SUPREME COURT OF QUEENSLAND

CITATION:	*Perry v Killmier & Anor* [2014] QCA 64
PARTIES:	**SHANE JAMES PERRY** (appellant) **v** **DWAYNE ARRON KILLMIER** (first respondent) **AAI LIMITED** ABN 48 005 297 807 (second respondent)
FILE NO/S:	Appeal No 10363 of 2013 SC No 459 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	4 April 2014
DELIVERED AT:	Brisbane
HEARING DATE:	25 March 2014
JUDGES:	Muir and Gotterson JJA and Applegarth J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The judgment given and the order made on 15 October 2013 be set aside.** **3. The second respondent pay the appellant's costs of and incidental to the proceedings including the costs of this appeal on the indemnity basis.** **4. The second respondent pay the appellant $280,686.70.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – WHAT IS – GENERALLY – where the appellant's partner was killed in a collision between a vehicle driven by her (the deceased) and a vehicle driven by the first respondent – where the appellant alleged in proceedings commenced by him that he and the deceased were living together as husband and wife at the time of her death – where the appellant claimed relief including $857,299 damages for loss of dependency resulting from the first

respondent's breach of a duty of care – where the primary judge found that the accident had been caused by the first respondent's negligence and that the deceased's negligence had contributed to the accident to the extent of 30 per cent – where the appellant failed on a dependency claim brought under s 18 of the *Supreme Court Act* 1995 (Qld) – where there was a delay between the primary judge's judgment and publication of reasons – whether the primary judge erred in finding that the appellant was not a de facto spouse of the deceased – whether forensic advantage was lost in hearing the evidence due to the delay between the hearing and the delivery of judgment – whether the primary judge gave adequate reasons for judgment

Acts Interpretation Act 1954 (Qld), s 32DA
Civil Proceedings Act 2011 (Qld), s 63
Supreme Court Act 1995 (Qld), s 17, s 18

Chambers v Jobling (1986) 7 NSWLR 1, considered
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, considered
Griffith University v Tang (2005) 221 CLR 99; [2005] HCA 7, followed
KQ v HAE [2007] 2 Qd R 32; [2006] QCA 489, applied
NAIS v Minister for Immigration and Multicultural and Indigenous Affairs (2005) 228 CLR 470; [2005] HCA 77, considered
Robert Bax & Associates v Cavenham Pty Ltd [2013] 1 Qd R 476; [2012] QCA 177, considered
Wallace v Kam (2013) 87 ALJR 648; [2013] HCA 19, followed
Warren v Coombes (1979) 142 CLR 531; [1979] HCA 9, distinguished

COUNSEL: A R Philp QC, with R D Green, for the appellant
S C Williams QC, with G C O'Driscoll, for the respondent

SOLICITORS: Bennett & Philp Lawyers for the appellant
Quinlan Miller & Treston Lawyers for the respondent

[1] **MUIR JA: Introduction** The appellant alleged in proceedings commenced by him in the Supreme Court of Queensland that he and the late Deborah Hannan, were living together as husband and wife at the time of her death in a collision between a vehicle driven by her and a vehicle driven by the first respondent on 12 June 2007. He claimed relief including damages for loss of dependency resulting from the first respondent's breach of a duty of care.

[2] The trial of the proceeding took place on 13, 14 and 15 November 2012. The primary judge gave judgment for the second respondent against the appellant on 15 October 2013 and delivered reasons for judgment on 6 November 2013. The delay between judgment and the publication of the reasons was explained by the primary judge as being due to disruption and dislocation caused by the unanticipated closure of the Townsville Courthouse consequent on the discovery of asbestos.

[3] The primary judge found that the accident had been caused by the first respondent's negligence and that the deceased's negligence had contributed to the accident to the extent of 30 per cent. The appellant, however, failed on the dependency claim brought under s 18 of the *Supreme Court Act* 1995 (Qld) (the 1995 Act), now replaced by s 63 of the *Civil Proceedings Act* 2011 (Qld).

The notice of appeal

[4] The appellant appeals on grounds that are extremely general and challenge no specific finding of fact. The grounds are that the primary judge:

1. erred in finding that the appellant was not a de facto spouse of the deceased;

2. ought to have found that the appellant was a de facto spouse of the deceased;

3. lost any forensic advantage in hearing the evidence due to the delay between the hearing and the delivery of judgment; and

4. failed to give any or any adequate reasons.

Relevant statutory provisions

[5] It will be useful at the outset to set out the relevant statutory provisions and, in particular, the relevant parts of s 32DA of the *Acts Interpretation Act* 1954 (Qld).

[6] Section 18 of the 1995 Act provided:

> "**18 Actions how brought**
>
> (1) Every such action[1] shall be for the benefit of the spouse, parent and child of the person whose death shall have been so caused and shall be brought by and in the name of the executor or administrator of the person deceased and in every such action the court may give such damages as the court may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought and the amount so recovered after deducting the costs not recovered from the defendant shall be divided amongst the before mentioned parties in such shares as the court shall find and direct.
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> (2) For subsection (1), the spouse of a deceased person includes a de facto partner of the deceased only if the deceased and the de facto partner lived together as a couple on a genuine domestic basis within the meaning of the *Acts Interpretation Act 1954*, section 32DA—
>
> (a) generally—
>
> (i) for a continuous period of at least 2 years ending on the deceased's death; or
>
> (ii) for a shorter period ending on the deceased's death, if the circumstances of the de facto relationship of the deceased and the de facto partner evidenced

[1] An action within the ambit of s 17 of the *Supreme Court Act* 1995 (Qld).

a clear intention that the relationship be a long term, committed relationship; or

(b) if the deceased left a dependant who is a child of the relationship—immediately before the deceased's death.

(3) Subsection (2) applies despite the *Acts Interpretation Act 1954*, section 32DA(6).

(4) In this section—

child of the relationship means a child of the deceased person and the de facto partner, and includes a child born after the death.

dependant, of a deceased person, includes a child born after the death happens who would have been wholly or partially dependant on the deceased person's earnings after the child's birth if the person had not died."

[7] Section 32DA of the *Acts Interpretation Act* 1954 (Qld) provides:

"**32DA Meaning of *de facto partner***

(1) In an Act, a reference to a ***de facto partner*** is a reference 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.

(2) In deciding whether 2 persons are living together as a couple on a genuine domestic basis, any of their circumstances may be taken into account, including, for example, any of the following circumstances—

(a) the nature and extent of their common residence;

(b) the length of their relationship;

(c) whether or not a sexual relationship exists or existed;

(d) the degree of financial dependence or interdependence, and any arrangement for financial support;

(e) their ownership, use and acquisition of property;

(f) the degree of mutual commitment to a shared life, including the care and support of each other;

(g) the care and support of children;

(h) the performance of household tasks;

(i) the reputation and public aspects of their relationship.

(3) No particular finding in relation to any circumstance is to be regarded as necessary in deciding whether 2 persons are living together as a couple on a genuine domestic basis.

(4) Two persons are not to be regarded as living together as a couple on a genuine domestic basis only because they have a common residence.

…"

The primary judge's reasons

[8] As the appellant and the deceased had not lived together as a couple on a genuine domestic basis for a continuous period of at least two years ending on the deceased's death, the appellant, in order to establish the de facto relationship relied on s 18(2)(a)(ii) of the 1995 Act. The primary judge's reasons for finding that there was no de facto relationship are essentially stated in paragraph [16] of his reasons. His Honour there said:

> "I accept that the [appellant] and the deceased lived together in several residences from February 2006 until June 2007 together with two of the children of the deceased, and they were sexual partners for this period. The [appellant] contributed to rent and household expenses (both jointly leasing the last of the residences) and shared household chores. The evidence, meagre as it is, suggests that the deceased was responsible for caring for or supporting the two children who resided with them. That evidence suggests the [appellant] did not involve himself in their lives. Concerning the reputation and public aspects of their relationship the only evidence is that they enjoyed social outings together and that of Francine Alexandrou and Fergul Simsek on the occasion of the attendance at the accountant's office a week before death. This evidence is not persuasive in my view that publicly the [appellant] and the deceased enjoyed a reputation of a couple living together in a 'genuine domestic basis', rather that the couple, fond of one another, had plans for such a relationship. The evidence relating to financial arrangements (s 32DA(2)(d) and (e)) reveals that at best the couple had plans. But these matters were only at a preliminary stage. The [appellant] gave evidence that he saw his future with the deceased. But his evidence of the discussions about how they might pool resources and purchase a residence were only in broad outline a few weeks before the visit to Airlie Beach. On the view I take of the [appellant]'s evidence concerning the deceased's marriage proposal, there was not a 'mutual' commitment to a shared life. So that on the view that I take of the evidence, whilst I accept the couple were intimate, affectionate and fond of one another, the [appellant] had not committed himself to a 'dependent' or 'inter-dependent' financial arrangement necessary in his mind to a 'mutual commitment to a shared life' so that 'for all practical purposes' he and the deceased would be living together as a married couple. That mutual commitment from the perspective of the [appellant] was, I find, dependent upon a financial commitment when a house was jointly purchased. I am not satisfied the [appellant] and the deceased lived together 'on a genuine domestic basis' before her death." (citations omitted)

[9] The reference to the evidence of Francine Alexandrou and Fergul Simsek relates back to earlier observations by the primary judge about the evidence of these two women. Ms Alexandrou said that the deceased had worked for her for some time in the past at an unspecified time "before the visit to Airlie Beach" during which the fatal accident occurred. The appellant and the deceased discussed with Ms Alexandrou a proposal about the deceased and the appellant pooling their assets to purchase a home. Ms Alexandrou was unable to provide anything other than general advice because she needed more information. She noticed that during the interview the couple sat on the same couch and touched each other. She concluded "that they were embarking upon a big personal commitment". Ms Simsek, Ms Alexandrou's secretary, noticed that the deceased and the appellant were holding hands. The primary judge observed that the appellant admitted that at the time of the accident and the deceased's death, he still regarded his money as separate from hers.

[10] After making the findings set out above, the primary judge stated:

> "In my view my finding is reinforced by Exhibit 12 which is revealing. It suggests a 'what's mine is mine, and what is hers is hers' attitude rather than the merging of affairs financial and personal that a 'genuine domestic basis' requires."

[11] Exhibit 12 is a copy of a letter of 3 July 2007 from the appellant to the solicitors of the executors of the deceased's estate.[2] In the letter, the appellant stated his willingness to waive his share of any refund of approximately $800 in cash in the deceased's handbag at the time of her death. The appellant claimed that the money was part of a sum of $1,200 derived from gambling winnings at a hotel on the date of the deceased's death and that half of the winnings were his. He requested a refund of $1,000 on account of the deceased's children's share of rent for the month of July. In the event that the refund could only be made out of the estate, he requested that the deceased's children agree to make the refund once the estate was finalised.

The appellant's argument

[12] The appellant's argument was to the following effect. There was evidence before the primary judge from which he should have concluded that the deceased was the appellant's de facto spouse.

[13] Whether persons are living together as a couple "on a genuine domestic basis" is to be determined by circumstances including but not limited to those listed in s 32DA. The s 32DA circumstances identified by counsel for the appellant as establishing his client's case were as follows.

The nature and extent of the common residence

- The couple were living in rented accommodation in Mascot at the time of the deceased's death. Both were signatories to and liable under the rental agreement which was for a term of 12 months commencing on 3 November 2006 and provided for occupation by four persons;

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[2] The letter appears to have been sent by facsimile transmission by the appellant's brother. It was signed by both the appellant and his brother.

- the couple had lived together with the deceased's children from about February 2006 at the deceased's premises at Matraville until it was sold to implement a property settlement between the deceased and her former husband. The couple and the deceased's children then moved to a house at Pagewood before moving to the Mascot property;
- the deceased was the only woman with whom the appellant had ever lived; and
- the period of cohabitation was for about 16 of the 18 months of the couple's relationship.

[14] The above matters show continuous cohabitation from an early stage after the commencement of the couple's relationship. The cohabitation gave rise to "a relationship" between the appellant and the deceased's children. Both the appellant and the deceased contributed to the rent, household maintenance and chores as well as food.

The length of the relationship

[15] Emphasis was again placed on the matters set out above, the monogamous nature of the relationship and the fact that it was the appellant's only such relationship. Another matter said to be relevant was that the deceased had been in a long term marriage which ended three to four years prior to the appellant and the deceased meeting and commencing their relationship.

Whether or not a sexual relationship existed

[16] The relationship was of a sexual nature throughout and was the most significant sexual relationship in the appellant's life.

The degree of financial dependence or interdependence and any arrangement for financial support

[17] Both contributed funds for the maintenance of a household. Additionally, the appellant was unable to live away from home without the assistance of the deceased's contributions to the expense of accommodation.

[18] The evidence discloses a significant level of financial dependence and interdependence consistent with a genuine domestic relationship.

Their ownership, use and acquisition of property

- The appellant and the deceased shared in the use of cash for holidays, entertainment and the like;
- a plan had been put in place for the acquisition of a property to be held by the couple and it was anticipated that there would be contributions from both for the acquisition of the property;
- implementation of the plan commenced with the visit to the accountant's office. The deceased also put into effect plans to obtain full-time employment which were directly related to the acquisition of the property; and
- the appellant gave evidence of his intention to sell his rental property in order to acquire the property.

[19] The plan required the sacrifice of current assets and free time to invest in remunerative employment and the joint acquisition of a house.

The degree of mutual commitment to a shared life including the care and support of each other

- The couple contributed to the emotional needs of each other and there existed a strong bond of love and affection;
- the couple shared holidays, outings, family and social gatherings, music festivals and other family activities;
- the couple arranged their home schedules to accommodate each other's work commitments; and
- the couple made time to go away regularly.

[20] The evidence disclosed a relationship involving mutual commitment and accommodation of each other's needs and obligations.

The care and support of children

[21] The appellant developed a relationship with the deceased's children consistent with a genuine domestic relationship. The existence of tension or difficulty says nothing of the genuineness of a relationship but merely demonstrates typical family experiences.

The performance of household tasks

- The couple mutually contributed to the domestic duties;
- household tasks were performed by each for the benefit of the whole household;
- home schedules were arranged to accommodate each other's work commitments; and
- some household tasks were shared as time together.

The reputation and public aspects of their relationship

- The evidence of Ms Simsek and Ms Alexandrou shows displays of affection connoting deep levels of intimacy, affection and love; and
- the evidence discloses a relationship which, by what was said by the appellant and the deceased and by their conduct, was a genuine domestic one.

[22] The primary judge failed to give proper regard to the above matters which demonstrated all the elements of a true domestic relationship which the parties anticipated would continue.

[23] Exhibit 12, upon which the primary judge placed some reliance, is irrelevant. It postdates the term of the relationship and was written at a time when the appellant was "grieving and in distress". In effect, it seeks to continue the respective contributions of the parties as they existed prior to the death of the deceased. To treat it otherwise is to have regard to an irrelevant consideration and to fail to give due weight to the other matters set out at length above.

[24] To the extent that the primary judge paid attention to the appellant's attitude to poker machine winnings, he fell into error. All of the matters set out above were uncontroverted either by cross-examination or independent evidence.

[25] The appellant also argued that the primary judge erred in holding that s 18(2)(a)(ii) of the Act required the evidence of the circumstances of the relationship to be of a "high degree of persuasion" and that the shorter the period of the relationship the higher the degree of persuasion required before a finding could be made.

The respondents' contentions

[26] The matters principally relied on by the respondents were as follows.

[27] Although the appellant and the deceased discussed marriage in May 2006, there was no further discussion of that topic after June 2006. A reason for the appellant then not committing to a matrimonial relationship was financial insecurity. That did not resolve prior to the deceased's death. The prospect of marriage was left until the couple were able to reside in a jointly owned home.

[28] Apart from being joint lessees of the rental property which they occupied from November 2006, the appellant and the deceased did not permit any mixing of their separate monies. The appellant remained unaware of the extent of the deceased's financial resources. His only capital was an undisclosed amount of equity in a rental property he owned at Mascot. The deceased was in part time employment and any "plans" for the purchase of jointly owned property could not proceed unless and until she increased her financial resources by full time work and otherwise limited her expenditure.

[29] The purchase of a property for in excess of $500,000 as contemplated by the appellant, would have fully committed his financial resources. Beyond obtaining some tentative or preliminary advice from an accountant which, if anything, highlighted the deficiencies in their "plans" for a joint property acquisition, neither the appellant nor the deceased advanced that plan any further. The appellant's "plans" appeared to rely on his being promoted to supervisor with a substantial increase in his prospective earnings. The availability of such a promotion was not confirmed in the evidence and the primary judge declined to make any finding in that regard.

[30] The appellant's evidence was to the effect that he doubted whether he had the aptitude or ability to fulfil a supervisor's role. Until November 2006, when the appellant and the deceased jointly rented a property, the appellant's contribution was the payment of an amount towards the deceased's rental payments on the jointly occupied homes and the payment of a further sum for groceries. Otherwise the appellant did not contribute to domestic outgoings. He even used his mobile phone rather than the landline for which the deceased paid.

[31] The appellant did not assume any financial or other form of responsibility for the deceased's children during the period of cohabitation. Although the appellant's argument makes much of an alleged "relationship" between the appellant and the deceased's children, the appellant conceded in cross-examination that the "relationship" was fraught with difficulty on both sides and that he resented the deceased's expenditure on her children.

[32] Reliance was placed on Exhibit 12 which was said to exemplify the appellant's attitude to financial matters in that the appellant demanded payment by the deceased's estate of a portion of the couple's poker machine winnings on the basis that it was his. He also demanded the return of a rental payment he had made and asserted that his liability for the costs of cleaning the rental house on termination of the lease was limited to one half.

[33] Neither the appellant nor the deceased disclosed each other as a "spouse" in his or her taxation returns during the period of cohabitation. Neither the appellant nor the deceased identified the other as a beneficiary on any policy of insurance. The appellant was not a beneficiary under the deceased's will executed in September 2006.

[34] Although some of the circumstances identified in s 32DA existed, others did not:

- There was no financial dependence or interdependence or any arrangement for financial support of one to the other. The appellant accepted that what was his was his and what was the deceased's was hers. The deceased exhibited an intention to continue to financially benefit her children despite objection raised by the appellant.

- Although the deceased was prepared to commit to a shared married life in May 2006, the appellant was not then prepared to do so and his focus did not change. He did not commit to the care and support of the deceased or her children and persisted in maintaining his financial independence.

- Although the appellant made some financial contribution to the household in sharing the rent and contributing to the cost of groceries, he did not otherwise support the deceased's children or otherwise have a sound relationship with them. There is no evidence of any involvement in their lives.

Consideration of relevant facts

[35] There are overstatements in both sets of submissions. The appellant's submissions tend to overstate "the relationship" between the appellant and the deceased's children. The respondents' submissions seek to draw too much from the lack of depth in the relationship. The assertion that the appellant did not have a "sound relationship" with the children is not borne out if what is meant is an appropriate relationship having regard to their respective ages and circumstances. Contrary to the respondents' submissions, it is not the case that the appellant admitted in cross-examination that the relationship between him and the deceased's children was "fraught with difficulty on both sides".

[36] The deceased had three children. The deceased's son, Matthew, was 24 at the time of the deceased's death; her daughter was 23; and her youngest son was 19. Matthew did not live at home and it does not appear that there was much interaction between the appellant and him. There was "a little bit" of friction with the daughter. The appellant regarded her as "okay but lazy". He said that he and the youngest son "gradually got on really well … He treated me like a father so to speak".

[37] The appellant's evidence that he was "not exactly sure what Hayley did" was an indication of the appellant's lack of involvement in the life of that child. Exhibit 12 is also suggestive of an absence of closeness between the appellant and the children.

[38] The ages of the deceased's children and the fact they worked or were studying at relevant times tended to make it less likely that the appellant's and the deceased's emotional bonds would be shared by the deceased's children. The evidence does not suggest that the children were in need of the appellant's care and support or of more care and support than the deceased was able to provide. Some minor support, however, was provided through the appellant's contributions to rent and food. The eldest son, of course, did not live with his mother and his siblings.

[39] The appellant had limited capacity to provide financial support. He was a bar attendant and TAB operator at Randwick Labor Club earning $524 net per week. His equity in a rental property owned by him was about $60,000. He was 43 years old at the time of the deceased's death. The deceased was working part time as a doctor's receptionist earning $720 per week gross. Had she not died, it is probable that she would have become a permanent full time employee on a gross wage of $1,280 per week. She had roughly $75,000 to $80,000 as a result of a property settlement with her former husband and was providing limited financial support to her children.

[40] It is correct that the couple were in no hurry to pool their resources. There is no evidence that they had any intention of doing so except when the joint acquisition of a house was effected. I do not regard that behaviour, however, as indicative of the nature of the relationship as it would be in the case of a younger couple with no other commitments. Both the deceased and the appellant were of mature age and used to their independence. The deceased may well have wished to have money available for the assistance of her children, should they require it. The appellant had the needs of his elderly mother to consider.

[41] The evidence does not reveal how much the household cost to run. The appellant contributed $520 per month towards the monthly rent of $1,500. He also spent about $50 to $70 per week for food for the household. If the appellant was subsidising other members of the household it would have been by a small amount only. Nevertheless, both the appellant and the deceased were bound by the terms of the lease and were effectively assisting each other to remain in suitable accommodation and maintain the household.

[42] The appellant swore that the deceased indicated a willingness to marry him four or five months after they "got together" and that he responded, "Well, why don't we look at buying a house together and - and settle in before we do that?" He said that the deceased said, "that'd be a better idea… So we'd have roots". I do not accept that this provides clear evidence of a failure by the appellant to commit "to a shared life, including the care and support of" the deceased.[3]

[43] What was being postponed, but not rejected, was marriage, not the continuance of a de facto relationship. The couple did not approach the accountant, Ms Alexandrou, for advice for many months but it would have been apparent to them that the acquisition of a house would have imposed a considerable financial burden, particularly until the deceased, as was her intention, became a full time employee.

[44] There are other matters that support the appellant's argument. The couple's relationship was of a sexual nature throughout the 16 month period of their cohabitation. They shared the same bed, socialised together on weekends, and

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3 *Acts Interpretation Act* 1954 (Qld), s 32DA(2)(f).

"went away together [on trips or vacations] just about every few months" and from time to time on weekends. They regularly visited the deceased's parents. They lived harmoniously together in a series of dwellings shared with two of the deceased's children. They were planning to buy a matrimonial home and had sought financial advice with a view to furthering that plan. The appellant "saw [his] future with" the deceased and "wanted to be with [her] for the rest of [his] life".

[45] Ms Simsek was told by the deceased over lunch that "she's very happy with [the appellant] and they live together now at that time and they were looking to permanently live together and get married later in life". Ms Simsek and the deceased were friends and discussed their respective relationships with partners from time to time.

[46] Household tasks, including cooking, were shared. Mowing and maintence of the yard were the appellant's responsibility. The couple were perceived by Ms Alexandrou to act as a couple. She noticed that they behaved affectionately towards each other, as did Ms Simsek.

[47] The primary judge found the evidence on the point under consideration "meagre". It was, but that was not necessarily fatal for the appellant's claim and the primary judge did not conclude to the contrary. It is then necessary to consider in some detail the matters that caused the primary judge to find against the appellant.

[48] The primary judge found that the evidence of Ms Alexandrou and Ms Simsek was insufficient to establish that "publicly the [appellant] and the deceased enjoyed a reputation of a couple living together in a 'genuine domestic basis'". His Honour concluded "that the couple, fond of one another, had plans for such a relationship".

[49] As for the financial arrangements matters referred to in s 32DA(2)(d) and s 32DA(2)(e), the primary judge concluded that "at best the couple had plans… [which] were only at a preliminary stage".

[50] The primary judge acknowledged the appellant's evidence that he saw his future with the deceased but noted that the discussion about pooling resources and purchasing a residence was "only in broad outline a few weeks before the visit to Airlie Beach". The primary judge said:

> "On the view I take of the [appellant]'s evidence concerning the deceased's marriage proposal, there was not a 'mutual' commitment to a shared life. So that on the view that I take of the evidence, whilst I accept the couple were intimate, affectionate and fond of one another, the [appellant] had not committed himself to a 'dependent' or 'inter-dependent' financial arrangement necessary in his mind to a 'mutual commitment to a shared life' so that 'for all practical purposes' he and the deceased would be living together as a married couple."

[51] The primary judge added:

> "That mutual commitment from the perspective of the [appellant] was, I find, dependent upon a financial commitment when a house was jointly purchased. I am not satisfied the [appellant] and the deceased lived together 'on a genuine domestic basis' before her death."

[52] In my respectful opinion, the primary judge erred in attributing too great a role in his determination to financial and property matters. For reasons advanced above, a couple's degree of financial interdependence and the manner in which they decide to hold property does not necessarily say a great deal about whether they are living together as a couple on a genuine domestic basis. It is common enough for real property to be held in the name of the lowest income earner in a relationship for income tax purposes and for property not to be held by the member of the relationship who is most exposed to damages claims. These considerations, although not directly relevant to the matters under discussion, show the need for caution in weighing factors associated with financial interests and property holdings for the purposes of determining whether a person is a de facto partner.

[53] The fact that the appellant and the deceased had not made much progress in their plan to jointly acquire a matrimonial home does not prevent the existence of the plan and the taking of a step towards its accomplishment from providing evidence of a stable, committed relationship. What is to be determined is not the existence, imminence or even the likelihood of marriage but whether the deceased and the appellant were de facto partners.

[54] The relationship for which the couple had plans, to adopt the primary judge's language, was a matrimonial relationship to be enjoyed in a jointly owned home. The existence of such plans for the future was necessarily inconsistent with an intention to continue the relationship on a de facto basis but was scarcely incompatible with the existence of a de facto relationship.

[55] The evidence of "the public aspects of [the couple's] relationship" was more extensive than the primary judge perceived. As well as enjoying social outings together and regularly visiting the deceased's mother, the appellant and the deceased took frequent trips, holidays and weekends away from home. Ms Simsek's exposure to the deceased was far greater than her meeting with the deceased for a few minutes in Ms Alexandrou's office. The deceased expressed happiness about the state of her relationship with Ms Simsek both in emails and in conversation when the two women met from time to time. The deceased informed her that she and the appellant "were looking to permanently live together" before marrying later. The appellant's unchallenged evidence was that he wanted to be with the deceased for the rest of his life.

[56] The primary judge, nevertheless, concluded that the appellant's "commitment to a shared life" was dependent upon a financial commitment when a house was jointly purchased. There was no such finding in respect of the deceased. Any such finding would have been inconsistent with the evidence discussed above and the evidence does not suggest that the appellant's commitment to a permanent relationship was any less than that of the deceased. The appellant had reasons for wanting to defer marriage until such a time as the couple could afford an engagement or wedding reception to celebrate with all of their friends. He denied having any "reservations whatsoever" about marriage.

[57] The appellant was cross-examined extensively with regard to his engagement and matrimonial plans and the proposal to acquire the matrimonial home and its slow development. There was no questioning, however, about his and the deceased's commitment to living together on a permanent and genuine domestic basis. That was likely to have been the result of a forensic decision and I am not critical of it.

As a result of the cross-examiner's approach, however, the evidence to the effect that both the appellant and the deceased viewed themselves as committed to living together as a couple on a domestic basis was unchallenged except in a quite tangential way.

[58] The primary judge's undue concentration on financial matters is also apparent from the emphasis given to Exhibit 12. The respondents' submissions asserted, wrongly, that in the letter the appellant had demanded payment by the deceased's estate of his portion of poker machine winnings. The letter, apart from suggesting that the appellant was not particularly close to the deceased's children, appears to lack evidentiary value. It sheds no light on the couple's financial interdependence. The evidence in that regard is discussed above. It is clear and was unchallenged. It is also clear from the evidence that a pooling of financial resources was contemplated and was to be pursued further on the couple's return from Airlie Beach.

[59] In determining whether a person is a "de facto partner", the focus must be on whether by reference to all relevant circumstances the person and another "are living together as a couple on a genuine domestic basis but who are not married to each other or related by family".[4] Because the period of continuous cohabitation was less than two years. Section 18(2)(a)(ii) required that "the circumstances of the de facto relationship of the deceased and the [appellant] evidenced a clear intention that the relationship be a long term, committed relationship".

[60] In deciding whether a person meets these descriptions, "any of their circumstances may be taken into account".[5] Such circumstances may or may not include the matters listed in s 32DA(2). Section 32DA(3) implicitly recognises that the weight, if any, to be afforded to the circumstances listed in sub-section (2) and any other non-listed circumstances will be a matter for the tribunal's judgment in each case.

[61] Keane JA, McMurdo P and Holmes JA agreeing, said of the concept of "de facto" relationship in *KQ v HAE*:[6]

> "These considerations all lend support to the view taken in earlier cases that a '*de facto* relationship' will not be established for the purposes of pt 19 of the [*Property Law Act* 1974 (Qld)] unless it can be seen that 'the parties have so merged their lives that they were, for all practical purposes, living together as a married couple'." (citations omitted)

[62] The "considerations" to which reference was made are stated in the preceding paragraph:[7]

> "It is clear from s. 32DA(4) of the *Acts Interpretation Act* that pt 19 of the PLA is not concerned with the relationship between people who merely live in the same household and share living expenses: the PLA is not concerned with the relationship between friends who share a household, or with that between carer and patient. Further, the fact that two people have a sexual relationship will not suffice to

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4 *Acts Interpretation Act* 1954 (Qld), s 32DA(1).
5 *Acts Interpretation Act* 1954 (Qld), s 32DA(2).
6 [2007] 2 Qd R 32 at 37–38 [19].
7 *KQ v HAE* [2007] 2 Qd R 32 at 37 [18].

> establish that they are '*de facto* partners'. This is clearly so, by reason of the fundamental requirement that the parties must be 'living together as a couple on a genuine domestic basis'." (citations omitted)

[63] Keane JA's observations provide some useful guidance as to the requirements of s 32DA but, of course, cannot displace the statutory test. In my respectful opinion, the above discussion demonstrates that the deceased and the appellant were living together as a couple on a genuine domestic basis at the date of the deceased's death and that the primary judge erred in not making this finding. The evidence also establishes that the circumstances of the couple's de facto relationship show "a clear intention that the relationship be a long term, committed relationship".

[64] The appellant argued that the primary judge erred in not applying the requisite standard of proof: the balance of probabilities. That was said to be because he "added an unnecessary requirement that the evidence be persuasive and convincing". This argument must be rejected.

[65] In paragraph [18] of his reasons the primary judge drew attention to the requirement of s 18(2)(a)(ii) of the 1995 Act that "the circumstances of the de facto relationship of the deceased and the de facto partner evidenced a **clear intention** that the relationship be a long term, committed relationship". The primary judge proceeded to place a gloss on the statutory language but went on to make it plain that he was "not suggesting" that the provision required a higher standard of proof than the balance of probabilities, "rather that the evidence be persuasive and convincing".

[66] Although the primary judge has followed a frequently trodden and often deprecated path of providing a gloss to the statutory language,[8] it does not seem to me that his Honour made an error of law. It goes without saying that for a judge to conclude that a de facto partner evidenced a "clear intention", the evidence in that regard must be "persuasive". It may also be thought that if the evidence was regarded as "persuasive" by the judge it would also be found to be "convincing". I do not accept that the primary judge imposed a higher evidentiary burden than that established by the test which he acknowledged applied: the balance of probabilities.

[67] There is no substance in the failure to give adequate reasons ground. The primary judge explained at some length in paragraphs [16], [17] and [18] why he found as he did. The appellant's real complaint is not that the reasons were inadequate but that they do not justify the conclusion that the appellant was the de facto partner of the deceased.

[68] Two matters remain to be addressed. The appellant did not pursue the adequacy of reasons ground of appeal. It was contended, however, that the delay between hearing and judgment greatly undermined any advantage the primary judge may have had in "assessing the [appellant] when he gave evidence". It was further submitted that "there could be no assumptions that statements of a general assertive character made by the trial judge are based on the sufficient consideration of the evidence or that evidence relevant to a particular finding not considered in the judgment has not been overlooked".

[69] It is the case that an appellate court "reviewing a decision of a primary judge, may conclude that delay in giving judgment has contributed to error, or made a decision

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[8] *Wallace v Kam* (2013) 87 ALJR 648 at [14]; *Griffith University v Tang* (2005) 221 CLR 99 at [104] and [152].

unsafe".[9] There is, however, nothing in the reasons which would indicate that the primary judge's delay did cause or contribute to error or otherwise resulted in the decision being unsafe. The part of the proceeding the subject of the appeal was far from complex and involved relatively little evidence. The appellant appeared to be a frank witness. There was no attack on his credibility in cross-examination and the primary judge made no adverse credit findings. In any event, in view of the conclusions I have reached, this argument has no bearing on the outcome of the appeal.

[70] The remaining matter is the respondents' submission based on *Fox v Percy*,[10] *Robert Bax & Associates v Cavenham Pty Ltd*[11] and *Chambers v Jobling*[12] that an appellate court, ordinarily, will disturb a primary judge's findings based on contested evidence only where the trial judge's decision was "glaringly improbable" or "contrary to compelling inferences".

[71] This is not an appeal based on a challenge to a primary judge's findings; witness the content of the notice of appeal. For the most part, the facts were undisputed on the trial and this Court is in as good a position as the trial judge to decide the proper inference to be drawn from the facts.[13] Moreover, the central issues in the case concern alleged errors made by the primary judge in the weight given to the circumstances listed in s 32DA(2) and other circumstances in making his determination.

Conclusion

[72] For the above reasons I would order that:

1. The appeal be allowed.

2. The judgment given and the order made on 15 October 2013 be set aside.

3. The second respondent pay the appellant's costs of and incidental to the proceedings including the costs of this appeal on the indemnity basis.

4. The second respondent pay the appellant $280,686.70.

[73] The parties agreed on the sum of $280,686.70 and that, because of an offer made by the appellant before trial and rejected by the second respondent, the second respondent should pay the appellant's costs of the trial on an indemnity basis. It follows from that agreement (in the absence of the identification of any circumstances that might warrant another result) that the appellant's costs of the appeal should be paid on the indemnity basis.

[74] **GOTTERSON JA:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[75] **APPLEGARTH J:** I agree with the reasons of Muir JA and with the orders proposed by his Honour.

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9 *NAIS & Ors v Minister for Immigration and Multicultural and Indigenous Affairs & Anor* (2005) 228 CLR 470 at 474.

10 (2003) 214 CLR 118 at 128.

11 [2013] 1 Qd R 476.

12 (1986) 7 NSWLR 1.

13 C.f. *Warren v Coombes* (1979) 142 CLR 531 at 551.