SUPREME COURT OF QUEENSLAND

CITATION:	*SLD v JMW* [2011] QSC 47
PARTIES:	**SLD** (applicant) v **JMW** (respondent)
FILE NO/S:	4079 of 2007
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	28 March 2011
DELIVERED AT:	Brisbane
HEARING DATE:	2-3 February 2011
JUDGE:	McMurdo J
ORDER:	**(1) By 31 May 2011 the respondent is to pay to the applicant the sum of $227,000.** **(2) Upon payment of the sum in (1):** **(a) the applicant is to do all things and execute all documents as are required to transfer to the respondent all her right, title and interest in the property described in these reasons as the applicant's house;** **(b) the applicant and the respondent are each to do all things and execute all documents as are necessary to cause the entire balance in the joint Bank of Queensland mortgage offset account to be paid or credited to the respondent;** **(c) the respondent is to do all things and execute all documents as are necessary to discharge the joint Bank of Queensland loan (account number 20281564) over the applicant's house or to cause that loan to be one owed to the bank only by the respondent;** **(d) the respondent is to do all things and execute all documents as are necessary to cause the applicant to be removed as a beneficiary of the trust;** **(e) the respondent will cause any outstanding rates on the applicant's house to be paid.**

(3) While the applicant remains the owner of the applicant's house, she will not deal with, dispose of or further encumber in any way her interest in that property.

(4) The respondent is to retain his interest in the property described as the respondent's house free of any claim by the applicant whatsoever.

(5) The respondent is to retain any interest in respect of the company and Equipment and Lifting Solutions Pty Ltd and will indemnify the applicant in respect of any liability of the applicant which relates to either of those companies or a business conducted by it.

(6) If the respondent does not comply with the order for payment in (1) of these orders:

(a) the properties described as the applicant's house and the respondent's house are to be sold by trustees to be appointed by further order; and

(b) the net proceeds of that sale are to be distributed first by a payment of $227,000 to the applicant, and the balance of the proceeds to the respondent, and to the extent that the proceeds are insufficient to pay that sum to the applicant, the balance shall be paid to her by the respondent.

(7) Subject to the preceding orders, each party is to retain all of the property in that party's name or possession free of all claims from each other and is to indemnify the other in respect of any liabilities relating to that property.

(8) There be liberty to apply.

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – APPLICATIONS – where the parties were in a de facto relationship from 2001 until late 2006 – where there are two children of the relationship – where the respondent made a greater financial contribution both initially and during the relationship – where the applicant made a greater contribution to the family welfare – where the applicant has the care of the children – what is a just and equitable adjustment of the parties' interests in the property

Property Law Act 1974 (Qld), Part 19
Uniform Civil Procedure Rules 1999 (Qld)

COUNSEL: M Black for the applicant
The respondent appeared on his own behalf

SOLICITORS: Sarah Cleeland Family Lawyers for the applicant
The respondent appeared on his own behalf

[1] This is a claim for relief under Part 19 of the *Property Law Act 1974* (Qld). The parties were in a de facto relationship from 2001 until late 2006. There are two children of that relationship, born in October 2003 and April 2006, who live with their mother, the applicant.

The relevant assets and contentions

[2] The applicant was born in 1976, the respondent in 1975. They met and began to live together in 2001, in a house north of Brisbane which the respondent had owned since 1998 ('the respondent's house').

[3] In May 2002, the applicant moved back to Brisbane and in about July 2002, she purchased an apartment at Northgate. Her purchase of the apartment was in order to provide her with some independence. But their de facto relationship continued. They divided their time between the respondent's house and the Northgate apartment until May 2003, when the applicant moved back to the respondent's house.

[4] After that, she rented out her apartment for about $150 a week until she sold it in February 2004. She had purchased it for $130,000, borrowing about $109,000 and obtaining a first home owner's grant of $7,000. She sold the apartment for $185,000. After the expenses of sale and the discharge of her mortgage, she received net proceeds of about $60,000. She deposited $60,000 on 11 March 2004 to an account with the Bank of Queensland, described as a home loan account for the respondent's house. It appears that this was a mortgage "offset" account with the bank, and I will refer to it as such. The effect was to reduce the mortgage debt over the respondent's house in which by then they were living with the first of their children, and to reduce the interest accruing on that debt.

[5] On 5 November 2004, the applicant caused the same amount, $60,000, to be withdrawn from the mortgage offset account. There is a substantial contest as to where it was paid. The applicant says that she used it to pay some of what was owing on a loan made by CBFC Limited for the purchase of a crane used in the business conducted by the respondent. This is denied by the respondent; he says that the money is unaccounted for and must have been applied by the applicant for her own benefit. I return to that question below.

[6] In the early period of their relationship, the applicant was employed full time as a legal secretary. Her gross income was then about $37,000. The respondent had been in business for some years prior to then as a self-employed rigger. His taxable income for the year ended 30 June 2001 was $51,775. The net profit from his business for the year ending 30 June 2003 was $63,000. In July 2003, the respondent established a company, of which he was and remains the sole director and shareholder ('the company'), which then carried on what had been his business as a trustee of a family discretionary trust ('the trust') of which the parties are beneficiaries.

[7] At the commencement of the relationship the applicant had little property. She owned a car which she had purchased in 2002 for $14,000, some of which she had borrowed from her parents and was repaying. She sold the car in November 2003 for $10,000 of which $5,000 was repaid to her parents. In September 2003, she stopped work shortly before the birth of their first child. The parties agreed that she

would not return to work but would run the household and assist the respondent in the business.

[8] The respondent's house was purchased in 1998 for $130,000, financed as to $100,000 by a loan from a building society and the balance from his savings. He says that by the commencement of the relationship, his equity in the house was about $75,000. He says that he also had furniture by then worth $40,000, two cars worth together $20,000 and about $5,000 worth of tools and equipment.

[9] In April 2006, the month in which their second child was born, the parties moved to another house which they purchased in the applicant's name ('the applicant's house'). It was purchased for $617,000, provided as to 10% from funds in the mortgage offset account, as to $31,700 from the company and as to the remainder from a new loan from the Bank of Queensland. The respondent's house was then rented out for $280 per week.

[10] In late 2006, the parties separated and their relationship ended. The respondent has remained in the applicant's house since. The respondent's house remains owned and rented out by him. In that way he has had the benefit of both properties since the end of their relationship, although the effective burden of the mortgages has been upon him.

[11] Each of the properties has been valued upon the joint instructions of the applicant's solicitors and the respondent's then solicitors. The applicant's house is valued at $585,000 and is subject to a mortgage securing about $445,000. The respondent's house is valued at $420,000[1] and is now encumbered to the extent of about $250,000. I shall return to the circumstances in which the respondent caused the respondent's house to become further encumbered, in amounts totalling about $100,000, from June 2010. There are arrears of rates upon the applicant's property of $5,048.

[12] There is a balance of $23,000 in a joint account with the Bank of Queensland, which was the mortgage offset account. The applicant says that this is jointly owned property. The respondent says that it is really the company's money. He says so upon the basis of a handwritten document dated 14 October 2008, and signed by each of the parties, which records an agreement that the respondent be permitted to draw upon the moneys then held in the offset account to pay "any and all arrears of child support" and the balance towards the repairs of a crane owned by the company. He says that the applicant subsequently refused to allow him to withdraw that balance for the company, except upon the condition that she received one half of it. For present purposes, the money in that account remains an asset jointly held by the parties.

The business

[13] At least upon the applicant's case, there is another asset constituted by the company's business. She called an accountant, Mr Calabro, to give evidence valuing the business. He wrote reports in 2007, 2008 and 2009. He was appointed as the sole expert according to the *Uniform Civil Procedure Rules 1999* (Qld) and there is no question as to his independence. But his reports are of limited utility,

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1 As appears from a "Balance Sheet" handed up, without objection, by the applicant's counsel. The relevant page of the valuation itself (Document 89 of Exhibit 1) was omitted.

because the most recent of them relies upon accounts which are for a period ending 30 June 2007.

[14] In his 2009 report, he valued the net assets of the trust at a negative amount of $7,631. There were assets of $1,110,730, including a loan to the respondent of $93,581. There were liabilities of $1,118,361, apparently including loans from the applicant and the respondent, each in the amount of $21,424, together with an amount said to be owing to the company in its own right (rather than as a trustee) of $138,473. Mr Calabro valued the net assets of the company itself as $89,382. Its only substantial asset is what was said to have been owed to it by the trust. Mr Calabro then reached what he described as a "net value" of $32,359 in this way:

Value of the trust	($7,631)
Net assets of the company	$89,382
"*Debts owing by/or to related entities*"	
The respondent	($70,816)
The applicant	$21,424
Net value	$32,359

Upon this basis the applicant's case is that within the relevant pool of assets, I should include the business effectively conducted by the respondent and at that value of $32,359.

[15] The business has a substantial turnover and has been profitable. According to the tax return for the trust for the 2008 year its gross income was about $1.674 million which after expenses, gave a net profit of $65,540. That was shown as distributed to the respondent ($14,500), to the parties' children ($1,600 each) and to the company ($47,840). As at 30 June 2008, its assets and liabilities were said to be almost equal, in amounts of about $1.064 million. There were legal costs of $23,982 which had been recorded as an expense of the trust business, but which were not allowable as a deduction. It appears that these were legal costs incurred by the respondent personally, probably in relation to this dispute. The assets included a debt owing to the trust by the respondent of $114,590 and a debt owed by the applicant of $23,239. The liabilities included a debt to the company of $153,826.

[16] The trust's tax return for the 2009 year showed gross income of $2.13 million which after expenses resulted in a net profit of $188,684. This was shown as distributed to the respondent ($128,364), to the children ($2,660 each) and to the company ($55,000). The assets as at 30 June 2009 were $1,228,403, which included amounts owing to the trust by the respondent ($168,202) and the applicant ($23,239). The liabilities of $1,228,393 included $194,519 said to be unpaid distributions to the company in its own right.

[17] The 2010 tax return is yet to be prepared. The most recent accounts for the trust business appear to be a profit and loss statement, prepared on a MYOB system, for the period July 2010 through January 2011. This is incomplete, at least because it does not include depreciation, an item which in the 2009 year amounted to $220,597. According to this profit and loss statement, there was a total income of about $1.029 million and an operating profit of $164,526.

[18] There is no balance sheet more up to date than that as at 30 June 2009. I have no doubt that something could be produced from the MYOB system. But the

respondent has clearly failed to make proper disclosure, which may or may not be explained by the fact that he has been for some time without legal representation.

[19] Some further matters should be mentioned about the respondent's business. The first is that there is another entity entitled "Equipment and Lifting Solutions", in which the respondent said that he is a 50% owner. For this entity, he produced an MYOB profit and loss statement for the six months to June 2010 and a balance sheet said to be "As of June 2011" (sic), which was printed on the second day of the trial. The former showed a net loss of $21,164. The balance sheet showed assets of $349,044, liabilities of $340,538 (including $20,000 owed to the respondent) and therefore equity of $8,506.

[20] For much of the hearing, the respondent made reference to his liquidity problems. Ultimately, he substantiated that claim by producing a demand from Dun and Bradstreet for unpaid tax which included a payment slip issued by the Australian Tax Office. The demand was upon the trustee of the trust and was dated 5 January 2011. The amount demanded was $136,603. I accept that this has not been paid.

[21] Overall, the position of the business controlled by the respondent is not as clear as it should be, due to the respondent's failure to make proper disclosure. In the circumstances, he should not be given the benefit of the doubt in any respect where his financial circumstances and that of the business are unknown. However, some things are sufficiently clear.

[22] First, the business was profitable throughout the period of the de facto relationship providing a substantial household income. It made a small loss in the 2003 year, but after paying wages to the respondent of $51,894. In the 2004 year, there was a profit of $50,620 apparently after paying the respondent $5,769. In the 2005 year, there was a net profit of $54,564, and in the 2006 year a net profit of $389,887. In the 2007 year, the turnover rose considerably but there was a recorded loss of $7,641. I infer that this was after payments to or for the benefit of the respondent. Secondly, the business has grown rapidly, as measured by its turnover. In the 2003 year, its gross income was $197,021, by the 2007 year it was $1.49 million and, as mentioned, it was more than $2 million in the 2009 year. Thirdly, it seems to be highly geared and has at least recently experienced liquidity problems. This was explained by Mr O'Brien, an independent accountant who has prepared its tax returns for some years. It has borrowed substantial amounts to purchase equipment such as cranes. Its liquidity is affected by having to make repayments of principal from after tax income, although it also has the benefit of a substantial deduction for depreciation of those items. According to Mr O'Brien, at least as at 30 June 2009, the trust business was solvent.

[23] Again according to the balance sheet of the trust as at 30 June 2009, the respondent owed $168,202 to the trust, and the company in its own right (of which he is the sole shareholder) was owed $194,519. Thus, in net terms, the respondent might be thought to have had an interest of about $27,000 in that business. That balance sheet showed tax liabilities totalling $16,452. Given the recent demand on behalf of the ATO, it is likely that the position of the trust, and the value of the respondent's investment in this business, is worth no more than it was as at 30 June 2009. As it happens then, the apparent value of the interest of one or both of the parties in this business is not significantly different from that put forward in the applicant's case through Mr Calabro. I will proceed on that basis.

The respondent's mortgage

[24] I return to the extent of the mortgage over the respondent's house. By an agreement made with the Bank of Queensland, apparently in April 2010, the respondent obtained a line of credit facility with a limit of $100,000. The agreed security was a second registered mortgage over that house. The respondent began to draw on that facility on 9 June 2010. The facility was progressively drawn down leaving a balance owing to the bank of $96,222.83 as at 1 February 2011. Most of those drawings were payments to a bank account number which is apparently an account of the company, supporting the respondent's evidence that he had to obtain and draw upon this facility to continue to conduct the business. This is consistent with the liquidity problems to which I have referred.

[25] In this way the respondent's house has been further encumbered by almost $100,000. On 2 July 2007, the respondent, who was then legally represented, undertook not to encumber or otherwise deal with that property without the applicant's consent or an order of the Court. No order was obtained and the respondent does not suggest that he had the applicant's consent, whether in writing or otherwise.

[26] Subject to the question of what happened to the amount of $60,000 withdrawn from the offset account in November 2004, the property, resources and liabilities of the parties are identified by what I have said so far. In effect, the net asset position is substantially that as advanced in the applicant's case, save that it should be reduced by $100,000 for the further encumbering of the respondent's house. The result is that there are effectively property and resources which, net of liabilities, represents "a pool" of about $350,000. I should note that each party owns chattels worth about $10,000, the accrued superannuation interest of the applicant is about $31,000 and that of the respondent about $34,000.

The applicant's withdrawal of $60,000

[27] As to the $60,000 withdrawal, the relevant bank statement described the transaction as "DISB TRANSFER BCH-16818288". In his affidavit filed on 11 November 2009,[2] the respondent swore that the applicant withdrew that sum. In an affidavit sworn in response, the applicant said that "those proceeds were then transferred out of the Respondent's account on the 5th November 2004 to discharge the 8 tonne crane loan as evidenced in Exhibit "H" of the Husband's documents" (that exhibit number was a reference to the bank statement showing the withdrawal). Thus the applicant's case was that she did withdraw the money, but for the purpose of making a payment to the financier of a crane used in the business.

[28] The company borrowed to buy an 8 tonne crane, on terms which were set out in a letter dated 30 December 2003 from CBFC to the respondent as director of the company. The cash price for the crane was $89,500 and the amount lent was $88,085.65, which together with interest was to be repaid by 60 monthly payments each of $1,414.35 and a balloon payment of $26,850. The loan was guaranteed by the respondent and secured by an equitable mortgage given by the company which was dated 6 January 2004. That charge was released by CBFC on 11 March 2009, as is shown by the notification of that release which was lodged with ASIC. It

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[2] Paragraph 27.

appears that the loan was repaid on or about five years from the advance, having regard to the date of discharge of the equitable mortgage. There is evidence of a payment as late as December 2008 to CBFC by the company in that monthly amount of $1,414.35. Moreover, the company's balance sheets consistently show that the loan was repaid by the monthly instalments which were originally agreed. The balance as at 30 June 2004 was $105,539.62 and the balance as at 30 June 2005 was $88,567.42, a reduction of $16,972.20 over the year which equates to 12 payments of $1,414.35. It is of course inconsistent with a reduction in that balance of $60,000 which according to the applicant's affidavit, occurred within that accounting year. The 2006 balance was $67,866.15, the 2007 balance was recorded as $49,095.87[3] and the 2008 balance was recorded at $35,244.83.

[29] The evidence on this subject is unnecessarily incomplete. There is no proper explanation for the respondent not having a full set of the statements, showing the state of the CBFC loan over the agreed term of five years. But those documents could have been procured by the applicant and she has not produced her own bank statements as far back as November 2004. I conclude that the respondent has proved that the $60,000 withdrawn by the applicant was not applied towards this loan.

[30] The possibilities are that the applicant withdrew the $60,000 and applied it for her own benefit or that it was used for the purpose of the business, although not to repay the CBFC loan. There is no prospect that it was withdrawn but used for their joint domestic purposes: neither points to any item of expenditure which might be related to this money. The accounts of the trust do not contain any indication that the $60,000 was paid to it or for its benefit: they indicate the contrary. The applicant was heavily involved in the bookkeeping for the business so that she could be expected to be familiar with where such a substantial payment would appear in its accounts. Moreover, the balance sheets for 2004 and 2005 would indicate that this crane was the only valuable item of equipment then owned by the trust, so that it is not possible that she applied it for some other item.

[31] In my conclusion, it is more probable than not that the applicant withdrew that $60,000 and applied it, not for the business or otherwise for their joint benefit, but in some other way, for her own benefit. The relationship was often a difficult one and it is not unlikely that circumstances arose in which the applicant saw fit to withdraw the precise amount which she had deposited from her own money. That had been deposited to an offset account, effectively reducing the mortgage debt on a property which was in the respondent's name. At that stage, of course, the applicant's house had not been acquired. She may have considered then that against the event of the relationship ending, she should protect her position by withdrawing what she considered was still her money.

The respective contributions

[32] I come now to the contributions made by the parties. The greater financial contribution was made by the respondent. The understanding was that the applicant would not return to work after the birth of their first child. Her income from then on

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[3] As appears in the 2008 tax return (which included the balance as at 30 June 2007) which is part of Exhibit 5. Another balance sheet as at 30 June 2007, which is part of Document 41 of Exhibit 1, represents the balance at $45,828.72. The difference is not significant for present purposes.

came from distributions from the business. But she significantly contributed to the conduct of that business often working about 15 hours per week completing the bookkeeping. She assisted in other ways such as delivering equipment to the respondent when he was on a work site. He worked very long hours and, it must be recognised, the income of the business was primarily the result of his industry and enterprise. Of course, her managing the household and caring for the children allowed him to devote himself in this way to the business.

[33] I accept that he made a substantial initial contribution through his equity in the house which he had purchased in 1998. There was no corresponding contribution from her. I have found that her suggested contribution of $60,000 was in fact withdrawn for her own use. Overall, it must be said that his contribution was greater.

[34] According to her most recent statement of financial circumstances[4] she has a few items of personal property, including a car then worth $7,900 as well as an interest in the property to which I have referred. She also claimed to owe her parents an amount of $60,714. She returned to the workforce in early 2009, at that stage working two and a half days a week. She now works two days a week in a legal office. She has the responsibility of caring for the children. That will have some impact upon her earning capacity. The respondent has a poor history in paying for the children's maintenance.

[35] The case for the applicant is that she should have effectively 70% of net assets of $454,000, being an amount of $318,000. It is submitted that the applicant's house should be transferred to the respondent and so too should her interest in the joint offset account. She would give up any interest as a beneficiary under the trust.

Other considerations

[36] The more accurate figure of the "pool" is $350,000, because of the respondent's drawings on the line of credit facility. If he had to pay her $316,000, it is unlikely he would be able to raise further funds to meet the liquidity problems in the business. In particular, there would be no apparent means of paying the amount demanded by the ATO. This is relevant because s 293 of the *Property Law Act* requires the Court to consider the effect of any proposed order on the earning capacity of a party.

[37] So far as s 294 is concerned, it appears that the respondent is to provide child support for the two children. As I have said, there has been a history of non-compliance.

[38] Each of the parties is apparently in good health and able to obtain gainful employment.[5] Neither is in another relationship or has the responsibility to support others apart from the children.

Conclusion

[39] Overall, the most important facts may be summarised as follows. As was submitted for the applicant, the starting point was a net asset position of the order of $450,000.

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4 22 December 2010.

5 Sections 297, 298.

In the past year, the respondent has reduced that by nearly $100,000, with no benefit to the applicant. His financial contribution, both by the respondent's house and through the business, was greater. Her contribution to the business was substantial, in addition to her contribution as a parent and in the household. Her earning capacity is not as high as his, in part because of her particular responsibility for the children. He has had the benefit of both houses since their separation over four years ago.

[40] In these circumstances, notwithstanding his greater financial contribution, I would have adjusted their respective interests so as to provide each with a 50% share of the net assets, but for his reducing those net assets by $100,000 since last June. That 50% would have provided about $227,000 to each party. I conclude that it is just and equitable that she receive an order which would have that result.

[41] The further question is to how that result should be achieved. There would be substantial costs in appointing trustees for sale of the two houses. The applicant has the house in her name in which there is equity of about $135,000.[6] The applicant's counsel resisted the idea that that house would be left in her ownership, because there would be a cost to her of its upkeep, once the respondent vacated it. The appropriate relief, in my view, is to order the respondent to pay $227,000 for a simultaneous transfer of the applicant's house to him, a payment of the entirety of the offset account to him and the removal of the applicant as a beneficiary of the trust.

Orders

[42] My intention is to provide the respondent with a reasonable time in which to sell the respondent's house, if that must be done to raise the required sum to be paid to the applicant. The orders will be as follows:

(1) By 31 May 2011 the respondent is to pay to the applicant the sum of $227,000.

(2) Upon payment of the sum in (1):

the applicant is to do all things and execute all documents as are required to transfer to the respondent all her right, title and interest in the property described in these reasons as the applicant's house;

the applicant and the respondent are each to do all things and execute all documents as are necessary to cause the entire balance in the joint Bank of Queensland mortgage offset account to be paid or credited to the respondent;

the respondent is to do all things and execute all documents as are necessary to discharge the joint Bank of Queensland loan (account number 20281564) over the applicant's house or to cause that loan to be one owed to the bank only by the respondent;

the respondent is to do all things and execute all documents as are necessary to cause the applicant to be removed as a beneficiary of the trust;

the respondent will cause any outstanding rates on the applicant's house to be paid.

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[6] Allowing for outstanding rates.

(3) While the applicant remains the owner of the applicant's house, she will not deal with, dispose of or further encumber in any way her interest in that property.

(4) The respondent is to retain his interest in the property described as the respondent's house free of any claim by the applicant whatsoever.

(5) The respondent is to retain any interest in respect of the company and Equipment and Lifting Solutions Pty Ltd and will indemnify the applicant in respect of any liability of the applicant which relates to either of those companies or a business conducted by it.

(6) If the respondent does not comply with the order for payment in (1) of these orders:

  (a) the properties described as the applicant's house and the respondent's house are to be sold by trustees to be appointed by further order; and

  (b) the net proceeds of that sale are to be distributed first by a payment of $227,000 to the applicant, and the balance of the proceeds to the respondent, and to the extent that the proceeds are insufficient to pay that sum to the applicant, the balance shall be paid to her by the respondent.

(7) Subject to the preceding orders, each party is to retain all of the property in that party's name or possession free of all claims from each other and is to indemnify the other in respect of any liabilities relating to that property.

(8) There be liberty to apply.