Ottley v Chester [2010] NTSC 38

PARTIES:	JULIAN MAURICE OTTLEY v BARBARA FAYE CHESTER
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	NO 165 OF 2008 (20834156)
DELIVERED:	30 JULY 2010
HEARING DATES:	17-19, 22-25 FEBRUARY & 15-18 JUNE 2010
JUDGMENT OF:	MILDREN J

CATCHWORDS:

FAMILY LAW – de facto relationship – application for adjustment of property interests – separation agreement – no independent legal advice – whether valid – whether *Family Law Act* (Cth) applies – separation prior to March 2009 – *De Facto Relationships Act* (NT) – whether claim out of time – whether windfall gains are part of the joint contribution of the parties – correct approach to adjustment order – whether just and equitable to make an adjustment order – whether separation agreement should be set aside – claim for adjustment order dismissed

De Facto Relationships Act 1991 (NT), s 3A, s 3A(2), s 14, s 14(2), s 16(1), s 18, s 18(1)
Family Law Act (Cth), s 90B, s 90C, s 90D, s 90G, s 90UD

Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth), s 86(1)
De Facto Relationships Act 1984 (NSW), s 20
Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009 (Cth), s 17(1)

Aleksovski v Aleksovski (1996) FLC 92-705; *Black v Black* (2008) FLC 93-357; distinguished

Black v Black (1991) 15 Fam L R 109; distinguished/followed

Dwyer v Kaljo (1992) 11 Fam L R 785; *Evans v Marmont* (1997) 21 Fam L R 760; *In the Marriage of Pavey* [1976] FLC 90-051**;** *LF v RA* (2006) 2 Qd R 561; *Parker v Parker* (1993) DFC 95-139 ; *Van Jole v Cole* (2000) DFC 95-228; *Wallace v Stanford* (1995) 19 Fam L R 430; followed

REPRESENTATION:

Counsel:

Plaintiff:	V Peters
Defendant:	I Rowbottom

Solicitors:

Plaintiff:	Hunt & Hunt
Defendant:	Withnalls

Judgment category classification:	B
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Ottley v Chester [2010] NTSC 38
No 165 of 2008 (20834156)

BETWEEN:

JULIAN MAURICE OTTLEY
Plaintiff

AND:

BARBARA FAYE CHESTER
Defendant

CORAM: MILDREN J

REASONS FOR JUDGMENT

(Delivered 30 July 2010)

[1] This is an application by the plaintiff for a declaration as to the existence of a de factor relationship between the plaintiff and the defendant, for an order for the adjustment of interests with respect to the property of the parties pursuant to s 18 of the *De Facto Relationships Act 1991* (NT) (the Act) and for other incidental relief.

Background

[2] The plaintiff is a single man who was born on 3 September 1950. In 1989, he lived at 45 Robinson Road, Millner, Northern Territory, which he owned as the sole registered proprietor (the Millner property). At that time a company he owned, Ottley Investments Pty Ltd, owned an electronics

business. It traded under the name "Rent a Phone". The plaintiff operated the company's business as his own.

[3] In 1989, the defendant, who was born on 10 July 1946, lived at 3/20 Charles Street, Stuart Park, Northern Territory. She had separated from her ex-husband, Richard Chester. At that time, she and her ex-husband jointly owned a home property situated at Foxwell Road, Coomera, Queensland (the Coomera property). This property was unencumbered.

[4] On 4 July 1988, the defendant's father passed away. She inherited $33,934 from her father's estate and a share portfolio. In April 1989, she purchased a unit at 3/6 Belle Place, Millner (the Belle Place property) using funds she inherited and a loan from the ANZ Savings Bank Limited. This property she rented out. The defendant was working part time as a self-employed cleaner.

[5] In 1989, the defendant left her Stuart Park address and lived at the Millner property with the plaintiff. She maintains that the relationship was initially platonic and did not develop into a sexual relationship until 1990. In any event, it is common ground that a sexual relationship began either in 1989 or in 1990 and lasted until the defendant moved into Belle Place where she remained for a short period until about 1992 or 1993, when she resumed her relationship with the plaintiff, again living with him at the Millner property. It is not in contention that this was a de facto relationship within the meaning of s 3A of the Act and that the relationship lasted until at least May

of 2006. There is a dispute between the parties as to when exactly the relationship ended. For the purposes of s 16(1) of the Act, I am satisfied that the relationship lasted for a period of not less than two years.

The first period of the relationship

[6] There is a dispute between the parties as to when the relationship first began. Counsel for the plaintiff contends that it began in January 1989. The plaintiff himself thought it began in 1989 but could not recall any specific date or incident from which he could estimate the commencement of the relationship, except to say that they travelled to Perth together at Christmas time, 1989. However, he maintained that the relationship had already begun by the time the defendant purchased the Belle Place property in April 1989.

[7] The defendant's evidence is that she moved into the plaintiff's home after the Belle Place property was purchased. She said that as she had difficulty with receiving mail at this address because of the circumstances of its physical location, she changed her mailing address to the Millner property in August 1989.

[8] The defendant also gave evidence that when she moved to live at the Millner property, she paid rent into a savings account with the ANZ bank. The savings account was tendered as exhibit P18. The account is titled "Chester Faye Barbara Jim Ottley Account". There is an entry written in pencil "rent" for an amount of $50 paid into the account on 3 May 1989 and

thereafter there are further entries similarly marked “rent”, the last being on 20 October 1989 when the funds to the credit of the account were withdrawn. The first entry, when the account was opened, is dated 21 March 1989 for an amount of $60. Written in pencil is a notation “Croc and petrol”. However, in examination in chief, she said that this was a payment for rent. She maintained that this was a “joint account”, to which the plaintiff had access. The plaintiff denied any knowledge of the account. Plainly, it was not a joint account. There is no evidence, apart from the defendant’s assertions that the plaintiff had access to this account. I prefer the plaintiff on this issue.

[9] The defendant’s evidence was that she met the plaintiff in 1988. They both played golf at the same golf club. In 1988, she was in a de facto relationship with another person, Les Tavwavs. In cross-examination, she said that she moved from her unit at Charles Street to live in the Belle Place property towards the end of 1988. She said she had an operation and lived at the Millner property for a short period in 1988 to recuperate and then moved back to the Belle Place property. She also said that at some stage the plaintiff began staying at the Belle Place property as well. In cross-examination, it was put to her that she physically moved into the Millner property in early 1989, to which she said, “It could have been”.

[10] In her affidavit sworn 23 April 2009, the defendant said she moved into the Millner property in March 1989, but that the relationship initially was

platonic. She further claimed that a de facto relationship did not begin until about 1990.

[11] The defendant gave evidence that in August to September 1989, she and the plaintiff took a holiday to Gladstone together. She paid for the airline tickets. They went on a boat called *Mia Mia*, stayed one night in a hotel and also took a bus trip. Apart from buying a few drinks and some fast food, the plaintiff did not contribute to the expenses of this trip. None of this was put to the plaintiff, but it is some evidence that the parties were in a de facto relationship by then and it is consistent with the defendant's evidence that she changed her mailing address at about the same time. The plaintiff was not cross-examined about this topic.

[12] The evidence of both parties is unreliable as to precisely when the relationship commenced. The onus of proof is on the plaintiff to establish this question of fact. On the whole of the evidence, I consider that it is most likely that the relationship had developed into a de facto relationship by August 1989 and so I find.

[13] The next question is at what time did the parties separate after that. The plaintiff was unsure of the date this occurred, although he recalled the occasion which gave rise to the separation. It was put to him in cross-examination that this occurred in late 1992 and that the parties separated until September or October 1993. The plaintiff was reluctant to accept that they had separated, but he agreed that during this period the defendant lived

in the Belle Place property, that he had "kicked her out" because she was having an affair with his tenant who lived in a downstairs flat at the Millner property, that he forced the tenant to leave as well and that during this period he gave her no financial support or assistance and there was no sexual relationship between them. He also agreed that there was no financial settlement between them at this time because there was a mutual agreement that each would keep their own property separate during this period of the relationship. The defendant's evidence was that the period of separation was for about 18 months during 1992 to 1993. The defendant's evidence was that when she returned to live at the Belle Place property she had the telephone reconnected. According to exhibit D3, the defendant's telephone was connected in September 1992 and was disconnected on 27 August 1993. This is a period of 12 months. Based on that evidence, I find that the period of separation lasted for approximately 12 months. Overall, I find that the first period of the relationship lasted approximately three years.

The second period of the relationship – when did it begin?

[14] The precise date that the parties began the second period of the relationship is also uncertain. The best that I can do is find that they had recommenced their relationship in about late August 1993, when the defendant's telephone was disconnected.

When did the relationship cease?

[15] The precise date when the relationship ceased is important because the defendant maintains that the plaintiff's claim for an adjustment of property interests is statute-barred.

[16] Section 14 of the Act provides:

> **14. Time limit for making application**
>
> (1) Subject to subsection (2), where de facto partners have ended their de facto relationship, an application under section 13(1) must be made before the expiry of a period of 2 years beginning with the day after that on which the relationship ended.
>
> (2) A court may grant leave to a de facto partner to make an application under section 13(1) at any time after the period allowed by subsection (1) if the court is satisfied that greater hardship would be caused to that partner by refusing leave than would be caused to the other partner by granting it.

[17] The plaintiff commenced these proceedings on 5 December 2008. The defendant maintains that the relationship ended in or about May 2006. The plaintiff's case is that the relationship did not end until July 2007. Alternatively, the plaintiff claims an extension of time under s 14(2).

[18] At this point, it is convenient to mention that neither party contends that the provisions of the *Family Law Act* (Cth) have any application to this question. This is because the Act continues to apply to a relationship, which broke down before the Family Law Amendment (De Facto Financial Matters

and Other Measures) Act 2008 (Cth) came into force on 1 March 2009,[1] and both parties accept that it occurred before then.

[19] In determining this question, it is necessary to consider the provisions of s 3A of the Act:

> **3A De facto relationships**
>
> (1) For this Act, 2 persons are in a de facto relationship if they are not married but have a marriage-like relationship.
>
> (2) To determine whether 2 persons are in a de facto relationship, all the circumstances of their relationship must be taken into account, including such of the following matters as are relevant in the circumstances of the particular case:
>
> (a) the duration of the relationship;
>
> (b) the nature and extent of common residence;
>
> (c) whether or not a sexual relationship exists;
>
> (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
>
> (e) the ownership, use and acquisition of property;
>
> (f) the degree of mutual commitment to a shared life;
>
> (g) the care and support of children;
>
> (h) the performance of household duties;

[1] *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth), s 86(1).

(i) the reputation and public aspects of their relationship.

(3) For subsection (2), the following matters are irrelevant:

(a) the persons are different sexes or the same sex;

(b) either of the persons is married to another person;

(c) either of the persons is in another de facto relationship.

[20] My reason for turning to s 3A is that if the matters therein contain guidance for the existence of a de facto relationship, the same matters should also provide guidance for determining when the relationship ceased, although different weight will necessarily be given to some factors, such as the extent to which the parties owned property, because it will often be the case that the parties will not have altered their property interests by the time the Court is called upon to consider this question. A useful starting point is to consider and contrast the state of the relationship before and after the time the relationship is alleged to have ceased[2] and to consider whether there has been a physical separation of the parties accompanied by an expression by one of the parties of an intention to end the relationship. The other principle which must be borne in mind is that "all of the circumstances of the relationship must be taken into account"[3] and that what is involved in considering the factors set out in s 3A(2) is not a mechanical exercise of going through them as some kind of checklist, because, for instance, the

[2] *In the Marriage of Pavey* [1976] FLC 90-051.

[3] s 3A(2) of the Act.

parties themselves may have given little weight to some of those factors during the relationship.

[21] It is necessary to note that in 2000, the plaintiff and the defendant jointly purchased Lot 106, and the defendant purchased Lots 105 and 107 Lionel Road, Bynoe Haven Estate, Bynoe Haven, Northern Territory. Over a period of time a shed was built on both Lots 105 and 106 which were made into habitable residences, where the parties resided from time to time whilst still also residing at the Millner property.

[22] In December 2005, the plaintiff underwent surgery for a condition he described as "a problem with my gut". According to the defendant, the plaintiff was discharged from 12 December 2005, then went back for further surgery on 23 February 2006, being discharged again in March 2006. The defendant's evidence (exhibit D25) is that he was cared for by the defendant for about six months from 12 December 2005 at Lot 106, Lionel Road. Elsewhere she claimed that the plaintiff was residing at the Millner property from March 2006. Be that as it may, her evidence was that her son, Shane, who was staying on one of the Bynoe Haven properties with his then partner, Katie Tunsted, died on 5 March 2006. The plaintiff could not recall the exact dates, but did not dispute the defendant's evidence as to the dates.

[23] The defendant's evidence was that after Shane's death the plaintiff did not come down to Bynoe Harbour to see her until about a month later, when the plaintiff attended a wake after the funeral. He returned to the Millner

property soon after, because he was still receiving medical treatment. Prior to Shane's death, her evidence was that the plaintiff and Shane did not get along. According to the defendant, this was a turning point in their relationship and there were no sexual relations between them after that. According to the defendant, she told the plaintiff at about that time that relationship was over. The defendant's evidence about this conversation, when and where it took place and what exactly was said by whom, was extremely vague. Subsequently, she admitted that sexual relations continued until May 2006. I reject this evidence as untruthful. No such conversation was put to the plaintiff in cross-examination. The evidence of Katie Tunsted, who was still staying at Bynoe Harbour after Shane's death, was that whenever the plaintiff visited Bynoe Haven during this period he and the defendant shared the same bed.

[24] After the plaintiff recovered from his stomach problems, friends of the defendant, June Moffatt and Christopher Jones, rented the downstairs flat at the Millner property. Miss Moffatt thought that this was in April 2006. In May 2006, Katie Tunsted also moved into the Millner property, occupying a bedroom in the upstairs section of the house. Miss Moffatt's evidence was that from April 2006 onwards the plaintiff and the defendant spent the weekdays at Bynoe Haven and would return together each weekend to stay at the Millner property. So far as she knew, the parties were then in a de facto relationship. Her evidence was that she was unaware that the parties

had separated until she was told by the defendant in March 2007 that the relationship was over.

[25] At some time in the tax year ended 30 June 2006, the plaintiff obtained employment with an earthmoving company, H & K Earthmoving. The plaintiff then lived at the Millner property during the weekdays because it was more convenient for him to travel to work from there. On weekends, he would return to Bynoe Haven. The evidence as to when he started this employment is not clear, but it was probably in about May 2006. He was employed as a backhoe operator, working at Emerald Springs. How long he worked in that employment is unclear. The plaintiff's evidence was that after that he was employed by Northern Territory Emergency Service Services (NTESS), doing fire prevention work. According to Ms Tunsted, he was still in this employment towards the end of 2006. The plaintiff's evidence as to the period of this employment is extremely vague. The evidence is that in 2005 the parties purchased a small flock of Damara sheep which they were running in a fenced area on Lot 105. Because the sheep needed to be attended to, the defendant remained at Bynoe Haven when the plaintiff returned to live at the Millner property. From time to time, the plaintiff returned to Bynoe Haven on weekends, or the defendant would come into town and stay at the Millner property overnight. This was the pattern of the relationship during the period from about May 2006 until the end of the year.

[26] The defendant's evidence is that at some time towards the end of July or in August 2006, she and the plaintiff agreed to terminate the relationship. Her evidence was that she had come to stay at the Millner property. The plaintiff came home from work. They were in the bedroom. The plaintiff told her he would no longer support her. She said, "It's got to be over with, because I've just looked after you". The defendant went downstairs and immediately told June Moffatt and Wayne Zimmerle who were sitting around the pool that they had "broken off". After that, June Moffatt and Chris Jones invited her to join them at Dolly O'Reilly's restaurant at the Hibiscus Shopping Centre for dinner. She became drunk and took a cab home to the Millner property.[4] After that, she gradually started moving her personal belongings to Bynoe Haven. This evidence is supported by Mr Zimmerle who recalled the defendant telling him about the break-up, but he was unsure whether to believe it or not. After that night, he had an affair with the defendant which lasted a short time until he met another woman and began a de facto relationship with her. During the period of the affair, Mr Zimmerle was still living at the Millner property. The affair was conducted elsewhere. The defendant denied having an affair with Mr Zimmerle, but admitted sexual intercourse with him. June Moffatt had no recollection of any such conversation.

[27] The plaintiff's evidence was that the first time it had been indicated to him that the relationship was over was whilst he was in hospital in February

[4] Tr p 414-415.

2007 following a stroke. He said he did not believe the relationship was over at that time.

[28] Counsel for the defendant, Mr Rowbottom, submitted that the parties were already discussing separation in 2006, at about the time of the discussion in the bedroom of which the defendant gave evidence. The plaintiff gave evidence that he was doodling on a piece of paper, trying to work out what his share of the properties would be if the defendant bought him out, when he arrived at this figure. The defendant came into the room, he asked her for $100,000 for his share, to which she agreed. He also asked for $10,000 of this to be paid immediately because he wanted to buy a car as a payment to be made in good faith. The defendant confirmed this conversation took place. There is no evidence as to when it occurred; except that the plaintiff claimed he was still working at that time, which Mr Rowbottom submitted was consistent with the conversation occurring in 2006.

[29] Despite what the plaintiff said, I find that this conversation occurred in late 2007, because the sum of $10,000 to buy the car was not given to the plaintiff by the defendant, according to her bank records, until 5 November 2007.[5] In the event, the plaintiff did not purchase the car he had in mind because according to the evidence of Mr Jones, the car salesman the plaintiff has been dealing with, the defendant came to the yard to inspect the car and the plaintiff decided, after speaking to her about it, that the car was not worth buying.

[5] Ext D36.

[30] As to the alleged conversation at the pool, I accept the defendant's evidence as to the fact that she told Mr Zimmerle that the relationship was over and her evidence as to the conversation in the bedroom which immediately preceded it, principally because the defendant's account is to some extent supported by the evidence of Mr Zimmerle. Neither the plaintiff nor the defendant were impressive witnesses. The plaintiff had only limited recall of important events, probably due to a stoke he suffered in early 2007, and was plainly hostile to the defendant. The defendant was not always truthful and frank in giving her evidence either. Ms Moffatt was clearly in the plaintiff's camp, so to speak, and she did not positively deny the conversation at the pool. Mr Zimmerle was an impressive witness. He came to Court reluctantly and impressed me as an independent witness who did his best to tell the truth.

[31] In the period after August 2006, the evidence is that the defendant began over time to shift much of her personal belongings to Bynoe Harbour, but left a lot of her furniture and clothes at the Millner property. Whether the relationship had actually come to an end in August 2006 is quite unclear. My impression is that the defendant still wanted the plaintiff to think that the relationship was on foot. This impression is reinforced by the events of Christmas Eve and Christmas Day 2006, when the plaintiff attended at Bynoe Harbour for the usual Christmas Eve celebrations, with the defendant and with Chris Jones and June Moffatt.

[32] The evidence of Ms Moffatt was that she and her partner, Chris Jones, had arranged to go to Bynoe Harbour to spend Christmas with the plaintiff and the defendant. They stayed at Lot 106, the premises occupied by the plaintiff and the defendant, on Christmas Eve. Christmas lunch was celebrated on the block. The plan was for them all to go to the Sand Palms Hotel in the afternoon and spend the night there. The defendant booked a room for her and the plaintiff. Ms Moffatt and Chris Jones had also booked a room. However, the defendant lost her purse, so Ms Moffatt and Mr Jones agreed to pay for the plaintiff and defendant's room as a Christmas present. The present was given to them on Christmas Day together with a card, which was tendered as Ext D23.

[33] Subsequently they all went to the Sands Palm Hotel. The plaintiff and defendant had an argument and the plaintiff walked back to the shed at Bynoe Harbour where they were living. Ms Moffatt said that she thought they were still a couple. She denied knowing anything about a separation or any intent on her part to get them back together again.

[34] Mr Jones' evidence was similar to Ms Moffatt's, except that he added that on Christmas Eve the plaintiff and the defendant slept in the same bed. He also believed they had not "broken up".

[35] The defendant's evidence was that Ms Moffatt and Chris Jones booked her and the plaintiff into the room at the Sand Palms Hotel as a surprise because "they wanted us to get back together". According to her, they had Christmas

dinner at the hotel and it was convenient to stay at the hotel. She denied sleeping in the same bed as the plaintiff on Christmas Eve. She denied losing her purse on Christmas Eve; according to her account, the purse had been stolen "a long time before that". She denied booking the room herself. She explained the relationship she had with the plaintiff as "still friends". She conceded that the plaintiff still kept personal belongings at Lot 106 and she still had personal belongings of her own at the Millner property. Up to then she agreed she stayed at the Millner property whenever she came to Darwin, tended the garden and did whatever else needed to be done at the house. She conceded that this state of affairs continued into 2007.

[36] As to this evidence, I prefer the evidence of Ms Moffatt and Mr Jones wherever it conflicts with the evidence of the defendant, notwithstanding the close associations of those witnesses with the plaintiff. Mr Jones in particular stuck me when he gave his evidence as an honest witness. The plaintiff was only faintly cross-examined on this topic. He agreed that he did not in fact stay the night at the Sands Palm Hotel and walked back to Lot 106. He denied that the relationship was over or that there was any plan by Ms Moffatt or Mr Jones to "get you two back together again". I find that there was a drunken row between he and the defendant. I also find that, up to this point, the plaintiff and the defendant gave the appearance to others who knew them that the relationship was still on foot. At this time, nothing appeared to have changed, except that the defendant was slowly transferring some of her personal belongings to Lot 106. This was understandable

anyway, given that she needed to spend most of her time at Lot 106 to look after the sheep.

[37] On Saturday 17 February 2007,[6] the plaintiff suffered a stroke and was admitted as an inpatient at the Royal Darwin Hospital. At the time of the stroke, he was at Lot 109, Bynoe Harbour, assisting a neighbour to build a shed. An ambulance was called and the defendant drove the plaintiff in her car to meet it. The plaintiff remained an inpatient until he was discharged on 16 May 2007.[7] According to the inpatient notes, the plaintiff was in employment at this time and anxious to return to work. By the time of his discharge, the hospital notes indicate that the plaintiff would no longer be employable and arrangements were being made for him to receive a disability pension.

[38] According to the hospital notes, on 20 February 2007, the defendant privately told a social worker at the hospital that she and the plaintiff had "split up about one year ago", but continued to be friends. The plaintiff gave evidence that during his period in hospital the defendant told him that she had wasted the last 10 years of her life. The defendant denied this conversation. In any event, I am not able to draw any inference from it, even if it did occur.

[39] At some stage in late 2006, the defendant began to socialise with Mr Phillip Davis, who was called as a witness for the defendant. According to

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6 This date is taken from the hospital's clinical notes, Ext P17.

7 This date is taken from the hospital's clinical notes, Ext P17.

Mr Davis, they began seeing each other only as close friends and he would take the defendant to the Palm Sands Hotel on Tuesday nights to watch him play pool and to socialise. The plaintiff said that he heard a rumour about this in early 2007, but the defendant made no mention of it to him at the time. Mr Davis' evidence was that whilst the plaintiff was in hospital he began to court the defendant. They began a sexual relationship in March 2007. At that stage, he was still not living with the defendant and the defendant did not like to be seen publicly with him as her lover. Mr Davis has apparently still not moved in to live with the defendant, although he has stayed at Lot 106 overnight from time to time.

[40] Eventually, after the plaintiff was discharged from hospital, the defendant continued to go to the Millner property on a regular basis to assist the plaintiff, who was confined to a wheel chair. These trips also involved overnight stays, sharing the same bedroom with the plaintiff.

[41] When the plaintiff was discharged, the plaintiff's mother, Jean Ottley, and his sister, Lindsey Orton, arrived from Perth to assist the plaintiff in his recovery. Mrs Orton's evidence is that she and Mrs Ottley were met by the defendant at the airport and taken to the Millner property. She said that she stayed for three days. During her stay, the defendant told her that her feelings for the plaintiff had changed, that she no longer wished to look after him, but that she had not indicated this to the plaintiff. It was her evidence that during her stay the plaintiff and the defendant slept together in the main bedroom. She was not cross-examined on these topics except to

suggest that the defendant told her that she and the plaintiff "were no longer an item". She denied that.

[42] Mrs Ottley's evidence was that she had known the defendant since 1989 when the plaintiff and the defendant visited her in Perth. They stayed with Mrs Ottley for two weeks and thereafter she remained in regular telephone contact, including stays in Darwin and at Bynoe Harbour on a number of occasions. In July 2006, the defendant invited her and her partner to attend the defendant's 60th birthday celebrations to be held on 10 July 2006. She was unable to come because her partner was in hospital at that time.

[43] Mrs Ottley said that when she arrived at the Millner property on 12 May 2007, she noticed that the defendant's belongings were in that house, including furniture, jewellery, medications, two wardrobes full of clothes and a large photo of her daughter.

[44] During the next week, the defendant told her that she was no longer in love with the plaintiff and would not be his carer. She asked her if she had told the plaintiff. The defendant said, no, but that she would do so, whereupon she went to the bedroom and spoke to him. She was not present when this occurred, but she said that the plaintiff became visibly upset and tearful. Subsequently, Mrs Ottley made arrangements with Red Cross for them to provide such assistance as he may need. According to her evidence, the defendant left the Millner property on 11 June 2007, although she still left

many of her personal belongings there. Mrs Ottley stayed at the Millner property until July 2007.

[45] According to Ms Moffatt, the defendant had told her and Mr Jones in March 2007, at a time when the plaintiff was still in hospital, that she had broken up with the plaintiff and had told him so at the hospital. Neither the plaintiff nor the defendant agreed that any such conversation took place at that time and Mr Jones gave no evidence of it. I think that Ms Moffatt is mistaken about the time of this conversation.

[46] The plaintiff denied knowing anything about a separation until about November 2007, but I am unable to accept this. It would be most unlikely that this was not a topic of conversation between the plaintiff and his mother in June 2007. Furthermore, the evidence of Mr Davis was that he heard abusive telephone messages left on the defendant's answering machine after the plaintiff came out of hospital, which plainly indicated that the plaintiff was aware that the defendant had formed a relationship with Mr Davis. He was not cross-examined on this evidence and I accept it as true.

[47] In June 2007, the plaintiff returned to hospital for a time to have a hernia operation. After this time, the defendant still occasionally stayed at the Millner property from time to time whenever she came to town, but I am satisfied that the relationship was over by then. I find that the relationship ended in June 2007 when the defendant told the plaintiff's mother and the plaintiff that it was over. I reach this conclusion on the whole of the

evidence. Up to then, although the relationship had been deteriorating since prior to August 2006, I am satisfied that the defendant did not make a firm commitment to end the relationship until after the plaintiff's stroke. Notwithstanding the occasion in August 2006 referred to in paragraphs [26] to [30] above, the defendant did not openly, and to the plaintiff's knowledge, seek to put an end to the relationship, which in all outward respects appears to have gone along much as it had before. Even in March 2007, when the plaintiff was still an inpatient, the defendant took the plaintiff to Bynoe Harbour for overnight visits and still looked after his interests by helping to put his affairs in order, cut his hair and look after him generally whilst he recuperated. It was not until June 2007 that the defendant made it plain to the plaintiff that she no longer loved him and no longer intended to look after him. I therefore find that this claim is not statute barred. I declare that the second period of the relationship existed between August 1993 and June 2007.

Was there a separation agreement?

[48] I have already referred briefly to an occasion in late 2007 when the plaintiff asked the defendant for $100,000 for his share of the property. The defendant claims that a separation agreement in writing signed by the plaintiff was entered into in November 2007. The plaintiff denies that a binding written agreement was reached.

[49] Section 44(2) of the Act provides that a separation agreement is "subject to and enforceable in accordance with the law of contract". The term "separation agreement" is defined by s 3(1) of the Act to mean:

> … an agreement (whenever entered into) between 2 adults, whether or not there are other parties to the agreement, which:
>
> (a) is made in contemplation of terminating a de facto relationship between them or after terminating it; and
>
> (b) makes provision with respect to financial matters (whether or not it also makes provision with respect to other matters).

[50] The expression "financial matters" is defined by s 3(1) to include "the property of either or both of those partners" and "property" is defined by s 3(1) to include, inter alia, real and personal property and any estate or interest in real or personal property.

[51] There is no provision in the Act that a separation agreement, to be valid, must be in writing. However, s 45 of the Act has the effect that if an application is made to the Court for an order for adjustment of interests in property and if the Court is also satisfied that the agreement is in writing and signed by the other party, the Court may not make an order which is inconsistent with the terms of the agreement. Section 45(3) provides, in effect, that if the agreement is not in writing and signed by the other party, the Court may make such order as it could have made if there were no such agreement, "but may nevertheless have regard to the terms of the agreement". Section 46(2) provides a power in the Court to set aside all or

any of the provisions of a separation agreement if (relevantly to this case) "enforcement of the agreement would lead to serious injustice between the parties".

[52] The alleged written separation agreement is in the form of a statutory declaration signed by the plaintiff and dated 26 November 2007. It reads:

> "Faye Chester is paying Jim Ottley $100,000.00 (One Hundred Thousand $) as part property of 106 Lionel Road Bynoe Haven as end of partnership. $100,000 represents payment in full of assets obtained during de facto relationship. Rams loan to be paid in full and discharged the balance to go to Jim Ottley."

[53] There is also a further statutory declaration signed by both the plaintiff and defendant. This document is dated 26 November, but the year is left blank. It reads:

> "Faye Chester and Jim Ottley do solemnly and sincerely declare that we would like our RAMS Loan Account No 001993914 to be discharge all parties on loan (sic)."

[54] No submission was made by Mr Peters, counsel for the plaintiff, that the statutory declarations, when read together, were void for uncertainty. It seems to me that the documents set out with sufficient clarity the essential provisions of a settlement agreement. It provides for a total payment of $100,000 to by paid by the defendant to the plaintiff. It provides that it is in full settlement of the assets obtained during the partnership. It refers to the plaintiff's joint interest in Lot 106, Lionel Road, Bynoe Haven. It is tolerably clear that the parties intended that the plaintiff's interest in that property would be transferred to the defendant. It provides for the payment

and discharge of the RAMS loan by the defendant as part of the $100,000 to be paid. The RAMS loan is identified more particularly in the second statutory declaration.

[55] The evidence is that the plaintiff in fact transferred his interest in Lot 106, Lionel Road to the defendant, that the RAMS loan was discharged by the defendant and that the balance outstanding was in fact paid to the plaintiff or at his direction. Thus, the agreement has been fully executed.

[56] Mr Peters submitted that the agreement was unenforceable because the plaintiff did not have independent legal advice before signing the statutory declaration. He referred me to *Black v Black*.[8] However, that case turned on s 90G of the *Family Law Act 1975* (Cth) which specifically provided that these agreements must contain a statement from each party that, before they executed the agreement they received independent legal advice from a legal practitioner in relation to certain matters and required that the agreement must annex a certificate executed by the legal practitioner concerned. The Full Court of the Family Court of Australia held that compliance with s 90G was mandatory. However, there is no similar provision in the *De Facto Relationship Act* (NT). Mr Peters submitted that on 4 January 2010, the *Family Law Act* was amended by repealing s 90G and replacing it with a new provision. He submitted that this new provision applied to the circumstances of this case. However, s 90G applies only to a "financial agreement", which is defined by s 4 to mean an agreement under s 90B,

[8] (2008) FLC 93-357.

s 90C or s 90D. Those sections apply only to agreements made to parties to a marriage. The relevant provisions dealing with agreements between de facto partners are referred to as a Part VIIIAB financial agreement. The relevant section in the case of an agreement made after the breakdown of a de facto relationship is s 90UD. Amendments were also made by Act No 122 of 2009[9] affecting such agreements. Section 17(1) of the amending Act provides that those amendments do not apply to agreements made before the commencement of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*, i.e. 1 March 2009. As the agreement in this case was made in 2007, I am satisfied that there is no substance to Mr Peters' argument.

[57] No argument was presented by Mr Peters that the written agreement ought to be set aside for any other reason, such as undue influence non est factum or the like. I conclude therefore that the agreement is binding, subject to the Court's power to set it aside under s 46(2) of the *De Facto Relationships Act* (NT).

Should the agreement be set aside?

[58] Section 46(2) of the *De Facto Relationships Act* (NT) empowers the Court to set aside an agreement if enforcement of the agreement "would lead to serious injustice between the parties". That provision was considered by Riley J in *Van Jole v Cole*.[10] His Honour concluded that the expression

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9 *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth).

10 (2000) DFC 95-228.

"serious injustice" should be given its ordinary meaning of "a considerable wrong or unfairness". His Honour upheld a decision of a magistrate that the plaintiff in that case had received far less than she should have done under an equitable distribution as amounting to a "serious injustice". His Honour also took the view that the circumstances under which the agreement was entered into were relevant to whether or not there was a serious injustice. In *LF v RA*,[11] White J, after referring to *Van Jole*, said that "it is not… a serious imbalance of itself which will give rise to a conclusion of serious injustice. The detail of the relationship and the parties' financial and other contributors to the acquisition of the assets in the course of the relationship will be determinative of that question".

[59] At the commencement of the first period of the relationship, which began in August 1989, the plaintiff was the sole registered proprietor of the Millner property which he had purchase in 1985 with the assistance of a loan secured by a registered mortgage to the Australia and New Zealand Bank Limited. At that time, he held no other real property. He also owned Ottley Investments Pty Ltd, which in turned owned an electronics business which traded under the name of "Rent a Phone" and in which he was employed.

[60] The defendant jointly owned with her former husband the former matrimonial home at Foxwell Road, Coomera, Queensland. This property was occupied by her former husband and was also the home of their son, Shane. In July 1988, she inherited $33,934 from her deceased father's

[11] (2006) 2 Qd R 561 at [56].

estate. In April 1989, she purchased the Belle Place unit using part of her inheritance and a loan from the ANZ Savings Bank Limited. At this time, she was residing in a rented unit in Charles Street, Stuart Park. She rented out the Belle Place unit and used the rental income to pay off her loan. She worked part time as a cleaner.

[61] There was no division of property at the end of the first period of the relationship in September 1992.

[62] As at the beginning of the second period of the relationship in late August 1993, neither party had acquired any new assets. The defendant moved back into the Millner property and rented out Belle Place again.

[63] In April 1994, the plaintiff purchased a house at Rosella Crescent, Wulagi (Rosella Crescent) for $133,000 as an investment. This was financed by a mortgage from Australia and New Zealand Bank Limited. The house was registered solely in the plaintiff's name. The property was tenanted. The plaintiff admitted that he did not declare the income in his income tax returns, nor did he claim any of the outgoings as deductions. However, his tax returns show that the rental income was declared and the property was negatively geared. There is no evidence as to how much of the plaintiff's own money was used for this purchase. In June 2001, the plaintiff sold the property for $165,000. After taking into account stamp duty and conveyancing fees, there would have been a capital profit of about $30,000. The defendant made no capital contribution to the purchase of the property,

nor did she receive any of the rental income. On a few occasions, the defendant paid some of the rates and other expenses amounting to only a few hundred dollars.

[64] In June 1994, the defendant purchased a house at Carrington Street, Millner (Carrington Street) for $138,000 as an investment. This was also financed through a bank and registered solely in the defendant's name. The defendant paid a deposit of $18,000 towards the purchase. That property was also tenanted during the period of the relationship. The defendant still owns that property. The property as valued at about $400,000 as at the time of trial. The plaintiff made no capital contribution to the purchase of this property, nor did he receive any of the rental income. The rent was used to repay the mortgage, which was paid out several months ago. During the period of the relationship, the plaintiff assisted in removing some large trees from the garden, replacing some guttering to the roof and helped to do some renovations to the kitchen, bathroom and washroom. He also replaced all of the flyscreens with new screening, fitted out new air conditioners and assisted the defendant to repaint the house inside and out. From time to time, the plaintiff and the defendant removed garden rubbish from the land. The new materials, air conditioners and capital items were paid for by the defendant who also paid for any skilled labour required. There is no dispute that the defendant paid for all of the outgoings such as rates. The defendant admitted that the rental income from both Belle Place and Carrington Street was used to pay off her mortgages. Although she maintained there was a

surplus which she used towards household expenses, I do not accept that. The surplus from time to time would have been minimal, bearing in mind that net returns on house rentals are never very large. The defendant's income tax returns were not tendered, so I draw the inference that these returns would not have assisted her case.

[65] In April 2000, the plaintiff and the defendant jointly purchased Lot 106, Lionel Road, Bynoe Haven with the intention of building a home on the land and eventually retiring there. The property was purchased for $27,000 and registered in joint names as tenants in common in equal shares. No mortgage was registered over the land. However, the plaintiff entered into a loan with a lender called RAMS which was secured by a mortgage over the Millner property. The defendant entered into a contract as guarantor for the loan. The purpose of the loan was to provide funds for the plaintiff's half share of the purchase price and he drew down $15,000 to enable this to occur. Presumably, there were conveyancing fees and stamp duty which also had to be paid. The loan was actually for $70,000 because the plaintiff intended using the balance in order to build a house on the land. At the time when the loan was paid out in November 2007, there was still some $33,700 outstanding on this loan, which was discharged out of the $100,000 paid by the defendant at the time of the separation agreement. The defendant provided the balance of the initial purchase price from her own resources, which she said came from $100,000 she received as part of her share of the sale of the Coomera property.

[66] At the same time, the defendant purchased Lot 105, Lionel Road, Bynoe Haven for $26,000. The defendant paid the entire purchase price out of the same $100,000 referred to above. Her intention was to build a weekender on Lot 105 and rent it out.

[67] The plaintiff did not keep the whole of the RAMS loan initially, but had access to it through a drawdown facility, which enabled him to use the funds as he required them. According to the plaintiff, he subsequently drew down $5,000 on this loan to pay for the cost to rebuild the engine on a truck belonging to the defendant. Clearly, the plaintiff drew down more than $20,000 in all, but he was unable to recall what he did with the rest of the money.

[68] Subsequently, a shed was erected on both Lot 106 and Lot 105 by the parties and a bungalow was built on Lot 105, but not quite completed. The plaintiff's evidence was that he spent the profit he realised from the sale of Rosella Crescent in building materials for the shed and bungalow on Lot 105. He said he spent $5,000 on steel trusses and piers used for improvements to both properties and the rest went in "dribs and drabs" on things for the properties. The evidence is that the plaintiff designed these structures, but no plans, formal or otherwise, were ever prepared. The structures were built from second hand materials, which were located at various places in Darwin and trucked on site. The structures were built with the assistance of neighbours who lived in the area. The defendant and her son, Shane, also assisted with some of the work. The plaintiff was in charge

of these projects and directed what work had to be done, as well as physically assisting in the work. In relation to the bungalow, tradesmen (paid for by the defendant) were employed to do some of the work. The defendant also busied herself creating a garden on Lot 106.

[69] As to the defendant's contributions towards the Millner property, there is evidence that the defendant made significant contributions in improving the gardens and assisting with paving and the installation of a swimming pool and some painting work. The defendant made no capital contributions towards the original purchase of the Millner property and lived many years there without making any payment by way of rent. The fact that the defendant lived at the Millner property for many years in effect rent-free assisted her to pay off her mortgages over Belle Place and Carrington Street.

[70] The defendant also made a contribution towards some of the outgoings of the Millner property from time to time, such as sometimes paying for the rates and the telephone account and, for a time, helped out with the plaintiff's business in a small way. On the other hand, for many years the plaintiff met most of these expenses, including the cost of petrol for her car, whilst the defendant did most of the domestic chores, such as washing, cleaning, ironing and gardening. The defendant also purchased most of the food, whilst the plaintiff made a smaller contribution towards food, but he purchased most of the alcohol. The defendant also paid for airfares for a couple of holidays, including, probably, most of the accommodation expenses, whilst the plaintiff paid for food and drink.

[71] In January 2004, the Coomera property was finally sold. The defendant's share of the proceeds totalled $1 million. She invested this money into a superannuation fund in the name of Faye Chester Investments Pty Ltd as trustee for the Faye Chester Superannuation Fund (the Fund). In August 2004, the Fund purchased Lot 107, Lionel Road, Bynoe Harbour with the intention that he son, Shane, would eventually build a house on that property and then Lot 107 would be transferred to him. Her son, Shane, died before this plan was carried out. Lot 107 is still owned by the Fund.

[72] The Fund also purchased two lots of vacant land at Mt Bundy. The first was Lot 5534, purchased in February 2004 for $130,000. The second was Lot 6465, purchased in November 2005 for $90,000. It is not in contention that the plaintiff made no contribution towards the purchase of these assets, except, perhaps, to visit the blocks with the defendant when she was considering purchasing them.

[73] The balance of the funds have been spent in various ways not fully disclosed by the defendant. Some money was probably spent on the purchase of plant and equipment and motor vehicles needed for Lots 105 and 106. At the end of the relationship, the Fund had at least $300,000 in cash invested as well, plus $100,000 which the defendant paid to the plaintiff in November 2007. In addition, the defendant had at least $65,000 in two bank accounts held at the ANZ Bank.

[74] It is not possible to be entirely sure of the value of all of the contributions made by the parties to the relationship. The defendant tendered a great many documents relating to her own expenditure going back many years, but this documentation is incomplete. The precise nature of the defendant's income and how it was spent is elusive without, at least, her tax returns which were not tendered. After 1993, she worked full time as a cleaner for many years, but I have no idea what she earned. Moreover, the defendant has not been honest in revealing her income and assets to the Commonwealth, which is paying her a pension, and I have not found her to be a completely honest witness. The plaintiff is no better and it is clear that he has not revealed his full income in his tax returns (for example, the rent he received from the downstairs flat). His tax returns indicate only a modest income, but many of his expenses were claimed through Ottley Investments Pty Ltd, which was wound down in 2006. He was also a poor witness. That is not to say that I have rejected all of the evidence of the parties. There is a lot of common ground and, where their evidence is in serious conflict I have been able to make findings based on the evidence of other witnesses whom I have accepted as reliable and truthful, or based upon documentary evidence. Furthermore, there are inevitably large areas of the evidence where the parties could not be expected to be accurate in memory recall, particularly over such a long period of time and I have made allowances for this and accepted what I regard as the most probably correct version. So far as the

income of the parties is concerned, apart from rental income, I find that it was roughly equal.

[75] The approach of the parties as to how to go about making an order for adjustment in this case could not be more different. Essentially, Mr Peters' case is that the whole of the property of both parties should be pooled and divided between them on a 50/50 basis, including the property held in the Fund. Mr Rowbottom, for the defendant, says that the parties, throughout the relationship, kept their own assets separate and only jointly owned property, plus the value of improvements made by the plaintiff to the defendant's property should be considered and the value of improvements made to the plaintiff's property by the defendant, should be considered as the "pool". In the result, Mr Rowbottom contends that the division of property agreed to in the separation agreement of November 2007 is fair and should not be disturbed. I was not assisted by any authorities by Mr Rowbottom. Mr Peters referred me to a few cases, but they were not a great deal of help.

[76] The starting point is s 18 of the Act, which provides as follows:

> **18 The order for adjustment**
>
> (1) The order which a court may make under this Division with respect to the property of de facto partners or either of them is such order adjusting the interests of the partners in the property as the court considers just and equitable having regard to:

(a) the financial and non-financial contributions made directly or indirectly by or on behalf of the partners to the acquisition, conservation or improvement of any of the property or to the financial resources of the partners or either of them; and

(b) the contributions (including any made in the capacity of homemaker or parent) made by either of the partners to the welfare of the other partner, or to the welfare of the family constituted by the partners and one or more of the following:

(i) a child of the partners;

(ii) a child accepted by the partners or either of them into the household of the partners, whether or not the child is a child of either of the partners; or

(iii) any person dependent on the partners who has been accepted by the partners or either of them into the household of the partners.

(2) A court may make an order in respect of property whether or not it has declared the title or rights of a de facto partner in respect of the property.

[77] There are no children to be considered. "Property" is defined as I have already pointed out. "Financial resources" is defined by s 3(1) of the Act as follows:

… in relation to de facto partners or either of them, includes:

(a) a prospective claim or entitlement in respect of a scheme, fund or arrangement under which superannuation, retirement or similar benefits are provided;

(b) property which, pursuant to the provisions of a discretionary trust, may become vested in or used or applied in or towards the purposes of the de facto partners or either of them;

(c) property, the alienation or disposition of which is wholly or partly under the control of the de facto partners or either of them and which is lawfully capable of being used or applied by or on behalf of the de facto partners or either of them in or towards their or his or her own purposes; and

(d) any other valuable benefit.

[78] As a matter of fact, I find that there was a common understanding throughout the relationship that each would contribute financially towards their living expenses. The plaintiff would pay for the electricity, telephone, petrol, alcohol and buy items as needed for food. The defendant would do the weekly shopping which she generally paid for. Each party would receive the income and pay for the outgoings of the real property which they respectively owned. Each party would assist the other to maintain their respective properties, but, unless one party was unable to do so, each party would pay for the cost of the maintenance and improvements to their own properties to the extent that there was a need to pay for materials or to engage contractors. Only Lots 105 and 106 were viewed differently. In relation to Lot 106, that was joint property and each would make equal, or roughly equal, contributions towards improvements and maintenance, whether that was in the form of labour or the cost of materials. In relation to Lot 105, the plaintiff's evidence was that there was an understanding that if he helped the defendant to build the bungalow and shed on the property,

he would have a half interest. The Coomera property was considered to be entirely the property of the defendant as was the defendant's share of the proceeds of its sale. Each kept separate bank accounts, which were regarded as their own monies. They did not at any stage have a joint account.

[79] In *Evans v Marmont,*[12] a specially constituted bench of five Judges considered the correct approach to an application for an adjustment order under the s 20 of *De Facto Relationships Act 1984* (NSW), which is in para materia to s 14 of the *De Facto Relationships Act* (NT). In that case, the Court held that the approach by Mahoney JA in *Wallace v Stanford*[13] was correct and also approved of the approach taken by Hodgson J at first instance in *Dwyer v Kaljo*.[14] In *Wallace v Stanford,*[15] Mahoney JA made it perfectly clear that an inheritance by one party to the relationship was not something to be taken into account. As Mahoney JA said a windfall has no relationship to the exercise of the Court's discretion.[16] Mr Peters referred me to the judgment of the Full Court of the Family Court of Australia in *Aleksovski v Aleksovski,*[17] which is authority for the opposite proposition, i.e. that windfall gains by one partner are to be regarded as a joint contribution of the parties. However, that was a case decided under the Family Law Act. As was made clear in *Evans v Marmont,*[18] very different

[12] (1997) 21 Fam L R 760.
[13] (1995) 19 Fam L R 430.
[14] (1992) 11 Fam L R 785.
[15] (1995) 19 Fam L R 430.
[16] *Wallace v Stanford* (1995) 19 Fam L R 430 at 442.
[17] (1996) FLC 92-705.
[18] (1997) 21 Fam L R 760.

considerations apply under the *De Facto Relationships Acts*. Accordingly, the defendant's share of the proceeds of the sale of the Coomera property cannot be taken into account (except in a limited way not relevant for the purposes of this case).

[80] The correct approach, therefore, is that one must first identify and value the assets of the parties; secondly, to identify whether any, and if so what, contributions of the type contemplated by s 18(1) of the Act have been made by each party; thirdly, to determine whether in the circumstances the contributions of the plaintiff have already been sufficiently recognised and compensated for; fourthly, to see if the plaintiff has established that the balance of the contributions lies in favour of the plaintiff. In *Evans v Marmont*,[19] the majority of the Court said,[20]

> The following aspects of the approach adopted by Hodgson J are significant. He began by repeating four questions formulated by Powell J in earlier cases. Those questions set out, in a convenient sequence, certain matters which arise for consideration under s 20. There is nothing in the precise formulation of the questions, or in the sequence, which is, or was seen to be, rigidly binding. Having done that, Hodgson J went on to refer to some matters more likely to be contentious.
>
> First, he repeated and accepted what had been said in a previous case by Young J, to the effect that the factors referred to in paras (a) and (b) of s 20(1) are fundamental factors influencing the judgment of the court. Hodgson J then said:
>
> > I also agree with Young J that this is not the only factor which can be taken into account. In my view, if one considers the plaintiff's contributions and nothing else, this cannot

[19] (1997) 21 Fam L R 760.

[20] Referring to the approach by Hodgson J in *Dwyer v Kaljo* (1992) 11 Fam L R 785.

> conceivably lead to any view of what is just and equitable. Their relevance is only by reason of such relevance as they may have to the question: what is just and equitable having regard to the plaintiff's contributions?
>
> In my view, some other factors will be relevant in this way in all cases. One such factor arises from the question whether the contributions of the plaintiff have been sufficiently compensated. The relevance of this question is confirmed by the terms of s 17 of the Act. This in turn requires the court to reach some view of the value of the contributions of the plaintiff, and some view of the value of what the plaintiff has received in return.
>
> In most cases, I think the financial circumstances of the parties will be relevant. Certainly, it is necessary for the court to ascertain what the property of the parties comprises at the time of the hearing, because it is to this that any adjustments of interest have to be made. Further, I think that in most cases the needs and means of the parties will have general relevance, as subsidiary factors, to the question of what is just and equitable having regard to the plaintiff's contributions. However, as indicated earlier, I accept that the needs and means of the parties has no relevance except via its relevance to this question: in particular, the court cannot say that because the defendant has $11 million, and the plaintiff has something less than $50,000, for that reason it is just and equitable to make an adjustment.
>
> Other circumstances which may be relevant include such matters as the length of the relationship, any promise or expectations of marriage, and also I think opportunities lost by the plaintiff by reason of the plaintiff's contributions. This is by no means intended to be exhaustive. I do not think any limit can be set on what circumstances may be relevant, remembering always that the relevance must be to the question, what is just and equitable having regard to the plaintiff's contributions.

In general, we agree with those observations. It would be unrealistic to attempt to evaluate contributions of the kinds referred to in paras (a) and (b) for the purpose of determining what is just and equitable having regard to those contributions, in isolation from the nature and incidents of the relationship as a whole, relevant aspects of which may well include factors of the kinds mentioned by Hodgson J. Although, because of the particular facts in *Dwyer v Kaljo*, it was

> appropriate for his Honour, in the last of the quoted paragraphs from the judgment, to refer specifically to the plaintiff's contributions, it is important to bear in mind that s 20(1) directs that regard had to contributions of the designated kinds made by each of the de facto partners: often it may be found that contributions of the kinds referred to in para (b) will involve shared activities or reciprocal benefits not giving rise to any disproportionate burden which it would be just and equitable to satisfy by an adjustment of interests in property.

Identification and valuation of the parties' assets

[81] The relevant date for the identification and valuation of the parties' assets is the date of the trial.[21] I find as follows:

Plaintiff's assets		
1.	Millner property	$500,000
2.	Superannuation fund	$20,799
3.	Cash, ANZ Bank	$12,143
4.	V2 Plus account	$ 3,453
		$536,395

Defendant's assets		
1.	Belle Place	$215,000
2.	Carrington Street	$400,000
3.	Lot 105, Lionel Road	$320,000
4.	Lot 106, Lionel Road	$225,000
5.	Cash at bank	$65,000
		$1,225,000

[82] Both parties had a motor vehicle and owned furniture. I have no information as to their value and have assumed therefore that they are not significant.

[21] *Parker v Parker* (1993) DFC 95-139 per Young J.

Contributions made by the parties

[83] In this case, it is necessary to attempt to value the contributions made by the parties to the assets which each owned at the date of trial.

Plaintiff's contributions

Belle Place and Carrington Street

[84] As noted previously, the plaintiff's contribution was to provide the home at the Millner property and towards the end of the relationship the house at Bynoe Haven in which he had a half share. This assisted the defendant to pay off the mortgages and meet the interest payments. In addition, some allowance should be made for the work he did in maintaining Carrington Street. I consider that his contribution should be about 15 per cent over the combined value of these properties.

$92,250.00

Lot 105, Lionel Road

[85] As noted previously, the plaintiff's work and skill in improving this property and his small capital contribution needs to be taken into account. I assess his contribution at 40 per cent of the value of the property.

$128,000.00

Lot 105, Lionel Road

[86] As noted previously, the plaintiff's work and skill in improving this property and his small capital contribution needs to be taken into account. Each party contributed half of the purchase price. The defendant made a

contribution in the work she did in establishing the garden and providing the machinery, generators, pumps, etc. Overall, I assess the plaintiff's contribution at 60 per cent of the value of the property.

$135,000.00

$355,250.00

Defendant's contributions

The Millner property

[87] Allowance must be made for her contribution to the garden, painting and pool. I make a small allowance for paving, despite the denial of the plaintiff that she contributed anything towards the paving.

$30,000.00

[88] The defendant also made a significant contribution as home-maker. It is now recognised that the contributions of a de facto partner as home-maker should not be regarded as somewhat inferior to that of a spouse.[22] In addition, from time to time, the defendant looked after the plaintiff when he was recovering from his periods in hospital and thus assisted in his welfare. The plaintiff's contributions in this respect were relatively minor. Neither party gave evidence of who cleaned the pool. The plaintiff generally mowed the lawns and did maintenance tasks outside the house, whilst the defendant looked after the inside of the house. I infer that the plaintiff generally cleaned the pool and mowed the grass at Lot 106. Considering the length of

[22] *Black v Black* (1991) 15 Fam L R 109; *Evans v Marmont* (1997) 21 Fam L R 760.

the relationship, I think the defendant's contributions under this head were substantially more than the plaintiff's. I make an allowance of $250,000 for the defendant's contributions under this head.

$250,000.00

$280,000.00

Have the plaintiff's contributions been sufficiently recognised and compensated for?

[89] The net balance of the contributions favours the plaintiff in the sum of $75,000. He has already been paid $100,000. In the end result, I consider that it has not been demonstrated that the balance of the contributions lies in favour of the plaintiff. That being so, the plaintiff has failed to prove that it would be just and equitable to make an adjustment order in his favour, or that the enforcement of the separation agreement would lead to any serious injustice between the parties.

Conclusion

[90] The plaintiff's claim for an adjustment of interests is therefore dismissed. I will hear the parties as to costs.
