

# SUPREME COURT OF QUEENSLAND

[2002] QSC 049  
File No 2454 of 2001

BETWEEN:

**SUZANNE MARIE STEPHENS**

Plaintiff

AND:

**WILLIAM ROBERT ELL**

First Defendant

AND:

**PROPELL DEVELOPMENTS PTY LTD  
(ACN 000 976 545)**

Second Defendant

AND:

**ERRENMORE PTY LTD  
(ACN 010 567 745)**

Third Defendant

AND:

**ECOVALE PTY LTD  
(ACN 003 855 061)**

Fourth Defendant

AND:

**WALLABY HOTEL (MUDGEERABA) PTY LTD  
(ACN 002 430 775)**

Fifth Defendant

AND:

**BAROB PTY LTD  
(ACN 001 024 915)**

Sixth Defendant

AND:

**TERESINA PTY LTD  
(ACN 001 666 888)**

Seventh Defendant

AND:

**KANNAWICK PTY LTD  
(ACN 079 906 451)**

Eighth Defendant

AND:

**HOTEL GRAND CHANCELLOR (BRISBANE) PTY LTD  
(ACN 061 467 597)**

Ninth Defendant

AND:

**LEDA HOLDINGS PTY LTD**  
**(ACN 001 404 557)**

Tenth Defendant

AND:

**LEDA COMMERCIAL PROPERTIES PTY LTD**  
**(ACN 008 613 447)**

Eleventh Defendant

## **MOYNIHAN J – REASONS FOR JUDGMENT**

DELIVERED ON: 6 March 2002

HEARING DATE: 28 November 2001

- ORDER:
- 1. Dismiss plaintiff's application for orders that first defendant:**
    - a. Provide "financial statement of compliance" with the Act and Rules; and**
    - b. Complies with undertakings given on 22 December 2000**
  - 2. Direct the defendants supply further and better particulars of paragraphs 12(b), 13(c), 14(c), 25(a), (b), (c), (d) and 47 of the defence.**

CATCHWORDS: PRACTICE – UNDERTAKINGS – whether Court should enforce compliance with an undertaking.

*PROPERTY LAW ACT 1974* – where dispute over property – s 289(1) – disclosure of financial circumstances – practice direction 33 of 1999 – where purpose to ensure compliance with requirements of s 289 – what amounts to financial resources – what constitutes knowledge of financial resources – whether there has been compliance with s 289.

PROCEDURE – where request for further and better particulars.

COUNSEL: T D North SC with him P W Hackett for the applicant  
T Kirk SC with him R Jones for the defendant

SOLICITORS: Colwell Wright for the applicant  
Hickey Lawyers for the defendants

- [1] On 12 March 2001 the plaintiff commenced this action seeking declarations:
1. That the deeds of separation dated 14 December 1999 and 5 September 2000 are void.
  2. Effecting a just and equitable property distribution.
  3. That the first plaintiff is the beneficial owner of the properties registered in the names of the defendants described herein or alternatively that the defendants hold such property on trust for the first plaintiff and the defendant's share as this Honourable Court determines.
- [2] The statement of claim pleads claims based on the de facto relationship provision of the *Property Law Act* 1974, and on a constructive trust. The claim on the latter basis presumably explains why a claim rather than an originating application was used. The action has proceeded to the stage that a defence has been delivered.
- [3] In this application the plaintiff seek orders that:
- (a) The first defendant provide a statement of financial circumstances in compliance with s 289(1) of the *Property Law Act* 1974 and Practice Direction 33 of 1999.
  - (b) The first defendant complies with undertakings given on 22 December 2000 in a matter (sic) considered appropriate by the court.
  - (c) The defendants provide further and better particulars of the defence.
- [4] It is convenient to commence by disposing of (b). The plaintiff complains of non-compliance with an undertaking that the first defendant would "do all things reasonably necessary to ensure building works (being) effected on 57 Commodore Drive, Paradise Waters are completed expeditiously".
- [5] The apparent purpose of the undertaking was to allow the plaintiff to move into occupation of 57 Commodore Drive. It is not an issue that the works have been completed or that that the work was done other than expeditiously. The alleged non-compliance is that a number of sub-contractors engaged to complete the work have not been paid by the head contractor, a company identified with the first defendant.
- [6] The sub-contractors are not parties to the action. There may be legitimate disputes between the contractor and sub-contractors bearing on the obligation to pay. If there are they are irrelevant to the dispute between the plaintiff and the first defendant in respect of which the undertaking was given.
- [7] The undertaking does not expressly provide for the first defendant to pay or procure payment of the subcontractors. No basis has been shown, in the light of the considerations I have referred to, for inferring or implying an obligation that the first defendant pay or procure the payment of the subcontractors save in so far as that was necessary to have the work completed expeditiously. As I have said that is not an issue.
- [8] In any event the appropriate means of enforcing compliance with an undertaking to the court are proceedings for contempt or by suing on the contract reflected in the undertaking. If the Plaintiff wishes to pursue any issue of contempt one or other of

these courses should be followed rather than seeking to avoid addressing the issues which would arise in contempt proceedings or an action.

- [9] I turn to the issue of the adequacy of the statement of financial circumstances. Section 289(1) of the *Property Law Act 1974* (the Act) provides that a party to a proceeding for a property adjustment must disclose the party's "financial circumstances" in the way prescribed by the Rules, or a Practice Direction. Practice Direction 33 of 1999 (the Practice Direction) is designed to "ensure compliance with the requirements of s 289".
- [10] It will shortly be necessary to consider the terms of the Practice Direction in some detail. In the meantime it may be noted that para 2 provides to the effect that within ten days of the plaintiff serving a signed statement fully disclosing that party's financial circumstances as detailed in para 1, the first defendant must serve "in any event within ten days" a signed statement setting out his financial circumstances.
- [11] The first defendant served a financial statement dated 20 August 2001. The plaintiff did not accept that it complied with the Practice Direction and raised that by a letter of 31 August.
- [12] As a consequence of the 31 August letter, the first defendant filed an amended financial statement on 11 October 2001. This disclosed, among other things, his membership of a superannuation fund and that he was a potential beneficiary of some fifteen discretionary trusts. In each case the trustee, a proprietary company, and the trust deed was identified.
- [13] At some stage, apparently prior to if not at the time of the filing of the document of 11 October 2001, the first defendant provided the plaintiff with a list of companies with which he was associated as a director or shareholder. So far as is relevant, the list appears to include the trustees disclosed in the amended statement of 11 October 2001.
- [14] The plaintiff did not accept the adequacy of the 11 October statement and wrote to the first defendant under Chapter 11 Part 8 of the *Uniform Civil Procedure Rules* on 29 October complaining that the first defendant had still not fully disclosed his financial circumstances.
- [15] In addition to reference to complaints which had been made in a letter of 31 August dealing with the 20 August statement the 29 October said:
- ". . . the First Defendant has disclosed a number of companies in which he has an interest and a number of trusts in which he is a beneficiary. The additional disclosure does noting (sic) to acquaint the plaintiff with the First Defendant's financial resources to assess a fair value of the First Defendant or value the assets the First defendant by (sic) become vested in or become applied of."
- [16] It may be accepted, as was urged by the plaintiff's counsel, that the first defendant is a wealthy man. He is a successful property developer and apparently has extensive interests. It is apparent that the arrangement of his financial affairs are complex. It may also be accepted that the financial

statement of 20 August 2001 did not comply with Practice Direction 33 of 1999.

[17] The scheme of the Act appears to be that the Court has power to adjust “property interests” (s 282) taking into consideration “financial and non financial contributions to the acquisition, conservation and improvement of property . . . and financial resources” (s 291). These include superannuation and discretionary trusts (s 263). Disclosure of “financial resources” is a step in this process (s 289 and the Practice Direction).

[18] Paragraph 1 of the Practice Direction relevantly for the disclosure of financial resources in these terms:

- “1. The applicant for a property adjustment order must serve on the other party, within 10 days after filing the application, a signed statement fully disclosing that party’s financial circumstances, and in particular:
- (i) details of all interests in land owned or held by the party including:
    - a. the full real property description of the land or other description sufficient fully to identify the property;
    - b. the value of each such interest and the basis of that valuation;
    - c. details of any mortgages or charges over that property, including the name of the holder of the mortgage or charge and the amount secured thereby;
  - (ii) details of all shares and other similar property held by the party including:
    - a. a full description of the property sufficient to identify it;
    - b. the value of each item of property and the basis of that valuation;
  - (iii) particulars of all sums of money held by the party either in cash or in accounts with banks or financial institutions including:
    - a. the amount;
    - b. name of bank or institution;
    - c. the terms on which the money is held by that bank or institution;
  - (iv) details of any interest held by that party in any superannuation fund, trust or partnership;
  - (v) full particulars of any other property of any description owned by the party whether within the jurisdiction or elsewhere, including its value and the basis of that valuation;

[19] I note para 3 of the Practice Direction:

- “3. Nothing in this Practice Direction shall limit a party’s obligation to disclose in full that party’s financial circumstances relevant to the application”

And that the action is subject to the disclosure provisions of the Rules.

- [20] The first defendant has given information about his superannuation entitlement. As I understand it he has supplied or will supply the matters raised by the plaintiff’s 31 August letter save in respect of the superannuation and discretionary trusts. Argument before me focused on whether the first defendant was obliged to provide details of the assets of the various trusts and their value.
- [21] The first defendant’s rights in respect of the discretionary trusts are to be considered as a potential beneficiary and for the due administration of the trust; *Garside v Ireland, Revenue Commission* 1968 AC 4553; *Re Goldsworthy* 1969 VR 843 at 348; *Dwyer v Ross* (1992) 34 FCR 463 at 465. He does not have an interest in trust assets.
- [22] The first defendant’s position as a potential beneficiary is no doubt a “financial resource” to be taken into account in any “adjustment to property interests” to which the plaintiff may be entitled. He does not however have any interest in the trust assets. Nothing has been put before me to found the conclusion that the interest is property which may be the subject of adjustment.
- [23] These considerations are in my view reflected in para 1(iv) of the Practice Direction. This requires “details of any interest . . . in any trust”. This may be contrasted with, for example, para (ii) which requires a full description of shares and similar property including a “full description . . . sufficient to identify” the property and a valuation, with the basis of the valuation.
- [24] Nothing has been put before me to satisfy me that the first defendant has knowledge of the various trust properties or their value or that he was entitled as a potential beneficiary to obtain the information.
- [25] The considerations being those canvassed I am not persuaded it has been demonstrated the first defendant has failed to comply with his obligations under para 1(iv) of the Practice Direction.
- [26] A number of the plaintiff’s requests for further and better particulars remains outstanding. A schedule, summary, the relevant extracts from the pleadings, the request and the response is a schedule to these reasons.
- [27] **Requests 12(b), 13(c) and 14(c):** The plaintiff is in my view entitled to particulars of facts relied on in respect of the visits referred to in para 7 of the defence which found the conclusion that the visits were “unstructured, flexible and of short duration . . .” and hence not evidencing a de facto relationship as requested by 7(f) and (g).
- [28] As to request 33(a) the issue is whether the plaintiff played a role in the management of the companies. That is put squarely in issue with a “direct explanation” as required by r 166(4). I am not persuaded that further particulars of that explanation.

- [29] Similar considerations apply with respect to request 44(a). The issue joined is that the plaintiff did not contribute. The direct explanation is that others brought about any enhancement in value or profits in so far as this was the result of skill, expertise or efforts. I am not persuaded the particulars sought are required.
- [30] **Request 22, para 10(d):** of the defence is a direct assertion of an agreement to the contrary of that alleged by the plaintiff. The plaintiff is entitled to the particulars sought.
- [31] **Request 25(a), (b), (c) and (d):** The plaintiff is entitled to the particulars sought as to confirmation and acknowledgement pleaded by the defendant as an answer to the plaintiff's claim.
- [32] **Requests 42, 43 and 47:** While it is not obvious that the commencement dates are relevant to refusing the plaintiff's claim they may be and should be supplied.
- [33] **Request 47:** Paragraph 22A of the defence counters an allegation that the separation agreements are void because the plaintiff was not aware of the first defendant's financial position. The first defendant meets this with an allegation that she was "fully aware of (the first defendant's) property, financial resources and liabilities". The plaintiff is entitled to particulars of the factual basis of the alleged knowledge.
- [34] I dismiss the plaintiff's applications for orders that the first defendant:  
(a) provide a "financial statement in compliance" with the Act and Rules; and  
(b) complies with undertakings given on 22 December 2000.
- [35] I direct the defendants supply further and better particulars of paras 12(b), 13(c), 14(c), 25(a), (b), (c), (d) and 47 of the defence.
- [36] I will hear submissions on costs.