SUPREME COURT OF QUEENSLAND

CITATION:	*Catherine F v John F* [2004] QSC 327
PARTIES:	**Catherine F** (plaintiff) **v** **John F** (defendant)
FILE NO/S:	4123 of 2000
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	23 September 2004
DELIVERED AT:	Brisbane
HEARING DATE:	2-4 and 6 August 2004
JUDGE:	Byrne J
ORDER:	**The agreement between the plaintiff and the defendant made on 9 September 1998 ought to be specifically performed and carried into execution.**
CATCHWORDS:	EQUITY – EQUITABLE REMEDIES – SPECIFIC PERFORMANCE – PARTICULAR CONTRACTS – OTHER CONTRACTS - where de facto couple separated – where de facto couple entered agreement to transfer real estate – where plaintiff was to transfer her right, title and interest in three properties to the defendant in return for $120,000 – where the defendant was to arrange for the property transfers and removal of plaintiffs name from mortgage – where two transfers have not been effected and plaintiff is still a mortgagee – where delay of six years between the signing of the agreement and the hearing of this matter– where the plaintiff claims a 50% interest in each of the three properties – where defendant sought specific performance of the agreement – whether specific performance should be decreed – whether a discretionary bar is made out EQUITY – TRUSTS AND TRUSTEES – CLASSIFICATION OF TRUSTS IN GENERAL – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – where couple owned three properties - where unequal contributions to purchase price – where non-financial contributions by both parties - whether a constructive trust exits in relation to each

of the properties.

Baumgartner v Baumgartner (1987) 164 CLR 137
Calverley v Green (1984) 155 CLR 242
Engwirda v Engwirda and Ors [2000] QCA 61
Evenoon Ltd v Jackel & Co Ltd [1982] SLT 83
Giumelli v Giumelli (1999) 196 CLR 101
Gold Coast Waterways Authority v Salmead Pty Ltd [1997] 1 Qd R 346
Kensland Realty Pty Ltd v Whale View Investment Ltd and Tam, Pun and Yip (a firm) [2002] 1 HKLRD 87
Secured Income Real Estate (Australia) Ltd v St Martin's Investments Pty Ltd (1979) 144 CLR 596
Segacious Pty Ltd v Fabrellas [1991] 1 Qd R 471

COUNSEL: P Sweetapple for the plaintiff
Defendant on his own behalf

SOLICITORS: Bernadette Farnell for the plaintiff
Defendant on his own behalf

BYRNE J:

Nature of the Claim

[1] The parties began to live together in April 1982. In August 1983, they purchased a house at Ramsgate, New South Wales, for $85,800. As agreed at the time, they were registered as tenants-in-common in these shares: the plaintiff 2/5^{ths}; the defendant 3/5^{ths}. That apportionment reflected their contributions to the price. Of the $40,000 the parties contributed from personal funds, the plaintiff paid $16,000; the defendant $24,000. The balance of about $46,000 was borrowed on the security of a mortgage granted by both of them over their interests in the land.

[2] Apart from a brief separation in 1986[1], the parties lived at Ramsgate until the plaintiff moved to Nelly Bay, Magnetic Island in late 1992. After a few months attending to things at Ramsgate, the defendant joined her there. The parties had bought the Nelly Bay house intending to live there indefinitely. The $165,000 purchase price was part of a $264,000 additional borrowing on the security of Ramsgate. This time, the parties were registered as proprietors as joint tenants.

[3] In February 1997, the parties went to live at a house at Caboolture. Again, they purchased. Again, they were registered as joint tenants. There was, however, this difference: the defendant paid the entire purchase costs.

[4] The parties separated in January 1998. On 9 September 1998, they signed an agreement ("the Agreement") which, among other things, stipulated for the defendant to pay the plaintiff $120,000 and for her to transfer to him her interests in the Ramsgate, Nelly Bay and Caboolture properties. That day, the $120,000 was paid, and the plaintiff gave the defendant executed transfers of her registered

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1 This separation may have taken place in 1987, see Plaintiff's Affidavit filed 16 February 2004, para 27.

interests. The Caboolture transfer has been registered. Six years on, however, no transfer of her interests in Nelly Bay or Ramsgate has been registered.

[5] The plaintiff's claim is for a declaration that she is beneficially entitled to a half share of all three properties, and for consequential relief, including orders for sale and distribution of the proceeds in which credit is to be given for the $120,000. The claim rests on two contentions: that constructive trusts should be imposed in reliance on the principles discussed in *Baumgartner v Baumgartner*[2]; and that the Agreement is no obstacle to the success of her claim.

[6] By contributing her $16,000 and executing the mortgage that secured the about $46,000 balance of the Ramsgate acquisition costs, the plaintiff bought her 2/5^{ths} legal interest in that property for full value. And the refinancing of the Ramsgate loan, by a new mortgage granted by both parties, supplied the funds to acquire Nelly Bay. So the plaintiff was entitled, legally and beneficially, to at least a 40% interest in both those properties on their acquisition. Accordingly, the constructive trust remedy is called in aid, in effect, to:

- raise the beneficial interest in Ramsgate by 10%;
- extinguish any resulting trust of 10% of her legal interest in Nelly Bay; and
- confer a half share of Caboolture.

Effect of the Agreement

[7] The defendant contends that the Agreement precludes the current claim on the footing that it "was in full and final satisfaction of all claims that the parties had as against each arising out of their relationship".[3]

[8] The Agreement is an odd document. Its form was inspired by a precedent for a compromise concluded on the dissolution of a partnership. It begins by reciting that "the parties have been in partnership in Queensland and own certain property jointly"; that they have children; that they "have never married"; and that they "wish to dissolve their partnership as provided by the *Partnership Act* 1867 and wish to record the details of the agreed dissolution". But the parties were not partners. They had been married, although not to each other. And, by making the Agreement, they were not trying to dissolve any "partnership": rather, they were intent on recording, in a formal way apparently intended to have legally enforceable consequences, terms on which they were agreed for resolving some of the disputes that had attended their separation.

[9] The first question is whether, on the proper construction of the Agreement, the plaintiff released or else promised not to litigate the claim she now propounds.

[10] Clause 1 of the Agreement, headed "Transfer of Real Estate", provides:

> "In consideration of the payment of … $120,000.00 … by John to Catherine on or before the 9th September 1998, Catherine will transfer to John all her right title and interest in the properties at … Nelly Bay … and …Caboolture …and … Ramsgate …

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2 (1987) 164 CLR 137.

3 Paragraph 37 of the Defence.

> John will be responsible for all rates and outgoings relating to the said properties as and from the date of payment of the said sum … including the … registered mortgage over … Ramsgate."

[11] The parties are at one that the Agreement required the defendant to attend to preparation, stamping and lodgement of the transfers for registration. And, despite the choice of words in the second paragraph, it is also common ground that the defendant was obliged to secure the discharge of the plaintiff's liability under the Ramsgate mortgage.

[12] Clause 2 concerns "certain items of furniture in the said properties which are partnership property". The clause expressly anticipates further negotiations "as to the disposal of the furniture". Clause 3 concerns child support payments. Clause 4 relates to arrangements for contact with the children.

[13] By the quaint provision, clause 5:

> "The risk in the … real estate shall remain jointly with John and Catherine until … transfer of the property to their respective parties (sic)."

[14] Clause 6 contains a mutual warranty "that there are no other liens or interest over the … real estate and that the same will not be subject to any charges encumbrances or liens whatsoever as at the date of possession …".

[15] By clause 7:

> "The parties acknowledge that this is intended as an interim agreement to record their intentions and that certain matters remain outstanding between them. The parties agree to use their best endeavours to resolve all outstanding matters as quickly and amicably as possible for their mutual benefit.
>
> The parties further acknowledge that they will obtain their own individual legal advice as to the application of The Family Law Act … on the matters herein."

[16] Clause 10, headed "Costs", obliges the parties to bear equally "the costs of giving effect to the agreement including releasing or transferring any mortgage, bank fees, stamp duty, commissions or other costs".

[17] By clause 12:

> "The parties agree that they will as soon as possible and appropriate do and execute all such further acts deeds assurances authority papers and things whatsoever as may be required to more effectually carry out this agreement."

[18] There is no express promise to release or to forbear to pursue[4] such a claim as is now made. Is such a consequence a matter of necessary implication?[5]

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[4] As to the distinction between these, see *Chitty On Contracts*, 29th ed, (2004) para 17-019.

[19] By clause 1, the plaintiff was to transfer her interests in the three houses to the defendant. In exchange, he was to pay her $120,000 immediately, and to assume responsibility for all rates, outgoings, and mortgage payments in relation to the properties. The evident intent of this deal was that the defendant should become the sole beneficial proprietor and, consistently with the warranty in clause 6, free of any adverse "interests", "encumbrances or liens whatsoever". Leaving open the prospect that the plaintiff might, in years to come, litigate against the defendant a claim to an equitable interest in any of the properties scarcely accords with the apparent objective of the provisions relating to the real estate.

[20] Clause 7 is not opposed to this view of the intended effect of the Agreement. The clause does say that the Agreement is "interim"; but it is that only in the sense that the document was not a comprehensive compromise. "[C]ertain matters remain outstanding", the clause proclaims. The parties were to "use their best endeavours to resolve" them as well. The arrangements for the properties, however, were not provisional. The $120,000 was to be paid that day. The defendant was then to register the three transfers and a release of the mortgage as it affected the plaintiff. Only one stated contingency put the finality of these arrangements at risk: the possibility that enforceability might be affected by "the *Family Law Act* and other relevant legislation".[6]

[21] There are, therefore, sufficient indications that the Agreement was intended by the parties to dispose of any claim by the plaintiff to a beneficial interest in the properties. By necessary implication, the Agreement stipulates, in effect, for the loss of any entitlement to equitable intervention that might otherwise have been available in accordance with authorities in the *Baumgartner* tradition.

Non-performance

[22] Had the defendant seen to the transfers of the plaintiff's registered interests, and secured the plaintiff's release from the Ramsgate mortgage, he would[7] have become entitled[8] to insist that the Agreement precluded the plaintiff from succeeding in her claim to constructive trusts.[9] But he has not lodged the transfers for Nelly Bay or Ramsgate. And she remains a mortgagor of Ramsgate. So he has not performed important contractual duties of his concerning two of the properties, which means that the contingency upon which release of the plaintiff's present claims depends has not yet eventuated.

[23] The defendant, however, contends that he has not performed his contractual responsibilities only because of the plaintiff's refusal to cooperate with him: in particular, by declining to execute the documents concerning the mortgage. He

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5 cf *Evenoon Ltd v Jackel & Co Ltd* [1982] SLT 83, 87; N C Seddon & M P Ellinghaus, *Cheshire & Fifoot's Law of Contract*, 8th Aust ed, (2002) p 187; J W Carter & D J Harland, *Contract Law in Australia*, 4th ed, (2002) p 132.

6 The solicitor who prepared the Agreement inserted this because he disclaimed knowledge of the significance of such legislation. Incidentally, it is not suggested on either side that Part 19 of the *Property Law Act* 1974 applies to the Agreement or otherwise affects any aspect of this litigation.

7 Assuming that the Agreement is an enforceable contract – something discussed later.

8 The Agreement contains no indication, and there is nothing in the circumstances surrounding its execution to suggest, that the plaintiff's right to pursue such a claim as the present was lost upon mere execution of the Agreement rather than upon performance by the defendant of his pertinent obligations under it: see, generally, *Cheshire & Fifoot's Law of Contract*, Supra p 184.

9 Or any other arguably available equitable relief, such as an equitable charge or lien: cf *Giumelli v Giumelli* (1999) 196 CLR 101, 113.

contends, in substance, that, as the plaintiff has prevented his performance, his position should be determined on the assumption that he has satisfied his obligations.

[24] There is a short answer to this contention. However, as facts which bear on it matter to other issues, the curious history of events after the Agreement was executed may as well be canvassed now.

Performance prevented?

[25] Things started out sensibly enough. The day the Agreement was signed and the $120,000 paid, the plaintiff gave the defendant three executed transfer documents – one for each of the properties.[10]

[26] The Caboolture transfer was registered by the end of 1998. In March 1999, the plaintiff paid her share of the stamp duty exigible on that dealing. At that time, she pressed the defendant to propose, in writing, what she called[11] "the options for settling the two other property transfers and the mortgage arrangements on Ramsgate". As he had paid his $120,000, it might have been expected that he would have been anxious to finalize things. Instead, he prevaricated.

[27] In mid-July 1999, the plaintiff's solicitors wrote to the defendant complaining about his delay:

> "Clause 1 of the agreement remains outstanding in several respects namely that you have not effected the transfer of the properties situated at … Nelly Bay … and … at … Ramsgate … your failure … to effect the transfers is causing our client difficulty in relation to her social security entitlements which you are aware are means tested.
>
> Our client further notes that her name is still on the mortgage for" Ramsgate.

[28] The letter claimed that the solicitors had advised the plaintiff "that she has a claim exceeding that detailed in that agreement", and went on to insist that registration of the transfers and the "steps to remove our client from the mortgage" be effected within a month.

[29] The defendant's reply of 23 July began by asserting that the Agreement was "a valid contract entered into in good faith …". His letter was "purely an effort to 'fine tune' that agreement". He indicated that he would set about registering a transfer of the plaintiff's interests in Nelly Bay once he received a recent valuation of the property, and money to pay the plaintiff's share of the stamp duty and transfer fees. He spoke of relieving the plaintiff's liability on the Ramsgate mortgage, as a "process" that had commenced. The discharge, however, could only occur, he maintained, if his "finance application is approved by the Bank of Melbourne". And he asked that the plaintiff pay the Bank's "break costs". The letter also canvassed the prospect of consent orders being made in the Family Court of Australia for a transfer of the plaintiff's interest in Ramsgate. Such an outcome would, he wrote, "considerably reduce" the expense of registering that transfer.

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10 $40,000 was stated as the consideration in all three.

11 In her letter dated 30 March 1999.

[30] On 10 August 1999, the plaintiff's solicitors' reply began, cryptically, with: "It seems that the only agreement we have is that we agree to disagree on the validity of the agreement of 9 September 1998". The letter proceeded to:

- ask that the defendant forward "the signed transfer" and pay $2,150 on account of stamp duty;
- say that the plaintiff's solicitors would see to "the transfer" once they received the defendant's cheque for that amount and "the transfer document";
- seek the defendant's confirmation within 14 days that the Bank of Melbourne had approved a refinancing necessary to release the plaintiff's liability under the Ramsgate mortgage;
- assert that the plaintiff would not pay the "break costs".

[31] The plaintiff's solicitors' letter of 7 September 1999 mentions a conversation with the defendant four days earlier. The letter also said that the solicitors' instructions had not changed since their last letter, "contrary to your advices",[12] and went on:

> "In relation to the two properties under discussion we note you still have not delivered to us the signed transfer nor your cheque for the stamp duty. If you are interested in resolving the issue then we would ask you to deliver up the transfer and your cheque within 48 hours. We see no impediment why this transfer cannot be effected immediately.
>
> What are you doing about the New South Wales property? Have you taken steps to remove our client from the mortgage?"

[32] Still the defendant did not do what was needed to secure registration of the transfers or the release of the plaintiff's liability under the mortgage. To the extent to which his omissions might be rational, his conduct is, it seems, probably to be explained by a concern to avoid stamp duty and payment of the "break costs". Possibly, he wished to remain engaged with the plaintiff in one way or another. Or, perhaps, he just wanted to have everything, large or small, his way. However those things may be, she eventually lost patience with him.[13]

[33] In May 2000, the Statement of Claim was filed. It simply ignores the Agreement.

[34] The Defence set up the Agreement as a defence. The Counterclaim sought its specific performance[14], alleging that the plaintiff had refused to sign transfer documents "within a reasonable time".[15] As the Nelly Bay and Ramsgate transfers remained unregistered, this allegation might seem to relate to those instruments. This was the way in which the plaintiff appears to have understood the contention. For in the Reply and Answer, she says "that the (sic) she signed transfer documents

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12 This, presumably, is a reference to the defendant's account to the plaintiff's solicitors of one of the many discussions that have taken place between the parties in attempts to resolve their differences.

13 Her attitude to cooperation was also influenced by an experience in early 1998 when, as she sees things at any rate, he duped her into executing, in blank, a document concerning finance, wilfully misrepresenting the effect he intended.

14 In terms (see para 3 of the Prayer for Relief), "[a]n order that the plaintiff takes all reasonable steps necessary and sign (sic) all documents necessary to give effect to the" Agreement.

15 Para 2, Defendants Defence and Counterclaim filed 10 November 2000.

produced by the Defendant to the Plaintiff within a reasonable time".[16] But the next paragraph in the counterclaim contends:

> "Specifically, the documents produced by the Defendant to the Plaintiff which the Plaintiff failed to execute in a timely fashion were documents necessary to obtain a Release of Mortgage from the then Mortgagee in relation to mortgages registered over the various jointly held properties."

[35] The counterclaim then asserts that, during the period of the plaintiff's delay in executing a release of mortgage, the "Mortgagee, Bank of Melbourne, assigned its interest in the said mortgages to Westpac Banking Corporation".[17] Mention is next made of the "break costs", the pleading alleging that because of the assignment to Westpac:

> "[t]he Plaintiff (sic) has or will incur (sic) significantly higher fees in relation to the Release of Mortgage and is or will be liable for interest at higher rates than would otherwise have been payable."

[36] The prayer for relief seeks an indemnity for all fees to be incurred by the defendant in relation to obtaining a release "of any mortgage securing any loan held in the names of the Plaintiff and the Defendant jointly" and for "any payments of interest over and above that which the Defendant would have paid if a Release of Mortgage on or prior to the 30 September 1998 (sic)".

[37] In short, the pleaded complaint about lack of cooperation looks to be confined to a failure to execute those documents allegedly needed "to obtain a Release of Mortgage". Evidence on the topic, however, ranged more widely. In view of the way in which the trial was conducted, it is open to the defendant to rely, as I gather he does, on the plaintiff's omission to sign other documents: specifically, fresh instruments of transfer for Nelly Bay and Ramsgate.

[38] Since the pleadings closed in December 2000, there have been several meetings between the parties in attempts to resolve differences. Some of these discussions concerned steps needed to implement the Agreement. The defendant asked the plaintiff to sign documents. She would not. Then, on 27 October last year – five years after the Agreement was signed, and almost three years since the counterclaim seeking specific performance was instituted – the defendant wrote this to the plaintiff's solicitor:

> "As you are no doubt aware, your client has been requesting the transfer of title on the NSW property since 16 July 1999 …
>
> Your client's tardiness in signing a Deed of Release to the Bank of Melbourne resulted in considerably higher 'break costs' when the takeover of BOM by Westpac was complete.
>
> As the 5 year fixed term mortgage has now expired and no 'break costs' are payable to Westpac, would you kindly arrange for your

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16 Para 51, Amended Reply and Answer filed 11 December 2000.

17 See para 4 Counter Claim.

> client to sign the attached Westpac Release of Mortgage as the first step in the transfer as agreed on 9 September 1998."

[39] The enclosure was a draft request to Westpac. It sought the release of both from the Ramsgate mortgage. It also indicated that the property was to be refinanced, and that the loan would be paid out at settlement. No doubt the defendant, for purposes connected with his real estate investments, preferred this solution. The plaintiff, acting on legal advice,[18] told him that she would not sign. He argues that this kind of refusal has prevented his securing her release.

[40] Although the way in which the defendant proposed to secure the release of the plaintiff's obligations under the mortgage may have suited him – by a refinancing in which he too was released – nothing in the evidence demonstrates that he needed her to execute some additional document in order to induce the Ramsgate mortgagee to release her from liability. No bank employee was called to say, nor was there other evidence proving, that the Bank needed the plaintiff to sign anything to achieve that.[19] Nor was there evidence of New South Wales practice indicating that a signature of hers was needed to facilitate either her discharge from the mortgage or registration of that alteration.

[41] There was strife about transfer instruments as well. The defendant was troubled about the stamp duty likely to be assessed on the two remaining transfers. He investigated ways to minimize the duty: he considered consent orders to be made by the Family Court of Australia as a solution; and he looked at valuation issues. Eventually, he asked the plaintiff to sign a new set of transfers. That, it seems, first happened more than a year after the Agreement was executed, when he had told her that there had been delay in registering the transfers, which meant, he claimed, that a new set was required. She declined to sign, telling him she could not see any reason to execute a fresh set. He may well have asked her on other occasions to sign new transfers.[20]

[42] Six years ago, the plaintiff executed, and delivered to the defendant, forms of transfer of her interests in Ramsgate, Nelly Bay and Caboolture. These documents are not shown to have been unsuitable. Perhaps they involved a risk of higher stamp duty than might have been payable had the compromise been differently structured. If so, that is by the way. Nothing in the evidence demonstrates that the forms of transfer the defendant has had for six years are inadequate to convey the plaintiff's interests. Indeed, registration was achieved for Caboolture. In these circumstances, her refusal to sign new transfers is not shown to have inhibited the defendant in attending to conveyance of her interests in Nelly Bay and Ramsgate.[21]

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[18] Presumably the advice was prompted by a concern that her signature might jeopardise her claim to a *Baumgartner* interest or put at risk her contentions that the Agreement was signed "under duress" and that her consent to it "was vitiated by undue influence and/or unconscionable conduct …": see the Amended Reply and Answer.

[19] A representative of the Bank of Melbourne told the defendant that "a Deed of Release is what you need". He took this as an indication that he needed the plaintiff to sign a request. Even if this evidence suggests that the mortgagee required a written request from both parties to release the two of them, it says nothing about whether the plaintiff needed to sign another piece of paper to secure just her release.

[20] There is no evidence, primary or secondary, concerning the contents of these documents.

[21] Two other considerations confirm this: (i) the defendant's pleading complains about a refusal to sign a release of mortgage, not instruments of transfer; and (ii) the 27 October letter makes no mention of transfers.

[43] So it is not proved that the plaintiff's refusals to sign either new transfers or some request for release prevented the defendant's performing his contractual responsibilities or, if it matters, otherwise involved a breach of the plaintiff's promises, express[22] or implied[23], under the Agreement.

[44] Accordingly, the Agreement does not, at the moment, operate to preclude the plaintiff from pursuing her claim to constructive trusts.[24]

Specific performance

[45] The defendant, however, seeks specific performance. If that were decreed, and if he performed his obligations, the Agreement would[25] then present at least a formidable obstacle to the claims to the constructive trust.

[46] Despite his failing to attend to registration of the outstanding transfers,[26] the defendant maintains, in substance, that he is ready, willing and able to perform his contractual obligations. It is not suggested that the Agreement has come to an end.[27] The challenge to its efficacy relates solely to its validity at inception: the contention is that its execution was procured by duress, undue influence, or unconscionable conduct on the part of the defendant.[28]

[47] The plaintiff did not have independent legal advice on the Agreement before executing it. This calls for scrutiny of the circumstances surrounding the making of the Agreement.

[48] The plaintiff deposes:[29]

> "… I was desperate to settle our property issues because I wanted to leave the house at (Caboolture) as I could not keep John out of the house. He came to the house whenever he wanted and I felt intimidated and harassed by his behaviour.
> …
> I signed the agreement under duress. John was putting a lot of pressure on me by coming to the house whenever he liked. John is a very controlling person to the extent that when he said he would buy me a house he stipulated that only his children and I could live in it. He specifically stated my eldest daughter was not to live there nor were my elder parents permitted to come there. I saw this as an example of John wishing to retain control over me. John was constantly at the home and as his manner is very intimidating I found

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22 See the covenant for further assurance in cl 12;

23 cf *Secured Income Real Estate (Australia) Ltd v St Martin's Investments Pty Ltd* (1979) 144 CLR 596, 607.

24 This makes it unnecessary to consider whether the defendant should be treated as if he had performed had the plaintiff prevented him from doing so: cf *Gold Coast Waterways Authority v Salmead Pty Ltd* [1997] 1 Qd R 346, 360;and *Kensland Realty Pty Ltd v Whale View Investment Ltd and Tam, Pun and Yip (a firm)* [2002] 1 HKLRD 87, [91]-[99].

25 As Ms Sweetapple was disposed to accept: T296, ll 15-20.

26 And the plaintiff's release from the Ramsgate mortgage.

27 For example, by an election to terminate for repudiatory breach or failure to respond to a notice to complete.

28 Para 40, Amended Reply and Answer filed 11 December 2000.

29 Affidavit filed 16 February 2004, paras 57, 60-61. The defendant spoke of killing the plaintiff during the negotiations. However, she did not say, nor should it be inferred, that she took the matter seriously, or that it influenced her decision to conclude the Agreement.

> this to be harassment. John has no concept of personal space and he has an explosive temper. I obtained a protection order … after a contested hearing …
>
> Also at the time I signed the agreement I had very little self confidence and I was anxious to resolve things with John as quickly as possible. For this reason I signed the agreement hoping it would resolve all issues."

[49] Other considerations, however, reveal that the Agreement was not the product of any duress, undue influence, or other unconscionable conduct.

[50] The Agreement was negotiated over about three months. The discussions between the parties about the terms on which they might resolve their disputes were facilitated by a relationships counsellor, acting as a mediator, over several sessions. The outcome was communicated to a solicitor in whom both parties reposed confidence so that their consensus could be properly documented. Changes were discussed and agreed: the Agreement was the fourth solicitor's draft considered.

[51] Execution of the Agreement was witnessed by Mr Power, an assistant bank manager. He recalls that the plaintiff seemed angry with the defendant. But he says, and I accept, that he would not have witnessed her signature had he sensed a reluctance to make the contract.

[52] When the plaintiff did retain her own lawyers, far from challenging the Agreement, they insisted that the defendant perform his obligations under it.[30]

[53] Next, it has never been suggested that the consideration to acquire the plaintiff's interests in the properties – $120,000 plus, put shortly, her release from the Ramsgate mortgage – was other than appropriate. There was valuation evidence. None was directed to the fairness of the deal. And when the plaintiff was asked in cross-examination whether she was "quite happy" with the Agreement, she would have been, she answered, "had it been fully implemented".

[54] No doubt the plaintiff was anxious to conclude a settlement. But the notion that the Agreement was not an effective contract because it resulted from duress or else should be set aside on the footing that it was procured by undue influence or unconscionable conduct is unpersuasive. She was not overborne or ill-informed. The Agreement was the result of the free exercise of her independent will.

[55] Accordingly, the Agreement remains on foot and, subject to any discretionary bar, susceptible of specific performance. [31]

Discretionary bar

[56] No discretionary bar was raised until, at the end of the trial, the Reply and Answer was amended to say:

> "(a) Notwithstanding that the defendant was at all times material fully aware of the facts relied on in his counterclaim, he was nevertheless guilty of prolonged, inordinate and inexcusable delay in

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30 See para [27].

31 cf *Segacious Pty Ltd v Fabrellas* [1991] 1 Qd R 471, 479-480.

bringing the within proceedings and seeking the relief claimed herein and has acquiesced in the matters complained of, and further it (sic) thereby caused or permitted the plaintiff to believe, as in fact she did, that the defendant did not intend to make the claim herein or any claim against the plaintiff, such that the plaintiff acted to her prejudice and/or has otherwise been or would be prejudiced.

Particulars

…

ii. Despite repeated requests by the plaintiff, the defendant did not supply transfer documents to her for signing and lodgement in performance of the agreement made in September, 1998.

(b) In the premises the defendant is barred by laches from claiming the alleged or any relief against the plaintiff and/or it is inequitable and unjust to grant the defendant the alleged or any relief."

[57] Though filed in May 2000, the claim was not served for five months or so. Once served, the defendant promptly delivered his counterclaim seeking specific performance. He had not by then, nor has he since, intimated that he would not enforce the Agreement if need be. Nor has the plaintiff ever thought that he had abandoned it. The suggestion that the defendant's conduct induced the plaintiff to believe that he would not enforce the Agreement is without foundation.[32]

[58] The delay in commencing proceedings contention is not meritorious either. Of course, the counterclaim might have been brought earlier. More than two years passed before it was instituted. But in that period the parties were attempting to resolve their differences about a range of things, including the working out of the Agreement.

[59] The suggested discretionary bar is not made out.

[60] As the Agreement should now be specifically performed, what should happen to the plaintiff's claim? Subject to what the parties may say, it seems preferable to adjourn a determination on it to await implementation of the decree. If the defendant diligently performs his obligations, his unwillingness to accede to her claims could not be unconscionable,[33] in which event, presumably, the claim will eventually be dismissed.

[61] However, the issues on the plaintiff's proceeding have been fought out. And the defendant might not perform. Mainly to cater for that prospect, my conclusions concerning the case may as well be stated now.

Constructive trusts

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32 The defendant supplied transfers for execution the day the Agreement was made. Perhaps, the particulars should be understood as confined to the defendant's omission to accept the 1999 invitation to have the plaintiff's solicitors register the transfers. If so, they miss the point. The defendant was entitled – on one view bound – to arrange registration. He succeeded for Caboolture. Anyhow, that the defendant did not act on the invitation did not lead the plaintiff to suppose that he was not continuing to claim the benefit of the Agreement or that he would not enforce it through litigation.

33 Or unconscientious, if that tag be preferred.

[62] Before turning to an evaluation of the *Baumgartner* claim, mention should be made of an important matter concerning the registered interests the plaintiff took in two of the properties. The defendant arranged things so that the parties were registered as joint tenants of Nelly Bay and Caboolture. The plaintiff, however, makes no allegation of gift. That idea was unequivocally disclaimed.[34]

[63] The parties had previously been married. There were children of those relationships. A child of the plaintiff's marriage lived with the parties during the more than 15 years they spent together. They had two children of her own: girls born in 1984 and 1989. Both parties cared for the children. And, over the years, both made substantial contributions, financial and non-financial, to their households.

[64] Unsurprisingly, given the long time they were together, and the paucity of pertinent evidence, it is not practicable to assess accurately the value of their respective financial contributions.

[65] Both worked for much of the time, the plaintiff often part-time. There were extended periods when she was not employed. When the defendant was in full-time employment, he earned considerably more than she did. However, he had retired by the time Nelly Bay was acquired. He did earn income afterwards.[35] Some was expended for family purposes. Nonetheless, the evidence is too general to warrant a conclusion that he contributed a lot more to the overall expenditure involved in maintaining the three properties and in supplying other material family needs at them.

[66] Part of the difficulty in estimating the respective financial contributions derives from their pooling of money. From the time the parties moved into Ramsgate until reaching Caboolture, the plaintiff's earnings and at least much of the income the defendant derived from personal exertion[36] were paid into a joint account.[37] This account was used to meet household expenses, including outgoings such as rates and insurance premiums. There was a change at Caboolture, when the plaintiff established a bank account of her own into which her wages were paid. The evidence, however, is too sparse to permit any useful analysis of either the amounts each of the parties paid into the joint account or what they extracted from it for personal purposes unconnected with household expenditure.

[67] One matter concerning the plaintiff's contributions to Ramsgate deserves mention, however. In 1991, she sold a property at Lismore. The net proceeds – about $22,000 – were spent at Ramsgate: on renovations, plumbing and electrical work, and in buying new items for the kitchen, such as a refrigerator and a stove.

[68] On the non-financial side, the plaintiff did the bulk of the work in and around the homes.

[69] At Ramsgate, she did the ironing, cooking, cleaning, and most of the washing. The defendant sometimes mowed the small yard. In 1992, he repaired the swimming pool. At Nelly Bay, a similar distribution of household work continued, although

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34 By Ms Sweetapple: see T288, ll 41 – T289 ll 43; and T291, ll 6-10.

35 As examples, from his about $15,000 annual pension, commission from his work as a real estate salesman, and from his real estate investments.

36 As distinct from his many real estate investments.

37 The plaintiff maintained a separate account for Government welfare payments. This money was used for open house occasions at Christmas, in respect of birthdays, and for other family occasions.

the plaintiff's child, Amy, did much of the washing. Sometimes, the defendant mowed the lawn, cleared the gutters, and attended to maintenance. For the ten months or so that the parties lived together at Caboolture, much the same distribution of household work continued.

[70] The plaintiff's household work was of value to the defendant. It relieved him of the potential burden of paying for the services or else doing the work himself. Her contributions also freed him to pursue his interest in buying rental properties – investments which were, by a consensus dating from the resumption of cohabitation in 1986[38], treated as being his alone.

[71] Since leaving Ramsgate in November 1992, the plaintiff has not contributed to the expenses of maintaining the property. Rates, land tax, insurance premiums, repair costs, and interest instalments due under the mortgage, have been paid by the defendant. On the other hand, he has received all the income generated through letting the property. The same is true of Nelly Bay.

[72] In relation to Ramsgate, all considered, there is no significant "disparity between individual contributions",[39] and the plaintiff is entitled to the remedy suited to enforcing an equality of beneficial interests.

[73] This brings me to Nelly Bay.

[74] The Ramsgate mortgage is not in evidence. Nor is the documentation for the associated loan. Nonetheless, the plaintiff contends that it ought be inferred not only that she charged her 2/5^{ths} interest but also that the arrangements with the financier exposed her to liability to repay the entire borrowing. The defendant accepts this, acknowledging that the parties were liable, jointly and severally, for the secured debt. This matters because the purchase price came from funds lent on the security of a mortgage of Ramsgate. On this basis, the plaintiff contends, correctly,[40] that she paid in full for her registered interest as joint tenant. So there is no resulting trust in respect of any part of that interest. For Nelly Bay, the parties' legal and beneficial interests coincided from the outset.[41] Nothing[42] since would suggest that the equality should be altered judicially.

[75] Caboolture is more problematic.

[76] The about $153,000 to buy the Caboolture house was paid by the defendant using the proceeds of sale of an investment property of his in Western Australia. There was no borrowing to fund the acquisition.

[77] After the purchase, the plaintiff contributed to the improvement of the house. She applied about $6,500 of her tax refund to the purchase of household goods, such as furniture. She paid for curtain materials and blinds. She made the curtains. In the 10 months or so the parties lived together at Caboolture, she also contributed, to an unquantified extent, to other household expenses, such as electricity, telephone, rates and insurance.

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38 This resumption may have taken place in 1987, see Plaintiff's Affidavit filed 16 February 2004, para 27.

39 *Engwirda v Engwirda and Ors* [2000] QCA 61, [32].

40 *Calverley v Green* (1984) 155 CLR 242, 251, 257-258, 267-268.

41 Leaving aside the distinction between joint tenants and tenants in common: cf *Meagher, Gummow & Lehane's Equity Doctrines and Remedies*, 4th ed, (2002) p 103.

42 Apart from the Agreement.

[78] After the separation, the parties agreed that the plaintiff, who was to care for the children, should have much of the furniture and other things purchased for use at Caboolture. To that extent, she retained the benefit of her expenditure.

[79] As the plaintiff made no financial contribution to the purchase, there is a marked disparity between the worth of the parties' individual contributions, financially or in kind, at Caboolture.[43] Nonetheless, the plaintiff has not received back everything she bought for Caboolture. And while the parties lived there, she made valuable contributions to the household. The defendant ought to recognise as much; and for him to insist upon his legal rights deriving from the state of the registered title constitutes, in all the circumstances, unconscionable conduct meriting equitable intervention.

[80] For Caboolture, something akin to a 10% beneficial interest is appropriate.

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[43] Cf *Baumgartner* at 149-150.