



District Court of Queensland

[\[Index\]](#) [\[Search\]](#) [\[Download\]](#) [\[Help\]](#)

Erskine v. McDowall [2001] QDC 192 (3 September 2001)

Last Updated: 3 September 2001

DISTRICT COURT OF QUEENSLAND

CITATION:	<i>Erskine v. McDowall</i> [2001] QDC 192
PARTIES:	WARWICK DOUGLAS ERSKINE (Plaintiff) And COLLEEN PATRICIA McDOWALL (Defendant)
FILE NO/S:	D187 of 2000
DIVISION:	Applications
PROCEEDING:	Application for disclosure
ORIGINATING COURT:	Maroochydore
DELIVERED ON:	3 September 2001
DELIVERED AT:	Maroochydore
HEARING DATE:	16 July 2001
JUDGE:	Judge J.M. Robertson
ORDERS:	(1) I direct the defendant to make the necessary application under the <i>Freedom of Information Act</i> to obtain copies of all forms signed by the defendant and lodged with Centrelink and/or the Department of Social Security during the period September 1997 to January 2000, and upon obtaining copies to disclose those parts of the documents containing any reference to the defendant's domestic living arrangements and/or whether or not the defendant was cohabitating with another person in a de facto relationship during this period. (2) I reserve the costs of the application to the trial Judge.
CATCHWORDS:	PRACTICE - DISCLOSURE - Plaintiff seeks order requiring defendant to make application to Government Departments under <i>Freedom of Information Act 1982</i> (Cth) for copies of documents in their possession - whether those documents are "under the control of" the defendant - meaning of "control" <i>Cases cited:</i> <i>Taylor v. Rundell</i> (1841) CR and PH 104 <i>Taylor v. Santos Ltd</i> (1998) 71 SASR 434

	<p><i>Theodore v. Australian Postal Commission</i> [1988] VR 272</p> <p><i>Lonrho Ltd v Shell Petroleum Co Ltd</i> [1980] 1 WLR 627</p> <p>Statutes considered:</p> <p><i>Uniform Civil Procedure Rules</i>, rr 211, 223(4), 367</p> <p><i>Property Law Act 1974</i>, ss 38, 287</p> <p><i>Social Security (Administration) Act 1999</i> (Cth), s 207</p> <p><i>Freedom of Information Act 1982</i> (Cth)</p>
COUNSEL:	<p>G.D. Garrick (for the plaintiff)</p> <p>P.E. Firmin, Solicitor (for the defendant)</p>
SOLICITORS:	<p>Moroney Thiele (for the plaintiff)</p> <p>Gilshenan and Luton (for the defendant)</p>

[1] This application concerns the duty of disclosure imposed upon parties to a proceeding by r 211 UCPR:

"211 (1) A party to a proceeding has a duty to disclose to each other party each document -

- (a) in the possession or under the control of the first party; and
- (b) directly relevant to an allegation in issue in the pleadings; and
- (c) if there are no pleadings - directly relevant to a matter in issue in the proceeding.

(2) The duty of disclosure continues until the proceeding is decided.

(3) An allegation remains in issue until it is admitted, withdrawn, struck out or otherwise disposed of."

[2] The plaintiff seeks an order that the defendant disclose, by delivering to the plaintiff copies of all forms signed by the defendant and lodged with Centrelink and/or the Department of Social Security during the period September 1997 to January 2000 containing any reference to the defendant's domestic living arrangements and/or whether or not the defendant was cohabitating with another person in a de facto relationship during this period. The parties have resolved between themselves that part of the application relating to disclosure of documents set out in paragraphs 1(1) and (b) of the application.

[3] An order for disclosure of documents by delivery to another person may only be made if:

"(a) there are special circumstances and interests of justice require it, or

(b) it appears there is an objective likelihood -

(i) the duty to disclose has not been complied with; or

(ii) a specified document or class of documents exists or existed and has passed out of the possession or control of a party." r 223(4) UCPR

[4] It is common ground that the parties lived in a de facto relationship for some period. The plaintiff has pleaded that the period of the relationship was between January 1988 and December 1998 and between March 1999 and January 2000; that is a period in aggregate less than two years. The plaintiff's claim appears therefore to be based on an alleged constructive trust. The plaintiff and the defendant are not co-owners of the property the subject of the application so there is no power in this Court to make orders pursuant to s.38 of the *Property Law Act 1974* (The Act). If in fact the de facto relationship existed for at least two years, the Court has jurisdiction to make a property adjustment order pursuant to Part 19 Division 4 Subdivision of the Act. Section 287 of the Act is in these terms:

"287. A court may make a property adjustment order only if it is satisfied -

(a) the de facto spouses have lived together in a de facto relationship for at least 2 years; or

(b) there is a child of the de facto spouses who is under 18 years; or

(c) the de facto spouse who applied for the order has made substantial contributions of the kind mentioned in section 291 or 292 and failure to make the order would result in serious injustice to the de facto spouse."

[5] The Court has power to make a property adjustment order that is "just and equitable": s.286(1) of the Act. In deciding what is just and equitable the Court must consider the matters set out in Part 19 Division 4 Subdivision 3 of the Act, which includes the "financial and non-financial contributions made directly or indirectly" (by the parties) to inter alia "the financial resources ... of both (the parties)". The defendant has pleaded that the de facto relationship was for more than two years; from 14th September 1997 until 18th January 2000 with a break during the period mid-January 1999 to 26th March 1999.

[6] It follows that the period of the de facto relationship is a crucial factual issue for the Court to resolve. In paragraph 1(11) of the Amended Plaintiff's Reply and Answer to the Defendant's Defence and Counterclaim, the plaintiff pleads:

"during the period September 1997 to 18 January 2000 the Defendant admitted and/or represented to Centrelink that she was not in a de facto relationship with the Plaintiff over the period;"

[7] The defendant has not disclosed any forms she signed and lodged with Centrelink and/or the Department of Social Security during the period. In financial statements sworn and filed in Family Court proceedings between herself and her former husband the defendant did not disclose any income from Centrelink and/or Department of Social Security on 17th February 1998 and 18th February 1999. In her Defence and Counterclaim filed 30th August 2000 she admits in paragraph 4 (1)(ii) that in January 1998 she became unemployed and reliant upon Government benefits.

[8] For the purposes of this application, it is common ground that the defendant has not retained any copies of applications for unemployment to Centrelink/Department of Social Security.

[9] These documents cannot be obtained by notice requiring non-party disclosure pursuant to r.242 (1) UCPR: s.207 of the *Social Security (Administration) Act 1999*. As well as the admission in the Defence and Counterclaim, I am satisfied by implication that such documents exist for the reason that the defendant's solicitors in correspondence have stated that the defendant will not make an application to obtain access to those documents under the *Freedom of Information Act 1982* (Cth). The defendant's solicitor did not submit that there was insufficient evidence as to the existence of the

documents. Indeed he conceded that the defendant had a right under the Commonwealth Act to obtain copies of these documents by making a written application together with a fee: s.18. Centrelink information on the *Freedom of Information Act* available on the Centrelink web page states that a request to obtain access to personal records does not require payment of a fee, if the applicant has received income support, a pension, benefit or allowance.

[10] The only issue debated before me was whether the documents were "under the control" of the defendant. No submissions were addressed to the matters set out in r.223(4) UCPR. Neither counsel for the applicant nor the respondent's solicitor were able to refer me to any Queensland authority dealing with the concept of "control" in r.211(1)(a). UCPR r 211 replaced O.35 r.4 of the Supreme Court Rules which was in similar terms. Order 35 came into force on the 1st May 1994, and the concept of "custody" was omitted. Mr Garrick submits that "control" is synonymous with power, and argues that, as "power" has been judicially interpreted to mean "an enforceable right to inspect or to obtain possession of a document from a person who ordinarily has the document in fact": *Taylor v. Rundell* (1841) CR and PH 104 at 112; these documents are under the control of the defendant. That submission is not supported by more recent Australian authority in *Taylor v. Santos Ltd* (1998) 71 SASR 434. In that case the Full Court of South Australia held that documents in the possession and custody of a wholly owned subsidiary of Santos Ltd were not in its "possession custody or power". Doyle CJ (with whom Prior J agreed) said (at 438):

"... in my opinion, the obligation to discover hinges upon having a right or actual and immediate ability to examine the document. A person does not have the right or actual immediate ability if the person is able to inspect the document, only if a third person, who has control of the document, agrees to permit inspection"

[11] Indeed, in *Theodore v. Australian Postal Commission* [1988] VR 272, Murphy J held by reference to the duty of disclosure under the Rules of the Victorian Supreme Court that the fact that a litigant has, under the *Freedom of Information Act*, a right of access to a document does not place that document within his power within the meaning of the discovery rules. Certainly in *Lonrho Ltd v Shell Petroleum Co Ltd* [1980] 1 WLR 627 Lord Diplock at 635 held that a party had a document in his "power" only if he had a presently enforceable right to obtain inspection of the document from whoever held it, without the need to obtain the consent of anyone else. However, I cannot agree that "power" and "control" are synonymous. "Control" is defined in the Macquarie Dictionary 2nd Edition relevantly as "to exercise direction over ... command". I have concluded, somewhat hesitantly, that control is a more stringent requirement than power. It is difficult to conclude that in the ordinary sense of the meaning of "control" the defendant here has an ability to "direct" or "command" the Commonwealth Agencies to provide her with copies of the documents.

[12] That is not however the end of the matter. There is no doubt in my mind that, for the reasons identified, these documents potentially bear on a critical issue in the trial, that goes well beyond mere credit. In accordance with r.223(4)(b) UCPR I am satisfied that there is an objective likelihood that the documents exist and have passed out of the control of a party, and that the defendant should take steps to obtain copies and disclose them to the applicant. The Court has a general power pursuant to r.367 UCPR to make an order or direction that it considers appropriate, even though it may be inconsistent with another provision. Either under r.223(4)(b) or r.367 I direct the defendant to make the necessary application under the *Freedom of Information Act* to obtain copies of all forms signed by the defendant and lodged with Centrelink and/or the Department of Social Security during the period September 1997 to January 2000, and upon obtaining copies to disclose those parts of the documents containing any reference to the defendant's domestic living arrangements and/or whether or not the defendant was cohabitating with another person in a de facto relationship during this period. I reserve the costs of the application to the trial Judge.