SUPREME COURT OF QUEENSLAND

CITATION:	*Bartha v O'Riordan* [2004] QSC 205
PARTIES:	**MARIA BARTHA** **(**applicant plaintiff) v **MARIA O'RIORDAN** **(**respondent defendant)
FILE NO:	S12013/03
DIVISION:	Trial Division
PROCEEDING:	Application for summary judgment
DELIVERED ON:	25 June 2004
DELIVERED AT:	Brisbane
HEARING DATE:	5 April 2004
JUDGE:	Wilson J
ORDER:	**IT IS DECLARED THAT:**

1. **The Plaintiff is the sole legal and equitable owner of the property situated at 36 Merton Road, Woolloongabba, comprised in certificate of title No. 12744181 being Lot 3 on Registered Plan 12220 and situated in the County of Stanley, Parish of South Brisbane.**

IT IS ORDERED THAT:

2. **The Defendant within 60 days of the date hereof deliver up to the Plaintiff vacant possession of the property situated at 36 Merton Road, Woolloongabba, comprised in certificate of title No. 12744181 being Lot 3 on Registered Plan 12220 and situated in the County of Stanley, Parish of South Brisbane.**

3. **The Defendant, whether by herself or by her servants or agents or otherwise howsoever, be permanently restrained from occupying, using or otherwise being in possession of the property situated at 36 Merton Road, Woolloongabba, comprised in certificate of title No. 12744181 being Lot 3 on Registered Plan 12220 and situated in the County of Stanley, Parish of South Brisbane, or being upon, remaining upon or coming on to same except with the permission of the Plaintiff after 60 days from the date hereof.**

4. **There be judgment for the Plaintiff in the amount of $17,200.00.**
5. **The Defendant pay the Plaintiff's costs of the proceeding to be assessed.**
6. **If an appeal to the Court of Appeal is filed within 28 days of today, these orders all be stayed until the determination of the appeal.**

CATCHWORDS: REAL PROPERTY – GENERAL PRINCIPLES – INCIDENTS OF ESTATES AND INTERESTS IN LAND – JOINT TENANCY AND TENANCY IN COMMON – SEVERANCE – IN FAMILY LAW MATTERS – whether joint tenancy was severed during lifetime of joint tenant – whether joint tenant had acquired title by adverse possession to the plaintiff's undivided share – authority of defendant to represent estate – where intended beneficiaries are deprived of benefit under will – whether unconscionable for holder of legal title to deny equitable or beneficial interest in property.

Land Title Act 1994 (Qld), s.59
Limitation of Actions Act 1974 (Qld), ss. 13, 14(1) and 22
Public Trustee Act 1978 (Qld), ss. 29 and 35
Uniform Civil Procedure Rules 1999 (Qld), rule 292

Limitation Act 1935 (WA), s. 14

Baumgartner v Baumgartner (1987) 164 CLR 137
Bryson v Bryant (1992) 29 NSWLR 188
Chambers v Donaldson (1809) 11 East 65; 103 ER 929
Coles-Smith v Smith [1965] Qd R 494
Corin v Patton (1989 - 1990) 169 CLR 540
Culley v Doe d Taylerson (1840) 11 Ad. & El. 1008; 113 ER 697
Giulmelli v Giumelli (1998) 196 CLR 101
Jones v Chapman (1849) 2 Ex 803; 18 LJ Ex 456
Muschinski v Dodds (1985-1986) 160 CLR 583
Powell v McFarlane (1979) 38 P. & C.R. 452
Radonich v Radonich [1999] WASC 165
Smeaton v Pattison [2002] QSC 431
Sprott v Harper [2000] QCA 391

COUNSEL: L Jurth for the applicant plaintiff
M Wilson for the respondent defendant

SOLICITORS: Klar & Klar for the applicant plaintiff
Trilby Misso for the respondent defendant

[1] **WILSON J**: The plaintiff seeks summary judgment in her claim against her adult daughter for a declaration that she is the sole legal and equitable owner of a house

property at Woolloongabba, an order for possession of the property, an injunction to restrain the defendant from occupying the property, and damages for trespass.

[2] The plaintiff married George Baranyi in 1958. The defendant (their daughter) was born later that year. In 1961 the plaintiff and her husband purchased a house at Woolloongabba as joint tenants. They separated in 1963, when the plaintiff left the matrimonial home and moved to Sydney. The plaintiff and Mr Baranyi were divorced in 1968, but they did not enter into any property settlement.

[3] Mr Baranyi and the defendant continued to reside in the house until his death on 23 November 1993. Mr Baranyi met all mortgage payments, rates and maintenance.

[4] After the separation, the plaintiff did not visit the house again until 1971. On that occasion and on the approximately 10 subsequent occasions she visited, she stayed no more than an hour, attending to collect the defendant for access. She did not have keys to the property, and could not enter it unless Mr Baranyi or the defendant was present.

[5] The defendant has a daughter who was born on 19 November 1981.

[6] Mr Baranyi made a will shortly before his death which contained (*inter alia*) the following disposition –

> "My house is for both my granddaughter & my daughter."

He did not appoint an executor.

[7] The Public Trustee took steps towards the administration of the estate pursuant to ss 29 and 35 of the *Public Trustee Act* 1978. On 13 February 1995 the Official Solicitor to the Public Trustee wrote to the defendant -

> "I advise I have had a telephone conversation with Mrs Bartha who I understand is your mother.
>
> I understand from that conversation that it is your mothers intention that she transfer the house property to you and your daughter and she would be the Trustee of the property on behalf of you and your daughter.
>
> Would you please confirm that this in fact what your mother intends to do and if this arrangement is satisfactory as far as you are concerned. If it is a satisfactory arrangement as far as you are concerned then there would be little point for the Public Trustee of Queensland as the administrator of your late fathers estate in taking further action to recover the property on behalf of the estate.
>
> I look forward to your advice in this matter."

Nothing came of that proposal.

[8] As the surviving joint tenant, the plaintiff became registered as the sole owner of the property.

[9] The defendant has remained in occupation since Mr Baranyi's death, despite demand made by the plaintiff on 3 October 2002 that she vacate the property. For the period 1 November 2002 to 22 December 2003 the fair letting value of the property was at least $200 per week. Its unimproved value exceeds $250,000.

[10] Although the defendant claims to have paid rates on the property since her father's death, there is no evidence to support this. On the contrary, the plaintiff has produced evidence of making a payment to the Brisbane City Council of $4,745.26 in July 1999, which I infer was for arrears for rates, and of paying the rates since then.

[11] The plaintiff's case is simply put, that when Mr Baranyi died, she succeeded to the entirety as surviving joint tenant, and that since 2002 the defendant has been a trespasser on the property. Her counsel argued that the operation of the rule of survivorship can be circumvented only by severance during the lifetime of a joint tenant. Under the general law there are three ways this may be achieved: by alienation, at or law or in equity, by one of the joint tenants of his or her interest; by mutual agreement by the joint tenants; or by a course of conduct sufficient to indicate an intention or assumption between them that their interests are held as tenants in common: *Corin v Patton* (1989 - 1990) 169 CLR 540 at 546 - 547; *Sprott v Harper* [2000] QCA 391 at [7]; [8]. (Section 59 of the *Land Title Act* 1994 introduced a another way of unilaterally severing a joint tenancy, namely by the registration of a transfer executed by one joint tenant, but this did not come into effect until after Mr Baranyi's death.) It cannot be severed by devise in a will; *Smeaton v Pattison* [2002] QSC 431 at [3]; [11]. In his submission there were no facts pleaded by the defendant capable of constituting a severance of the joint tenancy. I accept these submissions. Prima facie the plaintiff is entitled to the declaration she claims.

[12] Counsel for the defendant submitted that there are issues which ought to go to trial, namely, whether, before his death, Mr Baranyi had acquired title by adverse possession to the plaintiff's undivided half share, and the defendant's claims that the plaintiff holds the property on constructive trust for Mr Baranyi's estate, or for the defendant, or for the defendant and her daughter.

[13] Someone claiming a possessory title to Torrens land must establish both the expiration of the relevant limitation period and satisfaction of the common law requirements in relation to adverse possession. By ss 13 and 14(1) of the *Limitation of Actions Act* 1974 –

> "**13 Actions to recover land**
>
> An action shall not be brought by a person to recover land after the expiration of 12 years from the date on which the right of action accrued to the person or, if it first accrued to some person through whom the person claims, to that person.
>
> **14 Accrual of right of action in cases of present interests in land**
>
> **(1)** Where the person bringing an action to recover land or some person through whom the person claims has been in possession thereof and has, while entitled thereto, been dispossessed or discontinued possession, the right of action shall be deemed to have accrued on the date of the dispossession or discontinuance."

[14] By the time Mr Baranyi died, more than 12 years had passed since the plaintiff moved out of the property. They had acquired the property as joint tenants, and at common law there was a presumption that possession by one joint tenant was possession on behalf of them all, so that all the joint tenants continued in possession and time could not run: *Culley v Doe d Taylerson* (1840) 11 Ad. & El. 1008; 113 ER 697). Counsel for the defendant submitted that that presumption was reversed by s 22 of the *Limitation of Actions Act.* He referred to *Radonich v Radonich* [1999] WASC 165, in which the differently worded s 14 of the *Limitation Act* 1935 (WA) was considered. For present purposes, I accept his submission as a correct statement of the law (although I am inclined to think the new presumption is a rebuttable one).

[15] The relevant common law principles were summarised by Slade J in *Powell v McFarlane* (1979) 38 P. & C.R. 452 at 470 – 471 as follows:

> "(1) In the absence of evidence to the contrary, the owner of land with the paper title is deemed to be in possession of the land, as being the person with the prima facie right to possession. The law will thus, without reluctance, ascribe possession either to the paper owner or to persons who can establish a title as claiming through the paper owner.
>
> (2) If the law is to attribute possession of land to a person who can establish no paper title to possession, he must be shown to have both factual possession and the requisite intention to possess ("*animus possidendi"*).
>
> (3) Factual possession signifies an appropriate degree of physical control. It must be a single and conclusive possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed. In the case of open land, absolute physical control is normally impracticable, if only because it is generally impossible to secure every part of a boundary so as to prevent intrusion. … Everything must depend on the particular circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.
>
> (4) … the *animus possidendi* involves the intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow."

The application of these principles would clearly turn on the resolution of questions of fact, which ought to be determined at trial and not on an application for summary judgment.

[16] However, any claim to title by adverse possession would have to be brought on behalf of Mr Baranyi's estate. Moreover, in an action for trespass to land a defendant cannot justify his or her conduct by setting up title in another person without also showing that he or she acted under the authority of that other person. See *Coles-Smith v Smith* [1965] Qd R 494 at 501; *Chambers v Donaldson* (1809) 11 East 65 at 74, 76; 103 ER 929 at 932, 933 and *Jones v Chapman* (1849) 2 Ex 803; 18 LJ Ex 456 at 458, 459, 460. As a beneficiary, the defendant does not have the requisite authority to represent the estate.

[17] The other basis on which the defendant seeks to defend the claim is that the plaintiff holds the property on constructive trust for (a) Mr Baranyi's estate, or (b) the defendant and her daughter, or (c) the defendant.

[18] The defendant has no authority to make these claims on behalf of her father's estate or her daughter, who is an adult not a party to the proceeding.

[19] The defendant alleges two material facts to support the allegation of a constructive trust in her favour;

(a) that she has paid all local authority rates in relation to the property since her father's death; and

(b) that the plaintiff expressed an intention to transfer the property to her.

I am satisfied that the first of these is factually untrue. The second, even if proved, would not be a sufficient basis for the imposition of a constructive trust.

[20] As counsel for the plaintiff submitted, a constructive trust is imposed by operation of law in circumstances where, according to the principles of equity, it would be unconscionable for the person who holds legal title to a property to retain and deny another person's equitable or beneficial interest in that property. The mere fact that that it would be unfair or unjust in a particular circumstance for the legal owner to assert ownership against another will not, in itself, amount to unconscionable conduct: *Muschinski v Dodds* (1985-1986) 160 CLR 583 at 615, 616; *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 148; *Bryson v Bryant* (1992) 29 NSWLR 188 at 196. Even then, the extent of the beneficial ownership afforded by way of constructive trust is a matter for the Court, the relief given being the minimum relief necessary to do justice between the parties: *Bryson v Bryant* (1992) 29 NSWLR 188 at 202; *Giulmelli v Giumelli* (1998) 196 CLR 101 at 113.

[21] Neither the facts pleaded in the amended defence and counterclaim nor those deposed to in the defendant's affidavit would be sufficient to establish unconscionability. I am satisfied that the claim to a constructive trust in favour of the defendant cannot succeed.

[22] I am satisfied that the defendant has no real prospect of defending the plaintiff's claim, and that there is no need for a trial. Accordingly the plaintiff is entitled to summary judgment under rule 292 of the *Uniform Civil Procedure Rules*. I will hear counsel on the form of the order and on costs.