



## Transcript of Proceedings

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Date: 16 March, 2004

SUPREME COURT OF QUEENSLAND

CIVIL JURISDICTION

MUIR J

No BS374 of 2004

KYT

Plaintiff

and

ISC

Defendant

BRISBANE

..DATE 10/03/2004

ORDER

**WARNING:** The publication of information or details likely to lead to the identification of persons in some proceedings is a criminal offence. This is so particularly in relation to the identification of children who are involved in criminal proceedings or proceedings for their protection under the *Child Protection Act 1999*, and complainants in criminal sexual offences, but is not limited to those categories. You may wish to seek legal advice before giving others access to the details of any person named in these proceedings.

HIS HONOUR: The plaintiff is the respondent to this application. She filed and served a claim and accompanying statement of claim in which she sought relief in respect of an alleged defacto relationship pursuant to the provisions of part 19 of the Property Law Act 1974.

The applicant/defendant contended that the incorrect procedure had been used and that the proceedings should have been commenced by application. He entered a conditional appearance and threatened to have the claim and statement of claim dismissed unless they were withdrawn and an application filed.

There was some to-ing and fro-ing between the parties about this and on 2 March the respondent's solicitors in a letter to the applicant's solicitors proposed some directions which included directions as to filing and service of affidavits by the applicant, "containing the particulars of her claim" affidavits in reply, expert evidence, disclosure, mediation and so forth.

The applicant's solicitors intimated that their client's prepared to consent to the directions as long as the respondent agreed to pay the applicant's costs of and incidental to the application including the costs of counsel. That was on 2 March, some eight days ago. That consent was not forthcoming. When the matter came before me this morning I was informed that the only matter in issue was the question of costs.

I have some reservations about the true construction of rules 9, 10 and 11 of the Uniform Civil Procedure Rules. I think there is some ambiguity in rule 10(a) in that it seems to me to be arguable that the subject application ought to be commenced by claim because having regard to rule 10(a) rule 11 may be said to "state the type of originating process to be used".

I do not, however, consider that to be the correct construction of the rules. In my view rule 10 is designed to permit proceedings to be started by application where an Act permits a person to apply for an order and does not state the type of originating process to be used.

Accordingly, the applicant's approach to construction has been vindicated but I must say that his approach, or that of his legal advisors generally, does not justify the same description.

This is a terrible waste of time, energy and cost. There should really have been no dispute about it. Once the matter had been raised the parties should have considered the correct position and then if the dispute couldn't be resolved the obvious course was to simply obtain an appropriate direction as to the way to proceed the next time the matter came to Court.

In this century as in the bulk of the last century proceedings did not fail and were not struck out because the wrong form

was selected. The parties acting sensibly obtained an appropriate order for directions as to the delivery of points of claim, if it was thought, for example, the complexity of the matter required proper particularisation and that particularisation should not be given the description of a statement of claim or defence.

In a matter such as this it would be rare, I think, for the matter to be able to proceed to any form of sensible trial without a precise identification in a formal document of the issues to be raised on each side. In this matter there should be a statement of claim, or points of claim and the directions consented to concede that.

Why there should be particulars of claim, but no particulars of defence escapes me. For the reasons I have indicated I would not regard it as a sensible exercise of my discretion to make orders along the lines sought unless they required that particulars of the defendant's defence be provided.

I propose, for the reasons I have given, to make no order as to costs, or if the parties wish, to make the costs the costs in the cause.

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HIS HONOUR: The orders then will be:

1. Any irregularity occasioned by the commencement of the proceedings by claim be excused.

2. The applicant/defendant file and serve a defence on or before 24 March 2004. 1
3. The plaintiff file and serve any affidavit or affidavits on which she seeks to rely on the hearing of this matter on or before 24 March 2004.
4. The defendant file and serve any affidavits upon which he intends to rely on the hearing of this matter on or before 7 April 2004. 10
5. Each party file and serve the evidence-in-chief of any valuation expert upon which they intend to rely on or before 21 April 2004.

The subsequent orders will be in terms of paragraphs 4, 5, 6, 7 and 8 of the letter of 2 March 2004 from Cranston McEachern to Messrs Rhonda Penny & Associates. 20

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