SUPREME COURT OF QUEENSLAND

CITATION:	*VTMVS v MREM* [2009] QSC 393
PARTIES:	**VS** (applicant) v M**M** (respondent)
FILE NO/S:	BS 9922 of 2009 BS 11370 of 2009
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	4 December 2009
DELIVERED AT:	Brisbane
HEARING DATE:	15 October 2009
JUDGE:	Martin J
ORDER:	**The application for a property adjustment order is dismissed.**
CATCHWORDS:	DE FACTO RELATIONSHIP – PROPERTY SETTLEMENT – Where parties involved in de facto relationship – Where parties lived in New South Wales during relationship – Where parties never lived together in Queensland – Where parties executed a termination agreement under New South Wales law upon termination of their de facto relationship – Where agreement purported to cover all rights under any Australian legislation – Where applicant brought subsequent application for property adjustment order under Part 19 of Property Law Act 1974 – Whether court has jurisdiction to determine application – Whether termination agreement is a recognised agreement under Property Law Act 1974 – Whether the applicant is estopped from bringing a further action – Whether application should be struck out or dismissed. *Property Laws Act* 1974 (Qld), ss 265, 266, 276, 277 *Property (Relationships) Act* 1984 (NSW), Part 3 *Australian Express Pty Ltd v Pejovic* [1963] NSWR 954 *B v T* [2007] QSC 55 *C v B* [2007] 1 Qd R 212

Carpenter v Buller (1841) 151 ER 1013
Discount Finance Ltd v *Gehrig's NSW Wines Ltd* (1940) 57 WN (NSW) 226
Greer v *Kettle* (1938) AC 156
Lainson v Tremere (1834) 110 ER 1410
Re Patrick Corp Ltd and the Companies Act (1981) NSWLR 328

Odgers, *Construction of Deeds and Statutes* (5th ed (1967))

COUNSEL: G. K.W. Page SC for the applicant
R.M. Galloway for the respondent

SOLICITORS: Emerson Family Law acting as town agent for Somerville Laundry Lomax for the applicant
Wiltshire Lawyers for the respondent

[1] There are two applications before the Court. In the first, the applicant is VS and she seeks a property adjustment order under Part 19 of the *Property Law Act* 1974 (Qld) ("**the PLA**" or "**the Queensland Act**"). The respondent to that application, MM, brings a separate application for the striking out or dismissal of VS's application on a summary basis for want of jurisdiction and on other grounds.

Background

[2] The applicant, VS, and the respondent, MM, agree they were in a de facto relationship from about 16 August 2002 to about 12 September 2007. During the entire period of their relationship, the couple lived in New South Wales and, until shortly after the commencement of VS's application, each party continued to reside there. The application by VS was filed on 9 September 2009. In an affidavit sworn on 15 October 2009, VS deposes that: "On 16 October 2009" she moved from an address in Sydney to an address in Queensland. These applications were heard on 15 October.

[3] The parties agree that in the course of their de facto relationship, four different properties, situated in Queensland, were purchased by them.

[4] Upon the termination of their relationship, VS and MM entered into a "Termination Agreement" ("**the agreement**") under s 44 of the *Property (Relationships) Act* 1984 (NSW) ("**the NSW Act**"). Pursuant to that agreement, MM paid to VS $350,000 in what he submits was full and final satisfaction of any claim, right or entitlement pursuant to any law in New South Wales or elsewhere in Australia.

The Issues

[5] The following submissions were made on behalf of VS:

(a) There is nothing in the NSW Act that statutorily bars the bringing of an application under Part 19 of the Queensland Act.

(b) There is nothing in the Queensland Act or the agreement itself which prevents the bringing of this application.

(c) The agreement is not a recognised agreement under the PLA as it does not satisfy the requirements of s 266, in that it does not disclose all 'significant property'.
(d) The question of whether the agreement contains all significant property is a triable issue.
(e) MM's application should be dismissed and directions given for the trial of her application.

[6] MM submits that VS's application is barred on several grounds:
(a) This court lacks jurisdiction to determine this case.
(b) If the court does have jurisdiction, then the application should fail at the threshold because the rights of the parties to property orders were subsumed in the agreement.
(c) The agreement constitutes a 'recognised agreement' as defined by s266 of the PLA and, as such, prevents the Court from making any inconsistent order.

[7] I will deal first with the questions of the jurisdiction and capacity of the Court to make an order of the type sought by VS.

Jurisdiction

[8] MM submits that the court does not have jurisdiction to determine VS's application as the PLA has no territorial application to the parties.

[9] Neither of the parties resided in Queensland at any time during which they were in a de facto relationship. There is evidence that there is property in Queensland which was owned by the parties. Neither party was living in Queensland at the time of the application. The question is: do the provisions of Part 19 of the PLA apply in these circumstances?

[10] The issue of territorial jurisdiction arose in the case of *C v B*.[1]

[11] In *C v B*, there was evidence that the parties had lived together in Queensland at some time during the course of their relationship. The respondent contested jurisdiction, however, on the basis that the couple owned no property in this State. In considering the question of jurisdiction, P D McMurdo J noted that "[t]here is no express provision as to the territorial operation of Part 19."[2] However, his Honour noted that "[s]ome territorial limitation upon the operation of Part 19 must be implied".[3]

[12] In considering the question, his Honour said:

> "[22] In my view the implied territorial limitation is effectively that accepted in *Baker v Johnston*. **The jurisdiction depends upon there having been a de facto relationship**. Such a relationship is defined by a reference to a cohabitation. This essential element of cohabitation enables in every case an assessment to be made of the place or places in which the

[1] [2007] 1 Qd R 212
[2] Ibid, [14].
[3] Ibid, [15]

> parties have been in a de facto relationship. The place of the relationship is where the partners live together, which involves the notion of residence. So a temporary visit together to Queensland would not involve them living together, i.e. residing, in this State. And just as a person can have more than one place of residence so there can be a de facto relationship which exists at one time in several places.
>
> [23] I would not accept that there is jurisdiction only where the relationship has *ended* in Queensland. If for example, parties have lived together as de facto partners in Queensland, and moved to New South Wales before ending their relationship, in my view Part 19 would still apply. **The policy of Part 19 is that it is the *occurrence* of a de facto relationship which should have financial consequences**. It represents the Parliament's view that the participation in such a relationship can involve expectations or assumptions about entitlements to property which cannot fairly be met in every case by the general law. That policy underlying Part 19 is not irrelevant for the fact that a relationship which had existed in Queensland ultimately ended after the parties had moved somewhere else." (emphasis added)

[13] The reasons in *C v B* were examined by A M Lyons J in *B vT*.[4] In that case, the parties had lived together in a de facto relationship in Queensland, but the period of Queensland residency ended prior to the commencement of Part 19. The respondent challenged the jurisdiction of the Court on the ground that the applicant's claim did not disclose the basis for the operation of the Queensland Act. Her Honour said:

> "[11] It is clear that as P McMurdo J indicated in the decision of *C v B* "there is no express provision as to the territorial operation of Part 19". It is not expressly confined to de facto relationships in which the parties had resided in Queensland or had begun or ended their relationship in Queensland. Nor is it expressly provided that it applies according to whether one or both of the former partners is a Queensland resident when a proceeding is commenced.
>
> [12] The terms "property" and "financial resources" are also used in Part 19 without any express territorial limitations such as property within Queensland. Nor is the occurrence of some relevant contribution, including a financial contribution, made expressly relevant or irrelevant according to its connection with Queensland. His Honour held however that some territorial limitation upon the operation of Part 19 must be implied.
>
> …

[4] [2008] 1 Qd R 33

> [22] Given that the parties commenced their relationship in Queensland, there is property in Queensland and that the parties currently reside in Queensland, I am not satisfied that the defendant has established that on the facts as pleaded the plaintiff has failed to establish that Part 19 applies to the circumstances of this case."

[14] Part 19 should be given a wide operation. So much is accepted in many of the cases. But Part 19 operates upon the existence of a de facto relationship, not upon the situation of property owned by the parties to that relationship. Dealing with this in general terms then, to hold otherwise would be to assert jurisdiction over a relationship which had no connection with Queensland apart from the situation of, say, some minor real property in the State. I respectfully agree with the reasoning in *C v B*. In order for Part 19 to apply, the parties to a de facto relationship must have resided together in Queensland for, at least, some time during the course of their relationship. That requirement is not satisfied in this case.

Effect of the agreement in Queensland

[15] Should I be in error on the matter of jurisdiction, I will consider the effect of the parties' earlier agreement upon the Court's capacity to make orders under Part 19.

[16] Section 274 of the PLA provides that, with some qualifications, the court must not make a property adjustment order which is inconsistent with provisions on financial matters within a "recognised agreement" between the parties.

[17] A recognised agreement is defined by s 266 as follows:

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

[18] Section 265(1) defines a "separation agreement" as follows:

> "**Meaning of separation agreement**
> (1) A ***separation agreement*** is an agreement –
> (a) made by de facto partners –
> (i) in contemplation of ending their de facto relationship; or
> (ii) after their de facto relationship has ended; and

(b) dealing with all or some of the de facto partners' financial matters."

[19] The effect of a separation agreement is dealt with in s 274 of the PLA:

> **"No property adjustment order inconsistent with recognised agreement**
> (1) If a court is satisfied there is a recognised agreement, the court must not make a property adjustment order inconsistent with the agreement's provisions on financial matters.
> (2) Subsection (1) is subject to sections 275 and 276."

[20] On 4 February 2009 the parties entered into a "termination agreement" as defined in s 44 of the NSW Act. Section 44 provides:

> **44 Definitions**
>
> (1) In this Part:
> **…**
>
> ***termination agreement*** means an agreement between 2 persons, whether or not there are other parties to the agreement:
>
> (a) that is made in contemplation of the termination of a domestic relationship existing between them, or after the termination of such a relationship between them, and
> (b) that makes provision with respect to financial matters, whether or not it also makes provision with respect to other matters,
>
> and includes such an agreement that varies an earlier domestic relationship agreement or termination agreement, but does not include an agreement to which subsection (2) applies.
> (2) An agreement made in contemplation of the termination of a domestic relationship is taken to be a domestic relationship agreement if the relationship is not terminated within 3 months after the agreement was made.
> …"

[21] MM submits that the earlier agreement was a valid Termination Agreement under the NSW Act, and was intended by the parties to end all claims for property adjustments or maintenance arising out of their relationship. Therefore, it was argued, the agreement operates as a bar, statutory and otherwise, to the bringing of further claims under Part 19 of the PLA.

[22] As to the argument of a statutory bar, it was submitted on behalf of the applicant that no agreement made pursuant to Part 4 of the NSW Act can have the effect of a statutory bar on Queensland proceedings. I accept that the mere fact that an agreement was made which is consistent with the NSW Act cannot prevent the application of Part 19. That, though, is not the point. Whatever the origins of the agreement, if it comes within the definitions in ss 265 and 266 of the PLA, then it will have the effect provided for in s 274.

[23] The respondent submits that the agreement satisfies the criteria in s266 and it therefore bars any action under Part 19. It is, strictly, incorrect to refer to the effect of s 274 as constituting a bar to action under Part 19. An order can be made, but it must not be inconsistent with the separation agreement.

[24] There is no dispute that the agreement is in writing, that it is signed by the parties and that their signatures have been witnessed by solicitors.

[25] The applicant goes into some detail in her affidavit about her role during the relationship and the assets which were accumulated. But, in order to demonstrate that the agreement does not come within s 266 of the PLA, she needs to demonstrate that it does not contain "a statement of all significant property, financial resources and liabilities of each de facto partner when the de facto partner sign[ed] the agreement." I am not satisfied that she has done that. The property referred to in her affidavit is property of which she must have been aware at the time of signing the agreement because it is referred to in the agreement. I was not directed to any piece of property that should have been included in the agreement but which was not.

[26] I do not accept that the adequacy of the assets list has been put in issue such that a trial is necessary to determine the facts.

Contractual Bar

[27] An alternative ground raised by the respondent as a bar to further proceedings under Part 19 is based in contract. At its core, the respondent's argument is that the parties expressly agreed and represented that the earlier agreement would settle once and for all any claims for property adjustments or maintenance arising out of their relationship, that the defendant relied on this to his detriment and that the applicant is therefore estopped from bringing any further claim.

[28] In support of this contention, the respondent referred *inter alia* to the following provisions of the agreement's recitals:

> "M. It is the desire of [MM] and [VS] that this Deed shall be an end once and for all of the rights and claims of each against the other for a financial adjustment or maintenance pursuant to Part 3 of the *Property (Relationships) Act*.
>
> …
>
> O. Prior to entering this Deed, both [MM] and [VS] weere [sic] each provided legal advice, independently of the other, as to the following matter as is required by section 47 of the *Property (Relationships) Act*:
>
> a) The effect of this Deed on their right to apply for an order under Part 3 of the Property (Relationships) Act;
>
> b) the advantages and disadvantages, at the time that the advice was provided, to the party making the agreement."

…

Q. [MM] and [VS] desire to clearly define their property rights in order to prevent confusion, to further promote harmony between them and to reduce the possibility of resorting to litigation.

…

T. [MM] and [VS] intend that this Deed will create a legal enforceable agreement between them."

In addition, there are the following terms of the agreement:

"7.1 Matthew and Vanessa mutually covenant, acknowledge and agree that they have entered into this Deed pursuant to the provisions of Part 4 and it relates to all claims and actions in respect of all financial matters arising out of their relationship (other than a breach of this Deed) including but not limited to their rights if any at all:

a) Under the Act;

b) At common law;

c) In equity; and

d) **Under any other law (both written and unwritten) of Queensland or any other State and/or Territory of the Commonwealth of Australia, or the Commonwealth of Australia itself including the *Family Law Act 1975* as amended**.

…

"12.2 That except as provided for herein, neither party shall after the date of signing this Agreement, commence [a] maintenance claim against the other party and each party forever forgoes their right to claim maintenance which they may otherwise have had pursuant to Part 3 of the Act [.] **where this Termination Agreement does provide for maintenance neither party shall seek in a court of competent jurisdiction to modify the maintenance provision in any manner provided for herein.**

…

12.8 That [MM] and [VS] mutually covenant that whilst this Deed is intended to operate and does operate only in regard to the existing rights of and particularly those rights arising under Part 3 of the Act as amended each party has entered into this Deed and accepted changes in her or his legal position for their detriment as well as for their benefit on the basis that **it is the firm intention of both of them that** notwithstanding any change of the law in the future **neither party will make any further claim against the other in relation to property and spousal maintenance only arising out of the fact that they have been in a de fact style relationship**.

…

> 22.1 [MM] and [VS] mutually covenant and acknowledge that this Deed they [sic] will only be rescinded or varied by a written Agreement executed by both parties with the same degree of formality as this Deed and pursuant to the provisions of sections 265(1) and (2) and Section 266 of the *Property Law Act 1974 (Qld)* as varied from time to time." (emphasis added)

[29] The terms outlined above are expressed in clear and unambiguous language. As such, the terms should be given their ordinary, objective meaning, subject to any statutory exception.

[30] At this point, I should refer to s 271 of the PLA which states that "A provision in an agreement purporting to exclude the jurisdiction of a court in relation to a cohabitation or separation agreement is invalid, but its invalidity does not affect the validity of the rest of the agreement."

[31] However, it is also stated in s 272 that "A cohabitation or separation agreement is subject to, and enforceable according to, the law of contract except as otherwise provided by this part."

[32] From the terms set out above, it is clear that the objective intention of the parties was to finalise property matters relating to their de facto relationship "once and for all" and that neither party should have recourse to any court of competent jurisdiction to change or challenge their agreement. While s 271 makes it impossible to oust the court's jurisdiction entirely, s 271 and s 272 together allow parties to agree not to challenge an agreement in court, where that agreement is otherwise valid and enforceable under the Queensland Act. The agreement between the parties in this case is both valid and enforceable.

[33] Generally, estoppel by deed arises where a person attempts to deny a statement of fact contained in a deed to which he or she, or anyone with whom he or she is in privity, is a party.[5] A party who knows that a deed is dealing with his or her property, cannot hide behind lack of knowledge as to the nature of the transaction or its effect because he or she has trusted the advice of a solicitor or some other person or has failed to understand that advice.[6]

[34] Recitals appear in most deeds before the operative part, usually to record certain facts or to state the circumstances or the purpose of the parties in entering into the deed. Recitals may operate as an estoppel and thus preclude a party from disputing or denying a statement of fact made in a recital of the deed, subject to certain exceptions as to who may claim.[7] A party to the deed may rely on such statements, although in order for the statement to operate as an estoppel, it must be a precise and unambiguous statement of fact.[8] It should also be noted that estoppel by deed may be relied on when an action is brought to enforce rights arising out of the deed, but not rights which are only collateral to the deed.[9]

---

[5] *Lainson v Tremere* (1834); 110 ER 1410; *Carpenter v Buller* (1841) 151 ER 1013 at 1014.
[6] *Australian Express Pty Ltd v Pejovic* [1963] NSWR 954;
[7] See Odgers' *Construction of Deeds and Statutes* (5th ed (1967)) at p 157
[8] *Discount Finance Ltd* v *Gehrig's NSW Wines Ltd* (1940) 57 WN (NSW) 226; *Greer* v *Kettle* (1938) AC 156 at p 170
[9] See *Re Patrick Corp Ltd and the Companies Act* (1981) NSWLR 328

[35] The recitals of the termination agreement clearly establish the parties' intention to determine their respective rights once and for all and to formulate a legally enforceable agreement, without resort to litigation. In addition, the terms of the deed are precise and unambiguous in stipulating that the agreement should determine each party's rights under any and all Australian legislation, and that neither party may make any further claim. The applicant would, if otherwise able to proceed, be estopped.

Orders

[36] For the reasons set out above, the applicant's application cannot proceed. It is dismissed.