CITATION: *Tony Warren Anderson v Vanessa May Turner* [2013] NTMC 020

PARTIES:	TONY WARREN ANDERSON
	v
	VANESSA MAY TURNER
TITLE OF COURT:	LOCAL COURT DARWIN
JURISDICTION:	Civil
FILE NO(s):	21218391
DELIVERED ON:	28 June 2013
DELIVERED AT:	Darwin
HEARING DATE(s):	14 December 2012 & 22 March 2013
JUDGMENT OF:	Dr John Allan Lowndes

CATCHWORDS:

LOCAL COURT – LAW OF PROPERTY ACT – ACTION IN EQUITY FOR ACCOUNTS BETWEEN CO-OWNERS – EQUITABLE JURISDICTION OF THE LOCAL COURT – ALTERATION OF THE COMMON LAW AND EQUITY – CONCURRENT JURISDICTION OF LOCAL COURT AND SUPREME COURT – THE ROLE OF PLEADINGS – OBJECTIVE APPROACH TO THE CONSTRUCTION OF CONTRACTS

S 45 *Law of Property Act*
S 14(1)(b) *Local Court Act*
S 27 *Administration of Justice Act* 1705
Henderson v Eason (1851) 17 QB 701 considered
Strelly v Winson (1865) Vern 297; 23 ER followed
Ryan v Dries (2002) 10 BPR 19497 followed
CEO (Housing) v Binsaris [2002] NTSC 9 considered
Toll (FECT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52 applied

REPRESENTATION:

Counsel:

Plaintiff:	Mr B Piper
Defendant:	Mr D Story

Solicitors:

Plaintiff:	Pipers Barristers and Solicitors
Defendant:	Story and Associates

Judgment category classification:	A
Judgment ID number:	[2013] NTMC 020
Number of paragraphs:	100

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

No. 21218391

BETWEEN:

TONY WARREN ANDERSON
Plaintiff

AND:

VANESSA MAY TURNER
Defendant

REASONS FOR DECISION

(Delivered 28 June 2013)

Dr John Allan Lowndes D/CM:

THE ISSUES BETWEEN THE PARTIES

1. As is apparent from the pleadings in these proceedings, the plaintiff's cause of action claiming the sum of $22,000, representing unpaid monies arising out of a property settlement in or about February 2009, is uncontested. The amount claimed by the plaintiff is admitted. The dispute between the parties is as disclosed in the defendant's Defence and Counterclaim.

2. In the second amended Notice of Defence filed on 30 January 2013 the defendant alleged, inter alia, the following:

    1. On or about 30 October 2004 the plaintiff and defendant jointly purchased a boat for the sum of $28, 495.

    2. The parties subsequently jointly expended a further sum of $8,000 on extra equipment for the boat.

    3. The plaintiff sold the boat without the consent or assistance of the defendant for the sum of $20,000, and retained for himself the whole of the proceeds of sale.

> 4. The plaintiff has failed, neglected or refused to account to the plaintiff for her share of the proceeds of sale, namely $20,000.
>
> 5. The plaintiff (as co-owner with the defendant) has kept more than his just or proportionate share of the proceeds of sale as described in section 45 of the *Law of Property Act*.

3. The defendant says that by reason of the foregoing the plaintiff is required pursuant to section of 45 of the *Law of Property Act* to account for and pay to the defendant her just or proportionate share of the proceeds of sale of the boat.

4. The defendant further says that she is entitled to a set off of the sum determined in the accounting required by section 45 of the *Law of Property Act* to be her just and proportionate share of the proceeds of sale against the amount claimed by the plaintiff in the Statement of Claim.

5. In the alternative, the defendant claims a set off in diminution or extinction of the sum claimed by the plaintiff by the amount owing to her as allowed in the second amended counterclaim.

6. By way of the second amended counterclaim the defendant claims that the plaintiff is indebted to the defendant in the sum of $10,000 plus interest and seeks an order that the plaintiff account for and pay to the defendant her just and proportionate share of the proceeds of sale.

SECTION 45 OF THE LAW OF PROPERTY ACT

7. It is immediately apparent from the Notice of Defence and Counterclaim that the defendant relies upon the provisions of section 45 of the *Law of Property Act* as entitling her to a share of the proceeds of sale by way of an accounting between co-owners.

8. The primary question that arises is whether the relief afforded by section 45 of the Act is available to the defendant in proceedings commenced in the Local Court.[1]

9. The self proclaimed purpose of the *Law of Property Act* was to consolidate, amend and reform the law relating to conveyancing, property and contract and for related purposes.

10. Section 45(1), which is headed "Liability of Co-owner to Account", provides as follows:

> A co-owner is, in respect of the receipt by the co-owner of more than the co-owner's just or proportionate share according to the co-owner's interest in property liable to account to the other co-owners of the property.[2]

11. Section 45 is contained in Division 2 of the Part 5 of the Act. Division 2 is headed "Partitions, Statutory Trusts, Sale and Division". In order to determine the purpose of section 45, within the legislative scheme, it is helpful to examine the provisions of sections 40, 42, 43 and 44 – which also appear in Division 2.

12. Put simply, section 40 confers upon the Supreme Court of the Northern Territory[3] several and diverse powers with respect to statutory trusts for sale or partition of property held in co-ownership.

13. Again in simple terms, section 41 of the Act invests the Supreme Court with certain powers with respect to a sale under a statutory trust for sale.

14. In equally simple terms, section 43 confers upon the Supreme Court the power to make certain orders with respect to the sale or division of chattels.

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[1] This issue was raised by the Court with the parties after the conclusion of the evidence and making of submissions.
[2] Subsection (2) defines "co-owner" as meaning " a joint tenant or a tenant in common, whether at law or in equity, of any property". "Property" is defined in section 4 of the Act as including "an interest in real or personal property and a thing in action".
[3] See the definition of "Court" in section 4 of the Act.

15. Section 44 of the Act deals with the powers of the Supreme Court:

> In proceedings under section 40 or 43 the Court may on the application of a party to the proceedings or on its own motion:
>
> (a) determine any question of fact arising (including questions of title) in the proceedings or give directions as to how the questions are to be determined; or
>
> (b) direct that inquiries are to be made and accounts are to be taken as necessary for the purpose of ascertaining and adjusting the rights of the parties.

16. Once one has regard to the other provisions in Division 2 of Part 5, the purpose and function of section 45 becomes obvious. Section 45 is clearly intended to assist the Supreme Court in exercising the powers conferred upon it under the Act – and particularly in relation to the taking of accounts for the purpose of ascertaining and adjusting the rights of the parties.

17. Throughout the *Law of Property Act* all references to the Court are to the Supreme Court of the Northern Territory. There is no reference to any other court, including the Local Court. It can, therefore, be concluded that it was not the intention of the legislature to confer any of the jurisdiction or powers created by the Act on the Local Court.

18. It follows that the Local Court has no jurisdiction to entertain the defendant's counterclaim insofar as it is based on the provisions of section 45 of the *Law of Property Act*.

19. That being the case, can the Local Court – in the exercise of its general equitable jurisdiction pursuant to section 14 (1)(b) of the *Local Court Act* - entertain the relief sought by the defendant in her counterclaim.

DOES THE LOCAL COURT HAVE JURISDICTION INDEPENDENTLY OF THE LAW OF PROPERTY ACT

20. Without any doubt, this is not an easy question to answer – and one which will inevitably yield differing judicial opinions, because of the lack of

uncertainty as to the state of the law prior to the enactment of the *Administration of Justice Act* 1705.

21. It would appear that the property law of England (as in force in 1836) was received into the colony of South Australia; and that body of law became the law of the Northern Territory when the Territory became a territory of South Australia in 1863.[4]

22. Assuming that to be a correct analysis of the law, the *Administration of Justice Act* would have constituted the law of property in the Northern Territory prior to the enactment of the *Law of Property Act*. The latter Act not only repealed the former but replaced it with substitute provisions such as section 45.[5]

23. Prior to the *Administration of Justice Act* the action of account was not available between co-owners at common law. But that Act effected a dramatic change to the law by allowing an action of account against a joint tenant or tenant in common who received "more than his just share or proportion": *Henderson v Eason* (1851) 17 QB 701. [6]

24. The position in equity is more complex. It is generally accepted that equity has always permitted accounting between co-owners where one owner has received more than his or her share.[7] However, what is far from clear are the circumstances under which equity allowed for an accounting between co-owners.

25. There is a line of authority that suggests, in the absence of an agreement between the parties, a bill for account in equity was only available when sought as part of a bill for partition or similar proceedings, or when all the

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[4] See the Northern Territory Law Reform Committee Report on the Law of Property 1998.
[5] Section 45 of the *Law of Property Act* replaced section 27 of the *Administration of Justice Act* 1705.
[6] See section 27 of the Act.
[7] See Langdell "A Brief Survey of Equity Jurisdiction" (1889) II Harvard LR 241 at 263. See also *Hill v Hickin* (1887). 2 Ch 579; *Lorimer v Lorimer* (1820) 5 Madd 363; *Hill v Fulbrook* (1822) Jac 573. See also Bradbrook, MacCallum, Moore and Grattan *Australian Real Property Law* 5th edition at [12.245]

criteria for a legal action for account have been satisfied.[8] It should be noted that *Re Tolmans' Estate* (1928) 23 Tas LR 29 does not support the general and independent availability of a suit in equity for accounting between co-owners.

26. There is also old authority to the contrary that favours the general and independent availability of such a suit: *Strelly v Winson* (1685) Vern 297; 23 ER. That case involved co-ownership of a ship. In obiter dicta it was held that there was a liability to account between co-owners when the ship profits.

27. However, the dicta in *Strelly v Winson* has been subjected to rigorous analysis and generated a degree of debate, as reflected in the following commentary which appears in Bradbrook, MacCallum, Moore and Grattan *Australian Real Property Law* 5th edition at [12.250]:

> It can be argued that *Strelly* was a case involving a bailiff relationship between the co-owners where one tenant in common managed by the mutual agreement of all for their mutual benefit: see *Henderson v Eason* (1851) 17 QB 701 where Parkes B stated that the Court was referring to a case where there was an agreement between the parties concerning management.
>
> In at least two subsequent decisions the view had been taken that the Strelly case was not authority for the proposition that a suit in equity for account between co-owners lies wherever one co-owner receives more than his or her share or proportion: see *Henderson v Eason* (1851) 17 QB 701; *Horn v Gilpin* (1755) Amb 255. However, in *Ryan v Dries* (2002) 10 BPR 19497 the New South Wales Court of Appeal upheld the authority of *Strelly v Winson* . The position remains unresolved but the better view seems to be that an independent action in equity is available: see Meagher, Heydon and Lehane *Equity Doctrines and Remedies* 4th ed Lexis Nexis Sydney 2002 p 880.

28. The complexity of the position in equity is also dealt with by Butt in *Land Law* sixth edition at [14.43]:

> On one view, equity has had for several centuries (and still has) an inherent jurisdiction to order an account as incidental to a partition or

[8] See *Denys v Shuckburgh* (1840) 4 Y&C Ex 43; *Leigh v Dickeson* (1880) 15 QBD 60, 67.

analogous suit.[9] On another view, however, the equitable jurisdiction to order an account between co-owners is itself based on the 1705 statute, so that the repeal of the statute has removed the source of the jurisdiction. This latter view was taken by the majority of the New South Wales Court of Appeal in 1994.[10] However, it was rejected unanimously by the same court eight years later.[11]

29. *Ryan v Dries* is not only authority for the historic position in equity, but also authority for the continuing availability of an action for account between co-owners, notwithstanding the repeal of the *Administration of Justice Act* and the absence of substitute provisions.

30. Although the position is far from clear, I am prepared to accept that the decision in *Ryan v Dries*, which upheld the authority of *Strelly v Winson*, represents the historic position in equity. Needless to say, if I have erred in coming to that conclusion, then it follows that apart from section 45 of the *Law of Property Act* there is no independent action in equity for account between co-owners; and the defendant's counterclaim must fail ab initio because the power conferred by section 45 of the *Law of Property Act* is vested solely in the Supreme Court.

31. The next critical question to be answered is whether the *Law of Property Act* was intended to alter and replace the common law or the law of equity, for if that were the legislative intent then the defendant's counterclaim must also fail at the outset.

32. While it is conceded that legislation can override the common law, there is a presumption that legislation is not intended to alter the common law –

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[9] See *Swan v Swan* (1820) 8 Price 518; 146 ER `1281; *Pascoe v Swan* (1859) 27 Beav 508; 54 ER 201; *Burnell v Burnell* (1879) 11 Ch D 213; *Hill v Hicklin* [1897] 2 Ch; Conway "Partition Actions and Accounting Adjustments between Co-owners" (1999) 7 APLJ 207 at 211-213. See also Meagher, Gummow and Lehane, *Equity* para [25-065] and following; *Re Tolman's Estate* (1928) 23 Tas LR 29 at 30-31.

[10] See *Forgeard v Shanahan* (1994) 35 NSWLR 206 at 222 (Meagher JA, Mahoney JA agreeing; contra Kirby P at 21); applied in *Cardineals- Hooper v Tierney* (1996) NSW Conv R 55-767 at 55,890; queried in *Hitchens v Htchins*(1998). 47 NSWLR 35 at 42-43. Meagher JA's gratuitous denigration in *Forgeard v Shanahan* (1994) 35 NSWLR 206 at 222G of members of the New South Wales Law Reform Commission (who recommended repeal of the 1705 statute) as "high-minded but ignorant", has not commended itself to later judges; see eg *Pennimpede v Pennimpede* [2009] NSWSC 85 at [156] per Bryson AJ. See generally Bradbrook et al *Australian Real Property Law* para [1-200]; Conway "Partition Actions and Accounting Adjustments between Co-owners" (1999) 7 APLJ 207 at 231-232.

[11] See *Ryan v Dries* (2002) 10 BPR 19,497 at [65].

legislation is presumed not to invade common law rights.[12] Courts require that it be clearly shown that the legislature intended to alter common law doctrines.[13]

33. The presumption against alteration of common law doctrines applies also to principles of equity.[14]

34. Whether or not the intent of the *Law of Property Act* was to alter or replace the existing general law is a matter of statutory construction, involving the application of well established principles of statutory interpretation: [15]

> It is a well-established principle of statutory interpretation that "no statute will be construed as abrogating a fundamental principle of the common law unless an intention to do so is clearly expressed".[16] If there are two possible constructions of a provision, the ambiguity is to be resolved "agreeably to the rules of the common law…
>
> The common law principles relating to the creation and disposition of property rights are also protected.[17] Nor will a statute be held to remove a remedy available to the citizen unless that intention is expressed in the clearest of terms.[18] However, if the words used are plain, the common law doctrine must yield to the will of the legislature.[19]

35. There is nothing in either the *Law of Property Act* or section 45 that clearly evinces an intention to remove the pre-existing entitlement in equity to bring a suit for account between co-owners. Indeed, the second reading speech in relation to the *Law of Property Bill* indicates an intent not to codify – or fully codify- the law of property in the Northern Territory. Although the

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[12] See Pearce and Geddes *Statutory Interpretation in Australia* 7th edition at [5.27].
[13] See Pearce and Geddes n 12 at [5.27].
[14] See Pearce and Geddes n 12 at [5.29]. See also *Minister for Lands and Forests v McPherson* (1991) 22 NSWLR 687.
[15] See Gifford *Statutory Interpretation* 1990, pp 185-186.
[16] See *Davern v Messel* (1984) 155 CLR 21 at 31; 58 ALJR 321 at 325 per Gibbs CJ(HCA); see also *Harrison v Lederman* [1978] VR 590 at 593 (Vic SC); *Thompson v Mastertouch TV Service Pty Ltd (No3)* (1978) 19 ALR 547 at 560 per Deane J (then sitting in the Full Court of the FCA, later in the HCA); *City of Montreal v Civic Parking Centre Ltd* (1981) 18 MPLR 239 at 256 per cur (Canada SC).
[17] See *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 682-683.
[18] See *Brigham's Creek Farms Ltd v New Zealand Milk Board* [1974] 1 NZLR 147 at 150.
[19] See *G J Colesa Co Ltd v Retail Trade Industrial Tribunal* (1986) 7 NSWLR 503 at 529; see also *Ealing London Borough Council v El Isaac* [198] 1 WLR 932 at 936; *Bromely London Borough Council v Greater London Council* [1983] 1 AC 768 at 837-838.

Law of Property Act enacts in modern form underlying property law principles that have been derived from the general law, the second reading speech discloses a clear intent to leave certain aspects of property law intact.

36. Accordingly, it is my opinion that there is jurisdiction in equity to entertain an action for account between co-owners independently of the statutory remedy contained in section 45 of the *Law of Property Act* – though, so far as the Supreme Court is concerned its general equitable jurisdiction has, for most, if not all, practical purposes been superseded by the statutory provisions.

37. The next and critical question is whether the Local Court has jurisdiction to entertain an action for account between co-owners as part of the equitable jurisdiction invested in the Court by section 14(1)(b) of the *Local Court Act*.[20] In other words, does the Local Court have concurrent jurisdiction (with the Supreme Court) to hear and determine an action for account between co-owners?

38. A similar issue arose in *CEO (Housing) v Binsaris* [2002] NTSC 9. The issue there was whether the Local Court, in the exercise of its equitable jurisdiction under section 14(1)(b) of the *Local Court Act*, has a jurisdiction in equity to grant relief from forfeiture under the *Tenancy Act*, which operates concurrently with the statutory discretion conferred upon the Supreme Court to grant relief from forfeiture.[21]

39. It was concluded that the Local Court had no such jurisdiction on the following grounds:

    1. Jurisdiction under section 138 of the *Law of Property Act* is vested exclusively in the Supreme Court.

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[20] Section 14(1)(b) provides that the Local Court has jurisdiction to hear and determine a claim for equitable relief if the value of the relief sought is within the jurisdictional limit. The jurisdictional limit is $100,000.

[21] See section 138 of the *Law of Property Act*.

2. If it were intended that the Local Court were to exercise a concurrent jurisdiction in equity it is curious that section 138 makes no reference at all to the Local Court.

3. The availability in the Local Court of equitable relief from forfeiture is incompatible with the provisions of the *Tenancy Act*, in particular section 48, as explained in *Mason and Mason v Northern Territory Housing Commission* (1997) 6 NTLR 152.

40. However, the issue in the present case is not as straightforward and as easily resolved.

41. On the one hand jurisdiction under the *Law of Property Act* – including the remedy provided by section - is vested solely in the Supreme Court. On the other hand, the Local Court is vested with jurisdiction to hear and determine a claim for equitable relief provided it is within the jurisdictional limit of $100,000. Equitable relief would seem to include an action in equity for account between co-owners.

42. It is clear from the *Law of Property Act* that the Supreme Court has the power to hear and determine an action for account between co-owners and to order a co-owner to account to another co-owner or owners where one co-owner has received more than his or her just or proportionate share. But what about the Local Court?

43. First, it is curious that neither the *Law of Property Act* nor section 45 makes any reference to the Local Court.[22] Given that the purpose of the Act was to modernise and reform the property law of the Northern Territory and to enact in modern form underlying property law principles that have been derived from the general law, one would expect that if the legislature had intended the Local Court to hear and determine actions in equity for account between co-owners, then it would have made provision within the *Law of Property Act* to confer comparable jurisdiction upon the Local Court (though perhaps subject to certain limitations), rather than relying upon the general

[22] By necessary implication the remedy provided by section 45 can only be granted by the Supreme Court.

jurisdictional provisions of the *Local Court Act*. It was open to the Northern Territory legislature to adopt the type of approach taken by Victoria when it enacted specific statutory provisions for accounting between co-owners in a similar manner to section 27 of the *Administration of Justice Act*. Under the Victorian *Property Law Act* 1958 certain actions for accounting can be heard by VCAT, while other actions can only be heard by a court. The Northern Territory legislature chose not to divide the jurisdiction in a comparable manner – that is as between the Supreme Court and Local Court. The approach taken by the Northern Territory suggests that the jurisdiction conferred by the *Law of Property Act* – including the relief afforded by section 45 – was to be exclusively exercised by the Supreme Court.

44. Furthermore, if the legislature had intended the Local Court to exercise equitable jurisdiction in relation to actions for account between co-owners, then it is difficult to comprehend why the legislature would confer a statutory jurisdiction upon the Supreme Court, but be content for the Local Court to exercise a comparable jurisdiction predicated upon a doubtful general equitable jurisdiction existing independently of the provisions of the *Administration of Justice Act* – particularly in light of the underlying purposes of the *Law of Property Act*. The *Law of Property Act* was enacted on the premise that the old imperial statute (the *Administration of Justice Act*) should not be repealed [23] without substitute provisions (such as section 45). The purpose of section 45 was to make clear the liability of a co –owner to account to another co –owner. In the process of clarifying the position it would seem that the legislature chose to confer exclusive jurisdiction upon the Supreme Court.

45. Secondly, section 45 of the *Law of Property Act* and section 14(1)(b) of the *Local Court Act* are apparently in conflict and inconsistent with each other.

[23] In particular section 27 of the *Administration of Justice Act*.

Applying the well established principle of statutory interpretation summed up in the latin maxim – *leges posteriors priores contrarias abrogant* – I have concluded that the Local Court does not have concurrent jurisdiction (pursuant to section 14(1)(b) of the *Local Court Act*) with the Supreme Court to hear and determine actions in equity for account between co-owners or to hear and determine any other matters of the type prescribed by the *Law of Property Act*. That conclusion is based on the following considerations:

1. The *Law of Property Act* was enacted after the *Local Court Act.* The *Law of Property Act* is therefore the later Act in time.

2. It is highly likely that the draftsman of the *Law of Property Act* was aware of the pre-existing general jurisdictional provisions of section 14(1)(b) of the *Local Court Act*; and that the former Act was drafted with full knowledge of the broad equitable jurisdiction previously vested in the Local Court.

3. The *Law of Property Act*, which vests sole jurisdiction in the Supreme Court, is an elaborate and detailed piece of legislation which was intended to modernise and reform the property law of the Northern Territory, and which enacted in modern form underlying principles that have been derived from the general law. The more detailed and elaborate later statutory provisions the more probable that it was intended that they should override earlier statutory provisions covering the same or similar subject matter.[24]

4. The *Law of Property Act* (including section 45) was intended to stand in the place of section 14(1)(b) of the *Local Court Act* insofar as that general jurisdictional provision conferred jurisdiction of the type conferred by the *Law of Property Act* upon the Supreme Court.

5. The *Law of Property Act* was intended to vest exclusion jurisdiction in the Supreme Court in relation to the subject matter of the legislation. By necessary implication the Local Court is precluded from exercising concurrent jurisdiction under section 14(1)(b) of the *Local Court Act* in relation to the areas of property law covered by the *Law of Property Act*.

46. It follows that the Local Court has no jurisdiction to hear and determine an action in equity for account between co-owners.

[24] See *Jennings Industries Ltd v Commonwealth* (1984) 57 ACTR 5 at 21.

47. However, in the event I am found to have erred in coming to that conclusion – and the Court does, in fact, have the relevant jurisdiction - I proceed to consider the remaining issues in these proceedings.

THE PLEADINGS ISSUE

48. As previously stated the defendant's counterclaim rested on the provisions of section 45 of the *Law of Property Act* – and was specifically pleaded in terms of that statutory provision. As the Court has found that the defendant is unable to invoke the provisions of section 45 in this court, the question that arises is whether the defendant can, in the alternative, rely upon an action in equity for an account between co-owners in circumstances where such an action has not been specifically pleaded.

49. The defendant submitted that the absence of a specific pleading in the alternative should not preclude the Court from considering the alternative equitable relief.

50. Paragraph 16 of the counterclaim reads as follows:

> In the alternative the defendant claims a set off in diminution or extinction of the sum claimed by the plaintiff by the amount owing to her as allowed in the second amended counterclaim as hereinafter appears.

51. In my opinion, paragraph 16 does not raise an alternative cause of action akin to an action for account between co-owners. It simply claims a set off by reason of the counterclaim (which is predicated on the provisions of s 45 of the *Law of Property Act*).

52. Read as a whole the amended defence and counterclaim fail to disclose – or adequately disclose - a suit in equity for account between co-owners.

53. The purpose of pleadings is to disclose all the issues in contention between the parties and which are to be determined at the trial. At no time prior to – or during the course of – the hearing was the Court or the plaintiff alerted to the possibility that the defendant was resting her counterclaim on an action

in equity for account between co-owners. Indeed, such an action does not appear to have ever been within the contemplation of the defendant. It was only after the Court queried the application of section 45 in these proceedings that the defendant sought to rely upon the alternative equitable relief.

54. The Local Court is a court of strict pleadings. Assuming that the Court is able to exercise equitable jurisdiction (in the nature of an action for account), should the Court permit a diversion from the counterclaim or hold the defendant to what is alleged?

55. The various authorities demonstrate that a court will not always strictly enforce the pleadings. Each case falls to be determined by its own individual circumstances. It is always a matter of determining at what stage the court should "stop a party from digressing too far from the issues raised on the pleadings".[25]

56. In the present case I consider that it would be permissible for the defendant to rely upon the unpleaded alternative action for the following reasons:

1. It is clear from the existing pleadings that the issue between the parties was whether the defendant remained a co-owner of the boat. If the defendant was not a co-owner at the time the boat was sold, then the defendant would not be entitled to equitable relief in any shape or form.

2. The Court heard evidence from both parties in relation to the issue. Whether the defendant relied upon section 45 of the *Law of Property Act* or an action in equity for account, the evidence would remain the same. If the defendant were allowed to rely upon an action in equity for account there would be no need for the Court to hear further evidence.

3. In essence, section 45 of the *Law of Property Act* encapsulates the general law that preceded the passing of the *Administrative of Justice Act*. In other words, the statutory provision embraces the principles applicable to an action in equity for account between co-owners.

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[25] See Cairns *Australian Civil Procedure* 9th edition p 207.

4. No prejudice would be occasioned to the plaintiff by allowing the digression from the pleadings.

5. It is in the interests of justice to allow the defendant to digress from the pleadings.

57. Technically, the counterclaim should be amended to incorporate the alternative equitable relief. I intend to hear the parties in relation to the necessary amendment.

THE MERITS OF THE COUNTERCLAIM

58. Assuming the Court does, in fact, have jurisdiction to hear an action in equity for account between co-owners (which is contrary to the Court's ruling), the threshold question is whether the defendant was a co-owner of the boat at the time it was sold by the plaintiff to a third party. Unless the defendant can establish that she retained an interest in the boat as a co-owner, a suit in equity for account cannot succeed.

59. Whether or not the defendant remained a co-owner of the boat depends upon the construction placed by the Court upon the agreement reached between the parties in February 2009.

60. According to the plaintiff the parties reached an agreement that the defendant would pay to the plaintiff the sum of $120,000 in consideration of the plaintiff transferring his interest in the house at Humpty Doo, including the household furniture and other assets located at the premises. As part of the agreement the plaintiff was to keep the boat, which was then in his possession. According to this view of the agreement the defendant ceased to be a co-owner of the boat.

61. The defendant placed a different interpretation on the agreement. According to her the agreement only related to the house and furniture, and did not extend to the other assets, including the boat. Accordingly, the defendant remained a co-owner of the boat.

62. It should be noted at the outset that neither party disputed the existence of a binding and enforceable contract: all the essential elements of a contract – offer and acceptance, consideration and an intention to create legal relations were acknowledged to be present. The dispute between the parties went to the scope of their agreement.

63. What were the actual terms of the agreement between the parties? The answer to that question depends upon a proper construction of the contract.

Principles Governing the Construction of Contracts

64. The actual terms of a contract are those which the parties objectively intended to include in it. [26]They comprise not only the terms expressed by the parties, but also those terms which it must be inferred they intended, although they were not expressed.

65. The objective approach to the construction of contracts prevails nowadays:

> Both in determining what terms have been incorporated in a contract and interpreting those terms, the task of construction is not to ascertain the subjective intention of the parties, but rather to determine what a reasonable person in their situation would have intended or assumed.[27]

66. According to this approach, evidence of the subjective intention of the parties is irrelevant, and the court cannot receive evidence from one party as to its intentions, and construe the contract by reference to those intentions.[28]

67. The objective approach takes into account the objective backdrop:

> The objective background extends beyond the external circumstances in which the contract was made, in that it includes the purposes and assumptions shared by the parties. Though such purposes or assumptions are "subjective" in the sense of representing individual states of mind, the

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[26] See *Riverwood International Australia Pty Ltd v Carmichael* (2000) 177 ALR 193 at 208. See also Seddon and Ellinghaus *Cheshire and Fifoot's Law of Contract* 9th edition at [10.17].

[27] See Seddon and Ellinghaus n 26 at [10.1]. See *Equuscorp Pty Ltd Glengallan Invetsments Pty Ltd* [2004] HCA 55 where it was held that the legal rights and obligations of parties turn on what their words and conduct would be reasonably understood to convey – not on their actual beliefs or intentions.

[28] If a court inadvertently receives evidence of the subjective intention of the parties then it should disregard such evidence in determining the actual terms of a contract.

> fact of their occurrence converts them into objective constituents of the transaction.[29]

68. The objective background of the relevant transaction includes its factual matrix, its genesis and aim, and the common assumptions of the parties. [30]

69. In Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd [2004] HCA 52 the High Court stated:

> References to the common intention of the parties to a contract are to be understood as referring to what a reasonable person would understand by the language in which the parties have expressed their agreement. The meaning of the terms of a contractual document is to be determined by what a reasonable person would have understood them to mean. That normally requires consideration not only of the text, but also of the surrounding circumstances known to the parties, and the purposes and object of the transaction.

70. However, there appears to be some controversy as to whether the subsequent conduct of the parties is inadmissible for the purposes of interpreting the terms of a contract:[31]

> In England the view has been adopted that the meaning of a contract must be determined as at the time when the contract was made, and that evidence of the subsequent conduct of the parties is inadmissible in the interpretation of a contract document.[32] However, Australian courts have not been unanimous on this point. Although there are dicta in two modern High Court judgments which offer some support for the view that such

[29] See Seddon and Ellinghaus n 26 at [10.13].
[30] See Seddon and Ellinghaus n 26 at [10.32].
[31] See Seddon and Ellinghaus n 26 at [10.16].
[32] See *L Schuler AG v Wickham Machine Tool Sales Ltd* [1974] AC 235. Distinguish evidence of subsequent conduct on whether a contract was formed which is admissible. See for example *Isotomic Pty Ltd v Adelaide International Racecourse Pty Ltd* [2007] SASC 111 at [54].

evidence is inadmissible,[33] the dogmatic application of this view is open to criticism,[34] and at odds with other (including High Court) authorities.[35] At the same time many courts have continued to profess adherence to it.[36]

However, evidence of post-contractual conduct may be admissible on the issue of implication.[37]

The Proper Construction of the Contract

71. The task of the Court is to construe the 2009 contract in light of the governing principles and the relevant evidence before the court.

72. In my opinion, it is more probable than not that the parties objectively intended that their agreement resolve all property issues between them, and that the agreement was that the plaintiff would transfer his right title and interest in the Humpty Doo property (including the household furniture) in consideration of being paid the sum of $120,000 - $98,000 to be paid forthwith, with the balance of $22,000 to be paid within 12 months; and that all other assets then in the possession of either party become their sole property. That objective intention is derived from the following evidence and proven facts and circumstances.

73. The plaintiff gave evidence that after he had separated from the defendant he wanted to split up all of the property owned by him and the defendant. To that end he had provided the defendant with an appraisal obtained from NT Realty; but the defendant did nothing about settling the matters between them. However, the defendant eventually came up with a resolution, offering

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[33] See *Administration of Papua and New Guinea v Daera* (1973) 130 CLR 353 at 446; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 348. See also *Maynard v Goode* (1926) 37 CLR 529 at 538; *AMP Society v Chaplin* (1978) 18 ALR 385 at 392; *Narich Pty Ltd v Commissioner of Pay-Roll Tax* (1983) 50 ALR 417 at 420.

[34] For relevant commentary and authorities see Seddon and Ellinghaus n 26 at [10.16] fn 156.

[35] See *Howard Smith &Co Ltd v Varawa* (1907) 5 CLR 68 at 78; *Hart v McDonald* (1910) 10 CLR 417; *Farmer v Honan* (1919) 26 CLR 183 at 197; *Thornley v Tilley* (1925) 36 CLR 1 at 11; *Sinclair Scott & Co v Naughton*(1929) 43 CLR 310 at 327; *White v Australian and New Zealand Theatres Ltd* (1943) 67 CLR 266; see also *Terex Resources NL v Magnet Petroleum Pty Ltd* [1988] 1 WAR 144 at 160; *Darter Pty Ltd v Malloy*]1993] 2 QD R 615 at 619; *Spunwill Pty Ltd v BAB Pty Ltd* [1994] 36 NSWLR 290. In *Royal Botanic Gardens and Domain Trust v South Sydney City Council* [2002] HCA 5 at [108] Kirby J acknowledged the existence of "different views" on the matter, but found it unnecessary to resolve them.

[36] For relevant authorities see Seddon and Ellinghaus n 26 at [10.16] fn 158.

[37] For relevant authorities see Seddon and Ellinghaus n 26 at [10.16] fn 158.

to pay the plaintiff the sum of $120,000, to which the plaintiff replied "That's great, that will do".

74. The plaintiff's evidence relates to the circumstances predating the agreement and the genesis and purpose or object of the agreement. The plaintiff's evidence is highly relevant to the objective intention of the parties.

75. It is significant that neither in evidence in chief nor cross examination did the defendant deny the plaintiff having originally indicated a desire for all of the property to be split up.

76. The matter was specifically raised at page 36 of the transcript of proceedings on 22 March 2013. There the following exchange occurred between the defendant and counsel for the plaintiff:

> Q: His recollection is very different, and that is that he wanted to split everything equally and that you were the one that came up with 120.000 as the figure, because that was all that you could pay him. What do you say to that?
>
> A: That he was in agreement with it.

77. In my opinion, the evidence given by the defendant in response to the cross-examiner's question amounts to a tacit acceptance of the fact that the plaintiff had communicated a desire to settle all of their property matters.

78. In any event, I am reasonably satisfied on the balance of probabilities that the plaintiff conveyed to the defendant that he wished to split up all their property, and that the defendant was aware of the plaintiff's desire. This is an external circumstance that needs to be considered in determining what the parties intended to be covered by their subsequent agreement.

79. The next relevant external circumstance is that at the time the agreement was struck between the parties, whereby the defendant was to pay the plaintiff the sum of $120,000 in consideration of the plaintiff transferring his right, title and interest in the Humpty Doo property, no mention was

made of the other co-owned assets. Against the background of the plaintiff's desire to effect an all-inclusive property settlement, this circumstance is consistent with the parties having intended that the agreement was to be a once and for all settlement of all their property.

80. A further relevant circumstance is that at the time the agreement was reached the parties then had in their possession various items of co-owned assets.[38] The absence of any reference to those assets is consistent with the parties having intended that the agreement was to be all inclusive, with the result that each party would become the sole owner of the assets currently in their possession.

81. A very significant circumstance evincing the objective intent of the parties is the statutory declaration signed by the defendant, acknowledging her indebtedness to the plaintiff for the sum of $22,000.[39] As submitted on behalf of the plaintiff, it is surprising that the statutory declaration which, in effect recorded a contractual obligation on the part of the defendant, made no mention of the defendant retaining an interest in the boat. If the defendant remained a co-owner of the boat, one would reasonably expect that she would have been keen to ensure that the acknowledged debt would be subject to her retaining an interest in the boat. The absence of any reference to her continuing ownership of the boat is indicative that the agreement between the parties was an all –inclusive property settlement, whereby the defendant was to relinquish her interest in the boat as co-owner.

82. There is a further circumstance that tells against the defendant's version of the agreement and her assertion that she remained a co-owner of the boat. According to the defendant the boat was to be available for both of them to use.[40] However, this presents as a highly improbable arrangement. It is

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[38] The defendant was in possession of the household furniture and various vehicles. The plaintiff was in possession of the boat which is the subject matter of the defendant's counterclaim.
[39] See Exhibit P2.
[40] According to the defendant it was assumed that they would be sharing the boat – "when he needed it, he can go. When I needed it, I could go". She added that "it wasn't that he could sell it".

difficult, if not impossible, to conceive of the plaintiff and the defendant having a sharing arrangement in relation to the boat, given the hostile non-communicative relationship between the parties that existed prior to and at the time the 2009 agreement.

83. Furthermore, in determining the objective intention of the parties it is permissible to have regard to the manner in which estranged partners conduct themselves – in the ordinary course of events – in relation to the resolution of property disputes. As a matter of ordinary human experience, where parties settle their differences they do so by agreeing to a complete property division. I accept that there might be exceptions. However, I think it is inherently unlikely in the present case that the plaintiff and the defendant agreed to a less than complete division of property as contended by the defendant.

84. In addition to all of the mentioned external circumstances, there was a vital piece of evidence that completely undercut the defendant's interpretation of the agreement. The following exchange took place between the defendant and the counsel for the plaintiff at page 37 of the transcript :

> Q: And I suggest to you that the reason that neither of you mentioned this, is because you both accepted that the property settlement of $120,000 was to resolve all issues between you, even though it wasn't said, it was clear wasn't it?
>
> A: Yes. 120,000. Yes.
>
> Q: Now just to (inaudible) fair Ms Turner, the 120,000 I just put to you was to resolve all of your property issues between you?
>
> A: Yes.

85. It is noted that the defendant was not re-examined as to any latent ambiguity or uncertainty as to the evidence she gave during cross –examination.

86. However, even without the defendant's own adverse evidence, all the other evidence is more than sufficient to enable the Court to ascertain the common

intention of the parties – that is to determine what a reasonable person in the situation of the plaintiff and the defendant would have intended or assumed. In my opinion, having regard to all of the surrounding circumstances known to the parties, a reasonable person in the situation of the parties would have intended the 2009 agreement to be an all inclusive agreement covering all property, including the boat. I am reasonably satisfied on the balance of probabilities that it was the common intention of the parties that the purpose or object of the agreement was to resolve all property matters between them; and by force of that agreement the defendant divested herself of any interest in the boat, and from that time onwards ceased to be a co-owner of the boat.

87. There is one further aspect which I feel should be addressed, though its resolution is not essential to the Court's determination of the terms of the agreement between the parties. It concerns the post contractual conduct of the defendant, and its effect on the court's construction of the agreement.

88. As pointed out earlier there is uncertainty as to whether evidence of the subsequent conduct of parties is admissible for the purpose of interpreting an agreement and its terms. However, if the law supports the admissibility of such evidence, then the post contractual conduct of the defendant should be viewed as further undermining her interpretation of the agreement.

89. The evidence shows that the boat was in the possession of the plaintiff as at the date of the 2009 agreement, and remained in his possession until the time it was sold. It is significant that although the defendant expected the plaintiff to return the boat to the Humpty Doo property (because the plaintiff did not have sufficient room to store the boat at his rented Nightcliff premises), the defendant never requested him to return the boat. Nor was there any discussion between the parties as to why the defendant's expectations had not been fulfilled – and how the so called sharing arrangement would actually work. More significantly, at no time between the 2009 agreement and the sale of the boat did the defendant make a

request to use the boat. Her explanation was a very lame – and ultimately unconvincing - excuse to the effect that she did not have "much of an opportunity to go fishing due to work commitments".

90. In my opinion the subsequent conduct of the defendant is completely at odds with the defendant's contention that the 2009 agreement did not result in her relinquishing her interest (as co-owner) in the boat.

91. There was another aspect of the defendant's subsequent conduct that counsel for the plaintiff sought to capitalise on. This relates to the defendant's pleadings – and in particular the credibility of her counterclaim in its amended form.

92. The Counterclaim filed on 15 June 2012 alleged as follows:

> 1. The plaintiff and defendant entered into an agreement with respect to division of property upon the breakdown of their de facto relationship in or about January 2009.
>
> 2. A term of the agreement was that the plaintiff would pay to the defendant a sum equal to half the value of the boat jointly owned by the parties as at the date of separation and which was to have been sold by the plaintiff.
>
> 3. The plaintiff sold the boat but has not accounted to the defendant for half of the proceeds.
>
> 4. At the time of separation the boat was valued at $28,000 and had been fully equipped at a cost of a further $8,000 and
>
> 5. The defendant claims the sum of $16,000.

93. It is clear that the initial counterclaim is at odds with the amended counterclaim.

94. When the defendant was taken to her earlier counterclaim by counsel for the plaintiff during cross examination she was unable to satisfactorily explain

it.[41] The defendant appeared to say that the agreement alleged in the counterclaim was not the agreement she had with the plaintiff. Rather, it was assumed that the defendant would share use of the boat with the plaintiff. So what should the Court make of this? To what, if any, extent, should the patent inconsistency between the defendant's two counterclaims impact upon the credibility of her counterclaim against the plaintiff - and inferentially her version of the 2009 agreement?

95. This is a matter in respect of which I have not had the benefit of submissions from the parties. However, my tentative view is that the inconsistency between the two pleadings – and the lack of a satisfactory explanation for that inconsistency – is a matter that reflects adversely upon the credibility of the amended counterclaim.

96. Although the two counterclaims and accompanying notices of defence were unsworn and, therefore, unverified, one has to proceed on the basis that the earlier counterclaim was prepared and filed in accordance with instructions received from the defendant. The fact that the defendant dramatically shifted her position in relation to the nature of the 2009 agreement and failed to give a satisfactory explanation for the change in position inevitably impugns the accuracy and credibility of her latest version of that agreement – and is an external (post contractual) circumstance that is relevant to the Court's proper construction of the agreement, which is directed at ascertaining the objective contractual intention of the parties.

97. In my opinion, these additional aspects militate against the defendant's interpretation of the agreement. However, as stated above, they are not necessary grounds for the conclusion that it was intended by the parties that the 2009 agreement would divest the defendant of all interests in the boat, thereby terminating her co-ownership of the boat.

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[41] See pages 45-47 of the transcript of the proceedings on 22 March 2013.

98. The end result is that in the event the Local Court has, in fact, jurisdiction to entertain an action in equity for account between co-owners, [42] there is no basis for the Court granting the relevant relief because the defendant ceased to be a co-owner by reason of the 2009 agreement.

THE COURT'S DECISION

99. The Court orders as follows:

   1. That there be judgment in favour of the plaintiff in the sum of $22,000.

   2. That the defendant's counterclaim be dismissed.

100. I will hear the parties, in due course, in relation to costs.

Dated this 28th day of June 2013

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Dr John Allan Lowndes
DEPUTY CHIEF MAGISTRATE

[42] The Court having ruled otherwise.