

DISTRICT COURT OF QUEENSLAND

CITATION: *Freeman v Montgomery* [2021] QDC 53

PARTIES: **FREEMAN, David**
(Appellant)

v

MONTGOMERY, Maria Jessica
(Respondent)

FILE NO/S: BD3327/19

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: District Court of Queensland at Brisbane

DELIVERED ON: 19 February 2021

DELIVERED AT: Brisbane

HEARING DATE: 8 February 2021

JUDGE: Devereaux SC DCJ

ORDER:

- 1. Paragraphs 56 to 58 of the Amended Statement of Claim filed 9 December 2020 be struck out.**
- 2. Leave to re-plead is refused to the plaintiff.**

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – STRIKING OUT – where an application is made for an order striking out paragraphs 56 to 58 of the Amended Statement of Claim pursuant to r 179(1)(b) of the *Uniform Civil Procedure Rules 1999* – where the paragraphs seek alternative relief – where the claim is listed for trial in less than two months – whether the paragraphs fail to plead material facts in support of a conclusion of law about a joint endeavour – whether the paragraphs require the joinder of a third party.

LEGISLATION: *Uniform Civil Procedure Rules 1999* (Qld), r 62, 149, 179(1)(b)

CASES:	<i>Baumgartner v Baumgartner</i> (1987) 164 CLR 137 <i>Giumelli v Giumelli</i> (1999) 196 CLR 101 <i>John Alexander's Clubs Pty Ltd v White City Tennis Club Limited</i> (2010) 241 CLR 1 <i>Muschinski v Dodds</i> (1985) 160 CLR 583 <i>O'Neill v Robertson-Staton</i> [2015] NSWSC 1949 <i>Riches v Hogben</i> [1985] 2 Qd R 292 <i>West v Mead</i> [2003] NSWSC 161
COUNSEL:	D. Forbes for the applicant S. Cooper QC and D. Chesterman for the respondent
SOLICITORS:	BJM Law for the applicant Bransgroves Lawyers for the respondent

- [1] This is an application for an order striking out certain paragraphs of the Amended Statement of Claim. The Claim was first filed on 16 September 2019. It pleads a case in proprietary estoppel and seeks a declaration that the defendant holds property, referred to as the Black Road property, on trust for the plaintiff, and other relief. A Notice of Intention to Defend was filed on 15 October 2019.
- [2] The plaintiff is the defendant's son. The Black Road property was adjacent to the plaintiff's then-residence at Woodwark. The plaintiff pleads that he was interested in buying the property, and told the defendant about it. The defendant eventually bought the property in March 2017 and lived in it from around March 2017 to April 2019.
- [3] Essentially, the plaintiff pleads that between March 2017 and April 2019, relying on statements the defendant made to the effect that the plaintiff and his son would inherit Black Road, he performed work on the property and gave the defendant money for the payment of rates, electricity bills and insurance. The plaintiff pleads that the defendant left the property in April 2019, in effect inviting him to stay there and maintain and improve it as he wished. But in

July 2019 he received a letter from the defendant's solicitor informing him the defendant intended to sell the property and he was not to enter it.

- [4] The plaintiff seeks the declaration that a trust existed and an order that the defendant transfer the Black Road property to his name. Alternatively, he seeks an order for equitable compensation. The defendant denies making some of the statements, and does not admit others. She denies that the plaintiff paid for electricity, rates or insurance, and disputes that the defendant did the work he claims. The defendant denies the proprietary estoppel, and counterclaims for various relief on the grounds that the plaintiff wrongly entered the property and has trespassed since. The plaintiff filed a Reply and answer on 30 October 2019. Thus, the pleadings closed.
- [5] The plaintiff and defendant assert contradictory accounts of the dealings between them. Other persons mentioned in the original Statement of Claim as having been present at, or taken part in, discussions, were Mr Henry Demes, the plaintiff's father and the defendant's husband, and Ms Aniko Freeman, described as the plaintiff's son's mother.
- [6] Disclosure was completed in January 2020. Thereafter, the plaintiff did not advance the cause. The defendant applied to have the matter listed for trial, the application returnable on 5 November 2020.
- [7] On 4 November 2020, the plaintiff's solicitors advised that the plaintiff would be amending his Statement of Claim. It was submitted that it was premature to set the matter down for trial. Nonetheless, on 5 November 2020, Rafter SC DCJ made orders for the trial to be heard for four days commencing 29 March 2021. His Honour also made orders for the plaintiff to file and serve the Amended Statement of Claim by 26 November 2020, and for other subsequent steps to be taken. On 26 November 2020, the defendant's solicitors received an unsealed copy of the Amended Statement of Claim. The document was not filed until 9 December 2020.

- [8] The Amended Statement of Claim makes a number of significant changes to the Claim. Under the heading “joint development of previous properties”, the plaintiff asserts in dot point 1:

In August 1989, Mr Demes purchased land at Oxenford for \$48,500 which the plaintiff and he developed.

- [9] The plaintiff values his contribution at \$80,000. The land was sold in 2001 for \$261,200. The plaintiff claims an equity in proportion to his contribution (62 per cent) in the sale price. Dot point 2:

In November 2001, the defendant and Mr Demes bought land at Worongary for \$220,000.

- [10] The plaintiff and Mr Demes developed the property and the plaintiff assesses his work value at not less than \$240,000. Some of the work is particularised as done with Mr Demes. Claiming that the proceeds of sale at Oxenford were put to the purchase of Worongary, the plaintiff claims 62 per cent of the purchase price as being his contribution. Adding the value of his work, the plaintiff claims his interest in the property became 81.95 per cent. The property was sold in August 2009 for \$690,000. Dot point three:

In August 2009, the defendant and Mr Demes purchased land at Beechmont for \$660,000.

- [11] As pleaded, the purchase of the Beechmont property was “facilitated by the sale” of the Worongary property (Amended Statement of Claim, paragraph 12). The plaintiff and Mr Demes developed and improved the Beechmont property. The plaintiff claims his work to be valued at \$190,000. Again, some work is particularised as having been done by the plaintiff together with Mr Demes. Dot point 4:

In January 2017, the defendant and Mr Demes sold the Beechmont property for \$675,000.

- [12] The plaintiff claims the defendant’s purchase of the Black Road property in March 2017 was made with the proceeds of sale of the Beechmont property. The plaintiff claims that from 1989 to 2017, the defendant represented to him

that she would bequeath all, or substantially all, of her interests in real estate to the plaintiff; that the representations induced him to contribute to the improvements on the properties; that the contributions caused a detriment to him, and, in the result, the defendant held her interests in the Worongary and Beechmont properties on trust for herself for life, and the plaintiff in remainder (Amended Statement of Claim paragraphs 15 to 18).

- [13] The plaintiff also pleads that the proceeds of the Beechmont property sale were impressed with a trust in his favour to the extent of his equitable interest in that property, and that he thereby made a contribution to the purchase of the Black Road property to the extent of that interest. The defendant does not challenge the amendments to the Statement of Claim described above, on the basis that the new facts pleaded may be relevant to the plaintiff's claim in proprietary estoppel. The defendant applies to strike out paragraph 56 to 58 of the Amended Statement of Claim. They read as follows.

[56] Further or in the alternative, the purchase, development, improvement and maintenance of the Oxenford property, the Worongary property, the Beechmont property and the Black Road property constituted a joint endeavour on the part of the plaintiff, the defendant and Henry Demes to accumulate real estate wealth as a family for the benefit of the defendant during her life and for the benefit of the plaintiff after the defendant's death.

[57] The joint endeavour has failed. Particulars. By a letter from Whitsunday Law dated 14 July 2019 referred to in paragraph 52 above, defendant asked the plaintiff to leave the Black Road property and announce her intention to sell it.

The defendant, by her latest will made 24 April 2019, has excluded the plaintiff from succeeding to the Black Road property. The defendant otherwise denies any obligations to the plaintiff in respect of the Black Road property or her estate in any way.

[58] In the premises, the defendant holds the Black Road property on trust for herself and the plaintiff in proportions representing their respective contributions to the acquisition, improvements and maintenance of the Oxenford property, the Worongary property, the Beechmont property and the Black Road property.

- [14] Under paragraph 58 in the Amended Statement of Claim is a table setting out each of the above mentioned properties, the purchase price as paid by the defendant or Mr Demes, the plaintiff's asserted valuations of his claimed contributions to their development, the sale prices, and his consequent equity. The ultimate claim is that he has 92.10 per cent equity in the Black Road property. The Amended Statement of Claim includes significant changes to the prayer for relief. As clarified by counsel at the hearing of the application, the plaintiff seeks, in the proprietary estoppel claim, a declaration that the defendant holds the Black Road property on trust "for herself for life and the plaintiff in remainder, subject to a right of the plaintiff to occupy the property". The plaintiff also seeks an order that the defendant execute all documents necessary to amend the register to reflect the declaration.
- [15] In the alternative, pursuant to paragraphs 56 to 58, the plaintiff claims a declaration that the defendant holds the Black Road property on trust for herself and the plaintiff in the proportions set out in paragraph 58. Alternatively to all of the above, the plaintiff seeks equitable compensation.
- [16] The defendant submits paragraphs 56 to 58 contain conclusions of law about a joint endeavour, but fail to plead facts in support of the conclusion in breach of Uniform Civil Procedure Rules rule 149, and so should be struck out, pursuant to UCPR rule 179(1)(b).
- [17] The plaintiff submits that the detailed history of purchases and development set out in the Amended Statement of Claim comprises the material facts in proof of the claimed joint endeavour. In my respectful opinion, the history of buying and developing does not supply material facts in support of the meeting of minds alleged in paragraph 56. It is not enough to say a parent bought a property and the plaintiff performed valuable work on it, after which it was

sold for more than the purchase price. The plea that the endeavour failed alludes to the formulation of Deane J in *Muschinski v Dodds* (1985) 160 CLR 583, which was applied in *Baumgartner v Baumgartner* (1987) 164 CLR 137. Counsel for the defendant referred me to *West v Mead* [2003] NSWSC 161, where Campbell J analysed the principles. See also *O'Neill v Robertson-Staton* [2015] NSWSC 1949. In *West v Mead*, Campbell J said at [58]:

Before any particular asset can become subject to a constructive trust in accordance with the Baumgartner principle, one needs to have a joint relationship or endeavour and an asset acquired in the course of and for the purpose of that joint relationship or endeavour.

[18] After referring to *Baumgartner*, Campbell J continued at [59]:

In accordance with this approach, a plaintiff needs to establish that there is indeed a joint endeavour between the parties, in which expenditure is shared for the common benefit. It is also necessary to identify what the scope of that joint endeavour is.

[19] The present case bears some relation to the scenario in *Giumelli v Giumelli* (1999) 196 CLR 101. However, it is instructive that the decision in that case concerned promises made by the parents to the son. See too the decision of McPherson J in *Riches v Hogben* [1985] 2 Qd R 292. For the reasons I have just given, I am satisfied that paragraphs 56 to 58 should be struck out. The plaintiff should not have leave to re-plead for a number of reasons. No draft further amended pleading has been proffered. The plaintiff's argument would not permit of one. There is another matter. The plaintiff has not joined Mr Demes, and has stated, in his solicitor's correspondence, a determination not to do so.

[20] In any case, as the claim is set for trial in less than two months, such further steps would cause the trial to go off. The plaintiff argues it is not necessary for him to join Mr Demes, because he does not pursue Mr Demes for any remedy. In this regard, the plaintiff pleads that Mr Demes has no equity in the Black Road property, as demonstrated by the table in paragraph 58. This is not a

persuasive reason for not joining Mr Demes. The plaintiff's contention depends, of course, on the acceptance of his assessment of the value of his various contributions, presuming a trial judge would accept he performed the work as pleaded.

[21] The plaintiff also refers to paragraph 24(a) of the Amended Statement of Claim as follows:

[24] On around the same day as the second conversation, a third conversation (third conversation) took place at the Beechmont property, during which words to the following effect were said:

(a) Plaintiff: Mum, Dad has agreed to a fifty-fifty split of the sale proceeds of this property [Beechmont property] on the condition that you purchased the Black Road property when it comes up for sale and if it's in budget.

[22] The plaintiff's case is that upon the sale of the Beechmont property, the defendant and Mr Demes parted ways, and so Mr Demes held no interest in the Black Road property. He explains that the value of his contribution to the Black Road property, as set out in paragraph 58, is determined without reference to his equity in the amount Mr Demes took away from the sale of the Beechmont property. But the pleaded failure of the joint endeavour to which Mr Demes was a party did not occur until either 24 April 2019 or 14 July 2019, the defendant having purchased the Black Road property in March 2017.

[23] On its face, the claim is that a joint endeavour to acquire property to which Mr Demes was a party subsisted from 1989 to 2019, but that Mr Demes was left with no equity in the ultimate property. UCPR rule 62 provides that each person whose presence is necessary to enable the court to adjudicate effectually and completely on all matters in dispute in a proceeding must be included as a party to the proceeding. Mr Demes' presence would be necessary to adjudicate effectually and completely on issues raised in the proceeding. As matters stand, there would be no basis on which to dispense

with the requirement that he be a party to the claim raised in the disputed paragraphs. Were the Court to make a declaration affecting his interest in the property of a joint endeavour to which he was said to be a party, he would be entitled to have the order set aside: see *John Alexander's Clubs Pty Ltd v White City Tennis Club Limited* (2010) 241 CLR 1 at [136]. The absence of Mr Demes as a party is another reason to remove paragraphs 56 to 58 of the Amended Statement of Claim.

- [24] The orders will be (1) paragraphs 56 to 58 of the Amended Statement of Claim filed 9 December 2020 be struck out; (2) leave to re-plead is refused to the plaintiff.
- [25] The defendant sought an order re-setting dates for compliance with the orders of 5 November 2020. I will receive brief written submissions from the parties by Wednesday 24 February 2021 on the content of such an order as that sought in paragraph 3 of the draft, and, secondly, as to whether costs should follow the event, which is my present inclination.