SUPREME COURT OF QUEENSLAND

CITATION:	*LF v RA* [2005] QSC 375
PARTIES:	**LF** (applicant) **v** **RA** (respondent)
FILE NO/S:	BS No 3070 of 2004
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	24 November 2005
JUDGE:	White J

ORDER:

1. Declare that the parties hold:

   (a) the Mudgeeraba property as tenants in common as to 9/10th share to the respondent and 1/10th share to the applicant; and

   (b) the Surfers Paradise unit as tenants in common as to 9/10th share held by the respondent and 1/10th share by the applicant.

2. That a Property Adjustment Order be made pursuant to s 286 of the *Property Law Act* 1974 in respect of the property situated at Robina such that the applicant and respondent each hold the property as tenants in common in equal shares.

3. That within 14 days of the day of these Orders, the respondent, RA shall pay the sum of $184,817.22 to the applicant, LF such payment to be made by way of bank cheque made payable to the Trust Account of the solicitors for the applicant, Messrs Primrose Couper Cronin Rudkin, Scarborough Street, Southport.

4. That contemporaneously with the payment of $184,817.22 referred to in Order 1 herein, the applicant, LF shall sign all necessary documents and do all

necessary things to transfer to the respondent all her right, title and interest in the following real property:

(a) the Robina property;
(b) the Mudgeeraba property;
(c) the Surfers Paradise unit.

(collectively "the real property")

Provided that the respondent shall contemporaneously refinance the existing mortgages secured by the real property and discharge the debt owed to the body corporate of the Burra Street property by way of body corporate fees and legal costs associated with the action taken by the body corporate against the applicant and the respondent so as to released the applicant from all liability pursuant to those mortgages, body corporate fees and legal costs and pending the transfer to the respondent of the applicant's interest in the said real property he shall indemnify the applicant and keep her indemnified in relation to any liability pursuant to the mortgages secured by the real property and any outstanding rates and/or body corporate fees owing in relation to the real property.

5. That for the purposes of putting Order 4 into effect, the solicitors for the respondent shall draw the necessary Transfer documentation.

6. That the respondent shall retain all his right, title and interest in the real property.

7. That each party sign all necessary documents and do all necessary things in order to give effect to the terms of these Orders and in the event of either party failing or refusing to do so, then the Registrar of the Supreme Court of Queensland is hereby authorised to sign all necessary documents and do all necessary things on behalf of the parties.

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – SEPARATION AGREEMENTS – application under Part 19 of the *Property Law Act* 1974 (Qld) ("the Act") – where cohabitation agreement drawn up by the respondent's solicitors – where applicant denies any discussion about the agreement – where the applicant at the time diagnosed with a benign tumour – where the respondent after the agreement was entered into increased a mortgage debt which was the sole responsibility of the applicant under the agreement – whether *non est factum* – whether revocation

by subsequent conduct – whether serious injustice to the applicant in light of her contribution to the acquisition of the assets and ongoing liability under the mortgages – where agreement set aside in its entirety

FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – GENERALLY – application under Part 19 of the *Property Law Act* 1974 (Qld) – where properties purchased during the relationship owned in unequal shares to the benefit of the respondent – where applicant allegedly unaware of the unequal ownership – where applicant did not peruse relevant documentation accessible to her – where no apparent deception on the part of the respondent – where "just and equitable" property adjustment made pursuant to s 286 of the Act – where limited evidence of financial and non-financial contributions

Property Law Act 1974 (Qld), s 272, ss 274-276, s 286, s 291
The De Facto Relationships Act 1991 (NT), s 46

Crago v McIntyre (1976) 1 NSWLR 729, cited
Frank Fat Ng v Ha Duk Chong [2005] NSWSC 270, unreported decision of 31 March 2005, cited
Petelin v Cullen (1975) 6 ALR 129, cited
Saunders v Anglia Building Society [1971] AC 1004, cited
Van Jole v Cole [2000] NTSC 18, unreported decision of 4 April 2000, cited

COUNSEL: C A Cooper, solicitor, for the applicant
B A Laurie for the respondent

SOLICITORS: Primrose Couper Cronin Rudkin for the applicant
Jones Mitchell for the respondent

[1] The applicant and the respondent commenced cohabitation at the Gold Coast in December 1996. They met in Melbourne where she was employed as a hairdresser. He was and is a stunt performer and dancer. The applicant was then 28 years having been born on 21 March 1968. The respondent was 34 years. His date of birth was 25 April 1962.

[2] The applicant was living with her parents. She had been married at 17 years and had divorced two years later. He had not long discontinued a de facto relationship. He supports financially a child from a previous brief relationship.

[3] The parties agree that their relationship which broke down irretrievably at the end of 2003 was a de facto relationship within the meaning of Part 19 of the *Property Law Act* 1974 ("the Act") and that their dispute about certain property entitlements falls to be regulated by that Act.

[4] Neither party owned real estate when cohabitation commenced and they lived in rental accommodation at the Gold Coast until May 2001 when they purchased a house at Robina which became their home.

[5] In May 2002 they purchased an investment property at Mudgeeraba and in November 2002 they purchased a unit on Chevron Island.

[6] The applicant seeks orders that these properties be sold and she retain half of the net proceeds of sale. The respondent contends that this jointly owned property is governed by a recognised agreement within the meaning of s 266 of the Act which would entitle the applicant to much less than an equal split. The applicant deposes that she signed this agreement without reading it and when she was distracted by serious health issues and that it ought not be enforced either by virtue of s 275 (revocation) or s 276 (serious injustice).

[7] The legal title to each parcel of land is as tenants in common in unequal shares significantly favouring the respondent which the applicant deposes she only discovered after she consulted a solicitor after the breakdown of the relationship.

[8] There are difficult issues of credit involved in the resolution of this dispute. Neither party was an apparently reliable witness in many respects. Neither said much about the nature and quality of their relationship. I had a strong impression that neither party listened carefully or at all, sometimes, to what the other had to say during the relationship about a number of important issues.

[9] The parties did not choose to inform the court fully about their financial affairs. The respondent was vague about the money he received from his employment and details of other sources of money and the applicant did not disclose her earnings from operating a hair dressing business at home in a direct fashion. This lack of detail makes the resolution of their dispute somewhat difficult. Where the differences are not essential I have tended to accept what each has deposed to.

Background

[10] The applicant was working as a hairdresser in Melbourne earning between $400-$450 a week when she met the respondent. She owned a Honda Integra motor vehicle with a value about $22,000, some furniture and perhaps a few thousand dollars in her bank account.

[11] The respondent was working as a professional dancer and stunt performer at the Gold Coast and in the film industry. He used a company AB Pty Ltd for the provision of his services. He deposes that he received about $30,000 from the sale of a house which he had owned with his former partner at Broadbeach and that he retained most of the furniture from that house. He deposes that he had about $10,000 in the bank. He had stunt equipment relating to his work. He deposes to owning an investment property in Doncaster in Victoria which he had purchased in 1993 for about $137,000. He sold that property in about 1997 receiving a net profit of about $27,000 which he deposes he applied to general living expenses for himself and the applicant. She denies that he spent this money to support her and that she paid for her own needs. There are no details given of the lifestyle they had but it may be inferred that an employed hairdresser's wages as reflected in the applicant's tax returns would not permit of extravagance – if, indeed, that was how they lived.

[12] The respondent owned a Porsche 911 motor vehicle when the parties met which he sold in 1998 receiving $32,000 from the sale and which he deposes he spent on general living expenses.

[13] The parties lived in rental accommodation until May 2001. The respondent deposes that he paid the rent solely while the applicant deposes that she always contributed. She worked for only four months as a hairdresser at the Gold Coast at the commencement of cohabitation before ceasing work. She says that she was sick. He says she did not like her employer, a friend of his. There are no details from the applicant about when she resumed work or for that matter from the respondent about his work and earnings at this time but in essence the applicant said she was unemployed for about a year and on social security benefits and did some hairdressing from home. So when she says she contributed to their joint expenses this may likely mean that she gave what she could to their joint expenses which may have been in quite modest amounts.

[14] Some tax returns are provided. The respondent seems to have had access to funds which the applicant clearly did not. The tax returns for AB Pty Ltd show that the applicant was a director and public officer of the company. The company's income was derived from stunt work receipts – nearly $82,000 in 2003 and hairdressing receipts of $3,750 for the same year. It might therefore be inferred that the applicant channelled her home hairdressing earnings through AB Pty Ltd. The respondent said that he also obtained income from residuals from overseas films which is reflected in his practice direction document and shows the receipt of $59,928 for the last three years from that source.

[15] The applicant, at some stage, commenced employment as a fragrance consultant at Myers working about 20 hours per week on Tuesday and Thursday from 4-9pm and on Saturdays and Sundays. She also worked as a hairdresser from home but does not say how many hours. That they were few may be inferred from the AB Pty Ltd tax returns. The respondent worked irregular hours and was often away from home working in Sydney. They held no joint bank accounts apart from the mortgage accounts in respect of the properties and generally seem to have operated financially separately.

The Robina property

[16] The respondent deposes that he paid the $37,000 deposit from his own money; the applicant deposes that those monies were "accumulated" while they cohabited. The title shows the registered owners to be the applicant and respondent holding the land as tenants in common 4/5 share to the respondent and 1/5 to the applicant. The transfer documents similarly reflect these shares. They are jointly liable under the mortgage to the National Australia Bank.

[17] The applicant denied that she agreed to this division which the respondent says they discussed and because he was making the greater contribution to the deposit and other acquisition costs to the property she agreed. The applicant says that they agreed to equal contribution to the mortgage repayments in as much as the respondent paid $250 each week and the applicant $100 but provided for their living expenses from her earnings of $150 per week. The applicant continued to make these payments of $100 per week for 12 months after she left but discontinued because she was struggling financially to pay her own rent and living costs.

The respondent remained living in the house at Robina. The respondent denies this level of contribution to living expenses by the applicant. I accept the applicant's evidence on this point. The property now has an agreed value of $455,000. The mortgage outstanding as at 4 November 2005 was $117,700. Minimal rates are presently due.

The Mudgeeraba property

[18] In May 2002 the parties purchased this property for $152,000. They had sufficient equity in the Robina property to borrow the whole of the purchase price. The respondent deposes that he sourced the property and provided the money for the costs of acquisition and discussed with the applicant how the property was to be held which she agreed. The property is held by the parties as tenants in common 9/10 to the respondent and 1/10 to the applicant. They are both liable under the mortgage to the National Australia Bank. The repayments have been serviced out of the rental received from tenants. Any surplus has been divided equally between them.

[19] The property has an agreed value of $270,000 with $140,681 owing to the National Australia Bank and outstanding local government charges of $2105.

The Chevron Island (Surfers Paradise) unit

[20] In November 2002 this unit was purchased for about $160,000. The parties are the registered proprietors as tenants in common 9/10 to the respondent and 1/10 to the applicant. The applicant deposes that like the other properties she believed she held a 50 per cent share.

[21] The unit is valued at $215,000 and there is $170,272 owing to the National Australia Bank under the mortgage. There are outstanding rates of $3,672 and body corporate fees of $7,525.

[22] The respondent denies that the applicant was unaware of the unequal ownership of the three properties and that the way in which they were to be held was discussed with her. There was no secrecy about the shares. It seems that the applicant did not concern herself with the documentation which was available had she cared to read it.

[23] Each transaction was handled by a solicitor – Mr Turnbull for the Robina property and Mr Evans for the two investment properties. The applicant denies any contact with them. Mr Evans sent settlement letters addressed to the parties jointly at their Robina address. The applicant agreed that the respondent was working in Sydney at the time and that she would collect the mail but maintains that she never opened letters addressed to them both which she saw as business letters and of no interest to her. Had she done so she would have read in the letter of 29 April 2002 from Mr Evans

> "I note you are purchasing the property as co-owners. I advise that co-owners may purchase either as joint tenants or as tenants in common. Where co-owners purchase as joint tenants the survivor on the death of a co-owners automatically inherits the whole of the property. Where co-owners purchase as tenants in common and the

> co-owner dies their share is disposed of in accordance with the terms of their Will or where there is no Will according to the laws which apply on intestacy. I note your instructions you are purchasing as tenants in common in the shares of 9/10th to [R] and 1/10th to [L]." Exhibit 5.

He wrote similarly in his letter to them both of 22 May 2002.

[24] Perhaps the applicant did not really understand the concept of owning property in unequal shares although that seems highly unlikely. I conclude that the respondent did not deceive the applicant about the unequal shares in the property and likely informed her, even if briefly, of these matters. The respondent said he would have gone into the investment properties with other members of his family but because he expected to marry the applicant it seemed appropriate that she should have some interest in the property. It is, however, abundantly clear that the loans for all properties were predicated on the applicant's continued employment and capacity to support the loan. She is shown in the loan application documents as a larger wage earner than the respondent.

[25] In early May 2003 the applicant was referred by her general practitioner, who had been treating her since June 2000 for various complaints, for a CT scan of her brain and pituitary gland. That CT scan revealed a lesion in the right side of the pituitary that measured about 4mm in diameter. The radiology report dated 9 May 2003 indicated that the appearances of the lesion were consistent with a pituitary microadenoma. As a consequence the applicant was referred to Dr G Senator, an endocrinologist, for further treatment. Dr Badawy, her general practitioner, deposed that the applicant was extremely upset and distressed at the time that this lesion was diagnosed. The applicant was concerned that it was not benign. Dr Senator has written a number of reports about the plaintiff's condition. He deposes that she would have been particularly concerned about her health at the time when she was told of the existence of the tumour and he gave oral evidence to that effect. The complaint with which the applicant has been diagnosed is one that can cause fertility problems and, as a consequence, the applicant requires ongoing monitoring but these health issues do not otherwise limit her ability to work. The tumour, she was reassured, was benign but that did not occur until she had consulted with Dr Senator on 20 June 2003.

[26] The plaintiff said she discussed her health problems with the respondent at about the time the "tumour" was diagnosed and as a result of his lack of emotional support she told him that the relationship was to end. As a consequence, she deposes, he had his solicitors draw up a cohabitation agreement.

[27] The respondent strenuously denies that the applicant ever told him of the "tumour" in her pituitary gland whilst they were residing together. He deposes that he knew of this only through correspondence from her solicitor consequent upon separation. He denies that she showed any display of anxiety or disability and appeared perfectly normal to him. He says that he instructed his solicitors to draw up a cohabitation agreement because he was sad and depressed at the time because about two weeks prior they had had an argument about the applicant going out to night clubs and coming home very late. During the argument she said that if they split up she wanted half of everything that he owned. He deposes that he reminded her that the properties were in unequal shares to which she allegedly responded that she did

not care and would get the property anyway. Several weeks later the parties, according to the respondent, discussed the issue of their entitlements to the properties and he told her that he was proposing to have a cohabitation agreement drawn up. He was concerned not to have the same financial outcome as occurred after his previous "break-up" and did not want to lose his financial security given the limited future for the work he did.

[28] The respondent said that he discussed the terms of the agreement drawn up by his solicitor with the applicant and told her that she should speak to a lawyer if there was anything she was unsure of in the agreement and to keep it for a week to consider it carefully. He deposes that she discussed the transfer fee on the Chevron Island unit (the property in which was to pass to her under the agreement) in the event that they separated because she was concerned she would not be able to pay. The respondent deposes that he had offered to help her and that was the only discussion about the terms of the agreement. He thought the applicant understood its terms.

[29] The applicant denies that there was any discussion between them about the agreement.

[30] The following is the applicant's description of how she came to sign the agreement

> "I had no idea of what the agreement was all about. I did not get independent legal advice before I signed the agreement. I did not even read the agreement. I just signed the document to keep [R] off my back and to try and avoid any further conflict. In the agreement, at Recital H it says that each party has been independently advised by his or her legal representative. I never had legal advice. At Recital I it sets out the advice that we were supposedly given but I received no such advice. On the last page of the agreement it provides for a certificate of Solicitor's advice and that was not signed in my case. I had no understanding in respect of the documentation I was signing. I did not even know how the properties were held at the time I signed the document and as deposed to above I never read the document. I was told just to sign it. We went together to Robina Town Centre and located a JP. Insofar as I recall only I signed the agreement at Robina. Once it was signed [R] took it and I did not see it again until separation when I asked for a copy and he gave it to me."

[31] The parties stayed together until New Year's Eve 2003/2004 when they separated after an argument. The respondent remained in the Robina house while the applicant has found rental accommodation within her means.

The cohabitation agreement - circumstances

[32] The agreement is said to be made pursuant to Part 19 of the Act. The document sets out the respondent's assets at the commencement of the relationship and the applicant's. Recital H provides that "each party has been independently advised by his or her own legal representative".

[33] Recital I sets out that those representatives have advised each party independently before executing the agreement concerning whether or not it was to the advantage financially or otherwise for each party to enter into the agreement, whether it was prudent to do so and whether or not, in light of the circumstances at the time, the provisions of the agreement were fair and reasonable. With respect to the property not the subject of dispute between the parties the respondent was to retain his stunt equipment and vehicles, the applicant her motor vehicle and they provided for division of furniture, household items and chattels by agreement.

[34] The key provisions relating to the property the subject of the present dispute between the parties provides that the respondent would assign all his interest in the unit at Chevron Island subject to the applicant refinancing the existing mortgage into her name so as to discharge the respondent's liability.

[35] At the same time the applicant was to transfer all of her interest in the Robina property and the real property at Mudgeeraba together with any other real estate held by the parties whether in joint names as joint tenants or tenants in common. This transfer was to be subject to the respondent refinancing the existing mortgages secured over those properties so as to discharge the applicant from liability.

[36] The parties further provided that the applicant would contribute to household expenses in the sum of $100 per week by way of direct debit to the mortgage payments for the Robina property and the respondent would be responsible for all other living costs including mortgage payments in respect of the other properties. This sum of $100 per week was expressly not to entitle the applicant to any interest in the Robina property. By clause 12 the parties agreed that after permanent separation they would not "charge, dispose of or damage any jointly owned assets without the consent of the other and not to withdraw any more than one half of the then current balance of any joint bank account".

Events subsequent to separation

[37] The respondent conceded that he had signed a number of documents as if he were the applicant. This had occurred prior to separation. Those signatures bear no resemblance to the applicant's signature and he maintained that the applicant had expressly or impliedly authorised him to do so. It is the case that he did not stand to obtain any benefit from signing, for example, her tax returns. The attitude of the applicant to matters of business and finance, as exemplified in her oral evidence, of complete indifference to such matters suggests that the respondent may well have thought he could sign her tax return on her behalf when he did.

[38] Much more serious however is the respondent's signature purporting to be that of the applicant directed to their accountant dated 13 January 2004 some two weeks after separation and at a time when he was in receipt of correspondence from the applicant's solicitors dated 12 January 2004 advising him that he ought not to act inappropriately with respect to their property. His letter to the accountant authorised the accountant to credit his and the applicant's trust account with any monies paid to either of them by the Deputy Commissioner of Taxation, pay outstanding fees owing and forward any surplus to him. It appears that the applicant agreed to pay part of her tax refund of $2,800 to the accountant towards outstanding AB Pty Ltd accountancy bills. As has been noted, it appears that the applicant's hairdressing business at home was directed through the company and,

accordingly, it was not inappropriate for her to pay part of that accountancy bill. It was inappropriate of the respondent to have proceeded in the way he did but it does not, in my view, have the quality of moral turpitude about it that Mr Cooper, for the applicant, suggests.

[39] The applicant increased the mortgage debt on the unit property by drawing down a further $10,000 for the purpose of buying stunt equipment and other chattels on 13 November 2003 just prior to their final separation without the applicant's agreement.

[40] The total agreed net value of the three parcels of real estate is $498,030.87, exhibit 1.

The cohabitation agreement - law

[41] By s 274(1) of the Act if the court is satisfied that there is a recognised agreement the court must not make a property order inconsistent with the agreement's provisions on financial matters subject to ss 275 and 276. Otherwise, a cohabitation agreement is subject to and enforceable according to the law of contract, s 272.

(i) Non est factum

[42] Whilst Mr Cooper did not seek to have the agreement set aside on the ground of *non est factum* it is as well to give some attention to the defence in the circumstances here where the applicant maintains that she ought not be bound by the agreement. In *Petelin v Cullen* (1975) 6 ALR 129 the High Court (Barwick CJ, McTiernan, Gibbs, Stephen and Mason JJ) said of the plea of *non est factum* at 133

> "The class of persons who can avail themselves of the defence is limited. It is available to those who are unable to read owing to blindness or illiteracy and who must rely on others for advice as to what they are signing; it is also available to those who through no fault of their own are unable to have any understanding of the purport of a particular document. To make out the defence a defendant must show that he signed the document in the belief that it was radically different from what it was in fact and that, at least as against innocent persons, his failure to read and understand it was not due to carelessness on his part. Finally, it is accepted that there is a heavy onus on a defendant who seeks to establish the defence. All this is made clear by the recent decision of the House of Lord in *Saunders v Anglia Building Society* [1971] AC 1004, especially at 1019; [1970] 3 All ER 961 at 965-6."

And later, the court observed at 134

> "It is now settled beyond any shadow of doubt that when we speak of negligence or carelessness in connection with *non est factum* we are not referring to the tort of negligence but to a mere failure to take reasonable precautions in ascertaining the character of a document before signing it. The insistence that such precautions should be taken as a condition of making out the defence is of fundamental importance when the defence is asserted against an innocent person,

> whether a third party to the transaction or not, who relies on the document and the signature which it bears and who is unaware of the circumstances in which it came to be executed. It is otherwise when the defence is asserted against the other party to the transaction who is aware of the circumstances in which it came to be executed and who knows (because the document was signed on his representation) or has reason to suspect that it was executed under some misapprehension as to its character. In such a case the law must give effect to the policy which requires that a person should not be held to a bargain to which he has not brought a consenting mind, for there is no conflicting or countervailing consideration to be accommodated – no innocent person has placed reliance on the signature without reason to doubt its validity."

[43] Finally, the court emphasised that a party relying on *non est factum* must be able to show that the party believed the document was radically different from that which it was in fact, at 135.

[44] In *Saunders v Anglia Building Society* [1971] AC 1004 Lord Reid after discussing the traditional ambit of the plea added at 1016,

> "I think that it must also apply in favour of those who are permanently or temporarily unable through no fault of their own to have without explanation any real understanding of the purpose of a particular document, whether that be from defective education, illness or innate incapacity."

This passage was referred to by Holland J in *Crago v McIntyre* (1976) 1 NSWLR 729 at 737 who said of the facts before him at 738

> "I would only add that it would not have saved the plaintiff's case on the present ground to say, as was put on the plaintiff's behalf at one stage, that he was so disinterested in the management of his affairs that he was prepared to sign whatever was put in front of him. If that was the fact he would still fail because, as his intention would have been to sign the document in fact placed before him, whatever it provided, that intention would have been carried out leaving no basis on which the plead non est factum: *Saunders v Anglia Building Society*, per Lord Pearson."

See also *Frank Fat Ng v Ha Duk Chong* [2005] NSWSC 270 unreported decision of 31 March 2005 of Hamilton J particularly at [20]-[23].

[45] Here the applicant was well aware that she was being asked by the respondent to sign a cohabitation agreement which regulated their entitlements to their jointly held property. Although the applicant maintains in her principle affidavit that she is dyslectic and has difficulty reading and comprehending documents she was able to read out competently a document in the witness box when asked to do so. She did not demonstrate any particular mental weakness of the kind mentioned by Lord Reid in *Saunders* which prevented her from having any real understanding of the document.

[46] The cohabitation agreement is not legally or conceptually complex. Physically it is well set out and easy to read. The applicant was given time to consider the agreement and to take advice. That the applicant might have been so distressed about her health condition and the deterioration in her relations with the respondent (if that be the case) as to be indifferent to her own interests cannot allow her to avoid, for that reason, the consequences of her signature.

Section 275: revocation by conduct

[47] Section 275 provides:

> "For s 274, a court must ignore a provision in a financial matter if the de facto spouses have, in writing or by their conduct, revoked the provision or consented to its revocation."

[48] Clause 3 of the cohabitation agreement provides that in the event of the relationship terminating, the unit, subject to the existing mortgage debt which was to be refinanced by the applicant as her sole responsibility, was to be transferred to her. The mortgage debt to the National Australia Bank as at June 2003 when the agreement was entered into was $155,000. This gave an equity in the unit of about $45,000. That mortgage debt was increased by $10,000 by the respondent drawing down that sum to purchase a jet ski in October 2003. This was done without the agreement of the applicant. The agreement provides that the parties would not further encumber joint property after final separation.

[49] The applicant contends this conduct by the respondent prior to final separation constitutes a repudiation of the agreement. The respondent accepts that a term may well be implied into the agreement that the respondent would not, without consent, further encumber the property to be transferred to the applicant prior to that transfer. He contends that a property adjustment order could be made to restore the applicant's equity in the unit but otherwise retain the agreement.

[50] In view of the approach which I take to s 276 it is unnecessary to decide this issue. Had the agreement otherwise been enforceable then it is unlikely that I would characterise the respondent's conduct as a repudiation but rather subject to an obligation to restore the applicant's equity. It is not "impracticable" by the imposition of the extra $10,000 on the mortgage debt for the agreement to be carried out as provided for in s 276(1)(b).

Section 276: serious injustice

[51] Section 276 provides:

> "(1) On an application for a property adjustment order, the court may vary all or any of the provisions of the agreement [cohabitation agreement] if the court is satisfied –
>
> (a) enforcement of the agreement would result in serious injustice for a party to the agreement ..."

The applicant contends that the gross inequality between what the respondent would receive based on the values in exhibit 1 of the three parcels of land and what the applicant would receive alone causes serious injustice to the applicant. On the

figures calculated by Mr Cooper, with which Mr Laurie made no argument, the respondent receives a notional $464,500 – 94 per cent of the total value of the property as against the applicant's $33,530.87 or 6 per cent of the value. This approach is reflective of the judgment of Riley J in *Van Jole v Cole* [2000] NTSC 18, unreported decision of 4 April 2000.

[52] Mr Laurie contends that the approach to the expression "serious injustice" should not be equated with the term "hardship" but with the concept of a failure to do justice and should be construed "as a condition or result achieved in an unjust manner embodying notions of duress, suppression of evidence, unconscionability or other militating factors which would tend to vitiate informed consent," written submissions [30]. He argued that an improvident bargain does not constitute injustice or unconscionability and that the applicant should be held to her agreement. He referred to ss 79A and 90K of the *Family Law* Act 1975 (Cth). Those provisions expressly limit setting aside financial agreements to those obtained by fraud etc. No such limitation is found in s 276 or Part 19 of the Act. Whilst this court may be assisted in its approach to Part 19 by the jurisprudence of the Family Court of Australia it is to the words of the Act that recourse must be had initially.

[53] The Online Oxford English Dictionary defines "injustice" as "The opposite of justice; unjust action; wrong; want of equity, unfairness."

[54] Some assistance may be obtained from the approach in *Van Jole* considering the same expression. The Queensland Law Reform Commission in the De Facto Relationships Report No 44 June 1993, expressly stated that "serious injustice" in what is now s 276 was the same test as in the Northern Territory and New South Wales legislation, at p34.

[55] *The De Facto Relationships Act* 1991 (NT) contains a provision (s 46) which permits a court to vary or set aside a cohabitation agreement if its enforcement would lead to serious injustice between the parties. In *Van Jole* the magistrate below after an examination of the relationship and the circumstances in which the agreement came to be signed concluded that the respondent had received far less than she should have under an equitable distribution. Riley J hearing the appeal concluded at [29] and [30]

> "In my view she [the magistrate] determined that the imbalance was sufficient by itself to give rise to the prospect of serious injustice between the parties. The circumstances of the execution of the agreement explained how the respondent came to enter into such an agreement and, possibly, added to the existing serious injustice.
>
> It was not submitted that her Worship incorrectly characterised the imbalance. Given the findings of her Worship regarding the contributions of the parties and her finding that the respondent was to receive $28,000 out of a total pool of $128,000, her conclusion was compelling."

[56] It is not, of course, a serious imbalance of itself which will give rise to a conclusion of serious injustice. The detail of the relationship and the parties' financial and

other contributions to the acquisition of the assets in the course of the relationship will be determinative of that question.

[57] The evidence suggests that I should approach the Robina property and the two investment properties differently. The evidence which I accept reveals that the applicant and the respondent made equal contributions in payments to the mortgage or for living expenses (which freed the respondent to make direct financial contributions) in respect of the Robina property – their home. It must be accepted that the respondent provided the deposit money and other outgoings for its purchase from his employment or other unspecified sources. The applicant simply could not have done so. But that may be balanced against the applicant continuing to pay $100 a week towards the mortgage while struggling to survive in rental accommodation on her small income whilst the respondent occupied the house for a year and continues to do so as co-owner.

[58] As with all the real property without the applicant's income it may be inferred that the respondent would not have obtained bank finance. That he might have had other co-investors is irrelevant. However, the two other properties were acquired as investment properties with no input from the applicant (apart from her contribution as a co-borrower to finance the purchases). The mortgages for those two properties have been serviced out of the rent.

[59] I am persuaded that there would be serious injustice to the applicant if the cohabitation agreement were to be enforced against her bearing in mind her contribution to the acquisition of the assets and her liability under the mortgages. Accordingly the agreement should be set aside in its entirety.

[60] When making a property adjustment order pursuant to s 286 the court may make any order it considers "just and equitable". In doing so the court must consider the matters mentioned in subsubdivision 3. The principal matter for consideration here are the provisions of s 291 where the court must consider the financial and non-financial contributions made directly or indirectly by the parties to the acquisition, conservation or improvement of any of the property and the financial resources of either of the parties. The parties have provided virtually no detail about how they lived their life together including about cooking, cleaning, gardening and other maintenance. I am therefore left with the bare information about actual contributions towards mortgage repayments and living expenses and assume mutual companionship and support but noting that the respondent was away working from time to time.

[61] There are no matters relating to health and employment capacity into the future which are submitted to govern any adjustment order which might be made.

[62] I am persuaded that an adjustment order ought to be made in respect of the property at Robina such that the parties should have an equal interest in it. I am not persuaded that there should be any adjustment to the existing legal ownership of the two investment properties.

[63] When this matter was called on for judgment on 22 December 2005 I indicated to the parties' representatives

- That orders contained in the judgment were those which I proposed but that they might wish to confer and agree on the form of order not inconsistent with the reasons and

- That the decision and reasons then provided to the parties would not be published on the Supreme Court's website by the Supreme Court Library until they were adjusted to reflect the non-publication requirements of ss 267, 342 and 343 of the Act.

[64] The parties have now reached agreement about the order which reflects the decision given on 22 December. The orders as agreed are

1. Declare that the parties hold:

   (a) the Mudgeeraba property as tenants in common as to 9/10th share to the respondent and 1/10th share to the applicant; and

   (b) the Surfers Paradise unit as tenants in common as to 9/10th share held by the respondent and 1/10th share by the applicant.

2. That a Property Adjustment Order be made pursuant to s 286 of the *Property Law Act* 1974 in respect of the property situated at Robina such that the applicant and respondent each hold the property as tenants in common in equal shares.

3. That within 14 days of the day of these Orders, the respondent, RA shall pay the sum of $184,817.22 to the applicant, LF such payment to be made by way of bank cheque made payable to the Trust Account of the solicitors for the applicant, Messrs Primrose Couper Cronin Rudkin, Scarborough Street, Southport.

4. That contemporaneously with the payment of $184,817.22 referred to in Order 1 herein, the applicant, LF shall sign all necessary documents and do all necessary things to transfer to the respondent all her right, title and interest in the following real property:

   (a) the Robina property;

   (b) the Mudgeeraba property;

   (c) the Surfers Paradise unit.

   (collectively "the real property")

   Provided that the respondent shall contemporaneously refinance the existing mortgages secured by the real property and discharge the debt owed to the body corporate of the Burra Street property by way of body corporate fees and legal costs associated with the action taken by the body corporate against the applicant and the respondent so as to released the applicant from all liability pursuant to those mortgages, body corporate fees and legal costs and pending the transfer to the respondent of the applicant's interest in the said real property he shall indemnify the applicant and keep her indemnified in relation

to any liability pursuant to the mortgages secured by the real property and any outstanding rates and/or body corporate fees owing in relation to the real property.

5. That for the purposes of putting Order 4 into effect, the solicitors for the respondent shall draw the necessary Transfer documentation.

6. That the respondent shall retain all his right, title and interest in the real property.

7. That each party sign all necessary documents and do all necessary things in order to give effect to the terms of these Orders and in the event of either party failing or refusing to do so, then the Registrar of the Supreme Court of Queensland is hereby authorised to sign all necessary documents and do all necessary things on behalf of the parties.