SUPREME COURT OF QUEENSLAND

CITATION:	*Coleman v Penfold* [2019] QCA 98
PARTIES:	**KEITH DAVID COLEMAN** (appellant) **v** **KYLIE ANN PENFOLD** (respondent)
FILE NO/S:	Appeal No 10519 of 2018 DC No 2 of 2017
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Beenleigh – Unreported, 30 August 2018 (Chowdhury DCJ)
DELIVERED ON:	24 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2019
JUDGES:	Sofronoff P and McMurdo JA and Bowskill J
ORDERS:	**1. The appeal is allowed.** **2. The orders made on 30 August 2018 are set aside.** **3. In substitution, the application under s 38 of the *Property Law Act* 1974 (Qld) is adjourned to the registry of the District Court at Beenleigh, to a date to be fixed, with no order as to the costs of that proceeding.** **4. The appellant is directed to file, in the District Court at Beenleigh, an application for leave to apply for a property adjustment order under s 288(2) of the *Property Law Act* 1974 (Qld), or any other application seeking declarations as to the rights of the parties in relation to the Beenleigh property, within 14 days.** **5. The respondent pay the appellant's costs of the appeal.**
CATCHWORDS:	REAL PROPERTY – PARTITION OF LAND – STATUTORY TRUST FOR SALE OR PARTITION – DISCRETION IN RELATION TO ORDERS – where the appellant and respondent are co-owners of a house – where the learned primary judge granted the respondent's application for an order under s 38 of the *Property Law Act* 1974 (Qld) appointing statutory trustees for sale of the house – where the respondent was unrepresented at the hearing of

the application – where the appellant sought an adjournment of the application to obtain legal advice and also due to medical issues – whether the primary judge erred in the exercise of the discretion not to adjourn the hearing of the application and therefore in granting the respondent's application

Property Law Act 1974 (Qld), s 38, s 42, s 288

Ex parte Eimbart Pty Ltd [1982] Qd R 398, cited
Jandlee Pty Ltd v Haskings [2013] QDC 320, cited
Muller v Zielonkowsky [2006] QSC 265, cited
Ranger v Ranger [2009] QCA 226, cited
Re Permanent Trustee Nominees (Canberra) Ltd [1989] 1 Qd R 314, cited
Riches v Hogben [1985] 2 Qd R 292, cited
Riches v Hogben [1986] 1 Qd R 315, cited
SAM v IDP [2007] 2 Qd R 456; [2006] QSC 344, cited
Szymanska v Szymanski [2015] SASC 126, cited

COUNSEL: M Horvath with S Lamb for the appellant
P G Jeffery for the respondent

SOLICITORS: Jeff Horsey Solicitors for the appellant
Guy Sara & Associates for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Bowskill J and the orders her Honour proposes.

[2] **McMURDO JA:** I agree with Bowskill J.

[3] **BOWSKILL J:** Mr Coleman and Ms Penfold were involved in a de facto relationship from about 1995 until 2007. They have two children, who are now adults. In late 1998 they bought a house in Beenleigh. The purchase price was $108,000. They borrowed $102,600 from a bank, secured by a mortgage, to pay for the house. Although their relationship ended in late 2006 or early 2007, they continued to live in the house together until August 2008, when Ms Penfold moved out. One of the children went with Ms Penfold, and the other stayed with Mr Coleman. Mr Coleman still lives in the house. He has been solely responsible for paying the mortgage since the separation.[1]

[4] Originally, Mr Coleman and Ms Penfold were registered as the owners of the house as joint tenants. In about August 2016, the joint tenancy was severed and they became registered as tenants in common, in equal shares.[2]

[5] There is a factual dispute between Mr Coleman and Ms Penfold about the financial contributions they each made, during their relationship, to repaying the mortgage, household expenses and improvements to the house. Mr Coleman also contends that, when Ms Penfold moved out in August 2008, she told him that he could have

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1 AR 31 (affidavit of Ms Penfold at [7]).
2 AR 29 and 34.

the house, at least during his lifetime.[3] For her part, Ms Penfold says that at the time of the separation, she did not "take further action" (in relation to the house) as their son wanted to stay with Mr Coleman and she "wanted to make sure that there would be a roof over his head".[4]

[6] Eight years after moving out, in August 2016, Ms Penfold, by her solicitor, contacted Mr Coleman and said she wanted to sell the house, and recover her half share of the proceeds.[5] In February 2017 she filed an application under s 38 of the *Property Law Act* 1974 (Qld) in the District Court, seeking the appointment of trustees for the sale of the house.

[7] The application did not progress with any haste to a hearing. It was administratively adjourned to the registry in May 2017, to enable the parties to obtain a valuation and try to negotiate an outcome. When that was unsuccessful, Ms Penfold's solicitor requested that the matter be listed for hearing. The application was mentioned on 20 August 2018, and then listed for hearing on 30 August 2018.[6]

[8] Although it appears at an early stage Mr Coleman may have had a solicitor acting for him, in the context of obtaining the valuation,[7] he was unrepresented at the hearing of the application on 30 August 2018.

[9] On the morning of 30 August 2018, Mr Coleman sent correspondence to the registry of the District Court, providing a medical certificate in which a doctor, on Mr Coleman's behalf, asked for the hearing to be adjourned so that he could get legal representation.[8]

[10] After the matter was called on for hearing, but before Mr Coleman had appeared in court, counsel for Ms Penfold made reference to this correspondence, and submitted that "[t]he utility in granting an adjournment in the circumstances would be non-existent… in view of the law around this particular area" and said that the matter had "come on a total of four times prior to today", suggesting there had been considerable delay.[9] As to the latter, that was not entirely accurate, in the sense that the matter had not come on for hearing four times, as is clear from the sequence of events referred to in paragraph [7] above.

[11] In any event, Mr Coleman did then arrive, appeared for himself, and indicated that he wished to apply for an adjournment, in order to obtain legal advice, and also as a consequence of his medical issues. He was able to show the court an email, on his mobile phone, which he had received from Legal Aid the day before, confirming funding for one legal advice session.[10] He also handed up other medical certificates or letters, apparently from a psychiatrist, hospital and his GP.[11]

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3 Mr Coleman's oral submissions at the hearing below, at AR 88 (lines 43-45), AR 89 (line 27), AR 91 (line 22) and AR 97 (line 42); affidavit of Mr Coleman, filed in this court, at [6].

4 AR 31 (affidavit of Ms Penfold at [10]).

5 AR 29.

6 AR 41 (affidavit of Mr Palombo, solicitor).

7 AR 67.

8 AR 72 and 73. The letter or medical certificate does not appear to have been made an exhibit, and is not before the court on this appeal.

9 AR 72 and 73.

10 AR 75-77.

11 AR 86. These also were not made exhibits, and are not before the court on this appeal.

[12] Counsel for Ms Penfold reiterated his earlier submission that there was no utility in an adjournment because, on the authorities, the outcome of the application for the appointment of statutory trustees for sale was "inevitable".[12] He submitted that the only circumstance in which there is a refusal of such an order "is when there's competing proceedings on foot, but that could never happen here because such proceedings are almost a decade out of time".[13]

[13] That was a reference to an application for a property division under s 44(5) of the *Family Law Act* 1975 (Cth), which was required to be filed within two years after the end of the relationship. As it turns out, that was an incorrect reference, because the Commonwealth Act did not apply to Mr Coleman and Ms Penfold's relationship.

[14] The learned primary judge was referred to authorities supporting the proposition that hardship, in the sense of illness or the disadvantage of losing one's home, is not sufficient to defeat an application under s 38 of the *Property Law Act*.[14]

[15] The learned primary judge refused to grant the adjournment, on the basis that this would only delay the inevitable. Accepting that hardship was not a sufficient basis to deprive a co-owner of their right to a statutory order for sale, his Honour proceeded to make the order sought under s 38 of the *Property Law Act*, which provided for the sale of the house, and division of half the net proceeds (after payment of the costs of sale, and payment of the mortgage debt) to each of Mr Coleman and Ms Penfold.[15]

[16] Mr Coleman appeals to this Court, assisted by lawyers acting for him *pro bono*, contending that the District Court judge erred in the exercise of the discretion not to adjourn the hearing of the application and, therefore, in granting Ms Penfold's application.

[17] On the appeal, Mr Coleman has sought leave to rely upon an affidavit of himself. In part, the affidavit confirms things Mr Coleman said at the hearing below (including in relation to what he contends was the arrangement for him to keep the house, after he and Ms Penfold separated). The affidavit also goes into more detail about his background, the financial contributions he contends were made, or not made, to the house and the hardship he will suffer if the order for sale is not set aside. Mr Coleman says in his affidavit that he did not know he could have gone to court after he and Ms Penfold broke up "to get the 50/50 shares in the house changed", let alone that he had to do that within two years, or that there was an option to apply for that even after the two years had expired. He says, though, that even if he had known about that, he would not have gone to court, because he believed he had an arrangement with Ms Penfold for him to have the house. Mr Coleman says that if he is successful in his appeal, he will make an application for permission to bring an application to adjust the existing 50/50 shares in the house, within seven days of this Court handing down its decision. He says the barristers who have acted for him on this appeal have said they are prepared to run that application for him, also on a *pro bono* basis.

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12 Referring to *Jandlee Pty Ltd v Haskings* [2013] QDC 320, *Ex parte Eimbart Pty Ltd* [1982] Qd R 398 and *Re Permanent Trustee Nominees (Canberra) Ltd* [1989] 1 Qd R 314.

13 AR 83. Underlining added.

14 For example, *Szymanska v Szymanski* [2015] SASC 126.

15 AR 13, order 13.

[18] I would give leave for Mr Coleman to rely upon his affidavit on this appeal, but only in substance in relation to the matters he raised at the hearing below, and the evidence of his intention to apply for leave to bring a property adjustment application. In so far as the details of his evidence about the financial contributions of the parties is concerned, the affidavit demonstrates that there are disputed factual issues, which may affect the legal interests of each of Mr Coleman and Ms Penfold in the property. But the substance of those disputed issues is not a matter for this Court to determine, given the nature of this appeal.[16]

[19] In my view, the exercise of the learned primary judge's discretion, in relation to the adjournment application, was affected by error in that his Honour proceeded on the basis of an incomplete statement of the relevant legal principles.

[20] Importantly, his Honour was not made aware of:

(a) the statutory provisions which applied, for the purposes of any property adjustment proceedings in relation to the relationship between Mr Coleman and Ms Penfold, namely, part 19 of the *Property Law Act*;

(b) s 288 of the *Property Law Act*, which confers a discretion on the court to give an applicant leave to bring an application for a property adjustment order outside the otherwise applicable two year time limit (after the end of the relationship), if the court is satisfied hardship would result to the applicant if leave were not given;

(c) the authorities that, in the context of s 288(2), "hardship" requires the court to be satisfied the person seeking leave will suffer a real and substantial detriment if leave is not granted; which is not the mere loss of the right to litigate a claim for property readjustment, but the hardship caused by the loss of that right[17] (to be distinguished from the hardship referred to in cases such as *Szymanska v Szymanski* [2015] SASC 126);

(d) the decision in *SAM v IDP* [2007] 2 Qd R 456, in which Mackenzie J granted leave under s 288(2) to apply for a property adjustment order (two years out of time), and adjourned the application which had been made under s 38 (at [26]); and

(e) more broadly, the potential for application of the general law of proprietary estoppel, in light of Mr Coleman's contention of an agreement, or arrangement, made in 2008, for him to keep the house, at least during his lifetime,[18] which may have provided a defence to the application under s 38.[19]

[21] It is not suggested counsel for Ms Penfold actively misled the learned primary judge. It was an error; and an unfortunate consequence of Mr Coleman's lack of legal representation.

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16 Cf *Ranger v Ranger* [2009] QCA 226 at [13].

17 See *SAM v IDP* [2007] 2 Qd R 456 at 459, and the authorities there referred to.

18 See, for example, *Riches v Hogben* [1985] 2 Qd R 292 at 301-302 per McPherson J and, on appeal, *Riches v Hogben* [1986] 1 Qd R 315 at 319-321 per Kelly SPJ, 326-327 per Macrossan J and at 339-342 per Williams J.

19 Generally, or in exercise of the powers conferred on the court by s 42 of the *Property Law Act*; see, for example, *Muller v Zielonkowsky* [2006] QSC 265 at [24]-[25].

[22] Having regard to those matters, it could not safely be concluded that Mr Coleman could "never" bring an application for a property adjustment order; or, even if that was not available, seek declaratory relief as to the respective beneficial interests of the parties in the property, under s 42 of the *Property Law Act*, in reliance upon the equitable principle of proprietary estoppel. If his argument, as to the arrangement made in 2008, was accepted, it may provide a complete answer to the application for relief under s 38 of the *Property Law Act*. In short, the making of an order under s 38 was not "inevitable", in the circumstances of this case. This does not reflect any assessment of the substantive merits of the proposed applications or arguments; only the potential outcome of pursuit of the various legal options available to Mr Coleman.

[23] Since the exercise of the discretion was attended by legal error, it is appropriate for this Court to intervene, and exercise the discretion for itself.[20] I am persuaded that, in the proper exercise of the discretion, the hearing of the application under s 38 ought to have been adjourned, to enable Mr Coleman to obtain the legal advice he requested (which he now has) and, within an appropriately constrained period of time, to make such applications (under s 288 of the *Property Law Act*, or otherwise) as he is advised.

[24] It would not be appropriate to leave the order which has been made under s 38 in place, whilst Mr Coleman pursues a property adjustment order, staying only that part of the order which deals with the distribution of the proceeds,[21] because on one view of the dispute between the parties there is the possibility of no order being made under s 38.

[25] I would therefore order as follows:

(a) The appeal is allowed.

(b) The orders made on 30 August 2018 are set aside.

(c) In substitution, the application under s 38 of the *Property Law Act* is adjourned to the registry of the District Court at Beenleigh, to a date to be fixed, with no order as to the costs of that proceeding.

(d) The appellant is directed to file, in the District Court at Beenleigh, an application for leave to apply for a property adjustment order under s 288(2) of the *Property Law Act*, or any other application seeking declarations as to the rights of the parties in relation to the Beenleigh property, within 14 days.

(e) The respondent pay the appellant's costs of the appeal.

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20 *House v The King* (1936) 55 CLR 499 at 504-505.

21 Cf the decision of Robin QC DCJ in *H v M* [2005] QDC 283 at pp 6-7.