SUPREME COURT OF QUEENSLAND

CITATION:	*S v W* [2004] QSC 212
PARTIES:	**S** (plaintiff) **v** **W** **(**defendant)
FILE NO/S:	BS 628 of 2004
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	23 July 2004
DELIVERED AT:	Brisbane
HEARING DATE:	16 July 2004
JUDGE:	White J
ORDER:	**Declare that:** **1. (i) the plaintiff has a 20 per cent interest and the defendant has an 80 per cent interest in real property, described in these reasons as the Blackbutt land.** **(ii) the plaintiff has a 48.8 per cent interest and the defendant has a 51.2 per cent interest in real property, Parish of Bribie, described in these reasons as the Diamond Valley land.** **(iii) the plaintiff has no beneficial interest and the defendant has the whole of the beneficial interest in real property, described in these reasons as the Mt Julian property.** **2. Subject to other order, or agreement between the parties, I order that the property mentioned in Order 1(ii) above to be vested in statutory trustees to be held by them on trust for public sale and to hold the proceeds of sale in the proportions set out in Order 1(ii). The costs of the sale are to be borne proportionally by the parties. A successful party may off-set the party's declared interest in the land against the purchase price.** **3. Liberty to apply on the question of the appointment of**

trustees mentioned in Order 2.

4. **Liberty to make submissions as to costs in writing within 7 days.**

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – CONSTITUTION AND CLASSIFICATION OF TRUSTS GENERALLY – CLASSIFICATION OF TRUSTS IN GENERAL – IMPLIED TRUST – CONSTRUCTIVE TRUSTS – INDEPENDENT OF INTENTION – GENERAL PRINCIPLES – de facto relationship of 9 years – where two properties were jointly owned – where one property owned solely by the defendant – where defendant's property purchased prior to the relationship –where the parties pooled their incomes during the de facto relationship – financial and non-financial contribution – where the third property was purchased jointly after the parties had separated

Family Law Act 1975 (Cth)
Property Law Act 1974 (Qld)

Baumgartner v Baumgartner (1987) 164 CLR 137, followed
Black v Black (1991) 15 Fam L R 109, cited
Eves v Eves [1975] 1 WLR 1338, cited
Muschinski v Dodds (1985) 160 CLR 583, followed
Parij v Parij (1997) 72 SASR 153 (F.C.), considered
Read v Nicholls [2004] VSC 66, considered
Singer v Berghouse (1994) 181 CLR 201, cited

COUNSEL: EJ Read for the plaintiff
The defendant appeared on her own behalf

SOLICITORS: Schultz Toomey O'Brien Lawyers for the plaintiff
The defendant appeared on her own behalf

[1] The parties were, according to their pleadings, in a de facto relationship as husband and wife between approximately 1982 and 1993. The evidence suggested that although they had known each other since 1982 they only began cohabiting in such a relationship in 1984. The plaintiff seeks declaratory orders and other relief relating to certain real property arising out of that relationship being

- rural land at Blackbutt in Queensland registered in the name of the defendant with a value of $37,500 and outstanding local government rates of $8,000;

- rural residential land at Diamond Valley (near Mooloolah) in Queensland registered in the joint names of the parties with a value of $250,000;

- residential land at Mt Julian (near Proserpine) in Queensland registered in the joint names of the parties with a value of $135,000. It is encumbered by a

mortgage in respect of a loan to purchase the property which is now approximately $84,000.

[2] The plaintiff also sought a declaration that he has a 50 per cent interest in household furniture, car and other chattels in each party's separate possession. The defendant by her pleadings sought to retain the chattels in her possession. In the course of the hearing the parties agreed that each party retain all chattels in his or her possession.

[3] The plaintiff lives at the Diamond Valley property and the defendant and their four children live at the Mt Julian property. The plaintiff seeks orders which would give him 50 per cent of the net value of each property and hopes, by a series of financial adjustments, to own in his sole name the Diamond Valley property. The defendant in her counter-claim seeks declarations that she is entitled to a 100 per cent interest in the three properties and an order that she indemnify the plaintiff in respect of the mortgage on the Mt Julian property.

[4] The provisions of Part XIX of the *Property Law Act* 1974 do not apply to this proceeding since the de facto relationship ended before the relevant commencement of the Part, s 257. Accordingly, the application falls to be determined by the application of principles enunciated in cases such as *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137 and elaborated in subsequent decisions such as *Parij v Parij* (1997) 72 SASR 153 (F.C.) and *Read v Nicholls* [2004] VSC 66 where the non-financial contribution of domestic partners is discussed.

[5] Although the non-publication and non-identification provisions contained in ss 342 and 343 of the *Property Law Act* apply only to proceedings brought under Part XIX, the reasons for those provisions and particularly to protect the children of this relationship suggest that the parties and the subject properties be identified no more than is necessary to give coherence to these reasons.

[6] The plaintiff was represented by counsel and solicitor. The defendant represented herself for no other reason than financial constraints. Both parties are in receipt of social security pensions – the plaintiff on a disability pension and the defendant on a sole parent's pension. They were the only witnesses in the trial and gave all their evidence orally, that is, there had been no orders for the exchange of affidavits or statements. This was unfortunate because the evidence was sparse about matters such as financial contributions and employment records and the need to set the evidence down before trial might have clarified matters which remained obscure.

[7] The plaintiff commenced proceedings by filing a claim and statement of claim in the District Court at Maroochydore on 25 January 2002. Judge Robertson transferred the proceedings to the Supreme Court on 24 November 2003, the morning of the trial, on the plaintiff's application because the value of the property was above the jurisdictional limit of the District Court. The defendant had been represented by solicitors in the past but by then was self-represented. The transcript reveals that she protested to his Honour that she had maintained for quite some time to the plaintiff (or his representatives) that the values of the properties were greater than he had put forward.

[8] The relationship seems to have been not entirely satisfactory from its commencement. The evidence which came from both parties suggested that the "de

facto" nature of their relationship did not actually commence until the end of 1984 rather than 1982 which, on the pleadings, they had agreed was the commencement date. The defendant alleges that the plaintiff was lazy and a poor provider throughout the relationship and engaged in numerous acts of physical violence against her. For his part, the plaintiff denies the violence or, at least, says it was responsive to the defendant's physical violence against him and asserts a steady employment history.

[9] There are significant issues of credit involved in the resolution of the dispute but, as I have indicated, the evidence was "broad brush" and without much detail making this difficult. The plaintiff sought to explain any lapses in memory by reference to a head injury caused by an assault on him in a hotel in 1999 (or 1997). No medical evidence was offered but it was clear that the plaintiff was quite hazy about periods of employment, dates and financial management among other things. Whether this was due to inherent causes or the assault I was unable to conclude. He says that as a result he is unable to work for wages. I found him an unpersuasive witness. In the absence of any objectively supporting evidence about his employment history which he had tendered as a hand-written general description of his, apparently, almost continuous employment, (exhibit 11), I was not persuaded that it was anything like as extensive as he maintained it was. At the same time he said he was in receipt of social security benefits for much of the period with which I am concerned. The plaintiff contended that the defendant had taken his records with her when they separated. I did not infer that she agreed with this proposition when she did not deal with the allegation in her evidence because of the difficulties under which she laboured without assistance from lawyers or any "Mackenzie" friend at the hearing. It may have been that she did take financial records including the plaintiff's employment records but they did not form part of her disclosed documents and she was, apparently, not asked about them prior to the hearing.

[10] Although the defendant had difficulty in giving much credit to the plaintiff for any contribution to the relationship either financially or by way of non-financial contribution, on the whole, I concluded that her recollection of their life together was more reliable. She had kept some records. Further the plaintiff agreed that throughout their relationship the defendant was responsible for managing their joint financial resources. For most of the relationship, I find, they were in receipt of social security benefits. After separation the defendant was in receipt of a sole parent's benefit and it is a measure of her competence that she was able to maintain regular mortgage repayments as well as provide for a growing family of four children. There was no other financial support. The plaintiff maintained that when he was earning wages he handed them all to her. She denies this and maintains that he mostly spent his wages on himself and to purchase trade tools. Since there is insufficient evidence for me to assess the level of his employment and thus any inference of greater financial contribution this probably does not greatly matter. When they were in receipt of social security benefits they were paid into a joint account when they were together. Whilst living separately the plaintiff received unemployment benefits and subsequently a disability pension and the defendant a sole supporting parent's benefit. But precisely when their funds were joint and when separate has not been established and I have been left to make general findings.

[11] The parties have been parents to four children – two born during their relationship on 4 November 1986 and 6 November 1988 and two born after on 9 December

1994 and 11 June 1997. I understood the plaintiff to concede that even when the relationship subsisted the defendant was generally responsible for the care of the children and has been thereafter. Allegations of alcohol and drug abuse against the plaintiff were made by the defendant which he denied. He made similar allegations against her.

[12] The parties met in about 1982 in their late teenage years when they each lived with their mothers. The plaintiff worked for the Brisbane City Council in some unspecified capacity when they first met and the defendant at the Kallangur Hotel. It seems to have been an "on-again-off-again" romance. During an "off" period in 1984, when the defendant was involved with another man, she searched out and purchased the land at Blackbutt. She paid the deposit of $8,000 from her savings from her employment. She obtained a loan of $8,500 for the balance of the purchase price from Esanda Finance with repayments of $150 per month.

[13] The parties recommenced seeing each other and towards the end of 1984 decided to refurbish a caravan and live in it on the Blackbutt land. The plaintiff said their intention was to live together, marry and have children and the land was to be used as family property. The defendant was more hesitant about what their intention was. She agreed that marriage was discussed and she liked the idea that the land would be for the first born child. She said she expected to acquire more assets. She did not speak well of the plaintiff as he was at that time. He was certainly unemployed but denies having drinking and other problems. The facts, in a sense, speak for themselves. They went to Blackbutt to live together. The plaintiff says he bought the caravan from his savings and the defendant said that they each contributed half to its purchase price. The cost was, according to the defendant, $1,450. She says that she bought a new refrigerator and oven and refurbished the caravan out of her wages from the Kedron Park Hotel where she was then working. The plaintiff had earlier been in employment as a form worker and then as a fencer but for some time prior to going to Blackbutt he had been in receipt of unemployment benefits.

[14] On the day they took the caravan out to the land the defendant was asked by the owner of the Radnor Hotel at Blackbutt to work in the bar. She had met her previously when she had been doing work on the property. She continued working for about 8 months and became pregnant. During this period the plaintiff continued to be unemployed. The defendant said that she made the payments on her loan for the purchase of the land but did not say when the repayments were completed. Over a period of some years some improvements were made to the property. A wood and iron annex of about $12m^2$ with extended roofing was used as an annex to the caravan and a cover for the van. A small ablutions block constructed with hardyplank walls, a roof and a concrete floor and an annex was added. The boundary was fenced with stock type fencing and some yards were erected. A valuation of the property contains photographs of these improvements which can be described as basic, exhibit 3. None of the buildings had local government approval and the valuer considered that the structures would add very little, if any, value to the land. Similarly the fences were said to be roughly constructed of poor quality and of no value. Nonetheless the land and its gradual improvements constituted the home for the parties, and in due course, their two children. The plaintiff maintains that he did most of the work on the improvements which took about three years largely because there was no electricity connected and the tools were all hand operated. The defendant says that she participated in the work.

[15] Towards the end of 1987 the plaintiff's mother was diagnosed with cancer and because, apparently, no other members of her family chose to do so, the parties and their infant child came to live in her house to look after it and to assist her when she was able to return home. The parties' disputed how long the plaintiff's mother was cared for when she eventually came home. The defendant suggested it was some months and the plaintiff some weeks. After her death at the end of April 1988 the parties decided that there was little point in returning to the land at Blackbutt because there was no work available for the plaintiff.

[16] The parties identified property at Diamond Valley which is near Mooloolah of nearly 500m^2 on which was located a partly completed very modest low-set block and timber home which they could afford to buy. Their bank had agreed to lend up to $50,000. The owners were in the process of registering a plan of sub-division but were prepared to enter into a contract with the parties and rent the property to them whilst waiting for the sub-division registration. The contract is dated 21 December 1988. The parties jointly obtained finance from the ANZ Bank with a housing loan of $38,000. The purchase price was $45,000. They were eligible for a first home owner's payment of $7,000 which, in effect, provided the deposit. The repayments were $500 per month and the security for the loan was registered mortgages over that property and the Blackbutt property. They paid rent until settlement of $30 per week. The loan was drawn down in March 1989.

[17] The plaintiff maintains that they were both in receipt of a joint social security benefit and the payments on the loan on the property came from those funds. At some point after they had moved to Diamond Valley the plaintiff obtained work in a bakery. They were in dispute about the duration of that employment, the plaintiff suggesting 6 months and the defendant 3 months. They did agree that for a limited period he worked as both baker and pastry cook and was in receipt of about $900 per week. Virtually the only reliable documentation before the court concerning the plaintiff's employment is an Australian Tax Office Notice of Assessment for the year ended 30 June 1990 which shows the plaintiff's taxable income for that year to have been $15,220 including some prescribed payments of $2,847.90. The latter would appear to relate to his work as a sub-contractor for a manufacturer of balustrades. The only other evidence was a 1994 Group Certificate relating to the plaintiff's employment at another bakery. That reflects employment from 1 November to 5 December 1993 after the relationship had broken down and for which he received the gross sum of $2,074.

[18] The parties decided to make use of the land by the development of a nursery to sell native and other plants. There is a dispute about the extent to which each contributed to the establishment of the nursery. It never became commercially productive. I accept that they both worked on its establishment. The defendant said that she needed to go to New Zealand on a family matter and left the plaintiff with instructions for the care of the plants, particularly the watering. It was her evidence that the plants were almost ready for commercial sale. When she returned from New Zealand a few weeks later all the plants were dead. The plaintiff maintains that there was a drought but there was a further element in that he believed that the defendant had been unfaithful to him whilst she was away and he lost interest in maintaining a joint venture. At some indeterminate time the plaintiff's pensioner father came to live with them and remained for about a year. He was ill and needed care (which seems to have fallen mostly on the defendant) particularly in respect of

his diet as he was diagnosed with diabetes. He then went to live in other accommodation.

[19] While the parties lived at Diamond Valley they sold flowers and fruit at local markets which had been purchased at the Rocklea Markets. Some profits were made, it seems, but there was no evidence as to how much or over what period.

[20] In about September 1993 the parties separated when the plaintiff left the home. He returned and at about Christmas time that year the parties again separated when the defendant moved to Tewantin with the children. The defendant put to the plaintiff that she did so because of his physical violence which he denied. After approximately 6 weeks the defendant and the children returned to the Diamond Valley property. During that period I understood the plaintiff to agree that he had paid about four or so weeks of the mortgage repayments which came from his social security benefits. When the defendant returned she resumed making the mortgage repayments from her sole parent pension. The plaintiff left the home then to live temporarily with a man with whom he was working although he agreed he was at the time in receipt of social security.

[21] The defendant stayed in the house with the children for 5 years after 1993. The plaintiff maintained that from time to time they were together but it would appear that although he sometimes slept on the lounge room floor or in a bus which he had purchased and which he parked for a time in the yard the defendant did not accept that they were living together. The two younger children were conceived during this period which the defendant says occurred without consent on her part. From time to time, as I understood the evidence, the parties engaged in activities together with the children.

[22] The defendant maintained that during that period of separation the relationship was violent and threatening to her and the children. The plaintiff denies that that was so and that any physical violence was always started by her. I accept that during this period the defendant assumed sole responsibility for the mortgage repayments out of her pension. It was her evidence that the situation became intolerable and she left with the children and rented accommodation in the Proserpine/Airlie Beach area for about a year. There was regular contact with the plaintiff. Eventually the parties decided that because of problems with reliable accommodation the defendant should purchase a house for herself and the children. The bank required the loan for the purchase of the house to be in joint names and the plaintiff to pay what remained on the Diamond Valley property loan of approximately $8,700. The bank took that property and the Blackbutt land as collateral security and lent some $90,000 to the parties to purchase the Mt Julian property. The plaintiff was adamant that the $8,700 had come from his father's estate. The defendant was incredulous that that could be so given that he had died some time previously and, in her view, in the past had been incapable of saving from his pension. It is unnecessary to resolve this dispute since it is accepted that the funds came from the plaintiff whatever the source. The plaintiff agrees that he has made no mortgage repayments in respect of the Mt Julian loan nor contributed to the rates. He did assist in building a fence across the frontage for security for the children.

[23] The defendant wished to sell the Blackbutt property because she was struggling financially. The plaintiff made no regular child support payments. There was some agreement with the plaintiff which I do not entirely understand that there would be a

deferral of the repayments on the Mt Julian loan for six weeks which would be "caught up" when the Blackbutt property was sold. However, before the property could be sold the plaintiff caused a caveat to be placed over it. The plaintiff's reasons for doing so were complex. He said it was because the defendant had taken out a domestic violence order against him and because she declined to give him anything from the proceeds of sale. There were other issues about another man living with the defendant which may have had some influence.

[24] During the period of separation from 1998 to 2003 the plaintiff made cash deposits to the defendant of $12,363.82 for the benefit of the children. He has also made in recent times direct deposits into the older children's bank accounts in sums ranging from $30 to, on one occasion, $300. Apart from tendering the deposit slips, no evidence was given about this money.

[25] The plaintiff says that he would like to re-establish the nursery on the Diamond Valley land so as to earn an income sufficient to service a loan which, he says, has been approved in principle by the bank for $100,000 so that he can pay out the mortgage over the Mt Julian property which he proposes as part of a settlement between them. The defendant would like an opportunity to return to that property and build up the nursery as she had in the past so as to give employment to their eldest son and make something for the other children. She is confident that she could do so. In the years that the plaintiff has lived at the property he admits that he has made no attempt to restart the nursery and nothing has prevented him from doing so. He also admits that he has not been prepared to do things such as re-roof the house because he does not wish to add to the value of the property so that the defendant could share in any increased value. The valuation report describes the improvements thus

> "The home is considered to have limited appeal, marketability and value due principally to its compact size ($67m^2$), rudimentary construction, average condition (particularly the shingle roof) and level of accommodation (one bedroom) though the bedroom is of sufficient size to provide for 2. The roof is in the state of disrepair that requires replacement." Exhibit 2.

Nothing about the plaintiff's past nor his presentation in the witness box suggests to me that he has the initiative, drive and energy necessary to re-establish a commercially viable nursery. I am persuaded that the defendant would do so.

[26] The defendant suggested to the plaintiff in cross-examination that she had been responsible for loan repayments and rates of about $140,000 since her first acquisition of the Blackbutt property whereas his contribution was approximately $15,000 including the $8,700 to pay out the loan over the Diamond Valley property. He was unable to respond to this proposition because, he said, she had always controlled the finances. Her conclusion seems to be predicated upon the assumption that any payments which came out of their joint social security account whilst they were living together was not a payment made by the plaintiff since she was responsible for managing their finances and her careful management made this possible. After separation she had made the repayments alone on the Diamond Valley property leaving the plaintiff with a modest amount of less than $15,000 owing. Further, she has been obliged to meet all the repayments on the more recently acquired Mt Julian property. The figure of $15,000 is supported by the loan account statements for the Diamond Valley property which show regular

weekly repayments with an amount of $15,662.86 owing as at 9 January 1998 (the last page of the statement available in evidence). The final payment of $8,646.11 was made on or about the 20 July 1999. The defendant is concerned to argue that the only way in which she has been able to meet mortgage repayments on the Mt Julian property has been by using money which is paid to her for the support of the four children. She receives $400 per week and $200 is devoted to the payments without any regular financial assistance in respect of the children from the plaintiff. He, on the other hand, she argues, has the benefit of a debt-free house due in no small part to her contributions over a long period of time between 1993 and 1998 during their separation and her careful management of their joint funds. The plaintiff says that he has had the expense of travelling to Mt Julian to see the children and this has precluded other assistance. He also says that he was not persuaded that any money he gave to the defendant in the past was used for the children and he ceased payments to her preferring instead from time to time to make cash transfers to the older children. He seemed to suggest that he had been responsible for providing clothes for the children but the defendant, I thought, rejected this, mentioning their want of proper school uniforms.

[27] Mr Read on behalf of the plaintiff submitted that the plaintiff's contribution to the Blackbutt property was such as to entitle him to a 50 per cent beneficial interest in it consistently with a common intention which the parties had at the time when they took up their residency that it was to be their home and that of any children of their relationship. His submission was that any income acquired by the plaintiff either from his own endeavours or from his social security payments was directed to the discharge of the loan and to the building and maintenance of the home. He submitted that the nature of the respective contributions to the Diamond Valley property was such that I should regard it as equal and that there should be a an equal division of the value of that property. The submission is that to give effect to those interests the plaintiff should be entitled to retain the Diamond Valley property and account to the defendant for 50 per cent of its value; that she be entitled to retain the Mt Julian property and account to the plaintiff for 50 per cent of its value. To give practical effect to that division the plaintiff would discharge the $84,000 remaining on the loan over the Mt Julian property, pay $2,000 in cash to the defendant who would retain the Blackbutt property and have responsibility for the outstanding rates of some $8,000. In effect, he contended for a global rather than an asset by asset approach. Because each property has a quite different aspect to it in acquisition terms, I have approached the matter on an asset by asset basis.

[28] The articulation of the claim by the plaintiff might be described as "pre-emptive" (except for the Blackbutt property) for the legal title to each of the Diamond Valley and the Mt Julian property is joint. However the issues are well enough joined by the defendant claiming a 100 per cent beneficial interest in all three properties in her counterclaim without her making reference to the impression of a trust upon the plaintiff.

[29] A starting point for the proper approach to claims of this kind arising out of a domestic relationship is the judgement of Deane J in *Muschinski v Dodds* whose reasoning was adopted by the majority of the High Court in *Baumgartner v Baumgartner* at 147-8. The parties, particularly the defendant, need to be aware that this court does not have the wide-ranging power of courts administering the *Family Law* Act 1975 (Cth) nor this court when exercising jurisdiction under Part XIX of the *Property Law Act* 1974 to make property adjustment orders where

matters such as caring for children by one partner in the future must be taken into account, s 299.

[30] Deane J in *Muschinski* noted at 613-5 that like express and implied trusts (including resulting trusts) the constructive trust developed as a remedial relationship superimposed upon common law rights by the Court of Chancery. His Honour noted at 613 and 614 that

> "It differs from those other forms of trust, however, in that it arises regardless of intention ... When established or imposed, it is a relationship governed by a coherent body of traditional and statute law. Viewed in its modern context, the constructive trust can properly be described a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle."

His Honour observed at 615 that the constructive trust was an in personam remedy which could be moulded and adjusted to give effect to the application and interplay of equitable principles in the circumstances of the particular case.

> "In particular, where competing common law equitable claims are or may be involved, a declaration of constructive trust by way of remedy can properly be so framed that the consequences of its imposition are operative only from the date of judgement or formal court order or from some other specified date. The fact that the constructive trust remains predominantly remedial does not, however, mean that it represents a medium for the indulgence of idiosyncratic notions of fairness and justice. As an equitable remedy, it is available only when warranted by established equitable principles or by the legitimate process of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding of the conceptual foundation of such principles."

[31] His Honour expressly rejected any notion that a constructive trust could be imposed by law whenever justice and good conscience, in the sense of fairness, required it quoting without approval observations of Lord Denning MR in *Eves v Eves* [1975] 1 WLR 1338 at 1341 and 1342. Furthermore, the mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert his ownership against another "provides, of itself, no mandate for judicial declaration that the ownership in whole or in part lies, in equity" in another, 616. His Honour concluded

> "Such equitable relief by way of constructive trust will only properly be available if applicable principles of the law of equity require that the person in whom the ownership of property is vested should hold it to the use or for the benefit of another. That is not to say that general notions of fairness and justice have become irrelevant to the content and application of equity. They remain relevant to the traditional equitable notion of unconscionable conduct which persists

> as an operative component of some fundamental rules or principles of modern equity."

[32] His Honour sought to identify the relevant principles of equity which might be applied to the facts in *Muschinski* – a combination of a commercial and personal relationship. He concluded that the underlying rationale

> "[l]ike most of the traditional doctrines of equity, [ ] operates upon legal entitlement to prevent a person from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct," at 620.

[33] The circumstances of this case, notwithstanding the intention to create a commercially viable nursery at some point, demonstrate no real element of the commercial in respect to the acquisition of the properties as in *Muschinski*. Deane J noted of that relationship at 621-2

> "It was a mixture of the commercial and the personal. The personal relationship provided the context and explains the content of the planned commercial venture. If the personal relationship had survived for years after the collapse of the commercial venture and the property had been unmistakably devoted to serve solely as a mutual home, any assessment of what would or would not constitute unconscionable conduct would obviously be greatly influenced by the special considerations applicable to a case where a husband and wife or persons living in a "de facto" situation contribute, financially and in a variety of other ways, over a lengthy period to the establishment of a joint home. In the forefront of those special considerations there commonly lies a need to take account of a practical equation between direct contributions in money or labour and indirect contributions in other forms such as support, home-making and family care."

It is that reference to indirect contributions which has permitted courts to make adjustments to property interests based on assessment of such imprecise and, in a sense, necessarily subjective, contributions as a homemaker and domestic manager.

[34] In *Baumgartner v Baumgartner* the High Court made observations about what matters were relevant in determining the terms of a constructive trust in a de facto domestic relationship. In that case the parties to a de facto relationship had pooled their incomes for living expenses and fixed commitments. The two properties in which they had lived were acquired in the man's name. After separation he asserted that the property was his sole property. Mason CJ, Wilson and Deane JJ concluded at 149-50 that as the property was acquired and developed as a home for the parties and was at least indirectly financed out of money drawn from their joint earnings, combined to support an equality of beneficial ownership "at least as a starting point". Their Honours said

> "Equity favours equality and, in circumstances where the parties have lived together for years and have pooled their resources and their efforts to create a joint home, there is much to be said for the view that they should share the beneficial ownership equally as

> tenants in common subject to adjustment to avoid any injustice which would result if account were not taken of the disparity between the worth of their individual contributions either financially or in kind."

Their Honours emphasised that the court should where possible strive to give effect to the notion of practical equality (where appropriate) rather than pursue complicated factual inquiries which will result in relatively insignificant difference in contributions and consequential beneficial interests.

[35] After reviewing *Muschinski* and *Baumgartner*, Debelle J with whom Cox and Millhouse JJ agreed in *Parij v Parij* concluded at 163

> "These decisions establish in unambiguous terms that, when determining whether it is unconscionable for one party to a de facto relationship to retain the sole beneficial ownership of property acquired in the course of the relationship, regard will be had to the manner in which the parties have conducted their relationship and the contributions each have made. When assessing their respective contributions, regard will be had to non-financial contributions as well as to financial contributions. The latter proposition is clear from the references to the "practical equation between direct contributions in money or labour and indirect contributions in other forms such as support, home-making and family care" in *Muschinski v Dodds* (at 622) and in the reference to "contributions either financially or in kind" in *Baumgartner* (at 150)."

[36] In *Read v Nicholls* there was an express finding of no financial contribution to the acquisition of properties the subject of the litigation. Nettle J found assistance in valuing indirect contributions from relevant legislation concerning de facto relationships relating to indirect contributions. He quoted with approval observations of Clarke JA in *Black v Black* (1991) 15 Fam L R 109 at 117 where his Honour, discussing the indirect contributions of a woman who had undertaken the responsibility of maintaining the home and bringing up the children said,

> "Whether her contribution should be regarded as less than, equal to or greater than the financial contribution by the wage-earning partner must depend upon the circumstances of the case, which will undoubtedly include the length of the relationship, the nature of the wage earner's contribution and the care, devotion and services of the home-maker."

So, too, in *Singer v Berghouse* (1994) 181 CLR 201 where Mason CJ, Deane and McHugh JJ stressed the importance of not disregarding or discounting the non-financial contributions made to the property of parties to a marriage-like relationship, 213. However I do not understand these observations to suggest that matters such as the future needs of the parties and/or the children as provided for, for example, in the Queensland legislation and the *Family Law Act* can affect a property adjustment order based on common law equitable principles.

[37] Although there was reference to the failure of a consensual joint relationship "without attributable blame" by Deane J in *Muschinski* at 618 suggesting that if

fault could be allocated it might affect the equities, on the state of the evidence in this case it would be difficult to make findings based on the attribution of blame to one party or the other for the quality and breakdown of the relationship.

[38] Despite the relatively unsatisfactory state of the evidence I propose to draw some conclusions about the financial contributions to the relationship and other indirect contributions made by the parties. Those conclusions suggest that it would be unconscionable of the plaintiff to assert a beneficial half interest in the properties particularly the Blackbutt land and the Mt Julian property. The defendant paid the deposit of $8,000 from her savings for the purchase of the Blackbutt land and obtained a loan for $8,500 for the balance of the purchase price with repayments of $150 per month. The defendant was in employment for some 8 months after she and the plaintiff went to Blackbutt and the plaintiff was in receipt of unemployment benefits but there is no evidence as to when the loan was repaid or the precise source of those funds. It is likely that repayments were coming from the defendant's earnings from her hotel employment both before they moved and after until she ceased employment. They were, it would seem, then in receipt of a joint social security benefit from which all their expenses were drawn. I conclude that the defendant contributed 60 per cent towards the purchase price of the Blackbutt land by way of deposit and repayments and the remaining 40 per cent was contributed to by whatever joint funds came into their relationship. The contribution that each brought to the establishment of the land as their home I assess as equal. Of the 40 per cent contribution to the repayment of the loan and the indirect contribution to the establishment of the home I would attribute 20 per cent to the plaintiff. He should therefore be declared to have a 20 per cent interest in the net value of that land.

[39] The loan for the Diamond Valley property was drawn down on the 17 March 1989 and payments were regularly made thereafter. When the parties separated in September 1993 the loan stood at some $31,000. It seems to be accepted that the plaintiff made four repayments from his monies which were then at $132 per week which would amount to $528. I accept the defendant's evidence that when she returned to the home she resumed making the mortgage repayments from her sole parent's pension. I accept that thereafter the defendant totally or substantially made those repayments until she left for the Airlie Beach/Proserpine area in 1998. On 1 October 1993 the loan stood at $30,742. As at 9 January 1998, the last available page from the bank statement, the indebtedness was $15,662.88. Rounding off figures and taking account of the plaintiff's four repayments in September 1993 it is possible to conclude that some $16,000 of the loan had been repaid. It is not realistic to deal with interest. Expressed very broadly, it can be seen that the joint contributions constituted 18.4 per cent of the loan repayments, that the repayments made solely by the defendant constituted 42 per cent of the loan amount and the payments made solely by the plaintiff constituted 39.6 per cent.

[40] During the period of separation the plaintiff occasionally lived at the property, sometimes he stayed with acquaintances and sometimes he rented accommodation. The plaintiff suggested that during that period a woman friend came to reside with the defendant but no attempt has been made to suggest that there should be any accounting for any occupation rent if any, indeed, was paid. Since the relationship had broken down in 1993 there can be no assessment of the indirect contribution to the relationship by way of maintaining the home and the family on equitable principles. Although the defendant is aggrieved that her care for the children both

financially and emotionally has been unsupported by the plaintiff so as to disentitle him from any share in the real property, to make a division on that basis after the breakdown of the relationship would, in my view, not be justified. The percentage contributions mentioned above give the plaintiff a 48.8 per cent interest in the Diamond Valley property and a corresponding interest of 51.2 per cent to the defendant.

[41] The arrangement with the Mt Julian property gave joint legal title to the parties. The payment of $8,700 to discharge the indebtedness over the Diamond Valley property is not, in my view, a contribution to the acquisition of the Mt Julian property. It has been accounted for in the plaintiff's interest in the Diamond Valley property. It suited the plaintiff that his four children should be housed securely. All of the mortgage repayments have been made by the defendant. The minor improvement by the addition of some fencing does not give the plaintiff any beneficial entitlement to that property. The defendant should be entitled to the whole of the beneficial interest in that property.

[42] In order to give effect to these findings I declare that the plaintiff has a 20 per cent interest in the Blackbutt property, a 48.8 per cent interest in the Diamond Valley property and no interest in the Mt Julian property.

[43] Both parties have expressed an interest in acquiring the Diamond Valley property. To resolve that issue the property should be offered for public sale with each party at liberty to bid for it with an entitlement to offset the party's declared interest in the property against the purchase price as provided for in s 40 of the *Property Law Act* unless the parties otherwise reach agreement.

[44] I declare that

1. (i) the plaintiff has a 20 per cent interest and the defendant has an 80 per cent interest in real property, described in these reasons as the Blackbutt land.

   (ii) the plaintiff has a 48.8 per cent interest and the defendant has a 51.2 per cent interest in real property, described in these reasons as the Diamond Valley land.

   (iii) the plaintiff has no beneficial interest and the defendant has the whole of the beneficial interest in real property, described in these reasons as the Mt Julian property.

2. Subject to other order, or agreement between the parties, I order that the property mentioned in Order 1(ii) above to be vested in statutory trustees to be held by them on trust for public sale and to hold the proceeds of sale in the proportions set out in Order 1(ii). The costs of the sale are to be borne proportionally by the parties. A successful party may off-set the party's declared interest in the land against the purchase price.

3. Liberty to apply on the question of the appointment of trustees mentioned in Order 2.

4. Liberty to make submissions as to costs in writing within 7 days.