SUPREME COURT OF QUEENSLAND

CITATION:	*CJR v BMS* [2010] QSC 16
PARTIES:	**CJR** (applicant) **v** **BMS** (respondent)
FILE NO/S:	5787 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 February 2010
DELIVERED AT:	Brisbane
HEARING DATE:	7 December 2009
JUDGE:	Martin J
ORDER:	**1. The applicant is to bring in minutes of order.**
CATCHWORDS:	DE FACTO RELATIONSHIP – PROPERTY SETTLEMENT – Where applicant and respondent in a de facto relationship for six years – Where parties had one child together – Where applicant has 3 other children – Where respondent owned real estate prior to relationship commencing – Where both parties made financial and other contributions during course of relationship – Where both parties dispute the extent of the other party's financial and other contributions – Where ownership and value of certain property is in dispute - Whether the parties contributed equally during the course of the relationship – Whether a property adjustment order should be made. *BLM v RWS* [2006] QCA 528 *FO v HAF* [2006] QCA 555 *Hardman v Hobman* [2003] QCA 467 *Property Law Act* 1974, ss 286, 291, 292, 293, 297, 298, 299, 341
COUNSEL:	AC Black for the applicant Respondent appeared unrepresented
SOLICITORS:	Hemming & Hart solicitors for the applicant

Respondent appeared unrepresented

[1] The applicant ("CJR") and the respondent ("BMS") lived together in a de facto relationship from March 2000 until final separation on 26 June 2006. BMS now seeks a property adjustment order under s 286 of the *Property Law Act* 1974 ("PLA"). The pool of property to be considered is relatively small. There is one child of the relationship who was born on 11 December 2000. The applicant had three children from previous relationships, one of whom was treated as a child of the relationship. A parenting order was made in the Federal Magistrates Court of Australia on 1 August 2008.

[2] CJR is now 45 years old. BMS is 35 years old. Neither has entered into a new relationship.

[3] The appropriate method to use when determining an application of this nature was laid down by the Court of Appeal in *FO v HAF* [2006] QCA 555. The process outlined by Keane JA at [52] is:

(a) Identify and value the property, resources and liabilities of the parties;
(b) Identify and assess the contributions of the parties to their pool of assets and determine their contribution-based entitlements in accordance with s 291 to s 295 of the PLA;
(c) Identify and assess the factors in s 297 to s 309 of the PLA to determine the adjustment to the contribution-based entitlement; and
(d) Consider the result of these earlier steps to determine whether that result is just and equitable in accordance with s 286 of the PLA.

Identification and valuation of the property etc.

[4] A table of assets and liabilities was prepared on behalf of the applicant. Save for the question of jewellery, with which I will deal later; it demonstrates that there is little difference between the parties on the value of the assets held by each of them. I have altered it in a few respects to set out my findings as to the assets within the available pool, for example, the respondent gave evidence of the state of his current bank accounts and I have inserted those.[1]

[5] The respondent's main dispute was with the amount of jewellery owned by the applicant. The applicant gave evidence that the jewellery noted in the schedule to her insurance policy was jewellery which had been given to her by her late father for her to sell in Australia. The jewellery was not sold and the applicant says it was returned to her father in the Philippines. The continuing presence of the jewellery in the insurance schedule was, said the applicant, an oversight on her part. The respondent argued that the jewellery was still in the applicant's possession but, in the absence of any evidence to the contrary, I accept the account given by the applicant and her valuation of the jewellery which she does own.

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1 Schedule "A".

[6] I also accept, on the basis of the bank statements which were exhibited to some affidavits, that the state of the applicant's bank accounts is as set out in the column in Schedule "A".

[7] A valuation of a unit in Queanbeyan which is owned by the respondent was the subject of an independent valuation which I have accepted.

[8] The parties are agreed on one thing – their respective superannuation entitlements should not be taken into account.

Contributions of the parties to their pool of assets etc. and contribution-based entitlements

[9] Not unusually, the evidence from each party conflicts over the extent to which each contributed to the acquisition of the property set out in Schedule "A". The only point on which they are agreed is that the real property at Queanbeyan had been acquired and paid for by the respondent well before the de facto relationship commenced.

[10] Both the applicant and the respondent have, to varying degrees, exaggerated the extent to which each contributed to household expenses and the parenting of the child of the relationship and the other children of the applicant, some of whom lived with them from time to time. Similarly, each of them has demeaned the contribution made by the other in an exaggerated way.

[11] I accept that the usual manner in which household expenses were paid was through a credit card in the name of the applicant but which was available, through an auxiliary card, to the respondent. Both parties would then pay off that card to varying extents over the time of the relationship.

[12] The applicant said that she had paid for the credit cards, food, electricity, telephone, internet, petrol, and all miscellaneous expenses including entertainment, holidays, clothing and footwear for the children. She also said that she had occasionally paid some of the respondent's bills related to his property in Queanbeyan. She accepts that he paid the rent on the property they were living in from his account.

[13] Not surprisingly, the respondent disagrees with the account given by the applicant. He says that he paid his share of expenses and that he was responsible for supporting the family when the applicant was ill before giving birth to their daughter and during the first year or so after the birth.

[14] I have attempted, through an examination of the bank documents annexed to the affidavits of both the parties, to determine the extent to which each of them made contributions to the running expenses of the household and the accumulation of the property which was in existence at the time of the final separation. Not all the primary material is available and some of it is difficult to understand. This is not surprising. As Williams JA said in *Hardman v Hobman* [2003] QCA 467:

> "[3] Parties to a de facto relationship (indeed as with parties to a lawful marriage) usually do not conduct their financial affairs on the basis that one day, following a parting of the ways, each would be in a position to give accurate evidence as to the financial contribution made by each to the relationship, in particular to the acquisition of

> property, and as to the value of that contribution when the relationship ended. For that reason courts called upon to adjudicate on issues such as raised by this appeal will, of necessity, have to adopt a broad brush approach. The trial judge cannot ignore positive evidence in order to achieve what is perceived to be a just outcome, but more often than not the sparsity of evidence will call for the application of what has often been referred to as 'palm tree justice'. Even then there are constraints on what a court can do.
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> [4] In cases of this kind the burden of proof is often of critical importance. The party seeking relief must place evidence before the court establishing entitlement to that relief. The absence of evidence does not mean that the judge has a free hand to order the transfer of property in a way which objectively may be seen to be just."

[15] The documents provided to me do not assist one way or the other in coming to a view of the financial contribution from each party.

[16] As I have noted above, there were times during the relationship when the applicant was unable to work, either through illness or because she was caring for their newborn child. During those times I find that the respondent paid for the rent and other expenses of the relationship and that the applicant, when she returned to part-time work, contributed significant amounts of her own income to household expenses.

[17] The respondent was often out of work or only able to obtain casual work.

[18] The respondent says, and I accept, that, at the time the relationship started, he had no debts, he owned the unit at Queanbeyan, a motor vehicle worth about $23,500, and he was living in a rental unit at Auchenflower. After the relationship commenced, the applicant and her three children moved into the Auchenflower unit. The respondent became pregnant and was unwell, which resulted in her ceasing employment. In order to care for her, the respondent resigned his employment. In December 2000, after the child was born, the family (save for the applicant's eldest child)moved to Canberra in order that the respondent could take up work there. In July 2001 they moved back to Brisbane.

[19] One of the major complaints made by the applicant is that the respondent devoted a lot of his time to playing computer games. This assertion was supported by the evidence of one of the applicant's daughters, JR. She was asked by the respondent about his adherence to a "chores roster". She responded: "I couldn't recall that I've really seen you do a lot around the house. My memories of you are mainly on the computer, to be honest."

[20] The respondent worked part-time in the last two years of the relationship. His taxable income for 2004/05 was $26,448 and for 2005/06 it was $27,888. More recently the relevant figures are: 2006/07 - $32,376 and 2007/08 - $15,165. The applicant's taxable income for 2004/05 was $33,153, for 2005/06 it was $13,874, and for 2006/07 it was approximately $15,000.

[21] Doing the best I can on the documents available to me, I find that the parties' contributions as referred to in s 279 of the PLA varied over the six years of the relationship and that, at times, one party was almost entirely responsible and, at

other times, the other party was almost entirely responsible. There were times when the contributions altered according to the relative incomes of the parties. On all the available material the appropriate conclusion is that the parties contributed equally under this heading.

[22] Under s 292 (family welfare), I am satisfied that the applicant contributed a greater amount by virtue of the care necessary for the children. However, I do not discount the work done by the respondent. The parties had different ways of parenting, particularly when it came to expenditure on the children. I assess the applicant's contribution to be in the order of 60%.

[23] I will deal with s 293 later in these reasons.

[24] No evidence was given about the matters referred to in s 295. Although an order has been made by the Federal Magistrates Court, it was not produced.

Factors under s 297 to s 309

Section 297

[25] CJR is 45 years old. BMS is 35 years old. Both are in good health.

Section 298

[26] The respondent is undertaking continuing studies to increase his earning potential in computer-related web design. The applicant is studying part-time at the Australian College of Natural Medicine. She is currently employed at a bridge club and earns $240 a month. She receives approximately $970 a fortnight in benefits. The respondent is currently earning $838 a fortnight which is made up of various allowances and the rent from the Queanbeyan unit.

[27] On the basis of the limited evidence as to future earning capacity I think it is more likely that the respondent will have higher earnings than the applicant but I cannot assess what they might be.

Section 299

[28] The applicant has to care for two children of the relationship.

Sections 300 to 309

[29] The evidence on these topics, except where already touched upon, was quite scant.

The Queanbeyan Unit

[30] The applicant submitted that I should follow the reasoning in *BLM v RWS* [2006] QCA 528 with respect to the manner in which I accounted for the Queanbeyan unit. In the decision, it was held per Keane JA that:

> "[40] It is well-established by decisions of the Full Court of the Family Court in relation to the provisions of the *Family Law Act 1975* (Cth) analogous to Pt 19 of the PLA that:

> "an initial substantial contribution by one party may be 'eroded' to a greater or lesser extent by the later contributions of the other party even though those later contributions do not necessarily at any particular point outstrip those of the other party.""

[31] In *BLM v RWS* and in other, comparable, cases, the issue to be determined was with respect to the contribution of a pre-existing asset. There are decisions concerning the sale of such an asset and the use of the proceeds to purchase a family home or a business. That is not the case here. The Queanbeyan unit was untouched. It remained as an income producing asset in the respondent's name and it was not used save for the rent being used to defray some of the parties' living expenses. It did not become part of the parties' property because it was never used to pay for or support the acquisition of such property.

[32] The unit is better characterised as a matter going to the financial security of the respondent and the facility to continue to earn rental income. It places him in a much better position than the applicant.

The appropriate order

[33] The total assets of both parties amount to less than $250,000. The evidence from both parties has not been of a sufficiently detailed nature to allow anything other than a broad brush approach. The applicant contributed more in parenting and about the same in asset acquisition as the respondent. The respondent is more financially secure than the applicant. The appropriate order, taking into account s 293, is to require the respondent to pay the applicant $60,000. The respondent, on the material, could not pay that amount immediately. I direct that the applicant bring in minutes of order to the effect that:

(a) The respondent pay the applicant the sum of $60,000 in two equal instalments. The first by the end of March 2010 and the second by the end of May 2010.
(b) Each party to retain all assets and property in their own possession.
(c) Each party to be responsible for the debts in their own names.
(d) Other ancillary orders.

[34] The applicant sought her costs of these proceedings and that her costs in the Federal Magistrates Court be taken into account. There is nothing in this case to take it outside the provisions of s 341 of the PLA. I make no order as to costs. As for the costs in the other Court, no order was made there and to take them into account in these proceedings would be to go behind the intent of the Commonwealth legislation that each party bears their own costs in the usual course.

SCHEDULE "A"

TABLE OF ASSETS/LIABILITIES

Item	Description	Ownership	Value ($)
1	12/48-50 Richard Ave, Queanbeyan	Respondent	160,000
2	Contents/furniture of former home	Joint	14,235
3	Contents/furniture/personal items in Applicant's possession, at "Annexure A" of Respondent's affidavit of 22.09.08, once car/jewellery/stock is deducted	Applicant	15,000
4	Jewellery	Applicant	500
5	Mitsubishi 1994 Lancer GSR	Respondent	6,200
6	BMW 1994 318i Sedan	Applicant	7,300
7	AMP share portfolio	Respondent	818
8	Bank accounts	Applicant	1,049
9	Bank accounts	Respondent	24,647
TOTAL GROSS ASSETS			**$229,749**
1	Credit card debt	Applicant	18,088
2	Credit card debt	Respondent	315
3	Debt owed to Centrelink	Respondent	3,822
4	HECS/Fee Help	Applicant	6,454
TOTAL GROSS LIABILITIES			**($28,679)**
TOTAL NET POOL			**$201,070**