SUPREME COURT OF QUEENSLAND

CITATION:	*Hardman v Hobman* [2003] QCA 467
PARTIES:	**DAVID JOHN HARDMAN** (plaintiff/appellant) **v** **LAVINIA RHODA HOBMAN** (defendant/respondent)
FILE NO/S:	Appeal No 3712 of 2002 SC No 93 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Mackay
DELIVERED ON:	31 October 2003
DELIVERED AT:	Brisbane
HEARING DATE:	24 October 2003
JUDGES:	Davies and Williams JJA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	EQUITY – TRUSTS AND TRUSTEES – CONSTITUTION AND CLASSIFICATION OF TRUSTS GENERALLY – CLASSIFICATION OF TRUSTS IN GENERAL – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – GENERAL PRINCIPLES – where appellant and respondent in de facto relationship predating amendments to *Property Law Act* 1974 (Qld) – where separated – where respondent owned and bought into relationship property as well as other assets – where appellant claimed equitable interest in that property – whether constructive trust existed over property in appellant's favour EQUITY – SETTLEMENTS – FAMILY ARRANGEMENTS – distribution of assets between parties – whether method of assessing entitlements resulted in too general a calculation of such – whether trial judge's decision 'unsafe and unsatisfactory' and against the weight of the evidence *Baumgartner v Baumgartner* (1987) 164 CLR 137, cited *Dunne v Turner* [1996] QCA 272; Appeal No 196 of 1995, 20 August 1996, cited

Muschinski v Dodds (1985) 160 CLR 583, cited

COUNSEL: The appellant appeared on his own behalf
M E Pagani for the respondent

SOLICITORS: The appellant appeared on his own behalf
J Hamilton & Associates (Mackay) for the respondent

[1] **DAVIES JA:** I agree with the orders proposed by Mackenzie J for his reasons, and for the further reasons of Williams JA.

[2] **WILLIAMS JA**: The facts which are relevant for purposes of this appeal are set out in the reasons for judgment of Mackenzie J which I have had the advantage of reading.

[3] Parties to a de facto relationship (indeed as with parties to a lawful marriage) usually do not conduct their financial affairs on the basis that one day, following a parting of the ways, each would be in a position to give accurate evidence as to the financial contribution made by each to the relationship, in particular to the acquisition of property, and as to the value of that contribution when the relationship ended. For that reason courts called upon to adjudicate on issues such as raised by this appeal will, of necessity, have to adopt a broad brush approach. The trial judge cannot ignore positive evidence in order to achieve what is perceived to be a just outcome, but more often than not the sparsity of evidence will call for the application of what has often been referred to as "palm tree justice". Even then there are constraints on what a court can do.

[4] In cases of this kind the burden of proof is often of critical importance. The party seeking relief must place evidence before the court establishing entitlement to that relief. The absence of evidence does not mean that the judge has a free hand to order the transfer of property in a way which objectively may be seen to be just.

[5] Such considerations are relevant here. The relationship in question lasted from 1984 to 1993. Understandably many records relating to financial transactions during that period are no longer available. Bank statements without evidence as to the transactions recorded therein are of little help to the court. Also, in this case the fact that the appellant occupied on a rent free basis, property owned by the respondent for many years after the termination of the relationship was a very significant factor, though it is difficult to put a monetary value on that benefit.

[6] The learned trial judge in this case addressed all the relevant issues in arriving at the conclusion he did. As the reasons of Mackenzie J demonstrate the evidence does not indicate that he made any error of principle in so doing. This court on appeal is not concerned with adjusting small amounts here and there. The submissions to this court do not indicate any error of law made by the learned trial judge nor that, in broad terms, the conclusion he reached was not justified.

[7] It follows, as the reasons for Mackenzie J indicate, that the appeal should be dismissed with costs.

[8] **MACKENZIE J:** The appellant and the respondent were for some time in a de facto relationship predating the amendments to the *Property Law Act* 1974 (Qld) concerning de facto property. The appellant claimed an equitable interest by way of

a constructive trust over certain property held by the parties. It was submitted that the trust arose from agreement or common intention that the parties would devote their respective earnings towards recurrent and day to day expenses of the joint household and invest in and accumulate assets for enjoyment, use and benefit of both parties.

[9] There was some dispute over the duration of the relationship. There were periods when they lived apart, according to the appellant for work related reasons. The learned trial judge accepted that the relationship subsisted from 1984 to 1993, the period contended for by the appellant.

[10] The learned trial judge held that in an appropriate case, both financial and non-financial contributions could be taken into account for the purpose of determining the respective entitlements of the parties to a de facto relationship. He accepted that the governing principle was that stated by Pincus JA in *Dunne v Turner* [1996] QCA 272; Appeal No 196 of 1995, 20 August 1996 which was based on *Baumgartner v Baumgartner* (1987) 164 CLR 137 and *Muschinski v Dodds* (1985) 160 CLR 583.

[11] At the time the relationship began, the respondent was employed fulltime as a physiotherapist. She worked in that capacity throughout the relationship and up to the time of trial. She contributed her earnings to the joint property pool. She had brought to the relationship an entitlement to a property settlement from her former husband which resulted in land at Mena Creek valued at the time of the property settlement in 1987 at $152,500, a 1983 Ford Falcon sedan and about $6,000 in cash.

[12] At the time the relationship began, the appellant was on unemployment benefits and remained on them until the end of 1987. He engaged in two periods of self employment during the course of the relationship. In 1985 he purchased a vessel called "Kismet" with $15,000, being part of the proceeds of the sale of his fishing licence and $12,000 borrowed from the bank. The vessel was used in a fishing venture the profits of which were conceded to be minimal. Later "Kismet" sank and became valueless except for equipment salvaged from it, which the learned trial judge treated as valueless by the time of the trial. At the commencement of the relationship he also owned a dory which was sold for $3,000 which he kept, and a Holden Kingswood which was eventually dumped as worthless. There was also furniture of little value.

[13] Towards the end of the relationship he also engaged in paw paw farming on the Mena Creek land. This venture was said to have been profitable although substantial evidence in that regard was lacking. The learned trial judge found that apart from expenses drawn by the respondent's son for farm expenses the appellant had used the income for his own benefit.

[14] At the conclusion of the relationship the assets of the parties comprised two of four parcels of land into which the Mena Creek property had been subdivided, a property at Cannonvale, the "Kismet" and the dory, a Toyota Utility and a Jaguar, a tractor and farm equipment and furniture. There was also a sum of about $20,500 in savings. The learned trial judge was not persuaded that timber which the respondent alleged had been cut on the property and sold by the appellant had existed.

[15] The land at Mena Creek is the most valuable asset in contention. It came, by virtue of the respondent's property settlement, to her as one block which was subsequently subdivided into four acreage blocks, two of which had been sold by the time of trial. The first parcel sold realised $80,000. The money was used to pay out a loan of $7,000 owing on the "Kismet", purchasing a Jaguar motor vehicle for $13,600 (which was retained after the separation by the respondent) and paying $5,000 to shift a shed as well as paying the costs of the subdivision. There was a surplus of about $15,000 after all of those payments. The learned trial judge treated that sum as money applied to the joint account despite allegations to the contrary by the respondent that it has been spent on the paw paw farm for the benefit of the appellant.

[16] A second block was sold 12 months or so later for $77,500, almost $73,000 of which went to the joint account. A Toyota utility was purchased for $17,300, retained by the appellant, and later sold for a little over $11,000 which he kept. The property at Cannonvale was purchased from these proceeds, using $50,000 of the money, $16,000 from the appellant's father and the balance by means of a bank loan. The Cannonvale property was sold in 1994 for $135,000. Almost $55,000 was used to pay out the mortgage and almost $20,000 to pay out an overdraft relating to the paw paw business. After commission and outstanding rates were paid, the balance of about $50,000 was deposited in trust to await the outcome of the present proceedings with the amount appreciating to about $65,000 by the time of judgment.

[17] The respondent had left Mena Creek to live in Mackay early in 1990. The appellant remained in occupation of the Mena Creek property for the 12 year period before trial. During that time he made no financial contribution to the rates or other expenses of the property and since at least 1993 made no contribution to maintenance. Since 1994 the rates were paid out of the proceeds of sale of the Cannonvale property.

[18] With regard to the unsold parcels of land at Mena Creek, the learned trial judge accepted valuation evidence from one valuer in preference to that of another that the valuation of the remaining parcels was $219,000. He gave detailed reasons for his finding. The conclusion was open to him to reach and there is no reason to think he erred in doing so. However, the learned trial judge accepted that the appellant was the instigator and driving force behind the subdivision.

[19] The learned trial judge said that he necessarily had to deal with the matter in a broad brush way. He found that conscience did not require that the contribution made by the appellant to the Mena Creek property should be represented by a legal interest in the property. He set out reasons in detail, principally directed to demonstrating that any contribution he made to the property in relation to the subdivision had been more than compensated by his occupation of the property for a lengthy period without rental or other financial contribution. He concluded that the appellant's contribution towards the subdivision and the profit derived from it was more than adequately represented by an interest in the fund from the sale of the Cannonvale property held in trust. The extent of his interest in the trust fund should reflect benefits already derived.

[20] The learned trial judge noted that there had been an unrepaid loan of $16,000 from the appellant's father which may not have been repayable since the estate of his

father was not pursuing the debt. Nevertheless, he allowed $16,000 from the fund held in trust noting that the appellant had also derived nine years rent free accommodation, the proceeds of the Toyota and whatever he obtained from the paw paw farming. He considered that this outcome recognised the contribution the appellant had made to the relationship.

[21] The appellant's written submissions dealt with a number of issues, some of which were developed further in his oral submissions. One was that his efforts and other input were instrumental in bringing about the most significant part of the increase in value of the Mena Creek lands. He contended that he was entitled to a larger share of the profits. The learned trial judge's approach to this issue is set out above.

[22] The appellant submitted that the notion that he had lived rent free on the property for the nine years after the relationship ceased was misconceived because he lived there because of necessity and the state of the premises was such that it would have attracted only minimal rental, and only on a seasonal basis if let commercially. It was submitted that since the issue of rental had not been pleaded, evidence concerning it was inadmissible. Although not raised expressly in the pleadings, para 5 of the defence denies any promise that the appellant could have unrestricted use of the land and alleges that the appellant made no contribution to expenses of the land. Non-payment of rent and loss of opportunity to lease the land are deposed to in the respondent's affidavit.

[23] In any event, the argument misconceives the point that the fact that the appellant had lived on the property without making any contribution to maintenance or outgoings was a relevant factor in determining respective entitlements. The learned trial judge was correct in ruling that the evidence was admissible. Further, even if an amendment were necessary, there was no reason to suppose that the issue came as a surprise to the appellant. The submission that the learned trial judge erred in declaring that the appellant had no interest in the property at Mena Creek and that there was no constructive trust over the unsold lots is without substance. The ground advanced that the appellants efforts and financial input involved in the subdivision were instrumental in bringing about the most significant part of the financial gain was taken into account by the learned trial judge. It has not been demonstrated that the finding he made should be disturbed.

[24] The argument that the learned trial judge erred in taking into account that the appellant had exclusive occupation of part of the property subject of the claim when he had an equitable interest in all of the property fails because it depends upon a finding that the appellant had an equitable interest in the Mena Creek property which was rejected by the learned trial judge. The learned trial judge's conclusion in that regard has not been demonstrated to be erroneous.

[25] It was argued that application of a broad brush approach without any "reasonable calculations upon which to adopt such an approach" resulted in too general a calculation, which did not provide a fair and equitable outcome. In a case like the present where intangible contributions were a significant component of the appellant's case, it is difficult to see how a more precise way of assessing entitlements could be achieved. In the end in a matter of this kind the onus of proof is on the appellant in the first instance to prove the financial worth of his contribution, and at appellate level to demonstrate that the learned trial judge could

not reasonably have made the findings of fact made. On both counts I am unpersuaded that the appellant is entitled to succeed.

[26] One issue that arose in the course of argument concerned the respondent's claim that she had paid mortgage payments on the Cannonvale property for a period from the termination of the relationship until it was sold, without any contribution from the appellant. He pointed to the fact that the property had been rented between the time of separation and the sale of the property. He believed that the rental was being used to pay the mortgage.

[27] The real estate agent's records suggest that payment of rent ($190 per week gross) may have been made by the agent to the respondent for two of those months but after that the moneys were retained by the agent. By December 1994 the amount so held was about $2,100. Although the evidence on the subject is far from clear, there is evidence that a dispute arose between the parties as to how the rental moneys should be disbursed. If there is any discrepancy in relation to the relatively brief period when the house was rented, it is not of a magnitude that would oblige this Court to interfere.

[28] The remaining grounds were that for essentially the same reasons as already referred to, the learned trial judge's decision was against the weight of evidence and "unsafe and unsatisfactory". In my view these grounds also fail. The decision was made by application of appropriate principles by the learned trial judge. There was evidence upon which he could reach the conclusions of fact he acted upon. It is not established that the outcome was unreasonable.

[29] **Order:**
The appeal is dismissed with costs to assessed.