PARTIES:	MICHELLE RHONDA STACEY
	v
	ROSS ALEXANDER PEARCE
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT of the NORTHERN TERRITORY exercising Territory Jurisdiction
FILE NO:	269/94 (9424054)
DELIVERED:	11 April 1997
HEARING DATES:	28 February 1997
JUDGMENT OF:	Thomas J

REPRESENTATION:

Counsel:

Applicant:	M. Carter
Respondent:	C. Black

Solicitors:

Applicant:	Close & Carter
Respondent:	Cecil Black

Judgment category classification:	C
Judgment ID Number:	tho97003
Number of pages:	10

tho97003

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 269/94 (9424054)

BETWEEN:

MICHELLE RHONDA STACEY
Applicant

AND:

ROSS ALEXANDER PEARCE
Respondent

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 11 April 1997)

This is an application by the plaintiff on summons dated 10 December 1996 seeking the following orders:

1. An order that funds totalling $12,783.65 standing to the credit of the plaintiff and the defendant in the trust account of Close and Carter Solicitors, be disbursed as follows:

(a) an order that funds of $12,231.65 be paid to Michelle Stacey being the remainder of the portion of proceeds of sale of 670 Strangways Road, Humpty Doo.

(b) an order that the defendant pay from the balance of the Financial Institution Duty (FID) of $131.52.

2. An order that the defendant pay the costs of and incidental to this application.

On the date the application was argued being 28 February 1997, Mr Carter for the plaintiff, advised the Court that following agreement between the parties the order he would be seeking was as follows:

1. An order that funds totalling $12,783.65 standing to the credit of the plaintiff and the defendant in the trust account of Close and Carter Solicitors be disbursed as follows:

(a) an order that funds of $12,200 be paid to Michelle Stacey being the remainder of her portion of proceeds of sale of 670 Strangways Road, Humpty Doo.

(b) an order that the defendant pay the plaintiff's costs, such costs to include $131.52 being the Financial Institution Duty payable from the trust account of Close and Carter.

The background of this matter is as follows:

On 15 April 1996 this Court made an order with the consent of the parties declaring that:

1. Pursuant to s10 of the *De Facto Relationships Act*, the plaintiff and the defendant did live between February 1983 and September 1993 together in a de facto relationship.

2. Both the plaintiff and defendant lived in the Territory on the day on which the proceeding was commenced and that both the plaintiff and the defendant lived together in the Territory for not less than one third of the period of their de facto relationship.

This Court then with the consent of the parties made orders as to the distribution of property between the parties.

Mr Carter, counsel for the plaintiff, asserts that the application for payment of monies from the trust account of Close and Carter to the plaintiff is in accordance with the terms of the Consent Order made by the Court on 15 April 1996.

The consent order made by the Court is in the same terms as a Minute of Orders Sought dated 13 April 1996, filed in Court and signed by solicitors for the parties.

Mr Black submits that a mistake was made when the Minute of Orders Sought was drawn up, in particular paragraph 3(i)(iv)(ae) which states:

> "3. In full and final settlement of this proceeding and in respect of a claim for an adjustment of property pursuant to s18 of the *De Facto Relationships Act* or any remedy or relief under any other Act or law, IT IS ORDERED THAT:
>
> .....
>
> (1) The property being Lot 7 of Strangways from Plan LTO 77/017 situated at 670 Strangways Road, Humpty Doo, NT, 0836 (hereinafter referred to as the "Humpty Doo property") be sold on the following terms and conditions:
>
> .....
>
> (iv) upon completion of the sale, the proceeds of the sale be applied as follows:
>
> .....
>
> (ae) fifthly, to the defendant, an amount equal to one half of the difference of the nett value of the Malak property and the nett value of the Nakara property; ....."

The Consent Order also made provision that:

(5) There be liberty to apply to the Master in Chambers upon seven days prior notice in writing to the other party, for consequential orders to facilitate the sale of the property and any other matter which is required to be done by the parties to put this order into effect.

Mr Black, counsel for the defendant, submits that the particular provisions of the consent orders referred to above did not correctly reflect the agreement reached between the parties following their negotiations. It is the submission of Mr Black that in essence the agreement was that an amount of

$75,000.00 be paid to Mr Pearce and after that the balance of the nett proceeds be shared 50/50.

Mr Black makes reference to a letter dated 30 January 1996 from Close and Carter being annexure "A" to the affidavit of Ross Alexander Pearce sworn 22 January 1997 which omitting formal parts states as follows:

> "Pearce & Stacey
>
> In an attempt to settle this case our client offers your client the sum of $75,000.00 from the proceeds of sale of all property together with 50% of the net balance.
>
> This (is) an open letter and will be referred to the Trial Judge should the matter proceed to judgment and an outcome less favourable be achieved by your client."

Mr Black states there is a mistake in the Minute of Orders Sought which was reflected in the Consent Order of 15 August 1996. On behalf of the defendant it is asserted that the way in which paragraph 3(1)(iv)(ae) is written does not give an equal distribution of the balance of the funds and does not accord with the fundamental principal of the settlement agreement which was an equal distribution of the balance of the nett proceeds.

The evidence considered by me in this matter is contained in the affidavit of Ross Alexander Pearce sworn 23 January 1997 and the affidavit of Michelle Rhonda Stacey sworn 10 December 1996.

Mr Black relies on s40 of the *De Facto Relationships Act* which provides as follows:

> "(1) Where a court is satisfied, on the application of a person in respect of whom an order has been made under Division 3 or 5 -
>
> (a) that there has been a miscarriage of justice because of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstances;
>
> (b) that in the circumstances that have arisen since the order was made, it is impracticable for the order or part of the order to be carried out; or
>
> (c) that a person has defaulted in carrying out an obligation imposed on the person by the order and, in the circumstances that have arisen as a result of that default, it is just and equitable to vary the order or to set the order aside and make a substitute order,
>
> the court may vary the order or set the order aside and, if it thinks fit, make a substitute order in accordance with that Division.
>
> (2) An order under Division 5 for maintenance, other than periodic maintenance, may not be varied except in accordance with this section."

There is a similar provision in the *Family Law Act* being s79A which provides as follows:

> "79A (1) Where, on application by a person affected by an order made by a court under section 79 in proceedings with respect to the property of the parties to a marriage of either of them, the court is satisfied that:
>
> (a) there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence, the giving of false evidence or any other circumstance; ....

the court may, in its discretion, vary the order or set the order aside and, if it considers appropriate, make another order under section 79 in substitution for the order so set aside."

In the matter of *Eillot and Willcox* (1996) FLC 83, 130 at 83, 134, the Court of Appeal in the Family Law Court states as follows:

> "The first ground of appeal sought to argue that the expression "any other circumstance" appearing in s79A should be read as *ejusdem generis* with fraud, duress, the suppression of evidence and the giving of false evidence and that they did not extend to procedural irregularities occurring in the course of the proceedings.
>
> Such a contention was at variance with previous decisions of this Court in *Clifton and Stuart* (1991) FLC 91-194; *Suiker and Suiker* (1993) FLC 92-436; *Garlick and Garlick* (1993) FLC 92-428; *Kokl and Kokl* (1981) FLC 91-978; *Liu and Liu* (1984) FLC 91-572 at 79,623 and *Rohde and Rohde* (1984) FLC 91-592 at 79,768.
>
> It should also be noted that the Supreme Court of New South Wales took a similar view of s75 of the *Matrimonial Causes Act* 1959, which was in similar terms - see *Byrne v Byrne* (1965) 7 FLR 342; *Wilson v Wilson* (1967) 10 FLR 203.
>
> It is apparent that to circumscribe the meaning of "any other circumstance" in the manner argued for by the wife would be to seriously limit the scope of the operation of a section which is designed to enable the court to correct miscarriages of justice created by the making of orders under the Act.
>
> The wife argued that in determining the issue, the court should weigh heavily the public policy issue of the desirability of litigation being brought to an end. While this may be a legitimate consideration in determining whether a court should exercise its discretion under the section, it cannot determine its meaning."

See also *Harrington v Lowe* (1996) FLC Kirby J 92-668 at 82,923:

> "..... The Court is entitled, notwithstanding an order made under s79 with respect to the property of parties to set such an order aside if it is

> satisfied that there has been "a miscarriage of justice by reason of .... any other circumstance". It is not for the rule-maker, by prescribing the evidence that may be given to establish such a "miscarriage of justice" in "any other circumstance" to attempt to control access by the Court to evidence which the Parliament has necessarily contemplated will be within a wide compass. ....."

and at 83,924:

> "..... The right of a party to correct consent orders on the basis of mistake and to seek the relief of equity against a written agreement which reflects the mistake, is a well-settled substantive entitlement of our law. ....."

The submission by Mr Carter for the plaintiff is that the plaintiff is entitled to a disbursement of monies as sought following the Consent Order made by the Court on 15 April 1996.

It is the argument by Mr Carter for the plaintiff, that this matter has been finally disposed of by this Court by the making of the Consent Order on 15 April 1996 and the matter cannot be reopened by the defendant (*Bailey v Marinoff* (1971) 125 CLR 529. See also *Strand Nominees Pty Ltd v Pennywise Smart Shopping* (1991) 1 NTLR 17 and *Martina v Mostler* (1988) FLR 88).

I agree with the submission made by Mr Black that s40 of the *De Facto Relationship Act* enables the defendant, Ross Alexander Pearce, to make application to this Court to set aside the consent order on the grounds specified in s40.

I do not agree with Mr Black's submission that I can grant leave to his client to argue the application during the course of an application by the

plaintiff for payment out of monies held in the trust account of Close and Carter. The defendant's application, if it is to be heard, should be properly made in accordance with the procedures laid down in the Supreme Court Rules.

I agree with Mr Carter that the defendant would first have to establish a ground under s40 of the *De Facto Relationships Act* that the consent order should be set aside and then persuade the Court that an adjustment should be made. This must necessarily involve a reopening of the whole case.

The parties are to be congratulated upon having reached agreement on a whole range of matters in respect of the division of property between them. The property which is the subject of the present argument involves a relatively small amount of money. There have obviously been lengthy and detailed negotiations and the parties have been able to agree as to the distribution of the substantial part of their assets. I would have considerable reluctance in making orders that effectively reopen the whole matter. However, I have come to the conclusion that if the defendant does decide to apply pursuant to the provisions of s40 of the *De Facto Relationship Act* then a consequence of his application if successful is that the whole matter be reopened to enable the Court to do justice between the parties.

I agree with Mr Carter's submission that it is not appropriate I deal with the defendant's application at this time. If the defendant intends to apply to the Court pursuant to s40 of the *De Facto Relationships Act* then he should

file and serve an application in accordance with the prescribed Rules of the Supreme Court and I will deal with such application on its merits.

I do not propose to make orders on the plaintiff's application today. The matter will be listed again for mention at 9.30 am on 2 May 1997. This will give the defendant time to file the appropriate application pursuant to s40 of the *De Facto Relationships Act* if that is his intention. Alternately, if the defendant has made no such application then it may be appropriate on the adjourned dated that I proceed to make orders to conclude the plaintiff's application.