

# SUPREME COURT OF QUEENSLAND

CITATION: *De Lacey v James* [2003] QSC 094

PARTIES: **JACQUELINE JUNE DE LACEY**  
(Plaintiff)  
v  
**DERECK ARTHUR JAMES**  
(Defendant)

FILE NO/S: S.94 OF 1998

DIVISION: Trial

PROCEEDING: Application for Orders

ORIGINATING COURT: Supreme Court at Townsville

DELIVERED ON: 9 April 2003

DELIVERED AT: Townsville

HEARING DATE: 9 & 10 December 2002, 1 April 2003

JUDGES: Cullinane J

**ORDER:** **Order that the defendant transfer all his right and title to and interest in:**

- (a) **the land described as 9 Parnell Court, Lot 10 on RP 739531, Parish of Coonambelah, County of Elphinstone;**
- (b) **moneys held in joint bank account number 3899-37394 at the ANZ Bank; and**
- (c) **jointly owned furniture in the dwelling situated at Parnell Court**

**to the plaintiff.**

**In all other respects the claims are dismissed.**

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – OTHER MATTERS – where plaintiff seeks declarations of beneficial entitlement to

property, following breakdown of de facto relationship with defendant – where principles of constructive trusts apply – whether plaintiff is entitled to declarations over defendant’s business interests.

*Property Law Act 1974 (Qld)*

*Fuller v Meehan* (1999) QCA 37, followed  
*Engwirda v Engwirda & Others* (2000) QCA 61,  
 followed

*Re: Bailey* (1978) FLC 90-424, considered  
*Re: Crapp* (1979) FLC 90-165, considered

COUNSEL: CA White for the Plaintiff/Applicant.  
 WL Pack for the Defendant/Respondent.

SOLICITORS: Dickinson Simeoni & Robins for the Plaintiff/Applicant.  
 Ruddy Tomlins & Baxter for the Defendant/Respondent.

- [1] This is a case in which the parties lived in a de facto relationship for some 16 years before separating. The plaintiff seeks declarations that she is beneficially entitled to or has a beneficial interest in certain property, some of which is held jointly with the defendant and some of which is held in the defendant’s name and seeks consequential orders in relation to such property.
- [2] It is acknowledged by the defendant that there should be orders transferring his interest in jointly owned property (a dwelling at Parnell Court, Townsville, moneys in a joint bank account and furniture at the dwelling) to the plaintiff. What this litigation has been about in substance is a claim by the plaintiff to an entitlement in the defendant’s business interests.
- [3] The 1999 amendments to the *Property Law Act 1974 (Qld)* conferring upon the court a wide power to make orders which are just and equitable in relation to matters of property have no application here. The matter therefore falls to be dealt with in accordance with the principles applicable to constructive trusts as they have been developed in the cases. The pleading here is wide enough to cover both a claim based upon a joint intention of the parties that the property be held for the benefit of both and a claim based upon the alternative grounds of unconscionability.
- [4] These principles necessarily mean that the claim is to be considered by reference to somewhat narrower considerations than would have been the case if the *Property Law Act* applied. See the judgment of the Court of Appeal in *Engwirda v Engwirda & Others* (2000) QCA 61 where the court in similar circumstances said, at para 2, footnote 1:

*“It was not open in these proceedings to allege any wider basis upon which the appellant was entitled to relief. See now, however, Property Law Act 1974, s.296 which permits a court to make any*

*order it considers just and equitable about the property of either or both de facto spouses, adjusting the interests of the de facto spouses in the property. See also s.291, 2.292, s.298, s.299, s.303, s.304, s.305.”*

- [5] To the extent that the case for the plaintiff involved an argument that the principles now applicable to proceedings affected by the *Property Law Act* should apply here, the submission must be rejected.
- [6] The plaintiff was born on 26<sup>th</sup> May 1939 and the defendant on 2<sup>nd</sup> July 1940.
- [7] They commenced to live together in a de facto relationship in 1981. Each had been previously married, in the case of the plaintiff, twice. The plaintiff had been widowed on 5<sup>th</sup> November 1977, had remarried in December 1979 but had separated after less than a year. Both the plaintiff and the defendant had children from previous relationships and two children of the plaintiff were living with her when the relationship commenced. For some time a child of the defendant also lived with them.
- [8] The plaintiff was the owner of two dwellings when the parties met. One of these was the house and land at Sheffield Street, Gulliver in which she resided and into which the defendant moved. She also had a house at Price Street, Belgian Gardens. Both of these dwellings were unencumbered. The defendant had somewhat less in the way of assets. He owned a vehicle. He had an interest in a former matrimonial home in New Zealand but this was encumbered. After some difficulties he obtained some proceeds representing his entitlement but notwithstanding his evidence that this went into the joint account, I am not satisfied this is so.
- [9] At the time of the relationship commencing the plaintiff was a receptionist and the defendant was a plant operator. They shared household expenses, each contributing from their respective wages. Initially they kept separate bank accounts but after a period commenced to use a joint account.
- [10] In 1983 they purchased a block of maisonettes at McLaughlin Street, Townsville as tenants in common. The plaintiff paid a deposit of some \$7,500 as well as the stamp duty and costs and the balance of the purchase price was borrowed jointly from a finance company. Payments were made in reduction of the debt from rental income from the maisonettes and also from the joint incomes of the plaintiff and the defendant. These moneys were secured by mortgages over the acquired property and the plaintiff's property at Sheffield Street.
- [11] The plaintiff ceased her employment and attempted a career as a real estate salesperson on commission but was unsuccessful. In 1983 she commenced to drive taxis and applied for a taxi licence in 1984. She obtained a licence and acquired a taxi and it was necessary to acquire some shares in a taxi company. The total cost of the licence, vehicle and shares was \$80,000. The plaintiff sold her property at Price Street, using \$50,000 from that for the purchase of the licence and borrowed the sum of \$30,000 for the

balance. She drove the taxi herself during the day, engaging drivers at night. She operated a separate bank account for the purposes of the taxi but says that she otherwise used her income for household purposes as had been the case prior to that.

- [12] It is clear, it seems to me, from the evidence that as between she and the defendant, she treated the taxi business as her own.
- [13] Each of them had some commitments arising out of educational and associated expenses for children.
- [14] In 1991 the McLaughlin Street units were sold. The plaintiff and the defendant purchased in their joint names a house at 9 Parnell Court, Cranbrook which became their residence. Prior to this they had lived in the Sheffield Street house although for a period they lived in one of the maisonettes at 57 McLaughlin Street. The purchase price of the Parnell Court house was \$275,000. Of this, \$78,000 represented the equity of the plaintiff and the defendant in the maisonettes, after the discharge of liabilities. Some \$192,000 was borrowed. Shortly after the purchase the plaintiff sold her property at Sheffield Street and discharged a bridging loan of \$80,000 which had been used to acquire the Parnell Court property. This amount represented the entirety of the proceeds she received from the sale of the Sheffield Street property. She sold her taxi business in 1992 receiving a net sum of \$225,000 of which \$118,000 was used to discharge the balance of the loan on the Parnell Court property. As well she discharged her indebtedness in relation to the acquisition of the taxi licence and vehicle and shares. She thereafter continued to drive taxis on a part time basis for other owners but had ceased this work shortly prior to the hearing of these proceedings. It would seem that some moneys from the proceeds of her taxi business were gifted by the plaintiff to children of the defendant.
- [15] It is common ground that from the commencement of the relationship the defendant told the plaintiff that he would not marry her. Nonetheless it seems clear that the relationship was a stable and close one. The plaintiff was content to proceed upon the basis that they would not be married. She says however that she felt sufficiently secure in the relationship to acquire substantial property with the defendant. As can be seen, her contributions to the acquisition of the property were substantial and, in the case of the Parnell Court property, she brought to that what would seem to be substantially all of the assets which she had.
- [16] As I have said it is accepted by the defendant that there should be an order transferring to the plaintiff his interest in the Parnell Court property together with his title to moneys in a joint bank account at the ANZ Bank and his entitlement to the joint furniture in the home.
- [17] Although there was some confusion about the precise time this occurred it seems that the plaintiff and the defendant separated in about September 1997.

- [18] In 1986 the defendant had been employed as a machinery operator. As a result of some discussions between he and two co-employees it was decided that they would set up a business between themselves as earthmoving contractors. For some time the defendant continued to work for his employer before joining the business. In order to acquire a scraper to conduct the business it was necessary for certain funds to be borrowed from the bank. This required each of the partners to obtain a personal loan of some \$20,000. The plaintiff provided a personal guarantee and the security of her property at Sheffield Street to enable the defendant to do this. It would seem from the evidence that the bank already held this security but nonetheless this must be regarded as an important contribution made by the plaintiff. I accept the evidence that she offered to do this and that the defendant accepted.
- [19] There is an affidavit from the accountant who advised the defendant and his two partners at the time the business was commenced, and who has since that time been the accountant to the various entities involved. Initially a partnership was formed to acquire plant and machinery and to lease it to a company (Detman Pty Ltd) which was brought into existence for the purposes of carrying on the business of earthmoving contractors under the name of CEV Constructions.
- [20] Each of the three held a share in Detman Pty Ltd. The explanation for structuring the business in this way is given by Mr Smith in his affidavit.
- [21] Subsequently the company itself began to acquire plant and equipment in its own name.
- [22] In 1989 one of the three men concerned retired and transferred his interest in the partnership to the defendant and the other continuing partner and transferred his share in the company to them. The evidence reveals that the two continuing partners assumed the outgoing partner's liability to the bank and made a payment of some \$44,000 or so over a period of somewhat less than a year to the outgoing partner. Although there were submissions made to me that the plaintiff again provided security in the same way as before for the additional indebtedness which the defendant incurred to the bank to enable him to do this, I do not think the evidence clearly shows this although it may have been the case.
- [23] In November 1991 another company, D & C Machinery Sales Pty Ltd, was incorporated and the defendant and the remaining partner were the sole directors and shareholders of the company. A discretionary trust was established for each of them and a unit trust was created in which each discretionary trust held an equal number of units. The unit trust carried on the business of the purchase and sale of second-hand machinery with the company as its trustee. A copy of the discretionary trust of the defendant is before the court. The plaintiff is not one of the beneficiaries provided for in the schedule to it.

- [24] In 1992 a superannuation fund was established, the members of which were the defendant and the other shareholder. Detman Pty Ltd has made contributions to the fund for the benefit of those members.
- [25] It is fair to say that the businesses prospered and substantial assets and, in particular, land holdings have been acquired by the various entities. Although there had been a good deal of valuation evidence placed before the court, fortunately the parties were able to agree upon the value of the defendant's interests in the various entities, as at the date of separation. There is also some evidence of their present value.
- [26] As at 30<sup>th</sup> June 1997 the superannuation fund had assets which it is said represent an interest of the defendant to the value of \$152,000. His shareholding in Detman Pty Ltd was valued at some \$630,000 and his interest in the partnership at some \$155,000. His interest in the unit trust was \$41,000 resulting in a total of \$980,000.
- [27] This had increased by 30<sup>th</sup> June 2001 to some \$1.3 million. The defendant, I think it can be fairly said, is now a wealthy man.
- [28] There has thus been something of a reversal in the financial positions of the respective parties between the time they commenced their relationship and when they ceased it.
- [29] Whilst the defendant had an interest in the former matrimonial home in New Zealand, this was substantially mortgaged and may have been subject to a claim by his wife. He subsequently received some proceeds from this. However at the time of the relationship commencing the plaintiff had two dwellings and was in a much better financial position than the defendant. Whilst the plaintiff had, at the time of separation, a substantial interest in the matrimonial home, it is the defendant's fortunes which have prospered more, as will be seen from what I have already set out.
- [30] It was suggested in the written submissions placed before the court on behalf of the plaintiff that the defendant had enjoyed what was in effect a windfall. There is however in my view no reason to regard the defendant's position as being other than the product of a good deal of hard work and good decision making, presumably after appropriate advice.
- [31] The defendant's work took him to fairly remote places where he would spend substantial periods.
- [32] I will shortly turn to the conduct of the plaintiff which she says justifies the imposition of a constructive trust upon the property that I have just referred to. Before doing so it is important to bear in mind one of the important and limiting principles which is applicable in such a case. As Thomas JA said in *Fuller v Meehan* (1999) QCA 37 at paragraph 16:

*"It would seem in principle that before a constructive trust could be held to arise there would ordinarily need to be some nexus between*

*the conduct giving rise to it and the property that is to be impressed with the trust.”*

- [33] The conduct can, it is clear, include non-financial contributions and may include contributions in the nature of domestic services which can be linked in some way to the acquisition or maintenance or further development of those interests.
- [34] As I have said the plaintiff puts the case on two bases. The first is a common intention. It was the plaintiff's evidence that she and the defendant effectively treated all of their property as joint and that this was an extension of part of the joint life which they lived. However the evidence in my view does not justify a conclusion that there was any common intention on the part of the parties that the business interest which the defendant acquired should be held jointly by them.
- [35] The plaintiff was not either a director or a shareholder of the company. She was not a partner. She took no role in the formal decision making processes of the business and as Mr Smith points out, he had not met her prior to 1994 when he commenced, to prepare the personal tax returns of both the plaintiff and the defendant. She had not attended any of the meetings which he held on about three occasions each year with the partners and in which taxation matters and the general planning of the financial affairs of the various entities would be discussed. Apart from some activities to which I will shortly refer, she did not perform any tasks in the conduct of the businesses.
- [36] Whilst I accept that the plaintiff and the defendant discussed acquisitions which the business might be proposing to make, this did not involve any decision making role on her part but was no more than might be expected of two people in a relationship, each having a general interest in the other's business activities.
- [37] The plaintiff says however that she has provided both direct assistance and indirect assistance to the defendant in the acquisition of his business assets.
- [38] Firstly as I have mentioned she provided the security to the defendant to enable him to obtain a personal loan at the outset. She says that on a number of occasions she visited the defendant whilst he was on sites away from Townsville and would from time to time take requirements such as spare parts needed on the site with her. She would occasionally clean the site office and the caravan being used when she arrived. She says that on a couple of occasions she drove employees to remote sites when she was going to visit the defendant.
- [39] The plaintiff allowed a shed at her Sheffield Street property to be used for the maintenance of plant and equipment until a property was acquired by the business at Pilkington Street in 1991.
- [40] The defendant acknowledges this activity on the part of the plaintiff but suggests that it was not as frequent or extensive as the plaintiff says.

- [41] The plaintiff at all times looked after the domestic needs of the household and whilst the defendant was away in the course of his work (for some times up to six months at a time) the plaintiff maintained the house and attended to the payment of all personal bills and similar requirements. I think this has to be regarded as a significant contribution which can be regarded as indirectly linked to the defendant's business as it would have been difficult or even impossible for him to have conducted it in the way that he did with his lengthy absences if he could not rely upon the plaintiff to maintain the home and attend to the matters I have referred to. The home was of course one substantially provided by the plaintiff and the defendant had the benefit of it.
- [42] Standing alone these considerations might well, I think, justify a finding that it would be unconscionable for the defendant to deny the plaintiff some, although necessarily limited, entitlement in relation to his interests in the business.
- [43] However there are, I think, some offsetting considerations. Firstly the defendant from 1987 when he became an employee of Detman Pty Ltd had paid the sum of \$24,000 per annum into the joint bank account. He had, prior to that time, a more substantial income than the plaintiff which appears in his affidavit and this was paid into the joint account. The payments which were made from the company continued for some relatively short period after the separation commenced. Overall it is clear that the defendant's contributions to the household must have been much greater than those of the plaintiff and for the greater period these came from the business.
- [44] Although the plaintiff gave some evidence that income from her taxi business was paid into the joint account, her evidence under cross-examination would suggest that her income was paid into an account held by her from which she did pay contributions to the joint expenses of the household and it would seem she also made some payments in cash for these purposes. Nonetheless it is clear that over the period concerned the defendant has made significantly greater contributions to the running of the household than the plaintiff. These payments were not affected by his absence on worksites and continued even though the expenses of the household would have been considerably less. His expenses whilst on site were paid by the company.
- [45] The plaintiff and the defendant jointly had the benefit of payments for telephone expenses and a fuel card paid for by the company. The evidence also suggests that some holidays were paid for by the company although these would seem to be associated with visits by the plaintiff to the defendant who was then working on site at places such as Darwin and Vanuatu.
- [46] The evidence taken as a whole I think requires the conclusion that the plaintiff and the defendant kept their business interests separate although they jointly purchased residential property from which they derived an income in the case of the maisonettes and obtained some taxation benefits.

- [47] Whilst there can be identified some direct and indirect assistance by the plaintiff to the defendant these are offset by benefits which the plaintiff received as a result of the defendant's business interests and the income he obtained from them. Some of the activities which the plaintiff relies upon, even taken at their best, such as the visits to the site, and the use by the business of the shed at Sheffield Street and the taking of spare parts and cleaning of an office site and caravan are, in the overall scheme of things, relatively minor.
- [48] The plaintiff may have a sense of grievance about the disproportionate financial position of the plaintiff on the one hand and the defendant on the other hand at the time of separation and the fact that this is a complete reversal of the position as it had been at the time when the plaintiff and the defendant commenced to live together, at which time the major contributions to the relationship can be seen to have been coming from the plaintiff but this cannot, on its own, be a basis for the making of orders of the kind sought.
- [49] In my view, when one considers the evidence as a whole, it is not possible to conclude that it would be unconscionable on the part of the defendant to retain the assets in the various business entities that he currently has and that he had in 1997.
- [50] Whilst, in view of these findings, it is not necessary to deal with a submission by counsel for the defendant that the orders sought insofar as they relate to the superannuation fund cannot be made, I think it fair to say that this appears to be not without substance. In both *Re: Bailey* (1978) FLC 90-424 and *Re: Crapp* (1979) FLC 90-165 the Full Court of the Family Court expressed the view that an entitlement to superannuation benefits was not property for the purposes of the *Family Law Act* or at least one could not be clearly identified as such. Each case involved a close examination of the relevant deed. Recently Part VIII B of the *Family Law Act* has been introduced to confer power on the Family Court to make certain orders in respect of such entitlement.
- [51] I order that the defendant transfer all his right and title to and interest in:
- (a) the land described as 9 Parnell Court, Lot 10 on RP 739531, Parish of Coonambelah, County of Elphinstone;
  - (b) moneys held in joint bank account number 3899-37394 at the ANZ Bank.
  - (c) jointly owned furniture in the dwelling situated at Parnell Court
- to the plaintiff.
- [52] In all other respects the claims are dismissed.