application of *House v. R*, but rather is governed by the principles stated in *Warren v Coombs*.
26. My thesis is that essentially the approach stated above is required in relation to all remedies which are conditioned on finding a just and equitable ground – and not just in company law.
27. Undertaking a search of the phrase “just and equitable” in the various government legislation databases produces a surprisingly large number of hits.
28. One example that has received judicial attention is s. 562A of the *Corporations Act*. In *Amaca Pty Ltd v McGrath & Ors* [2011] NSWSC 90; 82 ACSR 281,<sup>7</sup> Barrett J said:

“67 Section 562A(4) of the Corporations Act must therefore be seen as conferring a discretion that, while wide, can only be exercised judicially in the light of the whole of the circumstances surrounding the relevant subject matter. Lord Wilberforce explained this exercise in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360 at p.379:

‘It [the phrase “just and equitable”] does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way.

“68 In the present context, the relevant ‘legal rights’ are those arising from s 562A(2) or s 562A(3) - broadly speaking, first, the rights of all creditors entitled to participate under the winding up in respect of debts arising from insurance contracts written by the company before winding up to participate, to the exclusion of other creditors, in the enjoyment of reinsurance proceeds received by the liquidator (until either 100 cents in the dollar has been paid on those debts or the proceeds have been exhausted) and, second, the right of each such favoured creditor to participate in that way *pari passu* with each other such favoured creditor. Given the law reform materials to which I have referred (see paragraph [17] and [18] above), it may be inferred that the legislature deliberately rejected any notion of automatic flow-through of reinsurance proceeds to only those creditors with debts arising from the insurances which, as it were, were backed by the particular reinsurance; and that likely difficulties of matching reinsurance contracts held with insurance contracts written played a significant part in the adoption of that course.

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<sup>7</sup> *Amaca* was applied in *Sydney Water Corporation v McGrath* [2014] NSWCA 197, (2014) 101 ACSR 123



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89 ... The power under s 562A(4) is a power to order that s 562A(2) and s 562A(3) 'do not apply to the amount received under the contract of reinsurance' and to cause the amount to be applied in some other way. Such an order displaces the s 562A(2) or s 562A(3) requirement as to payments to be made by the liquidator 'out of the amount received' under the reinsurance contract and imposes some other requirement. Under s 562A(4) itself, the order can only be made if the court forms an opinion that the alternative manner of application of 'the amount received under the contract of reinsurance' is 'just and equitable in the circumstances'.

90 In deciding whether an order affecting a particular 'amount received under the contract of reinsurance' should be made, the court must thus focus on the amount itself, the circumstances prevailing at the time the court is asked to make the order and what, in those circumstances, is 'just and equitable' with respect to the application or disposition of the amount. The inquiry is, of its nature, directed to an existing and established factual situation involving the 'amount received'. A necessary factor in the decision as to what is just and equitable - and an element of the 'circumstances' to be taken into account - may be, in some cases, the quantum of the amount.

91 ... The purpose of s 562A(4) is to allow departure from the s 562A(2) or s 562A(3) regime in respect of a particular sum according to circumstances for the time being prevailing ... ”

29. This is another illustration of the approach of divining the statutory purpose from the terms, context and subject matter of the statute, in this case aided from law reform materials, to identify how the “just and equitable” concept is to be applied to the exercise of the specific statutory power in respect of its identified subject matter and purpose.

30. Another relatively recent case in a different statutory context was *The Concept Developer Pty Ltd v. Conroy* [2015] VSC 464 which considered the meaning of “just and equitable” in s. 33 of the *Subdivision Act, 1988 (Vic)*. That section provided:

**33 How can lot entitlement and liability be altered?**

- (1) If there is a unanimous resolution of the members, the owners corporation may apply to the Registrar in the prescribed form to alter the lot entitlement or lot liability.
- (2) In making any change to the lot entitlement, the owners corporation must have regard to the value of the lot and the proportion that value bears to the total value of the lots affected by the owners corporation.

- (3) In making any change to the lot liability, the owners corporation must consider the amount that it would be just and equitable for the owner of the lot to contribute towards the administrative and general expenses of the owners corporation.

31. The plaintiff in that case drew on the law concerning “just and equitable” winding up of companies<sup>8</sup>, as well as the most famous recent case dealing with the phrase in s. 79 of the *Family Law Act, 1975*, namely the High Court’s decision in *Stanford v Stanford* (2012) 247 CLR 108, [2012] HCA 52.

32. John Dixon J drew the following conclusions:

50 I draw from the authorities that whether a lot liability is just and equitable is not to be determined in accordance with fixed rules. It is a question of fact to be resolved in all of the circumstances in a principled way. The relevant circumstances are revealed by the statutory purposes and text. The owners corporation should begin by identifying the objectives of a lot liability, which is to express the proportion of the administrative and general expenses of the owners corporation that a lot owner is obliged to pay. Therein lies the rights and obligations of the lot owners. The initial focus will be on the nature of the subdivision, the number of lots, the area, layout, and uses of the common property, the existing expenses of the owners corporation and how those expenses are incurred in relation to the use of common property by lot owners and their invitees onto the subdivision. If known, how the proportionate contributions were initially set may be a relevant consideration.

51 The owners corporation should then consider the existing contributions of each lot owner to those expenses by reference to these considerations. The question is whether a lot liability should be altered involves understanding the existing lot obligations. The owners corporation should not start with the assumption that a lot owner’s lot liability is or should be different from that specified in the plan of subdivision.

52 Altering the lot liability then will involve a conclusion that the existing lot liability is not just and equitable when the competing considerations that I have identified are reviewed in the context of the legal obligation of each lot owner to pay a proportion of the owners corporation’s expenses. That legal obligation is identified from the statutory text. As between lot owners, each is required to pay a just and equitable proportion of the administrative and general expenses of the owners corporation.

53 What would be a just and equitable proportion to pay of expenses is an assessment made by reference to the considerations that I identified above (at [50]). The broad discretion that is conferred

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<sup>8</sup> *Re Tivoli Freeholds Ltd* [1972] VR 455, 468

on the owners corporation and on the tribunal where it makes an order requiring the owners corporation to make a change to the lot liability under s 33(3) is a wide discretion but not one to be exercised by administering what the plaintiff described as ‘palm tree justice’. The interests of lot owners are to see that the expenses of the owners corporation are justly and equitably borne by all lot owners and the rights of lot owners are to pay no more than a just and equitable proportion of the expenses. That is the nature of the balancing exercise to be undertaken by a principled consideration and, if done in this way, it would not be amenable to being described as idiosyncratic or ‘palm tree justice’.

33. It is notable that the criterion “just and equitable” appears also in *the Succession Act, 2006 (NSW)* ss. 66(2), 72(2), 115(3), 126, 134(4). These are important, every day provisions. The latter provision is rather special and has received recent consideration. Part 4.4 of the Act provides as follows:

**Part 4.4 Indigenous persons’ estates**

**133 Application for distribution order**

- (1) The personal representative of an Indigenous intestate, or a person claiming to be entitled to share in an intestate estate under the laws, customs, traditions and practices of the Indigenous community or group to which an Indigenous intestate belonged, may apply to the Court for an order for distribution of the intestate estate under this Part.
- (2) An application under this section must be accompanied by a scheme for distribution of the estate in accordance with the laws, customs, traditions and practices of the community or group to which the intestate belonged.
- (3) An application under this section must be made within 12 months of the grant of administration or a longer period allowed by the Court but no application may be made after the intestate estate has been fully distributed.
- (4) After a personal representative makes, or receives notice of, an application under this section, the personal representative must not distribute (or continue with the distribution of) property comprised in the estate until:
  - (a) the application has been determined, or
  - (b) the Court authorises the distribution.

**134 Distribution orders**

- (1) The Court may, on an application under this Part, order that the intestate estate, or part of the intestate estate, be distributed in accordance with the terms of the order.
- (2) An order under this Part may require a person to whom property was distributed before the date of the application to return the property to the personal representative for distribution in accordance with the terms of the order (but no distribution that has been, or is to be, used for the maintenance, education or advancement in life of a person who was totally or partially dependent on the intestate immediately before the intestate’s death can be disturbed).

Note. For example, a distribution may have been made under section 92A of the Probate and Administration Act 1898 or section 94 of this Act.

(3) In formulating an order under this Part, the Court must have regard to:

- (a) the scheme for distribution submitted by the applicant, and
- (b) the laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged.

(4) The Court may not, however, make an order under this Part unless satisfied that the terms of the order are, in all the circumstances, just and equitable.

**135 Effect of distribution order under this Part**

A distribution order under this Part operates (subject to its terms) to the exclusion of all other provisions of this Act governing the distribution of the intestate estate.

34. These provisions were first considered by Lindsay J in *Re Estate Wilson Deceased* [2017] NSWSC 1; (2016) 93 NSWLR 119. Kunc J considered a subsequent application in *The Estate of Mark Edward Tighe* [2018] NSWSC 163. At [27]-[29], [58]-[65] his Honour said:

27. *Tenth*, why should the Court be satisfied that the terms of the proposed distribution order are, in all the circumstances, just and equitable? The Court must be positively satisfied of that matter before it can make an order. Lindsay J considers this requirement in *Wilson* at [135]–[136]. The scope of matters to be taken into account is obviously broad but must, by reason of ss 134(3) and 135, include the proposed scheme for distribution, the relevant Customary Law and what the outcome would be under the Act in the absence of an order under Part 4.4.

28. In my respectful opinion assistance in understanding the application of s 134(4) may be derived from the judgment of the plurality in *Stanford v Stanford* [2012] HCA 52; (2012) 247 CLR 108 (“*Stanford*”) at [35] and following. That case considered the property settlement provisions of the Family Law Act 1975 (Cth), in particular s 79(2) that “[t]he court shall not make an order under this section [for the alteration of property interests] unless it is satisfied that, in all the circumstances, it is just and equitable to make the order”.

29. *Eleventh*, should an order be made in the exercise of the Court’s discretion under s 134(1)? It is not necessary for me to express any view, and I refrain from doing so, as to whether, on the proper construction of the Act, the Court retains a discretion not to make an order under s 134(1) even when it is satisfied under s 134(4) that the order is, in all the circumstances, just and equitable. The possibility that there may one day be a case where that point is more than just academic cannot be completely excluded, for example where an outcome supported by the applicable Customary Law may arguably be contrary to some other aspect of public policy.

... ..

**Is the Court satisfied that the terms of the proposed order are, in all the circumstances, just and equitable?**

58. The analysis must begin with Lindsay J’s observation in *Wilson* at [136] that the language of s 134(4) “is a classic means of invoking jurisdiction essentially equitable in character”. In addition, drawing on and paraphrasing the plurality’s consideration of a provision similar to s 134(4) of the Act in *Stanford* (see paragraph [28] above), I approach this question acknowledging that the expression “just and equitable” is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definition. It is not possible to chart its metes and bounds. Nevertheless, while it is not to be exercised in accordance with fixed rules, at least three consequences flow from the Act itself, in particular ss 134(3) and s 135.

59. Those consequences are, first, that the Court must consider the scheme for distribution itself; the laws, customs, traditions and practices of the Indigenous community or group to which the intestate belonged; how the estate would be distributed under the Act but for Part 4.4; and all other circumstances which the Court considers relevant. Second, while s 134(1) confers a broad power on the Court to make a distribution order, it is not a power that is to be exercised according to an unguided judicial discretion. It must be exercised rationally in accordance with legal principles, including those which the Act itself lays down, and for the purpose for which it was intended. In the present case the Court should, therefore, not start with the assumption that the Estate should be dealt with differently from how it would be dealt with under the general provisions of the Act to the extent they apply. Third, nor should the Court start with the proposition that the applicant has a right to the distribution order insofar as it has been established that the order is in accordance with the relevant Customary Law.

60. Bearing in mind the matters referred to in paragraphs [58] and [59] above, the Court is well satisfied that, in this case, it is just and equitable for an order to be made that the Estate be paid to Mr Campbell. The distribution scheme and the Kamilaroi Customary Law unequivocally support that outcome. Furthermore, but for an application under s 137 of the Act, the Estate would pass to the State pursuant to s 136 of the Act. That would be an unjust and inequitable result in the face of what is, quite apart from the situation under the Kamilaroi Customary Law, an overwhelming familial and moral claim to the Estate by Mr Campbell based upon his and Mr Tighe’s, in effect, lifelong relationship as brothers. To this must be added the fact that there is no one else with a legal, customary or moral claim to the Estate.

61. For the foregoing reasons, the Court is well satisfied that an order for the distribution of the Estate to Mr Campbell is, in all the circumstances, just and equitable for the purposes of s 134(4) of the Act.

**Should an order be made in the exercise of the Court's discretion under s 134(1)?**

62. Having regard to all of the circumstances recited in these reasons, and conscious of the absence of a contradictor, I am nevertheless unable to conceive of any reason why an order for distribution in accordance with the scheme of distribution set out in paragraph [54] above should not be made once the impediment posed by s 134(4) has been overcome.

63. For this final point of the analysis it is, with respect, useful to recall the way in which the ultimate question was posed by Lindsay J in Wilson:

“[173] The ultimate question for the Court under section 134, in the current proceedings, is, essentially: Had the deceased (a person without dependants) been required to make a will disposing of his estate, what are the terms of the will he would have made having regard to the interests of any person who had a just or moral claim on him, and the interests of those for whom he might reasonably be expected to have made provision, paying due regard, in all the circumstances, to what would be just and equitable?”

64. For the reasons set out in paragraph [60] above, and supported by the fact that the only evidence of Mr Tighe's testamentary intention (see paragraph [48(5)] above) also firmly points to Mr Campbell, the Court answers the question posed by Lindsay J in the circumstances of this case by concluding that Mr Tighe would have made a will leaving his estate to Mr Campbell. The Court will exercise its discretion under s 134(1) by making an order that the Estate be distributed by payment to Mr Campbell.

**Conclusion**

65. The orders of the Court are:

- (1) Order, pursuant to s 134 of the Succession Act 2006 (NSW), that the estate of Mark Edward Tighe, late of Walhallow, who died at Quirindi on 15 February 2015, be distributed by payment to Kori Alex Campbell.
- (2) Order that letters of administration of the estate of the deceased be granted to Kori Alex Campbell.
- (3) Order that the proceedings be referred to the Registrar for completion of the grant.
- (4) Order that the grant issue forthwith.

- (5) Order that any requirement for further compliance with the Probate rules, and any requirement for an administration bond, be dispensed with.

35. The influence of *Stanford*<sup>9</sup> in these decisions is again notable. In that case the High Court<sup>10</sup> rejected the Appellant's contention limiting the scope of the s. 79(1) power as a matter of construction, but then turned to the second contention – that it had not been shown that the order made satisfied the “just and equitable” condition in s. 79(2) of the *Family Law Act, 1975 (C'th)*.
36. It is important to note that the process of reasoning then developed began with the construction of the *Family Law Act*, and that *that* began with consideration of jurisdiction: what is the Court's jurisdiction? What power is it exercising? What is its purpose? What are the conditions?
37. The vital point that the jurisdiction to adjust property must arise from a *matrimonial cause* is the starting point. This informs the application of the concept “just and equitable” as used in s. 79(2). They must be proceedings ‘arising out of the matrimonial relationship’. This brings in the point that the jurisdiction is not one to take away property rights just because there is an inequality. There must be some fact or circumstance arising out of the marriage which is the ground or hook for the claim.
38. The conjunction of this jurisdictional requirement with the decision to make any order at all, and if so, *what order to make*, being conditioned on the order being just and equitable must mean, in my view, that the essential elements of the cause of action include, at least,
- a. Some fact or circumstance arising out of the matrimonial relationship;
  - b. That makes it unjust and inequitable that the Respondent should retain some identified part (or in theory conceivably the whole) of his or her property;
  - c. So that it is just and equitable that an adjustment order be made to take away some part of that property and re-direct it in one or other of the ways permitted by s. 79(1).

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<sup>9</sup> *Stanford v Stanford* [2012] HCA 52; (2012) 247 CLR 108

<sup>10</sup> At 115

39. The High Court next referred to spousal maintenance provisions in the statute. As they were not central to the case as argued, the Court put them to one side, but noted, that “it is important to keep these maintenance provisions in mind when considering the property settlement provisions on which argument in this Court focused.”
40. That observation supports the point that the policy of the statute is an important source for understanding what the phrase “just and equitable” means in the context in which it is used. In my opinion it is relevant to consider what is just and equitable for the purpose of s. 79 that a policy restrictive of spousal maintenance is disclosed in Pt. VIII of the Act. That means that it will not be just and equitable to use s. 79 as a back door to circumvent the restrictions imposed by the legislature – spousal maintenance disguised as a property adjustment.
41. In respect of s. 79(2) the Court described its relationship with s. 79(4). Section 79(2) prescribes a condition of exercise of the property adjustment power. Section 79(4) prescribes matters that must be taken into account in considering what, if any, order should be made. I observe that s. 79(4) does not prescribe elements of a cause of action. It prescribes relevant considerations (stated inclusively) which inform the nature and purpose of the power, as do other provisions of the statute also.
42. Of the “just and equitable” concept, the High Court said, at [36],
36. The expression “just and equitable” is a qualitative description of a conclusion reached after examination of a range of potentially competing considerations. It does not admit of exhaustive definition (23). It is not possible to chart its metes and bounds. And while the power given by s 79 is not “to be exercised in accordance with fixed rules” (24), nevertheless, three fundamental propositions must not be obscured.
43. The first point was that the starting point is private property:
37. First, it is necessary to begin consideration of whether it is just and equitable to make a property settlement order by identifying, according to ordinary common law and equitable principles, the existing legal and equitable interests of the parties in the property. So much follows from the text of s 79(1)(a) itself, which refers to “altering the interests of the parties to the marriage in the property” (emphasis added). The question posed by s 79(2) is thus whether, having regard to those existing interests, the court is satisfied that it is just and equitable to make a property settlement order.



44. This second point was a reiteration that the power must be exercised according to law and not upon judicial discretion.<sup>11</sup> The High Court warned once again against sitting under the palm tree.
45. The first point resurfaced in the observation at [39] that “s. 79 must be applied keeping in mind that ‘community of ownership arising from marriage has no place in the common law’.” This led also into the third point at [40] that private property is not lightly to be taken away. It is only to be taken away for just cause – where it is “just and equitable” to do so, based on some claim of justice according to the principled application of recognised juridical concepts.
46. At [39] it was also stated that the starting point is *not* to be an assumption that there should be an alteration. The starting point is private property, and the need for an Applicant to demonstrate a just claim to alter those rights. There is no automatic right to a division or settlement.
47. Paragraph [41] is a very significant passage because of the emphasis it places on the parties’ own arrangements and assumptions. It began by noticing the statutory provisions for binding financial agreements which can exclude jurisdiction under s. 79. It then moves to make the point that if there is no such binding agreement, still the parties’ common assumptions and arrangements are important considerations for the application of s. 79. The Court stated that the principles it was explaining, recognise,
- “ ... the force of the stated and unstated assumptions between the parties to a marriage that the arrangement of property interests, whatever they are, is sufficient for the purposes of that husband and wife during the continuance of their marriage. The fundamental propositions that have been identified require that a court have a principled reason for interfering with the existing legal and equitable interests of the parties to the marriage and whatever may have been their stated or unstated assumptions and agreements about property interests during the continuance of the marriage.”
48. This approach bears a striking resemblance to the approach applied for many years in relation to the just and equitable ground for winding up companies. The disappointment of consensual understandings as to the basis of association, with consequent significant prejudice to one party’s financial position is the type of thing

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<sup>11</sup> At [38]

that can found a claim by a shareholder to wind up the company on the just and equitable ground.

49. This kind of analysis brings in scope for a range of conceivable grounds involving concepts such as consensual assumptions, reliance, detrimental loss of opportunity, the unilateral exploitation by one party of property to which the other was entitled, or the self-interested taking of opportunities made available by the other party, on a basis not contemplated at the time it was made available. The categories are not closed, but the common thread is that there be some principled basis for asserting a just claim which goes beyond the mere fact that there was a marriage and that the Respondent has assets. There needs to be a just reason to disturb that ownership.
50. Paragraph [42] of the Reasons continues to develop along similar lines, but brings into play the relevance which the *termination* of common habitation and common *use* of property can have, in its relationship with the parties' hitherto consensual arrangements and understandings. This again, bears some similarity with situations and problems which often arise where shareholders fall into dispute and deadlock.
51. However, at par. [43] it was pointed out that the bare fact of an involuntary separation (as happened in *Stanford*) "does not permit a court to disregard the rights and interests of the parties in their respective property and to make whatever order may seem to it to be fair and just." This is a critical point. "Just and equitable" is not in the subjective eye of the judge. It is not a discretionary judgment. It is an evaluation according to legal principle and the facts and circumstances: see at [38]: "it rests upon the law and not upon judicial discretion".
52. It seems to me that a number of features of the Act should be borne in mind as needing further thought as a result of this approach. That is because the policy of the Act must guide the understanding of what is contemplated as "just and equitable".
53. First, divorce is permitted. Loss of consortium is not a proper basis for asserting a "just and equitable" claim.
54. Second, is the policy of finality disclosed in s.81. People are to be allowed to get divorced and get on with the rest of their lives. They are not to be held in limbo. It is not a just claim to seek to capitalise the other party's future and expropriate it to

the benefit of an Applicant who is not going to share that future with the Respondent. This it seems to me has relevance to contentions that a party's future earning capacity is relevant. It seems to me that it is generally not a legitimate ingredient of a claim. It may be relevant defensively or in some particular way, but the bare fact of a superior earning capacity does not make it a just subject for a claim.

55. Thirdly, in the factors prescribed as relevant in s. 79(4) it is to be noted that consideration of those matters is *mandatory* not discretionary. The statute says they *must* be considered, although it does not exclude consideration of other relevant factors.
56. To this there is the important qualification in s. 79(4)(e), that the factors prescribed in s. 75(2) must be considered 'so far as they are relevant'. This means that, unlike the other prescribed factors, s. 75(2) factors are not made relevant by force of s. 79(4). Their relevance must appear *otherwise*, by the process described by Mason J in *Peko-Wallsend*.
57. Fourth, the factors which are to receive mandatory consideration are to receive real consideration and weight. They cannot be cancelled out by formulaic resort to some supposedly countervailing factor which is not properly and factually evaluated. To do that is to disobey the statutory injunction to consider the prescribed factors.
58. Fifth, giving real consideration to the prescribed factors means that *each* must be evaluated on its *own* merits and one cannot simply say that one cancels out the other without undertaking a proper legal and factual evaluation.
59. The importance of these steps receives emphasis from the mandatory structure of s. 79(4) and their role, along with other provisions, in forming the context for understanding what is just and equitable for the purpose of s. 79(2), which is itself a mandatory condition.
60. Next, it is a necessary conclusion arising from *Stanford* that the old approach of using s. 79(2) as a check at the end of a four stage process is not the correct approach. Section 79(2) is central to evaluation of any adjustment claim, from beginning to end. It is central to the conception of the Applicant's cause of action and the Respondent's defences.

61. Finally, the renewed emphasis on the role of s. 79(2) and on the need to demonstrate a principled basis for any claim, or special defence, must have considerable consequences for practice and procedure. Procedural fairness must entitle parties to know with reasonable clarity from an early stage of the proceedings, how the claims and defences are formulated.
62. In *Banque Commerciale SA en liquidation v. Akhil Holdings Ltd* (1990) 169 CLR 279 at 285 Mason J said that, ‘the variety of matters which may constitute fraud ... effectively deprives a party who may or may not have acted fraudulently from ascertaining precisely what must be negated,’ as underlying the rule of practice that, ‘fraud must be pleaded specifically and with particularity’.
63. Likewise it may be said that the variety of matters which may constitute grounds for a just and equitable adjustment of property rights deprives a party charged with such a claim from ascertaining precisely what must be negated. If such proceedings are to have any claim to be a just administration of the law, then claims ought be required to be properly articulated, from an early stage.
64. This has already been the law for many years in company oppression suits. In *Shelton v National Roads and Motorists Association Ltd* [2004] FCA 1393 Tamberlin J struck out a statement of claim in an oppression suit and said:

26 In the present case, however, the ASOC does not draw any distinction between the two grounds, and a substantial number of allegations combine the two criteria without laying the ground for each of these separate bases which can give rise to orders under s 233. The ASOC does not refer to ss 232 or 233 of the Corporations Act in terms or by reference but at times it does use in a rolled-up the language of s 232. It does not specify how the extensive relief sought, presumably under s 233, will have the effect of remedying the conduct complained of or the consequences of that conduct. This is largely a result of the fact that the pleading does not delineate the way in which the conduct is unfairly prejudicial, oppressive or discriminatory, nor how the NRMA, in the conduct of its affairs, has impacted detrimentally upon the organisation and its members. There is a leap from the reference to a alleged irregularities to the allegation that in some unspecified way it is “just and equitable” that the constitution of 2003 should be set aside or dramatically modified, and the previous constitution re-instated. The remedies provide for in s 233 are designed to alleviate or remove the adverse consequences of conduct carried out in contravention of s 232, but the ASOC is silent as to how this is to be achieved if the applicant is successful. Even if it were to be established that one or more acts of the NRMA, the Board, or “majority” shareholders were to contravene s 232, it does not necessarily follow that the relief sought should or would be granted under s 233.

65. The oppression remedy is closely related to the just and equitable winding up ground. If anything, it more closely resembles the powers in s. 79 in that the oppression remedy it is designed to confer a very broad power to remedy oppression, just as s. 79 confers a very broad power to adjust property interests, to remedy injustice on matrimonial separation.
66. The observations of Tamberlin J have the same cogency for s. 79. No orders can be just, if the procedures are unjust.