SUPREME COURT OF QUEENSLAND

CITATION:	*Goodwin v Goodwin & Anor* [2004] QCA 50
PARTIES:	**ELMA AGNES GOODWIN** (applicant/respondent) **v** **SHANE CHRISTOPHER GOODWIN** (first respondent/appellant) **KERRI GAYLE GOODWIN** (second respondent)
FILE NO/S:	Appeal No 9057 of 2003 DC No 4 of 2003
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal Application for Reopening (Civil)
ORIGINATING COURT:	District Court at Brisbane
DELIVERED EX TEMPORE ON:	27 February 2004
DELIVERED AT:	Brisbane
HEARING DATE:	27 February 2004
JUDGES:	McPherson and Williams JJA and McMurdo J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed with costs** **2. Application to reopen refused**
CATCHWORDS:	REAL PROPERTY – PARTITION OF LAND – STATUTORY TRUST FOR SALE OR PARTITION – QUEENSLAND – where trustees appointed under s 38 of the *Property Law Act* for the sale of land which the appellant and his wife co-owned with the respondent as tenants in common – whether there was any evidence before court which enlivened discretion not to appoint trustees - whether there was a binding contract for the respondent to sell her share of the land to the appellant and if so whether it would affect the exercise of discretion *Property Law Act* 1974 (Qld), s 38
COUNSEL:	No appearance for the appellant L A Stephens for the respondent

SOLICITORS: No appearance for the appellant
G J Buckley & Associates for the respondent

McPHERSON JA: The appellant did not appear when this matter was called three times at the listed hour of 10.15 a.m. this morning. It has, for some weeks at least now, been listed for that time on this day and the appellant is fully aware of it. He has been sporadically communicating with the Registry insisting to the Appeals Registrar, but without success, that the hearing of this matter, which is his own appeal, should be adjourned to some date in the future.

Apparently, he made some such statement again last evening, or possibly this morning, urging that the appeal now be heard at a later time in the day to suit his convenience. He has a record of similar behaviour at past hearings and a record also of evading service of documents in this matter when the other party wished to effect service on him. He has also complained, though not in the form of material by affidavit, that the appeal is causing him stress; but, since it is his appeal, that may fairly be regarded as a self inflicted wound.

He also has complained, judging by some of the documents we have been favoured with in this matter, that the research facilities available to him in the rural area in which he lives do not enable him to prepare his appeal fully; but it will, I am afraid, be a long time before the public library at Wondai, or it may be Murgon, is upgraded to the level of

the Harvard Law School, and the determination of the appeal cannot wait until that happens.

Despite his disability in that regard, he has succeeded in amassing bundles of written submissions of little relevance, if any at all, including the suggestion, for example, that the *Property Law Act 1974* is invalid, that there is some form of settler-orientated version of the High Court decision in *Mabo* No. 2 and, of course, Magna Carta.

The protagonists in the litigation before us are Mrs Goodwin senior, her son Shane who is the appellant and his wife Kerri. They are, together, the registered co-owners as tenants in common of land at Windera, as to three shares of which Mrs Goodwin Senior is the proprietor and as to the other two the appellant and his wife are together joint tenants.

On 12 September 2003, the matter returned to the District Court at Kingaroy, after an adjournment earlier granted by Judge Dodds in July of that year; and Judge Robertson, who was then on circuit as the Judge at Kingaroy, made an order pursuant to s 38 of the *Property Law Act* on the application of Mrs Goodwin senior for the appointment of trustees for sale of the land. This appeal by the appellant has been taken against that order of Judge Robertson.

It is noteworthy that his wife Kerri Goodwin has not joined in the appeal and is not a party to it.

The appellant and his family live on and farm the property. Mrs Goodwin senior needs the proceeds of its sale to support herself, a fact which the appellant disputes but which is, in any event, immaterial to the outcome of the appeal.

It is well settled that, to an application under s 38 of the *Property Law Act* as this is, there is practically speaking no defence, and none has been suggested or was suggested at the hearing before the District Court in Kingaroy. The Judge who hears an application of this kind has nominally a discretion whether to make an order under the section, but there was nothing before his Honour to activate the discretion in this case in such a way as to require or lead the learned Judge to refuse the order that was sought and which he made.

On this appeal, there is, it is to be noticed, a letter dated November 1995 from Mrs Goodwin possibly suggesting the existence of an offer or unstamped agreement to sell her shares for 40 per cent of market valuation; but nothing has ever been done by the appellant to enforce it specifically and, as Mrs Goodwin senior says land values in Queensland have now changed so much since the offer was made, that it is doubtful if, even assuming that a contract ensued, it has not since been abandoned by the parties.

In any event, it must be seriously open to question whether the agreement, if any, would now be enforced specifically or otherwise than by way of claim for damages, which is not a

matter with which we are concerned here and which would not prevent the order in this case from taking effect. In any event, no proceedings were instituted by the appellant to give effect, if that was his intention, to the contract as it is for this purpose assumed to be.

The only other matter that I have noticed in the course of examining the voluminous papers with which we have been presented is a statement by the appellant that he has in various ways improved the property and is entitled to compensation in respect of it. Equally, I suppose, since he appears to have occupied it himself and with his family for some time to the exclusion of Mrs Goodwin senior, he may be liable, along with his wife as part co-owner, to pay an occupation rent for the benefit of having been in possession and used the property.

Matters of that kind, however, if relevant at all, will become material only when the property is sold and it becomes the task of the trustees to distribute the proceeds in which case it may be that they will need to consider the liability of the co-owners to account pursuant to s 43 of the Property Law Act.

In all the circumstances, I can see nothing that could be said to demonstrate that the Judge's order under s 38 in this case was not properly made or that his discretion in making it was not properly exercised. I would for my part therefore dismiss the appeal both for the reasons I have given and also

because of the non appearance of the appellant to support this appeal this morning when it was called on.

WILLIAMS JA: I have perused the record book and other material submitted to the Court by the appellant through the Registrar. Much of the appellant's material is difficult to comprehend. In so far as I can comprehend his material, the only possible defence to the application would seem to be that there was a binding contract between the parties evidenced by the exchange of correspondence in November 1995. That correspondence is found from pages 118 to 121 of the record book.

Before the Judge at first instance, that does not appear to have been a contention advanced by the appellant. In any event, the correspondence is so difficult to construe that it is doubtful that a binding contract ever came into existence; but even if that correspondence did evidence a binding contract the subsequent conduct of the parties, in my view, indicates that it has been mutually abandoned.

In all the circumstances, I agree with what has been said by Justice McPherson and with the order he proposes.

McMURDO J: I agree with each of those reasons for Judgment.

McPHERSON JA: The appeal is dismissed with costs.

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McPHERSON JA: This matter has finally come before us after Mr Goodwin appeared later this morning and asked for an order that the appeal be reopened and that he be given an opportunity of putting his submissions before us.

That having been done, I can only say that I have not seen or heard anything since Mr Goodwin appeared himself that would cause me to change my opinion as formed and stated earlier in the day.

WILLIAMS JA: I see no reason to depart from what I said earlier today. No grounds for reopening have been established.

McMURDO J: I agree. I would add that, in particular, we have heard nothing from the appellant this morning which persuades me that, at least by the time that the orders were made below, there was an enforceable contract between the parties which the appellant and his wife were ready, willing and able to perform.

McPHERSON JA: Yes. The appeal stands dismissed, as it was said to be this morning, with costs.