SUPREME COURT OF QUEENSLAND

CITATION:	*Cleret v Rago* [2014] QCA 158
PARTIES:	**DANIEL CLERET** (applicant) **v** **FRANCA RAGO** (respondent)
FILE NO/S:	Appeal No 524 of 2014 DC No 138 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time s 118 DCA (Civil)
ORIGINATING COURT:	District Court at Maroochydore
DELIVERED ON:	15 July 2014
DELIVERED AT:	Brisbane
HEARING DATE:	10 June 2014
JUDGES:	Gotterson and Morrison JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application is refused.** **2. The applicant is to pay the respondent's costs of and incidental to the application.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – TIME FOR APPEAL – EXTENSION OF TIME – WHEN REFUSED – where judgment was awarded in favour of the respondent who had brought proceedings against the applicant for possession of property – where the applicant sought leave to extend the time for filing the notice of appeal – where the respondent resisted leave being granted on the basis that any appeal has no reasonable prospects of success – where the applicant submits that the trial judge erred in his findings of fact concerning the issue of adverse possession – where the applicant submits that the trial judge erred in fact and law concerning the issue of constructive trust – where the applicant submits that there was a "misexercise of discretion" by the trial judge – where the applicant submits that the trial judge erred in a number of findings of fact and with findings as to the applicant's credibility – whether the appeal has reasonable prospects of success
COUNSEL:	The applicant appeared on his own behalf K S Howe for the respondent

SOLICITORS: The applicant appeared on his own behalf
Baldwin Cartwright Lawyers for the respondent

[1] **GOTTERSON JA:** I agree with the orders proposed by Philippides J and with the reasons given by her Honour.

[2] **MORRISON JA:** I have had the advantage of reading the reasons prepared by Philippides J. I agree with those reasons and wish to add some observations of my own.

[3] The learned trial judge was faced with competing versions from the applicant and the respondent. In some areas his Honour did not consider that the conflict in evidence needed to be resolved. Examples are in paragraphs [8], [19] and [20] of his Honour's reasons. In other areas the conflict had to be resolved, and in large part it was resolved in the respondent's favour. In doing so the learned trial judge rejected the applicant's evidence. Examples are in paragraphs [25] to [28] and [30] to [31] of his Honour's reasons.

[4] The applicant's challenge to the findings of the learned trial judge was largely, if not totally, concerned with demonstrating errors in his Honour's assessment of the facts and findings of fact. Given the advantage which the learned trial judge had, when compared to this Court, of being able to see and hear the witnesses first hand, that would normally pose a significant obstacle to a challenge based on the factual findings made.

[5] That is the case here. The applicant seeks to have this Court re-examine the evidence and substitute its own view of the facts. That might be possible where the facts were uncontested and clear error could be shown. But that is not this case. In relation to the critical areas, the constructive trust and the adverse possession claim, the evidence of the applicant was rejected. Furthermore, the claim for a constructive trust was not assisted by the lack of any evidence that the applicant's work on the house had actually added any value to it.

[6] The applicant's contentions, and his oral submissions, revealed a determined yet misguided view of the facts and the findings against him. Two or three examples will suffice to show the errors in his approach.

[7] The respondent paid a part of the deposit for the house by withdrawing a sum of $3,000 from the joint account owned by the respondent and the applicant. However, a short time later she returned the same sum to the joint account, from her own funds. The applicant could not comprehend how that showed that she had ultimately used her own funds for the deposit, even if she had temporarily used joint funds.[1]

[8] The applicant did some renovation work on the house, which the learned trial judge found to be a "modest en suite bathroom".[2] However, there was no evidence to show that the value of the property was thereby increased, nor that the rental value increased. The applicant could not accept that such evidence was necessary to establish that his work had contributed to the value of the house, and to its rental stream, and that one could not rely on the evidence of what the property was listed for with a real estate agent.

---

1 Reasons [53]; AB 1044.
2 Reasons [21]; AB 1040.

[9] The applicant's case below on the constructive trust issue was that he was entitled to have the entire property, not merely a percentage interest. For this he relied on establishing that he had paid the deposit and all loan repayments and rates. That case faltered at the outset, when it became evident that he had not paid the deposit. Further, the evidence established that the respondent paid some of the loan repayments and some of the rates, the balance being met by the applicant but, as his Honour found, under an arrangement whereby that was set off against his "rent" for occupying the property.[3]

[10] Notwithstanding that the applicant persisted in his claim to a constructive trust over the entirety of the property, only when confronted with the findings against him did he seek to have a constructive trust declared of some lesser proportion. But that was never his pleaded case.

[11] It was clearly open to the learned trial judge to make the findings he did, and no error has been demonstrated.

[12] I agree with the orders proposed by Philippides J.

[13] **PHILIPPIDES J:** On 11 December 2013 judgment was awarded in favour of the respondent, who had brought proceedings against the applicant for possession of property comprising a house and land at Kenilworth (the property) in the State of Queensland in respect of which she was the sole registered owner. She also sought, *inter alia*, damages for use and occupation of the property.

[14] Leave was sought to extend the time for filing the notice of appeal against the decision of the trial judge. The respondent accepted she had not suffered prejudice by reason of the short delay and did not contest the explanation given for the delay. The respondent, however, resisted leave being granted on the basis that any appeal has no reasonable prospects of success.

Background

[15] The applicant, who had been the de facto partner of the respondent, filed a counterclaim seeking a declaration that he owned the property and an order that the respondent transfer legal title to him. The trial judge recorded the allegations made by way of counterclaim as follows:

(a) the applicant had paid the deposit for the purchase of the property; had paid all loan repayments; paid all insurance; except from about 2008, paid all rates and he had made structural improvements increasing the value of the property;

(b) the applicant paid the respondent $11,000 (pursuant to an unwritten property settlement agreement that the property would belong to him), it being agreed that the respondent would use the $11,000 to buy a house in France;

(c) the applicant had been in possession of the property adverse to the respondent in excess of 12 years;

(d) alternatively, it would be an unjust enrichment for the respondent to continue to be entitled to the property;

(e) in the circumstances, the respondent held the property on a constructive trust for the applicant and it was unconscionable for her to assert her legal title and take a beneficial ownership.

---

[3] Reasons [32]; AB 1042.

The trial judge's decision

[16] The trial judge awarded judgment for the respondent against the applicant for recovery of possession of the property and damages in the sum of $21,501.82, (which comprised $20,898.99 that the applicant admitted the respondent was entitled to by way of reimbursement relating to council rates and charges paid and an amount for interest) and dismissed the counterclaim.

Findings of fact

[17] The trial judge made numerous findings of fact in the course of his reasons:

- The applicant, who was born on 15 March 1951, and the respondent, who was born on 27 June 1961, commenced residing in a de facto relationship in October 1982 when the respondent arrived in Australia to join the applicant. She was then 21 years of age and the applicant was 31 years of age. She had some small savings of about $1,000 and he owned a property and shares in a company which owned another property referred to as the Obi Obi property, where they lived. Their son, Guillaume was born on 24 September 1983. In late 1985 the respondent left the Obi Obi property. It was the first of several physical separations which the respondent described as breaks in the de facto relationship, but which the applicant disputed, contending that the relationship was unbroken despite the maintenance of two households. The trial judge found it unnecessary to determine the dispute: [8].
- On 12 September 1986, a joint bank account was opened: [9].
- In September 1986, when the relationship was in the nature of a de facto relationship, a daughter was conceived. At the time the applicant was earning less than the respondent: [10].
- The parties' daughter was born on 29 May 1987. There was a dispute as to whether the parties had then discontinued their relationship: [11].
- In October 1987, the respondent signed a contract to purchase the property for $39,000. The contract named the respondent as purchaser. The applicant had assets and he regarded the assets in his name as his own because they were his before the respondent arrived in Australia. The respondent had two children fathered by the applicant and at law no relevant assets to show for her five years in Australia. The trial judge accepted that the respondent intended to purchase a property in her name alone: [12].
- On 14 October 1987, $3,000 was drawn from the joint account and used as the deposit for the purchase of the property: [13]. On 15 December 1987, the plaintiff deposited $3,000 of her own funds to the joint account, which was funded by a first home owner's grant to her that she had previously applied for when she resided away from the applicant: [14].
- The purchase of the property settled on 7 April or 25 May 1988 with funds borrowed by the respondent alone from the Queensland Housing Commission, which the trial judge accepted the respondent alone paid at settlement: [15].
- In April/May 1988, the parties and their two children commenced living together. The trial judge found that if the de facto relationship had ceased, it had recommenced by that time. The parties were then paying off the loan together: [16].

- The applicant opened a restaurant in December 1989 where the respondent worked, being paid a wage, fixed after advice from the applicant's accountant at $6,000 per annum: [17].
- On 19 May 1992, the respondent vacated the property and left for France with the two children of the relationship and her evidence was that the de facto relationship had ended by that time. She received no maintenance from the applicant thereafter: [18].
- There was a dispute as to whether the applicant visited the respondent in France in 1992. The trial judge considered it unnecessary to resolve the dispute as it did not assist him in determining credibility or reliability about the critical issues in the history. His Honour accepted that the de facto relationship ended by the time of the respondent's departure for France: [19].[4]
- The applicant visited the respondent and the children in France, but the frequency was disputed and the trial judge found that resolving the dispute would not assist in determining the financial matters in issue before him: [20].
- During 1993 the applicant did some renovations in the house on the property which, the trial judge accepted, concerned the installation of "a modest en suite bathroom". But the trial judge found that it was not established that the house was extended or that the work added to the market value or the rental value and that they were done without any request from the respondent and without her knowledge: [21].
- In November 1993, the respondent was in financial difficulties in France and, not receiving any financial support in France for herself or the children, she decided to sell the property and instructed a real estate agent. The property was listed for sale for $148,000. There being insufficient interest in the property, the respondent asked the applicant to contact a real estate agent to act for her as a rental agent: [22].
- On 28 January 1994, the respondent wrote to the real estate agent, stating that her separation from the applicant was "definitive" and "being the sole owner of the house", she asked that dealings be conducted with her only: [23].
- From December 1993 until March 1996, the property was rented to third parties, but there was a period of two months in June and July 1994 when the applicant rented the property. The respondent was receiving monthly documents from the real estate agent showing the rental receipts: [24].
- The trial judge noted the applicant's contention that he paid the respondent $11,000 pursuant to "an informal property settlement agreement whereupon the parties agreed … that the property would belong to the [applicant]; that the [respondent] would use the $11,000 to purchase a house in France … for herself and the parties' children to live": [25]. The trial judge referred to the applicant's oral evidence regarding the alleged agreement: [26]. His Honour also referred to the applicant's deposed evidence as to an informal property settlement agreement "whereupon I would retain [the property] and I was to pay her an equivalent amount equal to or similar to the then existing net equity we had in [the property]": [27].

---

[4] The reference to November 2003 in [19] which the applicant referred to as an error of fact in his draft grounds of appeal is clearly a typographical error in the judgment and of no consequence.

- The respondent sent three bank transfers from France to the Maroochy Shire Council for rates and also sent three payments to the applicant to pay the mortgage accounts. These totalled about $3,700, with the last being paid on 7 October 1994. The trial judge found that the respondent's conduct in making a payment in October 1994 was inconsistent with the agreement alleged by the applicant to have been made five months earlier that the property was to be the applicant's property: [28].
- In early 1996, tenants in the property proposed to quit. At the time the mortgage debt was $14,376, with rates about $1,000 per year. The trial judge noted that the applicant proposed to the respondent that he move into the property, on the condition that he maintained the property, and that instead of paying rent he would cover the cost of mortgage payments, rates and water charges. The applicant took occupation of the property pursuant to that agreement in April 1996: [29].
- On 17 August 1996, 42,000 French Francs (FF) were withdrawn from the applicant's account in France. The trial judge noted the applicant's contention that this concerned providing a cash cheque to the respondent to allow her to buy a property in France, pursuant to the arrangement he claimed was made with her in March 1994. The respondent disputed receipt of the cheque and of the money: [30].
- On 4 October 1996, the respondent contracted to buy a property in France for 360,000FF. The trial judge was not satisfied that the respondent had used the applicant's funds. His Honour noted that, in any event, by the agreement alleged by the applicant, he was to pay to the respondent their equity in the property, which was much more than 42,000FF (then about $11,000): [31].
- The trial judge thus rejected the applicant's evidence of an agreement that the property would belong to him. Rather, the trial judge preferred the respondent's evidence that she accepted the applicant's proposition in early 1996 that he move into the property and that instead of paying rent, he would cover the cost of mortgage payments, rates and water charges, and on the condition that he maintained the property: [32].
- In 2000, the loan used to purchase the property was repaid. However, the applicant did not advise the respondent that the mortgage had been repaid. The applicant made all payments from the time he moved into the property in early 1996: [33].
- In 2002, the parties' son, Guillaume, returned to Australia and moved into the property, where he lived with the applicant: [34].
- Subsequently the respondent visited Australia and the applicant made a number of visits to France: [35], [36].
- The trial judge noted a dispute in the evidence as to whether the applicant visited the respondent on each occasion he visited France and as to the timing of the termination of the de facto relationship. In relation to that dispute the trial judge noted that the respondent was "unreliable at times", but that the unreliability was consistent with a fading recollection of events which happened more than 15 years earlier, noting also that on issues of credit, most discrepancies by the applicant were similarly explained: [36].
- The trial judge noted one respect in relation to which he was satisfied that the applicant was not credible. His Honour stated at [37]:

> "In one respect I am satisfied that the [applicant] was not credible. The [applicant] was embarrassed by cross-examination about how he obtained possession of the certificate of title for the property and bill of mortgage. After he had paid off the loan, the mortgagee sought to release the documents to the registered proprietor. She was in France and was not told. The [applicant] collected the documents and the receipt for the documents bears a signature remarkably like the [respondent's]. The [applicant] asserts that he did not pass himself of as Franca Rago by imitating her signature but merely wrote her name where he was asked to write it by the clerk who held the documents."

- Guillaume moved out of the property in July 2006 and thereafter reoccupied it for periods in 2008 and 2009: [38]-[40].
- On 18 April 2011, the Maroochy Shire Council issued a notice of intention to sell the property for unpaid rates, which the respondent did not receive directly. She was informed of it and paid the amount demanded: [41].
- On 13 May 2011, the respondent caused a notice to leave to be served on the applicant, which was sent by registered post: [42].
- On 22 June 2011, the respondent was served with an eviction letter but, as at the date of the proceedings before the trial judge, he had not vacated the property: [43].
- On 4 July 2011, the respondent instructed solicitors to commence proceedings for recovery of possession of the property: [44].

Adverse possession

[18] As to the issue of adverse possession, the trial judge noted the applicant's argument that he had adversely possessed the property since 19 August 1995 and for in excess of 12 years. The claim was based on the premise that he and the respondent had agreed in the 1990's that the property would belong to him and she abandoned it to him some time after that. The trial judge rejected that contention. Instead his Honour accepted the respondent's evidence that she gave permission to the applicant to move into the property on the condition that he cover the cost of mortgage payments, rates and water charges and that he maintain the property.

[19] His Honour referred to Butt *Land Law,* 6th ed, 2010, page 903 at [22 18],

> "Possession is not 'adverse' where it has the documentary owner's permission. However, three situations must be distinguished:
>
> - First, time cannot begin to run in favour of a person who takes possession with the documentary owner's permission. For example, time cannot run in favour of a person who goes into possession as a tenant, or licensee, or as bailiff or caretaker. Entry in the context of a family relationship between possessor and documentary owner usually suggests that possession is by permission, and is not 'adverse'." [48]

[20] The trial judge found that the applicant's possession of the property was not adverse until 22 June 2011, when the applicant was served with an eviction letter but continued in possession. The applicant was therefore not in adverse possession for more than 12 years. Given his Honour's finding that the applicant's possession was not adverse prior to 2011, he did not find it necessary to make findings as to a factual dispute relating to contradictory evidence given by the applicant and Guillaume concerning whether the applicant's possession was continuous until 2011.

Constructive trust

[21] The trial judge rejected the applicant's claim that he was entitled to the entirety of the property on constructive trust on the basis that it would be unconscionable for the respondent to retain any part of the property. His Honour found that the applicant did not establish that he paid the deposit for the purchase of the property and paid all loan repayments and rates, as pleaded. It was not unconscionable for the respondent to retain some of the property. His Honour rejected the claim that on the basis of the applicant's contributions the respondent held the property on constructive trust for the applicant.

Applicant's grounds of appeal

[22] The applicant seeks to raise four grounds of appeal in the draft notice of appeal. They can be categorised as follows:

(a) Adverse possession,
(b) Constructive trust,
(c) "Misexcercise" of discretion,
(d) Other errors of fact.

[23] The respondent submits that the draft notice of appeal contains no reasonably arguable ground to show that the appeal has any prospects of success. The trial judge's reasoning is sound both in logic and in law. As to the applicant's arguments concerning errors of fact, even if factual error might be discerned in the reasons of the trial judge, none was a material error. Further, the respondent submitted that the reasons as a whole disclose that the trial judge correctly understood the factual basis of the parties' contentions; he made findings open on the evidence and he has correctly understood and applied the relevant law.

Consideration

Adverse possession

[24] As to the first ground raised, the applicant's contention was that the learned trial judge erred in his findings of fact concerning the issue of adverse possession. In particular, the statement in the respondent's notice to leave dated 13 May 2011 that "there was no tenancy agreement to occupy or use the property or house" was said to support the case for adverse possession. This was said to run counter to [47], [48], [49], [50] and [51] of the reasons and to support the applicant's case for adverse possession. Additionally, it was contended that the trial judge "erred in law in not considering a plethora of documents" evidencing that the property was the place of residence of the applicant from 1996 until 2010, including when the respondent visited Australia in 2004. That evidence was said to be corroborated by the affidavit material.

[25] The respondent submitted that the applicant appeared to contend that since the respondent had asserted in the notice to leave that there was no tenancy agreement, the applicant's possession must have been adverse and continually so for 12 years. The respondent pointed to the trial judge's finding that there had been an agreement between the parties that the applicant could occupy the property on the condition that he make certain payments, which he did not do, justifying the matters contained in the notice to leave. There was contested evidence on that matter and the trial judge preferred the evidence of the respondent on that issue.

[26] As to the additional contention that there was "a plethora of documents" evidencing the property as the place of residence of the applicant, which the judge did not consider, the submission is misconceived. As the respondent argued, the judge did not reject that the applicant had lived in the property almost continuously from 1996. Rather, he found it unnecessary to determine that matter because of his finding that the applicant's possession up to the notice to leave was in any event, with the respondent's agreement; that is, with permission such that it could not be adverse. In those circumstances, there could be no adverse possession before 2011. The judge's findings cannot be impeached in that regard.

Constructive trust

[27] In reaching his determination on the constructive trust issue, the trial judge observed that the applicant's claim was for the entirety of the property; it was not a claim for a proportion of the property or for a charge for payment of a sum of money based upon a comparison of financial or other contributions by the parties to the property's acquisition. In effect, it was the applicant's case that it would be unconscionable for the respondent to retain any part of the property. As the trial judge noted, the applicant assumed a greater burden in bringing a claim for the entire property than he would have if he had brought a claim for less. His Honour observed that, "Perhaps because the [applicant] claimed everything, there was no detailed analysis of what each party contributed to the property's acquisition and to the acquisition and conservation of the other assets retained by the [applicant]".

[28] His Honour stated at [53] – [56]:

> "The [applicant] has not established the relevant matters pleaded by him that the [applicant] paid the deposit for the purchase of the property and paid all loan repayments and all rates. The [respondent] was liable to pay the deposit. She paid it from a joint account and reimbursed that account with her own funds derived from her first home owner's grant. She paid some mortgage repayments and some rates alone. The [applicant's] higher financial contributions to the joint account are partly explicable by the [applicant's] higher income, in turn partly explicable by the [respondent's] absorbing more of the burden of raising the two children while the parties were together.
>
> After separation, the [applicant] retained the restaurant business each of the parties had worked to build, the Elizabeth Street property and the Obi Obi property. That was in spite of some assistance by the [respondent] to the [applicant] in conserving each of those properties. In terms of value, the [applicant] retained most of the assets. Upon separation, the [respondent] alone supported the children.
>
> The en suite bathroom and alleged improvements by the [applicant] have not been proved to have increased the value or amenity of the property.
>
> It is not unconscionable for the [respondent] to retain some of the property. The [applicant's] claim that she should retain no part of the property and that he should retain all of the property fails. He made no application for anything less than the whole property. I reject the claim that on the basis of the [applicant's] contributions the [respondent] holds her property on constructive trust for the [applicant]."

[29] I also note the trial judge's observations at [31] dealing with the respondent's purchase of the property in France for 360,000FF:

> "She deposed that she saved 95,000FF, borrowed 210,000 from BNP Bank and took a loan for an unspecified amount from another entity. If I could be satisfied that she had used the [applicant's] money it would mean that she is not credible. I am not satisfied that she used the [applicant's] funds. If I could be satisfied that she had used the [applicant's] money it would not mean that the [applicant] had fulfilled the bargain he alleged was made in May 1994. By that alleged agreement he was to pay to the [respondent] their equity in the property. That was much more than 42,000FF which was then about $11,000. Considering that the property was purchased for $39,000 in October 1987, was offered for sale for $148,000 in November 1993, had rented for $250 per week and had a mortgage debt of less than $14,376, the equity payable by the defendant according to the alleged agreement should have been something in excess of $25,000 if market value had not exceeded the purchase price. If the list price in 1993 was any guide to market value in 1996, the [applicant] should have paid something in excess of a $100,000 to fulfil his alleged bargain. The notion that the [respondent] would accept $11,000 as full payment for the property she had listed for $148,000 is implausible. That she would accept it as full payment when she was raising the children without financial help from their father is implausible."

[30] As to the challenge in the draft notice of appeal concerning the trial judge's finding that there was no constructive trust, the arguments raised may be summarised as below:

- The learned trial judge erred in his findings of fact that the applicant's funds were not used for the purchase of the respondent's French property.
- The respondent was in financial difficulties on 10 November 1993 which had not improved by March 1996.
- It was glaringly implausible that by 2 October 1996 the respondent had saved 95,000FF ($22,000), which it was said was twice her monthly income.
- The trial judge erred in his finding at [53] that the deposit was $3,000, as it was $3,900 (10 per cent of the purchase price).
- The learned trial judge erred in law in stating at [53] that the funds were reimbursed to the joint accounts, since the funds in a joint account belong to each and the respondent could not reimburse herself.
- The learned trial judge erred in law in evaluating the respondent's equity in the property at the time of the informal settlement.
- The trial judge erred in law in holding that the applicant and the respondent had reached a concluded informal tenancy agreement as the notice to leave rebutted that contention.
- The evaluation of the applicant's equity in the property at March 1994 was $15,599.88 in accordance with the calculations set out in the draft notice.
- The respondent accepted the amount of $11,000 as it allowed her to secure the purchase of her house and she could not do any better.

[31] There is no substance in the applicant's challenge to the trial judge's determination concerning the constructive trust issue. Critically, the applicant maintained a single claim – that it was unconscionable for the respondent to maintain her legal title and that therefore the whole of the property should be transferred to him. In those circumstances, as the respondent correctly submitted, the trial judge did not need to make any finding as to whether the respondent had received from the applicant in about October 1996 the sum of 42,000FF. Nevertheless, in relation to the respondent's purchase of real property in France, his Honour observed at [31] that he was not satisfied that she used the applicant's funds. Even so, his Honour stated, "If I could be satisfied that she had used the [applicant's] money, it would not mean that the [applicant] had fulfilled the bargain he alleged was made in May 1994." As the respondent submitted, that is undoubtedly correct, since such a sum (about $11,000) could not on any view have been sufficient to restore to the respondent the value of her "equity" in the property.

[32] Nor is there any substance to the contention that the trial judge erred in his finding at [13] about the quantum of the deposit paid by the applicant. His Honour was there intending to refer to the respondent's evidence and documentary evidence that the respondent initially paid $3,000 of the deposit on the property from the joint account. There was clear evidence as to that. There was also evidence concerning the additional $900 paid. Even if there was an error by the trial judge as to the amount of the deposit, it was clearly not a material one. There was also abundant evidence to support the finding at [53] that the respondent then "reimbursed that account with her own funds derived from her first home owner's grant". There was no error of law or fact in that regard.

[33] I agree with the respondent's submissions that, in evaluating the equity of the respondent in the property at the time of the purchase agreement asserted by the applicant, his Honour dealt appropriately with the evidence. His Honour's reasoning was based on evidence before him, and permitted him to conclude that, "The notion that the [respondent] would accept $11,000.00 as full payment for the property she had listed for $148,000.00 is implausible". In my view, the applicant has not shown any error by the judge in reaching that conclusion. As to the calculations of the applicant contained within the draft notice of appeal, they are for the most part outside the evidence. And in any event, the calculation by the trial judge of a likely equity at the time of the alleged agreement was, as the respondent submitted, simply an investigation as to the plausibility of the claim by the applicant. The learned trial judge emphatically rejected that there was an agreement for the applicant to purchase the home.

"Misexercise of discretion"

[34] The applicant submitted that there was a "misexercise of discretion" by the trial judge in accepting at [18] the respondent's evidence as to the date of separation being 19 May 1992, and that that amounted to bias against the applicant. There was differing evidence on the matter, as the judge stated in his reasons. The trial judge preferred the evidence of the respondent and dealt with the matter at [18] and [19]. No basis for the allegation is advanced. It is utterly without substance.

Errors of fact

[35] The applicant submitted that the trial judge erred in a number of findings of fact, as well as his findings with regards to the applicant's credibility. In oral submissions,

the applicant asserted that these matters also went to showing bias. The draft notice of appeal raises the following matters concerning alleged errors of fact:

(a) The learned trial judge erred in finding at [10] that the respondent earned more than the applicant, not less.

[36] The respondent argued that if there was an error of expression in [10], as contended for by the applicant, it is the transposition of the words "plaintiff" and "defendant". That would be consistent with the findings at [53]. But in any event, any error in that regard does not detract from the critical findings as to adverse possession, nor as to the rejection of a constructive trust in the applicant's favour.

(b) The learned trial judge erred in his finding at [12] in inferring that the respondent intended to purchase the property in her name, since the deposit came from a joint account to which the applicant was the sole contributor.

[37] On the evidence at trial, the trial judge's finding that the respondent intended to purchase the property in her name alone was entirely open. In addition to the respondent's own evidence, which the judge preferred over that of the applicant, there was other evidence to support the respondent's account. It included documentary evidence such as the contract, the application for the first home owner's grant and the certificate of title itself. There was also the evidence of the sourcing of funds for the deposit from the joint account which the respondent reimbursed to the account and which was able to be viewed as consistent with her (and the parties') intention that the property should be wholly owned by her. Also pertinent were the findings made by the judge at [53].

(c) The learned trial judge erred in stating at [13] that the deposit was $3,000, as it was $3,900.

[38] I have already addressed this matter. It is not entirely apparent that there was error in that regard. And in any event, any error was not a material error.

(d) The learned trial judge erred in stating at [15] that the purchase of the property was settled with borrowed funds, when $2,766.86 came from the joint account.

[39] This seems to be an assertion that the purchase of the property was not settled with borrowed funds of $33,000 but that an additional $2,766.86 came from the joint account. In effect, the assertion was that that amount came from the applicant. As to the borrowed funds, the documentary evidence indicated that it was the respondent alone who borrowed from the Queensland Housing Commission and she alone was responsible for the deposit. She alone contracted the debt secured by mortgage. Given the way that the applicant's case was argued at trial (that the applicant was entitled to a constructive trust over the whole property), even if some funds for settlement came from the joint account, that matter does not impeach the findings of the trial judge as to the critical issues of adverse possession and the constructive trust.

(e) The learned trial judge erred in relation to what the applicant argued were his Honour's findings at [16] as to the period from April-May 1988, the respondent's income and nature of the business relationship concerning the restaurant.

[40] Contrary to the applicant's assertions, the trial judge was recording what the respondent had conceded in evidence. There were no findings recorded at [16] as to whether "the defendant had no income" and of the restaurant being a joint venture.

(f) The applicant appears also to contend that the learned trial judge erred in finding at [17] that the restaurant was in both names, that "the $6000 did not occur until 1991" and that the alleged payment was not remuneration as the business was losing money.

[41] But as the respondent submitted, the trial judge did not find that "the restaurant was in both names". The findings concerning remuneration being fixed upon for the applicant's efforts are supported by the evidence. And even if his Honour erred as to whether payment did not occur until 1991, it is not a matter that affects the relevant conclusions drawn by the learned trial judge.

(g) The learned trial judge erred in finding at [21] that work carried out on the house was limited to a modest en suite, which was contrary to the Council plan, photographic evidence, an affidavit by Camille Mortaud "and words such as renovated and restored used by the real estate agent".

[42] There can be no doubt that the findings by the learned trial judge concerning the renovations done by the applicant on the property were open to him on the evidence. But the pertinence of those findings is expressed at [21] where his Honour found that the applicant had failed to establish "that the house was extended or that the works added to market value or to rental value". No expert evidence was before the trial judge as to those matters. Further, there was no challenge to the finding at [21] that the works "were done without any request from the respondent and without her knowledge". It is to be recalled that the applicant's case was for a declaration of constructive trust and was not one based on restitution.

(h) The learned trial judge erred in finding at [22] that "dates on the house for sale and the schedule of disbursement forms 17 and 18 of November attest that the applicant alone attended to these matters".

(i) The learned trial judge erred in his finding at [24] as the applicant did not rent the property.

(j) The learned trial judge erred in his finding at [28] that "rates payments made by the [applicant] were made when the [respondent] was in France and were organised by the [respondent] and paid by him. On the 7 of October 1994 the property was rented and rent income covered mortgage payments."

[43] As to these matters it is difficult to understand how any material error is raised – the matters raised do not affect the reasoning in the judgment as to the critical issues for determination concerning adverse possession and the constructive trust, nor the conclusions drawn by the learned trial judge.

(k) The learned trial judge erred in accepting at [31] the $148,000 value for the property.

[44] Insofar as error is alleged by the learned trial judge in accepting $148,000 as the value of the property, I do not consider that the reasons at [31] bear this out. Rather, his Honour made an observation of uncontroverted fact that in November 1993 the house was offered for sale at $148,000. And in considering the probability of the agreement contended for by the applicant (that $11,000 would refund to the respondent her equity in the home), his Honour noted that if the list price in 1993 was any guide to market value in 1996 the applicant "should have paid something in excess of a $100,000.00 to fulfil his alleged bargain." That conclusion was open on the evidence.

(l) The learned trial judge erred in his credibility finding at [37].

[45] The trial judge at [37] found that the applicant was not credible in relation to how he obtained the documents referred to there. The trial judge recorded the applicant's contention that he did not pass himself off as Franca Rago by imitating her signature but that he merely wrote her name where he was asked to by the clerk. The trial judge had the relevant documentation and had the advantage of hearing the applicant's explanation. He clearly was not persuaded by it. That was a matter for his Honour to assess and no error is demonstrated.

[46] As is plain, I do not consider that there is substance in any matter sought to be raised by the applicant and would refuse the application as there is no prospect of success.

[47] I would order:

1. The application is refused.

2. The applicant is to pay the respondent's costs of and incidental to the application.