

# DISTRICT COURT OF QUEENSLAND

CITATION: *Evans v Hollenberg* [2024] QDC 56

PARTIES: **SAMANTHA HELEN EVANS**  
(Applicant)  
**v**  
**JASON LEE HOLLENBERG**  
(Respondent)

FILE NO/S: BD3176/23

DIVISION: Civil

DELIVERED ON: 23 April 2024

DELIVERED AT: Brisbane

HEARING DATE: 15 April 2024

JUDGE: Barlow KC, DCJ

ORDERS: **The respondent's application filed on 2 February 2024 be dismissed.**

CATCHWORDS: PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – JURISDICTION – GENERALLY – the applicant and respondent were in a de facto relationship that broke down – during the relationship they bought a property as joint tenants, which was later altered to tenants in common in equal shares - the applicant brought an application for the appointment of statutory trustees for sale and division of the proceeds of sale – the respondent applied, within that application, for an adjustment to the division of proceeds - there is jurisdiction to apply to the Federal Circuit and Family Court in respect of property division between former de facto partners – no such application had been made - an application in the Federal Circuit and Family Court would be out of time – the originating application sought an adjustment of the parties' rights to the proceeds of sale to allow for payment of the applicant's costs from the respondent's share – whether the originating application seeks to alter the parties' rights to the proceeds of sale - whether originating application is within jurisdiction of the District Court – whether the respondent's application is within the jurisdiction of the District Court

*District Court Act 1967 s 68*  
*Family Law Act 1975 (Cth) s 4*  
*Property Law Act 1974 ss 9A, 38, 39B, 42, 44*

*Emerald & Emerald* [2018] FamCAFC 217  
*JAB v The Executors of the Estate of the late MST* [2022] QSC 226  
*Krasnoff v Krasnoff* [2017] QDC 100  
*Ranger v Ranger* [2009] QCA 226

COUNSEL: Ms S K Long for the applicant

Mr S E Fisher for the respondent

SOLICITORS: Power & Cartwright for the applicant

Stolar Law for the respondent

- [1] Between 2009 and 2017, the parties were living together in a de facto relationship. During that relationship, they bought a house. They were registered as joint tenants of the fee simple.
- [2] They separated in October 2017. Ms Evans left the property to live elsewhere. Mr Hollenberg remained living in the house and still lives there. Some time later, Ms Evans formally severed the joint tenancy and they became registered as tenants in common in equal shares.
- [3] Apparently the parties made several attempts to sell the house, but for reasons unknown to me they did not succeed. On 30 October 2023, Ms Evans filed an originating application seeking the appointment of statutory trustees for the sale of the property. On 1 December 2023, Judge Smith DCJA ordered the appointment of trustees for sale and directed them to sell the property and to hold the net proceeds of sale on trust for the parties in equal shares (subject to one qualification described below) unless, in the meantime, Mr Hollenberg filed an application seeking an adjustment of his property entitlement in respect of the land. He qualified the equal division of the net proceeds of sale by ordering to the effect that, if Mr Hollenberg did not file such an application, then upon sale of the land the applicant's share be increased, and the respondent's share be decreased, by the amount of the applicant's costs of the application.
- [4] Mr Hollenberg did file such an application, which came before me on 15 April 2024. By his application, he sought "an adjustment of my property settlement" and 90% of the net proceeds of sale of the property (presumably with the balance to Ms Evans).
- [5] Ms Evans contends that Mr Hollenberg's application seeks orders that are beyond this court's jurisdiction. She submits that the property is part of the assets of the parties' former de facto relationship, which results in Mr Hollenberg's application constituting a "de facto financial cause" as defined in the *Family Law Act* 1975 (Cth) (FLA), s 4. Such a proceeding may only be brought in the Federal Circuit and Family Court of Australia Division 2 (FCFCA), as only that court has jurisdiction to make orders for the division of the parties' property rights, due to ss 39A and 39B of that Act.
- [6] Mr Hollenberg's counsel submitted that the court is not prevented from hearing his application. Any application to the FCFCA concerning de facto property division must be made within 2 years of the parties' separation or, if both parties consent, to

at a later time (s 44(5)). There is no suggestion that Ms Evans will consent to Mr Hollenberg now making an application in that court. Although that court can grant leave to a party to make such an application after that time, relevantly it can only be granted if the party will otherwise suffer substantial hardship. It is highly unlikely that the court would find that to be the case here and would therefore give Mr Hollenberg leave to make an application. In those circumstances, his only option is to seek an adjustment of the parties' rights to the proceeds of sale under this court's equitable jurisdiction or under s 42 of the *Property Law Act* 1974 (PLA).

- [7] I shall deal first with Mr Fisher's submission that the power to adjust the parties' entitlements to the proceeds of sale arises under s 42 of the PLA. In my view, it does not. That section simply provides for a methodology for determining the parties' rights to the proceeds of sale by statutory trustees. The right to such a determination or adjustment would arise only under some statutory or other cause of action, such as a declaration of a constructive or resulting trust, or restitution, based on unequal contributions to the acquisition and maintenance of the property.
- [8] So, is Mr Hollenberg's application outside this court's jurisdiction?
- [9] I note first that Mr Hollenberg's application is based on a contention that his beneficial interest in the property is greater than his registered legal interest. The claim is apparently asserted on the basis that he made substantially more contributions to the acquisition and maintenance of the property than did Ms Evans, although the legal cause of action on which he relies is not clear. Mr Hollenberg's counsel relied on the Court of Appeal's decision in *Ranger v Ranger* [2009] QCA 226 for the proposition that the court can consider the appropriate distribution of the proceeds of sale of a co-owned property based on the parties' beneficial interests. See also *Krasnoff v Krasnoff* [2017] QDC 100 at [50], [52]-[53].
- [10] Certainly, where statutory trustees for sale of property are appointed pursuant to s 38 of the *Property Law Act* 1974, after sale the trustees stand possessed of the proceeds of sale on trust for the co-owners. As the Court of Appeal made clear in *Ranger v Ranger*, the proportions in which the funds are held on trust, if not agreed, can and should be determined by a court. The consequence of any change from the parties' legal ownership might be the alteration of the statutory trusts as provided for in s 38(6). (This court has the jurisdiction to make these orders under s 68(1)(b)(vi) of the *District Court Act* 1967.)
- [11] Mr Hollenberg's counsel also contended that the court is given power by s 42 of the PLA to ascertain and adjust the rights of the parties. With respect, in my view the power to adjust the rights of the parties is not given under that section, but under s68 of the *District Court Act*. Section 42 simply makes it clear that the court has power, in order to determine the parties' entitlements, to direct inquiries and accounts. (I do note that Judge McGill SC appears to have had a different opinion – see *Krasnoff v Krasnoff*, but the difference between us is immaterial to the substance of this application.)
- [12] Mr Hollenberg's application is seeking an adjustment of the parties' rights to the proceeds of sale of the property from their 50% rights at law (based on their registration as tenants in common in equal shares) to reflect what he contends is his beneficial interest in the property as a result of his contributions to it.

- [13] To determine whether this court has jurisdiction, it is necessary to consider the relevant provisions of the FLA. They were usefully set out or summarised by Wilson J in *JAB v The Executors of the Estate of the late MST* [2022] QSC 226 at [17]-[25]. I respectfully adopt her Honour's summary without repeating it in these reasons.
- [14] *JAB* was not a case involving an application under the PLA, but (as described by her Honour at [6]) was a claim for a declaration that the plaintiff was entitled to be registered as the sole proprietor of the relevant property. Alternatively it was argued that the executors of the deceased's estate held the property on trust for the plaintiff and the deceased in equal shares or in the proportions of their respective contributions to the property. The plaintiff and the deceased, who had died in 2017, had been in a *de facto* relationship for some years. Her Honour held that the proceeding was a *de facto financial cause* and that the effect of ss 39A and 39B was that it was within the exclusive jurisdiction of the FCFCFA, so the Supreme Court did not have jurisdiction to determine the proceeding, even though there had not been any proceeding in the Commonwealth Court: see [86], [90], [95]-[100].
- [15] Her Honour referred to s 90RC of the FLA, but did not consider whether the proceeding before her was under a law of this State falling within that section. This is not surprising, as the claim before her Honour was not under a law of the State (construing that to mean a written law, not the common law), let alone one falling within that subsection.
- [16] Here, however, both parties' applications arise under s 38 of the PLA and the court's equitable jurisdiction. I do not consider that s 38 deals with financial matters relating to the parties to a *de facto* relationship arising out of the breakdown of the relationship. It is a much more general law. Although, on the facts of this case, the law applies to such matters, the law itself does not deal with them. But, even if I were wrong in that conclusion, the section does not deal with those matters by referring expressly to *de facto* relationships. It is not, therefore, a law of the type described in s 90RC(2): see paragraph 90RC(2)(b).
- [17] I also note the conclusion of Slattery J in *Metcalf v Zhang* [2018] NSWSC 1998 at [95] and [96] (relied on by counsel for Mr Hollenberg), that "s 90RC(2) does not prevent the pursuit in State Courts of general law actions between former *de facto* couples such as this one" and, "The operation of [the equivalent to s 38 of the PLA] is not affected by the FLA." Those conclusions support the conclusion I have just reached.
- [18] However, this conclusion does not determine this application, as it remains necessary to consider the application of ss 39A and 39B of the FLA. They are in a separate part of the FLA to s 90RC and subsequent sections.
- [19] As I have said, Mr Hollenberg's application is seeking an adjustment of the parties' rights to the proceeds of sale of the property. The property is "property" as defined in s 4 of the FLA: that is, property to which the parties to a *de facto* relationship are entitled. Mr Hollenberg's application is with respect to the distribution of that property after the breakdown of the *de facto* relationship. "Distribute", in relation to property, is defined as including "conferring rights ... in relation to the property" (see s 4). Mr Hollenberg seeks the conferral of a beneficial right to a greater

proportion of those proceeds than his current legal entitlement. Mr Hollenberg's application is therefore a "de facto financial cause" as defined.

- [20] The consequence of this conclusion is that jurisdiction to determine Mr Hollenberg's de facto financial cause is conferred on the FCFCA. His application must not be instituted otherwise than under the FLA: s 39A. His application in this proceeding is made otherwise than under that Act.
- [21] Mr Hollenberg also submitted that, as neither party has chosen to invoke the jurisdiction of the FCFCA, nor can they do so now without the court's leave (or, I interpolate, the agreement of both parties), the FCFCA no longer has jurisdiction and only this court can resolve the parties' dispute as to the distribution of the proceeds of sale. With respect, I disagree. That court continues to have exclusive jurisdiction. As the Full Court of the Family Court of Australia said in *Emerald & Emerald* [2018] FamCAFC 217 at [94] and [96], once a claim is within that court's exclusive jurisdiction, it does not lose that character as a result of, for example, a refusal to grant leave to make an application. Its jurisdiction is not ousted simply because neither party seeks to invoke it. Whether it will exercise that jurisdiction is a matter for it or the parties together to decide, if either or both parties seek to invoke it.
- [22] Similarly, and analogously to Wilson J's conclusion in *JAB* at [98], once a claim is a de facto financial cause, the jurisdiction to hear and determine the cause is within the exclusive purview of the FCFCA and it does not lose its character as a de facto financial cause simply because no proceeding has been commenced in the FCFCA.
- [23] Finally, Mr Hollenberg submitted that there is no conflict between the FLA and the PLA that might exclude an application for the adjustment of the parties' rights under the latter. The rights under each Act are different, with s 42 being broader than ss 39A and s39B. Again, with respect, I disagree. While disputes falling within the FLA may be a subset of disputes falling under the PLA (or in equity), the FLA makes clear that that subset cannot be the subject of a proceeding other than under that Act.
- [24] Therefore, Mr Hollenberg's application is not within the jurisdiction of this court. As Wilson J observed at [99]-[100], Mr Hollenberg no longer has a forum in which to bring his equitable claims (unless the FCFCA were to agree to consider a late application to that court).
- [25] Does that mean that Ms Evans' application, at least insofar as it seeks an order for the distribution of the proceeds of sale, is also a de facto financial cause?
- [26] I asked counsel for Ms Evans whether the originating application is itself outside this court's jurisdiction for the same reason, particularly as it sought an adjustment of the parties' rights to the proceeds of sale to allow for payment of the applicant's costs. She submitted that that is not the case, because the application does not seek to alter the parties' rights to the proceeds of sale (or, to use the words of the definition of "distribute" in the FLA, to "confer rights in relation to the property"), but rather simply to enforce existing rights. The method of payment of her costs sought by adjusting the entitlements to enable those costs to be paid out of Mr Hollenberg's share does not constitute an adjustment of the parties' rights, but is simply a methodology for paying the costs of the application. In other words, it is

an alternative to the court ordering an equal division of the proceeds of sale and also ordering that Mr Hollenberg pay Ms Evans' costs of the application.

[27] Ms Evans' application, in paragraph 2, seeks an order that the trustees, after sale, hold the net proceeds of sale as to 50% for each party, "adjusted as set out below." In paragraph 5, she seeks an order that the trustees distribute the net proceeds of sale:

- (a) to her, 50% plus the costs to be paid to her by Mr Hollenberg in accordance with paragraph 6 of the application; and
- (b) to Mr Hollenberg, 50% less those costs.

Paragraph 6 seeks an order that Mr Hollenberg pay Ms Evans' costs of the application and those costs, or so much of them as can be satisfied from his share of the net proceeds of sale, be paid by the trustees from that share to Ms Evans before Mr Hollenberg's share is distribute to him.

[28] There is obvious duplication between paragraphs 5 and 6 of the originating application, presumably from an abundance of caution. In my view, the adjustments sought in paragraph 5 are unnecessary, given the proposed order under paragraph 6. But paragraph 5 does not, in effect, seek an adjustment of the parties' existing rights to the proceeds of sale of the property. It seeks an equal distribution, effectively together with a lien or charge over Mr Hollenberg's share, to secure any costs that the court may order he pay to Ms Evans.

[29] I agree with Ms Evans' counsel's submission. Ms Evans is principally seeking to enforce her entitlement to 50% of the proceeds of the sale of the property of which she is a tenant in common of a 50% share. Whether she also obtains an order for costs in her favour and an order that the trustee pay such costs from Mr Hollenberg's share are questions that the court should determine separately.

[30] The result is that I dismiss Mr Hollenberg's application. I shall hear from the parties about the costs of that application and about the future steps (if any) needed for the final determination of Ms Evans' application, including the costs of it and, if ordered, how they should be paid.