SUPREME COURT OF QUEENSLAND

CITATION:	*Spencer v Burton* [2015] QCA 104
PARTIES:	**KENT RICHARD SPENCER** **(aka KENNETH RICHARD SPENCER)** (appellant) **v** **DAPHNE BURTON** (respondent)
FILE NO/S:	Appeal No 6469 of 2014 SC No 506 of 2012 SC No 820 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville – Unreported, 23 June 2014
DELIVERED ON:	16 June 2015
DELIVERED AT:	Brisbane
HEARING DATE:	18 March 2015
JUDGES:	Holmes and Gotterson JJA and Ann Lyons J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal should be allowed.** **2. The judgment and declarations made on 23 June 2014 should be set aside.** **3. The matter should be remitted to the trial division for determination by a different judge.** **4. The application for leave to adduce further evidence and notice of contention should be refused.** **5. The parties have leave to file any submissions on costs within 14 days of the date of delivery of the judgment.**
CATCHWORDS:	SUCCESSION – PROBATE AND LETTERS OF ADMINISTRATION – GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION – GRANTS OF ADMINISTRATION GENERALLY – TO WHOM GRANTED AND WHEN NECESSARY GENERALLY – QUEENSLAND – where the deceased died of cancer in July 2012 – where Kent Richard Spencer obtained Letters of Administration on Intestacy of her estate on the basis that the he was her de facto partner – where the deceased's mother

brought an application seeking a declaration that Spencer was not a spouse or de facto partner of the deceased, the Letters of Administration of Intestacy granted to him be revoked and that a replacement grant of Letters of Administration of Intestacy be granted to her – where the primary judge was not satisfied that Spencer had proven on the balance of probabilities that he and the deceased had lived together as a couple on a genuine domestic basis for the required two year period prior to her death – where the primary judge made declarations and orders in terms of the application brought by the deceased's mother – whether the primary judge erred in his reasons by acting unreasonably and against the weight of evidence in making findings of fact – whether the primary judge erred in his reasons by attributing little or reduced weight, misconstruing and failing to have regard to the evidence – where the reasons of the primary judge reveal an overemphasis on financial and property matters and a discounting of other indicia which were clearly present – whether the appeal should be allowed

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – FURTHER EVIDENCE – where the respondent seeks leave to adduce new evidence on the basis that the evidence supports the findings of the primary judge – where the evidence refers to the appellant's dealing with the estate funds prior to the trial and after those orders were made restraining him from dealing with estate property – where it seems that a decision was made by counsel for the respondent that the application for an account would not be pursued at the time of the trial – whether the Court is satisfied that there has in fact been reasonable diligence and that the documents were able to be obtained prior to trial

Acts Interpretation Act 1954 (Qld), s 32DA
Succession Act 1981 (Qld), s 5AA
Uniform Civil Procedure Rules 1999 (Qld), r 766

Clarke v Japan Machines (Australia) Pty Ltd [1984] 1 Qd R 404, followed
Lenehan v Queensland Trustees Ltd [1965] Qd R 559, cited
Norbis v Norbis (1986) 161 CLR 513; [1986] HCA 17, cited
O'Neill v Martini & Anor [2012] QSC 198, cited
Perry v Killmier & Anor [2014] QCA 64, cited
PY v CY (2005) 34 Fam LR 245; [2005] QCA 247, cited
S v B [2005] 1 Qd R 537; [2004] QCA 449, cited
Wiltshire v Amos [2010] QCA 294, cited

COUNSEL: S J Keim SC for the appellant
D B Fraser QC, with J A Greggery, for the respondent

SOLICITORS: Purcell Taylor Lawyers for the appellant
Connolly Suthers Lawyers for the respondent

[1] **HOLMES JA:** I agree with the reasons of Ann Lyons J and the orders she proposes.

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

[3] **ANN LYONS J: Introduction** Sharon Ann Burton died of cancer on 6 July 2012 at the age of 56. On 14 August 2012, Kent Richard Spencer obtained Letters of Administration on Intestacy of her estate on the basis that he was Sharon Burton's de facto partner.

[4] Five months later on 7 December 2012, Sharon Burton's mother, Daphne Burton, filed an application seeking a declaration that Kent Spencer was not a spouse or de facto partner of Sharon Burton. She also sought orders that the Letters of Administration on Intestacy granted to him be revoked and that a replacement grant of Letters of Administration on Intestacy be granted to her.

[5] After a four day trial commencing on 8 July 2013, judgment was delivered 11 months later on 23 June 2014. The primary judge was not satisfied that Kent Spencer had proven on the balance of probabilities that he and Sharon Burton had lived together as a couple on a genuine domestic basis for the required two year period prior to her death.

[6] On 23 June 2014, the primary judge made declarations and orders in terms of the application brought by Daphne Burton. The Letters of Administration on Intestacy granted to Kent Spencer on 14 August 2012 were revoked and orders were made that Letters of Administration on Intestacy be granted to Daphne Burton subject to the formal requirements of the registrar.

The appeal

[7] Kent Spencer (the appellant in these proceedings) now seeks to appeal the primary judge's decision. The grounds of appeal filed on 10 July 2014 contend that the primary judge:

1. erred in finding that the appellant was not a de facto spouse of Sharon Ann Burton (the deceased) within the meaning of s 5AA of the *Succession Act* 1981 (Qld) (*Succession Act*);

2. ought to have found that the appellant was a de facto partner of the deceased within the meaning of s 5AA of the *Succession Act*;

3. erred by finding that the appellant had not proven on the balance of probabilities that the appellant and the deceased lived together as contemplated by s 32DA of the *Acts Interpretation Act* 1954 (Qld) (*Acts Interpretation Act*);

4. erred in attributing too great a role to financial and property matters;

5. lost any forensic advantage in hearing the evidence due to the delay between the hearing and the delivery of judgment and such delay also caused or contributed to errors in the judgment;

6. erred and acted against the weight of the evidence and unreasonably in making findings of fact that:

    (a) there was an absence of circumstances of co-ownership or acquisition of property or any arrangements for financial support or interdependence between the appellant and the deceased;

(b) the appellant's care of his elderly mother and his work hours meant that he had precious little time to spend with the deceased;

(c) the appellant and the deceased only went on a holiday to Airlie Beach in the period between February and March 2012;

(d) the lease of the three bedroom apartment was only taken out jointly by the appellant and the deceased so the appellant could better care for the deceased in the latter stages of her illness;

(e) Colleen Weber was simply a social friend of the deceased; and

(f) Lynette Parkinson and Mark Gannon were simply social friends of the deceased.

7. erred in attributing little or reduced weight to the evidence of:

(a) Hanne Secher;

(b) Adrian Hepi;

(c) Desleigh Lindberg; and

(d) Robert Lillington.

8. erred in misconstruing the evidence of Colleen Weber and Peter Perkov;

9. erred in failing to have any regard to the evidence of Richard Taylor;

10. erred in finding that the evidence of Marion Hanslow, the appellant's mother, was not corroborative of the appellant's evidence;

11. erred in finding that the evidence of Daphne Burton (the respondent in these proceedings) in relation to the deceased's stay in Toowoomba between May and November 2009 was largely uncontroversial; and

12. because of the accumulated errors of the learned trial judge, made adverse findings concerning the reliability of the appellant's evidence which should be set aside or disregarded on appeal.

[8] The appellant seeks orders that the judgment given on 23 June 2014 be set aside and that the respondent's application for declaratory relief and orders at first instance be dismissed. Alternatively, the appellant seeks orders that the respondent's application for declarations and orders be remitted to the Trial Division to be heard according to law by another judge.

Application to Adduce Further Evidence and Notice of Contention

[9] On 12 March 2015, the respondent filed an application to adduce further evidence and a notice of contention.

[10] The application to adduce further evidence is brought pursuant to r 766(1)(c) and r 766(2) of the *Uniform Civil Procedure Rules* 1999 (Qld) and relates to the evidence of the appellant's conduct relevant to the issues in the notice of contention and the further evidence obtained subsequent to the trial pursuant to the Letters of Administration on Intestacy granted to the respondent.

[11] The grounds of contention are that:

1. The conduct of the appellant in failing to account for or disclose the existence of estate funds held in his bank accounts, in breach of an order of the Supreme Court dated 31 January 2013, constitutes an admission that he had no faith in the merits of his own case.

2. The conduct, admitted by the appellant, that he had, in breach of the order of 31 January 2013, applied estate funds to his own benefit and failed to truthfully account for the funds he had held was a further basis upon which the learned primary judge could and should have found the appellant to be a witness lacking in credit.

3. The swearing of affidavits on 14 February 2013 and 7 June 2013, which were false with respect to his dealings with the estate funds, was a further basis upon which the primary judge could and should have found the appellant to be a witness lacking in credit.

[12] The issues raised in the notice of contention and the application to adduce further evidence will be dealt with after a determination of the appellant's grounds of appeal.

The issue before the trial judge

[13] The issue before the trial judge, therefore, was whether the appellant was the *spouse* of the deceased on her death pursuant to s 5AA of the *Succession Act*. The relevant provisions of which are as follows;

> "**5AA Who is a person's *spouse***
>
> (1) Generally, a person's ***spouse*** is the person's—
>
> (a) husband or wife; or
>
> (b) de facto partner, as defined in the *Acts Interpretation Act 1954* (the ***AIA***), section 32DA; or
>
> (c) registered partner, as defined in the AIA, schedule 1.
>
> (2) However, a person is a ***spouse*** of a deceased person only if, on the deceased's death—
>
> (a) the person was the deceased's husband or wife; or
>
> (b) the following applied to the person—
>
> (i) the person was the deceased's de facto partner, as defined in the AIA, section 32DA;
>
> (ii) the person and the deceased had lived together as a couple on a genuine domestic basis within the meaning of the AIA, section 32DA for a continuous period of at least 2 years ending on the deceased's death; or
>
> (ba) the person was the deceased's registered partner; or
>
> (c) for part 4, the person was—
>
> (i) a person mentioned in paragraph (a), (b) or (ba); or
>
> (ii) the deceased's dependant former husband or wife or registered partner.

(3) Subsection (2) applies—

(a) despite the AIA, section 32DA(6) and schedule 1, definition *spouse*; and

(b) whether the deceased died testate or intestate."

[14] It was clear that the appellant was not married to or in any other registered relationship with the deceased in accordance with s 5AA(1)(a) or (c) of the *Succession Act*. The appellant argued, however, that he was a spouse pursuant to s 5AA(1)(b) of the *Succession Act* because he was the deceased's de facto partner, as defined in s 32DA of the *Acts Interpretation Act*, which is in the following terms:

"**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."

[15] Accordingly, in order to prove that he was a 'spouse' for the purposes of the *Succession Act*, the appellant had to establish that he and the deceased were de facto partners and that at the date of her death on 6 July 2012 and for the two years previously, he and the deceased were "living together as a couple on a genuine domestic basis" within the meaning of s 32DA of the *Acts Interpretation Act*.

[16] In *S v B*,[1] this Court held that the onus is on the party asserting the relationship existed at a particular date or subsisted for a time between one date and another to prove on the balance of probabilities that it was so in the period asserted. In relation to the question as to whether or not a de facto relationship existed in this case, it was therefore not sufficient to show that at some point in their relationship they lived together on a genuine domestic basis for at least two years, but that in the two year period before the deceased's death they lived together on that basis.

[17] Therefore, despite the fact that the current respondent was the applicant in those proceedings, the onus at trial was on the current appellant to establish that he and the deceased were 'de facto partners' for at least two years, ending on her death. The relevant two year period was the period between 6 July 2010 and 6 July 2012.

The decision at first instance

[18] At trial, there was no dispute between the parties that there had been an ongoing relationship between the deceased and the appellant which had commenced in 1999. At trial, Counsel for the respondent argued, however, that despite the ongoing nature of the relationship, it had diminished from 2003 or 2004 onwards and that there were a number of events that had contributed to the further lessening of the relationship between 2007 and 2009. Counsel for the respondent also acknowledged at trial that following the deceased's diagnosis of breast cancer in November 2010, the appellant was involved in her life to a greater extent, particularly following the indication that the cancer was terminal in November 2011. Counsel for the respondent, however, argued that the deceased and the appellant had not lived together as a couple on a genuine domestic basis for the requisite two years prior to her death.

Key findings on the s 32DA criteria

[19] The primary judge worked through a consideration of a number of factors in ascertaining whether the appellant and the deceased were living together as a couple on a genuine domestic basis for the requisite period of two years which ended at her death in July 2012. Those factors included some of the indicia listed in s 32DA of the *Acts Interpretation Act*. It is clear that any of the couple's circumstances can be taken into account in determining the question as to whether they were living together as a couple on a genuine domestic basis and that none of the indicia listed in s 32DA are considered to be a necessary prerequisite to any finding.

[20] In his Honour's reasons, it is clear that the primary judge accepted that the appellant was very fond of the deceased and loved her and that they were a close and intimate couple for much of the 13 years of their relationship.[2] He also accepted that despite his infidelity in 2009, the appellant and the deceased reconciled and continued to present as a couple on social occasions.[3] As his Honour correctly identified, the question was not whether they presented as a couple, but whether they were living together as a couple in a genuine domestic basis for the period of two years ending on 6 July 2012.[4]

[21] The primary judge considered that the main issues in contention in terms of the criteria in s 32DA(2) of the *Acts Interpretation Act* were:

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1 [2005] 1 Qd R 537, [2], [9], [33] and [50].
2 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [37] and [40].
3 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [37].
4 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [37].

1. The nature and extent of the common residence;
2. The degree of financial dependence or interdependence and arrangements for financial support;
3. Their ownership and acquisition of property; and
4. The reputation and public aspects of the relationship.[5]

[22] His Honour noted that there was not a close relationship between the appellant and the deceased's family, but considered that it was merely one factor to be considered.[6] It was clear that there were no children of the relationship.[7]

[23] In terms of the degree of mutual commitment to a shared life, including care and support of each other, and the performance of household tasks, the primary judge concluded that the evidence was mixed.[8] His Honour accepted that the deceased and the appellant shared a home in 1999 and that the appellant made a contribution by assisting with the renovation and improvement of that home at Sooning Street in Townsville.[9] The primary judge indicated, however, that those events took place many years before the two year period he had to consider.[10]

[24] The primary judge also accepted that in the latter months of the deceased's life when she was ill, the appellant helped and cared for her and had entered into a lease on a larger three bedroom apartment at Metro Quays, commencing on 23 June 2012, as part of an arrangement to enable him to better care for the deceased during the final months of her life.[11]

[25] The primary judge then came to an analysis of the reputation aspects of the relationship and referred to the evidence given for both sides by persons who had known the deceased and the appellant as to whether they conducted themselves consistently or inconsistently as "de facto partners".[12] The primary judge made a ruling in relation to the admissibility of that evidence indicating that much of the evidence which had been given was hearsay or opinion evidence.[13] The primary judge also indicated that even in relation to statements made by the deceased during her life which were against her pecuniary of proprietary interest, care had to be taken to look for corroborative evidence in light of the fact that such evidence is difficult to test.[14]

[26] In the subsequent seven paragraphs, the primary judge analysed the evidence of some 20 of those witnesses in very short compass.[15] The evidence of a number of witnesses including Debra Thomas, Katrina Johnson, Kay Tate, Desleigh Lindberg, Robert Lillington and Hanne Secher were considered to be "infected, in the view I take, by hearsay"[16] or were held to be of "little weight as it appeared to be infected by hearsay"[17] and were not considered in any detail by the primary judge.

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5 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, 20-22.
6 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [38].
7 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [40].
8 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
9 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
10 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
11 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
12 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
13 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [29].
14 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [29].
15 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [30]–[36].
16 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [32].
17 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [36].

[27] The reasons of the primary judge also make it plain that whilst he was satisfied that the appellant lived from time to time at the deceased's Metro Quays apartment, it was not to the extent he argued for, that is, in the two years prior to the deceased's death.[18] In particular, he placed reliance upon and specifically accepted the evidence of the neighbours, Raymond and Eleanor Williams.[19] That evidence was that they were not aware that the appellant 'ever' lived at the unit and that when the deceased was away, Mrs Williams would collect her mail. Mrs Williams also gave evidence that whilst she saw the deceased almost daily, she was never introduced to the appellant.[20] She did, however, say that she did see him picking the deceased up sometimes and that they had an issue about dirt on his car at one point.[21] Whilst Mr and Mrs Williams' evidence was that they would regularly have dinner with the deceased on Tuesdays at the Cowboys Leagues Club and socialise with her at Christmas, the appellant was not present at those events.[22] They also observed that the deceased's car space was often empty.[23]

[28] The primary judge was satisfied that the life the deceased and the appellant shared together was more committed in the early years of their relationship and in the last two to three months of the deceased's life.[24] The real issue related to the nature of the relationship in the intervening period. The primary judge accepted that in the last two years before the deceased's death, the appellant spent evenings at the one bedroom apartment at Metro Quays prior to the move to the larger apartment. He was not persuaded, however, that the deceased and the appellant lived together as a household at Metro Quays, so that it could be said they shared a life and performed household tasks together to the extent that it is possible to conclude that there was that degree of mutual commitment that s 32DA of the *Acts Interpretation Act* referred to.[25] His Honour continued:

> "[41] … My impression from the evidence of the witnesses called in both cases and also from that of the respondent is that the life they shared together may have been more committed in the years at Sooning Street and **perhaps for some time thereafter and perhaps in the last two or three months of Sharon's** [the deceased's] **life**."[26] (my emphasis and citations omitted)

[29] His Honour also considered that the "ambiguity" about the commitment to a shared life together was "also reflected in the evidence going to the reputation and public aspects of the relationship".[27] He concluded that "The evidence of the witnesses called who were friends and acquaintances of both Sharon [the deceased] and the respondent [the appellant] has left me with a sense of uncertainty".[28] Whilst he accepted that the appellant and the deceased presented socially as a couple and entertained at Metro Quays, given the evidence of the Mr and Mrs Williams, he was not satisfied that the appellant was present as "often as he would have it".[29] It is clear, therefore,

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18 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
19 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [30].
20 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [30].
21 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [30].
22 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [30].
23 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [30].
24 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
25 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
26 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
27 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [42].
28 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [42].
29 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [42].

that whilst accepting they consistently presented as a couple socially, the primary judge discounted that finding because he had not reached a concluded view about the evidence of the shared life together.

[30] However, in terms of the issues of ownership, use of and acquisition of property and the degree of financial dependence and interdependence, the primary judge considered that the evidence "was clear and unambiguous".[30] His Honour noted that the deceased and the appellant were never co-owners of property and, despite the appellant's evidence that his financial circumstances necessitated the properties being registered in the deceased's name, his Honour noted that even in the years subsequent to the resolution of the appellant's financial difficulties he made no payment towards the mortgage or utilities in relation to the properties even after his personal injuries payout.[31] In this regard, it is clear that the primary judge placed particular reliance on this aspect of the evidence because it was certain in contrast to the "shared commitment" aspect which he considered to be uncertain.

[31] The primary judge noted that the only exclusion from the conclusion that they kept their financial affairs completely separate was the evidence that shortly before the deceased's death, there was a joint lease of a three bedroom apartment at the Metro Quays complex for 12 months.[32] However, the primary judge considered that was only done two weeks before the deceased's death and concluded that it did not reflect the living arrangements or the relationship between the two over the entirety of the two years before her death.[33]

[32] The primary judge also considered that the documentary evidence supported the finding that the deceased made all of the mortgage payments and paid all of the utilities and outgoings in respect of both properties and that they did not have a joint bank account.[34] His Honour also noted that even when the deceased was ill and she received her lump sum superannuation payment, she made no payment to assist the appellant when he had substantial credit card bills.[35] No reference, however, was made by the primary judge to the hospital documents completed in 2011 and 2012 where the deceased referred to the appellant as her "partner" or her "de facto partner" which had been relied upon by the appellant at trial.

[33] The primary judge also considered that it was significant that the appellant was increasingly involved in the care of his mother, and that by 2009 he received a carer's payment between 13 January 2009 and 13 July 2012.[36] He had stated in his application for the allowance that he was providing care to his mother seven days a week for approximately 39 hours a week.[37] When confronted at trial with the fact that he was spending a lot of time with his mother during the relevant period, the primary judge noted that the appellant had contended that the deceased had "slept over" at his mother's flat which the primary judge did not find persuasive.[38]

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30 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [43].
31 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [43].
32 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [45].
33 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [45].
34 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [43].
35 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [43].
36 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [20] and [37].
37 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [20].
38 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [37].

[34] It was also significant to the primary judge that when the deceased spent some time in 2009 in Toowoomba caring for her mother, she took the keys to the Metro Quays apartment from the appellant and excluded him from the unit whilst she was away.[39] The primary judge also noted the appellant's affair in 2008 which had resumed in June or July 2009 whilst the deceased was in Toowoomba.[40]

[35] Significantly, the primary judge concluded that the appellant, who bore the onus in the case, was an unpersuasive witness.[41] He also considered that notwithstanding that there was some support for the appellant's evidence of the nature and circumstances of his relationship with the deceased in the evidence of the witnesses, he considered that there were ambiguities, particularly in relation to:

> "[46] …their dealings personally with respect to household arrangements, a shared life and mutual commitment when combined with the absence of any circumstance of co-ownership or acquisition of property or any arrangements for financial support or financial dependence or [interdependence] lead me to conclude that the respondent [the appellant] has not proven on the balance of probabilities that he and Sharon [the deceased] lived "together as a couple on a genuine domestic basis" as contemplated by s 32DA."[42] (citation omitted)

[36] The primary judge ultimately concluded that the appellant had not proven on the balance of probabilities that he and the deceased lived together as a couple on a genuine domestic basis as contemplated by s 32DA of the *Acts Interpretation Act*.

The appellant's outline of argument

[37] The grounds of appeal are set out in the Notice of Appeal and have already been referred to. In essence, the appellant argues that the primary judge:

(a) did not come to terms with the evidence due to delay, and misconstrued or attributed little weight to significant aspects of the evidence and generally acted against the weight of evidence.

(b) erred in the application of the criteria set out in s 32DA of the *Acts Interpretation Act* and, in particular, attributed greater weight to financial and property matters.

The respondent's outline of argument

[38] The respondent argues that the appeal concerns the evaluative approach taken by the primary judge to the findings of fact and there is no appealable error. It is also argued that the findings tend very strongly against the appellant's contention that he and the deceased were living together as a couple on a genuine domestic basis. The respondent argues that there is no basis for concluding that the primary judge overlooked evidence or misapplied a principle and that even though there was delay in giving judgment, this did not cause or contribute to error or result in a decision that was unsafe. Furthermore, the finding as to credibility was based on the appellant's own admission and a controversy with a neighbour of the deceased. It is also argued that there was no independent evidence or documentation which was accumulated over the 13 years which would support the appellant's own assertions as to the ultimate issue.

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39 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [23].
40 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [25].
41 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [46].
42 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [46].

[39] The respondent argued that where an evaluative process is undertaken by a primary judge, for an appellant to succeed it is necessary to demonstrate an error of legal principle or a significant error of fact finding which is so manifestly unreasonable as to indicate an application of an incorrect principle or a misunderstanding of the facts. In relation to the s 32DA criteria, the Court of Appeal in *Perry v Killmier & Anor*[43] held that in deciding whether a person and another are living together as a couple on a genuine domestic basis, any of their circumstances can be taken into account and that those circumstances may or may not include the matters listed in s 32DA(2).[44] It is submitted that s 32DA(3) implicitly recognises that the weight, if any, to be afforded to the circumstances listed in subsection (2) will be a matter for the trial judge in each case.[45]

The appellant's submission on the alleged errors in relation to the evidence

[40] The appellant argues that the trial judge lost any forensic advantage in hearing the evidence due to the delay between the hearing and the delivery of judgment and that delay caused or contributed to errors in the judgment. The appellant argues that those errors resulted in the decision being unsafe.

[41] It is also argued that the primary judge erred in his analysis of the evidence of a number of witnesses. It is argued that he erred when he found that Colleen Weber was simply a social friend of the deceased, as she was in fact a very close friend. It is argued that the primary judge misconstrued her evidence when he found that it was mainly based on hearsay because her evidence included her observations of the couple over many years, including the period from 2010 to 2012 which included visits to their unit. She also gave evidence that the deceased initially told her that 'they' had bought the Metro Quays apartment, which was an exception to the hearsay rule[46] and was admissible on the basis that it was a statement at the time of the purchase made by the deceased which was against her proprietary interests.

[42] It is also argued that the primary judge erred in finding that Lynette Parkinson and Mark Gannon were simply social friends of the deceased because their evidence was that they had known her since 2001 and Ms Parkinson's evidence was that she had a close relationship with the couple in the period that followed. The appellant argues that they were more than social friends and they gave assistance during the deceased's fight with cancer. Their unchallenged evidence was that they made observations of the appellant and the deceased as a couple, their visits to the apartment at Metro Quays, their relationship between 2010 and the deceased's death, the care the appellant provided to the deceased and the love they had for each other.

[43] It is also argued that the primary judge erred in attributing little or reduced weight to the evidence of Hanne Secher when she had known the deceased all of her adult life and was her best friend for over 30 years. Her evidence was unchallenged as to her observations of the appellant and the deceased at the Sooning Street unit and that the deceased told her that the loan had been taken out in her name as the appellant had an unresolved issue about a previous fire. She also gave evidence that the appellant had done work on the unit at Sooning Street.

[44] Ms Secher also gave evidence that the deceased and the appellant had shared the Metro Quays apartment and that once again the unit was in the deceased's name

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43 [2014] QCA 64, [60].
44 *Perry v Killmier & Anor* [2014] QCA 64, [60].
45 *Perry v Killmier & Anor* [2014] QCA 64, [60].
46 *Lenehan v Queensland Trustees Ltd* [1965] Qd R 559, 573.

because of the fire insurance issue. She gave evidence that the deceased wanted the appellant to have the Metro Quays apartment as his home and gave evidence of her observations of them at the unit. She stated that the appellant had cared for the deceased and that he was the love of her life.

[45] It is also argued that the primary judge erred in considering the evidence of Adrian Hepi was of reduced weight because he was not often in Townsville when the evidence was that he returned quite a bit and always caught up with the appellant and the deceased. He also gave evidence of being in Townsville in the early part of 2010 and 2011, which included visits to the unit at Metro Quays and his observations. Similarly, the evidence of Desleigh Lindberg and Robert Lillington should have been referred to in relation to the reputation and public aspects of the relationship.

[46] The appellant also argued that the primary judge erred in failing to have regard to all the evidence of Richard Taylor when he gave evidence of his visits to the Sooning Street unit and the Metro Quays unit, particularly as he was closer to the deceased than to the appellant. He also gave evidence of his visits to the Metro Quays apartment after the deceased's return from Toowoomba. His evidence was to the effect that it was obvious that there were two people living in the unit, as there were clothes in the unit belonging to the appellant and men and women's toiletries. His view was that they were living there as a couple. He also gave evidence that when the deceased was diagnosed with cancer, he visited the Metro Quays unit at least twice after that diagnosis and considered they were still living as a couple in the unit.

[47] It is also argued that the primary judge erred in finding that the evidence of Ms Hanslow was not corroborative of the appellant's evidence. It is clear that the primary judge did not give reasons as to why he did not accept her evidence which was corroborative of the appellant's evidence other than finding she was 'vague'.

[48] It is also argued by the appellant that the primary judge erred in finding that the respondent's evidence about the return to Toowoomba for Christmas in 2009 by the deceased was largely uncontroversial when there were shortcomings in that evidence at the trial. In particular, the respondent's diary entries recorded the deceased as leaving for Brisbane on 31 December 2009 when it was clear from other evidence that the deceased was already in Brisbane with the appellant on 30 December 2009. Furthermore, the respondent stated that the deceased went to Laidley on 24 December 2009 whereas in her affidavit she said that the deceased had spent Christmas with her and the appellant had gone to Laidley by himself. It is clear that the deceased had gone to Laidley with the appellant and they spent Christmas Day together and not with the respondent.

[49] The appellant argued that the conclusions of the learned trial judge must fall because they contained legal errors in relation to the legal concepts being applied and they contained factual errors which were not redeemable by the findings on credit.

The respondent's argument on the witnesses

[50] The respondent argues that the appellant was not accepted as a witness of credit and that the findings of credit made against the appellant are important. An appeal court is not in as good a position as the trial judge to decide the proper inference to be drawn from the facts and ordinarily an appellate court will not disturb a primary judge's findings based upon contested evidence and will usually only do so where the decision is glaringly improbable or contrary to compelling inferences.[47] It is argued

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47 *Perry v Killmier & Anor* [2014] QCA 64, [70]-[71].

that the appeal court should not be misled by "overenthusiastic evidence from the only party alive who can still give the evidence as to the exact relationship".[48]

[51] The respondent argued that the adverse credit findings were open on the evidence and the primary judge had a sense of unease in relation to a number of matters:

(a) his evidence about the deceased staying overnight at his mother's house;

(b) his responses to questions about his carer's allowance;

(c) his evidence explaining his residential address on driver and taxi licence applications;

(d) his evidence that the unit in the deceased's name at Metro Quays was considered a joint property, particularly when the appellant's exclusion from the unit while the deceased was absent was inconsistent with his own case that it was a joint property;

(e) his evidence that he financially supported the deceased for a period of four to five weeks when they lived at Airlie Beach in February and March 2012; and

(f) his claims as to the extent he was present at the deceased's unit.

[52] Furthermore, the primary judge's finding about the extent the appellant was present at the unit was made on the basis that the evidence of Raymond and Eleanor Williams was preferred to that of the appellant. The respondent submits that that finding was significant with respect the appellant's failure to establish that he and the deceased lived together on a genuine domestic basis. It was submitted that it was a significant aspect of the appellant's failed claim.

[53] The respondent argued that the sole challenge to the multiple adverse credit findings is to the use of the words "slept over" and otherwise no finding can be said to be affected by error. It was argued that the use of the phrase "slept over" was immaterial to the assessment by the trial judge that the appellant's evidence was unpersuasive.

[54] The respondent argued that another alleged error was a finding that Colleen Weber was simply a social friend, where it is clear the word "simply" was not used in the judgment and his characterisation was unremarkable. The respondent argued that Ms Weber's evidence does not go beyond the findings of the primary judge that the deceased and the appellant presented socially as a couple, entertained others as a couple at the Metro Quays apartment, that there was evidence of male occupation at the unit at different times and that the appellant cared for the deceased in the latter months of her life.

[55] Similarly, the respondent argued that the characterisation by the primary judge that Lynette Parkinson and Mark Gannon were social friends of the deceased accurately reflects their knowledge of the deceased as Ms Parkinson had little to do with the deceased in 2007 and 2008.

[56] The respondent argued that Hanne Secher simply confirmed that her evidence was a product of what she had been told by the deceased and that the evidence was therefore infected by hearsay. No authority was advanced as to why the judge erred in concluding that it was of little weight.

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[48] *O'Neill v Martini & Anor* [2012] QSC 198, [48] per Douglas J citing *Western v Public Trustee* (1986) 4 NSWLR 407, 409.

[57] In terms of the evidence of Adrian Hepi, the respondent argued that the evidence was consistent with the primary judge's view that he was not often in Townsville after 2008.

[58] The respondent argued that the evidence of Desleigh Lindberg was similarly infected by hearsay and Ms Lindberg confirmed in her evidence that she did not have any independent basis upon which to make observations about the relationship. Similarly it is argued that the primary judge was right to attribute little weight to the evidence of Robert Lillington, as he admitted in cross-examination that his knowledge of the relationship entirely depended upon what the deceased had told him about it.

[59] The respondent did not accept the complaints about the evidence of Peter Perkov or the failure to consider the evidence of Richard Taylor as the respondent argued that his relationship to the deceased was limited to a social basis and whilst he attended the residence twice over the course of a year, he provided little detail about those events.

[60] The respondent argued that in relation to the appellant's submission that the primary judge failed to provide reasons for finding the evidence of Ms Hanslow was not corroborative of the appellant's evidence is not substantiated because the primary judge found that Ms Hanslow was infirm, unwell and vague in the witness box. The respondent argued that there were clear reasons why Ms Hanslow's evidence was not corroborative of the appellant's evidence and it was open for the primary judge to arrive at that conclusion.

The evidence

[61] The submissions by both the appellant and the respondent outlined above require an analysis of the evidence the primary judge relied upon in coming to his decision, the evidence he rejected and his reasons for rejecting that evidence. The major complaints are that some evidence was misinterpreted, some evidence was given little or no weight without sufficient reasons as to why that evidence was discounted and some evidence was not taken into account at all.

[62] There is no doubt that the primary judge was faced with a difficult task given that at trial the appellant had produced a number of witnesses who gave evidence that he and the deceased were a couple during the relevant period, and similarly the respondent had produced a number of witnesses who gave evidence that they were not. It was necessary, therefore, for the primary judge to carefully weigh up the testimony of each witness and to consider the extrinsic evidence.

[63] There is also no doubt that the primary judge carefully examined the evidence of the appellant and was unpersuaded by his evidence in several critical areas. In particular, he was not convinced as to the appellant's explanation about the amount of time he had declared to Centrelink that he was spending caring for his mother in order to obtain a part-time carer's pension between January 2009 and July 2012 and the time he stated he spent with the deceased. The primary judge stated "When confronted with the circumstance that the respondent [the appellant] was spending a lot of his time with his mother and staying at nights at the West End flat he said that some of this time Sharon [the deceased] "slept over" at his mother's place. I did not find the respondent's [the appellant's] evidence persuasive in this respect."[49] That was clearly a significant finding for the primary judge.

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[49] *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [20].

[64] The primary judge was also uncertain about the reliability of the appellant's evidence about the time he spent with the deceased, particularly about the hours he worked from 2009 to 2012 given there were no tax returns. His Honour noted the following:

> "…But the circumstance of the considerable hours he was working in the Austar endeavour when combined with the hours that he represented to the Commonwealth he was devoting to the care of his mother can only have one consequence. If these claims are correct then he can have had precious little time to spend with Sharon [the deceased] and devote his attentions to her."[50]

[65] The primary judge also considered that the appellant's evidence about the extent to which he supported the deceased financially in early 2012 when she had stopped working but before she received her disability payment and superannuation was "longer than that circumstance would suggest".[51]

[66] It is not argued that those findings were not open on the evidence. It is argued, however, that there was a substantial body of evidence which substantiated the appellant's evidence in relation to cohabitation, his commitment to the deceased and the public and reputation aspects which was not taken sufficiently into account and weighed up with those factors that he had found.

Evidence which was not taken into account

[67] It would seem to me that there is a body of evidence which was not referred to in the judgment. I note that there was a significant body of uncontested evidence that the appellant would continually provide transportation for the deceased, particularly on social occasions, as she did not have a car. In this regard, it was evident that when the appellant did get a compensation payout in 2007, he spent the money on a Volkswagen (VW) convertible which the couple used extensively on any view of the evidence.[52] Those matters were not referred to.

[68] At the outset, I should note that there are a number of documents that I consider to be significant which were not referred to in the judgment. There is no doubt that the primary judge made reference to the address the appellant provided for his taxi and driver's licences which was his mother's address,[53] but there are other significant documents which were in evidence that were not referred to in the reasons. There were ASIC documents which listed the Metro Quays unit as the appellant's address and as the registered office of his company Hamspee Pty Ltd from September 2002 until it was deregistered in August 2008.[54] There were also receipts from hotels which clearly showed that the appellant and the deceased would holiday together at the locations he described and that he would pay for those holidays.[55] In this regard, I note the evidence of Raymond Williams indicated that the deceased was quite often away at Airlie Beach and Port Douglas,[56] which indeed corroborates the appellant's evidence that he and the deceased would frequently go away for weekends and that the deceased loved Airlie Beach in particular.

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50 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [22].
51 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [26].
52 ARB, 380-381.
53 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [37].
54 ARB, 469-475.
55 ARB, 466-467, 476-477 and 478-479.
56 ARB, 308.

[69] There is also other documentary evidence that I consider to be significant and should have therefore been referred to in the judgment. Of particular relevance was a Patient Admission Form from the Townsville Hospital dated 1 March 2011, which refers to the appellant as the deceased's "De facto" and notes the Metro Quays address as the deceased's home address and also the appellant's home address.[57] There is also a Discharge Summary Form at the Mater Hospital dated 21 May 2011 which notes that the deceased was discharged to "home" into the care of "Ken Spencer", the appellant, who was identified as her "Partner".[58] The Patient Admission Form at the Townsville Hospital dated 29 May 2012 also refers to the appellant as "De facto" and once again gives the Metro Quays address as his home address.[59] None of those documents were referred to in the primary judge's reasons.

[70] In my view, the documents are significant because they are either forms signed by the deceased or attached to forms signed by her. They were clearly part of the admission and discharge process at the hospital. There is no doubt, therefore, that the deceased would have provided the information on the forms or, at the very least, confirmed the accuracy of the information given she signed the documents. The 1 March 2011 document in fact is signed by the deceased on the same page as the information appears. Accordingly, I consider that they are statements made by the deceased indicating her view that as at March 2011 the status of the relationship she had with the appellant was that they were already a de facto couple residing at that address and that the appellant was her partner. It would seem to me that they are significant admissions by the deceased and that the primary judge needed to assess that evidence or deal with it in some respect.

[71] In terms of the other evidence which was not taken into account, the evidence of the witness Richard Taylor[60] was not referred to in the judgment at all. His evidence was that the appellant and the deceased moved into Metro Quays as a couple and that he would visit the unit three or four times a year. He spoke of them as being a 'very close' couple and of visiting them at the unit after the deceased's return from Toowoomba. He stated that he would meet up with them and go to their unit for drinks and whilst it was only a one bedroom unit, it was obvious that there were two people living there, as he saw clothes and toiletries belonging to both of them at the unit. His evidence was that that situation remained the same up until the last time he visited them at the unit in November 2011. That evidence was not referred to.

[72] Counsel for the respondent referred to the significance of the evidence of the neighbours, Eleanor and Raymond Williams, and argued that the primary judge's finding about the extent the appellant was present at the unit was made on the basis that their evidence was clearly preferred to that of the appellant. Counsel for the respondent argued that that reliance was a significant factor with respect to the appellant's failure to establish that he and the deceased lived together on a genuine domestic basis. The extent to which the primary judge relied on their evidence has caused me some concern.

[73] There is no doubt that the primary judge accepted at paragraph [11] of his reasons that the appellant and the deceased had in fact moved into the Metro Quays unit together in 2002. The primary judge also made an unqualified finding that he accepted the

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57 ARB, 420.
58 ARB, 428.
59 ARB, 430.
60 ARB, 550-554.

evidence of Eleanor and Raymond Williams. In my view, those two statements cannot sit together as they are inconsistent. The Williams' evidence was that they lived at Metro Quays in 2002 at the time the deceased moved in, they did not consider that the appellant "ever" lived at Metro Quays and they saw very little of the appellant despite seeing the deceased daily. Their evidence was summarised in the reasons in the following terms:

> "[30] Raymond and Eleanor (sic) Williams lived in Metro Quays in an apartment near Sharon's [the deceased]. Mr Williams said that he and his wife moved into Metro Quays before Sharon [the deceased]. They would sometimes have dinner with Sharon [the deceased] in a group on Tuesdays at the Cowboys Leagues Club. They also socialised with Sharon [the deceased] at Christmas parties. The respondent [the appellant] did not attend these events. He said that he was not aware that the respondent [the appellant] ever lived in the Metro Quays unit and when Sharon [the deceased] went away his wife collected Sharon's [the deceased's] mail. His observation was that Sharon's [the deceased's] car space was often empty, Mrs Williams said that she often saw Sharon [the deceased], passing her or seeing her almost daily. She was never introduced to the respondent [the appellant] by Sharon [the deceased] and she said that she sometimes saw the respondent [the appellant] picking Sharon [the deceased] up. In evidence the respondent [the appellant] said of Mr and Mrs Williams that he did not socialise with them and that he never introduced himself to Mrs Williams. He acknowledged that his only dealing with Mr Williams concerned an issue with respect to dust from a motor vehicle and that his only contact with Mrs Williams was a brief discussion just before Sharon's [the deceased's] death, it was at the wake after Sharon's [the deceased's] death that he was introduced to her."[61] (citations omitted)

[74] There is no doubt that Mr and Mrs Williams did not live 'across the hallway' from the deceased as originally asserted, but rather they lived on level 12 and the deceased lived on level 13 with a set of six or seven steps separating the levels. Furthermore, Eleanor Williams' evidence[62] was that, despite not being introduced to the appellant, she knew who he was and that she "often saw him in the hallway at Metro Quays" and that she "also often saw him waiting in his car" at the entrance to Metro Quays. Mrs Williams also acknowledged that the appellant moved into the bigger unit at Metro Quays with the deceased near the end of her life, but Mr Williams' evidence[63] was that the appellant *never* lived at Metro Quays. He did, however, indicate that there was an incident with the appellant using the loading bay to park his Porsche, which seems to be inconsistent with his statement that the appellant never lived there.

[75] As I have previously indicated, the primary judge in his reasons noted that there was no contest that the couple had moved into Metro Quays together in 2002 and that the respondent in these proceedings had accepted at trial that "in or around 2002 the couple moved from Breakwater Villa into a one bedroom apartment at Metro Quays."[64] If

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61 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [30].
62 ARB, 310-312.
63 ARB, 308-309.
64 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [11].

the primary judge was accepting the evidence of Eleanor and Raymond Williams in total, as he seemed to have done, he needed to explain why he was doing so, particularly when he made a finding which was contrary to their evidence. This was not done. That contradiction was in fact ignored.

[76] The evidence of Belva and Allan Lena was also referred to by the primary judge to the extent that they gave evidence they were aware that the appellant was involved with the deceased for a number of years.[65] Belva Lena's evidence, however, was that she saw no sign that the appellant resided in the unit at Metro Quays and did not consider that the appellant ever lived with the deceased at Metro Quays prior to the move to the larger unit in June 2012. She stated "No, he did not live in that unit there".[66] Belva and Allan Lena both accepted that "Ken [the appellant] did look after her in the last month or so of her life but was certainly not living with her prior to that time".[67]

[77] In my view, the evidence of Belva and Allan Lena and Raymond Williams that the deceased and the appellant had never lived together also had to be weighed up against a significant body of evidence that they had lived together for significant periods of time. The Williams' evidence was inconsistent with the evidence of a number of witnesses called by the respondent including Debra Thomas who stated that they had lived together at Metro Quays for at least two years from 2005 to 2007.

[78] Given the hospital documents signed by the deceased almost seventeen months before her death that she and the appellant were already a de facto couple residing at Metro Quays as at March 2011, the evidence of Belva and Allan Lena and Raymond Williams that the appellant and the deceased had never lived together in the one bedroom unit at Metro Quays needed to be critically assessed. That was not done.

Evidence that was given little or no weight

[79] Furthermore, I consider that by placing so much emphasis on the Williams' evidence, there is some justification for the submission by Counsel for the appellant that the primary judge failed to come to terms with some of the other evidence. As I noted earlier, in the reasons the primary judge dealt with 20 witnesses in seven paragraphs. In particular, he took a global approach to the evidence of friends and acquaintances of both the appellant and the deceased in the following way:

> "[29] Evidence was given for both sides by persons who had known Sharon [the deceased] and the respondent [the appellant] at different times. At trial there was a debate on the admissibility of the evidence. To the extent that the witnesses were able to swear to their observations and dealings with them, either as a couple or individually, which bore upon "reputational" matters, that is whether they conducted themselves consistently or inconsistently as "de facto partners" and particularly the circumstances as s 32DA of the AIA [*Acts Interpretation Act*] draws attention to then the evidence is admissible. But much of the evidence was hearsay in substance or opinion evidence and thus inadmissible (whether the opinion was based upon hearsay or not). I have not overlooked that statements against pecuniary or proprietary interest are

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65 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [31].
66 ARB, 62.
67 ARB, 307.

> admissible as an exception to the rule against hearsay but the authorities discussed in *Cross* suggest that care should be taken that the statements be against pecuniary interest when made, not only in light of supervening circumstances. Further even if it be that some statements or comments by the deceased might be admissible if not to prove the truth of the statements but to explain conduct at a particular time care should be taken to look for corroborative evidence in light of the circumstance that it is difficult for a party to obtain instructions and to test such evidence."[68] (citations omitted)

[80] In essence, the primary judge gave reasons for dismissing a large body of evidence on the basis that it was either hearsay or opinion evidence. He also indicated, however, that even where statements could be considered as an exception to the rule against hearsay, on the basis that they are made by the deceased against her own pecuniary of proprietary interests, he intimated he would require some corroboration even if the truth of the statements were not being pressed but rather were being relied upon to prove conduct. It would seem to me, however, that none of the deceased's statements which she made against her proprietary interests were ever actually specifically considered. I consider that issue needed to be addressed.

[81] The primary judge also specifically recognised that evidence of what a witness observed about the couple was admissible. Despite that recognition, I am concerned that the primary judge in fact rejected all of the evidence of some witnesses on the basis that it was affected by hearsay or contained opinion testimony when large tracts of the evidence was indeed admissible and should have been taken into account. I can see no basis for rejecting an entire testimony without further explanation, particularly when some aspects of the rejected evidence contained significant factual matters which needed to be assessed by the primary judge before coming to a conclusion on the issues before him.

[82] I consider that the evidence of Debra Thomas[69] was significant, as she was a witness called by the respondent. She in fact recognised that the deceased and the appellant had lived together for a substantial period of time. She was a close friend of the deceased and gave evidence that the deceased was in a relationship with the appellant at the time they first met a decade or so earlier. She stated that she did not meet the appellant for a number of years as the deceased "was a very private person and rarely spoke about her relationship with Ken [the appellant]."[70] Her evidence was that the deceased and the appellant lived together at Metro Quays for two years between 2005 and 2007 and that they were clearly living together at the time of the appellant's 50th birthday in June 2005.[71] Her view was that they broke up around 2008 or 2009 when the deceased moved to Toowoomba to care for her mother and the appellant moved out of Metro Quays and moved in with his mother. She also gave important evidence about their continued commitment to each other after 2009, stating that "Sharon [the deceased] relied on Ken [the appellant] and that they relied on each other for assistance and company. They saw each other on Sundays and spent time on drives and patronising restaurants."[72]

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68 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [29].
69 ARB, 313-316.
70 ARB, 313.
71 ARB, 313-314.
72 ARB, 315.

[83] Ms Thomas also stated that it was the appellant who was paying the bills in the final months of the deceased's life and that he was looking after her in her final days. Her evidence was that the deceased had indicated to her that "she would need someone to look after her and it might as well be him."[73] The primary judge, however, discounted her evidence as he considered it was either affected by hearsay or that it did "not bear significantly upon the circumstances or arrangements that applied within the two years prior to death."[74] That would not seem to be a completely accurate account of her evidence.

[84] All of the evidence of Janine Hartig, who was a witness for the respondent, was also considered by the primary judge to be unpersuasive in its entirety when she gave evidence that the appellant and the deceased had lived together at some point at Metro Quays but that she did not consider that there was evidence that the appellant was living there when she attended a New Year's Eve party in either 2008 or 2010.[75]

[85] The primary judge also discounted the evidence of the appellant's mother, Marion Hanslow, on the basis that she was "infirm and unwell" and gave "vague" evidence.[76] Her evidence, however, occupies some seven pages of the transcript and that evidence does not on the face of it appear to me to be vague. That evidence was that the appellant lived most of the time with the deceased and that she would occasionally visit and stay at her home. In this regard, she gave rather compelling and detailed evidence that the deceased was at her home one day with the appellant when a woman arrived and an argument broke out between the woman and the deceased. She also gave clear and rather compelling evidence about the nature of their relationship. She stated "I mean, Sharon [the deceased], he [the appellant] loved her to death, and she loved him, too. You know, they were just – they were just great."[77]

[86] The evidence of Colleen Weber[78] was also discounted on the basis that it contained hearsay evidence, although the primary judge did acknowledge her evidence to the extent that it indicated that when she cleaned the apartments after the deceased's death, there was evidence of the appellant's occupation.[79] Her evidence, however, was more extensive than that as she stated that when she moved them into the bigger apartment, she saw the appellant's suits hanging in the one bedroom unit. Ms Weber was one of the deceased's closest friend and was with her when she died. I consider that she gave some significant evidence which was not referred to by the primary judge about the extent to which the appellant and the deceased socialised as a couple and how she would visit the Metro Quays unit and see both of them there. I also consider that the deceased had made a statement to Ms Weber against her proprietary interests when she initially told her that 'they' had bought the Metro Quays apartment and as such it was an exception to the hearsay rule that should at least have been referred to. Ms Weber also gave evidence of visiting the deceased at Ms Hanslow's home when she came back to Townsville during the period she was caring for her mother in Toowoomba.

[87] Ms Weber also gave evidence that the appellant and the deceased resumed living together at Metro Quays after the deceased's return from Toowoomba in late 2009

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73 ARB, 316.
74 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [32].
75 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [33].
76 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [34].
77 ARB, 213-214.
78 ARB, 520-527.
79 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [35].

and that they continued living together as a couple even after she found out about the appellant's affair. Her evidence was that she resumed socialising with them as a couple at this time. She also gave evidence that the deceased was always in charge of her own financial affairs. She also referred to the extent to which the appellant would drive the deceased around in his car and the fact that they moved together to Airlie Beach in February 2012. She gave evidence of the life they lived together and that the deceased considered the appellant to be the "love of her life".[80] Her evidence supported the evidence of the appellant and his mother in many respects based on her own observations, but it was largely dismissed as hearsay by the primary judge without referring to the particular aspects of it which were of concern

[88] I consider that the evidence of Hanne Secher[81] was important. In my view, that evidence required analysis as she was the deceased's best friend and gave the eulogy at her funeral. She also knew the deceased throughout the entire period of the appellant's relationship with her. I consider her evidence to be particularly compelling because it is clear that she did not like the appellant. Her evidence was that after the deceased's return to Townsville in early 2010, she became aware of the appellant's affair but that he and the deceased worked through their issues and "went back to their usual living arrangements at their Metro Quays apartment."[82] This was not referred to by the primary judge.

[89] The following evidence of Hanne Secher, in my view, was also very relevant in terms of the question which had to be answered and needed to be dealt with by the primary judge.[83]

> "Ms Secher, did you give the eulogy at Sharon's [the deceased's] funeral? --- I did.
>
> You speak in your affidavit about the fact that you respected Sharon's [the deceased's] voice in terms of the relationship with Ken [the appellant]? --- That's right.
>
> You're speaking about a choice that was made since Sharon [the deceased] returned from Toowoomba; is that right? --- Sharon's [the deceased's] choice for the whole time that she was with Ken [the appellant]. That's the choice I was talking about, yes. Not just from when she returned, no.
>
> Well, what do you mean by you respected it? --- I think I mentioned in there somewhere that Ken [the appellant] and I were not friends, as such.
>
> Yes? --- And I'd always respected Sharon's [the deceased's] choice with her partner, despite the fact that he may not have been my favourite person or my choice for Sharon [the deceased], because it's not about me. It was about her.
>
> Right? --- So I certainly respect her choice in whoever her partner is.
>
> And you speak in your affidavit about knowing Sharon [the deceased] very well? --- Mmm.
>
> And that you were with her when she passed away? --- That's right. I was there, Ken [the appellant] was there and Colleen were there.

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80 ARB, 527.
81 ARB, 563-568.
82 ARB, 565.
83 ARB, 215-217.

> …
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> And the fact that Ken [the appellant] might have been caring for her since the diagnosis? --- Not just caring for her since the diagnosis. Ken [the appellant] was caring for her the whole time that they were partners. He was always - he was always there for (sic) her. Like I said, he was the one holding her hand when she passed away.
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> …
>
> You wouldn't be suggesting that they were living together continuously since Sharon [the deceased] returned from Toowoomba until the time she died, though? --- No, I said there were some circumstances there because Sharon [the deceased] was looking after her mother at some time and Ken [the appellant] was looking after his mother and there were different circumstances, but they were still a couple. Their love for each other didn't change, despite there might have been some changes to living arrangements at times.
>
> I know that you have a view about whether they were a couple or not and you are very firmly of the view that they were a couple? --- And that's from speaking to Sharon [the deceased]. From what my understanding of her - from her saying things to me like Ken's [the appellant] the love of my life, you get the impression that yes, they are a couple."

[90] That evidence was based on Ms Secher's long relationship with the deceased and her observation that the appellant was always there for her, cared for her and that they were partners. In my view, that evidence that she considered they were partners was admissible, as it was based on her own observations and experience with them. Her use of the word partner was clearly meant in its ordinary meaning and she was not giving an opinion as to the ultimate issue the judge had to decide. Her evidence needed to be specifically dealt with in order for the primary judge to come to a conclusion as to whether or not they were "de facto partners" as defined for the purposes of the legislation. Furthermore, I consider that Ms Secher gave evidence of statements the deceased made to her which were against her proprietary interests about the Metro Quays apartment being the appellant's home which were admissible and should have been taken into account.

[91] The evidence of Errol Bartkowski, Lynette Parkinson and Mark Gannon was referred to by the primary judge in that he acknowledged that "they were social friends of Sharon [the deceased] and the respondent [the appellant] and that they often socialised with them at the Metro Quays apartment where Sharon [the deceased] and the respondent [the appellant] appeared to be a couple."[84] What is not made clear in the judgment is that the evidence that was given specifically concerned the period after the deceased's return from Toowoomba and referred to seeing them as a couple in 2010 and 2011 as well as in the final months of her life at Metro Quays. Indeed, the evidence of Mark Gannon was to the effect that he visited them many times after the deceased's return from Toowoomba at the Metro Quays unit and that he considered that they grew closer in the last years of her life. He stated "It was obvious she was ill and that he was putting in extra effort caring for her."[85]

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84 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [35].

85 ARB, 201.

[92] Peter Perkov was a friend of both the appellant and the deceased over a long period. He stated that he would visit them together at the Metro Quays apartment. He spoke of being at the appellant's fiftieth birthday on the roof at Metro Quays in 2005. He referred to going back to the apartment after social gatherings and stated that he had seen evidence that the appellant was in occupation of the unit. He recalled going to the apartment after the deceased's return from Toowoomba and specifically referred to one such occasion in April 2011. His clear view was that they occupied the apartment together as a couple and considered they drew closer as a couple during her illness. Significantly, he stated that he would frequently run into the deceased around Townsville and noted that "There was never a conversation with Sharon [the deceased] that she did not mention Ken [the appellant]".[86] He gave evidence that the appellant asked him to fix a tap at the apartment. He said that he saw evidence of the appellant's toiletries in the bathroom and that the deceased had complained to him that the appellant never hung his towel up properly. Whilst he initially thought it was February 2012, he was not certain of the actual month when he was cross-examined. The primary judge, however, largely dismissed his evidence on the basis that Mr Perkov was vague about his dates.[87]

[93] Adrian Hepi was another social friend of both the appellant and the deceased and whilst the primary judge noted that he gave evidence of socialising at the Metro Quays apartment, he concluded "I was left with the impression that his evidence, whilst not unreliable was of reduced weight in relation to the ultimate questions where I formed the view that he was not often in Townsville after about 2008."[88] It is clear, however, that Mr Hepi did return frequently to Townsville and that in early 2010 he was hospitalised in Townsville with heart failure. He then returned in October 2010 to have a stent inserted and specifically referred to a particular meeting with the appellant at their unit before going out to dinner. He stated that he subsequently heard that the deceased had breast cancer and he visited her on 22 June 2011 after his own wedding and after the deceased's surgery. He stated "We went out at this time with Sharon [the deceased] and Ken [the appellant] to the C Bar on The Strand for dinner before going back to their Metro Quays apartment. They were still living very much as a couple together at the apartment."[89] He also referred to other visits to Townsville in October 2011 and November 2011 when he was doing his clinical nurse placement at the oncology and palliative care units at Townsville Hospital. He referred to the fact that the deceased told him that the appellant was looking after her and how fortunate she was.

[94] There is also clear evidence of the appellant and the deceased taking holidays together over the entire period and that this predates the period of July 2010. There is also evidence from the diary entries of Irene Burton which corroborates the appellant's evidence about their holidays together. The fact that they took holidays together is not determinative of the question of whether they were living together on a genuine domestic basis, but it needed to have been factored in to an evaluation. It does not seem to me to have been done.

[95] It is clear that the primary judge was required to evaluate a disparate body of evidence and I accept that such an assessment calls for value judgments which, as Mason and Deane JJ made clear in *Norbis v Norbis*,[90] means that there can be differences of

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86 ARB, 557.
87 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [35].
88 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [35].
89 ARB, 571.
90 (1986) 161 CLR 513, 518.

opinion. "Because these assessments call for value judgments in respect of which there is room for reasonable differences of opinion, no particular opinion being uniquely right, the making of the order involves the exercise of a judicial discretion". Their Honours continued:

> "…The contrast is with an order the making of which is dictated by the application of a fixed rule to the facts on which its operation depends.
>
> The principles enunciated in *House v. The King* were fashioned with a close eye on the characteristics of a discretionary order in the sense which we have outlined. If the questions involved lend themselves to differences of opinion, which within a given range, are legitimate and reasonable answers to questions, it would be wrong to allow a court of appeal to set aside a judgment at first instance merely because there exists just such a difference of opinion between the judges on appeal and the judge at first instance."[91] (citation omitted)

[96] In my view, the issue before this Court is not simply an issue as to a different view of the evidence which was before the primary judge. The fundamental difficulty is that I consider that some evidence was not taken into account when it should have been and that the reasons given for dismissing it were inadequate. Given the information on the hospital forms as early as March 2011, which was 17 months before the deceased's death, and the fact that the evidence of a number of witnesses was not dealt with at all or was dealt with by the primary judge in a minimal way, I consider that the primary judge did not in fact assess a significant body of evidence. In particular, he did not take that evidence into account appropriately when determining the degree of mutual commitment, issues of cohabitation and the reputation and public aspects of the relationship before he concluded that the life the couple shared together was more committed in the early years and "perhaps in the last two or three months of Sharon's [the deceased's] life".[92]

[97] I consider that the appellant has established that the primary judge failed to come to terms with the evidence and has satisfied this ground of appeal.

[98] The appellant also argues that when assessing the factors set out in s 32DA of the *Acts Interpretation Act*, the primary judge placed too much emphasis on the financial and property aspects of the relationship and did not sufficiently take into account the degree of mutual commitment and the reputation and public aspects of the relationship.

The s 32DA criteria

[99] In relation to the s 32DA criteria, Counsel for the appellant argues that the evidence supported a finding that the couple lived together on a genuine domestic basis for the requisite two year period.

The appellant's argument on the s 32DA criteria

The nature and extent of common residence

[100] The appellant argues that whilst cohabitation in a common residence is not necessary to establish a de facto relationship, there was in fact cohabitation for the whole of the 13 years of the relationship because of the following evidence:

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91 *Norbis v Norbis* (1986) 161 CLR 513, 518.

92 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].

- The appellant and the deceased started living together in 1999 at Sooning Street, then moved to the Quest Apartments and Breakwater Villas in around 2002. From 2002, they lived together at Metro Quays until they moved to Airlie Beach in February 2012. They moved back to Metro Quays when the deceased became ill in late February 2012 and they both became signatories on a 12 month lease for a larger three bedroom unit at the same complex which commenced on 23 June 2012. There were periods, however, when they both resided away caring for their mothers. The deceased resided in Toowoomba from May 2009 until November 2009 and the appellant stayed at his mother's flat before moving back to the Metro Quays unit in March 2010. He stayed at his mother's unit on occasions.

- The appellant used both his mother's address and the Metro Quays unit address on documents and for vehicle and taxi licences and for his application for Australian citizenship. Some significant documents were not referred to by the primary judge, particularly the patient admission forms and discharge summaries from both the Townsville and Mater Hospitals in 2011 and 2012 as well as an ASIC search and various tax invoices from hotels.

- The appellant's evidence as to his cohabitation with the deceased was supported by the evidence of a number of witnesses including Colleen Weber, Lynette Parkinson, Mark Gannon, Hanne Secher, Adrian Hepi, Richard Charles Taylor, Errol Bartkowski, Peter Perkov and Marion Hanslow.

The length of the relationship

[101] The appellant argues that there was no dispute that the appellant and the deceased had a close and intimate relationship from 1999 until the date of her death some 13 years later.

Whether or not a sexual relationship existed

[102] There was no dispute between the parties that a sexual relationship existed for the period of the relationship.

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

[103] The appellant argues that the learned trial judge found that the couple kept their financial arrangements strictly separate and ignored evidence that the deceased was in charge of the money and there would be a weekly reconciliation between the appellant and the deceased. It is also argued that the deceased and the appellant led a full social life and ate out often and the usual arrangement was that the appellant paid for the costs of dining and socialising. The evidence also indicated that the appellant paid for weekends away and annual holidays taken together. The appellant also purchased a VW car from his personal injuries payout and he paid for all car costs and transportation. It is argued, therefore, that there was financial interdependence.

Ownership, use and acquisition of property

[104] The appellant argues that the primary judge found that the deceased and the appellant were never co-owners of property which was contrary to the appellant's evidence that the arrangement between him and the deceased was that the Sooning Street unit and the Metro Quays unit were held in her name on behalf of both her and the appellant.

It was also argued that the primary judge should not have found that it was significant that after the appellant's financial problems were resolved, he made no payments towards the mortgage of the Metro Quays unit.

[105] It is argued that the primary judge erred in failing to have regard to the following matters, namely:

- there was no dispute that the appellant carried out the renovations at the Sooning Street unit;
- there was evidence by the appellant of statements made to him by the deceased in relation to the property arrangements which were an exception to the hearsay rule, as they were statements made by the deceased against her proprietary interests in relation to the ownership of the Sooning Street and Metro Quays units; and
- the appellant's evidence around the ownership of the units was corroborated by the unchallenged evidence of Hanne Secher and Colleen Weber.

[106] In any event, it is argued that the degree of financial interdependence and the manner in which they decided to hold property does not necessarily indicate whether they were living together as a couple on a genuine domestic basis because there does not have to be an intermingling of financial affairs before there can be a de facto partnership.

[107] The appellant argues that caution needed to be applied in weighing factors associated with financial interests and property holdings and that the primary judge erred in attributing too great a role to financial and property matters.

Degree of mutual commitment to a shared life including the care and support of each other and the performance of household tasks

[108] The appellant argues that the primary judge erred in finding that the appellant and the deceased did not live together as a household at Metro Quays and that the weight of evidence supported a finding that they shared a life and performed household tasks together with the requisite degree of mutual commitment. Their level of commitment as a couple is evidenced by the fact that he held the deceased's hand as she died and they faced the deceased's battle with cancer together. They also moved together to Airlie Beach and took out a 12 month lease on a three bedroom apartment.

The reputation and public aspects of the relationship

[109] The appellant argues that the deceased had relocated many years previously to work in north Queensland and that her family lived in Toowoomba. The life she lived in Townsville was therefore quite distinct from the life she had with her family.

[110] The appellant's clear evidence was that he and the deceased would go on holidays together, attend social functions and entertain friends together. The appellant argues that there was clear evidence of the public aspects of the relationship which were not taken into account.

The respondent's argument on the s 32DA criteria

The role of financial and property matters

[111] The respondent submitted that the primary judge had earlier undertaken a detailed analysis of the appellant's evidence relevant to this issue and, in particular, the fact

that the deceased did not apply any of her lump sum superannuation to the appellant's substantial credit card debt and was careful and frugal with her money. It was argued that the conclusion of the primary judge was consistent with the evidence and contrary to the appellant's submission and that the primary judge did refer to the weekly reconciliation between the deceased and the appellant but the appellant failed to produce any documents to substantiate that claim.[93]

Issues of co-ownership, financial support and interdependence

[112] The respondent argued that the challenged finding of the primary judge is that when the appellant received some funds after the resolution of his financial difficulties, he made no payment towards the mortgage or utilities at Metro Quays despite his evidence that it was a joint property. His evidence was that there was an arrangement between him and the deceased that because of his financial circumstances, the Sooning Street property and the Metro Quays apartment were to be registered in the deceased's name only. The primary judge considered that because no such payments were made, he rejected his contention that it was a joint property.[94]

[113] The respondent argued that the evidence which was said to constitute admissions by the deceased against her proprietary interests were vague and assumed the appellant's credit worthiness.

Time spent with the deceased

[114] In this regard, the respondent argued that the appellant's argument overlooks the unchallenged finding by the primary judge that he considered it difficult to be sure of the reliability of the appellant's evidence because there was little documentary evidence to support it and no tax returns for the financial years from 2009 to 2012.[95] Furthermore, the appellant admitted that the estimate of time he spent caring for his mother at 39 hours a week was accurate as at January 2009. It was also argued that the appellant's claim that he reduced his working hours after the deceased was diagnosed with cancer in late 2010 is difficult to reconcile with his evidence that after the deceased was diagnosed as being terminally ill he stayed in Airlie Beach to work and the deceased travelled by bus to Townsville for chemotherapy. It was argued that the appellant's workload was another aspect of his case which he should have been able to easily prove.

The move to Airlie Beach in February 2012

[115] The respondent argued that the appellant's submission that the primary judge erred in concluding that the move to Airlie Beach in early 2012 was a holiday rather than a relocation is not a substantial issue. The respondent argues that whilst the appellant stated it was a decision to relocate and not a holiday, nothing turns on the description of the trip as a holiday and in any event the appellant did not produce any receipts or bank account records for the expenses he said he paid for in support of the deceased.

The lease of the three bedroom apartment

[116] The respondent argued that the finding by the primary judge that the lease of the apartment was taken out jointly so that the appellant could better care for the deceased

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93 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [18].
94 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [43].
95 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [22].

in the latter stages of her illness was more favourable to the appellant, as his own evidence was that it was the deceased's decision because she wanted more space.

Did the primary judge err in his application of the factors required to satisfy s 32DA of the *Acts Interpretation Act*?

[117] I agree with Counsel for the appellant that the primary judge made the following findings:

- The appellant and the deceased had a close and intimate relationship from about 1999 until the time of her death on 6 July 2012.[96]
- The appellant was very fond of the deceased and loved her and they were a close and intimate couple.[97]
- The appellant and the deceased lived together at Sooning Street from 1999 and the appellant carried out renovations and improvements to that property.[98]
- The appellant's clothes and toiletries were evident at the Metro Quays unit where the deceased resided at the time of her death.[99]
- The appellant spent evenings at Metro Quays during the last two years before the deceased's death.[100]
- The appellant cared for the deceased during the latter years of her life.[101]
- The appellant and the deceased jointly leased a three bedroom unit at Metro Quays two weeks before her death.[102]
- The appellant and the deceased presented themselves as a couple to outsiders on social occasions.[103]

[118] The appellant argued that despite making those findings, the primary judge considered that the failure by the appellant and the deceased to purchase property in joint names and conduct joint bank accounts meant that a finding could not be made that the couple had lived together on a genuine domestic basis. The appellant argued that, despite positive findings on at least six of the eight possible indicia in s 32DA(2), the primary judge's decision reveals that an unreasonably excessive weight was placed on financial indicators in the definition. The appellant argued that the definition expressly states that no criterion and no finding on any criterion is to be regarded as essential to a positive finding.

[119] There is no doubt that the primary judge placed significant emphasis on the financial and property aspects of the relationship. It would also seem to me that in his ultimate analysis, the primary judge considered that the evidence about their long relationship, their mutual commitment to each other and the social and reputation aspects of their relationship was not as compelling as the financial and property evidence.

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96 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [11].
97 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [37].
98 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
99 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [38].
100 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
101 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
102 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [41].
103 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [37].

[120] In my view, the primary judge gave no real explanation as to why this evidence on how the deceased and the appellant presented as a couple socially for more than a decade was not important. Neither did he really address why the reputational and other public aspects of the relationship was not considered to be significant when, as Williams JA said in *PY v CY*,[104] the issue as to "how the couple presents to the public, will be the most decisive consideration". I consider that the evidence of how the deceased and the appellant presented socially in this case was significant, particularly after she became ill. It is clear that the appellant made a very real effort to take care of the deceased after her diagnosis in late 2010. On any account, that was a very difficult period for her and she was clearly quite unwell at times in the last 18 months of her life. The fact that the appellant made a commitment to support her during that extended period of time, in my view, speaks volumes in terms of his actual level of commitment to her.

[121] Furthermore, as all of the criteria are not required to be present before a finding can be made that a couple are living together on a genuine domestic basis, there was no necessity for there to be any intermingling of finances and property. There are of course many de facto relationships where there is never any intermingling of finances or property.[105] Significantly, when the deceased and the appellant had indeed lived together as a couple in 1999 at Sooning Street, they did not intermingle their finances or their property interests to any significant degree. There was a good reason to keep their property interests largely separate at the commencement of their relationship given the appellant's outstanding financial problems.

[122] In any event, the primary judge ignored the fact that there was evidence that the appellant paid for their frequent weekends away and their socialising. Given the clear evidence that the deceased was careful with her money,[106] I can see no basis for the primary judge's view that when the deceased received her superannuation and disability funds she would have paid out the appellant's credit card debts. She clearly had no real idea as to how long she would actually live and what funds she would require. I am also concerned that there seems to be a conclusion by the primary judge that a de facto partner would necessarily pay off their partner's debts and that a failure to do so would be fatal to a finding that they were a de facto couple who were living together on a genuine domestic basis.

[123] It is clear that the criteria in s 32DA are all to be weighed up and analysed together with other factors or circumstances the judge considers relevant. It is also clear that one criterion is not to be considered more significant than any other. Neither is it necessary for all the criteria to be present in order for a declaration to be made. It is clear that the question as to whether two people are living together as a couple on a genuine domestic basis is to be determined by circumstances which include but are not limited to those listed in s 32DA.

[124] I am satisfied that the reasons given by the primary judge do reveal an overemphasis on financial and property matters and a discounting of the other indicia which were clearly present.

[125] I consider that has been an error in the application of the indicia set out in s 32DA of the *Acts Interpretation Act*.

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104 [2005] QCA 247, [31].

105 See *PY v CY* [2005] QCA 247.

106 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [19].

[126] I turn now to a consideration of the Application by the respondent to Adduce New Evidence and the Notice of Contention.

The Application for Leave to Adduce New Evidence and the Notice of Contention

[127] The respondent seeks leave to adduce new evidence on the basis that the evidence supports the findings of the primary judge.

[128] Counsel for the respondent conceded at the commencement of the hearing of the appeal that even if the application to adduce further evidence were successful, the proper course would be for the appellant to be cross-examined in relation to the new evidence. As this would necessarily mean a new trial, Counsel for the respondent conceded that the appropriate course was that a consideration of that application should be deferred until after the determination of the appeal proper.

[129] That further evidence sought to be adduced is contained in the affidavit of Esetia Jane Cox.[107] The appellant had obtained Letters of Administration on Intestacy on 14 August 2012 and managed the estate funds for four months until orders were made in the Supreme Court at Townsville on 13 December 2012 restraining him from dealing with the deceased's property including her real property. The evidence refers to the appellant's dealing with the estate funds prior to the trial and after those orders were made restraining him from dealing with estate property. The evidence also relates to the appellant's conduct in concealing the true extent of the estate prior to the trial. Leave is also sought to adduce evidence as to the appellant's admissions which were given in the course of contempt proceedings brought by the respondent. Leave is also sought to adduce evidence of a loan application which was signed by the deceased in April 2009 which records her marital status as single.

[130] The principles relevant to the exercise of the discretion are well known and were summarised in *Clarke v Japan Machines (Australia) Pty Ltd*.[108] The Court held that three conditions must be fulfilled. First, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that it would have an important influence on the trial although not necessarily decisive; and third, the evidence must be credible.

[131] The respondent argues that the appellant was required pursuant to an order dated 31 January 2013 to file an account of the extent of the estate and his dealings with it. On 14 February 2013, however, he swore an affidavit which did not account for an amount of $90,332.92. The respondent argues that they have diligently pursued a full accounting by the appellant which was not forthcoming, and in addition to that failure the appellant falsely represented how those funds were utilised. He has also failed to account at all for some interest payments on the monies received form the rental of the unit at Metro Quays.

[132] The respondent relies on the decision of *Wiltshire v Amos*[109] to argue that the test for further admission of evidence on appeal is not as onerous when a party has failed to comply with an order for discovery. In this regard, the respondent has also discovered, since the trial, a copy of a document dated 6 April 2009 in which the deceased stated that her marital status was single.

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107 Index to Supplementary Record, 1-237.
108 [1984] 1 Qd R 404, 408.
109 [2010] QCA 294, [47]-[48].

[133] The respondent also argues that the evidence is credible, as it is based on bank account records and admissions made in the contempt proceedings. Given that the evidence is credible, it is argued that it would probably have had an important influence on the case. The respondent also submits that the fact that the appellant secretly kept and applied estate funds to his own use gives rise to an inference that he did not believe in the merits of his own case. That evidence, it is argued, would also have raised issues in relation to the appellant's credit which would have been tested in the trial.

[134] I do not consider, however, that the criteria for the admission of new evidence have been satisfied. In his reasons delivered on 23 June 2014, the primary judge referred to the outstanding issue of the application for an order that the appellant file an account of his administration of the estate and indicated that "This aspect of the originating application was, by agreement, not argued at trial but left for a consideration after I had delivered reasons and made orders in respect of the other claims."[110]

[135] It would seem to me, therefore, that a decision was made by Counsel for the respondent that the application for an account would not be pursued at that point in time. Furthermore, I am not satisfied that the respondent did use reasonable diligence to obtain evidence that was available prior to the trial. It would seem that no application for disclosure was made and the subpoenas that would have been able to be issued to obtain this evidence were not issued. The respondent did, however, issue subpoenas to other entities such as the Department of Immigration and Department of Transport. In particular, it would seem that during the trial the primary judge referred to the fact that the respondent could have sought further information pursuant to subpoenas or orders of the court. In particular, Counsel for the appellant referred to the following comment from the primary judge:

> "…I don't see that it's been demonstrated that I should draw any inference in circumstances where there wasn't a timely request for disclosure and the matter was pressed and not – and not dealt with by prosecuting the application for disclosure..."[111]

[136] I am not satisfied, therefore, that there has in fact been reasonable diligence and that the documents were able to be obtained prior to the trial. Furthermore, Counsel for the appellant argued that it had never been disputed that the appellant owes money to the estate:

> "13. In an affidavit sworn 7 June 2014, the Appellant deposed that $90,332.92 had been spent prior to the restraint. It was disclosed by the Appellant in an estate account provided on 3 November 2014 that $25,000.00 of the above amount was not spent until after the date of the restraint. On 6 November 2014, the Respondent brought separate contempt proceedings against the Appellant in the Supreme Court at Cairns. The Appellant has admitted utilising monies with the intention of repaying them back. The Respondent's contentions in relation to the Appellant's affidavits dated 14 February 2013 and 7 June 2013 are in dispute in the contempt proceedings. The same comments apply in relation to the orders dated 31 January 2013. In this regard, the Appellant's said affidavit dated 14 February 2013 was in the form of an

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110 *Burton v Spencer*, unreported, North J, SC No 820 of 2012, 23 June 2014, [47].

111 ARB, 137.

> estate account that contained an error as it did not include the abovementioned amount of $90,332.92. This was not the mistake of the Respondent but an obvious error in the preparation of the account. At all times throughout the preparation of the various estate accounts, the Appellant made every effort to provide relevant documents and instructions promptly to his solicitors. Justice Henry has reserved his decision in relation to the separate contempt proceedings."[112] (citations omitted)

[137] In my view, the evidence which came to light after the conclusion of the trial would not have had any impact on the respondent's case. In particular, the respondent significantly contested the appellant's credit at trial and the only potential use that could have been made of the use of the funds would have also gone to his credit. This is clearly not a case which rests on the credit of the appellant, as it is clear that the learned primary judge did not fully accept the evidence of the appellant. The real issue in this case is whether the evidence which supported the appellant's evidence was substantiated by the evidence of other witnesses or corroborated in some way by other documentation. Accordingly, I am not satisfied that the criteria had been met and I would refuse the application for leave to adduce further evidence.

[138] It is clear, therefore, that the issues raised in the notice of contention rely on the admission of further evidence on the appeal. As the application has failed, so too should the grounds set out in the notice of contention.

Conclusion

[139] I consider that the appellant has established that the primary judge failed to come to terms with the evidence and has also established that there has been an error in the application of the indicia set out in s 32DA of the *Acts Interpretation Act*. The appeal should therefore be allowed. I consider that the judgment given and the declarations made on 23 June 2014 should be set aside. There should be a new trial, in my view, given the significant evidence which was not evaluated. The trial judge should not be called on to re-hear the matter; the difficulties of his having to consider the evidence afresh are obvious. This is clearly a very unsatisfactory result given the elapse of time since the death of the deceased in July 2012 and the significant costs which have now clearly been expended on this appeal. The interests of justice require that any new trial be given an expedited hearing.

Orders

[140] I would make the following orders:

1. The appeal should be allowed.
2. The judgment and declarations made on 23 June 2014 should be set aside.
3. The matter should be remitted to the trial division for determination by a different judge.
4. The application for leave to adduce further evidence and notice of contention should be refused.
5. The parties have leave to file any submissions on costs within 14 days of the date of delivery of the judgment.

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112 Appellant's Outline of Submissions on Application to Adduce Further Evidence, 3.