Porter v Bright [2009] NTSC 72

PARTIES:	PORTER, Anthony John
	v
	BRIGHT, Suzanne
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	122 of 2008 (20826142)
DELIVERED:	22 December 2009
HEARING DATES:	9-11, 13 November 2009
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

De facto Relationships – Declaration as to existence of a de facto relationship – Adjustment of property interests.

Jones v Dunkel (1959) 101 CLR 298.
Evans v Marmount [1997] 42 NSWLR 70.

De Facto Relationships Act ss 3, 3A, 10, 14, 15, 16, 18

REPRESENTATION:

Counsel:

Plaintiff:	Mr Rowbottom
Defendant:	Ms Holtham

Solicitors:

Plaintiff:	Withnalls Territory Lawyers
Defendant:	Hotham & Associates

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

Porter v Bright [2009] NTSC 72
No 122 of 2008 (20826142)

BETWEEN:

ANTHONY JOHN PORTER
Plaintiff

AND:

SUZANNE BRIGHT
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 22 December 2009)

[1] These proceedings are brought pursuant to the *De Facto Relationships Act* ("the Act"). The Plaintiff seeks two orders firstly, a declaration as to the existence of a de facto relationship pursuant to section 10 of the Act and secondly, an adjustment of property interests pursuant to section 18 of the Act.

[2] The relevant provisions of the Act follow. Firstly the definitions of "de facto partner" and "de facto relationship" in section 3 namely:-

> ***de facto partner***, of a person, means a person who is in a de facto relationship with the person.
>
> ***de facto relationship*** has the meaning in section 3A.

[3] The term “de facto relationship” is defined by reference to section 3A of the Act which provides:-

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

[4] Section 10 of the Act provides as follows:-

> **10 Declaration as to existence of de facto relationship**
>
> (1) A person –

(a) who alleges that a de facto relationship exists or has existed between himself or herself and another named person; or

(b) whose pecuniary interests, or whose rights or obligations at law or in equity, are affected according to whether a de facto relationship exists or has existed between 2 other persons,

may apply to a court for a declaration as to the existence of such a de facto relationship.

(2) If any person whose interests would, in the opinion of the court, be affected by such a declaration is not present or represented, and has not been given the opportunity to be present or represented, at the hearing of the application, the court may, if it thinks that that person ought to be present or represented at the hearing, adjourn the hearing to enable that person to be given that opportunity.

(3) If the court is satisfied that a de facto relationship exists or has existed or does not exist or did not at a particular time or during a particular period exist (whether or not it previously or subsequently existed), it may make a declaration (which shall have effect as a judgment of the court) that persons named in the declaration have or have had a de facto relationship or are not in, or were not at a particular time or during a particular period in, a de facto relationship.

(4) The court shall state in its declaration that the de facto relationship existed or did not exist –

(a) at a date specified in the declaration; or

(b) between dates specified in the declaration,

or both.

(5) A declaration may be made whether or not the person or either of the persons named by the applicant as a partner or partners to a de facto relationship is alive.

(6) While a declaration remains in force, the persons named in the declaration are to be presumed conclusively for all purposes to have had (or, as the case may be, not to have had) a de facto relationship at the date specified in the declaration, or between the dates so specified, or both at that date and between those dates as the case may require.

[5] The existence of a de facto relationship was disputed and was the subject of most of the evidence called by both parties. The Plaintiff alleges that the de facto relationship commenced some time in 1997 and continued until approximately March 2008. The Defendant, although admitting friendship, cohabitation and casual sex with the Plaintiff, denies the existence of a relationship within the meaning of the Act.

[6] On either account, the relationship between the Plaintiff and the Defendant is an unusual one. If it is a de facto relationship as the Plaintiff suggests then there is little of the intermingling of finances, pooling of income and joint attendance at family functions usually evident in such a relationship. On the other hand if there is no de facto relationship then the extended cohabitation between the parties, the nature and extent of assistance each has given the other and the extent of the sexual relationship between the parties is also out of the ordinary.

[7] As to property interests there is only one asset for adjustment purposes and that is the property at 62 Hutchison Road, Herbert ('the Property"). The Plaintiff does not allege any contribution or claim to any other property of the Defendant and likewise the Defendant makes no claim for an interest against any property of the Plaintiff.

[8] I first make some general comments regarding the evidence. In doing so I will deal separately with the evidence of the parties on the one hand and the evidence of all other witnesses on the other hand. With respect to the latter,

I am not convinced that any of them were totally objective and truthful. The extent varied but each of the witnesses gave me the distinct impression that they were out to support the party calling them. I had particular concerns about the evidence of Brad Rundell and Daryl Porter called by the Plaintiff and Lynette Apolloni and Ingri Kontro called by the Defendant. Those concerns were far greater in the case of the witnesses called by the Defendant. There was at least a broad consistency amongst the evidence of the Plaintiff's witnesses. That evidence all supports the existence of a de facto relationship and largely confirmed the Plaintiff's evidence. The evidence of those witnesses was rigorously challenged in cross examination and with few exceptions, it was largely was unshaken.

[9] By comparison the evidence of witnesses called by the Defendant refuting the existence of the relationship was not as hardy under cross examination. The evidence of the Defendant, confirmed by her witnesses, was prefaced on the basis that the Defendant and those witnesses are good friends and that the Defendant confided in them. It was telling of the quality of their evidence that none of those witnesses, not even the Defendant's daughter, were aware that she had been in a sexual relationship with the Plaintiff. In the context of their evidence, that fact had to be at the cornerstone of their view of the relationship. In addition, that they were not aware of the extended sexual relationship is very revealing of the extent of their knowledge of the relationship and can hardly form a credible basis for forming such a dogmatic view that the parties were not in a marriage like

relationship. It appears that the first they knew of the sexual relationship was when it was put to them in cross examination. Despite that, when confronted with the extent of the sexual relationship and its duration in cross examination, they continued to support the Defendant's version. I thought that was totally unsustainable in the light of that revelation. I thought they were simply making conclusions based on what the Defendant had told them of the relationship, information that was at best incomplete. At worst it misrepresented the position. It is for that primary reason that I have no hesitation in rejecting that evidence outright. Moreover, it reflects poorly on the Defendant's credibility that she chose to call witnesses to support her case well aware that they were unaware of core facts.

[10] The evidence of two of the Defendant's witnesses deserves special criticism in light of the foregoing. Much of the evidence of Lynette Apolloni simply parroted what she was told by the Defendant. Her affidavit was littered with hearsay and its tender was accepted subject to the hearsay and on the basis that any hearsay evidence would be given appropriate weight. In my view it is appropriate that her evidence be afforded no weight at all. Ingri Kontro was caught out on a couple of occasions as being prepared to say whatever suited the Defendant's case. She exaggerated the extent of her contact with the Defendant and when caught out persisted with that in cross examination.

[11] Looking now at the evidence of the Plaintiff and the Defendant themselves, in general terms there were issues with the credibility of both, albeit more so in the case of the Defendant. By way of example, much of the evidence

as to contributions was unsupported by objective evidence. In light of that it was easy on the one hand for one to claim that a payment was made to the other in cash and just as easy for the other to deny that. Absent some objective evidence to verify any of those claims or denials, there is no sound basis to assess the relative merits of the evidence. I consider that any objectively verifiable evidence is to be preferred in this case given the state of the evidence overall.

[12] I now summarise the evidence in detail**.** The Plaintiff alleges that the relationship commenced in 1997 when the parties lived together at 15 Banfield Parade, Wongaling Beach in Queensland. He said that within six months the parties moved to another address in the same town, namely 15 McNamara Road. He said that the Defendant's children intermittently stayed there. This was during the period when the Defendant's daughter was rebellious, often ran away and spent much time living apart from her mother.

[13] The Defendant denied that initial cohabitation. She claimed that she was initially living with her daughter at 15 McNamara Road while the Plaintiff lived at 15 Banfield Parade. She claimed that she did not live at the Banfield Parade property and that she only stayed there occasionally. She says that after her daughter left in about the middle of 1998 the Plaintiff and his flatmate moved in with her at 15 McNamara Road. She says however that they were only flatmates. She claims that each occupant had their own bedroom and she specifically did not share a bedroom with the Plaintiff.

She denied that they were in a relationship at that time. She denies they have ever been in a relationship.

[14] The Plaintiff says that the parties lived together at the McNamara Road property until towards the end of 2000. He said that at that time he and the Defendant travelled together to the Plaintiff's hometown in Portland, Victoria, where they stayed there for some three to four months. The Defendant does not dispute that but maintains she was not in a relationship and in support, pointed to the fact that she maintained the lease on her premises in Queensland at the time. Whether she maintained that tenancy or not is not determinative either way of the existence of a de facto relationship. Witnesses called by the Plaintiff, largely confirmed the Plaintiff's version of events during this period, albeit that I have some concerns with that evidence.

[15] The Plaintiff says that after approximately four months in Portland he and the Defendant travelled together by road to Darwin, taking approximately four weeks to complete the journey and staying together at various places along the way. He says that they arrived in Darwin approximately April 2001. He said that they rented a cabin at the Overlander Caravan Park for 12 months. The Defendant agreed with that. The Plaintiff said it was a one bedroom cabin and the two shared the bedroom. The Defendant said it was a two bedroom cabin and each had their own bedroom. After 12 months living there the two moved to a two bedroom demountable situate at Wallaby Holtz Road where they lived for approximately two years.

[16] The Plaintiff alleges that the Defendant's son Bradley stayed with the Plaintiff and the Defendant intermittently over a six to twelve month period while they lived at this property. The Defendant denied this but failed to call her son as a witness.

[17] After the two year period at Wallaby Holtz Road the parties rented a demountable at 74 Mango Road for approximately two years. That was a one bedroom demountable. The Plaintiff said that the parties shared the bed whereas the Defendant maintained that she had a separate bed. Again, witnesses called by the Plaintiff who had contact with the parties while they lived there largely confirmed the Plaintiff's version of events during this period.

[18] From that accommodation the parties moved to the Property. This was purchased by the Defendant in March 2006 with settlement occurring on 5 April 2006. The Property was purchased as vacant land for $145,000.00 financed mostly by way of loan funds. The Defendant claims that she paid all of the deposit and conveyancing costs. The Plaintiff says that he repaid her half of that in cash. That is questionable given that it was of the order of $7,000.00. It is unlikely that he would have that amount available in cash. He did not claim that he withdrew it from his bank account nor did he produce any documentary evidence to show that. It is all very convenient as the cash nature of the payment largely renders it immune from objective verification.

[19] The Property was purchased in the Defendant's name only. There was some controversy about that. The various reasons given were that the Plaintiff, working only as a subcontractor, could not secure a loan. This was a curious claim given that he deposed to an income of between $50,000.00 and $60,000.00 per annum. Why being a subcontractor should be an impediment was not the subject of elaboration. If a financier was prepared to finance the Defendant alone on security of the land, I would expect that they would still do so if the Plaintiff was also a joint borrower. The fact that in 2005 the Plaintiff had secured a loan of approximately $12,000.00 to purchase a car seemed to belie his claimed inability to borrow money. Likewise his evidence that he was now able to borrow a substantial amount ($300,000.00) to buy out the Plaintiff's interest in the Property. On the other hand the Defendant, in her affidavit when discussing another loan acknowledged that she had taken out that other loan by reason of the Plaintiff's inability to borrow money himself.

[20] What then occurred was that in a short time span a shipping container and an old caravan were acquired for use as accommodation. In cross examination it was put to the Plaintiff that it was the Defendant who bought the container and that she paid the entire cost. The Plaintiff agreed that the purchase and initial payment was made by the Defendant but he maintained that he then repaid her half the cost. The Plaintiff however agreed that the caravan, albeit only costing $500.00, was paid for solely by the Defendant.

[21] Apparently both lived in the container until the caravan was purchased. From that time the Plaintiff says that both he and the Defendant slept in the caravan together whereas the Defendant says that she alone slept in the caravan and the Plaintiff remained in occupation of the container. Again, witnesses called by the Plaintiff who had contact with the parties while they lived there, largely confirmed the Plaintiff's version of events during this period.

[22] According to the Plaintiff the purchase of the container was the starting point in the development of the Property. He said that agreement had been reached between the parties as to the construction of a large shed which would then be fitted out for residential accommodation. As a result the Plaintiff did substantial earthworks to prepare the ground for the shed and, with the assistance of family and friends, commenced the construction of the frame for the shed. According to the Plaintiff there was then apparently a change of plan. He said that it was decided that a house would be constructed on the property. My impression from the Plaintiff's evidence was that he was not entirely in agreement with this. He was under the impression that as tenants in common the Defendant could own an identified part of the Property i.e., the part with the house and that he could own the balance. Indeed it seems that the fencing of the Property, effected by the Plaintiff, was predicated on this belief.

[23] He said in evidence that he did not contribute to the house (by that I think meaning contributions to the repayments for the loan taken out for the

house) because, as he said, the house was the Defendant's project. Nonetheless the evidence shows that he performed manual work of considerable value in the construction of the house.

[24] The house is now almost complete. There is apparently an amount of $6,599.00 still owing to the builder. The Defendant says that the financier will not release funds to pay that until the work is certified. In turn, certification apparently depends on action by the Plaintiff. My impression is that very little needs to be done to complete the certification of the house, however there has been no real explanation as to why that has not occurred.

[25] The shed previously referred to was not constructed with compliance with building requirements in mind. No approvals have been sought although the Plaintiff claims to have evidence which can support the grant of approvals. However, it remains incomplete and non compliant.

[26] The Plaintiff says that, at least with respect to regular or major expenditure in relation to the Property, all contributions have been roughly equal between him and the Defendant. He claims to have paid the Defendant 50% of the deposit and the acquisition costs that she paid. He says he has religiously paid $250.00 per fortnight until February 2008 when the payments reduced to $200.00 per fortnight. He says the payments were by bank transfer and were to cover what he says is his half of the loan repayments. Clearly this must refer only to the loan for the block and not

for the house as it is one and the same amount as he was paying from the outset.

[27] On the other hand the Defendant says that the payments the Plaintiff has made have been rent. The position is complicated by reason of another loan taken out by the Defendant to on-lend to the Plaintiff because, as both said, the Plaintiff lacked the capacity to borrow money. This loan was for the sum of $20,000.00. The Plaintiff says that $10,000.00 of this was to finance the construction of the shed and that he repaid that at $100.00 per fortnight from 4 September 2006 until 30 October 2007 when repayments increased to $150.00 per fortnight until repayment was complete.

[28] The aforesaid payments, for loan repayments according to the Plaintiff but rent according to the Defendant, were by made by bank transfer and were subsequently rejected by the Defendant from May 2008. There was no real explanation of that from the Defendant. It is odd that if the payments were rent as the Defendant claims, then it should have remained payable given that the Plaintiff has continued to occupy the Property as before. In light of that, her later complaint regarding the Plaintiff's failure to pay for power seems anomalous (see paragraph 37).

[29] The Plaintiff says that the remaining $10,000.00 of that loan was repaid to the Plaintiff, apparently in cash, within approximately one month of the loan being taken out. This is difficult to fathom. Such prompt repayment suggests a major change of plans in a short period of time. That was not

apparent on the evidence. Otherwise it belies the need to borrow the money in the first place. Moreover it was a large amount of money for the Plaintiff to hold in cash. Although the loan was initially drawn down to the Plaintiff in cash, it is unlikely that he kept this lying around in cash especially when he had his own bank account.

[30] On the other hand the Defendant's version is equally awkward. She said that the increase in the repayments of the second loan by $50.00 per fortnight coincided with the reduction in the claimed rental payments of $250.00 per fortnight by $50.00 per fortnight. Apart from the timing of that not coinciding by approximately six months, the Defendant claims that this was done because otherwise the Plaintiff would never have been able to repay the $10,000.00. She agreed that the loan has been fully repaid with interest. This seems to support the Plaintiff's version that only $10,000.00 was owed. However increasing one loan by $50.00 per fortnight and reducing another liability between the same parties by the same amount is entirely illogical if made for the stated purpose. It is akin to taking money out of one account and putting it in another account of the same person and claiming to have profited by that action.

[31] It is also odd that, if the parties were sharing these major expenses equally, that the Plaintiff repaid the whole of the loan to the extent that it was for the shed. On his version he should only have repaid $5,000.00.

[32] The Plaintiff claims that he did a lot of the work necessary on the Property. He claims to have utilised his connection through Pratt Plumbing, his long-standing employer, for this purpose and to the mutual advantage of the parties. This evidence was supported by the proprietor of that business. The Plaintiff says that he the earthworks, the land clearing, the driveways and internal roads, the trenching for irrigation and power, the pad for the shed and the container and the pad upon which the house was to be constructed.

[33] The Defendant attempted to minimise both the extent and the value of that work but her denials were very unconvincing and did not aid her credibility. For example she tried to suggest that the driveway or road was of a lesser quality than it actually was. She could not adequately explain what she meant and she conceded the point when photographs were produced. Likewise she said that the Plaintiff cleared too much of the land and that she was angry with him as a result. Despite that she agrees that she did nothing to stop the Plaintiff, an action more consistent with a tiff between co-owners in a de facto relationship than as owner and tenant. Similarly she said that the Plaintiff was not asked to do the pad for the house, that she did not direct him as to where it was to be situated. However it curiously transpired that it was sited more or less in the correct position. That was all in the face of her denials of discussions between her and the Plaintiff as to the siting of the house. That evidence did not ring true.

[34] Mr Steven Pratt, proprietor of Pratt Plumbing, gave evidence that from his years of experience and from having seen the nature and extent of the works performed by the Plaintiff, the value of that work would be at least $40,000.00 including the cost of hiring machinery. He said that the Plaintiff was permitted to use the company's machinery on a long term, as need basis in recognition of his excellent work history and his value as an "employee" (he was actually a subcontractor) for the business. He also said that he passed on to the Plaintiff the benefit of the wholesale prices that he is able to secure for the purchase of goods. Specifically he said that he saved the Plaintiff (and consequently the Defendant) a considerable amount by purchasing a leftover roll of electrical cable at an auction.

[35] The Defendant said that she borrowed approximately $163,000.00 to finance the cost of the construction of the house. That contract did not include plumbing, electrical, tiling and painting. The plumbing was to be performed by the Plaintiff and he quoted for this in the sum of $5,500.00. There was some dispute as to the nature and the purpose of the quote. The Plaintiff said that the value of actual plumbing work was of the order of $15,000.00 and that the quote was given to minimise the amount that the Defendant would have to borrow. That seems odd. If that is the case why get a quote at all or why not get a quote for even less. The Defendant on the other hand said that it was a true quote and that she paid the amount in advance. She accepted that it was cheaper than would be available on the open market, one of the few concessions she made. The fact that a quote was given at all

is puzzling given the claims the Plaintiff makes. That more supports the Defendant's version of events. The Plaintiff however says that the amount was only enough to pay for the materials required and that was what he expended the Defendant's payment on. That is still puzzling. He said that his labour would have been an equivalent amount as would have been the cost of the hire of equipment to complete the works.

[36] The only evidence of repayment instalments on the various loans is the affidavit evidence of the Defendant where she attests to loan payments being $900.00 per fortnight, no doubt in respect of both the loan for the acquisition of the land as well as for the construction of the house. There was no breakdown of those payments nor was there any evidence of the fluctuation of those payments from time to time, for example, due to variations in interest rates. The Plaintiff says, conveniently, that he simply paid the amount he was asked to pay and that he did not have access to, nor viewed the relevant loan documentation.

[37] The Defendant claims to have paid all rates since acquisition of the property. The Plaintiff disputes this and maintains that he paid half of the rates, again in cash, to the Defendant. The Defendant also claims that since the separation and despite that the Plaintiff has lived on the property (and with others and possibly receiving some payments from these others on account of power) she has paid all the power bills. The Plaintiff does not challenge that. As I mentioned earlier, I think this complaint from the Defendant is surprising given that during the same period she has rejected

the Plaintiff's payments by bank transfer, payments which the Defendant insisted were for rent.

[38] I prefer to base assessment of witnesses credibility and which evidence to prefer, where possible, on evidence which can be objectively assessed or verified and which stands up to the scrutiny of cross examination. Overall the state of the evidence is unsatisfactory and there remain many anomalies and unanswered questions. As a result, I approach the assessment of the evidence by looking broadly at the evidence rather than minutely considering the individual aspects of the evidence. With that approach in mind, I consider that the following are telling in the determination of which version of events to accept. These mostly impact adversely on the Defendant which I think is proportional to the flaws in her evidence compared to that of the Plaintiff. These are:-

(1) Despite the Defendant claiming that the amounts the Plaintiff paid her were for rent, she admitted that she did not disclose any rent in her tax returns. She admitted having engaged a tax agent to prepare her tax returns. She claims that she cannot recall if her tax agent asked her specifically whether she had any rental income to declare but in any event says that she just did not think about the need to declare the rental income.

(2) When the Defendant took out private health insurance through one of her employers, she nominated the Plaintiff as her

"partner". The Defendant says that she did so as a favour to the Plaintiff as he needed chiropractic treatment at the time. Even if that were true, the Defendant's willingness to engage in such dishonest and illegal behaviour is contraindicative of her credibility. The Plaintiff admits to legitimately utilising that entitlement for the purposes of chiropractic treatment and says that in total he claimed two chiropractor's consultations at $55.00 each. I consider the Defendant's explanation to be implausible.

(3) The Defendant described the Plaintiff as her partner and as her next of kin on some employment documents. When asked preliminary questions in cross examination, she denied ever referring to the Plaintiff as her partner but when the documentary evidence was put to her she admitted to having done so but could not explain why she did that.

(4) Likewise in relation to the some superannuation documents where, not only did she name the Plaintiff as her spouse she actually also nominated him as the sole beneficiary in preference to her own children. Again she denied having done so in preliminary questioning and could offer no explanation when the relevant documents were produced and put.

(5) In a Christmas card to the Plaintiff's mother, which clearly spoke of a period when she had earlier denied having cohabitated with the Plaintiff, she made comments inconsistent with her denials describing, for example, how tired the Plaintiff was when he got home from work. She tried to explain this in cross examination by claiming that she knew how he felt when he was "home" because she had seen him at the pub shortly afterwards. That explanation has no merit and that only serves to undermine her credibility further.

(6) Various photographs were put in evidence by the Plaintiff. These could generally be described as typical family photographs. They were of a period when the "relationship" was in its early stages. Photographs were produced which clearly showed affection from the Defendant towards the Plaintiff. The Defendant however refused to concede this apparent show of affection.

(7) The Defendant suggested that she was surprised when the Plaintiff purchased a water tank for the property saying that the Plaintiff had bought it without consulting her. Yet it was clearly a necessary item and it related to the bore pump and the pressure pump that she had had a part in purchasing.

(8) The Defendant's son Bradley was mentioned in the evidence more so than the Defendant's daughter Kathy. The latter was called to give evidence but the Defendant's son was not. He could have confirmed the living arrangements at Wallaby Holtz Road and also whether he lived there for the period claimed by the Plaintiff and denied by the Defendant. He is clearly a witness in the Defendant's camp. It was appropriate that the Defendant call him as a witness. I was very unimpressed when she initially suggested that he was unable to give evidence owing to surgery and a diagnosis of cancer, giving the impression in the process that both were recent events. In cross examination it was revealed that neither was recent and the Defendant conceded that neither was any impediment to her son giving evidence. It is appropriate that an inference pursuant to *Jones v Dunkel*[1] against the Defendant by reason of the foregoing. I infer that had he been called, his evidence would not have supported the Defendant's case.

(9) The conditions on the Property when the parties first moved there were basic to say the least. There were no bathroom facilities. Kitchen facilities were essentially described as a cleared area where there was a campfire and a barbeque. Clearly the rental value was minimal. Notwithstanding that the

[1] (1959) 101 CLR 298

Plaintiff paid a fixed amount of $250.00 per fortnight. This amount did not vary as living conditions improved. This is more consistent with the Plaintiff's claim that he was contributing to mortgage repayments as opposed to the Defendant's claim that he was paying rent.

(10) The Plaintiff deposed to three text messages sent to him by the Defendant since the date of separation. The first on 17 April 2008 seems to be attempting to explain the separation and to be conciliatory. It is consistent with a breakdown of a relationship rather than a tiff between flatmates. The third on 14 May 2008 says in part "… have a think about me buyin ya out". The Defendant's explanation is that those formed a series of messages and were in relation to her asking the Plaintiff to leave the Property. The Defendant suggested fearing violence from the Plaintiff because he was being asked to leave the Property, without evidence of any propensity or history of that occurring. In relation to the third message she claims to be referring to payment for some of the improvements he had made just to ensure that he vacated the Property. The combination of those explanations does not ring true.

[39] Overall, there are significant credibility issues in respect of the evidence given by the Defendant or called on her behalf. The flaws in the evidence of the Plaintiff and of witnesses called by the Plaintiff by comparison are fewer

and minor and mostly stood up to rigorous cross examination. For the reasons aforesaid I accept the evidence of the Plaintiff against that of the Defendant wherever the two are in conflict.

[40] For those reasons, and having regard to the matters referred to in section 3A(2) of the Act, I find that the parties have been in a de facto relationship from 1997 until approximately March 2008. I find therefore that the two year period referred to in section 16(1) of the Act as a precondition to an order for adjustment is satisfied.

[41] In terms of an adjustment of property interests, based on my assessment of the evidence, I find that the application has been made within the time prescribed by section 14 of the Act and that all of the prerequisites in section 15 and 16 of the Act have been met.

[42] The Plaintiff is consequently entitled to seek an order pursuant to section 18. I now turn to that issue. The adjustment of property interests is governed by section 18 of the Act. That section is set out hereunder, namely:-

> **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.

[43] A similarly worded provision in equivalent New South Wales legislation was interpreted in *Evans v Marmont*[2]. The principles espoused in that case have equal application under the Act. That case resolved previous conflicts in the approach to be taken to the interpretation of the New South Wales equivalent of section 18 of the Act. In that case the New South Wales Court of Appeal held that a Court may only make such adjustment as it considers just and equitable having regard to the factors specified in the section. It

[2] [1997] 42 NSWLR 70

does not permit a Court to do whatever it considers to be just and equitable without limitation or according to any other consideration.

[44] On the evidence in this case, although there is some scope for the application of section 18(1)(b), the influence of those factors specified there are minimal and do not account for much on the facts of this case. The question of the appropriate adjustment mostly turns on the extent of the direct or indirect financial and non-financial contributions to the Property and my determination of what is just and equitable having regard to those contributions.

[45] Based on my assessment of the evidence, it is clear that with one exception, both the Plaintiff and the Defendant attempted to equalise their contributions in respect of the Property and the domestic relationship as much as possible. The exception seems to be in relation to the mortgage payments for the loan for the construction of the house. The Plaintiff seemed to concede that the house was the Defendant's project and that he had no interest in that and consequently did not contribute to the mortgage payments in respect of the loan for the construction of the house.

[46] There is no direct evidence as to the amount of the mortgage payments attributable to the loan for the construction of the house as distinct to the initial loan for the acquisition of the land. According to the affidavit of the Defendant, the loan taken out to acquire the block was approximately $131,500.00. The loan taken out in March 2007 for the construction of the

house was approximately $163,000.00. Although accepting that the entire amount of the construction loan would not have been drawn down at the one time, the loan on account of the block represents 44.6% of the total loan and conversely the loan for the construction of the house represents 55.4% of the total loan.

[47] In her affidavit the Defendant states that the total mortgage repayments are $900.00 per fortnight which must clearly be an approximate amount only. Applying the aforesaid proportions equates, in round figures, to $400.00 per fortnight on account of the block loan and $500.00 per fortnight on account of the house loan. Interestingly the amount the Plaintiff paid, as rent according to the Defendant, but as a mortgage contribution on my findings, was then precisely half of the amount for the block loan.

[48] The separate loan of $20,000.00 complicates the calculation. Common to both versions of events is that at least $10,000.00 of that was a loan by the Defendant to the Plaintiff and that that has been repaid with interest. As to the balance, as I have preferred the Plaintiff's version of the evidence, I find that he repaid that balance to the Defendant within a short time of the loan being taken out. Therefore that total amount can be disregarded for the purposes of calculations.

[49] Assuming that the Defendant has solely paid the house loan proportion of the mortgage payments since the loan was taken out (March 2007) and, for ease of calculation, assuming that the entire amount of the house loan was

drawn down at the outset, in the intervening two and a half years approximately since the loan was taken out, the Defendant's contributions would be of the order of $32,500.00. Although the Plaintiff failed to contribute to the repayment of the house loan, the Plaintiff has nonetheless performed substantial works overall in the development and improvement of the property and in the construction of the house generally. I refer to my discussion of that evidence above. The value of the earthworks and machinery hire alone on the evidence of Mr Pratt exceeds the amount of the greater loan repayment contribution made by the Defendant. Bearing in mind that the evidence on that is based on estimates only and having regard to the apparent intention of the parties to overall contribute equally to the Property and the expenses of the relationship generally, equality is approximately maintained and as a result equality of adjustment is just and equitable and therefore appropriate. I have also assumed that the parties have also met all household expenses on an approximately equal basis.

[50] The current value of the Property on an "as is" basis is $380,000.00. The market value of the Property, were it to be fully compliant with building laws, would be $420,000.00. Both figures derive from a valuation tendered by consent.

[51] I find that the lack of compliance with building laws is due to the default of the Plaintiff. The Plaintiff was coy when this was put to him but I accept that that is essentially true. On the evidence it would seem that the compliance in relation to the house would require minimal further input.

The Plaintiff however has not secured that compliance. It is not just and equitable that the Defendant should be penalised for that default.

[52] The greater issue in terms of building law compliance is in relation to the partially erected shed. No attempt has been made to comply with building laws prior to the commencement of construction. Despite the Defendant's protestations that the Plaintiff effected works without her approval, in my view there is at least tacit approval on her part to the construction of the shed. It remains clear however that the controlling force behind that construction was the Plaintiff and although the Defendant had some say in this and has to take some responsibility for it on a just and equitable approach, the greater proportion of the responsibility rests with the Plaintiff.

[53] It seems that there is interest from both parties to purchase the interest of the other party as determined by the Court. The Plaintiff is unable to raise sufficient funds for this purpose. In evidence the Plaintiff indicated that the most he could raise was of the order of $300,000.00. On my calculation this would not be sufficient to take over the existing loans and to pay out the Defendant's interest in the Property.

[54] The Plaintiff seems to be under the mistaken belief that tenancy in common would allow some sort of physical division of the Property amongst the co-owners. He seemed willing to consider the back half of the block (that part with the container and partially constructed shed on it) to be his. Indeed the fence he erected seems to have roughly that sort of division in mind. I trust

that the Plaintiff's mistaken belief as to the nature of the tenancy in common has now been dispelled. Notwithstanding that, having regard to that belief and his apparent acceptance that the house was to be the Defendant's, the house representing an appreciable part of the overall value of the Property, it is appropriate that the Defendant have the initial option to purchase the Plaintiff's interest in the Property. The amount for this purpose should be subject to making an adjustment for the differential value in the land consequent upon the lack of building law compliance. As the responsibility for that rests largely with the Plaintiff, in my view it is just and equitable that the Defendant should be permitted to purchase the Plaintiff's interests based on the "as is" valuation subject to an adjustment to reflect what I broadly calculate to be the Defendant's responsibility for that non compliance. I consider that 25% is a just and equitable adjustment.

[55] On that basis the value of the Property should be taken to be $390,000.00 i.e., the "as is" value of $380,000 plus 25% of the difference between the "as is" and the market value. According to the only evidence available in this regard the current amount secured by the loan is $270,000.00. The balance owing to the builder ($6,500.00 in round figures) should be treated as if part of the loan. On this basis the Defendant then assumes responsibility for that debt. On that basis total liabilities come to $276,500.00 resulting in a notional net value for adjustment purposes of $113,500.00. Based on the equal division that I consider appropriate the value of the Plaintiff's interest in the Property on this basis is $56,750.00.

[56] I consider it appropriate that the Defendant have a period of two months to pay that amount to the Plaintiff failing which the Property is to be sold and there will be an appropriate division of the net proceeds of sale on the basis of the same adjustment as stipulated above on account of the differential value due to lack of building compliance.

[57] I will hear the parties as to the precise orders which should be made covering those contingencies and as to any consequential orders. I will also hear the parties as to costs.