# MOWBRAY AND SAMPSON

Order for arbitration under Family Law Act 1975 s.13E, made December 8th 2016.

Heard: Feb 20-21st 2017

Decision and award: March 10th 2017

Arbitrator: The Hon Peter Rose AM, QC

This case arose from a dispute about ownership of a family home ("the N property") following the breakdown of a de facto relationship between the applicant and the respondent which had lasted about 5½ years. The respondent's mother had a 20% share of the home as a tenant in common. She was also a party to the proceedings. She had resided in the N property along with the applicant and the respondent.

The names of the parties have been anonymised, consistently with the practice of the courts.

There were applications for Declarations and Orders in relation to the joint ownership of the family home and also an application for alteration of property rights pursuant to s.90SM of the *Family Law Act* 1975.

Issues arose concerning accrued jurisdiction and whether there was a power to order costs, not of the arbitration itself, but in relation to the other legal costs incurred. There were also conflicting valuations of the family home which would need to be resolved if the applicant were to buy out the shares of the other parties.

*Accrued jurisdiction*

The arbitrator found that he had accrued jurisdiction to determine the applications of the respondent's mother. This jurisdictional issue was not contested by any of the parties. In his reasons, Mr Rose stated:

1. It is trite law that jurisdiction cannot be conferred or exercised by consent.
2. I have concluded that the Court has accrued jurisdiction in the proceedings to determine the Applications of the Respondents. Such jurisdiction is inextricably linked to the proceedings the subject of the s.13E arbitration orders previously referred to. The issues and common substratum of facts involving the parties amount to a justiciable controversy of which the pending property alteration proceedings between the Applicant and the First Respondent pursuant to s90SM of the Act forms a part. The reasons are:-
    a. The parties had a familial relationship in a broad sense, in that the Applicant and First

Respondent lived in a de facto relationship for about 5½ years in the N property. The Second Respondent, the mother of the First Respondent, resided in that property for the same period.

b. The parties purchased the N property together. They are the registered proprietors as tenants in common reflecting their interest on the title as to 20% held by each of the Applicant and the Second Respondent and the remaining 60% by the First Respondent.

c. There are pending proceedings for alteration of property interests pursuant to s90SM of the Act and, in particular, the interests held by the Applicant and the First Respondent in the N property.

d. The matters referred to above represent a common substratum of facts from which the claims arise.

e. The Second Respondent also sought relief to achieve a one-third interest in the N property based on a resulting trust or, in the alternative, a constructive trust.

f. The Second Respondent seeks declarations and orders pursuant to s66G [of the Conveyancing Act 1919 NSW] in respect of the N property which, if successful, will cause the interests of the parties held in that property to be realised. Her application is supported by the First Respondent.

g. Consequently, the claims are "attached" and form part of a single justiciable controversy (see *Warby* & *Warby* [2001] FamCA 1469).

3. On the basis that jurisdiction has accrued, there is no issue that the Court has the power to grant appropriate remedies in respect of those claims. Indeed, no contrary submission was made.

**Costs**

The Second Respondent sought an order for costs, supported by the First Respondent. The Applicant submitted that there is an absence of power for an arbitrator to make an order for costs, given the terms of s13E of the Act. The Second Respondent submitted that the arbitration is in the exercise of accrued jurisdiction, which carries with it the powers which may be exercised by the Supreme Court of NSW to make orders pursuant to s66G and costs in relation to such proceedings. Mr Rose rejected the application. He stated:

1. On the 1st March 2017, I made directions for further submissions to be made in relation to the merits of the outstanding costs application, including the exercise of discretion.

2. By her email dated 2nd March 2017 (copied to the legal representatives for the other parties), counsel for the First Respondent informed me that her client's position is that "she would seek to agitate the issue of costs after judgment regarding the substantial matter in dispute is determined." This is a proper submission to have been made.

3. My concern is the delay that would ensue and further legal costs incurred by the parties for these reasons. A new timetable for submissions would need to be set. A further period would be required to consider the submissions and determine the matter with published written reasons. In addition, potentially there could be an application for review on a question of law. Ultimately, a costs application could be made by one or more of the parties pursuant to s. 117 and reliance on such power (if at all) to order costs in the exercise of accrued jurisdiction.

4. Those steps would take time and the parties would incur further legal costs which they can ill afford.

5. The result is that I will not determine the costs applications. The parties will then be free to make such application direct to the court as they may be advised. That will mean only one step to be taken with consequent savings in time and costs.

**Valuations**

There were two valuations of the property which were very far apart. Mr Rose declined to accept either valuation because, while both valuers used comparable sales data, both valuations suffered from the deficiency that "no analytical indicia was provided at all by reference to the features, location or land size of relevant sales compared to the subject property" which may have led them to their respective conclusions about value. Even allowing for subjective factors in a valuation, there needed to be a reasonably detailed explanation for how the conclusion was reached. It followed that the criteria for acceptance of expert evidence were not satisfied.