SUPREME COURT OF QUEENSLAND

CITATION:	*Mann v Whitney* [2011] QSC 387
PARTIES:	**SONYA MANN** (applicant) **v** **TIMOTHY CLIFTON WHITNEY AS ADMINISTRATOR AD LITEM OF THE ESTATE OF ANGUS DONALD MANN DECEASED** (respondent)
FILE NO/S:	SC No 6969 of 2011
DIVISION:	Trial
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Delivered ex tempore 11 November 2011
DELIVERED AT:	Brisbane
HEARING DATE:	11 November 2011
JUDGE:	Atkinson J
ORDERS:	**1. The application for Summary Judgment filed 3 November 2011 is dismissed.** **2. The Respondent's costs of and incidental to responding to this application be assessed on the Supreme Court itemised scale on a standard basis and paid by the Plaintiff.** **3. With the consent of the Applicant, an application for provision out of the estate pursuant to Part 4 *Succession Act* 1981, application BD 321/11, be remitted to the Supreme Court to be heard together with this claim BS 6969/11.** **4. The parties to both the application and the action shall participate in a mediation of both matters to be held on or before 20 December 2011:** **a) at a venue to be agreed upon, failing agreement the mediation rooms at the Queensland Law Society Inc;** **b) with the mediator to be Rebecca Treston of Counsel (or if she is unavailable, such other mediator as may be agreed upon amongst the parties or as may be ordered by the Court);** **c) the Administrator, as the Defendant in claim BS 6969/11 and the Respondent in**

application BD 321/11 shall prepare the brief for the mediator, the brief containing copies of all documents filed in both the claim and the application, and such other material as may be agreed upon amongst the parties; and

d) the fees of the mediator and any venue hire are to be paid by the Plaintiff in this claim and the Applicant in the application, in equal shares.

5. That in claim BS 6969/11 and the application BD 321/11:

a) any notice given by any party in either proceeding to another party shall be sufficient, where it is necessary, to be notice pursuant to the other proceeding;

b) affidavit or other material field in either proceeding shall be evidence in the other proceeding;

c) evidence given at the trial in either proceeding shall be evidence in the other proceeding; and

d) any document tendered as an exhibit in either proceeding shall be an exhibit in the other proceeding.

6. That any party be at liberty to apply on three days written notice to the other parties.

CATCHWORDS: EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – RESULTING TRUSTS – WHEN ARISING – JOINT PURCHASE OF LAND – where the applicant and deceased decided to purchase a home together and the deceased consequently purchased a property in his own name – where the applicant sought, inter alia, a declaration that the respondent held the property and its contents on constructive or resulting trust for the applicant and orders that the property be conveyed to the applicant – whether the applicant and deceased held the property as joint tenants or tenants in common

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the applicant sought summary judgment in the proceedings – where the extent of the co-ownership of the applicant and deceased in equity remained to be determined – whether summary judgment should be ordered

Property Law Act 1974 (Qld), s 35

	Uniform Civil Procedure Rules 1999 (Qld), s 292
	Delehunt v Carmody (1986) 161 CLR 464, cited *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, cited
COUNSEL:	R Peterson for the applicant R Whiteford for the respondent
SOLICITORS:	Hall Payne for the applicant McCullough Robertson for the respondent

HER HONOUR: This is an application for summary judgment brought in relation to a property described as Lot 4 on Registered Plan 20177 situated at 194 Simpsons Road, Bardon, in the State of Queensland, and its contents ("the Bardon property").

The summary judgment application seeks the following orders: that the plaintiff have judgment against the defendant and that a declaration be made that the defendant holds the Bardon property and its contents on a constructive or resulting trust for the benefit of the plaintiff; that an injunction be granted for the benefit of the plaintiff restraining the defendant from dealing with the Bardon property and contents otherwise than in accordance with these orders; that the defendant convey the Bardon property and contents to the plaintiff; and that the costs and outlays of the conveyance of the Bardon property to the plaintiff be paid from the estate of the late Angus Donald Mann, deceased.

The application is made pursuant to rule 292 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR"). As the Court of Appeal observed in *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, the words of that rule need no exposition. The words "no real prospect of successfully defending the claim" in the rule are used in contradistinction to "fanciful prospects of defending the claim". However, of course, summary judgment is given only in the clearest of cases where there is a high degree of certainty about the ultimate outcome.

In this case, for the reasons I am about to give, summary judgment would be quite unsuitable.

The background to this application involves an unhappy family situation. The deceased, Dr Mann, was, at the time of his death, married to the plaintiff, his second wife. He had previously married his first wife on 20 November 1994. They had two children of the marriage, one born in 1996 and one born in 1998. Those children had survived the deceased.

The deceased separated from his first wife in about 2006 and they were divorced in June 2007.

The applicant deposes that in 2007 she and the deceased decided to purchase a house as their future home. She deposes that she located a suitable property on the internet which was the Bardon property which was then under construction. She says that when she showed the deceased the house he said words to the effect, "This is for us."

She deposes that he purchased the Bardon property in his own name in April 2007. All of the deposit and the initial payment for the Bardon property was made by him.

She said that it was intended that she should contribute to the purchase price, but there appear to have been two reasons why she did not initially contribute, firstly because she had to sell her apartment and other personal items, and also

because the deceased was still undergoing a property settlement with his first wife.

Eventually she did sell that apartment and personal items and moneys were paid by her into the mortgage account, although not in precisely the same amount as was paid by the deceased. She said that when she paid the moneys she made out a cheque in the name of the deceased that was deposited into the mortgage account, and she told the deceased that this was a “big thing” as she was putting all she had in with him, and he replied, "Don't worry. This is our home."

Not long before his death she deposes they discussed preparing a will and life insurance, and they discussed those matters and he told her that if he died she would get everything. At no time, however, was the Bardon property transferred into both their names, so he remained at law the sole owner of the house.

She deposes to various contributions she made, financial and, more particularly, non-financial, and no doubt she has an arguable case of a trust over the property which may be in the form of an express, constructive or resulting trust depending on the precise terms of it. However, that is not what she seeks by way of summary judgment. What she seeks is the declaration that the defendant, who has been appointed the administrator of the deceased's estate as he died intestate, holds the property *solely* for her benefit.

It would appear on any understanding of the facts deposed before me that any trust over the property would result in the deceased and the plaintiff having been co-owners. The extent of the co-ownership remains to be determined.

There is nothing to suggest that there was any trust which made her the sole owner. The only way in which she could be entitled to the property now is if it was a necessary incident of the co-ownership that they were joint tenants, and she therefore has taken by survivorship. There is no unequivocal statement in the evidence to which I have been referred which suggests that the co-ownership was necessarily a joint tenancy.

If the plaintiff and the deceased were co-owners, then equity would presume that they were co-owners as tenants in common, not as joint tenants. This conclusion is obvious once one considers the High Court authority of *Delehunt v Carmody* (1986) 161 CLR 464.

The facts of that case were that Mr Carmody and Ms Delahunt, who lived in a de facto relationship for just over 30 years, contributed equally to payment of a deposit and the instalments on a home on the basis of an express oral agreement that they would own the property in equal shares and that it would in due course be put in the names of both. Ms Delahunt contended that the land had been held beneficially for herself and Mr Carmody as joint tenants, and that she was, accordingly, beneficially entitled to the land by

survivorship.

The High Court held at 472 that, "When a purchase is made in the name of one of two or more persons who contributed to the purchase price, and the relationship between the parties does not give rise to a presumption of advancement, the property will be held on a resulting trust for the persons who paid the price. Quite clearly, where the contributions to the purchase price have been made in unequal shares the property will be held on a resulting trust for the contributors as tenants in common in proportion to the amounts which each contributed".

The Court went on to consider whether or not, where purchasers contributed to the price in equal shares, the beneficial interest of the purchasers would be as joint tenants or as tenants in common.

As Gibbs CJ said at 473, equity had a dislike for joint tenancies because their effect was to make the ultimate ownership of the property depend on the chance of survivorship.

Their Honours held that taking account of section 26 of the *Conveyancing Act* 1919 (NSW) in New South Wales, which is reproduced in section 35(1) of the *Property Law Act* 1974 (Qld) and which provides that a disposition of the beneficial interest in any property, whether with or without the legal interest, to or for two or more persons together beneficially

shall be construed as made to or for them as tenants in common and not as joint tenants, that by analogy, the property held by one person on a resulting trust in part for another would be held in equity as tenants in common.

It seems to me that it is certainly not the case that this is a suitable vehicle for a summary judgment in favour of the plaintiff for a declaration that the defendant holds the Bardon property and its contents on a constructive or resulting trust solely for the benefit of the plaintiff, and I decline to so order.

The defendant, who is the administrator of the estate, has proposed directions which would lead to this case, particularly for the purposes of a mediation in the first instance, being considered together with an application for family provision brought by the two children of the deceased who obviously have an interest in the outcome of the administration of the estate, as of course does the plaintiff.

It seems to me that it is appropriate, having dismissed the summary judgment application, to make orders consistent with those directions sought, and I propose to do so.

So far as the costs are concerned, the respondent has asked for his costs and since, it seems to me, that the summary judgment application was bound to fail, he should have those costs in accordance with the orders sought.

I propose to make the order as per draft, which I will initial and place with the file.