SUPREME COURT OF QUEENSLAND

CITATION:	*SPD v DRH* [2009] QCA 125
PARTIES:	**SPD** (applicant/respondent) v **DRH** (respondent/appellant)
FILE NO/S:	Appeal No 11639 of 2008 SC No 3514 of 2007
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	15 May 2009
DELIVERED AT:	Brisbane
HEARING DATE:	8 May 2009
JUDGES:	Keane, Fraser and Chesterman JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed** **2. The parties may make written submissions to the Court as to the costs of the appeal in accordance with Practice Direction No 1 of 2005**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – SEPARATION AGREEMENTS – where undisputed facts demonstrate appellant financially dominated respondent – where appellant challenged findings of primary judge that failed to give effect to plainly unfair agreements between parties – whether primary judge erred in the exercise of discretion to make property adjustment orders APPEAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH DISCRETION OF COURT BELOW – IN GENERAL – INJUSTICE – PARTICULAR CASES – REFUSAL OF ADJOURNMENT – where primary judge refused application for adjournment to obtain further valuation of real property – where further valuation sought to impugn value asserted by appellant herself – whether refusal to grant application unjust

Property Law Act 1974 (Qld), s 264, s 265, s 266, s 272, s 274, s 277

SPD v DRH [2008] QSC 254, affirmed
The Beach Retreat P/L & Anor v Mooloolaba Marina Ltd & Anor [2008] QCA 224, cited

COUNSEL: The appellant appeared on her own behalf
P W Hackett for the respondent

SOLICITORS: The appellant appeared on her own behalf
Evans & Company Family Lawyers for the respondent

[1] **KEANE JA:** The appellant ("Ms DRH") and the respondent ("Mr SPD") lived together in a de facto relationship within the meaning of Pt 19 of the *Property Law Act* 1974 (Qld) ("the Act"). They were together from no later than August 1992 until at least July 2006. After the relationship ended, Mr SPD commenced proceedings seeking a property adjustment order under Pt 19 of the Act. The focus of Mr SPD's claim was upon the house in which the parties had lived during their relationship. The proceedings came on for trial in October 2008. At that time Ms DRH was 50 years old and Mr SPD was 60 years old.

[2] The learned primary judge upheld Mr SPD's claim, ordering that unless Ms DRH paid $260,000 to Mr SPD within 60 days of the judgment, the house should be sold by trustees to be appointed, and the net proceeds of sale should be distributed first by a payment of $260,000 to Mr SPD, and the balance of the proceeds to Ms DRH. His Honour gave liberty to apply. His Honour also ordered that Ms DRH pay Mr SPD's costs on the standard basis from 17 January 2008.

[3] Ms DRH challenges the decision on a number of grounds which can most conveniently be identified and discussed after a summary of the principal findings of the learned primary judge. As will be seen, many of his Honour's important findings are not contested.

[4] It may be noted here that at trial Ms DRH had the benefit of legal representation. The written submissions advanced on behalf of Ms DRH on the appeal were also prepared by lawyers. Ms DRH appeared on her own behalf at the hearing of her appeal. In the course of these reasons where reference is made to arguments advanced on behalf of Ms DRH, that reference is to arguments formulated by her legal representatives unless otherwise expressly stated.

The findings of the learned primary judge

[5] In May 1993 the parties became registered owners of the house as tenants in common in equal shares. Ms DRH paid $27,000 for her half share, that price reflecting the then value of the house of $140,000 less the mortgage debt of $86,000.[1] There is no challenge to this finding.

[6] In June 1993 the parties executed a deed ("the 1993 deed") which recited that the parties were living together in a de facto relationship and were registered proprietors of the house, that Ms DRH had paid certain of Mr SPD's debts, and that Ms DRH

---

1 *SPD v DRH* [2008] QSC 254 at [9].

had contributed in certain ways towards the improvement of the house and the joint finances of the parties. The operative provision of the 1993 deed was as follows:

> "In the event that the Parties cease to cohabit in a *de facto* relationship, then the Land will be sold and all assets held by the Parties jointly shall be liquidated, and NINETY PER CENT (90%) of the clear equity in the Land and in all such joint assets shall be paid to [Ms DRH]."

[7] On Ms DRH's behalf it was argued that the 1993 deed reflected her "overwhelming contribution to the assets" of the relationship.[2] The learned primary judge found that Mr SPD executed the 1993 deed on the basis that Ms DRH told him that she came to the relationship with $125,000 from the property settlement with her former husband. His Honour found that Ms DRH received from her former husband and brought to the de facto relationship with Mr SPD no more than $85,000.[3] The learned primary judge went on to conclude that the principal relevance of the 1993 deed to the issues before him was that it showed "the extent to which [Ms DRH] was already dominating [Mr SPD]".[4]

[8] In oral argument on the appeal, Ms DRH sought to challenge the finding that she brought no more than $85,000 to the relationship. I will discuss her contention in this regard in due course.

[9] Ms DRH asserted at trial that the de facto relationship between the parties had ceased in 2003. The learned primary judge accepted Mr SPD's evidence that the relationship subsisted until at least July 2006. This finding was significant in relation to the resolution of the issues in the case concerning the effect of agreements made between the parties in relation to their entitlements as against each other. His Honour's finding on this point is not disputed on the appeal to this Court.

[10] His Honour formed a distinctly adverse view of Ms DRH's honesty and credibility. His Honour also made findings the effect of which were that Ms DRH had dishonestly advantaged herself financially at Mr SPD's expense during the course of their relationship. Importantly in this regard, his Honour found that on 22 March 2004 Ms DRH misappropriated $50,000 to her own use without Mr SPD's knowledge from an interest bearing deposit which was in their joint names. His Honour found that Ms DRH also withdrew further amounts from their joint account without Mr SPD's knowledge between 27 May 2005 and 4 December 2006. Taking into account moneys paid into their joint account, his Honour concluded that "on the most favourable view for [Ms DRH], in net terms she misappropriated at least $70,000 from their joint funds, and for the most part, still had the proceeds of that when they separated."[5] Once again, Ms DRH does not seek to challenge these findings on the appeal to this Court.

[11] During the period of the relationship, Mr SPD's wages from his occupation as a carpenter were paid into a joint account, and Mr SPD thought Ms DRH's salary as a sales representative was also paid into the joint account. After Mr SPD commenced proceedings, he discovered that, in fact, all of Ms DRH's income was paid into an account in her own name.[6]

---

2 [2008] QSC 254 at [13].
3 [2008] QSC 254 at [20].
4 [2008] QSC 254 at [53].
5 [2008] QSC 254 at [42].
6 [2008] QSC 254 at [22].

[12] Over the period of the relationship, Mr SPD made much greater financial contributions to the living expenses of the parties. The details are set out in the reasons of the learned primary judge in the following table:[7]

"

YEAR	APPLICANT	RESPONDENT
1992	$26,531	Unknown
1993	$30,251	Unknown
1994	$33,197	$12,695
1995	$25,334	$15,228
1996	$22,209	$18,552
1997	$23,474	$18,436
1998	$46,407	$18,841
1999	$30,310	$20,601
2000	$34,788	$21,915
2001	$32,959	$12,376
2002	$36,785	$12,432
2003	$44,933	$16,650
2004	$55,473	$19,015
2005	$75,768	$17,699
2006	$63,992	$19,133

"

[13] Ms DRH managed all the bank accounts and cash and gave Mr SPD $50.00 per week for "pocket money".

[14] Once again, there is no challenge to these findings. On the hearing of the appeal, Ms DRH sought to argue that the learned primary judge had failed to appreciate that Mr SPD had bank accounts of his own, but this argument did not suggest that his Honour erred in his central finding that Mr SPD's wages were paid into the joint account. This finding is significant in relation to Ms DRH's contention in this Court that the learned primary judge failed properly to assess the effect of the parties' differing contributions to the relationship upon the resolution of a just and equitable adjustment of their property interests. It is sufficient at this point to note that Mr SPD's financial contribution was much more significant than Ms DRH's.

[15] The learned primary judge found that the parties shared the household duties. Each did work around the house, but Ms DRH's "overall … contribution was greater."[8]

[16] In June 2006 Ms DRH asked Mr SPD to transfer to her his interest in the house. The transfer was prepared by Ms DRH's solicitors. The transfer document recited that the parties agreed that the house "should be" and remain her property "solely". It provided that Mr SPD would transfer his interest to Ms DRH for "no consideration".

[17] It may be noted here that Mr SPD did not execute, and evidently was not asked by Ms DRH to consider executing, any document agreeing that he would not make an application of the kind contemplated by Pt 19 of the Act in the event of the termination of the de facto relationship between him and Ms DRH.

[18] The learned primary judge found that Mr SPD signed the transfer on the basis that he believed that their relationship (which Ms DRH was to assert in these

---

7 [2008] QSC 254 at [24].

8 [2008] QSC 254 at [29].

proceedings had come to an end in 2003) was still on foot and he wished it to continue.[9] Once again, there is no challenge to this finding.

[19] After Mr SPD commenced proceedings under Pt 19 of the Act, the parties met with a mediator from an organisation called "Relationships Australia". Mr SPD, for his part, agreed to this meeting without the benefit of legal advice. At this mediation, the parties reached an agreement whereby Ms DRH agreed to pay Mr SPD $5,500. The agreement contained the following terms:

> "Agreements
>
> 1 [The parties] willingly agree after careful consideration and exploration of the facts that by way of full and final property settlement they will split the asset pool approximated [sic] ($20,000)
>
> 27.5 : 72.5 the sum of $5,500 being transferred to [Mr SPD] from [Ms DRH] via Suncorp bank transfer within 24 hrs of today's date
>
> 2 [The parties] willingly agree that neither party will seek further legal action against the other for any purpose."

[20] The document in which these "agreements" were recorded included some notes which described the "asset pool" as having a value of $20,000. It appears that the parties proceeded to make the "agreements" on the footing that the house was the only asset in the pool and that it had a value of only $20,000. The amount which Ms DRH agreed to pay Mr SPD was 27.5 per cent of that value. The learned primary judge said in this regard:[10]

> "What is clear is that the parties did not include all of the relevant assets within this pool, and in particular the substantial funds which [Ms DRH] still held on bank deposit. According to her own affidavit, filed a few weeks after this agreement, she had assets worth, in total, $435,400, including the house to which she attributed $330,000 and the 'balance of my bank accounts', to which she attributed $53,000. In addition each party had superannuation entitlements."

[21] Prior to trial each of the parties filed statements of their financial circumstances. According to Ms DRH's statement, the house had a value of $475,000. That value was common ground between the parties. It was the basis on which the learned primary judge proceeded to identify and value the property, resources and liabilities of the parties as a step in the determination of what order adjusting the interests of the parties would be just and equitable.[11]

[22] At the beginning of the trial, Ms DRH's legal representative sought an adjournment of the trial to seek further evidence to impugn the house valuation of $475,000. This was, of course, the valuation which Ms DRH herself had asserted in her financial statement. The learned primary judge refused that application on the basis that Ms DRH had taken no steps to seek such further evidence the week before the commencement of the trial. It is now said that the learned primary judge erred in refusing Ms DRH's application for the adjournment.

---

9 [2008] QSC 254 at [30] – [35].
10 [2008] QSC 254 at [44].
11 [2008] QSC 254 at [56].

[23] It is also said by Ms DRH that the learned primary judge erred in failing to conclude that the effect of the 1993 deed, the agreement for the 2006 transfer and the 2007 mediation agreement was that the court should have ordered an apportionment of the asset pool on a 90:10 basis with the house excluded, or a 72.5:27.5 split of the pool with the house included. This argument is different from that advanced to the learned primary judge, which was to the effect that the effect of these agreements was to preclude the making of any order in favour of Mr SPD which might detract from her entitlement as against Mr SPD of the full beneficial enjoyment of the house.

[24] As I have already mentioned, Ms DRH also argues that the learned primary judge failed properly to assess the contributions of the parties to their relationship in the course of arriving at a just and equitable order.

[25] It is convenient now to turn to a discussion of Ms DRH's arguments.

The application for the adjournment

[26] The learned primary judge was obliged to exercise a judicial discretion to determine whether to grant Ms DRH's application for the adjournment. The overriding consideration bearing upon the exercise of that discretion is the need to ensure that justice is done between the parties. That having been said, however, a party may not insist upon an adjournment where to do so overreaches the bounds of fairness as between parties to litigation.[12]

[27] The situation, as it appeared to the learned primary judge, was that Ms DRH was seeking to adjourn the hearing to seek further evidence to pursue a possibility of impugning the value she had herself propounded in respect of the house. Mr SPD was living in rented accommodation; his circumstances were such that he obviously was looking to the resolution of the litigation to return to him some of the financial substance which he had established over his working life. Ms DRH's legal representation did not contend that further evidence would be likely to have any particular effect on that value. On the material put before him by Ms DRH, his Honour could not even be satisfied that any difference in Ms DRH's final value of the house would be greater than the costs thrown away by the adjournment. Accordingly, the learned primary judge was not in a position to form the view that any difference in value which might emerge could be significant to the outcome of the case. And, importantly, there was no satisfactory explanation for Ms DRH's delay.

[28] In these circumstances, the learned primary judge was entitled to regard the application as a piece of overreaching on the part of Ms DRH and to reject it as such.

[29] In this Court it was argued on Ms DRH's behalf that the refusal of the adjournment meant that his Honour was denied evidence necessary to enable him to come to a view of the expenses of sale of the house and so its net value. But this argument was not advanced to his Honour; and it was always open to the parties to adduce evidence of the costs of sale. Neither side suggested to his Honour that the absence of precise evidence on the point was an obstacle to his Honour coming to a sound conclusion in this regard. In my opinion there is no substance in this complaint, and, in any event, this Court should not entertain this point for the first time on appeal.

---

12 *The Beach Retreat P/L & Anor v Mooloolaba Marina Ltd & Anor* [2008] QCA 224 at [40] – [49].

[30] For these reasons, the first ground of challenge to the decision on appeal should be rejected.

The effect of the agreements

[31] Section 274 of the Act provides that, subject to some presently immaterial qualifications, a court to which an application is made under Pt 19 of the Act must not make a property adjustment order which is inconsistent with the provisions on financial matters contained in a "recognised agreement" between the parties. At trial, Ms DRH initially sought to argue that one or more of the agreements of 1993, 2006 and 2009 were recognised agreements for the purposes of s 274 of the Act. Ultimately that view was not pressed at trial. It is useful, however, to refer to the provisions of the Act which deal with recognised agreements in order to understand the arguments ultimately pressed by Ms DRH.

[32] The expression "recognised agreement" is defined in s 266 of the Act as follows:

> "**Meaning of *recognised agreement***
>
> (1) A ***recognised agreement*** of de facto partners is a cohabitation or separation agreement of the de facto partners that–
>
> (a) is a written agreement; and
>
> (b) is signed by the de facto partners and witnessed by a justice of the peace (qualified) or solicitor; and
>
> (c) contains a statement of all significant property, financial resources and liabilities of each de facto partner when the de facto partner signs the agreement.
>
> (2) Whether all significant property, financial resources and liabilities of a de facto partner are stated depends on whether the value of a property, financial resource or liability of the de facto partner that is not stated is significant given the total value of the de facto partner's stated property, financial resources and liabilities."

[33] Section 264(1) of the Act defines the term "cohabitation agreement":

> "**Meaning of *cohabitation agreement***
>
> (1) A ***cohabitation agreement*** is an agreement–
>
> (a) made by de facto partners–
>
> (i) in contemplation of starting their de facto relationship; or
>
> (ii) during their de facto relationship; and
>
> (b) dealing with all or some of the de facto partners' financial matters."

[34] Section 265(1) of the Act defines the expression "separation agreement":

> "**Meaning of *separation agreement***
>
> (1) A ***separation agreement*** is an agreement–
>
> (a) made by de facto partners–
>
> (i) in contemplation of ending their de facto relationship; or
>
> (ii) after their de facto relationship has ended; and
>
> (b) dealing with all or some of the de facto partners' financial matters."

[35] Section 272 makes provision for the effect of cohabitation or separation agreements in the following terms:

> "**Law of contract applies**
> A cohabitation or separation agreement is subject to, and enforceable according to, the law of contract except as otherwise provided by this part."

[36] Section 277 of the Act deals with the effect of cohabitation or separation agreements which are not recognised agreements. It is in the following terms:

> "**Other cohabitation or separation agreements may be considered**
> (1) This section applies if, on an application for a property adjustment order, a court is–
> (a) satisfied there is a cohabitation or separation agreement of the de facto partners; and
> (b) not satisfied the agreement is a recognised agreement.
> (2) The court may make any order it could have made if there were no cohabitation or separation agreement.
> (3) However, in making its order, the court may consider the agreement's provisions on financial matters, in addition to the matters the court is required to consider under division 4, subdivision 2."

[37] The principal argument which Ms DRH advanced at trial was that the court has no power to make an adjustment which involved the house because that would be inconsistent with the effect of the agreements. The learned primary judge rejected this argument. I agree with his Honour's reasons for rejecting this argument. His Honour said:[13]

> "[Ms DRH's] argument cannot be accepted. The effect of any of these agreements is made clear by s 277: the court *may* consider the agreement in deciding the case, but such an agreement need not be considered in every case, and the agreement need not be given effect in deciding whether an otherwise appropriate order should be made. If [Ms DRH's] argument were to be accepted, there would be no difference according to whether or not a separation or cohabitation agreement was a recognised agreement.
>
> Section 272 preserves the operation of the law of contract but it does so 'except as otherwise provided by this part'. In particular, it does so subject to the exercise of the jurisdiction under Part 19 to adjust property interests. One purpose of s 272 is illustrated by the example given at the foot of the section:
>
> > 'The effect of mistake, fraud, duress, undue influence or unconscionability in relation to a cohabitation or separation agreement is decided by the law of contract.'
>
> More generally, s 272 makes it clear that apart from the operation of Part 19, a cohabitation or separation agreement is enforceable or otherwise, according to the law of contract. Not surprisingly, Part 19 allows the Court to alter contractual rights in the course of altering proprietary rights."

---

13 [2008] QSC 254 at [51] – [52].

[38] A variation on the argument that s 277 of the Act precluded the making of the adjustment order sought by Mr SPD as a matter of power was the contention that it indicated that the power to make an adjustment order should not be exercised in this case. The learned primary judge rejected this argument as well:[14]

> "In this case, consistently with s 277(3), I have considered the provisions of each of these agreements. The 1993 deed is relevant, in showing the extent to which [Ms DRH] was already dominating [Mr SPD], because had he known the facts of what property she had or had not brought to their relationship, he could not have considered that it was fair that he would have only ten per cent of their property if their relationship should end, regardless of when the relationship ended or what had happened to their finances in the meantime. At this point in 1993, her contribution to the acquisition and maintenance of the house had been no more than his, she had paid out some small loans and (perhaps by then) paid for the American holiday. The 2006 agreement is relevant because, as already noted, it is more consistent with the relationship being ongoing, than with [Ms DRH's] case that it had ceased in 2003. The 2007 agreement is significant for the fact that it shows that she had not disclosed the large bank deposit which she then held. It is also significant because she paid $5,500 in consequence of that agreement, which must be considered."

[39] It is convenient to note here that, on the appeal, it was argued on Ms DRH's behalf that the learned primary judge fell into error in this paragraph of his reasons in his appreciation of the relevance of the agreements. Ms DRH's argument focuses upon s 277(3) of the Act which provides that "… in making its order, the court may consider the agreement's provisions on financial matters …", and asserts that it was only the provisions of the agreements on "financial matters" that the court may properly take into account for the purposes of s 277. On Ms DRH's behalf it was asserted that his Honour did not consider those "financial provisions" but was distracted by a consideration of irrelevant matters.

[40] This is a most disingenuous argument. It is perfectly clear from the learned primary judge's reasons that the observations under discussion were concerned to explain why his Honour regarded the "provisions on financial matters" contained in the agreements as having little weight in the determination of a just and equitable adjustment of property rights as between the parties.

[41] At trial, an alternative argument was put to the learned primary judge to the effect that by the 2006 and 2007 agreements, Mr SPD represented to Ms DRH that the house would be her property solely and permanently, and that on payment of $5,500 he would not further pursue the claim he had brought against her. In consequence of her reliance on these representations, it was said that Mr SPD was estopped from pursuing his claim. The learned primary judge rejected this argument. His Honour said:[15]

> "The estoppel argument has no merit when the facts are considered. It is said that she altered her position by assuming a responsibility for outgoings, but it is far from clear that thereafter she paid all

---

14 [2008] QSC 254 at [53].

15 [2008] QSC 254 at [55].

> outgoings. In the bank statements for the joint account for the second half of 2006, there are apparent references to the payment [for] electricity and for building and landscaping materials and furnishings for the house. Moreover, because each of the 2006 and 2007 agreements was made by [Mr SPD] in ignorance of [Ms DRH'S] secret appropriation of most of their considerable savings to her own account, it could hardly be thought that she could claim equitable rights on the basis of these transactions by cries of unconscionability."

[42] Once again, I am in respectful agreement with the opinion of the learned primary judge.

[43] In this Court, somewhat different arguments were advanced. First, it was said in the written submissions made on behalf of Ms DRH that the 2006 transfer reflected a clear intention on the part of the parties that Ms DRH should be entitled to the house. It is said that the absence of any reference to the termination of the parties' relationship does not detract from the clarity of the parties' expression of that intention. It was argued that this Court should, pursuant to s 277 of the Act, give effect to that intention by excising the house from the pool of assets subject to adjustment. This argument should be rejected.

[44] It was for the learned primary judge to determine what weight he should give to the context in which the 2006 transfer was executed. It is apparent that, while his Honour made no specific finding to the effect that Mr SPD had been acting under undue influence from Ms DRH in executing the transfer, his Honour was troubled by the disadvantageous effect of this transfer from Mr SPD's viewpoint which was explicable only by Ms DRH's dominant position in the relationship and Mr SPD's desire to preserve it. One can readily understand that, in making the discretionary assessment required by s 277(2) and (3) of the Act, his Honour was not disposed to aid Ms DRH's determined effort to expropriate Mr SPD's equity in the house.

[45] As to the 2007 agreement which was signed under the benevolent auspices of Relationship Australia, it is argued on Ms DRH's behalf that the operative provisions of the agreement reflect an agreement to split the pool of the parties' assets – including the house – 72.5/27.5, and that any order made under Pt 19 of the Act should reflect that intention.

[46] Once again, it must be acknowledged that it is readily understandable that the learned primary judge was not disposed to give any effect at all to an agreement which was so plainly unfair to Mr SPD and the premises of which were so bizarre that the written submissions filed in this Court on Ms DRH's behalf conceded that they were rightly described as "absolute nonsense".

[47] The second ground of Ms DRH's challenge to the decision on appeal is without substance.

Considerations bearing on the exercise of the discretion

[48] Ms DRH complains that the learned primary judge failed to accord appropriate weight to the non-financial contributions of the parties or to their contributions to family welfare. In particular, Ms DRH focuses upon his Honour's observations that "… this was not a case where [Ms DRH] did not work and did everything around the house, thereby significantly improving [Mr SPD's] capacity to earn income",

and that Ms DRH's "contribution to his earning income and in turn to his superannuation, as I have said, was not significant."[16]

[49] Ms DRH attributes to his Honour the view that:

> "a wife (usually) who does not work and therefore does 90% of the household duties and makes 90% of the contributions to family welfare makes a significant contribution and yet a wife who works, but still contributes the vast majority of household and family welfare contributions does not."

That view is plainly erroneous. It would be a grave – and obvious – error if the submission made on Ms DRH's behalf were accurate. But this submission is not accurate.

[50] The learned primary judge found that the parties shared household tasks and that Ms DRH made a greater overall contribution to work around the house.[17] But his Honour went on expressly to find that Ms DRH's contributions were not at a level which required recognition that, overall, their total contributions were not equal.[18] That his Honour took such an approach is hardly surprising given that there were no dependent children of the relationship to be cared for, that both parties were in paid employment, and that Mr SPD's financial contributions vastly outstripped those made by Ms DRH. Moreover, and importantly, Ms DRH had, by her surreptitious misappropriation of joint funds, improved her financial position to the substantial disadvantage of Mr SPD. The learned primary judge would have been understandably reluctant to crown Ms DRH's dishonesty with further success.

[51] Ms DRH also argues in this Court that the learned primary judge erred in failing to take into account the factors relating to the future needs of the parties adverted to in s 297 to s 309 of the Act. In particular, it is now said that the learned primary judge should have taken into account in the exercise of his discretion the circumstances that Ms DRH suffers from back problems and herpes simplex.

[52] Ms DRH did not advance this argument at trial and called no medical evidence to suggest that her working life is likely to be curtailed by any problems with her health. In these circumstances, it is not open to this Court to act upon this argument.

[53] Ms DRH also asserts that an adjustment in her favour should have been made in the exercise of the primary judge's discretion because she has the responsibility of caring for a child. No such concern was raised at trial and no evidence was adduced to show that Ms DRH bears a financial burden in terms of the care of either of her children both of whom are adults and one of whom is married. Once again, these points were not agitated at trial. It is not unjust to hold Ms DRH to the case she advanced at trial in relation to these points.

[54] Accordingly, these contentions should be rejected.

Oral argument

[55] As I have noted, in oral argument on the hearing of the appeal, Ms DRH sought to challenge the learned primary judge's finding that Ms DRH brought no more than

---

16 [2008] QSC 254 at [61] – [63].
17 [2008] QSC 254 at [29].
18 [2008] QSC 254 at [29], [61].

$85,000 to the relationship. Ms DRH argued that her sworn evidence showed that she brought $103,000 to the relationship and that his Honour erred in failing to appreciate that her evidence in this regard was uncontested.

[56] It is quite wrong to say that Ms DRH's evidence on this point was undisputed. Mr SPD's case at trial was that Ms DRH, in fact, brought only $63,000 to the relationship. The learned primary judge was plainly unwilling to accept the evidence of Ms DRH where it was not supported by other evidence. His Honour accepted that Ms DRH received sums of $41,000 and $32,000 from her former husband.[19] His Honour was also prepared to accept that Ms DRH received some further funds from her former husband which she contributed to the relationship. In this regard, his Honour found that Ms DRH paid some of Mr SPD's debts, but that the payment of the debts which were "said to have justified the apportionment in the 1993 deed, were relatively small."[20]

[57] Ms DRH asserts that she deposited funds received by her into two offset accounts. She said that she deposited $50,000 into each of these accounts. There was documentary evidence supporting only the deposit of $32,000 into one of these offset accounts. It is hardly surprising that his Honour was not able to find that there was only one offset account established by Ms DRH from moneys paid to her by her former husband.

[58] It may be that the learned primary judge's reasons do not disclose specific reasons for rejecting each and every sum which Ms DRH says makes up the total of $103,000 received by her from her former husband. It is clear, however, that his Honour was sceptical of her evidence in this regard. In any event, it is sufficient to say that even on the view now advanced by Ms DRH, she brought to the relationship an amount substantially less than the $125,000 which was said to justify the distribution of equity reflected in the 1993 deed.

Conclusions and orders

[59] Ms DRH's attempts to challenge the decision of the learned primary judge are entirely without substance.

[60] The appeal should be dismissed.

[61] As to the costs of the appeal, the parties may make written submissions to the Court in accordance with Practice Direction No 1 of 2005.

[62] **FRASER JA:** I agree with the orders proposed by Keane JA and his Honour's reasons for those orders.

[63] **CHESTERMAN JA:** I agree with the reasons of Keane JA.

---

19 [2008] QSC 254 at [20].

20 [2008] QSC 254 at [13].