KRUEGER v JANSEN

In the Supreme Court of the Northern Territory of Australia

Martin J.

26, 27, 28, 29, 30 November, 12 December 1990 and 29 April 1991

DEBT - action to recover - whether money lent - effect of deed - whether obligation to pay extinguished by deed - no clear term excluding ordinary consequences - "contribution" considered - may infer intention - obligation to pay not discharged

UNDUE INFLUENCE - whether presumption applies - engaged couple - de facto relationship - if not, influence must be actual - lack of independent advice not conclusive - deed not set aside on this basis

PRACTICE - pleading - estoppel & election - failure to plead - should be raised in pleadings so as to avoid surprise - Supreme Court Rules 13.07

Cases referred to:

Coulls v Bagot's Executor and Trustee Co Ltd (1967) 119 CLR 460
Duncombe v Porter (1953) 90 CLR 295
Gould & Birbeck & Bacon v Mt Oxide Mines Ltd (1916) 22 CLR 490
Harris v Jenkins (1922) 31 CLR
Johnson v Buttress (1936) 56 CLR 113
Laws Holding Pty Ltd v Short (1972) 46 ALJR 563
The Commonwealth v Verwayen (1990) 170 CLR 394
Yerkey v Jones (1938) 63 CLR 649
Young v Queensland Land Trustees Ltd (1956) 99 CLR 560
Zamet v Hyman (1961) 3 All ER 933

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Local Distribution

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 565 of 1987

BETWEEN:

MERYL ROSEMARY KRUEGER
Plaintiff

AND:

KEITH JANSEN
Defendant

CORAM: MARTIN J.

REASONS FOR JUDGMENT

(Delivered 29 April 1991)

When the plaintiff first met the defendant on a social occasion on 26 January 1986 she was then aged 35, had been widowed for approximately 18 months, and had two children approximately 7 and 6 years of age. She was then living in the house previously occupied by herself and her deceased husband with the children. Arising from his death she had received nearly $50,000 by way of a lump sum compensation and was in receipt of a pension for the benefit of herself and the children amounting to approximately

$570 per fortnight.

The defendant was a policeman, married, but recently separated from his wife. He had an interest in a house in Darwin which was then being let. A close and intimate relationship developed between the plaintiff and defendant. It was clear by early May 1986 that the separation between the defendant and his wife was permanent, and in about the middle of June the defendant completed moving into the premises occupied by the plaintiff. He had stayed overnight at those premises on a regular basis for some time prior to that.

In the meantime, commencing in April, the plaintiff commenced a course to qualify for employment as a Correctional Services officer which finished in early July. She took up employment with that Service on 11 July 1986, and was thus in receipt of a good income from the pension and wages. It was in about the month of July that the plaintiff fell pregnant to the defendant. A son was born to her on 5 April 1987. Whether the defendant proposed marriage to the plaintiff during the course of a party to celebrate her qualifying for employment with the Correctional Services Department is not clear, but she was certainly given the impression that the relationship which had only so recently developed between them would continue. As the defendant felt uncomfortable about living in "a dead man's house" the plaintiff and defendant considered moving,

and in about early August 1986 they inspected a house in Palmerston which had only recently been built and which was set up as a fully furnished display home by the builder. The plaintiff thought it was lovely. Finding the funds to purchase it, however, presented quite a problem. The price was $140,000. The defendant said he had no cash to contribute, although there were prospects of his obtaining about $30,000 from the sale of his property and he was entitled, he said, to a loan from the Defence Service Homes Corporation ("the Corporation") of $25,000.

The plaintiff's evidence, supported by contemporary documents, satisfies me that when the plaintiff and defendant were discussing the arrangements for the purchase of the house it was in the context of their jointly owning the property. If she contributed $40,000 out of the invested compensation funds and they borrowed $75,000 from a bank, then with the $25,000 which the defendant believed he could secure from the Corporation, the problem was met. Furthermore, upon the anticipated sale of the defendant's property there could be a substantial amount of additional cash available. The plaintiff understood from the defendant that they would together enter into a borrowing of $100,000 from the bank in the first instance, as she said "I also had to take a loan out of $50,000". It was clearly anticipated that there would be some delay with the Corporation loan. As it transpired the plaintiff and defendant obtained $75,000 from a bank to be secured by way of first mortgage

on the property, and a further $25,000 by way of a bridging loan pending the Corporation loan becoming available. In ordinary circumstances it would then be expected that the Corporation loan would go to pay off the bridging loan, the indebtedness would remain the same, but then split as between the bank and the Corporation. There was obviously some confusion, at least as the plaintiff explained it in her evidence, since when asked if something was said by the defendant to her about her $40,000 she replied "Well, he had told me on the minimum he should be getting $30,000 at least from the house for his share, because it had to be divided amongst Mary Jansen's family. And from the War Service, that would - $25,000, so there would be no problem with the $40,000 being paid back to me for the children and myself".

I am satisfied that whatever may have been the confusion in the mind of the plaintiff as to how and when the defendant would repay the $40,000 to be contributed by her, it was agreed between them that it would be repaid. It was not a gift. She was putting up $40,000 as a contribution towards the purchase price, the balance to be secured by loan arrangements. She expected the property to be purchased in their joint names, they would be jointly liable in respect of loans from the bank and in due course he would repay her the $40,000. In the way these things are commonly worked out, without the benefit of legal or other expert advice, the agreement come to between them taking into account the relationship in which they were then to

each other, seems reasonable. So far as the plaintiff was concerned she was laying plans for a long term future with the defendant and everything would work out wonderfully once the defendant and his then wife were divorced, his property sold and the Corporation loan became available.

Unfortunately all did not turn out as the plaintiff had anticipated. For reasons which are not entirely clear, but probably related to the Corporation's lending policy to de facto couples, that loan could not then be made available to the defendant if the property were to be purchased jointly with the plaintiff. In the meantime, however, the plaintiff had made the $40,000 available, and the two of them had entered into mortgages with the bank to secure $100,000. The transaction for the purchase of the property proceeded, using her funds and the bank loans, but at settlement by way of transfer of the title to him alone. There is no evidence that the plaintiff was even consulted about that let alone that she had agreed to it. (It is a peculiar feature of this case that the defendant gave no evidence). Perhaps he thought that he could still make good the $40,000 out of the proceeds of sale of his property and the Corporation loan, but that expectation, if there was one, was dashed when that property was not sold for the price he expected.

The settlement of the transfer of the Palmerston house to the defendant took place in early September 1986.

In early October the plaintiff found a piece of paper relating to the sale of the property owned by the defendant and asked him about it. He replied to the effect that the price expected had not been achieved and he intended to leave it on the market for a further period until he could get the amount he wanted. At about that time the defendant also informed the plaintiff that she was not a joint owner of the Palmerston property. As might be expected she protested and insisted that if she was not a joint owner of the property then she would have the money back. The plaintiff was no longer prepared to wait for the repayment of the $40,000. She had no "security" by way of a joint interest in the Palmerston house and wanted the money forthwith. Clearly those circumstances brought about a change in the relationship between the plaintiff and the defendant from that time. The plaintiff wanted her money, the defendant could not pay it and had no prospect of paying it until his property had been sold. There were other causes for friction between the parties which may not have amounted to much, if all had gone well with the house purchase as planned, but assumed significant proportions in the circumstances as they existed. The plaintiff had known for some time that the defendant had planned to take a lengthy holiday in Europe. He had relatives in Holland and those plans had firmed up to the stage where he was due to depart at the end of October 1986. Further, the plaintiff was having a difficult pregnancy.

She wanted security for herself and the children in relation to the $40,000 and made that plain to the defendant who undertook to instruct a solicitor to prepare an agreement. (Just what it was agreed it should contain, if anything, is not shown). He did so and the two of them went off to see the solicitor the following day. She had had an opportunity to have a look at a copy of the agreement the night before, but although she may have read it, she says she did not "take it in" because she trusted the defendant and he had told her she did not have anything to worry about. At the solicitor's office she says she and the defendant went through the agreement again, but she did not explain to me what was meant by that. She says that she asked the solicitor a question which was directed to whether or not she and the children were secured by the document and that she was told by him "There's no problem" .... "this protects you". The document was then signed.

Because of its significance in this case the complete text follows:

"DEED OF AGREEMENT

THIS DEED is made on the 29th day of October 1986

BETWEEN:

KEITH JANSEN of Lot 4098 Catalina Road, Palmerston in the Northern Territory of Australia.
Police Officer of the first part (hereinafter called "JANSEN")

AND:

MERYL ROSEMARY KRUEGER of Lot 4098 Catalina Road, Palmerston in the Northern Territory of Australia.
Home Duties of the second part (hereinafter called "KRUEGER")

WHEREAS

(a) JANSEN and KRUEGER are living together as husband and wife at the premises Lot 4098 Catalina Road, Palmerston.

(b) The said property is in the name of JANSEN.

(c) KRUEGER has contributed the sum of $40,000.00 (FORTY THOUSAND DOLLARS) towards the purchase of the said property.

(d) Certain questions have arisen between the parties concerning their future welfare and property.

(e) In order to promote harmony between themselves and reduce the possibility of resorting to litigation.

NOW THIS DEED WITNESSETH AND IT IS HEREBY AGREED AND DECLARED AS FOLLOWS:-

(1) This agreement shall be binding upon the heirs, executors, administrators and assigns of each party.

(2) The parties intend this agreement to be binding even if they subsequently are formerly married. They understand that this intention does not bind the court under the provisions of part 8 of the Family Law Act 1975, but express this intention as a factor relevant to the exercise of judicial discretion under part 8 or any legislation which replaces that part of the Family Law Act 1975.

(3) Save and except as specifically provided herein at the date of this agreement all property owned by each of the parties shall remain the sole property of the party who paid for it or received it as a gift.

(4) From this date onwards any property acquired by either party whether by purchase, through a gift or in any other fashion shall remain the sole property of that party regardless of the nature of the property or the use to which it is put or the enjoyment had there

from save and except property which is specifically stated to be acquired with the intention and for the purposes of joint ownership.

(5) The property known as Lot 4098 Catalina Road, Palmerston more specifically described in Certificate of Title Volume 142 Folio 64 has been acquired by JANSEN for the use and occupation of himself and KRUEGER and with a contribution of $40,000.00 (FORTY THOUSAND DOLLARS) from KRUEGER and in the event that the property is sold or otherwise disposed of it is agreed that after payment of any mortgages, rates, taxes or other debts attaching to the land the sum of $40,000.00 (FORTY THOUSAND DOLLARS) is to be repaid to KRUEGER and any remaining proceeds from the sale or disposition of the property are to be divided equally between the parties.

(6) If the parties cease to cohabit as husband and wife they will dispose of their jointly owned property (if any) by agreement. If no agreement is reached within one year of separation their jointly owned property will be sold and the proceeds divided save and except as previously stated herein equally between them. Each party will at the request of the other party execute and deliver whatever documents are necessary or convenient to accomplish the purposes of this agreement.

(7) This agreement shall only be rescinded or varied by a written agreement executed by both parties with a similar degree of formality as the present agreement.

(8) It is hereby expressly agreed that this agreement gives KRUEGER the right to lodge a Caveat in relation to Certificate of Title Volume 142 Folio 64."

On the face of it, it was signed, sealed and delivered. It was prepared upon the defendant's instructions and the plaintiff had no independent legal advice in respect of it.

According to the plaintiff, prior to the deed being executed, she and the defendant had been having fights about her wanting her money back and his continuing in his plans to go overseas, notwithstanding the difficulty she was then having with her pregnancy, caring for the other children and completing the shift into the new house. She had threatened to leave him. The plaintiff's evidence is that even after the deed was signed they were still fighting, she demanding the money and he asserting he did not have any. The plaintiff's evidence is not altogether clear, but I am satisfied on what she said that the signing of the deed did not allay her concerns, and in any event she was still angry with the defendant regarding his impending departure. They visited a duty free shop after signing the deed where he purchased a sapphire and diamond ring which fitted her ring finger saying "Well this might shut you up now". Hardly an unequivocal affirmation of an engagement to be married. If it was a proposal she gave no evidence that she accepted it, apart from keeping the ring.

What followed after his departure in late October 1986 is of little relevance to the real issues which have to be determined in this case. The defendant first went to Bali where the plaintiff contacted his room by telephone, which she pointed out was answered by a woman, and there were some further telephone conversations between them whilst he was overseas. The plaintiff also went to Bali for a holiday after the defendant departed. The differences

between them had not been resolved prior to his return to Australia. She moved out of the house the day before his return. In the meantime, and whilst the defendant was still absent overseas, she had instructed her solicitors to write a letter of demand to him and I will return to that shortly. When he returned they had further arguments about the money and she says that he slapped her face on one occasion. An attempt at reconciliation was short lived and unsuccessful. The defendant moved out of the property in late 1986. The plaintiff went to Adelaide in early 1987 and returned permanently to Darwin in May.

The defendant resided in the house for many months prior to the completion of its sale in February 1988. The net proceeds of sale were inadequate to meet the debts due on the mortgages to the bank. (The Corporation loan had not been substituted). The defendant entered into separate arrangements with the bank to repay the balance. The plaintiff did not join in that commitment and received nothing from the proceeds of sale. In this suit she seeks recovery of the $40,000.

The above represent my findings of fact. A concerted attack was made upon the credibility of the plaintiff in cross-examination and there is much to suggest that she has been careless of the truth in the past and on her oath before this Court. She admitted as much. She dissembled and was disingenuous on occasions. She clearly

allowed her ill feelings towards the defendant to colour her evidence in many respects. Notwithstanding all of that I am satisfied in respect of the essential elements of the case, on the balance of probabilities, as set out above. It is totally improbable that a woman in her position would have simply handed over $40,000 to the defendant without wishing to secure something for the benefit of herself and the children of her marrriage, however informal that security might be. The defendant handled all of the affairs concerning the purchase of the house and as already pointed out their names appear jointly upon receipts for the deposit and on the purchase contract, although her name had been deleted from it. There is no evidence that anybody other than he gave the instructions which led to her name appearing on those documents, and thus it is easy to infer that it was clear in his mind when they were prepared that the property was to be purchased in their joint names. It ended up in his name alone. That breach of understanding, for whatever reason, would undoubtedly have given rise to her grave concern and a loss of faith and trust in him requiring documentary proof of her entitlement to be obtained.

Definition of the plaintiff's cause of action against the defendant has caused difficulties which were continuing at the time of trial. Not the least of those difficulties arose from the deed itself. Its ambiguity and lack of certainty are obvious. Such a deed not uncommonly

contains a mutual release as between the parties, but there is none here. It fails to address the question of the joint liability to the bank, the responsibility of each of the parties to each other in respect of that liability, and it provides nothing as to what should happen in the event that the property was not sold at a price sufficient to discharge the debts and cover the whole of the $40,000. The defendant must bear any adverse consequences arising from those deficiencies since it is his document prepared by his solicitor on his behalf. The account for legal fees in respect of the deed was rendered to him alone.

When the solicitors for the plaintiff first contacted the defendant by letter of 20 November 1986 they asserted that the terms of the deed made it clear that the plaintiff had leant him $40,000 to enable him to purchase the property at Palmerston, and they demanded that that sum be repaid within 28 days from the date of the letter, "being the amount lent to you and confirmed by the agreement of 29 October last". In that letter those solicitors referred to what was termed, "the brief de facto relationship" and asserted that it had ceased. They said that they had advised their client to cease all payments as may fall due in respect of the property. That letter was awaiting the defendant upon his return from his overseas trip and his solicitors wrote to the solicitors for the plaintiff on 10 December 1986. They disagreed with the interpretation placed on the agreement by the plaintiff, but confirmed, "as

both of our parties did not have sufficient cash to raise the required deposit your client offered to contribute the sum of $40,000 to the purchase price. Our client offered to contribute the sum of $25,000 to the purchase price from a War Service loan. The remainder was to be a joint loan from the ANZ bank. .... The house is in our client's name solely because War Service would not give our client a loan as their requirements for a de facto relationship had not been fulfilled. They required a de facto relationship for not less than 3 years." In their view the plaintiff was entitled to the $40,000 only if the property was sold and after payment of the mortgage and so on. They seem to have been confused by what the deed meant in their reference to clause 6, asserting that if no agreement was reached in relation to the disposal of the property within a year of separation then the property was to be sold. Clause 6 only refers to jointly owned property. They demanded that the plaintiff immediately recommence contributing half of the mortgage repayments. In the course of that correspondence the respective solicitors had also joined issue in regard to certain other financial transactions involving each of the parties and it will be necessary to return to those matters later.

The writ was issued on 31 August 1987, that is prior to completion of the sale of the property which took place in early 1988. A Statement of Claim endorsed upon the writ was simple and straight forward enough, though rather

inaccurate in claiming that pursuant to the terms of the deed the plaintiff loaned the defendant $40,000 to assist the defendant in purchasing the property. The cause of action was a claim in debt for that sum. It went on to allege that a demand had been made for repayment of that sum, but that the defendant had failed to repay it. The plaintiff's claim was for $40,000 plus interest and costs. By his defence the defendant admitted execution of the deed, but otherwise denied the allegation in the Statement of Claim. He said in the defence that at the time of executing the deed he and the plaintiff were cohabiting in a de facto relationship, that both of them had agreed to purchase the property but were unable to cause it to be conveyed into their joint names and it was therefore registered in the defendant's name alone. Denying that the $40,000 was loaned to him as alleged, the defendant asserted that that sum was used by both parties as a deposit on the property and that in reliance upon the deed the amount was not due and payable until the property was sold, "which event has not occurred, and then only from the available proceeds of sale and not otherwise". At the same time a counterclaim was made seeking contribution from the plaintiff in respect of the joint bank loans alleging not only the joint and several liability of them to the bank, but an oral agreement that each would pay 50% of those loans. Resting upon the plaintiff's failure to meet her obligations as alleged, the defendant claimed damages, interest and costs. By the time the reply and defence to the counterclaim had been delivered

the sale of the property had taken place which fact was alleged, and the plaintiff went on to say that the defendant failed to repay the sum of $40,000 pursuant to his obligations in the deed. She denied any liability to the defendant.

Judgment in default of appearance was signed on 16 September 1987. It was set aside on the defendant's application. The matter proceeded. A trial date was fixed for 31 May 1989 and on that date the plaintiff appeared but the defendant did not. His Honour the Chief Justice proceeded to hear the plaintiff during the course of which counsel said clause 5 of the deed provided a contingency in which the funds would be repaid, but that was not the only circumstance in which the funds would be repaid. His Honour also referred to evidence given by the plaintiff on that occasion to the effect that the advance of $40,000 was a loan and that the defendant had promised to repay her in any event. Judgment was entered for the plaintiff, but, again, was subsequently set aside upon the defendant's application. On that occasion leave was given to the plaintiff to amend the Statement of Claim and the amended document was filed on 28 March 1990. It was further amended pursuant to leave given by his Honour on 11 April 1990. It alleges as follows:

. In about mid July 1986 the defendant orally requested that the plaintiff loan him $40,000 to

assist the defendant in purchasing the property.

. The defendant further orally agreed that he would repay to the plaintiff all sums which she would lend to him for that purpose when requested to do so.

. On or about 19 August in reliance upon the agreement the plaintiff paid that sum to the defendant.

. The defendant repeated his promise to repay on numerous occasions.

. The plaintiff orally requested repayment and the defendant promised to repay the loan monies subsequent to the making of the loan prior to 31 October 1986 when he left for Europe, and that he has failed to repay the loan.

. On 29 October 1986 the plaintiff, without benefit of legal or other advice and under the undue influence of the defendant, which undue influence arose from the relationship of confidence existing at the time between the parties, signed a Deed of Agreement proffered to her by the defendant. The undue influence also existed at the time of the original request referred to above and at the date

of the advance. The defendant, inter alia, orally misrepresented to the plaintiff that the deed would be by way of further security for the loan. The bargain thereby obtained was harsh and unconscionable.

. The plaintiff through her solicitor demanded repayment of the monies, but the defendant had failed to repay the same.

The plaintiff claimed damages for breach of the oral agreement, an order setting aside the deed, alternatively, damages for breach of the terms of the deed and interest and costs. By its defence to the final amended Statement of Claim the defendant denied the allegations regarding the loan. He said that on 1 August 1986 the plaintiff paid $1,000 to the vendors of the property and on or about 22 August 1986 she paid $39,000 to those vendors, but denied that those payments were in reliance upon the agreements alleged by the plaintiff. He said that they were made in reliance upon the terms of the deed referred to. (How those payments could be made in reliance upon a deed of 29 October 1986, weeks after the dates of payment, is difficult to comprehend). In any event he denied all allegations by the plaintiff going to the loan and demand for payment of it. He admitted the deed and said "The defendant denies that the plaintiff signed the deed without the benefit of legal or other advice and says that the

plaintiff had the benefit of legal advice from .." naming the solicitor whom he had instructed to prepare it. He denied that she was under his undue influence and the other allegations in that regard either at the time of the alleged loan or at the time the deed was signed. He denied the alleged misrepresentation but said "that he represented to the plaintiff that the deed would be by way as security for the plaintiff's contribution to the purchase price of the property". He said that the bargain obtained was not harsh and unconscionable but fair and equitable; joined issue generally on the allegations made by the plaintiff as to the effect of the deed; gave particulars of the sale of the property for $106,000 and of the disposition of the proceeds by way of repayment of mortgages and other outgoings and expenses associated with the sale. The counterclaim was also put forward in much the same general terms as that originally pleaded, (it is more particularly set out later), including a claim for contribution by the plaintiff to his liability under the loan taken out by him after the completion of the sale of the property. The defence to the counterclaim was simply a denial of liability and raised the question of the plaintiff's contributions towards payment of those liabilities. She also pleaded that such documents as she signed in relation to the bank loans were signed without the benefit of legal or other advice, and under the undue influence of the defendant arising from the relationship of confidence existing at the relevant time.

When requested for particulars as to the nature of the alleged relationship of confidence the solicitors for the plaintiff replied that "the plaintiff and the defendant were engaged to be married". During the course of the trial they also provided particulars of the undue influence alleged in respect of the advance of monies by the plaintiff to the defendant and of the signing of the bank loan documents which are as follows:

> "[a] The Defendant had represented that the Plaintiff would be a joint owner of the property at Lot 4098 Catalina Road.
>
> [b] The Plaintiff was pregnant.
>
> [c] The Plaintiff had recently lost her husband and was still grieving.
>
> [d] The Plaintiff had commenced a new and stressful job.
>
> [e] The Plaintiff was in a new dependent relationship with the Defendant.
>
> [f] The Defendant had promised marriage.
>
> [g] The Defendant was of dominant character.
>
> [h] The Plaintiff had an overwhelming need for emotional and physical security for herself and for her children [6 and 7 years].
>
> [i] The Plaintiff was ignorant of legal matters."

They also provided particulars of undue influence in respect of the execution of the deed on 29 October 1986 and they are as follows:

> "[a] Each of the particulars set forth above.

[b] The Plaintiff had recently left her job and was even more worried for her financial security.

[c] The Plaintiff was stressed and anxious about her pregnancy and was experiencing bleeding from her uterus.

[d] The Plaintiff was under doctors supervision.

[e] The Plaintiff was anxious about the security of her relationship and was keen to be clear of rising doubts.

[f] The Defendant lead her to believe that Mr Peebles the Solicitor, was acting in both their interests."

It also became explicit during the course of the trial that the defendant relied upon an estoppel arising from the deed, particulars of which were reduced to writing and are as follows:

> "The defendant says the plaintiff has by making and relying on the deed caused the defendant to presume that the deed comprised a valid and binding settlement of all matters in dispute between the parties up until 29 October 1986 and the defendant has relied upon her conduct to his detriment and the plaintiff is therefore estopped from seeking to have the deed set aside, or to claim on the basis of a prior oral loan agreement, or to claim the sum of $40,000 from the defendant on any basis other than that set out in the deed.
>
> PARTICULARS OF DETRIMENT
>
> The defendant has suffered detriment by:
>
> (a) continuing to meet loan repayments on the house after the deed;
>
> (b) selling the house after the deed;
>
> (c) arranging his financial affairs on the

presumtpion that the deed was valid and binding on both parties."

The issue of election also arose and the following particulars were provided to the plaintiff:

"The defendant says the plaintiff has elected to rely upon the deed and is therefore prevented from now seeking to have it set aside.

PARTICULARS

The plaintiff has relied upon the deed by:

(a) having her solicitors issue the letter of demand of 20 November 1986;

(b) causing the special writ of summons to be issued on 31 August 1987;

(c) applying for and obtaining 2 judgments based on the deed."

The plaintiff sought particulars in relation to election and there follows the request and answers in that regard:

"Q1. What other facts if any are relied upon to establish the election?

A1. The facts are as pleaded.

Q2. When was the election made?

A2. The election was first made on 20 November 1986.

Q3. When and how was the election communicated to the defendant?

A3. Upon receipt of a letter from the plaintiff's

solicitors dated 20 November 1986 and then again upon service of the Writ.

Q4. What actions or conduct did the defendant pursue as a result of the election?

A4. Irrelevant.

Q5. What actions or conduct would the defendant have pursued but for the election?

A5. Irrelevant.

Q6. If it is alleged that there has been some waiver by the plaintiff of her rights:

(a) When was the waiver made?

(b) How was the waiver made?

(c) How and when was the waiver communicated?

A6. (a) Not applicable

(b) Not applicable

(c) Not applicable.

Q7. If there was conduct by the plaintiff amounting to waiver, identify each and every action carried out by the defendant as a consequence of such waiver and each and every detriment suffered by the defendant in replying upon such conduct?

A7. Facts of estoppel are pleaded and waiver has not been raised."

"Pleadings are only a means to an end, and if the parties in fighting their legal battle choose to restrict them, or to enlarge them, or to disregard them and meet each other on issues fairly fought out, it is impossible for either of them to hark back to the pleadings and treat them as governing the area of the contest" (per Issacs and Rich

JJ. in Gould & Birbeck & Bacon v Mt Oxide Mines Ltd (1916) 22 CLR 490 at 517).

The factual background to the contribution of the $40,000 by the plaintiff presented difficulties to those preparing the Statement of Claim, but a party may in any pleading make inconsistent allegations of fact if the pleading makes it clear that the allegations are pleaded in the alternative (Rule 13.09(1)). As to the defence I consider that the issues of estoppel and election should have been specifically raised as matters which the defendant alleged made the plaintiff's claim not maintainable. At the very least those matters should have been disclosed in the defence as matters which might otherwise take the opposite party by surprise (Rule 13.07). Without having examined it in detail it seems to me that the Northern Territory rule goes beyond the rules of the Supreme Court of Queensland discussed in Laws Holding Pty Ltd v Short (1972) 46 ALJR 563. At p. 565 Barwick CJ. referred to the desirability of pleading an estoppel and at p. 571 Gibbs J. said that, "In general matters of fact grounding an estoppel should be pleaded". The rules of this Court reinforce and make more explicit what was there said in relation to the Queensland rule under consideration.

The plaintiff has consistently claimed since the letter of demand and thereafter in her pleadings that her cause of action is for recovery of the $40,000 loaned to the

defendant. Although as is referred to above, I find there was an agreement that those funds be applied towards the purchase of the property to be acquired in the joint names of the plaintiff and defendant, the plaintiff does not rely upon that and the defendant's breach as founding any cause of action or for the purposes of obtaining any specific relief. She does, however, rely upon the loan although there was some uncertainty as to when the obligation on the part of the defendant to repay it would arise. That was the position at the time the deed was signed. As to that, the plaintiff says firstly that she is not precluded by its terms from pursuing recovery of the $40,000 upon failure of the defendant to pay upon demand (clause 5 of the deed is simply one but non exclusive agreement as to repayment) and, in any event, she seeks to have the deed set aside upon the basis that she entered into it consequent upon undue influence exercised by the defendant.

Though sometimes with a degree of confusion of thought expressed in the pleadings (something which might have been clarified by the seeking of particulars, which was not done) the plaintiff has consistently claimed her money. Faced with the deed, she tries to overcome it and has never relied upon it as being the foundation of her cause of action. The defendant was upon express notice of that upon receipt of the letter from the plaintiff's solicitors of 20 November 1986 "The terms of this deed make it clear that our client has lent to you the sum of $40,000 to enable you

to purchase the property ... We hereby formally demand on behalf of our client that you repay within 28 days from the date hereof the amount of $40,000 being the amount lent to you and confirmed by the agreement on 29 October last". There is no evidence that between the date of the deed and receipt of that letter the defendant had done anything to his detriment in reliance upon any assumption as to a state of legal affairs induced by the plaintiff. The plaintiff did not make any promise to the defendant which caused him to act to his detriment and there was no unconscionable conduct on her part. Estoppel does not arise. Any detriment suffered by the defendant arose because of the vagaries of the property market. The deed did not oblige him to sell the property at any particular time. Indeed the failure of the deed to address the question of time is one of its major failings. It has been the defendant's position throughout this case that clause 5 of the deed is the only obligation undertaken by him in respect of the money paid over by the plaintiff and since the property was sold at a price which was less than the amount owing on it by way of mortgage and other debts his liability to the plaintiff was discharged. There is no substance in the defendant's claim that the plaintiff elected to rely upon the deed and is prevented from now seeking to have it set aside. (As to election in pleadings see Mason CJ. in The Commonwealth v Verwayen (1990) 170 CLR 394 at p. 408).

All the plaintiff has done is to take a different

view of the legal effect of the deed than that adopted by the defendant. In that she is either right or wrong but she is not debarred from raising that question. She did nothing to lead the defendant to assume that she shared his opinion as to what was the effect of the deed. Her position was made clear when her solicitors first wrote to the defendant, long before the defendant sold the property.

On the other hand I am not satisfied that the deed should be set aside upon the basis of the exercise of undue influence by the defendant on the plaintiff either to be presumed because of the relationship between them at relevant times, or as proven by the facts of the case. What is the unfair advantage which the defendant is alleged to have obtained? It cannot be seen from the provisions of clause 5 of the deed itself since it requires him to repay to the plaintiff not only the $40,000 in the event that the property is sold, but in addition one half of the net proceeds of sale (an acknowledgment, perhaps, that it was intended that the property be purchased by them jointly). There is no suggestion that at the time the deed was executed the defendant was aware that that provision would be of no value to the plaintiff, and it must be taken to have been a bona fide undertaking on his part. No doubt, it would also have seemed to have been attractive by the plaintiff. After all, in normal circumstances property values tend to rise not fall and at the time of the purchase there was an equity of $40,000 in it. The deed, on its

face, did not secure any unfair advantage to the defendant but the defendant argues that upon its proper construction the deed operated so as to discharge the defendant from his liability to the plaintiff for the $40,000 except in the circumstances predicated in clause 5 that is, in the event that the property is sold. If the sale price was such as to see the plaintiff repaid the sum of $40,000 then that was what she wanted and the defendant was even prepared to be generous and give her half of any remaining proceeds. On the other hand if the property was sold and there was nothing for the plaintiff then that would discharge the defendant's liability for repayment of the "contribution", which is nothing more than a euphemism for "loan". I have applied the evidence as to the circumstances in which the deed came to be executed (including the facts and circumstances surrounding the advance of $40,000) to overcome the ambiguity in the word "contribution".

Does clause 5 prescribe the only circumstances in which the defendant is to be obliged to repay to the plaintiff the money and then only if the circumstances of sale are such as to enable the payment to be made? I think not. The clause proceeds upon the somewhat optimistic basis that upon a sale there will be sufficient net proceeds to enable the defendant to pay the loan of $40,000 to the plaintiff at least. It places no obligation on the defendant to sell and there is no time limit to the operations of the clause. It contemplates a disposal of the

property (otherwise than by way of sale) but for a consideration out of which the loan might be paid. Plainly the plaintiff could be held out of the repayment of the loan of an indeterminate period of time by force of circumstances or design.

The repayment of the loan of $40,000 not being conditioned upon any circumstance when it was made created an immediate debt by the defendant to the plaintiff, and the defendant had failed in his obligation to repay in response to the requests that he do so prior to the execution of the deed. It was open to the plaintiff to issue and serve a writ even without making any form of request. (Young v Queensland Land Trustees Ltd (1956) 99 CLR 560 at 566 and Chitty on Contracts, General Principles, 25th Edition, paragraph 1843). There was no clear term excluding the ordinary consequences flowing from the making of the loan (see Dixon CJ. in Duncombe v Porter (1953) 90 CLR 295 at 306 and Fullagar J. at 311). The plaintiff's cause of action for recovery of the loan had accrued prior to the signing of the deed. Was the defendant's obligation to repay the loan upon request extinguished by the provisions of the deed? A clear intention to bring an obligation to an end is intrinsic to contractual discharge, but such an intention may be inferred from the parties conduct. Discharge of all contractual obligation must be distinguished from partial discharge or variation. The terms of an earlier contract may be varied without the contract being terminated. Here

again the intention of the parties is to be observed (see Cheshire & Fifoot's, Law of Contract, 5th Australian Edition, chapter 20, commencing at p. 609). There is no direct evidence of the intention of the parties at the time the deed was executed beyond the plaintiff's insistence that she get her money back and the defendant's instructions to his solicitor as demonstrated in the terms of the deed. The respective positions adopted by the parties after the deed was signed do not assist in determining their intentions at the time the deed was executed. The defendant has endeavoured to cloud the issue as to what the law is concerning the monies paid to him by the plaintiff by his categorising it as a "contribution". That word is ambiguous and as I have already held the transaction was a loan. If the defendant had acknowledged that, then he and his legal adviser may have considered the consequences arising from the loan, and may have sought to deal with it in the deed expressly by way of release or discharge. That was not done and particularly since the document was that of the defendant he must bear the result. The effect of the deed was not to release or discharge the defendant from the obligation to repay the loan to the plaintiff upon request and did not release the cause of action which had arisen prior to its execution. At its highest it was a variation of the defendant's obligation conditioned upon the sale of the property, in which event clause 5 would operate. The defendant received no such benefit as would call into question the issue of undue influence.

That is enough to dispose of that issue, but I should deal with the other matters raised in relation to it, a great amount of the hearing being taken up with them. Whether the plaintiff and defendant were engaged to be married to each other prior to the execution of the deed is a moot point. Indeed, not the least of the questions that arise is what is meant by being "engaged" in these times. In the case of this couple there was no formal announcement, no advertising in a newspaper, no party and the accepted symbol of the commitment, the giving of a ring by the prospective groom to the prospective bride, was not done until after the deed was signed. I have already remarked upon the dubious circumstances surrounding that. It will be borne in mind that the defendant was then still married. In this day and age the fact that a couple happen to be living together as if husband and wife is by no means an unequivocal indication of their intention to be married to each other. "The Courts of law, it must not be forgotten, do not prohibit persons from stripping themselves entirely of their property if the transaction is the purely voluntary and perfectly understood act of the donor, and the donor's mind is unaffected by undue influence" per Starke J. in Harris v Jenkins (1922) 31 CLR at p. 367, and as his Honour pointed out by reference to authority more than mere influence must be proved so as to render influence "undue". Some relationships are deemed to be relationships in which it may be presumed that undue influence gave rise to the benefit accruing to the person exercising that influence.

Dixon J in Johnson v Buttress (1936) 56 CLR at p. 134 said, "The basis of the equitable jurisdiction to set aside an alienation of property on the ground of undue influence is the prevention of an unconscientious use of any special capacity or opportunity that may exist or arise of affecting the alienor's will or freedom of judgment in reference to such a matter. The source of power to practice such a domination may be found in no antecedent relation but in a particular situation, or in the deliberate contrivance of the party. If this be so, facts must be proved showing that the transaction was the outcome of such an actual influence over the mind of the alienor that it cannot be considered his free act. But the parties may antecedently stand in a relation that gives to one an authority or influence over the other from the abuse of which it is proper that he should be protected. When they stand in such a relation, the party in the position of influence cannot maintain his beneficial title to property of substantial value made over to him by the other as a gift, unless he satisfied the court that he took no advantage of the donor, but that the gift was the independent and well-understood act of a man in a position to exercise a free judgment based on information as full as that of the donee." His Honour then went on to describe what he described as some of the well known relations from which he said a presumption arises including as between solicitor and client, physician and patient, parent and child, guardian and ward "... and a man from the woman he has engaged to marry". Although his Honour did not

there refer to authority for that particular proposition a number of cases are referred to in Meagher Gummow & Lehane, Equity Doctrines and Remedies at paragraph 1515 which, as the authors point out, were 19th century cases (although they do refer to one report in 1931). His Honour further adverted to the presumption of undue influence applying in the case of a large gift "taken by a man from the woman to whom he is affianced" in Yerkey v Jones (1938) 63 CLR at p. 675. If there was such a presumption whether related only to a large gift or otherwise, then in England, at least, it was somewhat modified in a case of a deed of arrangement or settlement made between the engaged couple which on its face appears much more favourable to one party than the other. In those circumstances the Court may find a fiduciary relationship so as to cast an onus on the party benefited of proving that the transaction was completed by the other party only after full, free and informed thought about it (per Lord Justice Evershed in Zamet v Hyman (1961) 3 All ER 933 and 937). Lord Justice Donovan at p. 942 did not think it ought to be presumed at that time (1961) that between every engaged couple such a high degree of confidence and trust existed that undue influence is or may be possessed by the one over the other; "Without being too cynical, one knows that not all engagements are idyllic affairs. No doubt in most cases there would be no engagement to marry, unless there were confidence and trust on both sides; but I think this should be affirmatively approved if, later on, one of the parties seeks to upset some disposition of

property on the ground of undue influence". Lord Justice Danckwerts agreed with the comments of Lord Justice Evershed. If there was an engagement to be married between the plaintiff and defendant at the time this deed was executed (which I very much doubt) then the circumstances at the time were far from idyllic. I also bear in mind that it has been consistently held that the presumption of undue influence does not arise between husband and wife, and in this case the parties had been living together as if husband and wife for some months. The same policy that may have led the Courts to deny the presumption in the case of husband and wife may well not operate in respect of those living in such a de facto relationship, but taking into account modern conditions I am not prepared to hold that a woman entering into a deed with a man with whom she has been living in a de facto relationship concerning the repayment of a loan of $40,000 previously made by her to him must be presumed to have been made as a result of undue influence applied by him.

Therefor if the plaintiff is to have the deed set aside she must prove that that influence was exercised. There is no evidence that the defendant exercised any undue influence over the plaintiff in relation to the deed notwithstanding the plaintiff's then circumstances. The plaintiff had sought some form of assurance from the defendant that she would get her money back. There is no evidence that the terms of that assurance were discussed

between them but she was given a copy of the document to consider and she had the opportunity of obtaining independent legal advice. There was a solicitor in Darwin who had assisted her in relation to matters arising from the death of her husband. She did not seek that advice, but instead voluntarily went with the defendant to the office of the solicitor who prepared the deed. I have not had any evidence from the solicitor, but if the plaintiff did seek advice from him as to the effect of the deed, he having prepared it upon the instructions of the defendant, she should have been advised to seek independent advice, but as I have said she had already foregone the opportunity to do that for herself. In the circumstances of this case I do not consider that the fact that the plaintiff did not have independent legal advice before executing the deed as pointing to or proving undue influence on the part of the defendant.

The plaintiff issued her writ demanding payment of the $40,000 prior to the sale of the property. She is entitled to that sum subject to the question of the contribution sought by the defendant against her in respect of the joint debts.

The defendant's counterclaim as pleaded alleges that on 13 August 1986 the plaintiff and defendant entered into a loan agreement with the Australia and New Zealand Savings Bank Limited to jointly borrow the sum of $75,000 to

use as part payment in the purchase of the property. Particulars are given of the term, interest rate and monthly repayments. He further alleges that on the same date the plaintiff and defendant entered into another loan with the bank to jointly borrow $25,000 to use as part payment and particulars are given of that. It is alleged that both the loans were granted to the plaintiff and defendant and that they were jointly and severally liable to make repayments. He further alleges that on or about that date the plaintiff agreed with him that repayment of the loans were to be borne equally between themselves and that despite repeated requests on his part the plaintiff failed to make any payments on the loans. He says that he has made all the repayments and seeks to recover one half of the total of them, together with one half of a loan of $10,000 taken out by him from the bank to pay off the difference between the amount realised on the property and the mortgage due at date of settlement. He claims one half of the establishment fees and principal and interest in relation to that loan. He further alleges that he and the plaintiff orally agreed that each would deposit monies to a joint account from which the repayments of the first and second loans referred to above would be made, and further, they agreed that no drawings from that account other than for those repayments would be made by one party without the consent of the other. He says that in breach of that agreement the plaintiff did not pay money into that account, and on or about 3 November 1986 withdrew $2,800 from it without his consent, and he claims

that amount as well.

As to those claims, the plaintiff says firstly that such documents as were signed by her were signed without the benefit of legal or other advice and under the undue influence of the defendant. That was not pressed upon the hearing. The documents referred to were between the bank on the one hand and the plaintiff and defendant on the other, and the bank was not a party to the proceedings. There was no evidence of any undue influence by the bank or the defendant upon the plaintiff. The plaintiff goes on to deny any agreement with the defendant that the repayments of the loan secured by the mortgages were to be borne equally between themselves, and otherwise to deny any liability to the defendant in respect of the matters the subject of his counterclaim. The plaintiff also endeavoured to set up a claim to an accounting as between herself and the defendant in respect of the operation of the joint account. The Limitations of Actions Act was also pleaded against the defendant but that was not pursued.

There is no evidence that when the loans were obtained from the bank there was agreement between the plaintiff and the defendant that they would contribute equally to the repayment of the loans and interest to the bank, nor that there was any agreement between them that upon a failure of either to make due contribution to the amount to be paid to the bank the other having made up such

contribution would have a right of recovery against the one in default. None of the documents in evidence emanating from the bank cast any light upon the position, although the letters offering loans were addressed to the plaintiff and defendant. There is no evidence of the acceptance of those loans in any documentary form, not even the mortgages. The plaintiff acknowledges signing documents at the bank and that a joint account was opened. She says that the purpose of the joint account was "to make the house payments, and for both of us to have access to". She said that she made arrangements to pay money into the joint account and that over a period of time she handed money to the defendant, "quite a bit of money". There is supporting evidence of the plaintiff's having paid her money into the joint account or giving it to the defendant as well as evidence that she withdrew funds from the joint account which bore no relationship to the obligations under the loan arrangements with the bank. I can find no evidence of a contract or the dubiously called "quasi contract" pursuant to which the defendant is entitled to have paid to him by the plaintiff any sum on account of monies paid by the defendant towards the loans, nor that it was their intention to create contractual rights and obligations in respect of the sundry transactions concerning the joint loan accounts. Their arrangements were analogous to those of domestic arrangements between man and wife and should be treated in the same way.

Nor do I think that the defendant is entitled to any contribution from the plaintiff in equity. The benefit obtained by the plaintiff was the discharge of her obligations to the bank under the joint loan. Her obligations to the bank were satisfied when the mortgages were discharged upon the settlement of the sale of the property and the bank entering into a fresh loan agreement with the defendant in respect of the balance. The basis upon which relief may be sought absent contract is in equity and in particular upon the maxim that "equality is equity", when contribution is under consideration. There is a discussion at paragraph 1006 et seq in Meagher Gummow & Lehane, Equity Doctrines and Remedies on the issue of co-ordinate liabilities. No reason has been advanced as to why the equitable obligations as arising between co-sureties and co-insurers should not be equally applied in respect of co-borrowers. Contribution between the co-borrowers may be inequitable. In this case the plaintiff's obligation to the bank, undertaken jointly with the defendant, was entirely for the benefit of the defendant. Her undertaking went to the repayment of monies lent for the purposes of securing the property for him, "It was not borrowed for them both but for him alone" per Barwick CJ. in Coulls v Bagot's Executor and Trustee Co Ltd (1967) 119 CLR 460 at 480. In that case the house had been bought by the deceased husband as the matrimonial home and he had it transferred to himself and his wife as joint tenants. The husband had provided part of the purchase money out of his own money and planned to sell

a former matrimonial home, which was his property, to provide that balance, but as a temporary measure he arranged for two mortgages over the newly acquired property to secure loans which enabled him to complete its purchase. Both mortgages were signed by both the husband and the wife, on whom they imposed joint and several liability for the mortgage debts. At the time of the purchase, the husband announced, in effect, that he was buying the house for his wife. After the husband's death, his executor, following demands by the mortgagees, paid off both mortgages and then demanded indemnity or contribution from the widow, the owner by survivorship. See generally the remarks of Taylor and Owen JJ. at p. 488. Whatever may have been the intentions of these parties when they first considered purchasing the property (and the probabilities are that it was to be purchased by them jointly partly with funds advanced to them by the bank jointly, as to $100,000) surely the defendant cannot urge in all good conscience that he is entitled to a contribution to the mortgage debt when the property was transferred to him alone without the consent of the plaintiff.

There will be judgment for the plaintiff for $40,000. This is not an easy case when it comes to the question of the awarding of interest, but the jurisdiction is to be exercised on a discretionary basis. It should not commence from the date upon which the funds were made available by the plaintiff since she was at that time

content that her contribution would lead to her having an interest in the property and the return of the money at some future though indeterminate time. Just when she found that the property had not been transferred to her and the defendant jointly is not precisely known, but the date of the deed which was consequent upon that fact is fixed. The defendant will pay interest to the plaintiff on the sum of $40,000 at the rate of 12% per annum from 29 October 1986 to date of judgment.

Judgment for the plaintiff upon the defendant's claims against the plaintiff.