SUPREME COURT OF QUEENSLAND

CITATION:	*SBB v WMM* [2011] QSC 296
PARTIES:	**SBB** **(applicant)** **v** **WMM** **(respondent)**
FILE NO/S:	BS1523 of 2010
DIVISION:	Trial Division
PROCEEDING:	Originating application
DELIVERED ON:	5 October 2011
DELIVERED AT:	Brisbane
HEARING DATE:	14 July 2011
JUDGE:	Mullins J
ORDER:	**Adjourn the proceeding to a date to be fixed for submissions on the form of the orders and the costs of the proceeding**
CATCHWORDS:	FAMILY LAW – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – GENERALLY – where parties in a de facto relationship for four years with no children in the household – where parties were agreed as to the value of assets to be divided, but not the apportionment of the assets – where respondent's financial contributions were greater than the applicant's financial contributions – where contribution of the respondent as homemaker and carer was significant – whether the adjustment of the agreed assets in the proportions of 40% to the applicant and 60% to the respondent was just and equitable *Family Law Act* 1975 (Cth), s 79 *Property Law Act* 1974 (Qld), s 286, s 292, s 296, s 305, s 309 *FO v HAF* [2006] QCA 555; [2007] 2 Qd R 138, followed
COUNSEL:	J W Selfridge for the applicant T F Jordan for the respondent
SOLICITORS:	Berck & Associates for the applicant Bennett Carroll Solicitors for the respondent

[1] The parties were de facto partners for about four years from December 2004. The applicant is now 58 years old and the respondent is 60 years old. The applicant applies for a property adjustment order pursuant to s 286 of the *Property Law Act* 1974 (*PLA*). The parties have identified the assets that have to be divided between them and are agreed on the values of those assets. What they have been unable to agree upon are their respective contributions to the relationship and the impact of other factors relevant to the assessment of a just and equitable division of their assets.

Approach to the evidence

[2] Where the parties have not agreed on the value of assets contributed to the relationship or the quantification of non-financial contributions to the relationship, it has been necessary to make findings on disputed evidence. It was apparent during the hearing that each party had a tendency to overvalue his or her own contribution and undervalue the contribution of the other party. The cross-examination of each party was mainly for the purpose of highlighting this tendency. I identify in these reasons where it has been necessary to address this tendency to resolve the differences between the parties.

History of the relationship

[3] When the parties met in January 2004, the applicant worked as a miner and lived in Biloela in a rented apartment and the respondent worked as a nurse's aid and lived on the Sunshine Coast in her own home which was unencumbered. The applicant earned approximately $2,350 gross per week. The applicant owned land in a coastal town which was mortgaged and on which only a large shed was constructed. I will refer to this land as the subject property.

[4] Before their de facto relationship commenced, by way of a business venture they purchased land in Biloela in July 2004 as tenants in common in equal shares. The applicant paid for this land using the sum of $44,700 borrowed from his bank that was also secured on the subject property. The amount owed on the subject property before the additional advance was $103,205.

[5] The respondent left her employment when she moved to Biloela in December 2004 to live in rented accommodation with the applicant. The respondent was able to rent her Sunshine Coast home for $375 per week, but there were unspecified periods when that property was vacant. The respondent did not resume paid employment during the course of the parties' relationship. The respondent did all the housework while the parties lived together and the respondent took on the role of carer for the applicant, as required, in relation to his various illnesses. The applicant did some maintenance works on the respondent's Sunshine Coast property, although the respondent was critical of the quality of the works. When the respondent had the Toyota vehicle, the applicant did minor services on the vehicle.

[6] Apart from the parties' real property, the applicant's significant assets at the commencement of their relationship were his Cougar Cat boat (purchased in 1995 for $54,000, but sold in 2007 for $30,000), his Toyota Landcruiser purchased in November 2004 for $50,000 (for which there was an outstanding liability to Esanda of $34,406), superannuation of $169,664, the timber and bricks he had acquired for building on the subject property (which he valued at $50,000), his tinny boat valued at $5,500, and his wine collection (which he valued at $8,000).

[7] Although the applicant attributed a value of $54,000 to the Cougar Cat boat, its sale price of $30,000 in 2007 was a better yardstick for valuing the boat at the commencement of the relationship, than the purchase price in 1995. Although the applicant endeavoured to justify his reliance on the purchase price, on the basis that the sale price was the price for which he was forced to sell the boat, because the respondent did not like the ocean, I consider it a better approximation of real value to treat the boat as having a value of $35,000 at the commencement of the relationship. The purchase price of $50,000 is the appropriate value for the applicant's Toyota Landcruiser. The respondent estimated the applicant's wine collection as 45 bottles at $30 per bottle, making $1,350. The applicant stated that he had 90 odd bottles and that he never placed anything in his collection that was under $80. The respondent's approach to the valuation of the wine collection was mechanical, but there was no precision about the applicant's approach. As I was unconvinced by either approach, I will allow a value of $4,000 for the wine collection at the commencement of the relationship.

[8] The respondent had $98,109 in her superannuation fund and a 1996 Toyota Surf four wheel drive vehicle which she valued at $17,000. As the respondent sold her Toyota Surf vehicle to one of her sons for $7,000 in 2008, a value of $10,000 is a more appropriate value for the respondent's vehicle at the commencement of the relationship.

[9] The parties did not open a joint account with Westpac until 9 June 2006 which the respondent controlled and through which the respondent then managed their finances. The initial deposit of $96,492 to the joint account came from the respondent's superannuation which she was able to access after reaching 55 years in June 2006. They also had a credit card account with Westpac which the applicant used. The applicant deposed to paying a number of accounts using that credit card, but the credit card bills were then paid from the joint account. In looking at the parties' contributions to their relationship, it is the ultimate sources of the funds they utilised during the relationship that are relevant rather than the immediate source of payment such as the credit card account or the joint account. The respondent undertook a detailed analysis of expenditures made during the relationship. Once account has been taken of the assets and income contributed to the relationship by the respondent which were the source of expenditures that the respondent claimed were made by her, it is not necessary to identify which of the expenditures during the relationship were made from which source of funds.

[10] The respondent repeatedly asserted in the first affidavit that she filed for the purpose of this application that she met "all of the living expenses" for both parties. The problem with that assertion is that the only income that the respondent regularly received from the commencement of the relationship until she was able to access her superannuation was the rent from her Sunshine Coast home. In that same period as the applicant was well paid as a miner, it is an overstatement to suggest that all living expenses were paid by the respondent. The respondent clarified her position in her second affidavit recognising that the situation between the parties was different before she was able to use her superannuation. During cross-examination the respondent also modified her position and suggested that prior to June 2006, the applicant paid his bills and the respondent paid her bills. The respondent still overlooked the benefit she received from the rent, household and entertainment expenses met by the applicant.

[11] The parties bought a caravan in June 2006 for $79,550, so that they could travel around Australia. The applicant paid the deposit of $7,900 and the respondent withdrew $71,510 from the joint account on 27 June 2006 for payment for the caravan. The applicant stopped work at the mines in late July 2006. The applicant used his holiday and long service leave for the seven months they spent travelling and during that period he salary-sacrificed about $1,000 per week into his superannuation.

[12] In October 2006 they sold the Biloela land for a gross capital gain of $77,000 which was used to reduce the mortgage debt secured on the subject property after repaying the amount of the loan that had been obtained for the purchase of the Biloela land. Each party included an equal share of the taxable capital gain in his or her 2007 income tax return. There was no suggestion by the parties that there should be any attempt to adjust accounting for the proceeds of the sale of the Biloela property, other than how it has been reflected by the parties' dealings during their relationship.

[13] There is one respect, however, that the respondent's approach to the Biloela land should not be followed. The respondent asserted that the applicant's mortgage of the subject property had a balance of $146,680 at the commencement of their relationship. This was correct, but reflected the extension of the loan to purchase the Biloela land that was in joint names, but was purchased entirely with funds borrowed by the applicant on the security of the subject property prior to the commencement of the relationship. As the proceeds of sale were used to reduce the loan secured on the subject property, it is fair to both parties to treat the loan at the commencement of the relationship as the amount of the loan before it was extended to purchase the Biloela land in joint names.

[14] The respondent sold her Sunshine Coast home in December 2006 for a net sum of $602,911. Initially she put $50,000 into the parties' joint account and $550,000 into her superannuation fund. She subsequently drew on her superannuation fund to meet expenses of the relationship.

[15] After they returned from their travels, they moved into the shed on the subject property. The applicant had operations for his eyes, shoulder and a hernia. He used sick leave and received some WorkCover benefits during this time.

[16] The parties decided to build a house on the subject property. The applicant transferred the subject property to the respondent and him as joint tenants in early 2008. The applicant obtained a valuation from NPR Valuers Pty Ltd in December 2007 that the market value of the subject property including the shed for "Family Transfer purposes only" was $240,000. That is the value that the respondent considers should be attributed to the subject property at the commencement of the parties' relationship. The applicant has obtained an historical valuation of the subject property as at 30 December 2004 that was undertaken by the same valuers in January 2009. The valuation has proceeded on the basis that the shed was liveable and that improvements by way of partial retention of the allotment had been carried out to accommodate the existing shed. The valuation of $310,000 was apportioned between the land ($260,000) and the improvements ($50,000).

[17] It is not surprising that the applicant seeks to value his contribution of the subject property at the commencement of the relationship at $310,000, and that the

respondent asserts that it should be valued at $240,000. Theoretically there should not be a different valuation of a property for "family transfer purposes," but the comparable sales that are referred to in the valuation obtained in January 2009 and the size of the shed suggests that a valuation between the two valuations would be an appropriate valuation of the applicant's contribution at the commencement of the relationship.

[18] Another asset that the applicant had at the commencement of the relationship was timber and bricks that he had acquired for the purpose of constructing the house on the subject property. The applicant had 11,000 bricks purchased pre-GST and only 1,000 were not used for the house. He had also felled his own timber and had it milled for the house in 10 metre lengths. There were 12 lengths. The parties worked in re-sizing the timber for the flooring of the house. The applicant made most of the skirting boards during the house construction. The applicant estimated the value of the timber and bricks that he had acquired for the house at the commencement of the parties' relationship was $50,000. The respondent obtained a quote from the builder for the cost of the applicant's bricks and timber that were used in the house on the basis of what it would have cost to acquire those same quantities at the time of construction. That is a more realistic approach to the valuation of the timber and bricks and I will use the respondent's figure of $35,000.

[19] The parties obtained from Budcon Pty Ltd, the builder engaged to build the house on the subject property, a letter dated 22 January 2009 that listed the amounts that had been paid by each of the parties on account of the construction. According to that breakdown, as supplemented by further information on which the parties are agreed, the applicant had paid $97,866.44 on account of the construction and the respondent had paid $192,774.40. There is still work to be completed before the house will satisfy local authority requirements and be able to be sold. These works include addressing the problem of floor slope in the showers, some internal painting, problems caused by the built-in rainwater tank, landscaping and timber railings to be attached to the verandas.

[20] In 2008 the respondent purchased a VW Tiguan motor vehicle for $45,000 of which $24,825 was paid by the applicant from his superannuation and the balance was paid by the respondent. The respondent left the subject property on 23 November 2008 and returned to the Sunshine Coast. The parties spoke by telephone, but were unsuccessful in addressing their relationship problems. Eventually on 2 January 2009, the respondent retrieved her belongings from the subject property.

[21] The respondent's contributions to the completion of the house on the subject property and the applicant's living expenses ceased on 23 November 2008. The respondent took the caravan with her and sold it for $70,000 which she deposited to her bank account. The applicant has asserted that the caravan was sold at an undervalue, but there is no supporting evidence to enable such a finding to be made.

[22] The applicant officially retired from his employment on 9 December 2008.

[23] The applicant asserted that he also contributed financially to the relationship his winnings from betting through the TAB. That assertion is not accepted by the respondent who described the applicant as a regular gambler. In the absence of any records to support net gains from gambling, it is not appropriate to include any additional contribution made by the applicant from that source.

[24] The applicant has remained living in the subject property and has been responsible for paying the expenses of the subject property since separation. Insurance for the house has been approximately $610 per annum and rates for the subject property have been approximately $4,000 per annum which makes the applicant's contribution for occupying the subject property about $90 per week. The applicant estimated, and I accept, that a permanent rental for the subject property, if it were lawfully able to be rented, would be about $250 per week.

[25] During the hearing of the application, I made the suggestion that the applicant by living in the subject property has gained a benefit from using the respondent's equity in the subject property, whilst the respondent had to rent accommodation elsewhere. There is a problem, however, with applying a strict mathematical calculation to this approach, as it does not take into account the failure of both parties to resolve their property dispute earlier that has also contributed to the failure to complete the house on the subject property which is an impediment to earning income from the rental of the house.

[26] It was always the applicant's intention to retire to the house he would build on the subject property. He is now familiar with the area and feels comfortable in the house, because of his familiarity with it, despite his poor eyesight. The applicant seeks that an adjustment order allow for him to remain living in the subject property.

[27] After working as a volunteer, the respondent returned to paid employment in August 2010, but her living expenses exceed her modest income.

Identification of the property pool

[28] The description of the parties' assets and current agreed values of each asset for the purpose of this application are:

Subject property	$500,000
Respondent's savings	183,446
Respondent's VW Tiguan	30,000
Applicant's Landcruiser	35,000
Applicant's superannuation	113,808
Respondent's superannuation	7,800
TOTAL:	**$870,054**

[29] One issue of concern to the applicant during this proceeding was the respondent's interest in a family trust. The respondent deposed to being a trustee and principal of the family trust that was established by her former husband in March 2000 for the benefit of the two sons from that marriage, but that the deed was amended to remove her as a principal. The respondent deposed to continuing as a director of the trustee company, but that she is not capable of making sole decisions regarding the assets of the trust from which she derives no benefit, as it operates as an investment vehicle for the benefit of her sons. It is common ground that the terms of the trust deed provide for the possibility of distributions being made to persons in a wider class than the respondent's sons, such as the respondent herself or a de facto spouse of the respondent. There is no evidence that during the course of the relationship the respondent obtained any personal benefit from the family trust.

[30] I am satisfied that as any interest of the respondent in that family trust did not play any role in the parties' financial dealings, and having regard to the relatively short duration of the parties' relationship, it is not appropriate that the respondent's contingent interest in the family trust should be treated as an asset in the property pool that is to be divided in this proceeding. An alternative submission was made on behalf of the applicant that as the family trust owned residential property, the family trust could have made one of those properties available to the respondent for her residence post-separation. It was suggested that it was a circumstance that the court should take into account under s 309 of the *PLA*. I do not accept that the justice of the case requires that approach.

[31] Of the assets set out in the above table, the parties agree that, apart from the subject property, each party keeps the asset that is shown in the name of that party which results in the applicant keeping assets valued at $143,808 and the respondent keeping assets valued at $221,246. That leaves the subject property as the asset that has to be divided to reflect a just and equitable division of all their assets, after taking into account the assets that each has kept. At the conclusion of the hearing, the respondent's submission was that the subject property should be sold and, after repayment of a debt of $5,327.68 owed to the respondent's daughter, the net proceeds of sale should be divided 70 per cent to the respondent and the balance to the applicant. The applicant acknowledges that the debt of $5,327.68 must be repaid to the respondent's daughter from joint assets. The applicant submitted that, after allocating the other assets shown in the table to the party in whose name the asset stands, the subject property should be divided so that the overall division of the assets is an equal division.

[32] Apart from adverting to the fact that the applicant has remained living in the subject property post-separation and the respondent had to pay rent for her accommodation post-separation, there were no detailed submissions of counsel addressed to analysing the parties' expenditure post-separation. The parties appear to have proceeded on the basis of an assumption that the rate of diminution in their respective assets post-separation did not require any specific adjustment between them.

What is a just and equitable adjustment of the parties' property interests?

[33] It was common ground between the parties that the court must take the same approach to the exercise of the discretion under s 286(1) of the *PLA* as has been applied by the Family Court in alteration of property interests pursuant to s 79 of the *Family Law Act* 1975 (Cth): *FO v HAF* [2007] 2 Qd R 138 at [51]-[52].

[34] The respondent must be given credit for her contribution as the homemaker during the relationship, as required by s 292(1) *PLA*.

[35] The court must consider the matters mentioned in subsubdivision 4 (s 297 to s 309) of the *PLA* to the extent they are relevant in deciding what order adjusting interests in property is just and equitable: s 296 *PLA*.

[36] Although the parties are of comparable age, the applicant has significant health issues. He suffers from diabetes with associated high blood pressure and significant problems with his eyesight which will continue to deteriorate. The applicant will not be returning to paid employment. The respondent's age places a limit on the

period of time that she is likely to continue in paid employment which suggests that it is fair that there is no specific adjustment for these prospective factors.

[37] Under s 305 of the *PLA* the court is required to take into account the length of the de facto relationship. As it was a relatively short relationship of four years, the relative contributions of the parties, both financial and non-financial, to the relationship are critical in determination of the division of the parties' assets. It was common ground that the applicant's contribution by way of income during the relationship was about $300,000 compared to the respondent's contribution by way of income of about $100,000. A submission was made on behalf of the applicant that he should be given credit for the increase in his superannuation during the relationship due to statutory payments made by his employer. No analysis of the figures was undertaken for that purpose on behalf of the applicant. The figures used for income, in any case, are rounded and I have taken the general effect of the submission into account when determining the proportions that the parties should bear of the agreed assets.

[38] There is no evidence that either party is cohabiting with another person in a way that requires the court to consider the financial circumstances of that cohabitation. The applicant married a Chinese citizen in June 2010 who has been unable to obtain a visa to move to Australia. It could be another year before the applicant's wife is able to obtain the requisite visa.

[39] A summary of the applicant's financial contributions during the period of the relationship (leaving furniture, jewellery and tools aside which was the approach of the parties) is:

Income		$300,000
Subject property		275,000
Cougar cat boat		35,000
Toyota Landcruiser		50,000
Bricks and timber		35,000
Superannuation		169,664
Wine collection		4,000
Tinny boat		5,500
Total		**$874,164**
Less liabilities		
Esanda	$34,406	
Mortgage	103,205	
		137,611
Net contributions		**$736,553**

[40] A summary of the respondent's financial contributions during the same period is:

Income	$100,000
Toyota Surf	10,000
Superannuation	98,109
Sunshine Coast property	602,000
Total	**$810,109**

[41] In financial terms, the respondent's financial contributions slightly outweighed that of the applicant, but then an adjustment needs to be made for the respondent's contribution as the homemaker and carer for the applicant which significantly outweighed the applicant's non-financial contributions to the relationship. The contribution as a homemaker and a carer over a period of four years deserves more than a token value. Account must also be taken of the fact that the applicant has had the benefit of using the respondent's equity in the subject property to date which exceeds the rates and insurances paid (or payable) by the applicant for the subject property to date. I have therefore concluded that on a contribution based entitlement, the adjustment of the identified pool of assets would be on the basis of 40% to the applicant and 60% to the respondent. Coincidentally that is between the respective positions adopted by the parties. Perhaps that is not surprising in view of the approach of each of them to the task that was required in dealing with their contributions to the relationship. On reflection, however, I am satisfied that provided the costs of completing the house on the subject property are borne by the parties in the proportions to which they are entitled to share the proceeds of sale and the applicant continues paying the rates and insurances for the subject property while he remains living there, the adjustment of the agreed assets in the proportions of 40% to the applicant and 60% to the respondent accords with the parties' contributions to the relationship and would be just and equitable in the circumstances.

Orders

[42] The respondent seeks the sale of the subject property, on the basis that will be the source of the funds for the applicant to pay the respondent the amount to which she is entitled under the property adjustment order. My conclusion on the appropriate division of the agreed assets makes the sale of the subject property inevitable. Before any sale of the subject property can proceed, the further works must be carried out to complete the house for it to be saleable. Counsel did not in their submissions at the hearing specifically address the orders required to ensure that the works to complete the house are undertaken. That will need to be covered in the final orders.

[43] I will therefore adjourn the proceeding to a date to be fixed that is convenient to the parties to enable submissions to be made on the form of the orders that should be made to reflect the conclusions that I have reached in these reasons and in relation to the costs of the proceeding.