SUPREME COURT OF QUEENSLAND

CITATION:	*C v B & Anor* [2006] QSC 195
PARTIES:	**C** (plaintiff) **v** **B** (first defendant) **W** (second defendant)
FILE NO/S:	10985 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	4 August 2006
DELIVERED AT:	Brisbane
HEARING DATE:	28 July 2006
JUDGE:	McMurdo J
ORDER:	**The defendants' application filed on 10 February 2006 is dismissed.**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – RELATIONSHIP – where the plaintiff pleads that the first defendant and the plaintiff lived together in a de facto relationship in Queensland after 1999 and the relationship did not end before 2005 – whether the plaintiff and the first defendant were in a de facto relationship in Queensland – whether the relationship of the plaintiff and the first defendant ended before the commencement of part 19 of the *Property Law Act* 1974 (Qld) FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – where there is an application for an adjustment of the parties property interests under part 19 of the *Property Law Act* 1974 (Qld) – whether the jurisdiction to adjust the property interests of de facto partners at the end of a relationship under part 19 of the *Property Law Act* 1974 (Qld) is limited to property situated within Queensland or has a more general territorial operation FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY

INTERESTS – where there is an application for an adjustment of the parties property interests under part 19 of the *Property Law Act* 1974 (Qld) – where the second defendant holds certain real property upon a discretionary trust – whether first defendant's rights in relation to the discretionary trust constitute "property" for the purposes of an adjustment of the parties property interests

PROCEDURE – QUEENSLAND – PRACTICE UNDER RULES OF COURT – STAYING PROCEEDINGS – where the first and second defendants apply to stay or dismiss the proceedings for want of jurisdiction under r 16 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether the claim should be stayed or dismissed

Family Law Act 1975 (Cth)
Acts Interpretation Act 1954 (Qld), s 32DA, s 35
Property Law Act 1974 (Qld), Part 19, s 255, s 257, s 260, s 261, s 263, s 283, s 286(4), s 291, s 298, s 329, s 333, s 333(1)(o), s 337, s 341
Uniform Civil Procedure Rules 1999 (Qld), r 16, r 124
Property (Relationships) Act 1984 (NSW)

Bailey v The Uniting Church in Australia [1984] 1 Qd R 42, cited
Baker v Johnston, unreported, de Jersey CJ, SC No 7262 of 2005, 30 September 2005, discussed
Chung v McKinnirey, unreported, Ambrose J, SC No 56 of 2003, 28 May 2003, discussed
Davidson v Davidson (1991) FLC 92-197, cited
Harris v Harris (1991) FLC 92-254, cited
Voth v Manildra Flour Mills Pty Ltd (1990) 171 CLR 538, cited
Wanganui-Rangitikei Electrical Power Board v Australian Mutual Providence Society (1934) 50 CLR 581, discussed

COUNSEL: T D O J North SC, with M E Eliadis, for the plaintiff
D G Mullins SC, with J I Otto, for the defendant

SOLICITORS: Philippa Power for the plaintiff
Hopgood Ganim for the defendant

[1] **McMURDO J**: Part 19 of the *Property Law Act* 1974 (Qld) confers a jurisdiction to adjust the interests in property of persons who had been in a de facto relationship. But what is the required nexus with Queensland for that jurisdiction? In these proceedings, which involve a claim under Part 19, the first defendant says that there is no jurisdiction. That contention has several grounds, some of which involve questions of fact which cannot be determined summarily, and others which involve questions of law and upon which he now applies to set aside or stay the claim.

[2] The grounds which involve factual issues are whether the plaintiff and the first defendant were ever in a de facto relationship except outside Australia (or

Queensland at least), and whether their relationship ended before the commencement of Part 19.[1] The plaintiff pleads that they lived together as de facto partners in various places, but including the Gold Coast for some time after 1999 and that the relationship did not terminate before 2005. The defendants argue that even upon those alleged facts, there is no jurisdiction because there is no claim for the adjustment of an interest in property which is situated in Queensland. As I will discuss, that argument should be rejected for two reasons. The first is that the jurisdiction under Part 19 is not limited to property which is within Queensland. The second is that not all of the property the subject of these proceedings is demonstrated to be outside Queensland.

The plaintiff's case

[3] The plaintiff alleges that from July 1997 she and the first defendant began to live together in Majorca until she returned to Sydney to give birth to their son in May 1998. She says they lived together again from late 1998 until early 2000, in the Cayman Islands and New Zealand, before she came back to live in Australia because of their son's medical complications. The first defendant was still living overseas but made frequent visits to stay with her and their child in Sydney and subsequently at the Gold Coast and they made visits to see him in New Zealand. She says that from late 2001 the plaintiff and the first defendant lived together at times at the Gold Coast, at times in New Zealand and also in their travels overseas. At the Gold Coast they lived in a house which they had agreed should be purchased with funds partly provided by him and partly borrowed by her, with the intention that the house would be used by them as their Gold Coast residence.

[4] She pleads that in mid 2003 she and the first defendant discussed acquiring a rural property in the Gold Coast hinterland as their new residence, and that after inspecting a number of properties, they decided to acquire a property in Queensland which I will call "the house". The first defendant then caused the house to be acquired by the company which is the second defendant. She pleads that the first defendant and a Mr Dalton hold the only shares in the second defendant and its directors are Mr Dalton and a Mr O'Reilly. The house was acquired in October 2003 and the plaintiff says that she and the first defendant thereafter made various decisions with respect to its maintenance and renovation, which the first defendant put into effect by instructions to Mr Dalton. She pleads that:

> "By reason of an arrangement agreement or understanding the terms of which are unknown to the plaintiff the first defendant exercises control over the second defendant and the house such that the second defendant is and has at all material times been his 'alter ego'."

[5] She then pleads that throughout their relationship, which she says ended on 1 January 2005 when they separated, she made contributions to the property and financial resources of the first defendant in various ways not involving a direct financial contribution.

[6] She alleges that the first defendant "has within his control assets and resources in Australia, New Zealand and elsewhere of a value the total of which is unknown to the plaintiff, but exceeding $50 million". Lastly she pleads an alternative case of

---

1 21 December 1999; Part 19 applies only to a de facto relationship which ended after that date: s 257

estoppel, on the basis that her work in the acquisition and development of the house makes it inequitable for him to "continue to permit the second defendant to hold its interest in the house without recognising or acknowledging the plaintiff's entitlement to a proprietary interest in that property".

[7] She claims the following relief:

> "1. A Property Adjustment Order in her favour pursuant to Section 286 of the *Property Law Act* 1974 by which the First Defendant causes the Second Defendant to transfer to the Plaintiff its interests in the house and/or the First Defendant pays to the Plaintiff the sum $2.5 million or such further or other sum as to the Court may seem just.
>
> 2. Further or in the alternative a Declaration that the Second Defendant holds the house property subject to a constructive trust in favour of the First Defendant and Plaintiff in such shares or proportion as to the Court may seem just.
>
> 3. Such further or other Order."

[8] In the course of argument, the plaintiff's counsel made it clear that the alternative claim for the payment of $2.5 million is not premised upon the case that the first defendant has some property in or in relation to the house. Rather the claim is that the first defendant's interests in all of his property, alleged to be worth more than $50 million, should be adjusted so that $2.5 million is paid to her. In that respect then, she claims an order in relation to assets, at least some of which, on the face of her pleading, could be within Queensland. So even upon the first defendant's argument that it is only property within Queensland which can be subject to an order under Part 19, there would be jurisdiction for this particular claim. Still the defendants pursued their application by seeking some order disposing of a claim in relation to the house.

[9] The claim for a declaration of a constructive trust appears to be based on the alleged estoppel and not dependent upon the exercise of a jurisdiction under Part 19. The defendants say that the estoppel case is bound to fail, because the facts alleged by the plaintiff cannot be reconciled with the terms of a trust under which the second defendant purchased the house. For the defendants, an affidavit of Mr Dalton was read, in which he says that the second defendant owns the house as the trustee of the so called Queensland Farming Trust, a discretionary trust in which the first defendant is a potential beneficiary. The defendants say that there is no pleaded case that the trust deed is a sham so that the plaintiff's claim for a constructive trust is inconsistent with the existence of a discretionary trust which is not impugned. But on at least one reading of the statement of claim, the plaintiff does challenge the case that the second defendant owns the house subject only to that discretionary trust, because she pleads that the second defendant is and has always been his "alter ego". Perhaps the plaintiff's pleading needs some refinement in this respect. But for present purposes it is not so clear that her case accepts the efficacy in all respects of the discretionary trust. The defendants seem to be applying for summary judgment by this argument, and I am not persuaded that this alternative claim is yet demonstrated to have no real prospect of succeeding such that it should be struck

out on this application. I will turn then to the defendants' arguments about jurisdiction.

The operation of Part 19

[10] The Supreme Court, and within their respective monetary limits the District Court and the Magistrates Courts, have jurisdiction to hear and decide matters under Part 19.[2] Relevantly for the present case, the court is empowered to adjust the interests in property of the parties to a de facto relationship which has ended. Section 286 provides:

> "**286 Court may make property adjustment order**
>
> (1) A court may make any order it considers just and equitable about the property of either or both of the de facto partners adjusting the interests of the de facto partners or a child of the de facto partners in the property.
> (2) In deciding what is just and equitable, a court must consider the matters mentioned in subsubdivision 3.
> (3) It does not matter whether the court has declared the title or rights in the property.
> (4) In this section –
>
> *adjust*, for interests of persons in property, includes give an interest in the property to a person who had no previous interest in the property."

The matters which the court must consider in deciding what is just and equitable,[3] include the financial and non financial contributions made by or for the de facto partners in the acquisition, conservation and improvement of the property of either or both of them, as well as the contributions to the financial resources of either or both of them.[4] The court must also consider the (present) income, property and financial resources of each of the de facto partners (s 298).

[11] An application for a property adjustment order may be made by a de facto partner after the de facto relationship has ended.[5] Section 261 defines "de facto relationship" as the relationship between de facto partners. As to who is a de facto partner, s 260 adopts the definition within s 32DA of the *Acts Interpretation Act* 1954 (Qld), which is that a reference to a de facto partner is one "to either 1 of 2 persons who are living together as a couple on a genuine domestic basis but who are not married to each other or related by family". That provision specifies some of the circumstances which are relevant in deciding whether two persons are or were living together as a couple on a genuine domestic basis, such as the nature and extent of their common residence and their ownership, use and acquisition of property.

---

2 Section 329. The Magistrates Court does not have power to make a declaration: s 329(1).
3 Mentioned in subsubdivision 3
4 Section 291
5 Section 283

[12] The term "property" is not defined specifically for Part 19 and takes its meaning then according to the general law and the particular context of Part 19. The term "financial resources" is defined, s 263 providing that it includes the following:

> "(a) a prospective claim or entitlement under a scheme, fund or arrangement under which superannuation, resignation, termination, retirement or similar benefits are provided to, or in relation to, the person;
> (b) property that, under a discretionary trust, may become vested in, or applied to the benefit of, the person;
> (c) property the disposition of which is wholly or partly under the control of the person and that may be used or applied by or on behalf of the person for the person's benefit;
> (d) any other valuable benefit of the person."

[13] The purposes of Part 19 are expressed by s 255 to include the resolution of financial matters[6] and the facilitation of a just and equitable property distribution at the end of a de facto relationship. By s 333, the court's powers include ordering the transfer of property, the sale of property and the distribution of the proceeds of sale in proportions the court considers appropriate, the payment of a lump sum, the production of a document of title, or the doing of anything else to enable an order to be carried out effectively, and the making of any other order it considers necessary to do justice. By s 337, in a proceeding for a property adjustment order, the court must make orders that as far as practicable will end the financial relationship between the de facto partners.

[14] In all of this, there is no express provision as to the territorial operation of Part 19. It is not expressly confined to de facto relationships in which the parties had resided in Queensland, or had begun or ended their relationship in Queensland. Nor is it expressly provided that it applies according to whether one or both of the former partners is a Queensland resident when the proceeding is commenced. The term "property" and "financial resources" are used without any express territorial limitation, such as property within Queensland. Nor is the occurrence of some relevant contribution, including a financial contribution, made expressly relevant or irrelevant according to its connection with Queensland.

[15] Some territorial limitation upon the operation of Part 19 must be implied. Part 19 cannot be understood as applying to the world, and to confer potential rights and impose potential obligations regardless of any connection with Queensland. The question of what is that implied limitation, of course, is one of statutory construction. It is a different question from that of the constitutional power to give Part 19 an operation on persons and property outside the State. The defendants do not argue that Part 19 has an extra territorial operation which is beyond the legislative power. Any argument of that kind would have to meet the principle that "the requirement for a relevant connection between the circumstances on which the legislation operates and the State should be liberally applied and that even a remote and general connection between the subject matter of the legislation and the State will suffice".[7] The question then is one of statutory construction.

---

6 Defined by s 262 to be matters about the property or financial resources of de facto partners

7 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 at 14

[16] That question is affected relevantly by two presumptions, each of which is rebuttable. The first is that legislation is not intended to have extra territorial effect. This common law presumption operates with the rebuttable presumption according to s 35 of the *Acts Interpretation Act* 1954 that a reference to "a locality, jurisdiction or other thing is a reference to such a locality, jurisdiction or other thing in and of Queensland", although the statutory presumption may have a narrower scope.[8] The second of these presumptions, which is related to the first, is that general words are presumed not to extend to cases governed by foreign law. In *Wanganui-Rangitikei Electrical Power Board v Australian Mutual Providence Society*,[9] Dixon J said:[10]

> "The rule is that an enactment describing acts, matters or things in general words, so that, if restrained by no consideration lying outside its expressed meaning, its intended application would be universal, is to be read as confined to what, according to the rules of international law administered or recognised in our Courts, it is within the province of our law to affect or control. The rule is one of construction only, and it may have little or no place where some other restriction is supplied by context or subject matter. But, in the absence of any countervailing consideration, the principle is, I think, that general words should not be understood as extending to cases which, according to the rules of private international law administered in our Courts, are governed by foreign law."

[17] The presumption against extra territorial effect is said to found the defendants' argument that Part 19 does not empower a court to alter an interest in any property outside Queensland. The second presumption is relevant to the defendants' apparent reliance upon the rule of private international law that, with some exceptions, a court will not exercise jurisdiction in respect of the title to, or possession of, land situated abroad: the *Mocambique* rule.[11]

[18] The submissions cited two cases in which there has been an issue of the territorial operation of Part 19. The first is the judgment of Ambrose J in *Chung v McKinnirey*.[12] The plaintiff there lived in Queensland when she commenced proceedings against her former de facto partner. He had never lived in Queensland and was not said to have any assets here. So there had been no de facto relationship within Queensland because there had not been a relationship involving cohabitation in Queensland. Ambrose J held that he had no jurisdiction to entertain her claim. His judgment was heavily influenced by the *Mocambique* rule, and his Honour held that the claim had all "the essential characteristics" of those which were unsuccessfully pursued in *Mocambique* itself and the more recent application of it in *Hesperides Hotel Ltd v Muftizade*.[13] He said that "for the reasons advanced in those cases in my view this court should not without the assent of McKinnirey entertain Chung's claim to the extent that it is directed towards realty outside the State of Queensland – in whatever part of the world such realty might be found".[14] His

---

8 See Pearce and Geddes *Statutory Interpretation in Australia* (4th ed) at [6.25]

9 (1934) 50 CLR 581

10 (1934) 50 CLR 581 at 601

11 *British South Africa Co v Companhia de Mocambique* [1893] AC 602; *Potter v Broken Hill Pty Co Ltd* (1906) 3 CLR 479

12 unreported, Ambrose J, SC No 56 of 2003, 28 May 2003

13 [1979] AC 508

14 *Chung v McKinnirey*, unreported, Ambrose J, SC No 56 of 2003, 28 May 2003 at [54]

Honour went on to say that he could find nothing in Part 19 for the proposition that it would permit an order for the payment of a proportion of the value of foreign real estate, before concluding as follows: [15]

> "On the assumption that critical to the making of the order for payment of monies which Chung seeks in her claim is the jurisdiction of this court to make an order adjusting the property rights of McKinnirey in lands outside the jurisdiction of the Supreme Court of Queensland enforceable in those lands and indeed in respect of personal property outside the jurisdiction of this court when he has never been a resident in Queensland and is not presently a resident of Queensland and has not subjected himself to the jurisdiction of this court to entertain Chung's claim, in my view following *Mocambique* and other subsequent authorities to the same effect this court should not entertain that claim."

[19] The other case is the judgment of the Chief Justice in *Baker v Johnston*.[16] The defendant there challenged the jurisdiction under Part 19 on the basis that the de facto relationship had existed in Papua New Guinea, not in Queensland. The connection with Queensland, however, was said to be that the defendant owned property here which was purchased during the relationship. The plaintiff sought to justify her proceedings not by a certain construction of the statute but on the basis of r 124 of the *Uniform Civil Procedure Rules (*"*UCPR*"), i.e. that it was a proceeding in which the subject matter was property in Queensland. The defendant's argument did address the construction of Part 19, and was that the "entry point" for relief was the ending of a de facto relationship, which understood as a de facto relationship existing in Queensland, meant that there was no jurisdiction because the relationship had been in Papua New Guinea. His Honour accepted that argument. At one point of his Honour's reasons, he noted a concession by the plaintiff's counsel that "any judgment would be confined to property in Queensland and that the application would, in that case, need to be amended". But that was said in the context of the plaintiff's argument upon r 124. There was no consideration of whether there could be a jurisdiction to affect property outside Queensland in the context of a relationship which had involved cohabitation within Queensland.

[20] A territorial limitation according to the situation of the property, the interests in which would be the subject of relief, would be problematical and inconsistent with the expressed objects and other terms of Part 19. The court must make orders that, as far as practicable, will end the financial relationship between the de facto partners (s 337), a task which would be impeded and often prevented if the court was unable to make orders affecting some of the property owned by both or either of them. And the essential criterion affecting the court's determination of an application for a property adjustment order is what the court considers just and equitable, about which the court is to consider the state of the assets and financial resources of the respective parties and their respective contributions to that position. It would be artificial for the court to purport to assess what is just and equitable by looking at only part of the picture. The potential for injustice by avoiding a consideration of property outside Queensland, or of a party's contribution in relation to that property, is obvious. If there is no such territorial limitation as to what constitutes the

---

15 *Chung v McKinnirey*, unreported, Ambrose J, SC No 56 of 2003, 28 May 2003 at [63]

16 *Baker v Johnston*, unreported, de Jersey CJ, SC No 7262 of 2005, 30 September 2005

property to be considered by the court, it would not seem that there is some limitation as to what constitutes the property for which an adjustment order should be made.

[21] Part 19 substantially enacts the recommendations of the Queensland Law Reform Commission in its report entitled *De facto Relationships*.[17] The Commission discussed whether its proposed legislation should express some required nexus with Queensland.[18] It referred to (what is now called) the *Property* (*Relationships) Act* 1984 (NSW), which has requirements of residency in New South Wales on the day of the application and for a substantial period of the de facto relationship, or alternatively the fact of substantial contributions made in New South Wales by the applicant. The Commission recommended against any express requirement for some Queensland connection, saying that it could "have the practical result of limiting the jurisdiction otherwise available at common law".[19] It referred to *Voth v Manildra Flour Mills Pty Ltd*[20] and said, in effect, that any question as to the territorial reach of the proposed law could be decided according to that decision. But the principles from *Voth* involve a different question, which is whether a proceeding should be stayed or dismissed for having been commenced in a clearly inappropriate forum. The Commission's report therefore does not assist.

[22] In my view the implied territorial limitation is effectively that accepted in *Baker v Johnston*. The jurisdiction depends upon there having been a de facto relationship. Such a relationship is defined by a reference to a cohabitation. This essential element of cohabitation enables in every case an assessment to be made of the place or places in which the parties have been in a de facto relationship. The place of the relationship is where the partners live together, which involves the notion of residence. So a temporary visit together to Queensland would not involve them living together, i.e. residing, in this State. And just as a person can have more than one place of residence so there can be a de facto relationship which exists at one time in several places.

[23] I would not accept that there is jurisdiction only where the relationship has *ended* in Queensland. If for example, parties have lived together as de facto partners in Queensland, and moved to New South Wales before ending their relationship, in my view Part 19 would still apply. The policy of Part 19 is that it is the *occurrence* of a de facto relationship which should have financial consequences. It represents the Parliament's view that the participation in such a relationship can involve expectations or assumptions about entitlements to property which cannot fairly be met in every case by the general law. That policy underlying Part 19 is not irrelevant for the fact that a relationship which had existed in Queensland ultimately ended after the parties had moved somewhere else.

[24] It follows that upon the facts pleaded by the plaintiff, there is jurisdiction in relation to the first defendant's property wherever situated, because the parties were in a de facto relationship under which they lived together in Queensland and, should it matter, which ended in Queensland. The jurisdictional challenge therefore fails.

---

17 Report No 44, June 1993

18 At pages 36-38

19 Page 37

20 (1990) 171 CLR 538

Property in the House

[25] I turn then to the defendants' argument that the plaintiff can claim no property in or in relation to the house, which could be the subject of a property adjustment order, with the result that the claim in paragraph 1 of the prayer for relief should now be struck out. The defendants say that the first defendant has no interest in that real property. On the face of the trust deed for the Queensland Farming Trust, the second defendant holds that real property upon a discretionary trust. The trust deed identifies the first defendant as the "specified beneficiary" and a class described as "general beneficiaries" which includes the first defendant. The trustee is given a discretion to apply or set aside the income for any one or more of the general beneficiaries, to accumulate that income or to pay it for charitable purposes. The trustee also has a discretion as at the "vesting day" to appoint one or more of the general beneficiaries as persons entitled to the trust fund and any accumulated income, and in default of any such appointment, the trust fund and income will be held for the first defendant as the specified beneficiary. The trustee also has a discretion to effectively select that date which will be the "vesting day".

[26] As is common ground, the first defendant at present has no proprietary interest in the trust estate and specifically the house, although he has sufficient standing to compel the proper administration of the trust.[21] But that is not to say that he has no property as a result of the terms of the trust. As a potential beneficiary he has that right to compel the administration of the trust. He also is the specified "appointor" under the trust deed, and as such he is empowered to appoint a new or additional trustee and to remove an existing trustee.[22] The plaintiff says that those rights constitute property, although not property in the nature of an existing interest in the trust estate. The plaintiff's argument has the support of decisions in the Full Court of the Family Court in which such rights in relation to a discretionary trust have been held to be property for the purposes of the corresponding regime in the *Family Law Act* 1975: see e.g. *Davidson v Davidson*[23] and *Harris v Harris*.[24] In *Harris*, the court cited the judgment of McPherson J (as he then was) in *Bailey v The Uniting Church in Australia*[25] where his Honour said:

> "Divorced from the context of taxing statutes, the word property, standing by itself, has been said to 'include property, rights and powers of any description' … It includes a claim or right of action … 'Property' was long ago said to be "the most comprehensive of all terms which can be used, in as much as it is indicative and descriptive of every possible interest that a party can have." (References omitted)

Referring to an apparently identical position of the husband as a beneficiary and appointor under the trust deed in that case, the Full Court in *Harris* held that his:

> "interest as a beneficiary under the trust in combination with his rights and powers as appointor and guardian place him, for the

---

21 Jacobs' Law of Trusts in Australia (6th ed) at [317]; *Re Weir's Settlement Trust* [1971] Ch 145

22 Clause 19

23 (1991) FLC 92-197

24 (1991) FLC 92-254

25 [1984] 1 Qd R 42

> purposes of section 79 of the *Family Law Act* 1975, into the position of an owner of property which property is constituted by his interest and his rights and powers under the trust. This property is properly evaluated as equivalent to the value of the assets of the trust."

[27] As is said in *Discretionary Trusts* by Hardingham and Baxt (2nd ed),[26] the object of a discretionary trust, in circumstances comparable to the first defendant's position, has a right or rights amounting at least to an equitable chose in action which is "property in the strict sense". In particular the inalienability of that chose in action does not prevent it from being property, and the authors cite *Cain's Case*[27] where Kitto J said:

> "It may be said categorically that alienability is not an indispensable attribute of a right of property according to the general sense which the word 'property' bears in the law. Rights may be incapable of assignment, either because assignment is considered incompatible with their nature, as was the case originally with debts (subject to an exception in favour of the King) or because a statute so provides or considerations of public policy so require, as is the case with some salaries and pensions; yet they are all within the conception of 'property' as the word is normally understood."

In my view the right or rights of the first defendant, even without regard to his specific rights as the Appointor are such as to constitute property in the sense of the general law. A further question is whether they are property in the context of Part 19.

[28] Are they property for which there can be an order for "adjustment"? Subsection 286(4) defines "adjust" in inclusive terms: as including the giving of an interest in the property to a person who had no previous interest in it. But the ambit of what is permitted by a "property adjustment order" is also defined according to the powers expressed within s 333. They include a power to make any order or grant any injunction which the court considers necessary to do justice. So viewing the relevant property as the first defendant's right to compel the proper administration of the trust, an order could be made whereby the first defendant would exercise that right as required by the plaintiff, in so far as it is necessary to do what is "just and equitable". This is not to say that the court could thereby vary the terms of the trust, or require the first defendant as appointor or the second defendant as trustee to act inconsistently with their duties and the proper limits of their powers. It is simply to say that the scope of what can be ordered as an "adjustment" of an interest in property would permit an order to be made in relation to the exercise of the first defendant's rights under this trust deed although those rights are not assignable.

[29] The defendants refer to the definition of "financial resources" for Part 19,[28] as including "property that, under a discretionary trust, may become vested in, or applied to the benefit of, the person". They argue that something cannot be at once property of a party and amongst the financial resources of the party, and the statute indicates that any right of the first defendant in relation to this trust is in the latter

---

26 At [605] and [609]

27 (1954) 91 CLR 540 at 583

28 Section 263

category. But that argument refers to the property which is the real estate, the house. That real property constitutes a "financial resource" of the first defendant. His right as appointor to affect the administration of the trust, in combination with his right as a beneficiary, constitutes property which is distinct from that of the real estate itself.

[30] The first defendant's rights under the trust deed are thereby susceptible to orders under Part 19. It may be that the court could not order in terms of paragraph 1 of the plaintiff's prayer for relief. But the precise terms of what could be ordered was not the subject of detailed argument: instead the respective submissions focussed upon whether there was some property in relation to the house which could be the subject of an order. Accordingly it would not be appropriate now to strike out that part of paragraph 1 of the prayer for relief (even with leave to amend). It is for the plaintiff to maintain the claim in the present terms or amend as she may be advised. That should cause no expansion of the scope of this litigation, for the house is conceded to be a "financial resource" so that the first defendant's rights under the trust will have to be explored.

Conclusion

[31] The defendants' application, originally made under r 16 of the *UCPR*, to stay or dismiss the proceedings for want of jurisdiction, should be dismissed, as should the alternative application made at the hearing for the summary dismissal of the proceedings against the second defendant and the first defendant insofar as they involve a claim in relation to the house. The result is that the defendants' application filed on 10 February 2006 will be dismissed.

[32] I will hear the parties as to any consequential orders and as to whether any order for costs is appropriate.[29]

---

[29] Section 341