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Conveyancing and Property

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GIFTS: CONDITIONAL OR NOT? – FLOURENTZOU v SPINK

As home ownership becomes an increasingly distant reality for many Australians,[1] traditional forms of household composition are giving way to more diverse shared living arrangements.[2] One such arrangement involves the so-called granny flat, whereby a parent joins the household of their adult children, often to support care for their grandchildren. As explained by Patricia Lane in this journal in 2018,[3] questions as to the underlying equitable title arise where this arrangement is accompanied by the parent's contribution to the acquisition or renovation of the property. One such case was determined by the NSW Court of Appeal in December 2019, in *Flourentzou v Spink*.[4] Mrs Spink was successful in her claim for an equitable charge over the home of her daughter and son-in-law, the Flourentzous.

The Facts

At the age of 62, Mrs Spink had contributed $147,000 towards the purchase of the Flourentzous' home. The funds had come from the sale of Mrs Spink's own home and comprised her primary asset. The parties agreed that Mrs Spink would live with the Flourentzous "long term".[5] She would occupy a separate part of the property, and in addition to the money for the purchase, contributed $18,314.26 towards renovations to create her living space. The parties anticipated that Mrs Spink would assist her daughter to care for the Flourentzous' young children.

When Mrs Spink's relationship with the Flourentzous soured after only three years of living together, she lodged a caveat over the property to protect her interest. Consequently, the Flourentzous "evicted" her and she brought the action alleging that her capital contribution supported an interest in the property.

Ascertaining Intention

As is typical in such situations there was no written agreement, and Mrs Spink had no registered interest. It was therefore up to the Court to determine whether there was an intention that Mrs Spink had an interest, or whether as the Flourentzous maintained, her contribution was an absolute gift without the intention to derive an interest in the property. Because the nature and extent of Mrs Spink's contribution would be sufficient to support an interest, it was the question of intention that occupied the Court's attention.[6] The reasoning centred upon the nature of the capital contribution as an absolute or conditional gift, although the Court might have considered the related issues of intention as to beneficial ownership[7] or as to the existence of a constructive trust.[8]

In analysing intention, the Court interrogated the evidence of the bank officer who managed the loan at the time of purchase. According to her evidence, the parties had declared the $147,000 to be an unconditional gift. However, the document signed by Mrs Spink for the bank in relation to the money

[1] Australian Institute of Health and Welfare, "Home Ownership and Housing Tenure" (11 September 2019).

[2] Brendan Churchill, "Mum, Dad and Two Kids No Longer the Norm in the Changing Australian Family", *The Conversation*, 8 January 2018 <https://theconversation.com/mum-dad-and-two-kids-no-longer-the-norm-in-the-changing-australian-family-88014>; Patricia Lane, "Reform in Elder Law – Granny Flats" (2018) 92 ALJ 413.

[3] Lane, n 2.

[4] *Flourentzou v Spink* [2019] NSWCA 315.

[5] *Flourentzou v Spink* [2019] NSWCA 315 [38].

[6] Discussed in *Flourentzou v Spink* [2019] NSWCA 315, [17]–[22].

[7] *Calverley v Green* (1984) 155 CLR 242.

[8] *Muschinski v Dodds* (1985) 160 CLR 583; *Baumgartner v Baumgartner* (1987) 164 CLR 137.

simply recited the fact of a contribution of $60,000 to "help with the purchase",[9] without further. The Court found that this evidence did not support the Flourentzous' claim that the gift was unconditional: the bank officer had acted on an assumption only. The bank officer's assumptions perhaps hold a lesson for lenders in inquiring into the source of funds for property purchases. Regardless of the interpretation of Mrs Spink's statement, lenders should be wary of any capital contribution given the discretion in the court to declare a beneficial interest.

The value of contemporaneous written evidence of intention is open to question given the parties' relationship. It is possible to imagine that a parent may genuinely desire to help their children such that they believe they are prepared to contribute significantly to their property acquisition even as an absolute gift – until in hindsight, they are left penniless. In one sense, and subject to cultural norms of a family, it might be rational to give one's children a gift of capital. In this case, however, the Court found that it was instead illogical to assume that Mrs Spink had done so.

Contextual Approach

The Court's reading of the evidence concerning Mrs Spink's statement engaged with the broader context of the parties' circumstances – particularly those of Mrs Spink. A mature woman, she had few means. Having spent most of her assets on the Flourentzous' house, she had no means of acquiring her own home. The Court looked five, 10 years into the future, suggesting that it was unreasonable to expect that Mrs Spink had intended an absolute gift that would leave her as a 72-year-old woman potentially without anywhere to live and no remaining means.

At a time when women over 55 are the fastest growing demographic experiencing homelessness,[10] this is no mere conjecture. Based on current data, this would have been a very real possibility for Mrs Spink if the Court found against her. While it is not the role of the Court to address matters of policy, taking account of Mrs Spink's social and economic context not only elucidates her intention as to her significant financial contribution, but also effectively addresses a broader social issue.

It is notable that this case does not involve a suggestion of undue influence, and unconscionability was not argued: this is no *Commercial Bank of Australia Ltd v Amadio*.[11] And yet in interpreting Mrs Spink's intention in such a socially contextual way, the decision demonstrates a less overtly commercial approach to questions of familial property distribution than can otherwise be observed in the law.[12]

Conclusion

Although perhaps not explicit in the Court's reasons, this case suggests a subtle development in the approach of the general law to family transactions. Despite this, the case also reveals the need for alternative mechanisms for determining disputes – not only in the interests of access to justice, but also for meeting the public policy imperative of supporting equitable access to housing for ageing members of the population. This is particularly the case given the challenges of interpreting intra-familial capital contributions in terms of the general law.

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[9] *Flourentzou v Spink* [2019] NSWCA 315, [32].

[10] Australian Human Rights Commission, *Older Women's Risk of Homelessness: Background Paper* (April 2019).

[11] *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

[12] See, eg, Kate Galloway, "The Role of Pateman's Sexual Contract in Beneficial Interests in Property" (2019) 27 *Feminist Legal Studies* 263.

VALE SOLATIUM?

The recent High Court decision in *Northern Territory v Griffiths*[13] (*Griffiths*) concerning compensation for loss of native title was the subject of analysis in this column a few months ago.[14] One issue briefly addressed there was the Court's unanimous rejection of the term "solatium" to describe the non-economic loss suffered by the former owners. Instead, their Honours reasoned that adoption of the broader concept of "cultural loss" was necessary to better recognise the essential characteristics of native title, given that it derives "from a different belief system".[15] They considered that the concept of solatium, grounded in the common law and, more recently, conventional compulsory acquisition legislation, would "distract" from these unique features. One possible argument in support of dropping the term is that solatium amounts in land acquisition statutes tend to be assessed at a substantially lower level than economic loss, commonly set at 10%. Indeed, this very argument was advanced by the Commonwealth and Northern Territory. It follows that the rejection of the notion of solatium in favour of a broader notion of cultural loss implies removing this limit.

However, looking simply at the amount of the award in favour of the Claim Group, the High Court's unanimous introduction of the concept of "cultural loss" was clearly unnecessary to raise the award limit: regardless of whether the award was deemed "cultural loss" (High Court) or solatium (as held in the Federal Court and Full Federal Court) all judges at every level of the litigation agreed that the figure of $1.3 million for the non-economic component of the loss represented an acquisition on "just terms". The judges variously reasoned that simply because the solatium/cultural loss figure is commonly a fraction of the land's economic value, it does not have to be in all instances because the *Native Title Act 1993* (Cth) does not impose such a limit. So removing solatium had no effect on the ultimate amount awarded in the non-economic loss category.

Perhaps a more compelling reason for adopting the term "cultural loss" in preference to solatium is that today plain English is preferable to Latin terminology, particularly when only a tiny proportion of the population as a whole, including lawyers, have more than the barest understanding of the language. We have come a long way since the comedian Peter Cook complained over half a century ago in his "Experiences Down the Mine" sketch that he had failed to become a judge "because I didn't have the Latin. I didn't have the Latin for the judgin'".[16] The language of the law has progressively sidelined Latin. In replacing the term "solatium", the High Court has followed the example of the NSW Legislature in 2017. An amendment to s 60(2) of the *Lands Acquisition (Just Terms Compensation) Act 1991* (NSW), which increased the cap for what was formerly solatium to $75,000, simultaneously substituted the Latin term with the phrase "disadvantage resulting from relocation": ss 4, 61(1).

Furthermore, the majority of jurisdictions where compensation for non-economic loss is payable have opted for plain English over the Latin. In *Griffiths*, for example, the relevant NT statute, the *Lands Acquisition Act 1978* (NT), details the grounds for compensation over and above the market value of the land in Sch 2 of the Act. Rule 9 of Sch 2 deals with payments of additional compensation for the equivalent of solatium in other jurisdictions, in cases where the acquisition is of a dwelling. It provides that "the amount of compensation otherwise payable under this Schedule may be increased by the amount which the Tribunal considers will reasonably *compensate the claimant for intangible disadvantages resulting from the acquisition*" (emphasis added). (Significantly, with no limit on the level of this payment, it is potentially more generous than any other Australian solatium provision.) Subrule 2 includes similar factors to be considered in the assessment of this amount to those other jurisdictions that authorise solatium payments. The factors the Tribunal must take into account include: "(a) the

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[13] *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* (2019) 93 ALJR 327.

[14] B Edgeworth, "Valuable, Invaluable or Unvaluable? The High Court on Native Title Compensation" (2019) 93 ALJ 442.

[15] *Northern Territory v Mr A. Griffiths (deceased) and Lorraine Jones on behalf of the Ngaliwurru and Nungali Peoples* (2019) 93 ALJR 327, [53].

[16] Peter Cook, "Experiences Down the Mine", *Complete beyond the Fringe* [Box set], EMI Audio CD, 21 October 1996, ASIN: B000006SW2; see also <https://www.youtube.com/watch?v=ofUZNynYXzM>.

interest of the claimant in the land; (b) the length of time the claimant has resided on the land; and (c) the inconvenience likely to be suffered by the claimant by reason of his removal from the land; … (e) the period during which the claimant would have been likely to continue to reside on the land." Importantly, the subrule adds "(f) any other matter which is, in the Tribunal's opinion, relevant to the circumstances of the claimant".[17] And r 1A extends the compensation provisions to native title with any "necessary modifications".

Similarly, in Tasmania, the term "solatium" is avoided. Section 29 of the *Land Acquisition Act 1993* (Tas) simply provides for "additional compensation … [for] hardship [arising from] unsuitable accommodation due to age, infirmity or want of means". The terminological question does not arise in Queensland or South Australia for the reason that no such payment is available in those less generous jurisdictions: s 25(1)(g) of the *Land Acquisition Act 1969* (SA); s 20 of the *Acquisition of Land Act 1967* (Qld). This leaves only Victoria (s 44 of the *Land Acquisition and Compensation Act 1986* (Vic)) and Western Australia deploying "solatium". The cap is set at 10%, although more can be awarded in exceptional circumstances in Western Australia: ss 241(8), (9) of the *Land Administration Act 1997* (WA). The Latin term has therefore only small minority support across the jurisdictions.

The express preference in the High Court for cultural loss rather than solatium, or indeed the term "intangible disadvantages" under r 9 of the NT legislation, is a welcome classification of non-economic loss in native title compensation cases. It signals a more inclusive approach to the non-economic dimension of native title. It also highlights the fundamentally unique character of that title. While solatium is conventionally measured in essentially individualistic and psychologistic terms, cultural loss embraces both the individual and the collective harm felt across the Claim Group, present members and future members included.

None of this, of course, should be interpreted as an argument against the study of the Latin language. As the forerunner – the veritable *fons et origo* – of so many contemporary European languages, and the gateway to some of Western literature's greatest works, it offers unlimited literary, artistic and intellectual enlightenment. And as Henry Beard has demonstrated in his *Latin for All Occasions*,[18] with only slight modifications, it can be readily deployed in countless, and surprising, contemporary settings (such as online dating, pop culture or cocktail party banter). But this argument has no place in a polity committed to the rule of law, one element of which is making its legal language as inclusive and accessible as possible.

The gradual disappearance of solatium from the property law lexicon is therefore no cause for lament.[19] Were he still alive, Peter Cook would no doubt agree, as we bid it a fond and reverential "vale".

BE

[17] See further, Marcus Jacobs, *The Law of Compulsory Land Acquisition* (Thomson Reuters, 2nd ed, 2009) Ch 29.

[18] Henry Beard (aliter, Henricus Barbatus), *Latin for All Occasions* (*Lingua Latina Omnibus Occasionibus*) (Avery/Penguin, rev. ed, 2004).

[19] This argument might well be extended to many other terms such as "sui generis", "de minimis" and "volenti non fit injuria".