Supreme Court
New South Wales

Case Title:	Mohamed v Mohamed
Medium Neutral Citation:	[2012] NSWSC 852
Hearing Date(s):	29/05/2012
Decision Date:	31 July 2012
Jurisdiction:	Common Law
Before:	Harrison AsJ
Decision:	(1) The appeal is dismissed. (2) The application for judicial review fails. (3) The amended summons filed 3 May 2011 is dismissed. (4) The plaintiff is to pay the defendant's costs as agreed or assessed.
Catchwords:	APPEAL FROM LOCAL COURT - Magistrate upheld contract between plaintiff and defendant - plaintiff and defendant had been married under Islamic law but not under Australian Law - contract contained clause whereby plaintiff was to pay defendant $50,000 in the event the plaintiff initiated "separation and/or divorce" - Magistrate found contract enforceable - whether error of law - whether jurisdictional error - whether contract against public policy - appeal dismissed
Legislation Cited:	Civil Procedure Act 2005 Family Provision Act 1982 Family Law Act 1975 (Cth) Local Court Act 2007 Property (Relationships) Act 1984 Supreme Court Act 1970
Cases Cited:	A v Hayden [1984] HCA 67; (1984) 156 CLR 532 Akileh v Elchahal 666 So 2d 246 (1996) Aziz v Al-Masri (2011) 2011 BCSC 985 Aziz v Aziz 127 Misc 2d 1013; 488 NYS 2d 123 (1985) Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das [2012] NSWCA 164 Cattanach v Melchior [2003] HCA 38; (2003) 215 CLR 1 Clair v Munce [2007] NSWSC 419 Codelfa Construction Pty Ltd v State Rail Authority (New South Wales) [1982] HCA 24; (1982) 149 CLR

	337 Dare v Pulham [1982] HCA 70; (1982) 148 CLR 658 Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd [1915] AC 79 Durham v Durham [2011] NSWCA 62 Edwards v Harris [2012] NSWSC 1 Ford v Henry [2009] NSWSC 147 Granatino v Radmacher [2010] UKSC 42; [2011] 1 AC 534 Haque v Haque [1962] HCA 39; (1962) 108 CLR 230 Husain v Hasan (1937) 65 IA 119; (1938) 40 BOMLR 735 Kaddoura v Hammoud [1988] OJ No 5054 Khanis v Noormohamed [2009] OJ No 2245 Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales [2010] HCA 1; (2010) 239 CLR 531 Kostas v HIA Insurance Services Pty Ltd [2010] HCA 32; (2010) 241 CLR 390 M (NM) v M (NS) [2004] BCLR (4th) 80 Mahony v Industrial Registrar of New South Wales (1986) 8 NSWLR 1 Bruker v Marcovitz [2007] 3 SCR 607 Martin v Kelly [2008] NSWSC 577 Marando v Rizzo [2012] NSWSC 739 Moss v Moss [1912] HCA 90; (1912) 15 CLR 538 Nasin v Nasin (2008) 2008 ABQB 219 Nathoo v Nathoo [1996] BCJ No 2720 O'Sullivan Partners (Advisory) Pty Ltd v Foggo [2012] NSWCA 40 Odatalla v Odatalla 810 A 2d 93 (2002) Shahnaz v Rizwan [1965] 1 QB 390 Swain v Waverley Municipal Council [2005] HCA 4; (2005) 220 CLR 517 Water Board v Moustakas [1988] HCA 12; (1988) 180 CLR 491 Wilkinson v Osborne [1915] HCA 92; (1915) 21 CLR 89
Texts Cited:	Ann Black and Kerrie Sadiq, "Good and Bad Sharia: Australia's Mixed Response to Islamic Law" (2011) 17 UNSW Law Journal 82 Encyclopaedic Australian Legal Dictionary
Category:	Principal judgment
Parties:	Mostafa Mohamed (Plaintiff) Neima Mohamed (First Defendant) Magistrate Trad (Second Defendant)
Representation	
- Counsel:	J Cohen (Plaintiff) P Lange (First Defendant)
- Solicitors:	Elliot Lawyers (Plaintiff) Farah Lawyers (First Defendant)
File number(s):	2010/332875

Decision Under Appeal

- Court / Tribunal:
- Before: Trad LCM
- Date of Decision: 10 September 2010
- Citation:
- Court File Number(s) 2009/380

Publication Restriction:

JUDGMENT

Introduction

1 **HER HONOUR:** On 3 May 2011, Mostafa Mohamed filed an amended summons in this Court seeking: first, leave to appeal from the whole of the decision of her Honour Magistrate Trad dated 10 September 2010; secondly, that the appeal be allowed; thirdly, that the judgment of the court below be set aside; fourthly, that the first defendant's claim against the plaintiff be dismissed; fifthly, that the matter be remitted to the Local Court; and sixthly, in the alternative, a writ of certiorari bringing the decision into this court to be quashed.

The Local Court proceedings

2 The plaintiff is Mostafa Mohamed ("Mostafa"), who was the defendant in the Local Court proceedings. The first defendant is Neima Mohamed ("Neima"), who was the plaintiff in the Local Court proceedings. The second defendant is her Honour Magistrate Trad. I shall, for convenience, refer to the parties by their first name.

3 In the Local Court on 10 July 2009, by way of statement of claim, Neima claimed payment of the sum of $50,000. These proceedings were initiated to enforce the terms of a pre-nuptial financial agreement ("the agreement"), made between Mostafa and Neima Mohamed. Clause 11 of the agreement stated that Mostafa was to pay Neima a "Moackar Sadak" (also known as a type of dowry) of $50,000 in the event that Mostafa initiated "separation and/or divorce".

4 The pleading contained in Neima's statement of claim is brief. It states:

"The plaintiff relies on the following facts and assertions:

1. On 4 April 2004, the Plaintiff and the Defendant were married.

2. On 28 February 2005, the Plaintiff and the Defendant executed a pre-nuptial financial agreement. This agreement regulates the financial affairs of the parties during and after marriage.

3. This agreement states that the Defendant should pay $50,000.00 if he initiated any separation or divorce proceedings.

Particulars

(a) Signed pre-nuptial agreement dated 28 February 2005.

4. On 11 September 2008, the Defendant Islamically divorced the Plaintiff."

5 In response, the pleading in defence by Mostafa is also brief. It states:

"1 Paragraph 1 is denied.

2 Paragraph 2 is not admitted.

3 Paragraph 3 is not admitted.

4 Paragraph 4 is denied.

5 The Defendant states he is not indebted as alleged. Any separation was initiated by the Plaintiff.

Particulars

In the first week of Ramadan 2008 the Plaintiff told the Defendant the relationship was ended and took his key from him to her premises."

Proceedings in the Local Court

6 On 11 September 2009, the Local Court referred the claim to arbitration pursuant to s 38 of the *Civil Procedure Act* 2005. On 1 December 2009, following arbitration, Mostafa filed a notice of motion seeking a rehearing. The motion was granted on the terms that the rehearing be limited to two factual issues in dispute: first, which party initiated the separation and/or divorce, and second, when did the separation and/or divorce occur. All witnesses were to give evidence in chief by way of affidavit.

7 On 20 August 2010, the Local Court hearing before her Honour Magistrate Trad took place. At the hearing, Mohamed denied that he had been married under Islamic law with Neima (10/9/10, T76). Without deciding that question, the Magistrate found that the parties had been in a "domestic relationship" (T99). The parties heavily disputed who initiated the separation and on which date this occurred. Mostafa claimed that Neima initiated separation on 11 September 2008 by taking his key for the home in which they

had both been living. Neima claimed that Mostafa initiated separation and relied on two instances: first, on 11 April 2007 when Mostafa had asked her to leave their home, and secondly, in the alternative, on 11 September 2008 when Mostafa Islamically divorced her.

8 In relation to the two factual issues in dispute, her Honour found that Mostafa initiated the separation on 11 April 2007 when he asked Neima to leave the home in which they had both been living, "following up this request with an emissary in the form of his daughter who told her to leave within a specified time frame and gave her directions as to the division of their property".

9 Her Honour made a finding that these events triggered Clause 11 of the agreement. The Magistrate entered judgment in favour of Neima in the sum of $50,000 and ordered Mostafa to pay Neima's costs on an indemnity basis.

The appeal and judicial review

10 Section 39 of the *Local Court Act* 2007 provides that a party who is dissatisfied with a judgment or order of the Local Court may appeal to the Supreme Court, but only on a question of law.

11 Section 40(1) of the *Local Court Act* provides that a party who is dissatisfied with a judgment or order of the Local Court may appeal to the Supreme Court on a ground that involves a question of mixed law and fact, but only by leave of the Supreme Court. Section 40(2) relevantly provides that a party who is dissatisfied with an interlocutory judgment of the Local Court may appeal to the Supreme Court, but only by leave of the Supreme Court.

12 Section 41 of the *Local Court Act* provides that this Court may determine an appeal by either (a) varying the terms of the judgment or order, or (b) setting aside the judgment or order, or (c) setting aside the judgment or order and remitting the matter to the Local Court for determination in accordance with the Supreme Court's directions, or (d) dismissing the appeal.

13 In *Swain v Waverley Municipal Council* [2005] HCA 4; (2005) 220 CLR 517, Gleeson CJ at [2] reiterated that in the common law system of civil justice, the trial process determines the issues between the parties. The system does not regard the trial as merely the first round in a contest destined to work its way through the judicial hierarchy until the litigants have exhausted either their resources or their possibilities of further appeal.

14 So far as the jurisdictional issues are concerned, Mostafa can rely on s 69 of the *Supreme Court Act* 1970. Section 69 provides that this Court has jurisdiction to grant any relief or remedy in the nature of a writ of certiorari, which includes jurisdiction to quash the ultimate determination of a court or tribunal in any proceedings if that determination has been made on the basis of an error of law that appears on the face of the record of the proceedings (s 69(3)). The face of the record includes the reasons expressed by the court or tribunal for its ultimate determination (s 69(4)).

15 In *Martin v Kelly* [2008] NSWSC 577 Johnson J discussed the confines of judicial review and said at [17]:

> "Relief in the nature of certiorari is not an appellate procedure enabling either a general review of the order or decision, or substitution of the order or decision which the Supreme Court thinks should have been made. Relief enables the quashing of the impugned order or decision upon one or more of a number of distinct established grounds - jurisdictional error, denial of procedural fairness, fraud and error of law on the face of the record: *Craig v South Australia* (1994-1995) 184 CLR 163 at 175-176."

16 See also *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales* [2010] HCA 1; (2010) 239 CLR 531 in which the High Court discussed the concept of error of law on the face of the record at [78]-[89].

Grounds of appeal

17 The way this appeal was conducted by the plaintiff's counsel was rather like a moving feast. Some appeal grounds are not addressed in the plaintiff's written submissions. Some of his oral submissions dealt with matters not raised before or contradicted matters raised in the grounds of appeal or written submissions.

18 Mostafa appeals from the whole of the decision of her Honour Magistrate Trad dated 10 September 2010. The grounds of appeal are as follows: first, that the Magistrate made errors of fact and law; secondly, that the decision of the lower court was affected by jurisdictional error; thirdly, that the Magistrate erred in not finding that the agreement was not properly executed in accordance with the law; fourthly, that the Magistrate erred in not finding that the agreement was unenforceable because it was against public policy; and fifthly, that the Magistrate erred in not finding that the relevant separation did not have to be in accordance with Sharia Law, as particularised by the statement of claim.

The agreement

19 It is necessary to refer to the relevant parts of the written agreement dated 28 February 2005. The first partner is identified as Mostafa Mohamed and the second partner is identified as Neima Mohamed.

20 The relevant parts of the agreement are reproduced below:

> "A. [1st Partner] born ... and [2nd Partner] born ... have been living in a relationship blessed by Islamic Sharia within the meaning of the Property Relationships Act 1984 (NSW) continuously for approximately the last seven (7) months.
>
> B. The parties intend to marry under Australia Law in future date and wish to enter into a financial agreement before marriage to preclude claims of any nature relating to financial matters that either party has or may have against the other pursuant to:
>
> (a) the Property Relationships Act 1984 (NSW)
> (b) the Family Law Act 1975 (Cth); and
> (c) the Family Provision Act 1982 (NSW)
>
> in the event that the relationship ends, the parties separate after the date of marriage or one of the parties dies.
>
> C. This deed relates to all property and financial resources of either of the parties and relates to spouse maintenance of [2nd Partner] both during and after the relationship or marriage. It is an agreement pursuant to s 90B of the Family Law Act.
>
> ...
>
> H. Before executing this agreement, each party has regard to the possibility that one or both of them may be subject to the change of circumstances inclusive of any of the following:
>
> (a) Separation;
> (b) Divorce;
> (c) Reconciliation;
> (d) The birth of a child or children;
> (e) Serious illness or injury;
> (f) Death;
> (g) The loss of any or all of the assets listed in the schedules attached to this agreement;
> (h) Significant increases or decrease in the value of the assets referred to in the schedule attached to this agreement..."

21 Clauses 11 and 12 read:

> "11. In the event that the [1st Partner] initiates separation and/or divorce, [1st Partner] is to pay [2nd Partner] the sum of fifty thousand ($50,000) dollars ('Moackar Sadak' also known as 'Dowry').
>
> 12. Moackar Sadak is not payable to the [2nd Partner] if she initiated the separation or divorce or if both parties mutually agree to separation or jointly applied for divorce."

22 Both parties attached schedules of their assets, signed the agreement and had it witnessed. A certificate was given by Neima's solicitor stating that he had given her independent legal advice as to:

> "1. The effect of the agreement on the rights of the parties to apply an order under Pt VIII of the *Family Law Act* 1975;
>
> 2. Whether or not at the time it was to the advantage, financially or otherwise of my client to enter into the agreement.
>
> 3. Whether or not at the time it was prudent for my client to enter into the agreement.
>
> 4. Whether or not at the time and the light of such circumstances as they were at the time reasonably foreseeable, the provisions of the agreement were fair and reasonable."

23 Mohamed gave evidence in the Local Court that his solicitor had explained the agreement to him and a certificate to that effect was tendered.

Whether the contract was against public policy (appeal ground 4)

24 I shall commence consideration of the grounds of appeal with ground 4, it being the broader ground of appeal.

25 The plaintiff submitted that her Honour erred in not finding that the agreement was unenforceable because it was against public policy, in that it was in effect an agreement of servitude. The plaintiff said that the effect of clause 11, and the requirement contained therein that he pay her $50,000 if he initiated separation and/or divorce, was to compel Mostafa to remain in a relationship with Neima. The plaintiff also submitted that it was against public policy for a court to determine which party had left a relationship. Finally, the plaintiff argued that clause 11 was a penalty clause, and was therefore void for illegality.

26 To support this ground of appeal, the plaintiff referred to *Cattanach v Melchior* [2003] HCA 38; (2003) 215 CLR 1 in their written submissions. It was not explained how this case relates to the present case. In my view, this case does not offer support for the plaintiff's case that the agreement is against public policy. Quite the contrary. In *Cattanach v Melchior*, Hayne J observed at [235]:

> "In the case of contract, it is well accepted that the law will seek to give effect to bargains that are struck between those of full age and capacity. To refuse to enforce a particular bargain on the grounds of public policy trenches upon the general policy favouring the enforceability of bargains."

27 The plaintiff also referred to *Wilkinson v Osborne* [1915] HCA 92; (1915) 21 CLR 89 at 96 and *A v Hayden* [1984] HCA 67; (1984) 156 CLR 532. In *Wilkinson*, Isaacs J stated at 96-97:

> "... It is not easy to collect or to reconcile all the observations on the subject of "public policy." But the judgment of Lord Halsbury LC, in *Janson v Driefontein Mines Ltd*, (1902) AC 484 at pp 490 and following, makes it clear that a court has not a roving commission to declare contracts bad as being against public policy according to its own conception of what is expedient for or would be beneficial or conducive to the welfare of the State. A court, says the Lord Chancellor, cannot invent a new head of public policy, and he enumerates some instances of undoubtedly unlawful things. Then, says the learned Lord at p 492 -
>
> It is because these things have been either enacted or assumed to be by the common law unlawful, and not because a Judge or court have a right to declare that such and such things are in his or their view contrary to public policy. Of course, in the application of the principles here insisted on, it is inevitable that the particular case must be decided by a Judge; he must find the facts, and he must decide whether the facts so found do or do not come within the principles which I have endeavoured to describe - that is, a principle of public policy, recognised by the law, which the suggested contract is infringing, or is supposed to infringe.
>
> He quotes with approval the words of Parke, B., in *Egerton v Brownlow*, 4 HLC at p 123, to the same effect. And this confirms my own reading of that case that the House did not necessarily reject all the fundamental principles enunciated by the majority of the Judges. In *Janson's Case*, (1902) AC at pp 504-5, Lord Robertson adopts the same reasoning and the general tenor of the judgments of Lord Macnaghten and Lord Lindley is confirmatory of the same view. In my opinion, the "public policy" which a court is entitled to apply as a test of validity to a contract, is in relation to some definite and governing principle which the community as a whole has already adopted, either formally by law or tacitly by its general course of corporate life, and which the Courts of the country can therefore recognise and enforce. The court is not a legislator, it cannot initiate the principle; it can only state or formulate it if it already exists.
>
> The rule of law as to contracts against public policy is constant, namely, that every bargain contrary to such a social governing principle is regarded as prejudicial to the State, or in other words, contrary to "public policy," or, as it is sometimes called, "policy of the law," and the State by its tribunals refuses to enforce it. ..."

28 Counsel for Neima referred to *Granatino v Radmacher* [2010] UKSC 42; [2011] 1 AC 534 in which the UK Supreme Court held that although it was the court and not any prior agreement between the parties which would determine the appropriate ancillary relief when a marriage came to an end, the rule that agreements providing for the future separation of the parties to a marriage was contrary to public policy was obsolete and no longer applied. The Court held, consequently, that it should give weight to an agreement made between a couple prior to, and in contemplation of, their marriage as to the manner in which their financial affairs should be regulated in the event of their separation in circumstances where it was fair to do so and that, in appropriate circumstances, the Court

could hold the parties to the agreement even when the result would be different from that which the Court would otherwise have ordered. This case supports the view that the present agreement is not contrary to public policy and is not an agreement of servitude.

29 The issue of the enforceability of agreements relating to the payment of "Moackar Sadak" is of some importance within our community and has recently been the subject of debate and discussion. See generally Ann Black and Kerrie Sadiq, "Good and Bad Sharia: Australia's Mixed Response to Islamic Law" (2011) 17 *UNSW Law Journal* 82.

30 Neither counsel was able to find any cases in Australia as to what law is generally applied to this type of contract. Hence, it may be instructive to consider how other common law countries have approached Moackar Sadak agreements.

31 *Mahr* is a required component of a valid Islamic contract of marriage, as it specifies the payment a wife will receive as a nuptial gift from her husband, which will be prompt (paid at the time of the marriage), or deferred (paid at the dissolution of the marriage by death or divorce), or a combination of both. It is a payment designed to provide for a wife when she is no longer required under Sharia law to be financially maintained by her husband, and as such has been an important security net in Muslim societies. A husband's unfettered right to pronounce divorce by *talaq* requires him to pay any remaining *mahr* and maintain his wife for the three-month *iddah* period (the time in which reconciliation can occur). His financial obligations to her then cease. Without legal fault grounds or without a contractual breach a wife can only terminate an unhappy marriage by a Sharia authority granting her a *khula* divorce. If granted, the husband is relieved of his obligation to pay *mahr*: Black and Sadiq, "Good and Bad Sharia" at 406. (Note that it appears that *mahr* is used in the excerpt above to refer to what the parties have referred to in their agreement as Moackar Sadak).

32 Counsel for Neima referred to the following cases from the United States, England and Canada: *Aziz v Aziz* 127 Misc 2d 1013, 488 NYS 2d 123 (1985); *Odatalla v Odatalla* 810 A 2d 93 (2002); *Akileh v Elchahal* 666 So 2d 246 (1996); *Shahnaz v Rizwan* [1965] 1 QB 390; *Nathoo v Nathoo* [1996] BCJ No 2720; M (NM) v M (NS) (2004) 26 BCLR (4th) 80; *Kaddoura v Hammoud* [1998] OJ No 5054; *Nasin v Nasin* (2008) 2008 ABQB 219; and *Bruker v Marcovitz* [2007] 3 SCR 607.

33 In *Aziz v Aziz* the defendant contended that a mahr was enforceable as a contract and that the court, as a court of general jurisdiction, may, in the interest of judicial economy, determine this claim. The Supreme Court of the State of New York determined the claim in accordance with common law, stating that the "document at issue" was "enforceable as

a contractual obligation, notwithstanding that it was entered into as part of a religious ceremony".

34 Turning to Canada, in *Nathoo v Nathoo* the British Columbia Supreme Court held at [25]:

> "Our law continues to evolve in a manner which acknowledges cultural diversity. Attempts are made to be respectful of traditions which define various groups who live in a multi-cultural community. Nothing in the evidence before me satisfies me that it would be unfair to uphold the provisions of an agreement entered into by these parties in contemplation of their marriage, which agreement specifically provides that it does not oust the provisions of the applicable law."

35 Counsel for Neima, however, conceded that the agreement in *Nathoo v Nathoo* otherwise satisfied the requirements of the applicable Canadian legislation and therefore the Court was not called upon to consider an agreement falling simply to be interpreted under the common law. *Nathoo v Nathoo* was cited with approval by Joyce J of the British Columbian Supreme Court in *M (NM) v M (NS)* at [29]. Joyce J stated at [31] that the agreement was "not unfair".

36 In fairness, counsel for Neima also drew attention to the decision of *Kaddoura v Hammoud* in which Rutherford J of the Ontario Court of Justice held at [24]:

> "While there may be much to some if not all of the contract and marriage contract law arguments raised by [counsel for the husband], I have concluded that the obligation sought to be enforced here is one which should not be adjudicated in the civil courts."

37 However, counsel for Neima submitted that this decision should not be followed in light of the weight of countervailing authority, in particular subsequent Canadian authority. I agree with that submission. I note also that in *Kaddoura v Hammoud* the parties had not signed a contract akin to the agreement in this matter, but rather the *mahr* was referred to, in Arabic, on the parties' Islamic marriage certificate. There were also questions in that case as to whether each party had understood the obligations being assumed pursuant to the *mahr*; that question does not arise in this case.

38 In *Nasin v Nasin* Moen J of the Alberta Court of Queen's Bench considered the enforceability of "Mahr agreements". The Court helpfully analysed the earlier Canadian case law (at [11]) and ultimately concluded at [24] that such agreements were enforceable as long as they complied with the formalities required by the applicable Canadian legislation and the contract was not "invalid for other reasons".

39 In *Nasin* at [12]-[13] the Court also referred to the Supreme Court of Canada's decision of *Marcovitz v Bruker* in which the majority held that the fact that a dispute had a religious

aspect did not make it non-justiciable. *Nasin* and *Marcovitz* undermine the precedential value of *Kaddoura*, in which the Court had refrained from enforcing an agreement on the basis that it did not wish to pronounce upon a religious topic.

40 The Ontario Court of Justice, subsequent to *Marcovitz*, did not follow its earlier decision in *Kaddoura*: see *Khanis v Noormohamed* [2009] OJ No 2245 at [67]-[68] (Backhouse J).

41 In *Khanis* the Court upheld a "maher" (sic) agreement even though it did not comply with the formalities required by the applicable Canadian legislation. Backhouse J stated at [73]:

> "Setting aside a marriage contract under s. 56(4) of the *Family Law Act is* discretionary. This is not a case where the parties were opting out or giving up rights under the *Family Law Act* where understanding the legislative scheme and the other party's financial position were critical. The terms of the marriage contract were simple. Other than the payment of the maker (sic) amount of $20,000, the parties retained their rights under the *Family Law Act*. The evidence satisfies me that the husband understood the promise he made and understood that it was binding upon him. I am not persuaded that, in these circumstances, the court should exercise its discretion to set aside the contract."

42 It was submitted that none of the Canadian case law would support a submission that contracts such as the agreement presently under consideration are *contra bonos mores*. This term is defined as "contrary to the accepted cannons of decent behaviour; against good morals" in the Encyclopaedic Australian Legal Dictionary (LexisNexis).

43 Other cases also hold that such agreements are ordinarily enforceable. In *Aziz v Al-Masri* (2011) 2011 BCSC 985, Silverman J of the British Columbian Supreme Court rejected a claim for the payment of dowry because under the terms of the agreement the wife did not appear to be a party. The Court, however, stated at [3]:

> "I have been referred to a number of cases where Canadian courts have upheld apparently similar contracts. It is clear that our courts have striven to be flexible in cases of this kind, seeking to recognize and accommodate the traditions of other countries and cultures where it is feasible and appropriate to do so. I start from the premise that this is the correct approach, generally..."

44 Counsel also drew this Court's attention to the decision of *Haque v Haque* [1962] HCA 39; (1962) 108 CLR 230 in which the High Court (Dixon CJ, Kitto, Menzies and Owen JJ) stated at 249:

> "It is only necessary to add that in the view expressed above an argument advanced against the effectiveness of the deed does not arise. The argument was that the deed was unenforceable in our Courts

> because it contemplated cohabitation between man and woman without lawful marriage, for the polygamous marriage celebrated within Western Australia had no effect as a marriage under our law. In the circumstances of this case it is by no means certain that a court would adopt such a position: for it was an attempt by Muslims honestly and genuinely to establish a relation which Muslim law would recognize although the ceremony was performed in Australia where the law would not recognize a polygamous marriage entered into within Australia."

45 Counsel for Neima submitted that although this was an *obiter* comment, it does nevertheless evidence the Court's openness to other customs, particularly of a religious nature, even where those customs might otherwise be contrary to public policy. Counsel submitted that the only prerequisite is a knowing and voluntary use of such customs by the parties.

46 In *Haque v Haque* the High Court referred to the Privy Counsel decision of *Husain v Hasan* (1937) 65 IA 119; (1938) 40 BOMLR 735. In *Husain v Hasan*, Sir George Rankin, delivering judgment for the Privy Council, upheld an appeal by the estate of a woman who had entered into a "mahr agreement" and had died during the course of the marriage, thus triggering, it was argued, the obligation to pay the dowry. The Board held that the rights under the agreement were enforceable by the estate. This appeal was from the Bombay High Court, and it could be argued that the Privy Council applied a different "moral standard" than it might have if the action had originated in England and Wales. However, the case is an early example of the common law courts upholding agreements such as the present one, without there being any suggestion that such an agreement might be contrary to public policy.

47 It is clear that courts in other common law countries have not interpreted these types of agreements in accordance with Sharia law but have applied common law or the relevant legislation, if any, governing the relationship between the parties.

48 As far back as 1964, in what we would now consider antiquated language, Winn J said in *Shahnaz v Rizwan* at 401-402:

> "As a matter of policy, I would incline to view that, there being now so many Mohammedans resident in this country, it is better that the court should recognise in favour of women who have come here as a result of a Mohammedan marriage the right to obtain from their husband what was promised, than that they should be bereft of those rights and receive no assistance from the English courts."

49 Winn J's view is echoed in Black and Sadiq's article "Good and Bad Sharia" at 406:

> "Sharia family law cannot be delegated exclusively to a religious tribunal, court or other body to apply and enforce as it is the right of all citizens to

> bring family matters to the courts of law for determination and have the general law of the land apply."

50 The authorities do not suggest that making a contract such as the agreement in this case would be against public policy. I am supported in this view by the caselaw outlined above and by the enacted of legislation providing for the making of agreements to regulate the financial affairs of individuals in the event their relationship or marriage breaks down (see, in particular, s 45 of the *Property (Relationships) Act* which explicitly excludes consideration of public policy when parties choose to enter into an agreement pursuant to that legislation). It is my view that the agreement is not contrary to public policy. Nor is the agreement a contract of servitude.

51 I also reject the argument that it is against public policy for a court to determine which party left a relationship. Courts are often called upon, especially in family matters, to determine sensitive factual matters such as when a relationship has ended, or whether it was indeed a de facto relationship, and it could not be said that this in any way breaches a principle of public policy recognised by law or by the community. See, for example, *Moss v Moss* [1912] HCA 90; (1912) 15 CLR 538; *Marando v Rizzo* [2012] NSWSC 739.

52 The plaintiff further submitted that clause 11 of the agreement is a penalty clause as the quantum is not referable to any damage or any settlement amount and merely penalised Mostafa for being the one who initiated separation or divorce. The plaintiff supported this proposition by reference to *Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd* [1915] AC 79.

53 In *Dunlop* the House of Lords was considering a commercial contract and determining whether a sum of money was best characterised as liquidated damages or as a penalty. The case has very limited, if any, application to this case. In particular, the case predates legislation such as the *Property (Relationships) Act* and *the Family Law Act* which allow for parties to enter into financial agreements. Furthermore, clause 11 cannot be viewed in isolation. Rather, the agreement covers all the property of the plaintiff and the defendant so that clause 11 forms part of the greater bargain between the two parties and it cannot be said to impose a penalty on Mostafa. This ground of appeal fails.

Her Honour did not have jurisdiction to make a decision in accordance with Sharia Law and erred in finding that the separation did not have to be in accordance with Sharia Law (grounds of appeal 2(d) & 5)

54 Grounds of appeal 2(d) & 5 can be dealt with together, since they both raise the issue of the applicability of Sharia Law to the agreement.

55 The plaintiff submits that the Magistrate did "not have jurisdiction to make a decision in accordance with Sharia law" (appeal ground 2(d)). In written submissions, the plaintiff stated: "What constitutes an initiation of Islamic divorce or separation proceedings is something distinct to Islamic law and could only be determined by an Islamic Court."

56 In relation to her finding as to the meaning of "divorce" in the agreement the Magistrate said:

> "The agreement refers to a divorce but I consider that must be taken to be divorce under Commonwealth legislation unless otherwise stated especially as a reference to - clearly relates to by virtue of B in the recitals, the concept of marriage under Commonwealth law. The agreement purportedly pursuant to the Family Law Act does not give an Islamic meaning of the term divorce ... But as I go back to it, this issue of using that term is not divorce for the purposes of the written agreement that's before the Court. That can only be read in my view given that it [the agreement] does not call the ceremony under Sharia law a marriage, it refers to marriage as an intention under the Australian law, that means divorce has to be the same term and the same concept as that under Australian law."

57 It is clear from this passage that her Honour did not consider "divorce" to have a meaning under Sharia law but rather under Australian law. In relation to "separation", her Honour did not attempt to define such a concept pursuant to Sharia Law, but rather sought to determine factually when separation occurred.

58 During submissions in this Court, the plaintiff's counsel, Mr Cohen, raised the issue of the appropriateness of the case being heard in a civil court, and the following exchange took place:

> "COHEN: ...It is no criticism of this particular type of contract but the question is whether that is an agreement that should be enforced by a civil court. There are religious courts and in certain circumstances agreements can be formulated to give religious courts certain authority to, for instance, arbitrate agreements.
>
> HER HONOUR: I guess nowhere in the agreement do they say that this has to be resolved in an Islamic court?
>
> COHEN: No, it is silent on that issue..."

59 Mostafa did not challenge the jurisdiction of the Local Court at first instance. The agreement is silent as to the application of Sharia Law and does not contain a clause to the effect that the parties are to mediate the dispute before their religious leader. The Magistrate did not purport to interpret the agreement pursuant to Sharia Law, but according to principles of Contract Law. This submission fails.

60 The plaintiff further submitted that the Magistrate erred in finding that the separation did not have to be in accordance with Sharia law, as particularised in the defendant's statement of claim (appeal ground 5). Unfortunately, the plaintiff did not address this ground in submissions.

61 Nowhere does the agreement require that the words "separation" and "divorce" be interpreted in accordance with their meaning under Sharia Law. It is important to observe that there is no definition clause. Had the parties intended that the terms "separation" or "divorce" be interpreted under Sharia Law, the terms could have been so defined in a definition clause.

62 No expert evidence relating to Sharia Law was relied upon either in the Local Court or in this Court. As discussed above, her Honour did not apply Sharia Law, nor was she required to do so to properly interpret the agreement.

63 The only reference in the statement of claim to Sharia Law is the pleading that the "Defendant [Mostafa] Islamically divorced the Plaintiff." The remarks I have made under appeal ground 1(c) in relation to the Magistrate's ability to make a finding that was not disclosed in the pleadings (namely that separation occurred in April 2007, not pursuant to an Islamic divorce in September 2008) support my finding on this ground that there was no error.

64 Her Honour did not need to decide whether an Islamic divorce occurred because the Islamic divorce alleged by Neima did not occur until September 2008, which was after the "separation" which the Magistrate found occurred in April 2007. The issue was therefore what was meant by "separation" in clause 11, which term the Magistrate was not required to interpret according to Sharia Law. This submission fails.

Her Honour erred in not finding that the agreement was not properly executed pursuant to the *Property (Relationships) Act* (appeal ground 3)

65 The third ground of appeal was that the Magistrate erred in not finding that the agreement was not properly executed in accordance with the *Property (Relationships) Act*.

66 Counsel for Neima submitted that Neima did not rely on the *Property (Relationships) Act* to seek to enforce the agreement in the Local Court and therefore it was not incumbent upon the Magistrate to determine whether or not the agreement had been properly executed within the terms of that Act. Counsel further submitted that even if the agreement had not been properly executed, ordinary contractual principles would apply.

67 On appeal, Mostafa's counsel conceded that the *Property (Relationships) Act* does not apply to the agreement, but argued that the Magistrate had determined the matter as if it did apply.

68 Part 4 of the *Property (Relationships) Act* provides for the making of domestic relationship agreements to regulate the financial matters of two persons who are in a domestic relationship or are contemplating entering one (s 44).

69 Section 46 of the *Property (Relationships) Act* provides:

> "Except as otherwise provided by this Part, a domestic relationship agreement or termination agreement shall be subject to and enforceable in accordance with the law of contract, including, without limiting the generality of this section, the Contracts Review Act 1980."

70 Section 48 of the *Property (Relationships) Act* provides:

> "Where a domestic relationship agreement or termination agreement does not satisfy any one or more of the matters referred to in section 47 (1) (b), (c), (d) or (e), the provisions of the agreement may, in proceedings other than an application for an order under Part 3, be enforced notwithstanding that the domestic relationship agreement purports to exclude the jurisdiction of a court under Part 3 to make such an order."

71 Therefore, s 46 expressly preserves the law of contract except as otherwise provided in Part 4 and s 48 confirms that a non-complying relationship agreement is enforceable in proceedings other than under Part 3: see *Ford v Henry* [2009] NSWSC 147 at [45].

72 Her Honour discussed the key provisions of the *Property (Relationships) Act* as follows (at 93):

> "S 46 of the *Property Relationships Act* (1984) notes that domestic relationship agreements remain subject to the law of contract. S 47 is not inconsistent with the foregoing provision in situations where one or more of the pre-requisites for a domestic relationship agreement have not been satisfied. S 48 of the Act also would appear to reinforce that point in that it provides that a purported exclusion of the provisions of the Act in a written agreement does not prevent the agreement falling within the ambit and then we come back to section 46. The plaintiff argued that it is for the foregoing reasons that the Common Law of Contract apply...I am satisfied that the Law of Contract should apply."

73 Her Honour did not need to consider whether the agreement was properly executed pursuant to the *Property (Relationships) Act.* A cause of action pursuant to that Act was not raised. Furthermore, that Act explicitly preserves causes of action pursuant to contract

law such as the cause of action brought by Neima in the Local Court. This ground of appeal fails.

Alleged errors of fact and law (appeal ground 1)

74 The plaintiff brought this ground of appeal on the basis that the Magistrate made errors of fact and law by: first, refusing to limit the use of the evidence of the annexures to Neima's affidavit sworn on 18 August 2010, in light of the restricted use for which this material was admitted into evidence; secondly, deciding that the cause of action in the case was in contract law and there was an enforceable agreement, which is contrary to what was stated in the particulars at paragraph 3(a) of the statement of claim; thirdly, deciding to consider the date and method of separation as being other that what was stated in the particulars at paragraph 4 of the statement of claim; fourthly, finding that Mostafa had directed or caused Neima to leave the property at Rockdale on or about 11 April 2007; and finally, finding that Mostafa had initiated separation and/or divorce with Neima.

(a) Annexures to Neima's affidavit sworn on 18 August 2010

75 The plaintiff submitted that the Magistrate made an error of fact or law in refusing to limit the use of the annexures to Neima's affidavit sworn 18 August 2010 in light of the restricted use for which it had been admitted into evidence. This ground of appeal was not covered in the plaintiff's written or oral submissions.

76 The Magistrate ruled that Neima's affidavit sworn 18 August 2010 was to be used only as a denial of Mostafa's allegations in his affidavit, and not to raise new matters because Neima's affidavit was served late. In the Local Court the solicitor acting for Mostafa did not object to the affidavit being tendered only for the purpose of rejecting what Mostafa had said in his affidavit. Her Honour then made the following interlocutory ruling:

> "HER HONOUR: Okay well I suppose and I appreciate what both of you have said on that, I suppose I would flag that had that not been the agreement if new evidence and new allegations were raised in the reply and if it was served what I would consider to be outside business hours on the 18th and that being only leaving on really business day I would not have let it in, in any event so insofar as it goes to basically simply deny is Mr Lange has referred to in shorthand which I embraced, and it simply is like pleadings then that's fine but in terms of any new allegations raised or so forth it would not be - I would not allow it in on that basis in any event so that being the case, I'll leave it as the agreement about having ruled on."

77 Later in the Local Court proceedings Mostafa's solicitor objected to the use of a document attached to Neima's affidavit sworn 18 August 2010, by Neima's counsel, to cross-examine Mostafa . The objection was based on the limited purpose for which that affidavit

was admitted. Her Honour, after what can be considered another interlocutory ruling, allowed the cross-examination to continue. Ultimately, however, her Honour concluded, in relation to the annexure in question, "[q]uite frankly its very limited, I really can't see how it's going to be of any assistance to the court by the way", and the annexure in question was not cross-examined upon further.

78 The plaintiff requires leave to appeal from an interlocutory ruling made in the Local Court. In *Be Financial Pty Ltd as Trustee for Be Financial Operations Trust v Das* [2012] NSWCA 164 the Court of Appeal (Basten JA; Tobias AJA agreeing) set out at [32]-[36] the principles to be considered in deciding whether leave to appeal should be granted:

> "The principles governing cases such as these have recently been restated in *Zelden v Sewell; Henamast Pty Ltd v Sewell* [2011] NSWCA 56. As Campbell JA noted (with the agreement of Young JA) at [22]:
>
> > "It is of some importance to reiterate the principles that were stated in *Carolan v AMF Bowling Pty Limited* [1995] NSWCA 69, where Sheller JA said that an applicant for leave must demonstrate something more than that the trial judge was arguably wrong in the conclusion arrived at. Cole JA relied on a principle that where small claims are involved, it is important that there be early finality in determination of litigation, otherwise the costs that will be involved are likely to swamp the money sum involved in the dispute."
>
> In *Jaycar Pty Ltd v Lombardo* [2011] NSWCA 284 Campbell JA, with the agreement of Young and Meagher JJA, expanded on his summary of *Carolan*, noting that Kirby P had recognised "that ordinarily it was appropriate to grant leave to appeal only concerning matters that involve issues of principle, questions of general public importance or an injustice which is reasonably clear, in the sense of going beyond [what is] merely arguable": at [46].
>
> ...
>
> In *Coulter v The Queen* [1988] HCA 3; 164 CLR 350, dealing with a challenge to a refusal of the South Australian Full Court to grant leave to appeal in a criminal matter, the majority noted that a leave requirement was a preliminary procedure "recognised by the legislature as a means of enabling the court to control in some measure the volume of appellate work requiring its attention": at 356 (Mason CJ, Wilson and Brennan JJ). That statement is clearly applicable to civil, as well as criminal, appellate jurisdiction.
>
> As the High Court has noted, an application for leave is not a proceeding in the ordinary course of litigation but a preliminary procedure: *Collins v The Queen* [1975] HCA 60; 133 CLR 120 at 122; *Coulter* at 356. On the other hand, there is no reason to doubt that s 58 of the *Civil Procedure Act 2005* (NSW), requiring a court to act in accordance with "the dictates of justice" when making an order or direction "for the management of proceedings", applies in respect of a leave application. One of the factors to be taken into account pursuant to s 58 is "the degree of injustice that would be suffered by the respective parties as a consequence of any order or direction": s 58(2)(b)(vi). That provision, like s 56, identifying the

> overriding purpose of the *Civil Procedure Act* as being to facilitate the just, quick and cheap resolution of the real issues in the dispute, recognises that questions of injustice are relative. Similarly, the requirement that this Court not order a new trial unless it appears that "some substantial wrong or miscarriage" has been occasioned, also reflects a principle of parsimony in requiring that the parties be put to the expense of a second trial: UCPR, r 51.53."

79 In the circumstances I refuse leave to appeal from the Magistrate's interlocutory ruling allowing use of the annexure. In any event, there is no error of law. Despite her Honour's ruling in relation to the affidavit, it was open for Neima's counsel to use any relevant documents in his cross-examination of Mostafa. This aspect of the first ground of appeal fails.

(b) Application of contract law and whether there was an enforceable agreement

80 There appear to be two limbs to this aspect of the plaintiff's submissions, namely: whether the Magistrate erred in deciding the matter as a cause of action under contract law, and secondly, whether the contract was unenforceable because a condition precedent, namely marriage under Australian law, had not been satisfied.

81 The plaintiff submitted that the Magistrate's decision that the agreement was to be interpreted under contract law is contrary to what was stated in the particulars in paragraph 3(a) of the statement of claim. Paragraph 3(a) states: "signed pre-nuptial agreement dated 28 February 2005". It is not clear what the plaintiff means by this.

82 The defendant submits that a cause of action in contract was identified because the statement of claim stated that the "Defendant executed a pre-nuptial financial agreement" in paragraph 2. Furthermore, it was submitted that it was open to the plaintiff to request further and better particulars if he was not satisfied a cause of action had been adequately disclosed.

83 The Magistrate was satisfied that the pleadings adequately addressed that there was a contract by way of referring to the "agreement". Her Honour said:

> "I am satisfied that the Law of Contract should apply and do not consider that the pleadings preclude this course being agitated and determined. The statement of claim referred to and identified the agreement in the particulars."

84 In any event, the defendant submits that if the pleadings were deficient, a failure to plead is not fatal to the cause of action, referring to *Water Board v Moustakas* [1988] HCA 12; (1988) 180 CLR 491 (Mason CJ, Wilson, Brennan and Dawson JJ). Their Honours said at 497:

> "Ordinarily the pleadings will be of assistance for it is one of their functions to define the issues so that each party knows the case which he is to meet. ... The particulars may not be decisive if the evidence has been allowed to travel beyond them, although where this happens and fresh issues are raised, the particulars should be amended to reflect the actual conduct of the proceedings. Nevertheless, failure to amend will not necessarily preclude a verdict upon the facts as they have emerged."

85 As referred to earlier, the pleadings contained in Neima's statement of claim are quite brief. Although the words "contract" have not been used, the words "Signed pre-nuptial agreement" in paragraph 3(a) of the statement of claim are sufficiently clear to allow her Honour to make a finding that the statement of claim involved a cause of action in contract.

86 Mostafa's counsel further submitted on this appeal that, because the agreement stated that it was "an agreement pursuant to s 90B of the *Family Law Act*", the parties had to be married under Australian Law as a condition precedent to the contract being enforceable. He submitted that the parties had not married under Australian law and that therefore the contract was unenforceable. In support of his submission, Mostafa's counsel argued that "separation" and "divorce", as the words appear in clause 11, do not apply to de facto relationships but are fundamentally "related to marriage".

87 Counsel for the defendant submitted that neither party had addressed the issue of s 90B in the Local Court and it had been accepted that the *Family Law Act* (Cth) did not apply. He said that this was a de facto relationship, "supported" by an Islamic marriage ceremony. Finally, he submitted that the terms of the agreement make it clear that marriage under Australian law was not a condition precedent.

88 It appears that the proceedings in the Local Court proceeded on the basis that the agreement was enforceable. Indeed Mostafa's motion for a rehearing in the Local Court was granted on the basis that the rehearing was limited to the issues of which party initiated the separation and/or divorce and when that occurred, and the evidence called went primarily to those issues. However, as this is an important issue, I will consider the question of whether marriage under Australian law is a condition precedent to the enforceability of the agreement generally and in particular of clause 11.

89 Section 90B of the *Family Law Act* (Cth) does provide for the making of financial agreements before marriage. However, the section only relates to agreements providing for matters "in the event of the breakdown of the marriage" or maintenance during and/or after the dissolution of marriage. It follows that s 90B cannot apply to Neima and Mostafa because a marriage under Australian law has not taken place.

90 The de facto relationship provisions of the *Family Law Act* (Cth) do not apply to the agreement because, at the time the agreement was made in February 2005, and at the date of separation (in April 2007), these provisions had not come into force. They commenced in March 2009 under the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act* 2008 which saw the introduction of Part VIIIAB, which covers financial matters relating to de facto relationships. Pursuant to s 86 of the amendment Act, the amendments do not apply to relationships that have ended prior to the commencement of the amendment Act, although a choice can be made to opt in to the new Act under s 86A of the amending Act. As there was no evidence before the Local Court that the choice was made to opt in, the *Family Law Act* does not apply to the agreement.

91 Recitals B, C and H of the agreement relevantly read:

> "B. The parties intend to marry under Australia Law in future date and wish to enter into a financial agreement before marriage to preclude claims of any nature relating to financial matters that either party has or may have against the other pursuant to:
>
> (a) the Property Relationships Act 1984 (NSW)l
> (b) the Family Law Act 1975 (Cth); and
> (c) the Family Provision Act 1982 (NSW)
>
> in the event that the relationship ends, the parties separate after the date of marriage or one of the parties dies.
>
> C This deed... is an agreement pursuant to s90B of the Family Law Act.
> ...
>
> H Before executing this agreement, each party has regard to the possibility that one or both of them may be subject to the change of circumstances inclusive of any of the following:
>
> (a) Separation
> (b) Divorce..."

92 There are several aspects of the agreement itself that support the defendant's submission that marriage under Australian law is not a condition precedent to the enforcement of clause 11, namely:

> (1) Nowhere in the agreement is it stated that marriage under Australian law is to be considered a condition precedent to the enforceability of the agreement generally, or to clause 11 in particular.
>
> (2) Clause 2 of the agreement states that the agreement "shall commence as and from the date of it execution by both parties". Recital B confirms, and it was not disputed by the parties, that as

at the date of execution, the parties were not married under Australian law. Indeed the Magistrate relied on this aspect of the recitals in support of her finding that "the parties intended the agreement apply from the date the agreement was executed and [the agreement] was not contingent upon a marriage recognised by the *Family Law Act*".

(3) Clause 5 similarly states that the parties agreed "to keep their financial affairs totally separate from each other during the relationship and the subsequent marriage". Clauses 6, 7 and 8 discuss how the parties will treat each other's, or joint, property "during the relationship *or* subsequent marriage". Thus these clauses seek to bind the parties during "the relationship", and prior to marriage under Australian law.

(4) Pursuant to recital B the parties wanted to preclude claims pursuant to the *Property Relationships Act*. That Act applies only to de facto relationships, which goes against the plaintiff's submission that marriage under Australian law was a condition precedent to the enforceability of the contract.

(5) Recital B includes provision in the event that the "relationship ends" (presumably before marriage) or "the parties separate after the date of marriage." This wording also suggests that marriage under Australian law is not a condition precedent to recital B, or to the application of clause 11.

(6) Recital B states that the parties "intend" to marry under Australian law. The language used is not so certain as to render marriage under Australian Law a condition precedent.

(7) Recital H provides for "separation" and "divorce" as two separate changes of circumstances. Clause 11 similarly provides for the occurrence of "separation and/or divorce". The wording of the agreement therefore suggests that the parties understood "separation" as distinct from "divorce".

93 I disagree with the submission that separation is fundamentally related to marriage, and could not describe the termination of a de facto relationship. The courts regularly apply the notion of separation to de facto relationships: see, for example, *Durham v Durham* [2011] NSWCA 62 at [11]; *O'Sullivan Partners (Advisory) Pty Ltd v Foggo* [2012] NSWCA 40 at [96].

94 In the case of an ambiguity in a contract, evidence of surrounding circumstances is admissible to assist in the interpretation of the contract but it is not admissible to contradict the language of the contract when it has a plain meaning: *Codelfa Construction Pty Ltd v State Rail Authority of New South* Wales [1982] HCA 24; (1982) 149 CLR 337 at 374-375 (Mason J).

95 In this case, the parties wanted financial certainty and sought to cover all their assets by entering into the agreement. Both parties had previously been married and had significant assets, in part from their previous marriages. Mostafa had adult children from a previous marriage. In all the circumstances, making the agreement contingent upon marriage under Australian law would not have provided them certainty in their financial affairs, because it was not certain that they would marry in the future.

96 Having regard to the terms of the contract, and to the extent of any ambiguity, the surrounding circumstances, it is clear that marriage under Australian law was not a condition precedent to the enforceability of the agreement. This argument fails.

(c) The Magistrate's decision as to the date and method of separation

97 The plaintiff submitted that the Magistrate erred in considering the date and method of separation as being other than that which was stated in the particulars in the statement of claim. Paragraph 4 of the statement of claim reads:

> "4. On 11 September 2008, the defendant Islamically divorced the plaintiff."

98 Her Honour found that separation occurred on 11 April 2007.

99 Pleadings and particulars furnish a statement of the case sufficiently clear to allow the other party a fair opportunity to meet it; however, a failure to amend particulars to accord precisely with the facts which have emerged in the course of evidence does not necessarily preclude a plaintiff from seeking a verdict on the cause of action alleged in reliance upon the facts actually established by the evidence: *Dare v Pulham* [1982] HCA 70; (1982) 148 CLR 658 at 664.

100 Both parties were on notice that the issues for determination in the Local Court were the date of separation and who initiated separation. Neima's counsel in the Local Court opened the proceedings by indicating that Neima maintained that separation occurred in April 2007, or in the alternative on 11 September 2008.

101 Evidence was called by both parties in relation to the events that occurred in April 2007 and September 2008. (I shall discuss this evidence in further detail below). It was open to her Honour to make a finding that was different from that contained in paragraph 4 of the statement of claim, in light of how the matter proceeded and the evidence that was called.

102 This submissions fails.

(d) & (e) The Magistrate's findings in relation to separation

103 The plaintiff submitted that the Magistrate erred in finding that Mostafa had directed or caused Neima to leave the Rockdale property on or about 11 April 2007 and in finding that Mostafa had initiated the separation and/or divorce from Neima. In written submissions Mostafa's counsel submitted that "All of the evidence in fact pointed to the ... conclusion... the defendant initiated separation from the plaintiff". Furthermore, it was submitted that the Magistrate's finding was not supported by the evidence so that the finding amounted to an error of law.

104 It is important to remember that the Local Court hearing was confined to two issues, namely the date of divorce and/or separation, and which party initiated the divorce and/or separation. Extensive evidence was provided during the Local Court hearing on these two issues. Neima and Mostafa tendered affidavit evidence and were both called for cross-examination. In addition, affidavit evidence of other witnesses was tendered and Neima's son, Mohamed, was cross-examined. Her Honour found that she could not rely on these "so-called independent witnesses" because each was relying on what they had been told by Neima or Mostafa, depending on whose case they had been called in. Her Honour did find that she could look to independent evidence in the form of the agreement and "other documents", most likely referring to the exhibits tendered during the Local Court proceedings.

105 Neima's statement of claim lists 11 September 2008 as the date which Mostafa "Islamically divorced" her and her affidavit of 26 May 2010 discloses that possible instance of separation, as well as a second one on 11 April 2007. In summary, Neima gave evidence that on 11 April 2007 she had an argument with Mostafa during which he scared her by waving around a knife. She gave evidence that that evening Mostafa's daughter, accompanied by a police officer, came to collect some of Mostafa's belongings and gave her a list separating Neima's, and her father's, belongings. On 13 April 2007 Neima moved out of the unit at Rockdale. A copy of the list was attached to Neima's affidavit dated 26 May 2010. Neima's affidavit described how, after April 2007, the parties attempted to reconcile, but that in September 2008, the parties had another argument which culminated in Mostafa saying the words "you are divorced" to Neima.

106 Mostafa denied that a separation took place on 11 April 2007. He said that after the events of 11 April 2007 they reconciled. It was after this reconciliation that they lived together in a unit at Lakemba. He gave evidence that Neima initiated the separation in September 2008, sometime during Ramadan, by asking him to leave the Lakemba unit. He deined saying the words "I divorce you".

107 The Magistrate made a finding that Mostafa initiated the separation on 11 April 2007. In relation to the events of 11 September 2008, her Honour stated that this was not relevant because the parties were in the process of reconciling, but had not yet done so, which meant they had not resumed a relationship for the purposes of the agreement.

108 The date of separation and the question of who initiated separation were not simple questions. There was contradictory evidence. Furthermore as Hallen AsJ said in *Edwards v Harris* [2012] NSWSC 1 at [170]:

> "The dispute and uncertainty exists because a de facto relationship tends to develop over time. Similarly, it tends to break down over time as well... "

109 I agree with the plaintiff that whether there was no evidence to support a factual finding is a question of law, not a question of fact: *Kostas v HIA Insurance Services Pty Ltd* [2010] HCA 32; (2010) 241 CLR 390 at [91]. However, in this case there was evidence on which her Honour could base her findings. Therefore, there is no error of law and this ground of appeal fails.

Jurisdictional error (appeal ground 2)

110 The second ground of appeal was that the decision of the Local Court was affected by jurisdictional error, with the following particulars provided: (a) the Court did not have jurisdiction to deal with matters otherwise covered by the *Property (Relationships) Act*; (b) the Magistrate erred in taking into account irrelevant considerations or in the alternative did not properly consider evidence of the applicant; (c) the decision was manifestly unreasonable and could not be supported by the evidence; (d) the Magistrate did not have jurisdiction to make a decision in accordance with Sharia Law (dealt with above).

(a) The Court did not have jurisdiction to deal with matters otherwise covered by the *Property (Relationships) Act*

111 It was submitted by counsel for Mostafa that the Local Court lacked jurisdiction to deal with matters otherwise covered by the *Property (Relationships) Act*. However, this was not addressed in his submissions.

112 Counsel for Neima did address this issue in reply and referred to *Clair v Munce* [2007] NSWSC 419, in which Brereton J stated at [4]:

> "[J]ust because parties have been de facto partners does not mean that they are limited to relief under that Act: they can also claim relied at law or in equity. Indeed, *Property (Relationships) Act*, s 7, specifically

> provides that nothing in that Act derogates from or affects any right of a party to a domestic relationship to ally for any remedy or relief under any other Act or any other law. If one simply wishes to enforce existing and legal and equitable rights and remedies it is unnecessary to resort to the *Property (Relationships) Act* for an order altering the existing interest."

113 It is clear that s 7 of the *Property (Relationships) Act* preserves a party's rights to relief under the common law. That section reads as follows:

> "Nothing in this Act derogates from or affects any right of a party to a domestic relationship to apply for any remedy or relief under any other Act or any other law."

114 The submission that the Magistrate did not have jurisdiction to deal with matters otherwise covered by the *Property (Relationships) Act* therefore fails.

(b) Her Honour erred in taking into account irrelevant considerations or did not properly consider the evidence of the plaintiff

115 Mostafa's counsel submitted that the Magistrate took into account irrelevant considerations, or in the alternative, "did not properly consider evidence of the applicant [Mostafa]". As this was not addressed in the plaintiff's submissions, the alleged irrelevant considerations and the basis of the alleged failure to properly consider Mostafa's evidence have not been identified.

116 The defendant submitted that this was nothing more than a complaint about the outcome.

117 In the circumstances the plaintiff has not shown that the Magistrate took into account irrelevant considerations or failed to properly consider Mostafa's evidence. These submissions must fail.

(c) The decision was manifestly unreasonable and could not be supported by the evidence

118 The plaintiff submitted that the Magistrate's decision was manifestly unreasonable and could not be supported by the evidence. Again, this was not covered in any of the plaintiff's submissions.

119 I have discussed some of the evidence above and concluded that there was ample evidence upon which the Magistrate made her findings in relation to the two key issues in this case (namely, who initiated separation and when separation occurred). This ground of appeal fails.

Conclusion

120 Each of the appeal grounds fails. The result is that the appeal is dismissed and the application for judicial review fails.

121 Costs are discretionary. Costs usually follow the event. The plaintiff is to pay the defendant's costs as agreed or assessed.

122 As this appeal raises the current issue of the way agreements based on religious or cultural tradition should be dealt with in our society, and it appears that there is not Australian case law on this topic, I shall refer this question to both the Australian Law Reform Commission and the NSW Law Reform Commission for their consideration as to whether this topic is suitable as the subject of a term of reference.

The Court orders that:

(1) The appeal is dismissed.

(2) The application for judicial review fails.

(3) The amended summons filed 3 May 2011 is dismissed.

(4) The plaintiff is to pay the defendant's costs as agreed or assessed.

****