Raga v Berger [2010] NTSC 44

PARTIES:	Aplonia Raga
	v
	Norris Arthur Berger
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	139/09 (20931651)
DELIVERED:	7 September 2010
HEARING DATES:	21, 23 June and 16 July 2010
JUDGMENT OF:	MASTER LUPPINO

CATCHWORDS:

De Facto Relationships – Preliminary point to determine duration of de facto relationship and any extension of time to commence proceedings – Principles to be applied to applications for extension of time – Balance of hardship enlivens a residual discretion – Factors relevant to the exercise of the discretion – Lack of full disclosure – Extension refused.

De Facto Relationships Act 1991 (NT), ss 3A, 14.
Interpretation Act (NT) s 28(1).

Jones v Dunkel (1959) 101 CLR 298; *Ottley v Chester* [2010] NTSC 38; *Parker v McNair* (1990) DFC 95-087*; Trelore v Romeo* (1991) DFC 95-108*;*

REPRESENTATION:

Counsel:

Plaintiff:	Ms Truman
Defendant:	Ms Allan

Solicitors:

Plaintiff:	DS Family Law
Defendant:	Mary M Allan

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

Raga v Berger [2010] NTSC 44
No. 139/09 (20931651)

BETWEEN:

Aplonia Raga
Plaintiff

AND:

Norris Arthur Berger
Defendant

CORAM: MASTER LUPPINO

REASONS FOR DECISION

(Delivered 7 September 2010)

[1] This is an application pursuant to the *De Facto Relationships Act* ("the Act"). The matter proceeds as a hearing on a preliminary point to determine the duration of the relationship and, if the application has been commenced out of the time, whether an extension of time should be granted.

[2] Section 14 of the Act limits the time within which an application under the Act can be made. That sections provides: -

14 Time limit for making application

(1) Subject to subsection (2), where de facto partners have ended their de facto relationship, an application under section 13(1) must be made before the expiry of a period of 2 years beginning with the day after that on which the relationship ended.

(2) A court may grant leave to a de facto partner to make an application under section 13(1) at any time after the period allowed by subsection (1) if the court is satisfied that greater hardship would be caused to that partner by refusing leave than would be caused to the other partner by granting it.

[3] The Originating Motion commencing these proceedings was filed on 16 September 2009. Applying section 28(1) of the *Interpretation Act*, if the de facto relationship is found to have ended before 15 September 2007 an extension of time is required.

[4] On the evidence before me there are three possible dates upon which the relationship ended. The Defendant's contention is that the relationship ended on 29 July 2007 and consequently the application was filed late by some 48 days. The Plaintiff's contention is that, other than a brief three month period of separation in late 2007, the relationship did not end until 30 August 2008. In that event the application is made within time. Alternatively it is open to find on the evidence that the relationship ended on 7 September 2007. In that event an extension is still required as the application would then have been filed late by 8 days.

[5] Section 3A of the Act provides that whether or not a de facto relationship exists is to be determined after all factors are taken into account and sets out a number of specific factors to be considered. That section provides as follows:-

3A De facto relationships

(1) For this Act, 2 persons are in a de facto relationship if they are not married but have a marriage-like relationship.

(2) To determine whether 2 persons are in a de facto relationship, all the circumstances of their relationship must be taken into account, including such of the following matters as are relevant in the circumstances of the particular case:

(a) the duration of the relationship;

(b) the nature and extent of common residence;

(c) whether or not a sexual relationship exists;

(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;

(e) the ownership, use and acquisition of property;

(f) the degree of mutual commitment to a shared life;

(g) the care and support of children;

(h) the performance of household duties;

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

(3) Omitted.

[6] The onus of proof is on the Plaintiff. Further, if an extension is to be required, the Plaintiff has the onus of establishing an entitlement to an extension.

[7] The evidence presented consisted of the evidence of both parties as well as a neighbour, Mr Michael Taylor. There is also some documentary evidence.

[8] For the reasons which follow, I find that the relationship ended on the date alleged by the Defendant namely, 29 July 2007 and accordingly an extension is required. For the reasons which follow, I am also of the view that the extension ought to be refused.

[9] Both parties agreed that the relationship commenced in October 2000. The Plaintiff was more specific saying it was on 15 October 2000. She claimed to be so precise because she made a diary entry of that event. The Defendant says that the relationship ended on 29 July 2007. Although the Plaintiff concedes that the Defendant commenced sleeping in a separate bedroom at about that time (she says it was on 30 July 2007), she denies it was the end of the relationship.

[10] The Plaintiff maintains that as sex continued beyond 29 July 2007, she considered that to be indicative of an ongoing relationship. This is based on her belief that having sex with a person equates to being in a relationship with that person. That appears to be a fixed belief and something that she focused on repeatedly in the course of her evidence. Indeed her counsel, Ms Truman, also focused on this and extracted a concession from the Defendant that he was aware of that belief.

[11] Irrespective of that being a fixed belief in the Plaintiff's mind, it does not automatically follow that a sexual relationship amounts to an ongoing de facto relationship. Although the sexual nature of the relationship is one of the specific factors enumerated is section 3A of the Act, it is not the only factor relevant to that determination. Ongoing sexual relations can be consistent with either version.

[12] It is curious that the Plaintiff is so set in her views in that regard in any event. She maintains that belief despite that she admits to having suspected

that the Defendant had a girlfriend in Bali, whom he saw relatively regularly, and with whom the Defendant had ongoing and apparently regular contact. She conceded, and noted in her diary, that the Defendant had informed her of that relationship. It is also curious in the light of her claim that some of the sex that occurred post 29 July 2007 was non-consensual.

[13] There is no agreement as to extent of sexual relations post 29 July 2007. The Defendant says there was none. The Plaintiff claims significant sexual relationships frequently occurring over an extended period up until August 2008, which is when she claims the relationship ended. She relied on diary entries to support her contention. For reasons which appear below I reject that evidence. Indeed I consider that crucial parts of that evidence have been contrived.

[14] The Plaintiff claims that the initial period of the relationship continued until 7 September 2007 at the least and that there followed a resumption after a temporary separation of some two months. She was in Bali from 3 September 2007 and concedes that on her return from Bali she lived elsewhere. She concedes also that the Defendant had consulted a lawyer thereafter and that the parties attended a family law conference at the Northern Territory Legal Aid Commission in regards to property settlement matters in October of 2007. The precise date of that conference appears to have been 1 October 2007.

[15] The Plaintiff's contention is that if there was a separation as of 7 September 2007 then there was a resumption of the relationship on 22 November 2007. That evidence of resumption is disputed in any event. It commences with the Defendant travelling to Bali at that time and he inviting the Plaintiff to reside at the house from that time. As is set out below, she ultimately continued to reside in the house until August 2008.

[16] The Defendant returned to Darwin on or about 6 December 2007. The Plaintiff agreed that on the Defendant's return, they were not then immediately a "couple". She claims, again based on that same belief, that the relationship resumed as soon as sexual relations commenced between her and the Defendant following his return from Bali. These two statements are not easily reconciled as her evidence is that sex took place on 7 December 2007. Indeed she records in her diary that sexual intercourse occurred twice on that date.

[17] The Plaintiff concedes that she was a boarder when she moved back to the home on 22 November 2007. This is consistent with her diary entries. She confirmed that it was a temporary arrangement and that the Defendant told her she could stay as long she continued to pay rent.

[18] The rental arrangement was formalised by the giving of receipts by the Defendant to the Plaintiff. These demonstrated a very loose arrangement as there were variations in the amount paid. Those variations were dependant

on the recurrent or consumable type expenditure which the parties appear to have been sharing according to consumption or usage.

[19] The Plaintiff was asked in evidence in chief whether, at any stage between December 2007 and August 2008 (the period covered by the receipts), she thought that she was no longer a renter but was instead back in a relationship with the Defendant. She answered in the negative.

[20] The Plaintiff gave her evidence with the assistance of an interpreter. She clearly had some understanding of English. Indeed some of her diary entries are made in relatively good English. As her evidence proceeded, and more so in cross-examination, I formed the view that she was sheltering behind the interpreter. Her persistent requests for questions to be repeated, very often in the case very simple questions, suggested that. In addition the Plaintiff was often very vague in her evidence. She had a relatively good recall of matters to her favour but claimed to have forgotten other material things.

[21] As to objective matters, I thought it odd that the Plaintiff claimed to have recorded all important things about the relationship in her diary such as occasions of sex. She claimed that she would make an entry in her diary straight after the sex occurred. I thought it odd that not only would she do that but that she considered it important to record occasions of sexual activity. That all sounds contrived to me, a view which was reinforced when, despite her long search in the course of her evidence, she could only find

two of those dates. Both were on 7 December 2007, the day after the Defendant returned from Bali. Her diary records two occasions of sexual intercourse on that date. She could only recall one without reference to her diaries. The next date that she gave was on 21 February 2008. One of her diaries, (the "Woman's Diary" 2008) however records sexual intercourse on 16 February 2008. Two to three occasions of sexual intercourse in a period of two and a half months is not consistent with a relationship on that account alone.

[22] After failing to find entries of recorded sexual relations in her diaries after that long search, the Plaintiff was given an opportunity to locate those entries during a break. She then came up with a list with of 29 occasions. These were all in the blue index diary. All of the entries appear on three pages to the exclusion of other entries. This is peculiar because, as Ms Truman reminded me in the course of an objection, the Plaintiff's evidence was that she recorded events "as they went along". Clearly therefore the entries should not have been on three consecutive pages or out of sequence with other significant events. They also appear to have been written with the same pen. An examination of the diaries rules out the possibility that the list simply separately and conveniently listed the dates recorded elsewhere throughout the diaries.

[23] It is inconceivable in those circumstances that the Plaintiff was unable to locate those in the ample time allowed during the course of her evidence. Had the entries been scattered throughout her diaries then her inability to

locate them would be understandable. However the entries should have been easily located as they were in a discrete section of one diary and on three consecutive pages. The inference that the list was created during the break is a strong one. That is particularly so because that list was located in response to challenges to her evidence of the extent of sexual relations.

[24] The significant gap in sexual activity in the period 7 December 2007 until February 2008 is inconsistent with her assertion at paragraph 25 of her affidavit that "...we regularly had sexual intercourse on at least two occasions per week". That affidavit evidence is in turn inconsistent with the statutory declaration that she gave to the Police in respect of a domestic violence application where, apparently referring to the same period, she says "I thought we were not boyfriend and girlfriend anymore." That seems to have suited what she was attempting to achieve on that occasion. Her evidence appears to be tailored to the situation she needs to meet.

[25] As I have said, I thought it odd that the Plaintiff felt the need to record dates of sexual activity in her diary. The commencement of that recording assumes some significance. It must be indicative of some change in the nature of the relationship in her mind and I think this goes well beyond the occupation of separate bedrooms. That she has only recorded sexual intercourse occurring after that time indicates that the Plaintiff must have at least considered the possibility of the end of the relationship at that time. The relationship had been ongoing for some seven years before then. Despite the diaries going back as far as the 1990s, the earliest recorded

entry for sexual activity is after the date claimed by the Defendant to be the date of separation. As other significant pre-separation events are recorded, such as repayment of loans and contributions to financial expenses, the significance of those omissions is heightened. As the only recorded instances of sexual activity are after the date which the Defendant posits as the separation date, in my view, it appears that they have been recorded simply in preparation for countering the suggestion of a separation at that time.

[26] I summarise some of the entries appearing in the Plaintiff's diaries which I consider significant overall, namely:-

1) The entry relating to the Plaintiff moving back into the house on 22 November 2007 confirms that she considered she was a house sitter.

2) The entries between 6 July 2007 and 30 July 2007 shows that she had reason to believe that the Defendant had a girlfriend in Bali. That discredits her claim that sex meant she was in a relationship.

3) Likewise the entry for 7 December 2007 which confirms that she was aware the Defendant had a girlfriend in Bali.

4) The entries relating to repayment of the car loan to the Defendant between 30 March 2004 and 26 September 2004 indicates a capacity to save approximately $7,000 over a six month period.

5) The entries for sexual activity on 13, 15 and 20 August 2007 records that the Plaintiff had sex with the Defendant but that she was unwilling and only yielded because she was scared. This is inconsistent with equating sex with the existence of a relationship.

6) Multiple entries, many of which appear to be hand written reproductions of the content of text messages or letters are indicative of the Plaintiff's knowledge of the Defendant's relationship with his girlfriend in Bali.

7) The entry of 30 July 2007 relating to the Defendant moving into the second bedroom. The Defendant says that this occurred on 29 July 2007, nonetheless the Plaintiff records that the Defendant moved into that room after an argument about the Defendant's girlfriend in Bali. This is particularly relevant and is against the Plaintiff as it sits well with the Defendant's version of a separation at about that time.

8) An entry approximately 23 September 2007 (at a time when the Plaintiff maintains the relationship was existing) where the Plaintiff records words to the effect that one day she would find someone to love forever and not just for sex.

[27] There are other credibility issues with the Plaintiff's evidence. Her claims in her affidavits as to the extent of her contributions by way of spending on groceries were not supported by her bank statements. These are relevant to the factor of financial contribution and interdependence in section 3A of the

Act. When challenged she claimed that rather than pay for groceries direct from her account she withdrew cash and utilised the cash over a period of time. That likewise was not supported by the bank statements. Her affidavit evidence was to the effect that she was spending between $150.00 and $200.00 per week on groceries. One representative six week period shown on her statements shows that even if that evidence was accepted, the most she could have possibly have spent in that period was $400.00 and that assumes that all of her cash withdrawals went to groceries.

[28] When that was put, her retort then was that she always had cash on hand anyway therefore she did not always need to use her card. That came very late in the course of questioning on the topic. An allegation concerning cash is easy to make but by its very nature is difficult to rebut or verify. Given how that allegation arose, I have grave suspicions about that evidence and I reject it. Moreover the fact that the Plaintiff is willing to give that evidence and when in a difficult position is telling generally in terms of her credibility.

[29] She also claimed that all cash withdrawals went towards groceries and over periods in excess of one week. Again that is not entirely borne out by the bank statements. There are two $500.00 withdrawals within a period of six days and clearly her evidence cannot be true in regard to those withdrawals. The allegations of the Defendant that the Plaintiff regularly attended the casino are interesting in light of that. The Plaintiff conceded that although she attended the casino very frequently, she did little gambling and spent her

money mainly on food and drinks with her friends. In these circumstances that evidence is highly unlikely.

[30] The Plaintiff's credibility was also seriously questioned when she attempted to explain why she did not commence proceedings before the end of the limitation period, the question referring to a limitation expiry of 29 July 2007. The Plaintiff's evidence was very vague as to what she knew about the limitation period. However it is known that she attended a conference at Northern Territory Legal Aid Commission on 1 October 2007. She conceded that she was given some advice about property settlement matters and knew that there was a limitation period. If so, she must have been told that it was a two year period. She must have known of the possibility that it expired in July 2009.

[31] The Plaintiff's explanation for the delay overall was that she had to arrange for private representation and needed to save money to cover legal fees before she could do that. Her evidence in that respect was also inconsistent and the situation regarding her finances just does not fit well with that.

[32] Particularly revealing in this regard is the failure of the Plaintiff to produce bank records post June 2008. Given that her evidence concerning how much she had saved and at what time was confusing, vague and inconsistent, the period post June 2008 is a critical period in the context of her saving sufficient funds for legal representation. On any version of the evidence, she still had 12 months from then to commence her proceedings. When asked

about those records she said that those records were available. No explanation was offered as to why they were not produced.

[33] Absent those records I am left with selected documentary evidence and the confusing recollections of the Plaintiff as to the state of her finances. Those bank records would have clarified that. An inference in accordance with *Jones v Dunkel*[1] that those records would not have supported the Plaintiff's case is appropriate. Given what those records would have shown, that inference is very damaging to the Plaintiff's case.

[34] That is reinforced by the unconvincing nature of Plaintiff's claim that she had to save for legal fees because she was unable to borrow funds. When pressed she conceded that she did not want to pay interest. Clearly she had a capacity to borrow funds. She had done so previously in relation to a car loan. Overall her evidence as to her savings was erratic and inconsistent.

[35] Parts of the Plaintiff's evidence were corroborated by evidence of a neighbour, Mr Taylor. Mr Taylor described occasions when he has observed the Plaintiff and the Defendant, during very relevant periods, socialising and undertaking activities consistent with an ongoing relationship. Although Mr Taylor denied any animosity towards the Defendant, I thought that denial was unconvincing.

[36] However I have other concerns about Mr Taylor's evidence. Whether deliberately or subconsciously, his evidence was slanted towards the

[1] (1959) 101 CLR 298

Plaintiff and lacked objectivity in my view. This was most apparent when he initially claimed both the Plaintiff and the Defendant did the gardening, mostly together and approximately equally. His evidence was generalised and he could not think of any specific instances which supported that view. When pressed he ultimately had to concede that the bulk of the work was performed by the Defendant. This is inconsistent with the Plaintiff's evidence alleging close to equal contribution in that respect. It is consistent with the Defendant's evidence that he did the bulk, if not all, of the gardening.

[37] Moreover photographs were tendered which indicate that the existence of shrubbery and the like would give Mr Taylor very limited opportunity to observe much of the activities occurring in the yard of the Defendant's home. Also revealing were his extended absences overseas for work purposes occurring relatively regularly and for weeks at a time.

[38] As to Mr Taylor's evidence which supported the contention of an ongoing relationship based on social intercourse, Mr Taylor was unaware of a separation possibly occurring in July 2007. Without that clear demarcation I suspect that at best he was confusing observations of the parties before July 2007.

[39] In my view, at best, the evidence of Mr Taylor is neutral. It certainly cannot go as far to shore up the deficiencies that I have found in respect of the Plaintiff's credibility.

[40] For these reasons, I reject the Plaintiff's evidence as to the time of the separation at least. With that and with her actions being consistent with the Defendant's contention as to the date of separation, I accept the Defendant's evidence on that issue.

[41] That does not mean that I accept all of the Defendant's evidence. Overall I consider the Defendant's evidence to be equally unimpressive. Many matters were put to the Defendant as a challenge to his evidence and mostly all such matters were denied or rejected. Mostly all such matters were not able to be confirmed one way or the other by objective evidence, for example, the occasions of claimed sexual intercourse by the Plaintiff. Similarly with respect to the circumstances alleged by the Plaintiff to amount to an ongoing relationship or the resumption of a relationship.

[42] The Defendant refuted the suggestion that the tenancy or boarder situation was a deliberate sham. This had been put to him on the basis that the receipts indicated variable amounts of rent, (and clearly below a market rent), that no income tax was declared, that payment seemed to include adjustments for household items or consumables, that the payment history was erratic and, lastly, that at no time before the relationship or after the relationship did he have any other tenants.

[43] The Defendant conceded very little and steadfastly maintained his position throughout. He was very fixed and rigid such that I formed the impression that his evidence was rehearsed. His evidence as to the alleged contributions

by the Plaintiff is a particularly good example. The Defendant said that the Plaintiff did little in the way of gardening, shopping, cooking, cleaning and other domestic chores. He claimed that he did the bulk of these. He steadfastly refuted all suggestions to the contrary. He refused to concede the Plaintiff even helped him indirectly e.g., by assisting in picking out paint colours, tiles, and arranging trades. That evidence overall is not credible.

[44] There were also instances where I thought the Defendant tailored his evidence to suit his case. His account of events when the Police attended at the time that the Plaintiff finally left the home is the best example. His evidence suggested that it was the Police who required the Plaintiff to leave, despite his objections apparently out of concern for the Plaintiff. He said that the reason the Police insisted that the Plaintiff leave was that they wanted to avoid another domestic call out. He said nothing about this is his affidavit. I consider that to be unlikely.

[45] The Defendant also claimed that the Plaintiff was always late and in arrears with her rent and other payments. This however is contrary to the receipts which he himself completed. His explanations to account for this were unconvincing. At one point he went as far as suggesting that neighbours would have heard the arguments that he and the Plaintiff had in respect of those arrears. I thought that was a clear instance of where the Defendant made things up as he went. That specific allegation was not put to Mr Taylor in cross-examination and I am prepared to draw the appropriate inference from that omission.

[46] The Defendant's evidence of financial circumstances was also vague both as to the amounts and times of significant financial matters. In cross-examination it became evident that there were a number of notable omissions and I think he was far from honest in relation to the circumstances surrounding the substantial payment he made for the medical treatment of his friend in Indonesia.

[47] In relation to the latter, he attempted to give a very favourable impression of himself but that highlighted how he was prepared to tailor his evidence to suit. Documents relative to material he had presented to a Social Security Appeal Tribunal hearing, when compared to his evidence before me, clearly leads to the inference that he changes his version as it suits. What favoured him at the Social Security Appeal Tribunal hearing was against his interest before me.

[48] In the case before the Social Security Appeal Tribunal, the Defendant was attempting to establish that he was under some familial obligation to justify the substantial payment he made for that person's treatment. The relevance of that for the purposes of that Tribunal was that the substantial payment that he made was otherwise to be treated as a gift thereby bringing into operation a preclusion period in relation to the Defendant's social security entitlement.

[49] He went to extreme lengths to blame everyone else for what he now alleges are apparent errors in the documentation relating to the Social Security

Appeal Tribunal hearing. In my view there were no errors. I particularly refer to the claim that he did not refer to the person in Indonesia as a fiancé but only as a friend. The situation was highlighted when it became clear that despite claiming numerous errors, when given the opportunity to make corrections, the only correction he made was a comparatively minor one i.e., he corrected the age of the person involved. The report indicated that the age was 16 and he corrected that to 26. No other corrections were made. It is curious in the overall scheme of things that he considered the age of the person to be important, yet he chose to leave uncorrected the apparent and obvious errors as to the nature of the relationship, particularly as that error was repeated numerous times throughout those documents.

[50] Despite the fact that five people were involved in that hearing and despite the fact that he did not take the opportunity to make corrections when the opportunity presented, he maintained that all of those five other people recorded things wrongly. I consider that to be most unlikely and the Defendant's denials adversely impact on his credibility on a significant issue. That issue is the question of hardship which is material to the question of whether an extension should be granted. That is discussed below.

[51] For those reasons I was not prepared to accept the Defendant's evidence overall. I am not obliged to fully reject one version or another and can reject parts of the evidence of a witness and accept other parts. The state of the evidence is such that I am not prepared to accept any one person's evidence

if it is not supported by objective evidence. In this regard this favours the Defendant both in terms of the available objective evidence and in terms of the Plaintiff having the burden of proof.

[52] I therefore find that the parties separated on or about 29 July 2007. The result is that issues of the parties occupying separate bedrooms (as a factor to determine whether or not there was still an ongoing de facto relationship), questions of a temporary separation and a resumption of co-habitation, questions of social intercourse, questions of financial interdependence and direct and indirect contributions of the parties are no longer relevant.

[53] The net result therefore is that the Plaintiff requires an extension of approximately seven weeks. By reason of section 14(2) of the Act, the grant of an extension is a discretionary matter and that discretion is enlivened if there is the balance of hardship in the Plaintiff's favour.

[54] There have been few decided cases on the principles to be adopted by the Court, and guidelines which should be followed, in relation to extensions of time under provisions similar to section 14(2) of the Act. I was not referred to any in the Northern Territory nor am I aware of any. Although it was an issue in *Ottley v Chester*,[2] ultimately that was not discussed given the findings in that case. Legislation similar to the Act exists in other jurisdictions in close to identical terms and authorities from other jurisdictions are relevant.

[2] [2010] NTSC 38

[55] *Parker v McNair*[3] a decision of the Supreme Court New South Wales is an appropriate starting point. The relevant section in that case was in very similar terms to section 14(2) of the Act. McLelland J there said (at 76159):-

> "It seems to me that on the true construction of that subsection, although the preponderance of hardship is a condition which the Court must find satisfied before it can grant leave, it is not a condition the satisfaction of which requires the granting of leave. The use of the expression "may" in that subsection gives the Court a residual discretion and any other matter relevant to the interest of justice as between the parties can be taken into account including, for example, a question of whether there is an adequate explanation for delay which has occurred."

[56] I respectfully agree with these observations. Legislation which bestows discretions commonly involves a two stage process of requiring the existence of certain circumstances to operate as a pre-condition to the exercise of a residual discretion. Section 14(2) of the Act operates in a similar way. In such situations there is a prerequisite which must be satisfied before the discretion is enlivened. In the case of section 14(2) that precondition is establishing a balance of hardship. Once the Court is satisfied that the precondition has been met then there remain factors to be considered in relation to exercise of the discretion. The discretion must then be exercised judicially and is unfettered. For that reason factors relevant to the particular case must be considered. Guidelines can only therefore go so far and the factors which are relevant to the exercise of the discretion are not closed.

[3] (1990) DFC 95-087

[57] In my view the balance of hardship favours the Plaintiff. The hardship she will face is that on any version there is a de facto relationship of some seven years and it is clear that the Plaintiff therefore has a claim of some value. The Defendant's claim to hardship is not borne out on the evidence. His hardship relates largely to the injudicious divesting of a large sum of money, of the order of $75,000.00. The key events in relation to that all occurred within the limitation period. During the course of his evidence the Defendant claimed that he would not have paid that sum of money had he known of these proceedings. At paragraph 66 of his affidavit sworn 30 November 2009 the Defendant says "I would not have assisted my friend in Bali with payment of medical fees if I had any idea Nia would make a claim against me". I think the circumstances of that payment belie that claim in any event. The Defendant was aware of the existence and length of the limitation period. At paragraph 51 of the same affidavit the Defendant says "I am well aware that Nia had two years from the date of our separation, that is until 29 July 2009 to make a claim…". Leaving aside therefore whether he would have made the payment in any event, the payment was well before the limitation period expired. Claiming hardship resulting from that is entirely untenable.

[58] The Defendant also suggests some financial hardship from the delayed sale of the house property. All that has to be measured against the extent of the delay, namely, a seven week period. The Defendant has not established that

the hardship claimed all arises from a relatively short period of delay and it is inconceivable that it could.

[59] In those circumstances, the pre-condition is satisfied. It still remains a matter for my discretion as to whether an extension is granted notwithstanding the balance of hardship.

[60] A number of factors are relevant to the question of the exercise of the discretion. *Trelore v Romeo*[4] is another relevant decision of the New South Wales Supreme Court. In that case Young J, after reciting with approval the passage from *Parker v McNair*[5] referred to above, refuted the suggestion that *Parker v McNair*[6] was authority for the proposition that the Court should be very free in extending time where the only hardship that would be suffered was in actually having the case heard and where a plaintiff might otherwise be deprived of the fruits of the action.

[61] That has direct application to the current case given that the Defendant has failed to establish any genuine hardship if the extension were granted. Young J however disagreed and said that:-

> "Whilst hardship must be evaluated the case for an extension is to be considered on all these circumstances as to whether it is just in the Court's discretion to extend the time."

[62] As to guidelines, Young J considered that appropriate guidelines as to how to approach an extension application would be to have regard to:-

[4] (1991) DFC 95-108
[5] (1990) DFC 95-087
[6] (1990) DFC 95-087

1) The reason for making a late claim;

2) Will there be unacceptable prejudice;

3) Has there been any unconscionable conduct on either side which is relevant.

[63] Ms Truman suggested that all unconscionable behaviour on the part of the parties was by the Defendant. I accept that there was unconscionable conduct on the Defendant's part. However, there is some relevant conduct by the Plaintiff as well. I refer to her contrived diary entries. She omitted to produce those diaries until it was necessary to rely upon then at the trial. Ms Allan claimed that the Plaintiff had not discovered those and that they were only produced late. Although Ms Truman challenged the failure to disclose on the basis that there had not been any orders for discovery, she did not challenge the allegation of the late production.

[64] The Plaintiff has been less than open in respect of producing other documents, for example bank account records post June 2008. Given that she relies heavily on her need to save money to pay lawyers as an explanation for not bringing proceedings within time, those records assume significant relevance. A party seeking a favourable exercise of a discretion cannot fail to produce material documents solely in that party's possession relevant to the exercise of that discretion.

[65] In any event I am not satisfied of the explanation for the Plaintiff's failure to take action within the prescribed time. I have concluded that the Plaintiff must have known of the existence of the limitation period and that she had reason to know that it possibly expired in July 2009. She claims she was unable to save sufficient money in that period. I look upon this in the context of her repayments to the Defendant of her car loan which evidenced a capacity to save. The evidence (her diary entries) shows that she repaid approximately $7,000.00 over a six month period. Notwithstanding that, she claims not to have been able to save enough money until just seven weeks after the expiry of the limitation period. No explanation has been given as to why that seven week period was critical.

[66] The Plaintiff's claim of an inability to borrow funds does not stand up to scrutiny. When she was pressed this was revealed to be a reluctance to pay interest. She had an apparent capacity to borrow money. She was in full time employment. No evidence of significant or unusual liabilities which would impact on that capacity was led. No evidence was produced to support the contention of an inability or inappropriateness of borrowing money. There is not even an explanation why a short term borrowing of an amount sufficient to commence the proceedings was not borrowed immediately before the expiration of the limitation period. The significance of the seven week delay becomes apparent here. If, as the Plaintiff would have me believe, she managed to save whatever shortfall she needed to commence proceedings in

that seven week period, then clearly only a relatively small amount of a loan and for a short period was required.

[67] There was a notable absence of evidence from the Plaintiff in relation to the precise arrangements that she needed to make to fund the legal proceedings. There was little evidence of the amount required and no evidence as to whether the amount was required simply to commence proceedings, how much she would then need to top up from time to time, what the frequency of those top ups would be. There was no evidence that she looked at other arrangements and other possibilities of that funding.

[68] On the available evidence, if she lacked the necessary funds (which has not been established to my satisfaction), it simply appears that the Plaintiff was not prepared to pay take out a loan, likely a small loan, so as not to incur interest. She seemed content to let the limitation period expire rather than do that.

[69] On the facts of the current case the rejection of the Defendant's claim to prejudice is not sufficient alone for the Court to grant an extension. The remaining factors enumerated above remain relevant. In my view the absence of a valid and justifiable explanation for the delay and the failure of the Plaintiff to produce evidence to support that explanation are good reason to deny the extension in this case. For the foregoing reasons I decline to grant an extension of time.

[70] I will hear the parties as to costs and other ancillary orders.