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FORGEARD v SHANAHAN †

Court of Appeal: Kirby P, Mahoney JA and Meagher JA

13 May, 11 October 1994

Partition — Statutory trust for sale or partition — Common law principles — Application to statutory discretion — Conveyancing Act 1919, s 66G.

B

Partition — Statutory trust for sale or partition — Principle for payment of an occupation fee by one co-owner — Exclusion of other co-owner — Claim for cost of improvements — Conveyancing Act 1919, s 66G.

Partition — Statutory trust for sale or partition — Principles for calculation of an occupation fee by one co-owner — Where one co-owner effects improvements to the property — Conveyancing Act 1919, s 66G.

C

Partition — Statutory trust for sale or for partition — Allowance for mortgage repayments, water rates and council rates by one co-owner — Arises from contribution and not common ownership.

Real Property — Joint tenancy and tenancy in common — Incidents — Improvements by co-owner — Entitlement to payment — Claim for occupation fee — Calculation of payment for "improvements" — Conveyancing Act 1919, s 66G.

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The *Conveyancing Act* 1919, s 66G, institutes a scheme for statutory trusts for sale of jointly owned property.

Held: (1) (By Mahoney JA and Meagher JA; Kirby P contra) In formulating the principles to be applied in the exercise of the statutory discretion contained in the *Conveyancing Act* 1919, s 66G, the Court should have regard to the decisions in analogous partition and similar cases at common law. (219E)

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(2) (By Meagher JA with whom Mahoney JA agreed; Kirby P dissenting) In common law partition and similar cases, the rights of one co-owner against another co-owner of real property, when one has been in occupation and the other has not, include:

(a) the payment of an occupation fee by the co-owner in possession but only where:

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(i) the other co-owner has been excluded from occupation; or

Pascoe v Swan (1859) 27 Beav 508; 54 ER 201, referred to.

(ii) the owner in occupation claims an allowance in respect of improvements.

Teasdale v Sanderson (1864) 33 Beav 534; 55 ER 476, referred to.

(b) the entitlement to an allowance in favour of a co-owner in occupation who effects improvements (which is more than mere repairs and maintenance) is for the lesser of the value of the enhancement of the property and the cost of effecting the repairs, where the non-occupying owner seeks an occupation fee. (214G, 219B, 221E-224F)

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Williams v Williams (1899) 68 LJ (Ch) 52; *Swan v Swan* (1820) 8 Price 518;

† [EDITORIAL NOTE: An application for special leave to appeal to the High Court has been filed.]

146 ER 1281; *Parker v Trigg* [1874] WN 27; *Watson v Gass* (1881) 51 LJ (Ch) 480; *Re Jones; Farrington v Forrester* [1893] 2 Ch 461; *McMahon v Public Curator of Queensland* [1952] QSR 197, referred to.

(3) Accordingly, in determining the rights of joint tenants for the purposes of making orders pursuant to the *Conveyancing Act* 1919, s 66G, where one owner has left the jointly owned property but has not been excluded from occupation:

(a) insurance premiums and expenses for pest control incurred by the occupying co-owner cannot be claimed as improvements which are recoverable from the other owner;

(b) an occupation fee should be charged to any occupying owner but the fee should not exceed the value of improvements made by the occupying owner; and

Brickwood v Young (1905) 2 CLR 387, considered;

(c) an allowance should be made in favour of the owner making mortgage repayments, water and council rates, but such allowance arises from a claim for contribution for payments made by one debtor of a debt jointly owed and not because of the co-ownership of real estate. (214G, 219B, 224F-226B)

Muschinski v Dodds (1985) 160 CLR 583, followed.

Note:

A Digest — REAL PROPERTY (3rd ed) [21], [315]; (2nd ed) [35]; PARTITION (2nd ed) [12]

CASES CITED

The following cases are cited in the judgments:

Baumgartner v Baumgartner (1987) 164 CLR 137.
Boulter v Boulter (1898) 19 LR (NSW) Eq 135.
Brickwood v Young (1905) 2 CLR 387.
Cook's Mortgage, Re; Lawledge v Tyndall [1896] 1 Ch 923.
Creswell v Hedges (1862) 1 H & C 421; 158 ER 950.
Dennis v McDonald [1982] Fam 63; [1982] 1 All ER 590.
Dwyer v Kaljo (1992) 27 NSWLR 728.
Fettell, Re (1952) 52 SR (NSW) 221; 69 WN (NSW) 186.
Ford v Lord Grey (1703) 1 Salk 285; 91 ER 253; (1703) 6 Mod 44; 87 ER 807.
Goodtitle v Tombs (1770) 3 Wils KB 118; 95 ER 965.
Griffies v Griffies (1863) 8 LT 758.
Hayward v Skinner [1981] 1 NSWLR 590.
Henderson v Eason (1851) 17 QB 701; 117 ER 1451.
Jacobs v Seward (1872) LR 5 HL 464.
Jones, Re; Farrington v Forrester [1893] 2 Ch 461.
Jones v Brown (1856) 25 LJ (Ex) 345.
Leigh v Dickeson (1884) 15 QBD 60.
Luke v Luke (1936) 36 SR (NSW) 310; 53 WN (NSW) 101.
M'Mahon v Burchell (1846) 5 Hare 322; 67 ER 936.
McCormick v McCormick [1921] NZLR 384.
McMahon v Public Curator of Queensland [1952] QSR 197.
Mallet v Mallet (1984) 156 CLR 605.
Muschinski v Dodds (1985) 160 CLR 583.
Ngatoa v Ford (1990) 19 NSWLR 72.
Pannizutti v Trask (1987) 10 NSWLR 531.
Parker v Trigg [1874] WN 27.
Pascoe v Swan (1859) 27 Beav 508; 54 ER 201.
Pemberton v Barnes (1871) LR 6 Ch App 685.
Rees v Rees [1931] SASR 78.
Rice v George (1873) 20 Gr 221.

Scapinello v Scapinello [1968] SASR 316.
Singer v Berghouse [No 2] (1994) 65 ALJR 653; 123 ALR 481.
Squire v Rogers (1979) 39 FLR 106; 27 ALR 330.
Strelly v Winson (1685) 1 Vern 297; 23 ER 480.
Swan v Swan (1820) 8 Price 518; 146 ER 1281.
Teasdale v Sanderson (1864) 33 Beav 534; 55 ER 476.
Tolman's Estate, Re (1928) 23 Tas LR 29.
Watson v Gass (1881) 51 LJ (Ch) 480.
Wheeler v Horne (1740) Willes 208; (1740) 125 ER 1135.
Williams v Williams (1899) 68 LJ (Ch) 528.

No additional cases were cited in argument and submissions.

APPEAL

This was an appeal from the decision of Rolfe J concerning an account taken between joint owners following an order for the sale of jointly owned property pursuant to the *Conveyancing Act* 1919, s 66G.

C M Harris, for the appellant.

M L Brabazon, for the respondent.

Cur adv vult

11 October 1994

KIRBY P. In this appeal from the Equity Division of the Supreme Court (Rolfe J), this Court has been involved in a review of an adjustment of the competing claims of the parties, each against the other, following a breakdown of their personal relationship. The amounts involved in the competing claims are small in absolute terms. They are even smaller in terms of the differences between the nett adjustment, when the competing approaches of the parties are compared. As often happens, the complications of the applicable legal principles vary in inverse proportion to the amount at stake in the proceedings.

In my view, it is as inappropriate to apply to the adjustment required, the supposed "rules" favoured by Meagher JA, in the exercise of the statutory discretion which was invoked, as it is to apply to personal relationships in today's Australian society, the epithets used by Meagher JA, such as "mistress" and "paramour". Principles of law, like language, must keep pace with the society that the law serves.

The breakdown of a personal relationship: property consequences:

Mr John Forgeard (the appellant) began living with Ms Helen Shanahan (the respondent) some time between 1968 and 1972. The difference in the commencement date matters not. The parties entered a de facto married relationship. During the relationship, each of the parties worked, the respondent with interruptions.

In 1975, the parties purchased together a home in Penshurst. The names of each were shown on the certificate of title. They were registered as proprietors as joint tenants. Each contributed from joint savings to the deposit. For the balance, a loan was obtained from a building society, secured by a registered first mortgage.

A The parties lived together until October 1981. At that time, Mr Forgeard left the home in Penshurst. The personal relationship was terminated. A dispute between the parties arose as to whether Ms Shanahan thereafter changed the locks and denied Mr. Forgeard access to the property. Rolfe J had before him conflicting evidence on this point. For some reason, the parties did not pursue it by cross-examination. Rolfe J was therefore unable to resolve the conflict. This led him to dismiss Mr Forgeard's claim that he B had been physically excluded from the property of which he was co-owner.

Ms Shanahan did not sell the property, although Mr Forgeard had agreed that they should do so on the basis that they should divide the proceeds of the sale equally between them. Ms Shanahan had children from an earlier relationship. She and they treated the house as their home. Ms Shanahan and her children continued to reside there. At some later time, Ms Shanahan established another de facto married relationship. Her companion moved in and lived with her in the Penshurst home.

C Mr Forgeard continued for a time to make mortgage payments in respect of the Penshurst property. However, by June 1982 he ceased making such payments. Thereafter, Ms Shanahan made all of the mortgage payments as they fell due. She also paid the local council rates, water rates, insurance payments on the property and other outgoings.

In January 1983, Mr Forgeard commenced proceedings in the Equity Division of the Supreme Court. He sought an order under the *Conveyancing* D *Act* 1919, s 66G, for the appointment of statutory trustees for the sale of the jointly owned property. Had those proceedings been prosecuted with more vigour, it might have been expected that many of the problems of adjustment which subsequently arose, could have been avoided. But it was not to be so. The proceedings were not heard by Rolfe J until December 1990. His Honour delivered his judgment in February 1991. Final orders were made in April 1991.

E The orders made appointed trustees for the sale of the Penshurst property. The orders vested the land in such trustees to be held upon the statutory trusts for sale provided by the Act. After the sale of the land at auction, the trustees were ordered to deduct from the proceeds of the sale, certain items which are not in dispute (for commission and legal expenses of the trustees and legal expenses of post-sale transfer), but also one item which is in dispute, being an adjustment payable to Ms Shanahan.

F Subject to such deductions, the balance of the proceeds of the sale were ordered to be divided equally between the parties, "subject to the accounting by the trustees set out in the next succeeding order".

That order read:

> "All payments in respect of mortgage repayments, water rates, council rates, insurance and pest control in respect of the said land and property … from 12 November 1990 until the completion of the sale of the said property by the trustee shall be borne by the plaintiff and the defendant G equally and to the extent that any monies become payable to either the plaintiff and/or the defendant shall be accounted for by the trustees in the manner set forth in [the reasons of Rolfe J]."

The orders contained a declaration that Ms Shanahan was entitled to a contribution of $40,587.12 from Mr Forgeard in respect of her cross-claim. Certain proceedings commenced by her in the District Court were stayed.

Some of the items previously in dispute are not now in dispute between the parties. Thus, Mr Forgeard conceded that the adjustments in favour of Ms Shanahan in the sum of $40,587.12 found by Rolfe J, stood to her credit in the final accounting. That sum represented the aggregate of amounts paid by Ms Shanahan for sums paid to various lending institutions. But the central question which was tendered to Rolfe J for decision, concerned the way in which mortgage payments should be adjusted and whether there should be any allowance for the use and occupation of the premises by Ms Shanahan between the time Mr Forgeard left and the time the property was sold. A further question arose, if the last-mentioned sum were found to be payable, as to how the adjustments should then be worked out between the parties.

Competing contentions of the parties:

Mr Forgeard conceded, in addition to the sum of $40,587.12 mentioned above, that a number of contributions would have to be made in respect of the mortgage payment made by Ms Shanahan in relation to the Penshurst property.

He accepted that Ms Shanahan had paid $36,100 in mortgage repayments. He asserted that he had paid $3,159 in mortgage payments until he ceased such payments in June 1982. Although this was in dispute, Rolfe J determined that dispute in favour of Mr Forgeard. Accordingly, Mr Forgeard conceded that Ms Shanahan was entitled to contribution for the mortgage payments in the sum of $16,470.50, being one-half of $36,100 less the sum of $3,159 found to have been paid by him. In all, therefore, Mr Forgeard conceded a credit in favour of Ms Shanahan of $57,057.62.

To off-set this credit (which Ms Shanahan claimed) Mr Forgeard sought countervailing allowance to be made for the following items:

Allowance for occupation fee between October 1981 and November 1990	$68,290.00
Mr Forgeard's share (being one-half)	34,145.00
Less Ms Shanahan's entitlement of the nett adjustment in favour of Mr Forgeard	(-) 16,470.50
Balance owing:	$17,674.50

In addition, Mr Forgeard claimed entitlement to an adjustment of $168 per month for each month after November 1990 until the subject property was sold. That amount was made up of Mr Forgeard's entitlement to half the imputed rent of $368 per month, less Ms Shanahan's entitlement to contribution to the mortgage payments of $200 per month. Upon the basis that the property was sold by contract in August 1991 and the sale completed and the property vacated in October 1991, Mr Forgeard claimed $1,848 additional occupation fee.

Mr Forgeard sought variation of order 4 of the orders of Rolfe J to accord with this product of the mutual adjustments.

Upon several of the items in the adjustments set out above, Rolfe J's approach accorded with that urged for Mr Forgeard. However, there was one major point of difference. This concerned the entitlement of Mr Forgeard to recover an occupation fee from Ms Shanahan in excess of the mortgage payments made by Ms Shanahan. Rolfe J concluded that he was forbidden by legal authority from ordering an adjustment in favour of Mr Forgeard in such terms. His Honour held:

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> "The question is whether the plaintiff is entitled to the benefit of this amount. In my, opinion the decision in *Brickwood v Young* (1905) 2 CLR 387 yields a negative answer to this question for the reasons, albeit with the qualification I have already given. In the result the claim for use and occupation fee in excess of the mortgage payments fails."

It was this determination by Rolfe J — and the consequence which it had on the ultimate adjustments between the parties — which became the focus B of the submissions to this Court in the appeal. The other members of this Court are of the opinion that the conclusion of Rolfe J was correct. With respect to his Honour and to the majority, I do not agree.

The approach to adjustments on statutory sale:

A glance at the "rules" found in the old cases to govern the adjustment of the rights of disputing co-owners at common law and in equity (collected in the reasons of Meagher JA), demonstrates how inappropriate it is to permit C at least some of them to control the exercise of the judicial discretion conferred on a judge of this Court by a statute made by the parliament of this State.

Most of the "rules" were developed long before the existence of the phenomena to which the statute must now typically apply, as in the instant case. I refer, for example, to:

1. The widespread ownership of real property by working people and D especially the exceptionally high incidence of home ownership in Australia;

2. The high incidence in contemporary Australian society of home ownership, including co-ownership, by women;

3. The changed nature and availability of credit and the widespread availability of consumer credit;

4. The high levels of de facto married relationships which have now become an unremarkable feature of our society. At the time the "rules" were E developed, such relationships were exceptional and generally regarded as a scandal;

5. The frequent treatment of de facto married relationships as mainly equivalent for legal purposes to marriage, with incidents such as co-ownership, including of real property, which need to be sorted out when the relationship breaks down; and

6. The high incidence of breakdown of such relationships and the F consequent necessity for the courts to adjust the claims of the parties according to principles apt to the sense of justice and the requirements of conscience today — as distinct from by reference to "rules" developed for the adjustment of property claims expressed long ago and far away, usually for completely different problems in utterly different social conditions.

It is true that s 66G of the *Conveyancing Act* 1919 institutes a scheme for statutory trusts for sale (or partition) of jointly owned property. It is also true that the statutory scheme replaces the trusts earlier devised by the courts of G Chancery and other remedies developed by the common law. But it would be a serious mistake, in my view, to assume that the modem exercise of the judicial discretion provided by s 66G of the *Conveyancing Act* is to be blinkered and bridled by the earlier "rules". Particularly this would be a mistake where the discretion invoked is to be applied to the adjustment of the claims and counter-claims of parties such as the present in a de facto

married relationship where the Court's final order must reflect a result which accords with the community's sense of justice and its perception of the requirements of conscientious conduct. A

One has only to run one's eyes through the "rules" collected in the reasons of Meagher JA, to see how inappropriate some of the pre-existing "principles" would be for the adjustment of the rights of co-owners, when applied to the exercise of judicial discretion, conferred by parliament to ensure a just resolution of a dispute between co-owners today. How could it possibly be within the scope of the powers conferred by parliament by s 66G of the *Conveyancing Act*, to hold, as a blanket rule, that the law should treat a co-owner, not actually ousted or excluded from the property, as a person who has "chosen not to exercise his legal right to occupy the land"? Such a rule would completely fail to take into account the multitude of reasons which may explain a withdrawal from land held in co-ownership after the breakdown of the personal relationship which occasioned the creation of the co-ownership in the first place. How could it be said, in the face of the discretion conferred by s 66G, that a co-owner, not in occupation, is today to be taken as "normally virtually without remedy"? The notion that the secret removal of chattels by one co-owner for the purpose of selling them and applying them for his or her own use, does not amount to a conversion or confer any right whatever on a co-tenant to sue in trover, is so offensive to reason that it would take the strongest authority of the High Court of Australia or of this Court to oblige me to say that it was the law of this jurisdiction today. If it was thought safe to repeal the Statute of Anne (4 & 5 Anne, c 3, s 27) by the *Imperial Acts Application Act* 1969, this was doubtless out of the belief that such a repeal would not restore to the law of this State the principles derived in the fourteenth and fifteenth centuries in feudal England. It is not "high minded but ignorant people" who secured the repeal; but parliament. I would not infer that the repeal wrought the havoc which Meagher JA concludes. The Statute of Anne could be safely repealed in 1969 because modern notions of equity — and the proper exercise of judicial discretions conferred by parliament — render the instruction of the Statute of Anne unnecessary in contemporary circumstances. The Statute of Anne does no more than to express the principle that, in disputes between co-owners, they should account to each other for "a just share or proportion" of the outgoings and income attributable to the property jointly owned. As most such disputes in this State are now determined by agreement or, in default of agreement amongst unmarried couples by the application of s 66G of the *Conveyancing Act*, it would have been perfectly reasonable for parliament to assume that the principle adopted by the Statute of Anne would be sufficiently incorporated in our law by the proper exercise of the powers conferred on the Court by s 66G. B C D E F

The history of those powers was traced by me in *Pannizutti* (1987) 10 NSWLR 531 (with the concurrence of McHugh JA and, relevantly, of Needham A-JA). The present statutory provision is descended from the *Partition Act* 1868 (Imp) (31 and 32 Vic, c 40). By s 4 of that Act, it was provided: G

> "In a Suit for Partition, … if the … Parties interested, individually or collectively, to the Extent of One Moiety or upwards … request the

A Court to direct a sale … the Court shall, unless it sees good Reason to the contrary, direct a Sale of the Property ….”

That provision was considered by the House of Lords in *Pemberton v Barnes* (1871) LR 6 Ch App 685. Lord Hatherley LC (at 693) considered the operation of the section and the scope for refusing relief under it:

> “… the onus is thrown on the person who says that the Court ought not to order a sale, to shew some good reason why it should not do so; otherwise, the Court is bound to order it … But still there is a certain discretion left to the Court, so that the Court can refuse a sale where it is manifestly asked for through vindictive feeling, or is on any other ground unreasonable.”

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The English Act was substantially copied in New South Wales by the *Partition Act* 1878. Section 4 of that Act empowered the Court, on a request of any of the parties interested “if it thinks fit”, to direct a sale of the property. Section 5 is in material parts a copy of s 4 of the *Imperial Act*. Each of the sections was expressed to apply: “In a suit for partition is, here if this Act had not been passed a decree for partition might have been made ….”

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In *Pannizutti*, I called attention to the departure from this formula when the *Conveyancing (Amendment) Act* 1930 repealed the 1878 Act and introduced s 66G to govern partition of property held in co-ownership. There was no requirement for reference to the pre-existing partition suit. There was no mandatory obligation on the Court (“… the Court *shall* … direct a sale of the property”) (emphasis added). The power was given to the Court in apparently permissive terms (“… the Court *may* … appoint trustees of the property … on the statutory trust for sale …”) (emphasis added).

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In *Pannizutti*, I referred to the question posed by Kearney J in *Hayward v Skinner* [1981] 1 NSWLR 590 as to whether the Court had a complete discretion under s 66G. In *Pannizutti*, it was not necessary to determine that question. Subsequently, in *Ngatoa v Ford* (1990) 19 NSWLR 72, Needham J concluded, after a full review of the authorities in this State and in other jurisdictions having like legislation (at 77):

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> “With respect, I agree with the conclusions of the Full Court [of Queensland in *Ex parte Permanent Trustee Nominees (Canberra) Ltd* [1989] 1 Qd R 314]. Despite the respect one accords to a decision of McLelland J, it is my opinion that his Honour erred in deciding, in *Re Fettell* [(1952) 52 SR (NSW) 221; 69 WN (NSW) 186] that no circumstances existed under which a valid application under s 66G could be refused ….
>
> It is not, I think, desirable that one should attempt to define exhaustively the circumstances in which an order may be refused, judicial experience is that such matters should be resolved on a case by case basis.”

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I agree with Needham J. The provision of the discretion is made the clearer by the contrast which exists between the pre-existing law of partition, the earlier imperial and local statutes and the present provisions of the *Conveyancing Act* 1919, s 66G.

The provision by parliament of a judicial discretion in cases of statutory partition is designed, amongst other things, to ensure that the judge determining the application under s 66G, may provide or withhold the relief upon conditions relevant to the proper adjustment of the competing claims of the co-owners upon each other. In the instant case, Rolfe J appears to have acknowledged this by the terms of the orders which he eventually made. Those orders (as I have shown) provided for the deduction of the proceeds of the sale of certain sums specified by his Honour before the balance was to be "divided equally between the parties subject to the accounting by the trustee". This is the way, by the vehicle of s 66G of the Act, that a judge determining such an application is empowered to provide for the proper adjustment of the conflicting claims of the parties. It is as wrong to confine the exercise of the discretion under the *Conveyancing Act*, s 66G, to rigid rules as it was held to be wrong to limit the discretion under another statute, the *De Facto Relationships Act* 1984: see *Dwyer v Kaljo* (1992) 27 NSWLR 728 at 744. However convenient it may be to busy judges (and parties) to have rules, they cannot be allowed to warp the exercise of discretion conferred upon a judge and expressed in general terms. The judge may, of course, be assisted from time to time by reference to common law and equitable principles which preceded the passage of partition legislation, and specifically s 66G of the *Conveyancing Act* of this State. But it would be quite wrong, in my view, for the judge to limit or control the exercise of discretion by reference to that pre-existing law as if it were still binding and substantially carried into the statute. If parliament had intended this, the Act would have been so expressed. By the departure of the statutory language from the earlier formula ("… where if this Act had not been passed a decree for partition might have been made …"), parliament has made it clear that the judge is released from the automatic application of the pre-existing law. He or she is simply the donee of statutory powers. Such powers must be exercised for the purposes for which they have been conferred by parliament. This is, relevantly, to provide, where sale is ordered, for a sale on proper terms and for the just distribution of the proceeds. Without these pre-conditions being possible, the Court would withhold its exercise of the discretion or would command the sale upon conditions which secured the statutory objects.

With every respect to those of a different view, I am of the opinion that the adjustments in this case miscarried because of an incorrect assumption that s 66G simply incorporates the pre-existing law of partition, without any consideration as to whether that law is apt to modern circumstances of co-ownership and the application of a statute providing for statutory trusts for sale. In my view, that law is not incorporated. The statements of the pre-statutory "rules", in the reasons of Meagher JA, are enough to show why this must be so. It is inconceivable that a donee of statutory powers expressed in the general language of the *Conveyancing Act* 1919, s 66G, could today harness the exercise of those powers to all of the "principles" collected by Meagher JA. However applicable those principles might have been in another place, in earlier times and in the fact situations then before the courts, many of them are quite inappropriate to controlling the exercise of statutory discretion afforded by s 66G of the *Conveyancing Act* 1919. Which was the jurisdiction which Rolfe J was asked to exercise.

Limiting a co-owner's compensation to expenditure:

It is probably fair to say that, at the trial of these proceedings, those acting for Mr Forgeard shared with the representatives of Ms Shanahan and the primary judge, the error which I have now exposed. It was simply assumed by everyone that the old law was imported from the ancient partition suits into the judicial discretion to order sale of property held in co-ownership as provided by the parliament of this State. For Mr Forgeard it was certainly urged that relief under s 66G of the *Conveyancing Act* was equitable in its nature. It therefore imposed upon Mr Forgeard the duty to do equity, and hence to bring into account, to her credit, the amounts expended on the property by Ms Shanahan. Likewise, it was urged for Mr Forgeard that Ms Shanahan, in her cross-claim for an accounting to her of the sum owing by Mr Forgeard, was subject to the obligation herself to do equity. Although I prefer the view which I have expressed concerning the operation of the Act and the discretion it affords, these conditions on the provision to the parties of the relief which they respectively claimed, probably armed the primary judge with the necessary powers to assure the adjustments to the full extent that conscientious conduct on the part of each of the parties necessitated.

Once an action for partition had been commenced, either under the old law or under the statute, a co-owner who had been in sole occupation of jointly owned property, was obliged to account to the co-owner for that sole occupation: cf *Teasdale v Sanderson* (1864) 33 Beav 534; 55 ER 476. Where a party in sole occupation of jointly owned property had spent money on improvements which had exceeded the increase in the value of the property, such co-owner was entitled, that notwithstanding, to set-off the excess of expenditure against the obligation to account for the sole use and occupation of the property: see, eg, *Squire v Rogers* (1979) 39 FLR 106 at 127-128; 27 ALR 330 at 348.

I agree with the submission for Mr Forgeard that there is no reason of principle why compensation for the sole use and occupation of jointly owned property should be limited in amount to the expenditure by the party in occupation upon improvements to the property. Where a co-owner obtains an advantage, rather than incurring an expense, there is no reason why he or she should not account to each of the other owners, in full, for such advantage. If the recovery were limited, as found by the trial judge, it would mean, in the instant case, that had Ms Shanahan paid no mortgage instalments during the the time she had continued to live in the property, Mr Forgeard would have had no right whatever to compensation from her in respect of her occupation of the property, notwithstanding her undoubted enjoyment of the benefits thereof. If this were so, Mr Forgeard would have been doubly penalised. That could not be the law.

To meet these objections of logic and principle, reliance was placed by Ms Shanahan upon a passage in the reasons of Griffith CJ in *Brickwood v Young* (1905) 2 CLR 387. The Chief Justice (at 398) referred to *Teasdale v Sanderson* as authority for the proposition that the obligation of a sole occupier to account for his occupation, extended only to the extent of any charge for expenditure on the property for which he was entitled.

It is common ground between the parties that *Teasdale v Sanderson* is not authority for the proposition propounded by Griffith CJ. Nor is there any support for it in the reasons of O'Connor J in that case. His Honour

recognised that the adjustment for sole occupation to be made might, in the facts of that case, exceed the credit for the expenditure: see ibid (at 401). A

Rolfe J felt himself obliged to apply Griffith CJ's dictum. For a number of reasons, I do not believe that his Honour was so bound:

1. The dictum, as Griffith CJ himself recognised, was by way of obiter. It was (as the Chief Justice said (at 398)) "not necessary to express any opinion on this point". It was not part of the holding in *Brickwood v Young*, which is binding on this Court; B

2. When the authority cited to support the proposition stated as a rule is examined, it does not do so;

3. The other judge who gave reasons in the case (O'Connor J), appears to have acknowledged that the contrary was the law;

4. The principle stated was not expressed in the context of partition legislation, for the compulsory sale of land held in co-ownership, but in the context of resumption legislation where only the distribution of compensation money was in issue; C

5. It is incorrect in principle, to attempt to control the statutory discretion provided by s 66G of the *Conveyancing Act* 1919 by reference to any supposed "rule" expressed on a dubious foundation and for different purposes in an obiter remark confined to the facts of a quite different case; and

6. The circumstances of the present case (and cases like it), make it quite unsafe to treat solutions offered in different circumstances long ago as if they were strict rules governing the equitable adjustment of the off-setting claims and obligations, pre-conditioned to the making of orders under s 66G. D

Released from the supposed application of the dictum in *Brickwood v Young*, and addressing only the proper exercise of the statutory discretion under s 66G of the *Conveyancing Act* (or the obligations imposed upon the parties each to do equity as each was seeking), a number of considerations are relevant to Mr Forgeard's claim: E

1. The evidence shows that, when he left the Penshurst property in October 1981, he asked Ms Shanahan to agree to sell the property and to divide the proceeds equally;

2. It was Ms Shanahan who, for her convenience, wished to stay in the property for as long as possible. It was she who resisted its earlier sale;

3. It was Ms Shanahan who continued to live in the property with her two children. The evidence showed that for most of the time in question, those children paid her rent. In that sense, she was receiving a benefit from co-ownership which equitable principle would oblige her, at the least, to bring into account in favour of Mr Forgeard; and F

4. In two of the years in question at least, Ms Shanahan lived in the property with another man with whom she had established a de facto married relationship. The Court is not concerned with Ms Shanahan's personal relationships, which are entirely her own business. But her partner could not ordinarily have expected to live in the property, owned by a former de facto partner, with no contribution to the equivalent of an occupation fee. In short, it would not ordinarily be expected that a former partner, like Mr Forgeard, would be obliged to subsidise the "rent" of a later domestic partner of Ms Shanahan, who enjoyed benefits owned by Mr Forgeard jointly with Ms Shanahan. G

A Accordingly, it is my view that Rolfe J was in error, both in the approach which he took to the adjustments which he proceeded to order, and in his assumption that the statutory discretion which he was exercising, was in some way controlled by the dictum of Griffith CJ in *Brickwood v Young*.

Notice of contention: other claims:

To combat the foregoing arguments, Ms Shanahan, by a notice of
B contention, claimed to be entitled to an adjustment from Mr Forgeard not only for the mortgage payments which she had made in respect of the subject property, but also in respect of outgoings expended on the property while she was in sole occupation. The detail of these claims are set out in an affidavit of Ms Shanahan which was read before Rolfe J. His Honour decided that Ms Shanahan was entitled to an adjustment in respect of expenditure which increased the value of the property, so long as the increase in value exceeded
C the expenditure. He decided, however, that the only expense which increased the value of the property was the repayment of the mortgage payments. He did not accept that Ms Shanahan was entitled to any contribution from the appellant in respect of her payment of the other outgoings.

Mr Forgeard submitted that it would not be equitable to reduce the extent of Ms Shanahan's obligation to him to account for a proportion of the sole occupation of the co-owned property by an amount of the money which
D represented expenses which did not increase the value of the property. With respect, I cannot agree. Some at least of the expenses which Ms Shanahan incurred, related to the ordinary costs which would normally fall upon co-owners for the regular maintenance and upkeep of their jointly-owned property. Without such expenditures, the property would, or might, be diminished or significantly reduced in value. The expenses for which Ms Shanahan claimed, included municipal rates and water rates. His Honour allowed Ms Shanahan an adjustment equivalent to half of the sums which he
E found expended on these items, together with the mortgage repayments. However, he made no allowance at all for premiums paid on homeowners' insurance, the cost of essential pest control, or replacement sums for the repair of guttering, replacement of rotten weatherboards, erection of a new side fence, provision of pool chemicals and certain legal expenses. I should record that Ms Shanahan made no claims or contributions to the home as homemaker not directly productive of a monetary return: cf *Mallet v Mallet*
F (1984) 156 CLR 605 at 623; *Singer v Berghouse [No 2]* (1994) 68 ALJR 653; 123 ALR 481.

Some of the sums claimed by Ms Shanahan are disputable. They may be personal claims which Ms Shanahan could enforce against Mr Forgeard. It is important to remember always the jurisdiction which Rolfe J was exercising, viz, that conferred by s 66G of the *Conveyancing Act*. Only sums expended directly relevant to the property jointly owned would form the proper basis
G of an order attaching conditions to the sale of that property. However, in my view, the premiums on the houseowners' insurance, the cost of pest treatment, repair and replacement of essential items in the property, and erection of a new side fence, would all be proper expenses recoverable by Ms Shanahan from Mr Forgeard. She would be entitled to bring those expenses into account in the adjustment necessary to the making of a proper

order under s 66G. To that extent, I would uphold some of Ms Shanahan's claims in her notice of contention.

Strictly speaking, I consider that the notice of contention ought to have been formulated as a cross-appeal. If Ms Shanahan were correct in her contentions, they were reasons for setting aside the adjustment made and re-calculating the adjustments. They were not reasons for upholding the adjustments reached by Rolfe J. Presumably the course of contention was followed for prudent reasons of risk minimisation and cost containment.

Conclusion: fresh adjustment required:

The result is that I consider that both Mr Forgeard and Ms Shanahan have proper complaints about the adjustment which was made of the respective claims between them. The fundamental mistake was to approach that adjustment, not by reference to the relevance it had to the exercise of the statutory powers under s 66G of the *Conveyancing Act*, but by reference to supposed "rules" or "principles" developed in pre-statutory partition suits or for other purposes not strictly pertinent to the jurisdiction invoked.

The proper principle is a simple one. Where the discretion conferred by s 66G of the *Conveyancing Act* 1919 is enlivened, the judge making orders under that section is empowered (and probably required) to do so upon terms which adjust, as between the parties, the respective claims which each has upon the other for outgoings expended directly in relation to the subject property (such as mortgage repayments, council and water rates) or incurred for the necessary protection of the property, its security and essential maintenance (such as insurance premiums, pest control costs, essential repairs and the provision of a new side fence). These costs, mostly incurred by Ms Shanahan, should have been totalled. Off-set against them, should then have been allowed a proper occupation fee paid in proportion to the respective interests of Ms Shanahan and Mr Forgeard for the period that Ms Shanahan occupied the property alone. If that approach to the adjustment had been adopted, it would have been the proper exercise of the discretion afforded to the Court by s 66G of the *Conveyancing Act* 1919. It would also have ensured that each of the parties, seeking equity, was obliged to do equity. It would have avoided the imposition of artificial rules inherited from earlier case law addressing different circumstances and applying different legal regimes. It would have had the added benefit, in a case such as the present, of securing harmony between the governing principles applied under s 66G and those applied in analogous circumstances where the adjustment of the property interests of parties to a de facto relationship which has terminated, falls to be determined: see *Baumgartner v Baumgartner* (1987) 164 CLR 137 at 150.

Because I am of the view that a fundamental error has occurred in the approach to the adjustments to be made, and of the principles to be applied for that purpose, and because I consider that such error affected the rights of each of the parties, I can see no alternative but to return the proceedings to the Equity Division for the application to the facts of the correct principles as I have explained them. This is, of course, an unfortunate prospect in a dispute of this magnitude. It is possible that the parties, if required to face that prospect, would be able to adjust their claims and counter-claims by

A reference to the considerations which I have listed. But if that proved impossible, judicial reconsideration of this matter is necessary.

Orders:

I therefore propose the following orders:

1. Appeal allowed;

2. Set aside the judgment and orders of Rolfe J;

B 3. In lieu thereof, order that the proceedings be returned to the Equity Division for re-trial conformably with the opinion of this Court;

4. Order that the costs of the first trial abide the outcome of the second; and

5. Order that the respondent pay the appellant's costs of the appeal but have, in respect thereof, a certificate under the *Suitors' Fund Act* 1951.

MAHONEY JA. I agree in the principles stated by Meagher JA and with C the result he proposes.

As I have understood the argument, there is on appeal no fundamental difference between the parties as to the extent of the power granted by s 66G of the *Conveyancing Act* 1919, as amended, to refuse an order for partition. I do not understand *Re Fettell* (1952) 52 SR (NSW) 221; 69 WN (NSW) 186 to be pressed. It is not necessary to pursue the question whether, under s 66G, an order for sale can and should be refused.

D The real issue in this proceeding has been how the proceeds of the sale of the property should be divided between them. Rolfe J examined the principles which had been involved in partition cases when the power to order partition and the like derived essentially from the equitable jurisdiction of the Court. It is those principles which have been the subject of examination in this appeal.

Those principles do not, as such, apply in the exercise of the power to E order statutory sale under s 66G. In this the Court exercises a statutory power and, considered formally, the way in which the statutory discretion is to be exercised must be derived, in the ordinary process of statutory interpretation, from the terms of the statute.

However, it is proper that, in formulating the principles to be applied in the exercise of the statutory power, the court should have regard to what has been decided in the analogous partition and similar cases. This is what F ordinarily courts do. It is proper that it be done. Each new area of the law must be dealt with in its own way and, no doubt, each judge must, as counsel's argument inferred, form his own conclusions. But the law has developed by, inter alia, the use of analogies. The judicial process has, as Holmes, Cardozo and others have observed, seen this as a legitimate technique for dealing with new problems. It is a technique which contributes to the certainty of the law: lawyers may expect that the principles developed in one case will be applied to solve the problem posed by an analogous case. G It is proper that, with proper exceptions, that be done in this case.

The principles which have been evolved in this area of the law derive, in the first instance, from the incidents which the law long ago attached to common ownership of land. I see no reason to depart from them. To do so would be merely to substitute one set of judgments as to what is just for another, without there being a compelling reason for the one or the other.

The principles, for example, to be applied to or to be derived from the right to occupy commonly owned land are, I think, of this nature.

These principles have been applied so as to determine what is the law in individual fact situations. Some of the cases relied on by counsel in this appeal may not establish principles but may be thought to turn upon the form of the cause of action: cf *Jones v Brown* (1856) 25 LJ (Ex) 345. Others of them may turn not upon principle but upon the detailed analysis of the manner in which profits in question were derived from the land and the circumstances in which the occupying co-tenant derived those profits: cf *Henderson v Eason* (1851) 17 QB 701; 117 ER 1451.

As with many principles, minds may differ as to the result of the application of them to particular fact situations. But, in my opinion, there is in most of the decisions a commonsense accommodation of competing claims. Thus, one common owner occupying the land may have an interest in effecting improvements which will make his occupation more comfortable; in a sense, it may be unjust if, having effected them, he receives no compensation for the increase in the land value resulting from them. On the other hand, the non-occupying owner may legitimately wish not being required to pay for, or for a share of, improvements which he does not desire to have effected. But if the benefit of the improvements be realised by sale of the land, there is justice in affording to the co-owner who has effected the improvements some benefit from them when the proceeds of disposal are divided. And, on one view, there is justice in setting off against such an allowance for improvements a notional occupation fee payable by the one who during his occupation of the land has effected them.

The decisions which have been laid down represent, I think, a practical attempt to accommodate the justice of competing claims of this kind. Views may differ as to the merits of the result achieved in some cases. But, in my opinion, the balance does not lie heavily on one side or the other. In these circumstances, I see no reason to interfere with the application of the law which Meagher JA has suggested.

I agree that the appeal should be dismissed with costs.

MEAGHER JA. This is an appeal by Mr Forgeard (the plaintiff) from part of a judgment of Rolfe J concerning an account taken between him and his ex-mistress, Miss Shanahan (the defendant), following an order for sale made under s 66G of the *Conveyancing Act* 1919, as amended.

The plaintiff and the defendant commenced to live together at some time between 1968 and 1972. In the latter part of 1975 they bought for $36,100 a house known as 2c Percival Street, Penshurst. Penshurst is a suburb of Sydney. They became registered proprietors as joint tenants of the property. Its purchase was financed as to $6,100 from the parties' joint savings and as to $30,000 from a loan by St George Building Society, secured by a mortgage over the property.

In December 1981, the relationship apparently turned sour. His Honour's finding on the matter should be quoted:

> "The parties cohabited in the property until October 1981 when the plaintiff left. The circumstances in which this occurred were not explored before me. Cohabitation between the parties has not resumed and the defendant has remained in occupation of the property. I have

A not overlooked that the plaintiff alleges in par 15 of his affidavit of 31 May 1988 that the defendant changed the locks to the property and denied him access to it. In par 15 of her affidavit of 12 November 1988 the defendant denies these allegations. In the absence of any further evidence or any cross-examination I cannot resolve this dispute and, certainly, I cannot find that the plaintiff was relevantly excluded from the property."

B It is agreed that during the period of cohabitation the plaintiff and the defendant pooled all their financial resources and that any assets acquired during this period were owned jointly.

Since October 1981 the plaintiff has been trying to sell the house. The defendant, who has since installed a new paramour in it, is reluctant to agree.

On 24 January 1983, the plaintiff sought an order for sale under s 66G of the *Conveyancing Act* 1919, seeking the appointment of trustees for sale. C Nothing further happened until April 1988 when the defendant filed a cross-claim seeking the imposition of a constructive trust on the plaintiff's interest and various other orders.

The following facts were agreed:

1. Between October 1981 and November 1990 the defendant made payments totalling $45,906 in respect of mortgage repayments, water rates, council rates, insurance and pest control.

D 2. If the property had been leased between those dates the rent which could have been derived would have been $68,290.

3. In October 1981 the market value of the property was $187,500.

4. In October 1981, the amount required to discharge the mortgage was $12,338.

It was alleged by the plaintiff, but denied by the defendant, that he had paid-off the mortgage to the extent of $3,159. His Honour accepted the E plaintiff on this point. The upshot was that, in an application for sale under s 66G of the *Conveyancing Act* 1919, the plaintiff sought to make the defendant accountable for an occupation fee and the defendant sought an allowance in her favour for the expenditure incurred by her. This raises the question of what rights one co-owner has against another, particularly when one has been in occupation and the other has not.

The position may, I think, be summarised as follows:

F 1. Since both joint tenants and tenants in common have joint possession of the land in which they have the estate, it was a settled rule of law that the possession of any one of them was the possession of the other of them, so as (for example) to prevent the statutes of limitation from affecting them; nor did the bare receipt of all the rents and profits by one operate as an ouster of the other: *Ford v Lord Grey* (1703) 1 Salk 285; 91 ER 253; (1703) 6 Mod 44; 87 ER 807.

G 2. It follows that, where one co-owner is in occupation and the other not, but there has been no actual ouster or exclusion by the former of the latter, the law treats the latter simply as someone who has chosen not to exercise his legal right to occupy the land.

3. It also follows that a co-owner not in occupation was normally virtually without remedy. He could not sue in trespass unless there was an ouster: *Creswell v Hedges* (1862) 1 H & C 421; 158 ER 950. In the case of

personalty, he could not bring trover, absent ouster (*Jacobs v Seward* (1872) LR 5 HL 464), and even the secret removal of chattels by one co-owner for the purpose of selling them and applying them to his own use, did not amount to a conversion or confer any right on a co-tenant to sue in trover: *Jones v Brown* (1856) 25 LJ (Ex) 345. A co-owner out of occupation could not even recover his share of rents and profits if the co-owner in occupation appropriated them to himself: no action of account lay either at law or in equity: *Henderson v Eason* (1851) 17 QB 701 at 716-719; 117 ER 1451 at 1457 per Parke B.

4. Apart from statute, a co-owner out of occupation had remedies at law in two situations, and no more. If he had been ousted, he could bring ejectment and mesne profits: *Goodtitle v Tombs* (1770) 3 Wils KB 118; 95 ER 965; *Luke v Luke* (1936) 36 SR (NSW) 310; 53 WN (NSW) 101; *Dennis v McDonald* [1982] Fam 63; [1982] 1 All ER 590. If, on the other hand, his co-owner were in occupation by agreement that co-owner became an agent or bailiff and rendered himself liable in a common law action of account. In either case (that is, of ouster or occupation by agreement) he would be liable for rents actually received and possibly also for an occupation fee.

5. Apart from statute, in equity the plight of a co-owner not in occupation was little better. There did not seem to be any action which would render a co-owner in occupation liable to refund any rents received, much less liable for an occupation fee. It is true that there is a solitary and curious decision in 1685 which might suggest the contrary. That case is *Strelly v Winson* (1685) 1 Vern 297; 23 ER 480, an Admiralty case which seems to have wandered into the Chancery courts. In the course of the judgment the Lord Keeper said (at 297; 480): "and so where one tenant in common receives all the profits, he shall account in this court as bailiff to the other two for two-thirds" a proposition which has never been relied on, or even noticed, in any case decided since that date.

6. In 1705 things improved a bit with a Statute of Anne. That statute is properly cited as 4 & 5 Anne c 3 s 27, although — curiously — often referred to as 4 Anne c 16 s 27. In so far as it is here relevant it provides:

> "And… from and after the said first day of *Trinity* term, … shall and may be brought … by one joynt tenant, and tenant in common, his executors and administrators, against the other, as bailiff for receiving more than comes to his just share or proportion, and against the executor and administrator of such joynt tenant, or tenant in common (sic) …"

Thereafter, as far as rents actually received were concerned, a non-occupying co-owner had a statutory right of action both at law and in equity, which caused the courts no problem subject to occasional disputation about what constituted an accountable "rent": see, eg, *Wheeler v Horne* (1740) Willes 208; 125 ER 1135 and *Squire v Rogers* (1979) 39 FLR 106 at 121-122; 27 ALR 330 at 343.

7. In New South Wales the Statute of Anne although formerly available, was repealed by the *Imperial Acts Application Act* 1969, a piece of legislation recommended by a Law Reform Commission. It is a neat illustration of the havoc which can be wrought by high-minded but ignorant people, putting litigants in New South Wales back into the position they would have been in before 1705 in England.

A 8. So much for rents actually received. Turning to the liability of a co-owner in occupation to pay an occupation fee, the position at law is fairly clear. He was not liable unless he excluded his co-owner, in which case he rendered himself liable in ejectment and for mesne profits, or if he constituted himself a bailiff, in which event he would be liable in an action of account, like any other bailiff: *Re Tolman's Estate* (1928) 23 Tas LR 29 at 31; *Rees v Rees* [1931] SASR 78 at 80-81. Indeed, the whole bias of the law against making a co-owner in occupation liable to account is precisely based on the rationale that if such a liability were to exist a co-owner could, by abstaining from entering into occupation, turn his co-owner into an involuntary bailiff. As far as equity is concerned, an occupation fee will be exacted in at least two circumstances: first, in a partition suit (or related litigation): if there has been an exclusion, the tenant in occupation will be charged with an occupation fee (see, eg, *Pascoe v Swan* (1859) 27 Beav 508; 54 ER 201); this is an example of equity following the law; and secondly, if the owner in occupation claims an allowance in respect of improvements effected by him, equity will permit such an allowance only on terms that he is accountable for an occupation fee — this is an example of he who comes to equity having to do equity: see *Teasdale v Sanderson* (1864) 33 Beav 534; 55 ER 476.

9. In *Halsbury's Laws of England*, 1st ed, vol 21, par 1594, it is stated: "Where one party has been in exclusive occupation, the court, if desired, will order that he shall be charged an occupation rent". Three cases are cited as authority for the proposition, but none of them really supports a proposition so wide. There is, of course, ample authority that an occupying party may be charged with an occupation rent if he has ousted the other party or if he is seeking an allowance for improvements; but there is no authority which goes beyond that. On the other hand, there is much authority against the proposition, including *M'Mahon v Burchell* (1846) 5 Hare 322; 67 ER 936, and the decisions of Kindersley V-C in England in *Griffies v Griffies* (1863) 8 LT 758; of Salmond J in New Zealand in *McCormick v McCormick* [1921] NZLR 384 and of Long Innes CJ in Equity in New South Wales in *Luke v Luke*: see, also, *Scapinello v Scapinello* [1968] SASR 316. Indeed, if the law were as *Halsbury* stated, the rule of public policy referred to in par 8 above would be infringed.

10. If a co-owner in occupation effects improvements on the co-owned property he may claim an allowance for any improvements in value effected by him. Such an allowance may be claimed in an action for partition. The allowance is not a reimbursement of the amount expended, but an allowance in respect of the amount by which the value of the property has been increased, not exceeding the amount expended, the "value" to be ascertained at the commencement of the action. The law has thus been stated in a number of cases, including *Williams v Williams* (1899) 68 LJ (Ch) 528; *Swan v Swan* (1820) 8 Price 518; 146 ER 1281; *Parker v Trigg* [1874] WN 27; *Watson v Gass* (1881) 51 LJ (Ch) 480; *Re Jones; Farrington v Forrester* [1893] 2 Ch 461 and *McMahon v Public Curator of Queensland* [1952] QSR 197. Thus, in summary, a tenant who effects repairs, is entitled to an allowance for the lesser of the value of the enhancement of the property and the cost of effecting the repairs.

11. There is authority that no allowance for improvements will be allowed

in favour of the occupying owner unless the non-occupying owner seeks to charge him with an occupation fee, so that the two rights are truly mutual: one cannot claim one without suffering the other: see *Teasdale v Sanderson* and *Rice v George* (1873) 20 Gr 221; but it is not difficult to point to cases where improvements have been allowed although no occupation fee was charged: for example *McMahon v Public Curator of Queensland.*

12. A variation on these themes is supplied by the Federal Court of Australia's decision in *Squire v Rogers*. This case decides that where the co-owner in occupation has been in receipt of rents and profits from the property and used them to finance improvements, if his other co-owner seeks an allowance equal to a proportion of the rent and profits he must make the occupying co-owner an allowance in respect of all moneys spent, not simply so much of them as results in an advancement of the value of the land.

13. What is meant by [improvements] is something more than mere repairs and maintenance, for which no allowance can be made: *Leigh v Dickeson* (1884) 15 QBD 60; *Henderson v Eason*; *McMahon v Public Curator of Queensland*.

14. If the non-occupying co-owner seeks an allowance for rents and profits not accounted for, or semble for an occupation fee, there is authority for the proposition that such an allowance is limited by the extent of the occupying co-owner's claim for improvements: *Brickwood v Young* (1905) 2 CLR 387. Mr Harris, for the appellant, is, I think, correct in saying that there is nothing in authority to justify this limitation. It is not justified by the only authority Griffith CJ cites for it, *Teasdale v Sanderson*. It is not part of the ratio of *Brickwood v Young*.

15. All the above principles are applied in partition actions, and cannot be relied on elsewhere, except in administration actions: *Re Cook's Mortgage; Lawledge v Tyndall* [1896] 1 Ch 923; *Boulter v Boulter* (1898) 19 LR (NSW) Eq 135; and in other cases where there is a fund in court, for example, because of a resumption: *Brickwood v Young*. They should also be applied, as Mr Harris argued, in cases where the Court decrees sale under s 66G of the *Conveyancing Act* 1919. Sale and partition are true alternatives, and should, mutatis mutandis, be governed by the same principles.

16. Apart from questions of improvements and occupation fees, which arise from the relationship of co-owners, it will also often happen that co-owners are joint debtors (for example, on a mortgage, or because rates are levied on the property). If one co-owner pays such a debt in full he is entitled to require the other co-owner to contribute a rateable amount; at least that is the prima facie position. In this regard the parties' rights arise from the equitable doctrine of contribution, not from the law of property (see Gibbs CJ in *Muschinski v Dodds* (1985) 160 CLR 583 at 596-597), that is, they would apply in the case of all joint debts even if the debtors owned no property.

The amounts in respect of which the defendant sought an allowance were payments of $45,906 made by her and interest thereon. The sum of $45,906 was composed of the following items:

Mortgage repayments	$36,100
Water rates	$ 3,440
Council rates	$ 4,300

Insurance	$ 1,542
Pest control	$ 524

His Honour found as a fact that the defendant made all these payments. His Honour also held that the principles applicable to a partition case applied to a case seeking sale under s 66G of the *Conveyancing Act* 1919.

His Honour, in effect, allowed the defendant a sum representing one-half of the first three amounts. I do not see how there can be any quarrel with that. They were payments made by one of two debtors of a debt jointly owed by them both. He also made a deduction, as he should, of one-half of the mortgage payments of $3,159 made by the plaintiff. He made no direct allowance for either the insurance or the pest control; and, again, I do not see why he should. They cannot be classified either as payments for improvements or payments of debts jointly owing. At most they are payments towards the maintenance of the property, and as such no allowance should be made in respect of them.

On the other hand, the plaintiff's claim that the defendant be charged with an occupation fee raises different points, and two points — both difficult — in particular. The first point is whether any allowance at all should have been allowed. As I have endeavoured to explain (see par 8 and par 9 above), no such allowance should be made except in reply to the other party's claim for improvements. The defendant was making a claim for an allowance by way of contribution. The manner in which Rolfe J dealt with this problem is as follows:

> "Whilst in the present case the mortgage payment made by the defendant did not amount to improvements in the sense of physical improvements to the land enhancing its value, they are, in my opinion, to be equated to improvements because the effect of them is to increase the value of the equity of the parties in the property and hence the amount of the proceeds distributable to them. In the present case the defendant has asserted her equity to the mortgage payments and, therefore, in my opinion, must account for rents and profits."

I have some difficulty with the last sentence I have quoted. There were no "rents and profits", and the plaintiff was seeking an allowance in respect of an occupation fee, which is rather a different thing. This difficulty apart, I am far from convinced by his Honour's reasoning. In the case where one party is claiming an allowance for improvements and the other is seeking to charge an occupation fee, both claims can arise in partition actions (and related actions), and only in such actions. Each claim is a potential incident of a partition action. In this context, "no rent if no improvements" makes good sense. The discharging of joint debts stands in a different position. An adjustment occasioned by such a discharge is not necessarily made in a partition action: it could be made in an action for contribution, which could be brought quite independently of a partition action (or its equivalent). In the present case, for example, the defendant could have brought an action for contribution before or after the s 66G case. In these circumstances to equate a claim for contribution with a claim for an allowance for improvements does not seem to me to carry much conviction. However, the defendant has not cross-appealed and his Honour's decision on this point must therefore stand.

The second problem concerns the question whether there is a limit to a

claim for an occupation fee. As has been shown (par 14 above), the High Court said so in *Brickwood v Young*, although in obiter dicta unsupported by prior authority. Their Honours said that no claim for an occupation fee should be allowed in excess of the value of the improvements. Rolfe J followed these dicta. Whether we should or not has caused me much anxiety. On the whole I think we should. This is partly because I do not think an intermediate appellate court should lightly decline to follow the considered dicta of a very distinguished High Court. But it is also because I think it is probably justifiable in principle. To begin with, to allow an occupation fee in excess of the value of improvements would, to the extent of the excess, infringe the principle of public policy referred to in par 8 supra. Again, since the equity to claim an occupation fee is always spoken of as a "passive" equity or a "defensive" equity, that is, one which can only be relied on to repel a claim for improvements, there is much to be said for treating it as exhausted once it has repelled that claim.

The appellant also argued that he was entitled to a year's extra occupation fee more than his Honour allowed, and further that he should be allowed interest. In view of his loss on the *Brickwood v Young* point, however, these matters become academic.

The result is, therefore, that the appeal should be dismissed with costs.

(By majority)

Appeal dismissed

Solicitors for the appellant: *Simpson & Harrison.*

Solicitors for the respondent: *Griffiths Delaney & Co*.

D I BROWNE,

Solicitor.