SUPREME COURT OF QUEENSLAND

CITATION:	*JAB v the executors of the estate of the late MST* [2022] QSC 226
PARTIES:	**JAB** (plaintiff) **v** **THE EXECUTORS OF THE ESTATE OF THE LATE MST** (defendants)
FILE NO/S:	5862 of 2019
DIVISION:	Trial Division
PROCEEDING:	Claim
DELIVERED ON:	21 October 2022
DELIVERED AT:	Brisbane
HEARING DATE:	13 – 17 March 2022
JUDGE:	Wilson J
ORDER:	**1. The plaintiff's claim is dismissed.** **2. The question of costs is adjourned to a date to be fixed.**
CATCHWORDS:	PROCEDURE – STATE AND TERRITORY COURTS: JURISDICTION, POWERS AND GENERALLY – JURISDICTION – GENERALLY – where the plaintiff and the deceased were in a de facto relationship that broke down – where the plaintiff previously brought proceedings relating to the property in the Federal Circuit Court – where the plaintiff seeks relief in relation to that property in the Supreme Court pursuant to equitable principles and statute – where the defendants contend that the claims fall within the exclusive jurisdiction of the Commonwealth courts pursuant to the *Family Law Act 1975* (Cth) – where the plaintiff states that the claims are not de facto financial causes – whether the claims are de facto financial causes – whether the Supreme Court has jurisdiction to determine the claims EQUITY – TRUSTS AND TRUSTEES – IMPLIED TRUSTS – CONSTRUCTIVE TRUSTS – DE FACTO RELATIONSHIP – where plaintiff and deceased were in a de facto relationship – where the de facto relationship broke down – where the plaintiff seeks a declaration that the defendants hold the title to the property on trust for herself and the deceased in equal shares – where the plaintiff claims

that the parties agreed to purchase a property together – where the property was solely registered in the name of the deceased – where the plaintiff claims she made contributions to the purchase and improvement of the property – where the defendants deny that there was a joint endeavour – where the defendants say that there is no unconscionability – whether a constructive trust should be imposed

REAL PROPERTY – TORRENS TITLE – TRANSFERS – EXECUTION – where the plaintiff claims the deceased executed a transfer – where the transfer was not properly witnessed by a justice of the peace – where the defendants dispute the signature on the transfer is that of the deceased – where handwriting expert evidence was adduced – whether the transfer was executed by the deceased

COUNSEL: P Hackett for the plaintiff
A Collins for the defendants

SOLICITORS: Forest Lake Law Practice for the plaintiff
Hall Payne Lawyers for the defendants

[1] The plaintiff, JAB[1], was formerly in a de facto relationship with MST ("the deceased") who passed away in 2017. The defendants are the executors of his estate.

[2] In July 2002, the deceased acquired a property at Kalbar ("the property") for $220,000. These proceedings concern a dispute over the legal and beneficial ownership of that property, with the plaintiff claiming that:

(a) prior to the deceased completing the purchase, she and the deceased orally agreed to buy the property together on the basis that they would each contribute one half of the purchase price;

(b) the plaintiff made financial contributions towards the acquisition and improvement of the property by payments to the deceased (which are particularised in her statement of claim); and

(c) unbeknown to the plaintiff, the contract was prepared in the deceased's name alone as purchaser.

[3] The plaintiff states that when she learnt that her name was not on the title to the property in around 2013, she immediately made demands of the deceased to transfer the property into their joint names rather than his alone. She states that on 12 March 2016, the deceased executed a document, being a transfer in Form 1 and Form 24, transferring his right, title and interest in the property to himself and the plaintiff to be held as joint tenants.

[4] The plaintiff states that upon the execution of the transfer, she and the deceased became, in equity joint tenants of the property. The plaintiff gave evidence that she did not register the transfer as she was informed that she would not be able to do so until a mortgage over the property in the deceased's name was released.

[5] The plaintiff claims that the acquisition of the property was a joint endeavour by herself and the deceased, that the joint endeavour failed as the deceased registered the property in his name alone and that it would be unjust for the property to remain registered in the sole name of the deceased. Accordingly, she claims that the deceased held the property on trust for the plaintiff and himself in equal shares, or alternatively, in the proportions of their contributions to the property.

[6] In such circumstances, the plaintiff claims, *inter alia*:

(a) A declaration that she is entitled to be registered as the sole proprietor of the property pursuant to the transfer executed by the deceased on 12 March 2016.

(b) In the alternative, a declaration that the defendants as the executors of the estate of the deceased hold any right, title and interest they may have in the property upon trust for the plaintiff and the deceased in equal shares, or, alternatively, in the proportions of their contributions to the property.

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[1] As these reasons refer to Federal Circuit Court and Family Court proceedings between the plaintiff and the deceased, these reasons have been anonymised in accordance with s. 121 of the *Family Law Act 1975* to protect the identities of the parties.

(c) In the alternative, equitable compensation in the amount of $205,670.

[7] The defendants state that the plaintiff and the deceased were in a de facto relationship. Accordingly, their primary submission is that pursuant to the *Family Law Act 1975* ("the FLA"), the Family Court of Australia or the Federal Circuit Court ("the FCC") (together, "the Commonwealth courts") have exclusive jurisdiction to determine the property interests of the plaintiff and the deceased.

[8] However, if it is determined that this Court has jurisdiction to hear the plaintiff's claim, then the defendants submit that the acquisition of the property was not a joint endeavour, and the deceased therefore did not hold the property on trust for the plaintiff and himself. They also submit that the plaintiff has not established the cornerstone feature of unconscionability.

[9] Further, the defendants state that the deceased did not execute the transfer and that the signature on the transfer documents is not that of the deceased.

[10] After a four day trial, I heard closing submissions from the parties. Both the plaintiff and the defendants' counsel prepared written submissions. However, in my view, these submissions were insufficient, particularly in relation to determining the jurisdiction issue. The matter was adjourned for the parties to provide further written submissions with the option to return and provide additional oral submissions. No party required further oral submissions.

The three issues to be determined in this case

[11] The defendants prepared a list of 22 issues in dispute and the parties' submissions addressed these issues. However, many of these issues are repetitive and overlapping. They can be summarised into three fundamental issues:

(a) First, whether the Supreme Court has jurisdiction to determine these proceedings ("the jurisdiction issue");

(b) Second, if this Court has jurisdiction, whether the deceased held the property on trust for the plaintiff and himself in equal shares or, alternatively, in the proportions of their contributions to the property ("the trust issue");

(c) Third, whether the deceased executed the transfer documents ("the transfer issue").

[12] In relation to the first issue, I have found that this Court does not have jurisdiction to determine the plaintiff's claim.

[13] However, even if I determined that this Court did have jurisdiction to consider the trust issue, the plaintiff's claim still fails. In my view, after considering all the evidence, the deceased did not hold the property on trust for the plaintiff and himself and the plaintiff is not entitled to equitable compensation.

[14] Further, I have found that the deceased did not execute the transfer documents. Accordingly, the plaintiff and the deceased did not become in equity joint tenants of

the property. The plaintiff is not entitled to be registered as the sole proprietor of the property pursuant to the transfer.

Does the Supreme Court have jurisdiction to determine these proceedings?

The relevant provisions of the FLA

[15] To determine the jurisdiction issue, it is necessary to consider the relevant provisions of the FLA.

[16] A "de facto relationship" is defined in s. 4AA of the FLA. As neither party disputes that the plaintiff and the deceased were in a de facto relationship, it is unnecessary to set it out.

[17] Section 4 of the FLA defines "de facto financial cause", "distribute", "proceedings", "property" and "property settlement proceedings" as follows:

> ***de facto financial cause*** means:
>
> …
>
> (c) proceedings between the parties to a de facto relationship with respect to the distribution, after the breakdown of the de facto relationship, of the property of the parties or either of them; …
>
> ***distribute***
>
> (a) in relation to:
>
> (i) property, and financial resources, of the parties to a de facto relationship or either of them; or
>
> (ii) vested bankruptcy property in relation to a bankrupt party to a de facto relationship;
>
> includes conferring rights or obligations in relation to the property or financial resources.
>
> …
>
> ***proceedings*** means a proceeding in a court, whether between parties or not, and includes cross-proceedings or an incidental proceeding in the course of or in connexion with a proceeding.
>
> ***property*** means:
>
> …
>
> (b) in relation to the parties to a de facto relationship or either of them – means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.

property settlement proceedings means:

…

(b) in relation to the parties to a de facto relationship – proceedings with respect to:

(i) the property of the parties or either of them; or

…

[18] Section 39A of the FLA refers to instituting proceedings in de facto financial causes:

(1) A de facto financial cause may be instituted under this Act in:

(a) the Federal Circuit and Family Court of Australia (Division 2); or

(c) the Supreme Court of the Northern Territory of Australia; or

(d) a court of summary jurisdiction of a participating jurisdiction.

…

Proceedings only to be instituted under this Act

(5) A de facto financial cause that may be instituted under this Act must not, after the commencement of this section, be instituted otherwise than under this Act.

(6) Subsection (5) has effect subject to subsection 90RC(5).

[19] Notably, s. 39A(5) makes it clear that a de facto financial cause that may be instituted under the FLA must not, after the commencement of s. 39A, be instituted otherwise than under the provisions of the FLA. Section 39A commenced, as did the entirety of Part VIIIAB of the FLA, on 1 March 2009.

[20] Section 39B of the FLA sets out which courts have jurisdiction in relation to de facto financial causes:

(1) Jurisdiction is conferred on:

(a) the Federal Circuit and Family Court of Australia (Division 2); and

(c) the Supreme Court of the Northern Territory of Australia;

(d) each court of summary jurisdiction of each Territory;

with respect to matters arising under this Act in respect of which de facto financial causes are instituted under this Act.

(2) Each court of summary jurisdiction of each referring State is invested with federal jurisdiction with respect to matters arising under this Act in respect of which de facto financial causes are instituted under this Act.

(3) This section has effect subject to this Part.

[21] Section 44(5) of the FLA prescribes time limitations for instituting proceedings in relation to de facto relationships:

(5) Subject to subsection (6), a party to a de facto relationship may apply for an order under section 90SE, 90SG or 90SM, or a declaration under section 90SL, only if:

(a) the application is made within the period (the ***standard application period***) of:

(i) 2 years after the end of the de facto relationship; or

(ii) 12 months after a financial agreement between the parties to the de facto relationship was set aside, or found to be invalid, as the case may be; or

(b) both parties to the de facto relationship consent to the application.

…

(6) The court may grant the party leave to apply after the end of the standard application period if the court is satisfied that:

(a) hardship would be caused to the party or a child if leave were not granted; or

…

[22] The provisions dealing with financial matters relating to de facto relationships are contained in Part VIIIAB of the FLA.

[23] Section 90RC of the FLA sets out the relationship between State and Territory laws and the Act in relation to, *inter alia*, the provisions contained in Part VIIIAB. It provides that Parliament intends for the regime in the FLA to apply to the exclusion of State and Territory laws to the extent that they deal with financial matters relating to

the parties to de facto relationships arising out of the breakdown of their de facto relationship:

> *De facto financial provisions*
>
> (1) In this section:
>
> ***de facto financial provisions*** means the following provisions:
>
> (a) this Part;
>
> …
>
> *State and Territory laws do not apply to financial matters*
>
> (2) Parliament intends that the de facto financial provisions are to apply to the exclusion of any law of a State or Territory to the extent that the law:
>
> (a) deals with financial matters[2] relating to the parties to de facto relationships arising out of the breakdown of those de facto relationships; and
>
> (b) deals with those matters by referring expressly to de facto relationships (regardless of how the State or Territory law describes those relationships).
>
> …
>
> *Exception – insufficient link to a participating jurisdiction or Division 2 not applicable because of section 90SB*
>
> (3) Despite subsection (2), Parliament does not intend that the de facto financial provisions are to apply to the exclusion of a law of a State or Territory in relation to a financial matter relating to the parties to a de facto relationship arising out of the breakdown of the relationship if:
>
> (a) a court cannot make an order under this Part in relation to that financial matter because of section 90SB, 90SD or 90SK; and
>
> (b) there is no Part VIIIAB financial agreement that is binding on the parties dealing with that financial matter.
>
> …
>
> *Exception – laws facilitating this Act*

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[2] Section 4 of the FLA states that financial matters in relation to the parties to a de facto relationship include the distribution of the property of the parties of either of them.

(4) Despite subsection (2), Parliament does not intend that the de facto financial provisions are to apply to the exclusion of a law of a State or Territory to the extent that the law facilitates the operation of this Act.

…

Exception – prescribed State or Territory laws

(5) Despite subsection (2), Parliament does not intend that the de facto financial provisions are to apply to the exclusion of a law of a State or Territory if the law is prescribed in regulations made for the purposes of this subsection.

[24] Subsections 90RC(3) to (5) demonstrate that there are only three scenarios in which Parliament did not intend that the de facto financial provisions are to apply to the exclusion of any law of a State or Territory. I note that none of these scenarios/exceptions apply to the circumstances of this case, and they have not been put in issue by the parties.

[25] Section 90SM of the FLA refers to the alteration of property interests after the breakdown of a de facto relationship and, relevantly in the circumstances of this case, states:

(1) In property settlement proceedings after the breakdown of a de facto relationship, the court may make such order as it considers appropriate:

(a) in the case of proceedings with respect to the property of the parties to the de facto relationship or either of them – altering the interests of the parties to the de facto relationship in the property;

…

(2) If a party to the de facto relationship dies after the breakdown of the de facto relationship, an order made under subsection (1) in property settlement proceedings may be enforced on behalf of, or against, as the case may be, the estate of the deceased party.

History and consequences of the legislative amendments in the FLA

[26] Prior to the introduction of Part VIIIAB of the FLA, which reserves exclusive jurisdiction in relation to de facto financial causes to the Commonwealth courts, property disputes arising out of the breakdown of a de facto relationship were determined by reference to State and Territory law and equitable principles.

[27] Part 19 of the *Property Law Act 1974* (Qld) ("the PLA") commenced on 21 December 1999 and sets out the Queensland statutory scheme for dealing with property disputes

arising out of the breakdown of a de facto relationship. It governed disputes of that kind in Queensland between its introduction and the commencement of Part VIIIAB of the FLA.

[28] In 2003, the Queensland government referred its power over financial disputes and agreements in de facto relationships to the Commonwealth pursuant to the *Commonwealth Powers (De Facto Relationships) Act 2003.* However, this Act did not commence until 24 October 2008.

[29] The *Family Law Amendment (De Facto Financial Matters and Other Measures) Act (Cth)* 2008 ("the amending Act") was passed by the Commonwealth Parliament on 10 November 2008. It amended the FLA by inserting Part VIIIAB, which provides the Commonwealth courts with jurisdiction over proceedings in relation to declarations, maintenance, property adjustments and financial agreements between the parties to de facto relationships. The parts of the legislation concerning de facto relationships commenced on 1 March 2009.

[30] The FLA, as amended, provides a uniform approach to resolving financial disputes between de facto couples in the participating States and Territories.

[31] The FLA de facto regime has application to:

(a) de facto relationships that break down from 1 March 2009 and satisfy the threshold requirements under the legislation; and

(b) de facto couples who separated before 1 March 2009 who are eligible to opt into the jurisdiction.

[32] In response, on 26 August 2009, s. 255A of the PLA was enacted. It provides that Part 19 of the PLA does not apply in relation to financial matters relating to de facto partners arising out of the breakdown of their de facto relationship if the FLA applies.

[33] In *KMR v SHF*,[3] McMeekin J made it clear that all de facto property disputes arising after 1 March 2009 are to be heard and determined in the Family Court:

> [3] The jurisdiction to hear and determine the application under Part 19 of the PLA resides in this Court, not the Family Court. That is so because the parties' relationship broke down before the commencement of the *Family Law Amendment (De Facto Financial Matters and Other Measures Act) 2008* (Cth). Since the commencement of that Act all de facto property disputes arising after commencement are heard and determined in the Family Court. Where the relationship broke down prior to the

[3] [2011] QSC 153.

> commencement the parties have the right to "opt in" and have their dispute determined by the Family Court…
>
> (citations omitted, emphasis added)

The plaintiff's application in the FCC

[34] On 10 May 2017, the plaintiff filed an initiating application for property adjustment orders between herself and the deceased in the FCC pursuant to s. 90SM of the FLA. Her initiating application sought both interim and final orders. I note that an interim order sought by the plaintiff was a declaration that she held an equitable interest in the property the subject of the proceedings in this Court.

[35] The plaintiff sought, as part of the proposed final orders in the FCC, that:

> … the property of the relationship be divided by way of 68% to the applicant and 32% to the respondent…

[36] A further aspect of the final relief sought by the plaintiff in the FCC was that:

> The Respondent retain and the Applicant otherwise relinquishes all right title and interest in and to [the property].[4]

[37] The orders sought by the plaintiff in the FCC related to the property the subject of the proceedings in this Court.

[38] The chronology of the plaintiff's proceedings in the FCC were set out by Strickland J n *Simonds (deceased) & Coyle* [2019] FamCAFC 47 ("*Simonds*"):

> [6] On 10 May 2017, some two months prior to the de facto husband's death, the de facto wife filed an Initiating Application seeking orders for property adjustment between her and the de facto husband. That application asserted that the spouses finally separated on 29 December 2015.
>
> [7] On 26 June 2017, Judge Coates ordered that the deceased file any response by 10 July 2017. No Response was filed in accordance with that order.
>
> [8] The de facto husband passed away in late July 2017.
>
> [9] On 27 July 2017, the deceased's solicitors filed a Response out of time, said to have been signed by them on 25 July 2017. The Response sought orders that the application be dismissed, asserting that the relationship between the spouses ended in 2013 and thus, the application was not filed within two years after the end of the de facto relationship as required by s 44(5) of the [FLA].

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4 With consequential orders for the sale of the property and the division of the proceeds.

[10] On 30 October 2017, Judge Coates made orders substituting the personal legal representatives for the de facto husband in the proceedings.

[11] The trial commenced on 10 May 2018 before Judge Egan. His Honour heard the evidence and argument in relation to the date of separation, and his Honour then adjourned the hearing of the matter until 1 June 2018 so as to allow the de facto wife an opportunity to obtain legal advice and to file an Amended Initiating Application which included an application for leave to commence the proceedings out of time, if so advised.

[12] The de facto wife filed that Amended Initiating Application, together with an affidavit in support, on 25 May 2018.

[13] His Honour found that the relationship came to an end on 9 October 2013, and thus the application filed on 10 May 2017 was out of time.

[39] I note that the amended initiating application filed by the plaintiff no longer sought the declaration that the plaintiff had an equitable interest in the property the subject of these proceedings.

[40] Judge Egan made orders that, pursuant to r 1.09 of the *Family Law Rules 2004*, the plaintiff be granted leave, *nunc pro tunc*, to make an application for property adjustment orders despite her initiating application being out of time, as he granted the application for leave to institute proceedings out of time in her amended initiating application and to continue that application against the defendants in these proceedings (as the executors of the deceased's estate).

[41] The defendants successfully appealed this decision on the basis that Judge Egan did not have jurisdiction to entertain the amended initiating application that had been filed on 25 May 2018. In *Simonds*, Murphy J (with whom Kent J agreed) stated:[5]

Was there jurisdiction to make the Order?

[45] Section 39B(1)(b) of the [FLA] confers upon the Federal Circuit Court of Australia jurisdiction "with respect to matters arising under this Act in respect of which de facto financial causes are instituted under this Act". "De facto financial cause" is defined to include relevantly:

(g) any other proceedings… in relation to concurrent, pending or completed proceedings of a kind referred to in any of the preceding paragraphs.

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5 *Simonds (deceased) & Coyle* [2019] FamCAFC 47, [45]-[51], [56]-[58].

[46] The "preceding paragraphs" there referred to include, relevantly:

> (c) proceedings between the parties to a de facto relationship with respect to the distribution, after the breakdown of the de facto relationship, of the property of the parties or either of them.

[47] The proceedings referred to in that sub-paragraph are those governed by s 90SM of the [FLA]. It is the power given to the Court by s 90SM which was invoked by the de facto wife in her Initiating Application, filed when the deceased was alive. Section 90SM empowers the Court relevantly to make such orders as it considers appropriate with respect to the property of the parties to the de facto relationship or either of them.

[48] However, s 44(5) provides that the Court does not have the power to make a s 90SM order unless, relevantly, the application was made within the period of two years after the end of the de facto relationship. His Honour's finding as to the latter meant that the de facto wife could apply as of right for a s 90SM order "only if" she did so by 8 October 2015. She did not. The de facto wife's Initiating Application could only be effective to institute s 90SM proceedings if she first obtained leave to proceed pursuant to s 44(6) of the [FLA].

[49] The deceased died after the date of the breakdown of the relationship, and before the property settlement proceedings commenced by the de facto wife were completed. Those facts, stated in that manner, prima facie avail the de facto wife of s 90SM(8) of the [FLA] such that the property settlement proceedings may be continued against the deceased's legal personal representative. However, crucial to the issue on this appeal, the "property settlement proceedings" must meet the relevant statutory definitions. The terms of s 90SM make it clear that the Court's power under that section can only arise in the defined "property settlement proceedings":

[50] That expression is defined in s. 4 of the Act as (again relevantly):

> ***property settlement proceedings*** means:
>
> (b) in relation to the parties to a de facto relationship – proceedings with respect to:
>
> (i) the property of the parties or either of them…

[51] "Proceedings" is defined separately to "property settlement proceedings" in s 4 and, relevantly, "means a proceeding in a

court … and includes … an incidental proceeding in the course of or in connexion with a proceeding."

…

[56] The Amended Initiating Application, filed by the de facto wife after the death of the deceased, instituted proceedings different to the s 90SM proceedings commenced by her Initiating Application; that Amended Initiating Application instituted "proceedings with respect to leave to institute proceedings with respect to property of the parties to the marriage or either of them". The Court's jurisdiction depends upon the terms of any legislative grant of jurisdiction. There is no statutory grant of jurisdiction which provides for an application for leave to institute proceedings to be excluded from the principle that the deceased's death prevented those proceedings being instituted.

[57] Without that specific grant of jurisdiction and power, an application invoking s 44(6) after the death of the deceased could not be made. Without that application and an order accordingly pursuant to s 44(6), the application for a s 90SM order could not be made; the Court had no such power unless and until a s 44(6) order was made.

[58] His Honour did not have the jurisdiction to make the order which he did. The application for leave to appeal must be granted, the appeal allowed, and the order set aside.

The FCC had jurisdiction to determine the plaintiff's application if it had been instituted in time

[42] Where a de facto relationship breaks down after 1 March 2009 and the threshold requirements are met,[6] the Commonwealth courts have exclusive jurisdiction to resolve proceedings between the parties to a de facto relationship with respect to the distribution, after the breakdown of the de facto relationship, of the property of the parties or either of them.[7]

[43] The Commonwealth courts had jurisdiction in relation to this matter from when the plaintiff and the deceased's de facto relationship ended (which Judge Egan found occurred on 9 October 2013[8]). Accordingly, at that time, the plaintiff was entitled to bring an application in the Commonwealth courts for the distribution of property the subject of a dispute arising out of the breakdown of her de facto relationship.

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6 *Norton & Locke* (2013) 50 Fam LR 517, [18].

7 See, for example, *Davies v Richardson* [2011] NSWSC 810, [1], [20]; *Ristic v Maroti (No 2)* [2014] VSC 540, [18]; *Massalski v Riley* [2021] FamCAFC 116, [18].

8 *Simonds (deceased) & Coyle* [2019] FamCAFC 47, [13].

[44] The plaintiff accepts that, in 2016, she sought advice from her solicitor about what to do in relation to the dispute over the property and her solicitor advised her to bring a Family Court or Federal Circuit Court application. I note that, on 13 June 2016, the plaintiff received an email from her solicitor which set out her options in relation to the dispute. One of the options provided by her solicitor at that time was to "[s]eek Family Law agreement out of time". The plaintiff states that she did not file an application until 2017 because she was "hoping [the deceased] would do the right thing" by putting her name on the title to the property or paying out her half of the property.

[45] As set out above, the plaintiff filed her initiating application, which sought to invoke the "financial causes" jurisdiction of the FCC, on 10 May 2017. At that time, the plaintiff asserted that she was within the two year limitation period. However, ultimately, the FCC found that the relationship ended in 2013. After the FCC proceedings began (but before any decision was made), on 28 May 2018, the plaintiff filed an amended application which included an application for leave to institute proceedings out of time pursuant to s 44(6) of the FLA. This application sought identical final orders to the initial application and no longer pursued the interim orders.

[46] The Full Court of the Family Court found that at the time of the deceased's death,[9] there was no valid application on foot. This conclusion was based on the finding that because of the operation of s. 39B(1) of the FLA, a "financial de facto cause" had not been instituted.[10] The Full Court determined that the deceased's death precluded the plaintiff from making an application for leave to proceed out of time. Jurisdiction was therefore lost.

[47] The FCC would have had jurisdiction to determine the plaintiff's application if she had:

(a) commenced proceedings for property adjustment orders within two years of the end of the de facto relationship as mandated by s. 44(5)(a)(i) of the FLA; or

(b) sought and received the deceased's consent to proceed out of time pursuant to s. 44(5)(b) of the FLA, notwithstanding that she filed her initial application out of time; or

(c) filed an application to commence proceedings out of time pursuant to s 44(6) of the FLA prior to the deceased's passing.

[48] Critically, if the plaintiff had done these things, there would have been no issue as to the plaintiff being able to continue her claim in the FCC notwithstanding the deceased's death.

[49] This is a case where, but for her inaction, the plaintiff's claims, which were de facto financial causes, may have been instituted pursuant to the FLA. Jurisdiction was only lost because of the plaintiff's failure to take the necessary steps.

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9 On 21 July 2017.

10 *Simonds (deceased) & Coyle* [2019] FamCAFC 47, [25].

Proceedings in this Court

[50] On 4 June 2019, just over two months after the Full Court of the Family Court determined that Judge Egan did not have jurisdiction to entertain the amended initiating application, the plaintiff filed the originating claim and statement of claim in these proceedings in this Court.

[51] The defendants raised the jurisdiction issue and made an application for the proceedings to be struck out for want of jurisdiction.[11] Whilst this application was dismissed by Boddice J, the parties agree that the jurisdiction issue was reserved for consideration by me as the trial judge.

The plaintiff's submissions in relation to the jurisdiction issue

[52] The plaintiff, in her second further amended statement of claim, particularises that the acquisition of the property was a joint endeavour by herself and the deceased, and in the circumstances, the deceased held the property upon trust for her. She also claims that on the execution of the transfer, she and the deceased became in equity joint tenants of the property.

[53] The plaintiff states that these proceedings invoke equitable principles, including those relating to either a resulting trust or constructive trust.[12] However, I note that the legal principles that the plaintiff relies upon only refer to joint endeavour constructive trusts and equitable compensation.

[54] The plaintiff does not accept that her right to claim equitable relief is lost by the enactment of State and Federal de facto property legislation (or that it would otherwise be an abuse of process). The plaintiff highlights the decision of the Full Court of the Family Court that I have set out above, noting their conclusion that the FCC had no jurisdiction pursuant to s.90SM of the FLA.

[55] The plaintiff states that none of her causes of action are a "de facto financial cause" or "de facto property settlement proceedings" as defined in s. 4 of the FLA. She further submits that she does not seek the distribution of property based on the assessment of the contributions criteria prescribed in s. 90SM(4) of the FLA, but rather, a declaration of the true present legal ownership of the property and ancillary orders that follow from that determination.

[56] The fact that the plaintiff and the deceased were formerly in a de facto relationship, the plaintiff states, is irrelevant to both the causes of action and this Court's jurisdiction.

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11 Application dated 21 May 2021 (court document 18).

12 *Bloch v Bloch* (1981) 180 CLR 390; *Calverley v Green* (1984) 155 CLR 242; *Muschinski v Dodds* (1985) 160 CLR 583 and *Baumgartner v Baumgartner* (1987) 164 CLR 137.

To support this proposition, the plaintiff refers to several decisions where she says the Supreme Court granted relief of the type that she seeks in her claim.[13]

A review of the cases referred to by the plaintiff

[57] There is no authority directly analogous with the circumstances of this case.

[58] The plaintiff referred to *SAM v IDP; IDP v SAM*[14] where, when granting an application for leave to institute proceedings outside the time limits set out in Part 19 of the PLA, Mackenzie J said:

> "[18] On the evidence I am satisfied that the applicant has shown to the required standard that she will suffer hardship. The substantial detriment she will suffer is that if she is precluded from making a claim, her capacity to obtain a just division of property consistent with current notions of the entitlements of parties to a de facto relationship will be significantly limited. The relationship was of relatively long duration. If she has to rely on equitable remedies, the prospects of her obtaining an outcome within the range she might obtain in pt 19 proceedings are not promising. In this case, that detriment extends beyond mere deprivation of the right to bring proceedings. She will probably suffer a real and substantial detriment."

[59] It should be noted that *SAM* was decided before 1 March 2009, the date from which the FLA de facto regime has application.

[60] I note that the other cases[15] that the plaintiff cites, as referring to *SAM* with approval, all involve de facto relationships that also broke down before 1 March 2009.

[61] For example, *Coleman v Penfold*[16] concerned a dispute over a house between a de facto couple whose relationship ended in 2007. In February 2017, an out of time application was brought pursuant to s. 38 of the PLA in the District Court, seeking the appointment of trustees for the sale of the house. There was a reference to an application for property division pursuant to s. 44(5) of the FLA which was required to be filed within two years of the end of the relationship. However, as Bowskill J (as her Honour then was) noted, that was an incorrect reference as the FLA did not apply to

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13 *McGhee v Churven; Churven v McGhee* [2021] QSC 212 at [49]-[51]; *Nolan v Nolan & Ors* [2014] QSC 218 at [83]-[109]; *Wakefield v Silkwatch Pty Ltd & anor* [2012] QSC 412 at [35]-[41] [112] and *Piatek v Piatek; Piatek v Piatek & Anor* [2010] QSC 412 at [135]-[149].

14 [2007] 2 Qd R 456; [2006] QSC 344.

15 *D v D* [2007] QSC 131; *HT v CS* [2009] QSC 51; *AC v CM* [2010] QSC 384; *FLC v AJO* [2012] QSC 21 and *Coleman v Penfold* [2019] QCA 98.

16 [2019] QCA 98.

the parties' relationship.[17] This would have been because the relationship ended before the commencement of the FLA de facto regime.

[62] Further, the plaintiff refers to *DA v KG & Anor*[18] ("*DA*") where, in refusing an application for leave to extend time in which to commence de facto property proceedings pursuant to Part 19 of the PLA, McMeekin J stated:

> [34] The difference between what might be achieved under a Part 19 application and what might be achieved by resort to equitable remedies was considered by Mackenzie J to be a legitimate measure of the relevant detriment in *SAM v IDP*. I agree that that is a proper approach.
>
> [35] The significant difference, as I perceive it, between the approach of equity and the approach under Part 19 is in the range of factors that can be brought into account under a Part 19 application. In *Baumgartner* the majority spoke of "the general equitable principle which restores to a party contributions which he or she has made to a joint endeavour which fails when the contributions have been made in circumstances in which it was not intended that the other party should enjoy them" (at 149). Where, as here, the applicant asserts that his contributions were made in the expectation that he was creating a joint home for the parties then it is clear that the equitable principle is, prima face at least, enlivened. Thus refusal of leave to proceed with the Part 19 application would not mean the end of his potential rights.[19]
>
> (citations omitted)

[63] Once again, *DA* is a case where the de facto relationship ended before the commencement of the FLA de facto regime, so it is of limited assistance.

[64] The rationale from *SAM* and *DA* is that if Part 19 of the PLA is precluded from applying, or leave is not given to commence proceedings under that Part, then equitable principles continue to operate. The refusal of a court to grant leave to proceed out of time under the PLA does not prevent a plaintiff from seeking any relief which equity may be able to grant.

[65] This, however, is not analogous to the position the plaintiff finds herself in, where, pursuant to Part VIIIAB of the FLA, the Commonwealth courts have exclusive

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17 See paragraph [13].
18 [2010] QSC 318.
19 The plaintiff states that this decision was referred to with approval in *FLC v AJO* [2012] QSC 21, where the de facto relationship also broke down prior to 1 March 2009.

jurisdiction to hear such matters. In my view, these cases do not support the plaintiff's submission that the enactment of federal de facto property legislation does not preclude the plaintiff seeking equitable relief in this Court.

[66] As McMeekin J made clear in *KMR*, since 1 March 2009, all de facto property disputes are heard and determined in the Family Court.

[67] The plaintiff's submission fails to engage with the differences between the PLA and FLA de facto regimes. Section 39A of the FLA states that a de facto financial cause that may be instituted under the FLA must not be instituted otherwise than under the FLA. Section 90RC of the FLA notes that the de facto financial provisions of the FLA apply to the exclusion of any law of a State or Territory to the extent that the law deals with financial matters relating to the parties to de facto relationships arising out of the breakdown of those de facto relationships. There are no such exclusivity provisions in the PLA.

[68] The plaintiff also refers to several decisions where the Court granted relief of the type sought by the plaintiff in this claim. However, the facts and circumstances of those cases can be distinguished from this case.

[69] *McGhee v Churven; Churven v McGhee*[20] related to a dispute between siblings, not former de facto partners. The dispute in *McGhee* concerned the beneficial ownership of a residential unit which had been purchased by the brother but registered in the name of their late mother.

[70] *Nolan v Nolan & Ors*[21] also did not deal with a property dispute arising in the context of a de facto relationship. In that case, the joint endeavour (a number of farming enterprises) involved a divorced couple and the former husband's parents.[22]

[71] *Wakefield v Silkwatch Pty Ltd*[23] concerned a dispute between the plaintiff, who had been in a de facto relationship, and a company regarding the beneficial ownership of a property. The plaintiff's former de facto husband was not a party to the proceedings.

[72] *Piatek v Piatek; Piatek v Piatek & Anor*[24] concerned a property settlement between a formerly married couple, not a de facto couple. They were married in Poland and divorced some years ago by a Polish Court and the main legal issue was whether the disputes related to property in Australia, or derived from property, once located here, should be determined in this jurisdiction or in proceedings on foot in Poland dealing generally with their matrimonial property. A constructive trust was granted to the

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20 [2021] QSC 212.
21 [2014] QSC 218.
22 *Nolan v Nolan & Ors* [2014] QSC 218, [99]. I note that the decision was appealed on the basis that there was inadequate evidence to assess the contributions to the common endeavour and the appeal was successful: *Nolan v Nolan* [2015] QCA 199.
23 [2012] QSC 412.
24 [2010] QSC 412.

former wife over one half of the proceeds of sale of properties which she had contributed to. In that case, the couple had been divorced in Poland some years prior to commencing proceedings. There had been a previous application to have the proceedings temporarily stayed on the basis that this Court was not an appropriate jurisdiction. Martin J (as his Honour then was) had found that this Court was an appropriate jurisdiction to hear the Australian component of the proceedings in comparison to a regional Polish court. That decision was not challenged at trial.

[73] Despite the distinguishing features of these cases, the plaintiff provided no submissions as to their application, or relevance, when considering the facts and circumstances of this case.

The Supreme Court does not have jurisdiction to determine these proceedings

[74] In all of the circumstances, I accept the defendants' primary submission that exclusive jurisdiction to determine the property interests of the plaintiff and the deceased was vested in the Commonwealth courts.

[75] I note that *Farrall v Money*[25] *("Farrall")* and *Massalski & Riley*[26] provide some support for the defendants' position.

[76] In *Farrall,* the appellant commenced proceedings in 2012 against the respondent, his former romantic partner, in the District Court. He sought, *inter alia*, a declaration that beneficial ownership in a residential property legally owned by the respondent was shared as by himself and the respondent as tenants in common in equal shares.

[77] The claim arose from the terms of a Deed of Release dated 9 February 2006 executed by the appellant and respondent in settlement of property adjustment proceedings the appellant had commenced against the respondent under Part 19 of the PLA in the Supreme Court in 2005. The Deed provided that in consideration of the respondent holding one half of the residential property in trust for the appellant, he released her from all his claims to certain properties, including that property.[27]

[78] The appellant had commenced proceedings in the Federal Magistrates Court (as the FCC then was) against the respondent for a property settlement in reliance on Part VIIIAB of the FLA. The appellant sought a declaration of the existence of a de facto relationship between himself and the respondent. The appellant also sought relief including an equal division of assets, and the pool of assets included the property the subject of the District Court proceedings. The parties disputed whether a de facto relationship existed between them on 1 March 2009 such that would enliven the jurisdiction of that Court pursuant to the provisions in Part VIIIAB of the FLA.[28]

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25 [2012] QCA 262.
26 [2021] FamCAFC 116.
27 *Farrall v Money* [2012] QCA 262, [2]-[4].
28 Such that the jurisdiction of the FLA could be enlivened.

[79] At first instance, a Federal Magistrate was unable to find that a de facto relationship had existed as at 1 March 2009. The appellant appealed against that decision.[29]

[80] The respondent, in that context, stated that the applicant was prohibited by s. 39A(5) of the FLA from bringing the originating application in the District Court and brought an application for a stay pending the conclusion of the appeal proceedings in the Family Court.[30] The stay was granted. In his reasons, Newton DCJ stated:[31]

> [23] In my view it is clear that this Originating Application concerns the distribution of property which forms part of the property pool of the de facto financial cause commenced by the applicant in the Federal Magistrates Court and now subject to an appeal to the Full Court of the Family Court. Until those proceedings have concluded, this Court should accord the provisions of s. 39A(5) of the Family Law Act 1975 their full meaning and effect by declining to proceed to determine the application."

[81] The appellant appealed Newton DCJ's decision to grant the stay. The heart of the appellant's submissions before the Court of Appeal were that Newton DCJ erred in finding that the application was a de facto financial cause.[32] Gotterson JA (with whom Holmes JA agreed) considered that Newton DCJ had not made such a conclusive finding and dismissed the appeal on that basis.[33]

[82] McMurdo J (as his Honour then was) agreed with Gotterson JA's reasons, but also commented that:

> "[26] In his proceedings in the Federal Magistrates Court, now under appeal to the Family Court, the appellant contends that the parties were in a de facto relationship as at 1 March 2009. If he is right about that, so that his appeal to the Family Court succeeds, then as the primary judge said at paragraph [23] of his reasons, the appellant's case in the District Court is "with respect to the distribution, after the breakdown of the de facto relationship, of the property of the parties or either of them". Therefore the proceedings in the District Court would be within paragraph (c) of the definition of "de facto financial cause", which is within s 4 of the Family Law Act 1975. If so, then as the primary judge recognised in that part of his judgment which has been quoted by Gotterson JA, s 39A(5) of the Family Law Act

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29 *Farrall v Money* [2012] QCA 262, [5]-[10].
30 *Farrall v Money* [2012] QCA 262, [4].
31 *Farrall v Money* [2012] QDC, unreported, Newton DCJ, D92 of 2012, 26 March 2012.
32 *Farrall v Money* [2012] QCA 262, [14].
33 *Farrall v Money* [2012] QCA 262, [15].

> 1975 would be engaged, with the consequence that the District Court would not have jurisdiction.[34]"

[83] In *Massalski & Riley*,[35] the de facto wife commenced proceedings in the Supreme Court of Victoria seeking, effectively, the imposition of a constructive trust over a share of a property proportionate to her contributions to the acquisition of the land.[36] The de facto husband applied to transfer the proceedings to the Family Court to be consolidated with existing property settlement proceedings between the parties underway in that Court and the application was granted.[37]

[84] At trial, the primary judge dismissed the proceedings transferred from the Supreme Court.[38] The wife then, on appeal, presented an application which sought orders designed to have the transferred claims transferred back to the Supreme Court. She sought a declaration that because the transferred claims were invalidly transferred, the primary judge's decision in relation to the transferred proceedings was "ineffective."[39]

[85] In deciding that point, the Full Court of the Family Court considered that the proceedings between the de facto wife and the husband as to the wife's claim to an interest in his share of the property on the basis of a constructive trust were a de facto financial cause and within the Family Court's exclusive jurisdiction.[40]

[86] In this case, I consider that the plaintiff's claims for equitable relief in relation to the property are de facto financial causes and thus within the exclusive jurisdiction of the Commonwealth courts.

[87] I agree with the defendants when they say that the plaintiff has attempted to circumvent the consequences of the decision of the Full Court of the Family Court by "cherry picking" a single property from the entirety of the de facto assets and seeking a declaration as to the existence of a constructive trust (and consequential orders) solely in respect of the property.

[88] The defined terms that comprise the definition of a de facto financial cause, as set out in s. 4 of the FLA, demonstrate that the meaning of that term is wide, and intentionally so:

(a) "*proceedings* between the parties to a de facto relationship":

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34 The District Court not being one of those courts specified in s 39A(1) as courts in which a de facto financial cause may be instituted.
35 [2021] FamCAFC 116.
36 *Massalski & Riley* [2021] FamCAFC 116, [8].
37 *Massalski & Riley* [2021] FamCAFC 116, [9].
38 *Massalski & Riley* [2021] FamCAFC 116, [5].
39 *Massalski & Riley* [2021] FamCAFC 116, [17].
40 *Massalski & Riley* [2021] FamCAFC 116, [18]-[22].

(i) *Proceedings* means a proceeding in a court, whether between parties or not, and includes cross proceedings or an incidental proceeding in the course of or in connexion with a proceeding;

(b) "with respect to the distribution":

(i) *Distribute*, in relation to property… of the parties to a de facto relationship, or either of them… includes conferring rights or obligations in relation to the property or financial resources;

(c) "after the breakdown of the de facto relationship, of the *property* of the parties or either of them":

(i) *Property* means property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion.

[89] Further, I note that s. 90SL of the FLA provides that declarations may be made in relation to the existing title or rights in respect of property, with the power to make consequential orders.

[90] In my view, the equitable relief that the plaintiff seeks in these proceedings falls within the definition of a de facto financial cause in the FLA as it relates to the distribution, after the break down of the de facto relationship, of the plaintiff and the deceased's property, or the property of either of them.

[91] I note that one of the interim orders the plaintiff sought in the FCC was a declaration that she held an equitable interest in the property the subject of the proceedings in this Court, although the plaintiff ultimately abandoned her sought interim orders. The final relief she sought was that the property pool be divided on a 68 per cent to 32 per cent basis in her favour.

[92] In these proceedings, the plaintiff submits that she is not asking the court to consider the entire property pool of the relationship but, rather, seeks a declaration of the true present legal ownership of one property and the ancillary orders that follow from that determination. In my view, seeking relief for one property in isolation does not prevent it from falling within the meaning of a de facto financial cause.

[93] After the de facto relationship ended, the plaintiff could only seek the orders that she now seeks in this Court in the Commonwealth jurisdiction. This Court would not have had jurisdiction to deal with these matters had she brought the claim she now advances in this Court at the time of the breakdown of her relationship with the deceased. Nothing that has occurred in the intervening period has altered this position.

[94] Judge Egan found that the relationship between the plaintiff and the deceased ended as early as 9 October 2013. As such, the application brought on 10 May 2017 was well outside the standard application period, and the plaintiff did not seek leave to apply out of time pursuant prior to the deceased's death. Accordingly, no further proceedings

can be instituted in relation to any de facto financial cause pursuant to the FLA after the deceased's death.

[95] In relation to the plaintiff's submission that her de facto relationship with the deceased is irrelevant, I consider that the legislative intent clearly manifested in the FLA is for the Commonwealth courts to have exclusive jurisdiction over de facto property proceedings. As I have stated, in my view, the circumstances of this case are captured by the definition of a de facto financial cause set out in s. 4 of the FLA.

[96] As I have noted previously, it is crucial to note that the plaintiff could have brought this de facto financial cause pursuant to the FLA de facto regime in the Commonwealth courts had she properly complied with the time limitations imposed by that regime. The plaintiff was on notice at the time she brought her initiating application that she would need to seek leave to institute proceedings out of time. Her solicitor had advised her in June 2016 that one of her options in relation to the property was to "[s]eek Family Law agreement out of time".

[97] In *Emerald v Emerald*,[41] the Full Court of the Family Court considered a submission that, if leave to commence proceedings out of time was refused in relation to a property jointly owned by a formerly married couple in the Family Court, proceedings could be instituted in relation to that property in the state jurisdiction as it was no longer a "matrimonial cause".[42] The decision sets out the following matters relevant to this case:

> [87] There have been cases where proceedings have been instituted in a state court, and action has then been taken in the Family Court of Australia to restrain those proceedings in the context of an application for leave to institute proceedings. However, no case was cited and nor is this Court aware of any, where the specific issue has been whether proceedings could be taken in the state court following the dismissal of an application for leave to institute proceedings in the Family Court of Australia.
>
> …
>
> [94] … Once it is determined that a claim is a matrimonial cause, the jurisdiction to hear and determine such a cause is within the exclusive purview of courts exercising jurisdiction under the Act…
>
> …

41 [2018] FamCAFC 217.

42 Noting that the provisions in the FLA relating to "matrimonial causes" and "de facto financial causes" are largely identical.

> [96] Importantly, this claim cannot subsequently lose its character as a matrimonial cause as a result of the outcome of, or a determination made in, the proceedings, for example, as here, a refusal to grant leave. That is what Nygh J in *Rennie and Higgon* was referring to in describing the application for leave as a procedural provision, only affecting the remedy but not the right (… see also *DMW v CGW* (1982) 151 CLR 491).

[98] The same could be said in this case. The plaintiff's claim in this Court falls within the definition of a de facto financial cause set out in s. 4 of the FLA. Once it is determined that a claim is a de facto financial cause, the jurisdiction to hear and determine such a cause is within the exclusive purview of the Commonwealth courts exercising jurisdiction pursuant to the FLA. The claim cannot lose its character as a de facto financial cause as a result of the determination made by the Full Court of the Family Court.

[99] I acknowledge that the plaintiff does not have a forum in which to bring her equitable claims.

[100] This is clearly unfortunate. However, it is unavoidable that it is the result of the plaintiff's lack of prompt and informed action. Had the plaintiff made her application for property adjustment orders in compliance with the prescribed time limitations, the matter could have been considered in the Commonwealth jurisdiction.

[101] When there is legislative intervention in the rights of parties beyond the common law and equity, and it is intended that the legislation is to govern the relationship or the rights of parties, there are always circumstances where a party may be precluded from pursuing their rights because of the applicability or effect of the legislation.

[102] As May and Ainslie-Wallace JJ stated in *Sharp & Sharp* [2011] FamCAFC 150:

> [12] It is important to bear in mind the purpose of s 44 in the context of the Act, which is that time limits are to be observed as the wording of that section makes clear. The principles concerning applications for leave to commence an action out of time are well known. In *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; (1996) 186 CLR 541 at 551 McHugh J said:
>
> > The discretion to extend time must be exercised in the context of the rationales for the existence of limitation periods. For nearly 400 years, the policy of the law has been to fix definite time limits (usually six but often three years) for prosecuting civil claims. The enactment of time limitations has been driven by the general perception that

> "[w]here there is delay the whole quality of justice deteriorates". [footnotes omitted]

[13] At 553 his Honour continued:

> A limitation period should not be seen therefore as an arbitrary cut-off point unrelated to the demands of justice or the general welfare of society. It represents the legislature's judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated...

[103] The plaintiff's failure to litigate her cause of action within the legislative bounds of the FLA does not mean that the exclusive jurisdiction of the FLA did not exist, whereby she can re-litigate her cause of action in this Court under a rebadging of what is essentially the same claim.

[104] I find that the claims for relief brought by the plaintiff are within the exclusive jurisdiction of the Commonwealth courts pursuant to s. 39A(5) of the FLA.

[105] The Supreme Court of Queensland does not have jurisdiction to determine these proceedings.

Did the deceased hold the property on trust for the plaintiff and himself?

[106] Even if I had jurisdiction to consider whether the deceased held the property on trust for the plaintiff, I am not satisfied that he did. For completeness, I will set out my reasons as to this issue and the factual findings I have made.

<u>The plaintiff's claim and relief</u>

[107] In relation to the trust issue, the plaintiff states that:

(a) the acquisition of the property was a joint endeavour by the plaintiff and the deceased;

(b) she made financial contributions towards the acquisition and improvement of the property by payments to the deceased, including:

(i) $50,000 on 3 July 2002 by transfer from her bank account to the trust account of the solicitors handling the purchase of the property;

(ii) $25,000 on or about 3 July 2002 from the sale of a property she owned at Hoya Road ("the Hoya Road property"); and

(iii) Deposits from her bank accounts totalling $126,670, comprising:

(A) $3,610 from an account ending in 416 (five deposits from 19 August 2002 to 11 November 2002, and one deposit on 13 July 2006);

(B) $12,560 from an account ending in 734 (33 deposits from 21 November 2002 to 8 October 2004);

(C) $110,500 from an account ending in 205 (82 deposits from 29 July 2006 to 29 March 2013).

(c) the joint endeavour failed because the deceased failed to register the property in the names of the plaintiff and himself;

(d) it would be unjust for the property to remain registered in the sole name of the deceased; and

(e) the deceased held the property on trust for the plaintiff and himself in equal shares, or, alternatively, in the proportions of their contributions to the property.

[108] The plaintiff, in the alternative to the declaration that she is entitled to be registered as the sole proprietor of the property pursuant to the transfer (which I deal with below), seeks a declaration that the defendants, as the executors of the deceased's estate, hold any right, title and interest they may have in the property on trust for her and the deceased in equal shares, or, alternatively, in the proportions of their contributions to the property.

[109] In the alternative, the plaintiff seeks equitable compensation.

[110] The plaintiff also claims that upon execution of the transfer, she and the deceased became in equity joint tenants of the property.

The defendants' position

[111] The defendants' case, as particularised in their amended defence, is effectively that:

(a) The plaintiff and the deceased knew the property was to be registered in the deceased's name alone;

(b) The plaintiff, prior to 5 July 2002, transferred the sum of $50,000 to the trust account of a solicitors' firm or about 3 July 2002 (so as to form part of the settlement funds paid to the seller of the property on 5 July 2002);

(c) The plaintiff did not provide the deceased with the $25,000 she claims she gave him from the proceeds of the sale of the Hoya Road property;

(d) The plaintiff did transfer the other amounts to the deceased as particularised in her claim. However, these transfers were not financial contributions towards the acquisition and improvement of the property, as:

(i) most of the transfers from 19 August 2002 to 13 July 2006 were in relation to rent, electricity, telephone, water and other associated payments which formed part of the general living expenses of the plaintiff and her son; and,

(ii) the transfers from 29 July 2006 to 29 March 2013 were reimbursements for expenses paid by the deceased's visa card for the plaintiff's business.

[112] The defendants state that the acquisition of the property was not a joint endeavour by the plaintiff and the deceased and, consequently, there was not a failure of a joint endeavour. They say that it was not unjust for the property to remain registered in the sole name of the deceased and that the deceased did not hold the property on trust in equal shares, or otherwise, on the proportion of any contributions to the acquisition of the property.

[113] The defendants state that even if there was any joint endeavour which arose by way of a partnership as between the plaintiff and the deceased, a court in equity must take into account the entirety of the contributions as between the parties to the assets of the relationship and other financial benefits conferred by the deceased on the plaintiff, or for her benefit, and not make a determination by reference to one piece of real property owned by one of the partners.

[114] In all of the circumstances, the defendants state that the plaintiff has not established the cornerstone feature of unconscionability.

Relevant legal principles

[115] In this case, the plaintiff has pleaded that the deceased held the property on trust for her on the basis of a joint endeavour constructive trust.

[116] The current position of the law on joint endeavour constructive trusts originates in a series of High Court decisions beginning with *Muschinski v Dodds*.[43] In that case, Deane J set out the following principles in relation to a joint endeavour constructive trust:[44]

> Like most of the traditional doctrines of equity, it operates upon legal entitlement to prevent a person from asserting or exercising a legal right in circumstances where the particular assertion or exercise of it would constitute unconscionable conduct (citation omitted)…Those circumstances can be more precisely defined by saying that the principle operates in a case where the substratum of a joint relationship or endeavour is removed without attributable blame and where the benefit of money or other property contributed by one party on the basis and for the purposes of the relationship or endeavour would otherwise be enjoyed by the other party in circumstances in which it was not

43 (1985) 160 CLR 583.
44 *Muschinski v Dodds* (1985) 160 CLR 583, 619-620.

> specifically intended or specially provided that that other party should so enjoy it. The content of the principle is that, in such a case, equity will not permit that other party to assert or retain the benefit of the relevant property to the extent that it would be unconscionable for him so to do.

[117] The High Court subsequently approved and applied the principles set out in *Muschinski* in *Baumgartner v Baumgartner*,[45] which concerned contributions made by de facto partners to the purchase of a property. In the circumstances of that case, Mason CJ, Wilson and Deane JJ commented:[46]

> Equity favours equality and, in circumstances where the parties have lived together for years and have pooled their resources and their efforts to create a joint home, there is much to be said for the view that they should share the beneficial ownership equally as tenants in common, subject to adjustment to avoid any injustice which would result if account were not taken of the disparity between the worth of their individual contributions either financially or in kind.

[118] A joint endeavour exists where both parties have made contributions which are linked directly or indirectly to the acquisition, maintenance, or improvement of the property the subject of the dispute and the parties intend for the benefit of the contributions to be for their mutual enjoyment.[47] The formulation of the remedy in such a case ought to involve an assessment of the respective contributions of the parties.[48]

[119] A contribution of a party need not be financial. A contribution may be in kind or otherwise, such as contributions to family welfare by way of domestic assistance.

[120] A constructive trust arises by the operation of law and is not contingent on the parties' intention. Equity imposes a constructive trust regardless of the actual or presumed agreement or intention of the parties as to the retention or assertion of beneficial ownership of property, to the extent that such a retention or assertion would run contrary to principles of equity.[49]

[121] The foundation for the imposition of a constructive trust where parties have engaged in a joint endeavour is that a refusal to recognise the existence of the equitable interest amounts to unconscionable conduct and the trust is imposed as a remedy to circumvent that unconscionable conduct.[50] The mere fact that it would be unfair or unjust for the

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45 (1987) 164 CLR 137.
46 *Baumgartner v Baumgartner* (1987) 164 CLR 137, 149-150.
47 *Muschinski v Dodds* (1985) 160 CLR 583.
48 *King v Fister* [2022] QCA 47, [35].
49 *Muschinski v Dodds* (1985) 160 CLR 583, 613-614; 617.
50 *Baumgartner v Baumgartner* (1987) 164 CLR 137, 147.

owner of property to assert his ownership against another does not mean that a constructive trust can be imposed.[51]

[122] There is a significant body of case law where a constructive trust has been imposed over property owned by one party to a de facto partnership or marriage where both parties contributed to the purchase price of the property to address the unconscionability inherent in that arrangement.[52] It is clearly *prima facie* unconscionable for a party to retain ownership in that factual scenario.

[123] A constructive trust is a discretionary and flexible remedy.

[124] In this case, the plaintiff also seeks, as an alternative, equitable compensation.

[125] Equitable compensation may be an appropriate remedy in lieu of,[53] or in addition to,[54] the imposition of a constructive trust as an adequate remedy to address the unconscionable retention of assets or property by one party following the breakdown of a joint endeavour.[55] An equitable lien or charge over the property of the joint endeavour may be imposed where a constructive trust is not appropriate.[56] The amount of the charge or lien is typically the value of the plaintiff's contribution to the joint endeavour.

The plaintiff's credibility and reliability

[126] The plaintiff's case is largely reliant on her evidence being accepted.

[127] There is no independent evidence of any agreement between the deceased and the plaintiff as to their intention regarding the ownership of the property when they purchased it. There is evidence of funds being transferred from the plaintiff's account to the deceased's account, and it is not in dispute that the plaintiff transferred $50,000 to the trust account of the solicitors handling the purchase of the property to form part of the settlement funds. However, other than the plaintiff's version of events, there is no evidence as to why these payments were made.

[128] The plaintiff's evidence was spread over four days (with other witnesses interposed on occasion). I had the opportunity, for a prolonged period of time, to observe her demeanour and responses to questions, many of which I found disingenuous.

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51 *Muschinski v Dodds* (1985) 160 CLR 583, 615-616.

52 See, for example, *Muschinksi v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137; *Hohol v Hohol* [1981] VR 221; *Giumelli v Giumelli* (1999) 196 CLR 101; *Lloyd v Tedesco* (2002) 25 WAR 360.

53 See, for example, *Giumelli v Giumelli* (1999) 196 CLR 101.

54 In *Nolan v Nolan* [2015] QCA 199, the Court of Appeal held that the respondent was entitled to $319,050 as a recognition of her contribution to the common endeavour. The orders were structured so that the appellants were to pay the respondent that sum and that the properties and any proceeds of sale were to be held on trust for the respondent to the extent of $319,050.

55 *Giumelli v Giumelli* (1999) 196 CLR 101.

56 See, for example, *Tasevska v Tasevski* [2011] NSWSC 174, [84]; *Taylor v Streicher* [2007] NSWSC 1006; *Morris v Morris* [1982] 1 NSWLR 61; *Stoklasa v Stoklasa* [2004] NSWSC 518.

[129] Overall, I found the plaintiff an unimpressive witness and I have serious concerns about her credibility and reliability.

[130] The plaintiff gave evidence about her conversations with the deceased. Further, many texts and emails between the plaintiff and the deceased, as well as between the plaintiff and her solicitor, were tendered as evidence. However, in my view, as I have set out when considering the transfer issue, this correspondence paints a picture that is in many respects inconsistent with the plaintiff's evidence. Indeed, I have found that, contrary to the plaintiff's evidence, the deceased did not execute the transfer.

[131] The plaintiff gave evidence that the deceased controlled their relationship's finances. She effectively states that she had no understanding of such matters and that she did not see many of the relevant documents. This is an important part of her case, for she suggests that her naivety to these matters led her to believe (for years) that her name was on the title of the property when it was not. However, I do not accept this.

[132] It is important to appreciate that at the time the property was acquired, the plaintiff was not a novice at buying and selling properties; she owned two properties in her own name at the time she met the deceased. So, at the time of the property's acquisition and afterwards, the plaintiff had experience in buying and owning properties.

[133] The plaintiff gave evidence that she thought that she signed the contract for the property. However, the clear evidence is that she did not. Given her experience in buying and selling properties it is difficult to accept that she, at the time, believed she had signed a contract when she had not. I am satisfied that at the time of the purchase of the property she would have known she did not sign a contract for the property, whatever she now states that her belief was.

[134] The plaintiff also states that she thought that she was present when the contract was signed. I note that she gave evidence that she knew the people who sold the property. She states that they said to her "we were really surprised that you weren't there at settlement." As the plaintiff did not sign the purchase contract, this comment would have been unremarkable. However, on her version of events, where she believed that she had signed the contract, such a comment would have been perhaps surprising. Indeed, counsel for the defendants asked her, immediately after she gave this evidence, whether after that comment was made, she asked the deceased whether her name was on the title. Her response was no, because she presumed that he would put her name on the title deed.

[135] The plaintiff accepted that over the years subsequent to the purchase, she would have seen the rates notices and insurance documents that were sent to the property. As the property was only in the deceased's name, they would have been only addressed to him. However, this apparently did not raise any concerns for the plaintiff. She ultimately attempted to deny having seen these notices, stating that the deceased did all the business and that she did not collect the mail.

[136] An example of the plaintiff attempting to distance herself from the financial matters of the relationship is her contention that she transferred an additional $126,670 to the deceased from her Bendigo bank account ("the Bendigo account")[57] as a contribution to the acquisition and improvement of the property.

[137] The plaintiff states that from July 2006, she set up a direct debit that transferred $1,000 a month from the Bendigo account to the deceased to pay off her half of the purchase price of the property. She gave evidence that the direct debit was meant to stop at the end of June 2007. As she was bedridden after a motor vehicle accident, she asked the deceased to stop the direct debit and close the account as he had access to her bank accounts.

[138] There is clear evidence that this did not occur. The transfers continued, and the amount increased to $1,500 per month from 29 July 2008 to when the payments ceased on 29 March 2013. The plaintiff gave evidence that she did not know that the transfers continued, nor that the Bendigo account remained active. I do not accept this.

[139] The Bendigo account bank statements were addressed to the plaintiff at the address of the business she ran with the deceased. When this was raised with the plaintiff, her response was that the deceased "got all the mail because he did everything" and that she "didn't see these things." This was the plaintiff's constant fallback position.

[140] The plaintiff was shown a bank statement for the Bendigo account dated 1 July 2012 to 31 July 2012 and a reconciliation report for her party business. The plaintiff's handwriting is on the back of this reconciliation report, where she noted several figures which correspond to deposits into the Bendigo account:

> Can I just ask you to look at this bank statement and reconciliation report – the reconciliation report's dated 11th of August 2012 – for me?---Cheers.
>
> And what I'm interested in is the reconciliation report – can you just turn it over on the back. See those figures there?---Yes.
>
> You've written those?---I have.
>
> Why are you writing them if - - -?---I have no idea - - -
>
> - - - Mike does all the finances?--- - - - what those figures are for.
>
> Right. But they're there, aren't they?---Yes. They're there, but I have no idea what those figures are for.
>
> If I suggested to you they married up to the – to the bank statement, would you wish to comment, or you just don't know?---I have no idea.
>
> All right. Can I suggest to you is you writing figures on the back of a reconciliation sheet and therefore shows you had some

[57] Account number 126586205, t/as [the business name].

involvement with the financial aspects of the business?---I had no involvement with it.

…

Now somehow that must have got into your hands if you're writing on the back of it?---I - - -

Correct?---Yes, and I took no notice of what it was. I have no idea what these are. Mike could have just said, "Write these down."

Well - - -?---How - - -

It's just, Ms Cooper, that you told us that you have told Mike to close the account?---Mmm.

In '07?---Yes.

And here we are in '12 - - -?---I know.

- - - and you've got the bank statements that are arriving on the back of the reconciliation sheets?---I've written on the back of the reconciliation sheet, but that's got nothing to do with the Bendigo Bank. I've written on the bank of a reconciliation sheet – sheet.

Well, those – I'm suggesting those amounts on the back can be seen in the bank statement, and I'm suggesting to you that well knew this account was in operation in 2012?---I did not know this account was in operation.

….

WITNESS: And in 2012, we were that busy. I wouldn't have had a clue what was happening.

MR COLLINS: Ms Cooper, I'm trying to – I'm suggesting to you that in this court, for these proceedings, you are completely downplaying your position and your knowledge in the business to paint a false picture, a false picture, that Mike controlled everything, and you knew nothing when it was, with respect, a business conducted by you. And you knew what was going on?---Mike did all the finances of the business. I knew very little about the finances of the business. I was too busy running the business, making money for the business.

Right. For the benefit of both of you as we know, correct?---To keep the business afloat, because it was in my name.

And I'm suggesting to you that you are a relatively sophisticated person capable of understanding the accounts that come in, and the bank statements?---Look, I very rarely looked at them. I was too busy running the business.

[141] The plaintiff maintains that the fact that she has written out figures which correlate with deposits into the Bendigo account, "doesn't mean that I've seen the statement". She further states that the defendant "could've easily read that out to me at work."

[142] In my view, it is difficult to reconcile the plaintiff's belief that the Bendigo account was closed with the fact that she has written out figures that match deposits into the Bendigo account on the back of a reconciliation report for her party business.

[143] Further, on 23 April 2013, $32,969 was transferred to the plaintiff from the Bendigo account that she states she believed was closed. The plaintiff states that she believes that this was cash left over from the business.

[144] I do not accept the plaintiff's evidence that she believed the Bendigo account was closed. The Bendigo account bank statements were addressed to her at the address of their party business. Her handwriting is on the back of a document that clearly refers to deposits into the Bendigo account and considerable funds were transferred to her from the Bendigo account. The plaintiff maintaining that she believed that the Bendigo account was closed in 2007, in such circumstances, is somewhat incredulous.

[145] The plaintiff consistently gave evidence that in relation to the property and their finances, the deceased did everything and she knew nothing; it was a hallmark of her evidence. However, I do not accept it.

[146] Indeed, the plaintiff's consistently repeated ignorance to such matters was often her fallback position; in my view, such a position was more evasive than explanatory.

[147] I consider that the plaintiff was a business savvy person, who bought and sold her own properties prior to, and during, her relationship with the deceased and understood much more about their finances than she portrayed in her evidence.

[148] Further, as I have set out when considering the transfer issue, the plaintiff's evidence is often inconsistent with the little documentary evidence that exists in this case.

[149] These are just some examples of matters that raise fundamental concerns about the plaintiff's reliability and credibility. Such are my concerns with the plaintiff's evidence that I am reluctant to accept her evidence alone without some other supporting evidence.

Was there an agreement with the deceased to buy the property together?

[150] The only evidence about the circumstances in which the property was purchased comes from the plaintiff, and she provides the only evidence about herself and the deceased agreeing to buy the property together. Such a contention is not supported by the fact that the contract for the property was prepared in the deceased's name alone. The plaintiff states that this was done unbeknownst to her. However, as I have already stated, at the time of the purchase of the property she would have known that she did not sign a contract for the property, whatever she now states that her belief was.

[151] The plaintiff states that in either 2012 or 2013 she learned she was not registered as a joint owner of the property. She states that she then brought this up with the deceased on many occasions, mainly from about 2015 onwards, verbally, in writing and via text. Many texts and emails from her to the deceased about this issue have been tendered as evidence. On the evidence before me, the deceased barely acknowledged these demands. In my view, none of this correspondence assists in establishing that the plaintiff and the deceased agreed to buy the property together.

[152] My concerns with the plaintiff's credibility mean that, in all of the circumstances, I am not satisfied that she and the deceased orally agreed to buy the property together on the basis that they would contribute one half of the purchase price.

[153] I cannot accept her evidence on this issue, and there is not sufficient supporting evidence to reach that conclusion without the plaintiff's evidence.

The transfer of $50,000 on 3 July 2002

[154] It is agreed between the parties that the plaintiff made a financial contribution of $50,000 to the property's acquisition on or about 3 July 2002 by bank transfer. The only evidence of the basis for such a transfer, beyond the parties' agreement that this contribution was towards the settlement funds of the property, comes from the plaintiff. Given my concerns regarding the plaintiff's credibility, I am not satisfied as to the circumstances or conditions, if any, of such a transfer.

The transfer of $25,000 on or about 3 July 2002

[155] The plaintiff owned two properties at the time she commenced living with the deceased, one of which was the Hoya Road property. A title search reveals that she acquired this property in March 2000 and sold it in October 2002. She states that when she sold this property, she received a bank cheque for $25,000 which she endorsed the back of and signed over to the deceased. There is no documentary evidence, such as the deceased's bank statement, supporting such a conclusion.

[156] The plaintiff states that as the purchase price of the property was $220,000, her 50 per cent share was $110,000. On the plaintiff's case, she had paid $75,000 towards her share (the initial $50,000 and the contested $25,000 from the Hoya Road property proceeds) after she allegedly signed over the Hoya Road property proceeds to the deceased.

[157] The defendants dispute that the plaintiff paid this money to the deceased. There is no documentary evidence to support the plaintiff's contention. The only evidence is her version of events.

[158] However, after considering all of the evidence, I have concerns about accepting the plaintiff's evidence that she contributed $25,000 from the sale of the Hoya Road property.

[159] Once again, the plaintiff's evidence contains inconsistencies which affect her credibility. The plaintiff's version at trial contradicts some of the previous versions she

provided, such as the versions in her further and better particulars and other earlier affidavits filed in the FCC proceedings:

(a) In 2017, the plaintiff's affidavit in the FCC proceedings stated that the contribution from the Hoya Road property was $27,500;

(b) In 2018, the plaintiff swore a further affidavit in the FCC proceedings where her evidence was that the amount she contributed from the sale proceeds of the Hoya Road property was $20,000; and

(c) The first time the plaintiff ascribed the sum of $25,000 to the contribution from the proceeds of the Hoya Road property was on 5 November 2020, in the further amended statement of claim in these proceedings.

[160] Her evidence has also changed regarding the character of the payment. In her 2018 affidavit in the FCC proceedings, the plaintiff stated that the payment from the proceeds of the Hoya Road property formed the "deposit" for the purchase of the property. She no longer advances that claim.

[161] Further, her evidence as to how the payment was made has been inconsistent. In her further and better particulars, the plaintiff states that she deposited a cheque for $25,000 into the deceased's account. At trial, her version of events changed to describe endorsing the cheque to the deceased and handing it over to him.

[162] Additionally, the plaintiff's evidence at trial somewhat contradicts the documentary evidence as to when the payment was made.

[163] I note that the pleaded case is that the payment of $25,000 was made on or about 3 July 2002 from the sale of her Hoya Road property. However, that date has varied over time.

[164] In her 2017 affidavit in the FCC proceedings, the plaintiff stated that the sale of the Hoya Road property occurred in 2003 or 2004. In a further affidavit in those proceedings sworn in 2018, the plaintiff stated that she undertook further investigations and found that the sale took place on 10 July 2002. The first time I am able to discern that the plaintiff claimed the proceeds from the sale of the Hoya Road property were signed over on 3 July 2002 was in the amended statement of claim in these proceedings, filed on 9 November 2020.

[165] In his opening, the plaintiff's counsel suggested that the sale of the Hoya Road property did not occur until September or October of 2002, referring to a transfer on the title search for the property. In her evidence, the plaintiff was unable to precisely identify the sale settlement date beyond stating that the sale took place in the second half of 2002.

[166] Further, I note that the plaintiff did not raise this $25,000 contribution in her correspondence with the deceased, nor explicitly with her solicitor.

[167] The plaintiff states that the deceased sent her a text where he conceded that she had contributed $75,000 towards the purchase price of the property. On 11 January 2016, the plaintiff texted the deceased asking him if he was prepared to put her name on the property deed. The deceased replied on 12 January 2016:

> I would agree provided that:
>
> 1. My name goes on your property
>
> 2. Cost of both changes be borne by you
>
> 3. You acknowledge your regular use of cannabis
>
> 4. You provided $75k towards the farm
>
> 5. I have spent 100 of 1000s of $s. I will provide a list including bmw and diamond

[168] The plaintiff states that this text is a concession that plaintiff put $75,000 towards the property (the original $50,000 contribution plus the $25,000 from the sale of the Hoya Road property). However, in the circumstances, I am not sure what this $75,000 refers to. The text sent by the deceased does not contain any explicit reference to the Hoya Road property. I am therefore not satisfied that the deceased is referring to the $25,000 the plaintiff alleges she signed over from the proceeds of sale of the Hoya Road property, especially since the plaintiff's assertions about the amount of the contribution she made has changed from $27,000 to $20,000 and now to $25,000. I am therefore not satisfied that this text is a concession that the plaintiff contributed $25,000 from the Hoya Road property towards the purchase of the property.

[169] There is an email from the plaintiff to her solicitor on 13 June 2016 where she provides a comment on a letter sent to her by her solicitor for review. She asked to change the amount she sought to be paid before the property can be transferred or sold from $300,000 to $75,000. It is not clear whether this $75,000 has any explicit connection to the Hoya Road property. It seems unlikely. I note that, about a half an hour later, her solicitor emails the plaintiff seeking to confirm her phone instructions to increase the amount to $80,000.

[170] I also note that the plaintiff sent an email to the deceased on 10 December 2016 stating that she put "85k towards the house- $25k short of my half, but you said not to worry about the rest of my half therefore that's why the balance was never paid in money." It is also not clear whether this $85,000 has any explicit connection to the Hoya Road property, alone or in combination with the other contributions the plaintiff says she made.

[171] In all of the circumstances, I am not satisfied that the plaintiff provided the deceased with $25,000 from the sale of the Hoya Road property as a financial contribution towards the acquisition and improvement of the property.

<u>The transfer of $16,170 from 19 August 2002 to 13 July 2006</u>

[172] I am not satisfied that the payments the plaintiff made to the deceased from 19 August 2002 to 13 July 2006 were contributions to the acquisition and improvement of the property.

[173] At the time of making some of these transfers, the plaintiff provided a description of what they were for which is recorded in the bank statements. However, she never described them as contributions to the purchase price of the property. Rather, where she did provide a description for the transfers, they were variously described as rent, electricity, or telephone payments. Notwithstanding that the plaintiff states that these payments related to the purchase price of the property, her contemporaneous characterisation of these payments contradicts that.

[174] The plaintiff states that it was the deceased who told her how to describe these transfers:

> So, for some reason we don't know, it's been put down as rent?---Yes. He asked for it to be put down as rent.
>
> Right. But – and you had - - -?---So, again, I trusted him.
>
> Right. But it wasn't rent, was it?---No, it wasn't.
>
> In your mind, it wasn't rent?---Of course it wasn't. It was repayments.

[175] Considering the concerns I have with the plaintiff's credibility, I am not prepared to accept her evidence about these payments when it runs directly counter to some of her contemporaneous descriptions of the purpose of these transfers.

<u>The transfer of $110,500 from 29 July 2006 to 29 March 2013</u>

[176] In relation to these transfers, the defendants submit that these amounts were simply amounts transferred as repayments of funds used from the deceased's credit card for the business. The defendants also submit that they could not be contributions towards the improvement of the property, as they suggest that the deceased paid for improvements, pointing to a number of documented improvements that took place at the property between 2002 and 2011.

[177] It is clear that the plaintiff transferred $110,500 to the deceased between July 2006 and March 2013. However, I am not satisfied that these transfers were financial contributions towards the acquisition and improvement of the property. There is no independent evidence to support such a contention.

[178] The plaintiff states that these transfers were made without her authority as she told the deceased to stop making payments towards the property and to close the Bendigo account. In such circumstances, it is difficult to ascertain how such contributions are towards the acquisition and improvement of the property when the plaintiff says she had no knowledge of the purpose of their use.

[179] However, in any event, I have not accepted the plaintiff's evidence that these transfers were made without her knowledge.

[180] In my view, the plaintiff was aware that this account had not been closed and was still being operated. As I have set out above, I have concerns about the plaintiff's credibility and reliability in relation to her evidence about what she knew about the Bendigo account and how it was operated. As I have already stated, such are my concerns with the plaintiff's evidence that I am reluctant to accept her evidence alone without some other evidence.

[181] Accordingly, in such circumstances, I am not prepared to accept that these payments were made towards the acquisition and improvement of the property.

The plaintiff is not entitled to the claimed relief

[182] As I have set out, I had the opportunity to observe the plaintiff give evidence for a substantial period of time where I could consider not only her evidence, but her demeanour in giving it. I did not find the plaintiff an impressive witness and I have serious concerns with her credibility and reliability.

[183] I am not satisfied on the evidence that there was an oral agreement or mutual intention between the plaintiff and the deceased that they would purchase the property together on the basis that they would each contribute one half of the purchase price.

[184] Further, I am not satisfied, on the evidence, that any of the funds transferred by the plaintiff were in fact contributions towards the acquisition and improvement of the property. Clearly, transfers were made from the plaintiff to the deceased. However, given my concerns regarding the plaintiff's credibility and reliability, I am not satisfied as to the circumstances or conditions, if any, of these transfers.

[185] Accordingly, in my view, there was not a joint endeavour in this case.

[186] Further, the plaintiff has not established the cornerstone feature of unconscionability.

[187] It is uncontentious that the property was acquired whilst the plaintiff and the deceased were in a de facto relationship. The deceased made several significant financial contributions to the relationship including:

(a) his support of the business in the plaintiff's name; and

(b) the gifts which he provided to her, including two BMW cars (one worth $100,000) and jewellery.

[188] The plaintiff acknowledges the deceased's contribution to the business in a letter she sent the deceased in 2008:

> I don't want you to walk out of the business. I need your support and help and what else would you do? You have also put too much money in to it to simply walk away and I can't keep the business going by myself. I don't want to employ anyone else as I enjoy working with you and it will help our books look better.

[189] The business was sold in April 2013 for $118,955. On 2 April 2013, the proceeds of the sale were paid into the plaintiff's bank account which were then invested in a term deposit. Soon after, there was a further payment of $32,969 from the Bendigo account to her account on the closure of the business, which the plaintiff states she believes was the cash left over in the business account.

[190] In my view, there can be no unconscionability in one asset derived during the course of the de facto relationship remaining in the ownership of the deceased's estate. The plaintiff otherwise had substantial assets and received the benefit of the business.

[191] The other feature which cannot be ignored is the plaintiff's conduct in withdrawing significant funds from the deceased's account. From 6 February 2017 to 20 February 2017, the plaintiff withdrew multiple $1,000 amounts totalling $24,000 from the account in the deceased's name (she had an additional card attached to the deceased's credit card and was an authorised user). $1,000 was the maximum amount which could be withdrawn each day. She states that the reason she did this was:

> So he could feel what it feels like when someone's done the wrong thing by them, and that's exactly what I said to him. I said, 'How does it feel when someone's done the wrong thing by you? That's exactly what you'd done to me by not putting my name on that title deed.'

[192] She never repaid this money and used it to pay court fees.

[193] In my view, the deceased's retention of the legal title against the background of the entirety of the relationship was not in any manner or form unconscionable.

[194] Accordingly, the plaintiff's claim for equitable relief fails.

Did the deceased execute the transfer documents?

Two issues in relation to the transfers

[195] There are two fundamental issues concerning the transfer:

(a) First, whether it was in fact signed by the deceased; and

(b) Second, if it was signed by the deceased, whether its irregular witnessing affects its validity.

[196] In relation to the transfer documents, four witnesses gave evidence:

(a) The plaintiff, who states that the deceased signed the transfer documents.

(b) A justice of the peace ("the JP") who signed the transfer documents as a witness without actually witnessing the deceased sign the documents.

(c) Ms Nichol (the plaintiff's handwriting expert), who gave evidence that, in her opinion, the impugned signature is the deceased's signature.

(d) Mr Heath (the defendants' handwriting expert), who gave evidence that, in his opinion, the impugned signature is not the deceased's signature.

The plaintiff's position

[197] To support her submission that the deceased signed the transfer, the plaintiff relies on three sources of evidence:

(a) Her own evidence that she saw the deceased sign the transfer;

(b) The JP's evidence that he:

(i) recognised the deceased's signature; and

(ii) spoke to the deceased to confirm that he had signed the transfer; and

(c) Ms Nichol's conclusion that the signature on the transfer is the deceased's signature.

[198] The defendants called evidence from a competing handwriting expert, Mr Heath, who states that the signature is a forgery and is not the deceased's signature.

[199] The plaintiff states that Mr Heath's report has a number of deficiencies. She particularises two in her submissions:

(a) First, contrary to his oral evidence, no allowance is made in his report for the deceased's obvious ill health (which the plaintiff says is addressed in Ms Nichol's report and the attached medical records). The plaintiff submits that the deceased's health at the time would have impacted his signature in the way Ms

Nichol opines, and this is consistent with the specimen signature closest in time on 1 March 2016 ("the 1 March 2016 signature").[58]

(b) Second, for the reasons set out by Ms Nichol, the line ratio of all the specimen signatures is consistent and the variance in the individual letters is within acceptable variations of a person's signature, especially given the deceased's then ill health.

[200] The plaintiff states that I may undertake a visual comparison between the impugned signature on the transfer documents and the known specimen signatures of the deceased.[59]

The plaintiff's evidence

[201] The plaintiff gave evidence that in about March 2016, the deceased agreed to sign a transfer to put her name on the title. The plaintiff says she then went to her solicitor and had a transfer prepared. She states that she and the solicitor wrote the details she needed to fill out on the transfer in pencil, and when she was with the deceased, she wrote it in pen.

[202] She states that she came to an arrangement with the deceased about where and when the transfer documents would be signed; he would go to an RSL meeting in the morning, then the plaintiff would meet the deceased and the JP after the meeting. However, the deceased did not attend the RSL meeting. The plaintiff states that she drove over to his place to see why he did not attend, and he told her he did not go because of a medical condition.

[203] The plaintiff states that, whilst she was there, the deceased signed the transfer in her presence. She then went back to the RSL to see the JP with the transfer. In her presence, the JP phoned the deceased. She could hear him asking the deceased if the signature on the transfer was his signature, and saying:

> By signing this, do you know what form you've signed and what are the implications from signing that form – that [the plaintiff] can get her name on the title and everything.

[204] She states that she could not hear the deceased's response. The JP then witnessed the plaintiff and the deceased's signatures.

[205] The plaintiff tendered transfer documents dated 12 March 2016. The plaintiff thinks she and the deceased completed them and signed the transfer on that date.

The JP's evidence

[206] The JP states that he knew the deceased as they both served in the Royal Australian Air Force ("RAAF") together. He gave evidence that he knew the deceased's signature as he had seen it "quite often" in the course of their time in the RAAF together.

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58 Defined as 06(11) by Mr Heath.

59 *Jackson v Arawak Holdings Pty Ltd & ors* [2016] QSC 57, [78]; s 59(2) of the *Evidence Act 1977*.

[207] He says that the plaintiff attended the RSL with the document and asked him to witness it. The JP states that he rang the deceased and asked whether it was his signature, to which the deceased replied that it was.

[208] The JP gave evidence that his understanding at that time was that if he recognised someone's signature, he could certify it. He acknowledges that this was wrong. He says that he was not aware of the requirements and obligations of s. 162 of the *Land Title Act 1994* ("the LTA") when he witnessed the transfer.

[209] The JP knew that the deceased had been self-medicating with alcohol for quite a long time. However, he did not know about the deceased taking any prescription drugs. The JP states that:

> [the deceased] had, in fact, been self-medicating for quite a while. And I would expect that his signature wouldn't be exactly. Anytime you sign, it's never the same twice.

[210] I place no weight on the fact that the JP recognised the deceased's signature because he had seen it when they served in the RAAF together. The JP gave evidence that it had been several years since he last saw the deceased's signature by the time he purported to witness the deceased's signature. He states that he would only have seen the deceased's signature on RAAF documentation. I note that the plaintiff gave evidence that the deceased let the RAAF at the end of 2005 or in 2006, at least 10 years prior to when the JP purported to witness the deceased's signature.

[211] I place no weight on the JP's evidence that he rang the deceased to confirm whether he signed the transfer. Such evidence is hearsay and is not admissible to prove the truth of its contents.

[212] Even if I could consider this evidence, it would not change the outcome.

[213] On the preponderance of evidence, I am not satisfied that the deceased signed the transfer. I prefer the evidence of Mr Heath, who gave evidence that the impugned signature on the transfer documents is not the deceased's signature. Further, the plaintiff's correspondence does not support her evidence that the deceased signed the transfer. Indeed, in many respects the plaintiff's own correspondence is inconsistent with her evidence.

<u>The handwriting experts</u>

[214] Two handwriting experts, Ms Nichol and Mr Heath, gave conflicting evidence as to the authenticity of the signature. In all of the circumstances, I prefer the evidence of Mr Heath.

[215] In my view, Mr Heath has more relevant experience and training than Ms Nichol.

[216] Mr Heath commenced training in the field of forensic document examination in 1980 while an officer with the Queensland Police Service. He completed a four-year intensive certified training course on forensic document examination, which had a

significant focus on handwriting and signatures. He qualified as a forensic document examiner in 1984 at the end of that course.

[217] He was the officer in charge of the Document Examination Section from August 1989 until March 1991 when he retired. Since then, he has run a full-time document examination consultancy service.

[218] Mr Heath has given evidence on between 550 and 600 occasions in various courts around Australia, has prepared and presented numerous papers on forensic document examination to many government departments and is a member of the Australasian Society of Forensic Documents Examiners Inc.

[219] Ms Nichol, on the hand, has not had as much training nor experience in considering disputed handwriting.

[220] She is clearly an expert in handwriting; however, her area of expertise is in calligraphy and teaching handwriting rather than in forensic document examination.

[221] She gave evidence that in 1980 she was granted a Churchill Fellowship to study handwriting overseas, which included two weeks of training at Scotland Yard, and weekly training for six months with an independent document examiner.

[222] In evaluating handwriting, Ms Nichol follows the process set out in the book *Harrison's Suspect Documents* and the criteria set out by the Metropolitan Police in London. Since completing the Churchill Fellowship in 1980, she has not done any further courses in relation to simulated signatures.

[223] She has not prepared any research or presentation papers on the area of forensic document examination in respect of simulated signatures nor spoken at any conferences. Ms Nichol is not a Member of the Australasian Society of Forensic Document Examiners but was a member of the Forensic Science Society of Harrogate in York.

[224] Ms Nichol gave evidence that she would write approximately twenty to thirty reports a year on disputed documents, most of which relate to private matters which do not necessarily go to court. She states that she has given evidence in a court or tribunal approximately 20 times.

[225] In my view, Mr Heath is by far the more accredited expert in relation to this matter. He has significantly more relevant experience and training.

[226] Further, I ultimately prefer the evidence of Mr Heath.

[227] He focuses on and notes significant differences between the deceased's specimen signatures and the disputed signature. On that basis, he concludes that there is an abundance of evidence to conclude that the disputed signature on the transfer documents is false and not that of the deceased.

[228] Mr Heath and Ms Nichol adopt markedly different approaches.

[229] Ms Nichol focuses on writing ratio; she states that the line ratio of all the specimen signatures is consistent and the variance in the individual letters is within an acceptable range of variation of a person's signature, particularly given the deceased's ill health at the time of the disputed signature. She states that a person's signature retains many features even though the stroke quality (through age or infirmity) may deteriorate: the starting and finishing places remain consistent; the writing ratios often remain consistent; and spaces within and between letters can remain consistent. However, she notes that the stroke quality and pressure applied to the paper may vary greatly.

[230] Ms Nichol states that it is very difficult to simulate another person's signature and it is very easy for a document examiner to identify a simulated signature. She states that as we go through life, each person develops a style of writing where "our individuality starts to shine through" and cannot be suppressed. Ms Nichol states that each person ends up with their own individual writing ratio, and when attempting a forgery, ratio is probably the most important thing to master, as your own writing ratio would be "trying to fight you to write your way".

[231] Mr Heath, on the other hand, focuses on the specific letters rather than the global look and general ratios within and between the letters. He accepts that the ratio of the disputed signature is similar to that of the specimen signatures.

[232] Mr Heath, however, does not agree that replicating the ratio of a signature is a difficult task. His opinion is that ratio is not something that a forger is concerned with at all. Rather, a forger will be concerned with whether the signature can be rapidly completed so as to imitate the fluency of a natural signature, whether it is carefully completed so as to replicate the structure of the various letters and their proportional height and replicating the pictorial aspects of the signature within the best of the forger's ability.

[233] In all of the circumstances, I prefer the approach utilised by Mr Heath.

[234] I accept that ratio is an important part in the process of determining whether a signature is simulated or not. However, as Mr Heath states, there are many tools in conducting a forensic examination to determine whether a document in a forgery, and "writing ratio" is a minimum tool. He disagrees with Ms Nichol's perspective that it is a pre-eminent feature in any examination because a person's signature may vary substantially in some of the ratios over time.

[235] I accept Mr Heath's evidence that focusing on ratio, to the exclusion of other areas, could lead to substantial error because there are many areas that are important in the examination of signatures.

[236] Mr Heath identifies that the letters in the disputed signature are comprised of more than one stroke, particularly noting the M and the R. He states that if a writer is unwell (as the deceased was at the time of the purported signature), the last thing they would do is carefully overwrite strokes and retouch the letter to make it look better. He states that the strokes were clearly not within the proper sequence of the strokes.

[237] In my view, the methodology utilised by Mr Heath is much more robust and analytical than that which was implemented by Ms Heath. Mr Heath's evidence explained the basis of his opinion better than Ms Nichol's evidence.

[238] The plaintiff criticises Mr Heath for making no allowance for the deceased's obvious ill health, which is addressed in Ms Nichol's report (and the attached medical records). The plaintiff states that the deceased's health, at the time, would have impacted on his signature in the way set out by Ms Nichol and that is consistent with the specimen signature closest in time on 1 March 2016, which Ms Nichol comments was similarly deteriorated. She also sets out the significant medical ailments with which the deceased was struggling at the time of the transfer.

[239] However, in my view, Mr Heath appropriately deals with the issue of the deceased's health. In his oral evidence, he gave a considered account of how the varying levels and causes of ill health, as well as the consumption of alcohol, may impact an individual's handwriting.

[240] Accordingly, in all of the circumstances, I prefer Mr Heath's evidence to that of Ms Nichol. I adopt his conclusion that the signature on the transfer documents was not written by the deceased. Indeed, it is the conclusion I reached after considering the specimen signatures and the disputed signature.[60]

The plaintiff's correspondence to the deceased and her solicitor

[241] In my view, it is also important to also consider the documentary evidence tendered, which includes:

(a) correspondence between the plaintiff and the deceased;

(b) correspondence between the plaintiff and her solicitor; and

(c) correspondence between the plaintiff's solicitor and the deceased.

[242] This evidence provides some contemporaneous context as to the events the plaintiff describes. I consider that this correspondence does not support the plaintiff's evidence that the deceased signed the transfer documents on 12 March 2016.

[243] There is correspondence between the plaintiff and the deceased prior to 12 March 2016 where the plaintiff requests that her name be put on the title deed or a monetary payout. The plaintiff states that on 12 March 2016, the deceased signed the transfer documents.

[244] The correspondence that occurs after this date between the plaintiff and the deceased and the plaintiff and her solicitor is informative and, at times, inconsistent with her account.

[245] The plaintiff states that, shortly after 12 March 2016, she took the signed transfer to her solicitor. However, she caveated this by saying that she may have just called her

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[60] As I am permitted to do by s 59(2) of the *Evidence Act* and *Jackson v Arawak Holdings Pty Ltd & others* [2016] QSC 57 at [78].

solicitor and told her. In any event, at a minimum, the plaintiff accepts that she certainly told her solicitor that the deceased had signed the transfer documents shortly after it was signed.

[246] On 30 May 2016, the plaintiff texted the deceased stating:

> Hi just wondering if you have done anything about putting my name on the house deed?

[247] Such a text is inconsistent with the deceased signing the transfer documents less than two months previously. If the deceased had signed the transfer documents on 12 March 2016, this text would be unnecessary.

[248] On 13 June 2016, the plaintiff's solicitor wrote the following email to the plaintiff:

> Received your phone call that cut out. Jill said that you wanted to increase the amount to $80,000. Please confirm that is right.
>
> To summarise your position, you can do 3 things but all require Mike's co-operation and signature:
>
> 1. Seek Family Law agreement out of time.
> 2. Register a caveat requiring you to be paid $80,000 before the property is ever transferred/sold.
> 3. Register a personal mortgage requiring you to be paid $80,000 before the property is ever transferred/ sold.
>
> If Mike does not co-operate, then you can file a claim in court or try mediation eg through Relationships Australia.
>
> Do you want to just write to Mike and ask for Family Law Agreement, or mention the other 2 options as well.

[249] Such correspondence from the plaintiff's solicitor seems to proceed on the basis that the deceased had not already signed the transfer.

[250] On 20 June 2016, the plaintiff's solicitor wrote a letter to the deceased titled "property settlement" which states:

> We have received instructions from [the plaintiff] to act for her in the above matter. Our client instructed that the two of you were in a relationship. The relationship has now broken down.
>
> During that relationship you bought [the property]. [The plaintiff] instructs that she contributed towards the purchase of the home on which you continue to live.
>
> In recognition of her contribution, [the plaintiff] requests you to transfer a half share of the home to her as joint tenants or repay her $85,000.
>
> Our client is prepared to make this final offer to you before considering legal action. She is willing to finalise this matter on

> the basis that you agree on or before 5 pm Friday 1 July 2016 to the following:
>
> 1. You transfer a half share in the home to our client and home is held as joint tenants;
> 2. You have the right to continue to live in the home.
> 3. You and your client surrender any further claims on each other's property.
> 4. You bear the legal costs of this matter, up to a total cost of $5,500 (inc GST) as our client has been forced to seek legal assistance.
>
> Our client reserves her legal rights.
>
> We commend this matter to your urgent attention as that it may be settled amicably and without the need of court processes with the attendant additional costs to you.

[251] I note that this correspondence indicates the plaintiff was willing to finalise the dispute if the deceased agreed to a number of matters including, *inter alia*, transferring a half-share in the property to her on the basis that it is held as joint tenants. Such a request is not consistent with the deceased having already signed the transfer documents on 12 March 2016; indeed, it is inconsistent.

[252] On 7 July 2016, the plaintiff sent the deceased a text which stated:

> You either put my name on the house deed or give me 300,000. I can't understand why you just don't put my name on the deed which should've happened when we purchased the place.

[253] Again, this text is inconsistent with the plaintiff's evidence that the deceased had signed the transfer documents four months earlier on 12 March 2016.

[254] On 23 August 2016, the plaintiff's solicitor wrote to her in the following terms:

> You phoned me this morning to advise that [the deceased] had agreed to transfer half of the property to you as joint tenants.
>
> You would be satisfied with this result and not proceed with litigation.
>
> These are the steps in order to achieve this result:
>
> 1. You and [the deceased] both sign a Form 1 Transfer with JP as witness.
>
> …
>
> 4. The Form 1 must be stamped (ie duty paid)
> 5. The stamped Form 1 is sent to the Titles Office for registration.

[255] On 11 October 2016, the plaintiff's solicitor wrote to her and stated:

> Recently you advised that [the deceased] had agreed to transfer half of the above property to you to avoid possible legal action…
>
> …
>
> We attach a transfer which would transfer the property from [the deceased] alone to you and [the deceased] as joint tenants. It requires a date of transfer and a valuation of the property...

[256] Once again, this is inconsistent with the plaintiff's evidence that:

(a) the deceased had signed the transfer on 12 March 2016; and

(b) shortly afterwards, she advised her solicitor that the deceased had signed the transfer documents.

[257] The plaintiff continued to send the deceased emails and texts indicating she wanted her name on the title to the property, all of which are inconsistent with her evidence that he had signed the transfer documents on 12 March 2016.

[258] On 30 October 2016, the plaintiff emailed the deceased asking him what he had done regarding the discharge of the mortgage and putting her name on the title to the property. On 31 October 2016, the deceased replied and said he would do something about the house soon.

[259] On 14 November 2016, the plaintiff emailed the deceased asking whether he had done anything about the property and expressing her frustration that nothing had been done despite her raising it repeatedly.

[260] On 30 November 2016, the plaintiff texted the deceased asking if he had done anything about putting her name on the deed.

[261] On 10 December 2016, the plaintiff sent an email to the deceased which included the following:

> Hi [the deceased]
>
> I'm reiterating what I said on Friday.
>
> 1. I've been asking for years for you to do something about putting my name on the deed – leaving my name on the Will means zilch
> 2. I put $85K towards the house - $25k short of my half, but you said not to worry about the rest of my half therefore that's why the balance was never paid in money
> 3. My name should have been on the deed from the date WE purchased it
> 4. You have to clear the 2nd mortgage you have over the deed with the NAB so I can get my name on the deed.
> 5. I am happy to arrange for my solicitor to draw up the papers legally and at my cost

6. This is to be done by end of December 2016
7. I am lodging the DRFD8 form so if nothing has been done by end of December I will go to Court
8. In court I will be asking for a lump sum of your super and any other assets I am entitled to plus my share of the house
9. The court will not put my name on the deed as it seems that separated/divorced couples are no longer entitled to any joint assets, so you will have to pay me out in monetary terms. Even if the court only awards me $200k you have to come up with this money
10. The easy way and most effective way for you to do this is simply put my name on the deed.

I am so disappointed that you are making me do this. I have let you stay there without asking for any payout, simply to put my name on the deed – which should have been done when we first bought the place TOGETHER. You have been dishonest and unfair by not putting my name on the deed, let alone letting me know about borrowing against OUR ASSET. Now you have backed me into a corner where I now have to look at court proceedings. This means both you & I have to spend between $30-$50k (if we settle in the first court session, if not then it will cost more). The only one getting anything out of it are the solicitors. You said 'everything always comes down to money', I can't wrap my head around why you would even say that. You get to live in the house until you kark it & what difference will it make then. I told you I would never force you to sell it and if you do sell it then I am asking for $320k and you get the balance – at least $420k. If my name is on it and I kark it before you then it yours – what is the problem??? IT COSTS YOU NOTHING FOR SOMETHING YOU SHOULD HAVE DONE 14 YEARS AGO.

[262] The plaintiff filed proceedings in the FCC in May 2017 and filed an accompanying affidavit.

[263] Notably, this affidavit was filed at a time when the deceased was still alive. In the affidavit, the plaintiff referenced the issue of her name not being on the title despite her having contributed funds. She then more specifically referred to her requests of the deceased to transfer the property into their joint names. However, there is no reference at all in this affidavit to him signing the transfer.

[264] I accept the defendants' submission that if a transfer document had been executed by both parties and was intended to be binding, there is no conceivable explanation as to why the plaintiff would not have referenced it in this affidavit.

[265] The first reference to the transfer arises in the plaintiff's second affidavit in the FCC, sworn on 28 August 2017. Notably, the deceased had passed away on 21 July 2017. This allegation therefore appears in circumstances where the deceased was not able to respond to it. It is concerning that the plaintiff made no reference to the deceased signing the transfer whilst he was alive.

[266] The plaintiff's evidence is not supported by the correspondence between herself and the deceased, nor the correspondence between herself and her solicitor. Indeed, in my view, the correspondence is inconsistent with the plaintiff's evidence and raises serious concerns about her credibility and reliability.

Summary

[267] In all the circumstances, for the reasons I have set out, I am not satisfied that the deceased signed the transfer documents on 12 March 2016. The plaintiff and the deceased therefore did not become, in equity, joint tenants of the property. The plaintiff is not entitled to be registered as the sole proprietor of the property pursuant to the transfer.

[268] Once I have reached the conclusion that the deceased did not sign the transfer, I do not need to consider the consequences of the JP not witnessing the signature in accordance with s. 162 of the LTA. That issue would have only arisen if I was satisfied that the deceased signed the transfer.

Conclusion

[269] For the reasons set out, the plaintiff's claim must be dismissed.

[270] I will give the parties an opportunity to consider these reasons before they are required to file and serve short written submissions on the question of costs. I encourage the parties to agree on an order for costs.

[271] However, if this cannot occur, the parties should, within fourteen days, agree on a timetable for the exchange of written submissions and advise the court accordingly. If it is appropriate, I will then deal with the question of costs on the papers, unless either party requests a hearing. In order to facilitate that process, I will adjourn the question of costs to a date to be fixed.

Orders

1. The plaintiff's claim is dismissed.
2. The question of costs is adjourned to a date to be fixed.