SUPREME COURT OF QUEENSLAND

[2002] QSC 151
File No 9149 of 2002

BETWEEN:

MERRIN ELIZABETH WATERHOUSE

Plaintiff

AND:

SHERIDAN MAREE POWER

Defendant

MOYNIHAN J – REASONS FOR JUDGMENT

DELIVERED ON: 10 May 2002

HEARING DATE: 14 November 2001

COUNSEL: Mr. P. Kronberg for the plaintiff

Ms. K.E. Downes for the defendant

SOLICITORS: Watts & Company for the plaintiff

Denise Maxwell – Solicitor for the defendant

Introduction

[1] This action arises out of a break-up of a de facto relationship. It falls to be determined under the law applying before Part 19 – Property (De Facto Relationships) of the *Property Law Act* 1974 became law.

[2] The plaintiff claims the following relief:

(i) a half share in a house at Wavell Heights;

(ii) the defendant's half share in a jointly owned property at Chillingham;

(iii) a four wheel drive motor vehicle registered in joint names.

[3] For reasons, which will emerge, it is noteworthy that the statement of claim does not plead a foundation for, or seek an account of the parties contributions to the acquisition, enhancement or maintenance of the properties the plaintiff claims or an inquiry as to the effect of the plaintiff's contribution on the value of the Wavell Heights property.

[4] The defendant continues to reside in the Wavell Heights house, she owns it and it is and always has been unencumbered. The Chillingham property has been sold and

the net proceedings retained pending the outcome of this action. The defendant retains the motor vehicle.

[5] The plaintiff was born on 14 January 1965 and the defendant on 4 November 1954. They met on 29 March 1991 and soon became involved in a sexual relationship. The plaintiff moved into the defendant's Wavell Heights house later in 1991. The parties did not contemplate a break up of their relationship and did not put any arrangements in place to deal with that contingency.

[6] The relationship broke up in late November 1999 and the plaintiff moved out of the Wavell Heights house. The defendant's evidence was that the plaintiff had formed another relationship. The plaintiff did not deny that she had but said that she left because she (the plaintiff) was not treated as "an equal partner". In any event I am left with the distinct impression that the plaintiff was the more dominant of the partners during the relationship.

The plaintiffs' case

[7] I continue to have difficulty in identifying with any precision the basis of the plaintiff's case. It is more practical to set out the relevant parts of the statement of claim than it is to attempt to summarise it:

> "4. In or about June 1992, on a date the plaintiff is unable to particularise, the defendant said to the plaintiff words to the effect that she, the defendant, had decided to give to her, the plaintiff, a one half interest in the Wavell Heights property, and repeated this claim throughout the relationship.
>
> 5. During the course of the parties' cohabitation the plaintiff provided to the defendant domestic support and assistance, including financial assistance.
>
> **PARTICULARS**
>
> (a) The defendant suffered from panic attacks and as thus the plaintiff assisted the relationship and the defendant's wellbeing, by or fulfilling outside domestic duties such as shopping, paying bills and the like;
>
> (b) the defendant would render to the relationship household assistance by way of performing household chores, gardening and the like;
>
> (c) the plaintiff contributed towards the ongoing maintenance, upkeep and renovations to the Wavell Heights property;
>
> (d) the plaintiff provided the primary source of financial income.
>
> 6. In January 1996, the defendant had ceased employment and thereafter the plaintiff was the primary income earner for the duration of the relationship, apart from income derived by

the defendant in her employment with Magna Data and from a business known as "Ribbon.net", which income the plaintiff is unable to particularise.

7. Subsequent to the defendant's loss of employment, the plaintiff paid for the ongoing expenses in maintaining the Wavell Heights property, in particular rates, electricity and other services.

8. On 11 April 1997 the plaintiff took voluntary early retirement from her employment.

9. As a consequence of her voluntary retirement the plaintiff received the sum of approximately $35,000.00 as termination pay and was able to access accumulated superannuation of approximately $100,000.00 in 1999.

10. From the proceeds of the termination payment and superannuation fund the plaintiff utilised such funds to acquire with the defendant, as joint tenants property at Lot 8 Beantree Road, Chillingham being Lot 8 on DP 794038, County Rous, Parish Tweed ('the Chillingham property') on 17 July 1999.

11. Throughout the relationship, the plaintiff was the primary income earner, earning $36,000.00 at the start of the relationship progressing to $49,000.00 at the end. Conversely, the defendant's income varied from $25,000.00 to $28,000.00 up until 1996 (QUT Student Guild), to $0.00 to $200.00 per week for 1996/97, $27,000.00 in 1997/98 from Magna Data, and approximately $400.00 per week from February 1999 to November 1999.

PARTICULARS

(a) The sum of $45,000.00 as a deposit on the property which was acquired for the sum of $178,789.00;
(b) The sum of $26,586.00 to acquire a four wheel drive utility more particularly described as a 4WD Ford Courier King Cab Utility, VTZ797;
(c) $20,000.00 to acquire household furniture;
(d) The sum of $1,500.00 to exterminate termites under the residence;
(e) The sum of $2,000.00 in acquiring a fireplace for the residence;
(f) The sum of $3,500.00 to install a rain water tank;
(g) The sum of $10,000.00 was expended on legal fees and stamp duty for and incidental to the acquisition of the property.

12. The defendant contributed the sum of $5,019.00 towards the acquisition of the property.

13. Of the balance of the purchase price of $135,000.00 the plaintiff and the defendant jointly applied for and were granted a home loan, secured by mortgage over the Chillingham property.

14. Mortgage repayments of $870.00 per month and credit card expenses (including groceries and petrol) were paid by the Plaintiff solely, which payments the plaintiff continues to pay to date.

15. The defendant incurred costs of $19,772.82 between July 1999 and February 2000 (groceries and living expenses, interest rates etc) which is outstanding. In addition, following separation the defendant withdrew sums totalling $7,522.00. This eliminated the credit that the plaintiff had established and compromised her ability to pay for farm equipment purchased at the urging of the plaintiff.

16. At the time of separation, and to this date, the defendant retains possession of:

    (a) the 4WD utility;

    (b) the plaintiff's household furniture and belongings (see attached list) in 40 Castor Road, Wavell Heights;

    (c) the Wavell Heights property;

    (d) the Chillingham property, including its improvements.

17. By virtue of the matters pleaded aforesaid, it is unconscionable for the defendant to retain:

    (a) a one half share or interest in the Wavell Heights property;

    (b) her interest in the Chillingham property; and

    (c) the 4WD utility."

[8] After the basis of the case was canvassed from time to time in the course of argument, it was ultimately submitted for the plaintiff, again it is simpler to set out the submissions;

> ". . . the evidence of the plaintiff . . . shows that from the very beginning of her cohabitation with the defendant she undertook contributions to the household. Whilst, initially, the parties maintained completely separate accounts, it is apparent from the plaintiff's evidence, that after the promise of one half of her house to her, she saw that the relationship was so committed that she then contributed more of her financial resources to the household.

> It is that pooling of resources which makes it difficult to say that her contributions to the property should be assessed strictly in accordance with her financial contributions to the improvements in the household. On the contrary, it would be appropriate to determine that the parties at least from the middle of 1992 were undertaking a joint endeavour in respect of the maintaining of the home and securing accommodation for themselves both then and in the future.
>
> In light of the statement of principle in *Baumgartner* (*Baumgartner v Baumgartner* (1987) 146 CLR 13), it would be necessary to ascertain the proportions (without undertaking a detailed assessment of the contributions) and attributing the joint endeavour as a joint endeavour in the enhancement of the property, as well as its maintenance.
>
> Accordingly, it would be appropriate to consider how the plaintiff's direct and indirect financial contributions contributed of the property, thereby entitling her, as it were, to a "purchase" of part of the then existing title in the land held by the defendant. In ascertaining this entitlement, regard needs to be had to the value of the property at the commencement of the relationship and at the end, to determine a fair proportion".

[9] Reliance on the statement set out in paragraph 4 of the statement of claim is not pleaded although it was argued. The pleading is short on providing a connection between for example the expenditure pleaded in paragraph 15 and the acquisition enhanced or sustained of the property in which the plaintiff now claims the defendant's interest.

[10] The pleading does not to my mind squarely raise the issues of common intention or joint endeavour and other issues pursued at the trial, some of which are canvassed in those reasons. It is also fair to say that the submissions appear to go beyond the case initially pleaded and the ratio of *Baumgartner*. (supra)

[11] The defendant did not take issue with these and other aspects of the pleading or the conduct of the case preferring to have the matter disposed of. That was, having regard to the amount in issue, a sensible approach. It has proved however to compound the difficulties of disposing of the case. Finally, I should also mention that the furniture referred to in the statement of claim did not feature in the trial.

Some general conclusions:

[12] The statement of claim pleads the plaintiff's provision of domestic support and assistance, including financial assistance, during the course of the parties' cohabitation as a basis for the relief claimed. Leaving aside the issue of financial assistance, no doubt each of the parties contributed general "domestic support and assistance" of the kind one might expect to be contributed in the course of a relationship such as theirs. On the view I take of the evidence, it is impossible to conclude, assuming it to be material to do so, that there was such a disparity between each parties' contribution to domestic support and assistance other than financial assistance so as to found the adjustment of rights in respect of the three properties on the basis of equitable principles of unconscionability canvassed in

cases such as *Muschinski v Dodds* (1986) 160 CLR 583 and *Baumgartner* (1987) 146 CLR 13.

[13] In my view there were separate and distinct arrangements in respect of each of the Wavell Heights house, the Chillingham property and the four-wheel drive. There was no overall common purpose or joint endeavour. I will deal with them in more detail later but note that the defendant had acquired, maintained and improved the Wavell Heights property prior to commencement of the relationship. The shares of the respective parties in the Chillingham property and in the four-wheel drive, both of which were acquired towards the end of the relationship, reflect the specific intentions of the parties.

[14] The financial arrangements between the parties fluctuated over the course of the relationship depending on considerations such as employment and health. The parties maintained separate bank accounts. During the relationship they opened a joint account to which each contributed and drew on but they appear to have otherwise maintained separate accounts although there were less utilised. The joint account was connected to the acquisition of the Chillingham property.

[15] The evidence of the plaintiff's financial contribution fell under four categories, first, contribution in respect of enhancement, maintenance and the running of the Wavell Heights property. Secondly contributions in respect of the acquisition, enhancement and running of the Chillingham property. Thirdly in respect of the acquisition of the four wheel drive. Fourthly contributions falling into none of these categories but relating to the parties general living expenses which the plaintiff sought to have brought into account in support of her property claims.

[16] As to the latter category it was, for example, submitted to the effect that over the course of the relationship the plaintiff paid some $111,866.00 for groceries and associated household needs. This, it was contended, was a □'s contribution. The defendant's contribution was therefore $55,933.00. On the basis that each of the parties received the benefit of half the expenditure ($83,899.50). It was submitted the plaintiff therefore contributed $27,966.50 to the benefit of the defendant.

[17] There is, however, no nexus between the disparity (assuming that to be the case) and the acquisition, enhancement and retention of the properties in which the plaintiff now claims the defendant's interests; cf *Engwerda v Engwerda & Ors* (unreported, 2000, QCA 61 para 28); *Baumgartner v Baumgartner* (1987) 164 CLR 137. It is not a case in which, for example, the plaintiff's disproportionate contribution enabled the defendant to accumulate funds to acquire, maintain or enhance the properties, her interest in which the plaintiff now claims.

[18] Finally I note that the evidence does not provide an adequate basis for properly determining the comparative net worth of the parties at separation; *Engwerda* (2000) QCA 61 at para 31.

Baumgartner v Baumgartner

[19] Given the plaintiff's reliance on *Baumgartner* (1987) 146 CLR 137, it is appropriate to say something about the facts of that case in comparison with this. *Baumgartner*

was a case of a house acquired in the name of one of the parties (the first partner) to a relationship. The first partner contributed the net proceeds of the sale of a unit, which he owned. The parties then pooled their earnings in the proportion of 55% by the first partner and 45% by the second partner for the purpose of the relationship including to secure accommodation for themselves and their child. The acquisition of the property was largely funded, directly or indirectly out of the pooled resources. On separation the first partner claimed that the property was his. He was found by the High Court to hold the property for both in the proportion of their contributions subject to a charge for the net proceeds of the contribution for the sale of the unit.

[20] As has and will emerge, the facts of this case are different. There are, for example, three properties giving rise to distinct considerations. The defendant owned and resided in the Wavell Heights property prior to the relationship and still lives there. The ownership of the other two properties of them reflects the parties' specific intent. The plaintiff seeks to bring into account contributions not directly related to the acquisition, retention or enhancement of the properties as well as contributions specifically related to one or other of them. For that and other reasons the financial relationships between the parties here is more complex than was the case in *Baumgartner*.

The Wavell Heights property

[21] The defendant paid $57,000.00 for the Wavell Heights property in 1987; this and subsequent figures are approximate. Her parents contributed $55,000.00 and the defendant $3,500.00 plus outgoings associated with the acquisition. This was pursuant to an informal family arrangement whereby she (the defendant) was to leave the house in her will to the benefit of the next generation of family members. It seems that a similar arrangement was made with the defendant's siblings.

[22] There was an arrangement between the defendant and her parents that if the defendant had "a little bit of extra money" she would give it to them with a view to accumulating her savings. They would return it to her "if she needed it". It seems that from time to time they did so to allow the Wavell Heights property to be enhanced or maintained.

[23] The only evidence directed to the value of the Wavell Heights property is from an experience real estate agent "familiar" with property values "in the Wavell Heights area", who had done a "drive by" shortly before the trial. He gave an opinion, unsubstantiated by an examination of comparative sales or other data, of the value of the property in 1991/92, November 1999 and at the date of the trial. The amounts are $115,000.00 to $160,000.00 and $190,000.00 respectively. The plaintiff contends for a "minimum assessment of □ of the increase in value of the property during the relationship…" as representing her contribution.

[24] These value figures are at best educated guesses. The evidence does not provide a basis for concluding that the increases reflect contributions made by the plaintiff to the improvement, maintenance or upkeep of the property. Any increases may well, for example, simply reflect general increases in property values over the period to which they relate.

[25] The plaintiff was living in rented accommodation before she moved in with the defendant. The defendant at the plaintiff's request asked a boarder who was living on the property to leave. I accept the defendants evidence that the question of the payment of rent was not discussed between them; it "seemed unnecessary" in the context of the relationship. I do not accept the plaintiff's evidence that there was a specific agreement that she wouldn't pay rent although the defendant did not in fact contemplate it. The plaintiff did not pay rent throughout the relationship. I should have thought, all else being equal this is a consideration to be brought into account on the defendant side of the ledger. The plaintiff, as the parties contemplated contributed to enhancements of the property, in as I have said there is no evidence as to whether these added to the value purportedly reflected in the figures and referred to earlier.

[26] The defendant had carried out enhancements, maintained and paid outgoings on the Wavell Heights property before and after the relationship commenced.

The Statement Pleaded in Paragraph 4 of the Statement of Claim

[27] It will be recalled that the plaintiff pleads statements by the defendant of an intent to give her a half share in the Wavell Heights property. As I have said there is no plea of the plaintiff's reliance on the promise. It was however submitted that the plaintiff saw this as a "commitment to the relationship" and so she "committed more of her financial resources" to it. The submissions reflect the plaintiff's evidence.

[28] The plaintiff gave evidence that the statement:

> ". . . came out of the blue. It wasn't something that I had either expected or solicited and I wasn't really quite sure why. But I guess it was for me that Sheridan was trying to indicate to me that she was committed in the relationship and all the resources were being pooled."

I note that such an arrangement would have been to the contrary of the family arrangement pursuant to which the defendant had acquired the property. The defendant took no steps to have any such intent implemented and the plaintiff did not do so. Assuming the statement was made, the evidence provides no basis for identifying the "more of her financial resources…" the plaintiff committed as a consequence of its being made.

[29] In a letter on 25 January 2000, the plaintiff's solicitors advanced a claim based on her having contributed towards "the acquisition, maintenance and upkeep" of the Wavell Heights property. This made no reference to the events pleaded in para 4 of the statement of claim. This is in my view surprising, if the statements were made the plaintiff saw them as having the consequences for which she now contends and acted on them.

[30] The plaintiff's mother gave evidence in support of the defendant having made statements pleaded, as did her father. The mother's answers in cross-examination to the effect that it was her signature on a document shown to her but that it was "possible" that her signature was copied from somewhere else "perhaps" by the defendant are at best bizarre. That fact that the witness felt constrained to make the claims in my view casts a deep shadow over her version of events and her evidence. I do not accept her evidence or that of the plaintiff's father.

[31] The evidence of Sandra Wilson of a celebration sometime in 1992 does not, in my view, justify a conclusion that the celebration was on account of the statement pleaded in para 4 of the statement of claim as distinct from, for example, the fact of the relationship was being celebrated.

Mirror wills

[32] The plaintiff gave quite categorical evidence that she and the defendant "decided" to make wills leaving everything to the other. This "decision" included that in the event of one party predeceasing the other, the deceased party's property was to be left to "the women in the families"; an arrangement contrary to the family arrangement I mentioned earlier in connection with the Wavell Heights property.

[33] No such claim was raised or pleaded prior to the plaintiff's raising it in her evidence. The plaintiff's counsel justified the absence of its being pleaded in terms of it being "merely corroborative of the fact that the parties considered their financial assets to be mixed".

[34] The plaintiff asserted that the parties went to see a solicitor and "gave instructions at the same time . . ." the defendant gave "exactly the same instructions" as she did and, the wills were "mirror reflections".

[35] This evidence is not supported by Mr Tooma, the solicitor involved whose evidence I accept. Mr Tooma gave evidence that the defendant made a will in 1990. That will was consistent with the defendant's account of the family arrangement to which I have referred. Those instructions in 1990 were the only instructions he received from the defendant in respect of a will.

[36] Mr Tooma received instructions from the plaintiff to make a will in November 1994. That will leaves the plaintiff's property to the defendant and in the event that the defendant predeceases her to the female relatives of the plaintiff and the defendant's. Whatever the plaintiff's reason for that course, I am satisfied there was no arrangement between the parties to make mirror wills.

Additional conclusions

[37] The plaintiff contended during the trial that she contributed to the acquisition of the Wavell Heights property by making repayments to the defendant's parents of the monies advanced by them for the acquisition of the property. The plaintiff may have made occasional payments to the defendant's parents at her request. I am not however satisfied that these were repayments of monies advanced for the acquisition of the Wavell Heights property not least because, as I have already said,

I am not satisfied that there was any such arrangement between the defendant and her parents.

[38] I do not accept the plaintiff as a creditable witness. In my view her evidence in a number of respects was at best for her a reconstruction designed to advance or enhance her case rather than a genuine account of events.

Indirect Contributions

[39] I have mentioned the claims in respect of groceries in para 16 of these reasons. It is also submitted-

> "The plaintiff paid for other expenses such as:
>
> - Electricity ($1,875.87 over 8 years – see exhibit 8; tables 12 and 14).
>
> This represents 9 electricity bills, which were presumably quarterly bills rather than monthly bills. The average bill would have been say $208. Over 8 years, this means that the couple likely received electricity bills totalling $6,656. This means that the plaintiff paid less than 1/3 of the total electricity bills during the 8-year relationship.
>
> - Carpet cleaning ($130.00 – table 12)
>
> - telephone ($2,584.15 over 8 years – see exhibit 8)
>
> This represents 11 telephone bills, which it is assumed were quarterly bills rather than monthly bills. The average bill would have been say $234.92. Over 8 years, this means that the couple likely received telephone bills totalling $7,517.44. This means that the plaintiff paid just over 1/3 of the total telephone bills during the 8-year relationship. Of course if the bills came monthly (which is more likely), then the total telephone bills for the relationship would have been $22,552.32, meaning that the defendant paid 11.5% of the total telephone bills."

[40] I do not propose canvassing other examples of this approach. No connection is between the expenditure and the acquisition enhancement and maintenance of the properties is pleaded, contended for or established. The submission is high on assertion and supposition and short on factual basis particularly given the view I take of the plaintiff's creditability.

[41] Presumably these submissions reflect the plaintiffs general submissions that *Baumgartner* (1987) 146 CLR 13 requires an assessment of properties without undertaking a detailed assessment of contributions. What the court said was that-

> "the court should, where possible, strive to give effect to the notion of practical equality, rather than pursue complicated factual inquiries which will result in relatively insignificant differences in contributions and consequential beneficial interest. We do not

> think, however, that the difference in the present case can be regarded as relatively insignificant. Nor has it been suggested that the difference in the amount of the financial contributions was offset by the greater worth of the respondent's contribution in other area. In these circumstances, though acknowledging that the case is close to the borderline, we consider that the constructive trust to be imposed should declare the beneficial interests of the parties in the proportions 55 per cent to the appellant and 45 per cent to the respondent."

[42] No doubt that is a desirable approach. The High Court was able to assess those proportions because of the factual findings made at trial. In my view this is not a case which is amenable to such a robust approach even without the view I have as to the plaintiff's creditability.

The Chillingham property

[43] As I have already said, this property has been sold and the net proceeds held pending the resolution of this action. The ownership arrangements reflect the explicit intention of the parties at the time of the acquisition of the property. That conclusion is an impediment to the relief claimed. The law will not impute an intention to the contrary of the explicit intention which exists here; *Muschinski v Dodds* (1984-1985) 160 CLR 503 at 595. This is not a case where the intention was based on assurances which were not fulfilled, as was the situation in *Muschinski*. The intention in the present case presumably reflected a belief that the relationship would continue.

[44] It well may be that the plaintiff contributed more to the funds used to acquire the Chillingham property but the extent of the disparity is, in my view, not determinable without a proper taking of account. Moreover such a disparity is not, on the view I have of the evidence, necessarily unconscionable so as to found the intervention of this Court.

The motor vehicle

[45] The position with the motor vehicle is comparable to that with respect to the Chillingham property. The plaintiff may have made a greater financial contribution than the defendant towards the acquisition of the vehicle. The registration in joint names appears to reflect the explicit intention of the parties. The extent of the disparity of contributions depends on the proper taking of an account. The demonstration of a disparity does not, without more, mean that it is unconscionable for the plaintiff to be a joint owner of the property and it does not follow that the relief sought is the appropriate relief in that event.

Outcome

[46] The plaintiff in my view has not established a basis for a half share in the Wavell Heights house or the defendant's share of Chillingham or the four-wheel drive. I will take submissions as to the form of the final order and as to costs.