SUPREME COURT OF QUEENSLAND

CITATION:	*D v D* [2007] QSC 131
PARTIES:	**D** (applicant) v **D** (respondent)
FILE NO/S:	BS11251 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 February 2007
DELIVERED AT:	Brisbane
HEARING DATE:	27 February 2007
JUDGE:	Lyons J
ORDER:	**1. The applicant be granted leave to apply for a property adjustment order pursuant to part 19 of the *Property Law Act* 1974** **2. The applicant's application for property adjustment to proceed on the basis of the originating application, filed 21 December 2006** **3. The application for property adjustment be adjourned to a date to be fixed** **4. No order as to costs**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – OTHER MATTERS - where de facto spouse sought leave to apply for a property adjustment order under Part 19 of the *Property Law Act* 1974 (Qld) – where more than two years have elapsed since the relationship ceased – where the applicant had a sufficient explanation as to the delay – whether the applicant would suffer 'hardship' if denied leave to apply FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – OTHER MATTERS - where de facto spouse sought leave to apply for a property adjustment order under Part 19 of the *Property Law Act* 1974 (Qld) – where more than two years have elapsed since the relationship ceased – where the applicant would suffer 'hardship' if denied leave to apply – whether the judge should exercise the discretion to

grant leave to apply

Property Law Act 1974 (Qld) s 288

In the Marriage of Neocleous (1993) 113 FLR 451, followed
In the Marriage of Whitford (1979) FLC 90-612, followed
Mackenzie v Mackenzie (1978) FLC 90-496, followed
SAM v IDP; IDP v SAM [2006] QSC 344, followed

COUNSEL: N Sayers for the applicant
A McDiarmid for the respondent

SOLICITORS: Rogers Matheson Clark for the applicant
Robin Watson Solicitors for the respondent

[1] **LYONS J**: Pursuant to an application filed on the 21st of December 2006, the applicant seeks leave to apply for a property adjustment order under part 19 of the *Property Law Act* 1974.

[2] Leave is required as more than two years have elapsed from when the de facto relationship relied upon ended, and in fact, some four years and three months has elapsed.

[3] The applicant is currently 49 years of age and the respondent is 43 of age and they commenced co-habitation in 1987 and lived together in a de facto relationship until their relationship ended in September 2000. The relationship was, therefore, a relationship of some 13 years and two children were born during this period.

[4] The relevant facts are as follows. In September 1987, the parties commenced co-habitation in the respondent's property at Nambour Street, Runaway Bay. On the 3rd of August 1990, the child, B, was born. In 1992 the respondent sold his Runaway Bay property and purchased land at Biggera Waters. The respondent financed the purchase with the proceeds of $116,000 from the Runaway Bay property and by a loan in his name. The property was registered in the respondent's name only. In March 1993 a house was constructed on the land at Biggera Waters. On the 2nd of February 1994 the child, K, was born. On the 1st of June 2000, T was born from a relationship between the respondent and LB. In September 2000 the parties finally separated.

[5] In October 2000, a separation agreement was drawn up but was not signed. In this document the respondent listed his assets as follows:

1. Real property at Coombabah Road, Biggera Waters valued at approximately $250,000;
2. A Camaro motor vehicle, valued at approximately $20,000;
3. A Holden utility, valued at approximately $5,000;
4. Furniture and personalty, valued at approximately $7,500; and
5. Tools, valued at approximately $15,000.

[6] In this document the respondent indicated that his liabilities were:

1. Two mortgages, totalling approximately $196,000;
2. An overdraft liability to the Bank of Queensland of approximately $10,000;
3. A Bank of Queensland credit card debt of approximately $5,000;

4. An Australian tax liability of approximately $3,000; and
5. A car liability of approximately $23,000.

[7] This document indicated that the applicant's assets at that stage were furniture and personalty valued at approximately seven and a half thousand dollars and a Nissan Pulsar motor vehicle valued at approximately $17,000.

[8] By affidavit dated the 20th of December 2006, the applicant submits that the property was worth substantially more, and was valued at approximately $300,000 and that the Camaro was valued at $20,000. The applicant also states that she has contributed some $14,000 in savings and a further $4,000 at the time the car was sold. She also indicated that she had made substantial financial contributions through her part-time employment and she also submitted that during the course of the 13 year relationship, she had made substantial non-financial contributions, particularly in relation to the raising of the children.

[9] In May to July 2002 there was an exchange of correspondence between the solicitors for the applicant and the solicitors for the respondent in relation to a property settlement, but no agreement was reached.

[10] On the 11th of July 2002, the applicant lodged a caveat over the Biggera Waters property. On the 2nd of August 2002, the respondent signed an undertaking not to deal with the Biggera Waters property in the following terms. He indicated that he would "not further encumber or in any way otherwise deal with the…property…until authorised to do so by [D] or her solicitors in writing or by Order of the court". He also indicated he would pay the costs of removing the caveat on the property.

[11] In September 2002, the limitation period within which the applicant may bring a claim expired. In September 2002, the respondent separated from his then de facto partner, LB. In October 2002, the respondent commenced a relationship with CW. In December 2002, the respondent acquired property at Bruce Avenue, Paradise Point and in May 2003, the respondent advertised the Biggera Waters property for sale.

[12] On the 31st of July 2003, the respondent signed a letter in the following terms:

> "I agree that any entitlement which you have to claim over 75 Coombabah Road will, on the sale of that property, be transferred to the property which I own at 24 Bruce Avenue, Paradise Point and you will be entitled to claim against that property in respect of such entitlement."

[13] In September 2003 the Biggera Waters property was sold for approximately $495,000. On the 24th of March 2006 the applicant returned the Nissan Pulsar to the respondent and on the 21st of December 2006 the applicant filed this application for leave to institute proceedings.

[14] Section 288 of the *Property Law Act* 1974 provides that, in relation to a time limit for making an application, a court may make a property adjustment order only if the application was made within two years after the day on which the de facto relationship ended or the court has given the applicant leave to apply. The court may give leave only if it is satisfied hardship would result to the applicant or a child of the de facto partners if leave were not given.

[15] In a decision of *In the Marriage of Whitford*[1] it is clearly set out that this is a two step process in the following terms:[2]

> "Thus, on an application for leave...two broad questions may arise for determination. The first of these is whether the Court is satisfied that hardship would be caused to the applicant or a child of the marriage if leave were not granted. If the Court is not so satisfied, that is the end of the matter. If the Court is so satisfied the second question arises. That is whether, in the exercise of its discretion, the Court should grant or refuse leave to institute proceedings."

[16] Accordingly we need to turn firstly to a discussion of the word "hardship". Hardship in the context of section 288 of the *Property Law Act* 1974 has been discussed in relation to similar provisions of the *Family Law Act* 1973 (Cth) and as Justice Mackenzie indicated in the case of *SAM v IDP*,[3] it is commonly accepted that the concept of hardship in this kind of provision requires the Court to be satisfied that the person seeking leave must demonstrate that they will suffer a substantial detriment if leave is not granted. He referred to the case of the *In the Marriage of Whitford*[4] which was also applied in the case of the *In the Marriage of Neocleous*,[5] where Lindenmeyer J said:[6]

> "However it is clear from many cases that "hardship" is a relative term, and that there is no absolute measure of it. What amounts to "a substantial detriment" depends upon the circumstances of each particular case. Whilst the existence of a reasonable claim to relief under section 79 is obviously a necessary ingredient of hardship, it has been held that the mere loss of the right to litigate that claim is not itself hardship."

[17] The case of *Mackenzie v Mackenzie*[7] also discussed this loss of the mere right to litigate a claim not being hardship.

[18] His Honour Strauss J in that case went on to discuss:

> "What amounts to a substantial detriment will depend on the circumstances of the applicant or a child of the marriage. In an appropriate case the loss of something of comparatively little value may constitute a substantial detriment...The loss of a mere right...to litigate a claim is not the hardship to which the section refers."

[19] In the decision of *SAM v IDP*[8] Mackenzie J went on to hold that in that case on the evidence he was satisfied that the applicant had shown to the requisite standard that she would suffer hardship. He stated that:[9]

> "The substantial detriment she will suffer is that if she is precluded from making a claim, her capacity to obtain a just division of property, consistent with current notions of entitlements of parties to a de facto relationship will be significantly limited. The relationship

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1 (1979) FLC 90-612.
2 (1979) FLC 90-612, p 78, 144.
3 [2006] QSC 344.
4 (1979) FLC 90-612.
5 (1993) 113 FLR 451.
6 (1993) 113 FLR 451 at [12].
7 (1978) FLC 90-496.
8 [2006] QSC 344.
9 [2006] QSC 344 at [18].

> was of relatively long duration. If she has to rely on equitable remedies, the prospects of her obtaining an outcome within the range she might obtain in Part 19 proceedings are not promising."

[20] In that case the detriment extended beyond mere deprivation of the right to bring proceedings and his Honour indicated in that case, "She will probably suffer a real and substantial detriment."[10]

[21] In the current case the respondent has stated that the substantial hardship has not been established. In particular, the respondent submits that the applicant has not established that there is a reasonable prima facie case that the applicant would succeed if the case went to trial. In particular, the respondent submits that if what the applicant would be expected to receive from the settlement is small, then there would be no hardship.

[22] The respondent submits that he has made the entirety of the financial contributions to the acquisition of the real property and that all of the financial obligations were his alone. The respondent also submits that the applicant's affidavit material does not address the liability issues and submits that at the time of separation his net equity in the Biggera Waters property was only $54,000, and that in the meantime he has paid all the outgoings and the mortgage payments.

[23] In the circumstances of this current case, I am, however, satisfied that the applicant has shown to the required standard that she will suffer hardship if leave is not granted. In particular, I am satisfied that given that there was a 13 year relationship and two children and that she has made substantial non-financial contributions to the relationship, there is a prima facie case that she would receive a division of the assets of the relationship of between 40 and 50 per cent.

[24] In particular, the respondent has not shown that if there was such a division, the amount the applicant would receive would be small, given the substantial assets the respondent owned at the end of the relationship. The respondent states that there were substantial liabilities, but there is no evidence of that before me to satisfy me that the amount the applicant would receive would be small.

[25] In particular, I am satisfied that the applicant's affidavit shows that she has continued to experience financial hardship since the separation. Since the relationship ended she has only been able to obtain part-time employment as a teacher's aide and she has been responsible for the day-to-day care of two children, now aged 16 and 13, who have resided with her in rented accommodation. The applicant lives frugally with her income barely covering her expenses. She has minimal assets other than a small superannuation account of $22,000 and a term deposit of $5,000, and a car worth $5,000 as well as some second-hand furniture.

[26] There is material to indicate that the respondent has paid child support of some $38,000 over the past six years, but that, as at November 2006, child support was some $1,856 in arrears.

[27] I am satisfied that if the applicant is not given leave she will not obtain a just division of property as the informal methods of settling the dispute have all failed, and if she has to institute equitable proceedings, her claim will not be as great as her

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[10] [2006] QSC 344 at [18].

proceedings pursuant to part 19 of the *Property Law Act* 1974. I am therefore satisfied that the first part of the two step process has been satisfied.

[28] Turning then to the issue as to whether in all the circumstances the discretion should be exercised. The respondent submits that in this regard, the issues to be looked at include reasons for the delay and the prejudice that the respondent will suffer if leave is granted, and the strengths and merits of the applicant's case. I have already referred to the strengths and merits of the applicant's case.

[29] The respondent submits that the applicant has offered inadequate explanation for the delay and simply says she could not afford to bring the proceedings and that she has waited four years to do anything about her claim. The respondent also states that, as a consequence of the applicant's delay, he has moved on with his life and has allocated his assets to his business and other investments.

[30] The affidavit material sets out that the applicant was initially advised that Legal Aid was not available to her to pursue her property settlement. The material also sets out that after the separation, the applicant did approach solicitors who commenced discussions about a property settlement without recourse to the courts and who ensured her position was protected. Importantly, the documents signed on the 31st of July 2003 by the respondent indicate that the respondent specifically recognised the applicant's claim against the property at Biggera Waters and importantly, this was recognised after the two year limitation period has expired. He specifically stated in these terms, after the expiration of the two year period: "You will be entitled to claim against that property in respect of such entitlement."

[31] I am satisfied that in the circumstances, the respondent indicated to the applicant he would recognise the applicant's claim, and given the previous conduct between the parties, this would be without recourse the formal processes of the court.

[32] Given her financial position, I am satisfied it was reasonable for her to believe that her rights would be protected in this way. It is now clear that the respondent has no intention of making any settlement of the applicant's outstanding claims without recourse to the courts. The applicant has only recently been advised by her brother-in-law that he will assist her in funding her claim through the courts. I am not satisfied that there will be prejudice to the respondent if leave is given on the basis that he has specifically recognised the applicant's claim and the applicant has indicated on some six occasions that she could seek relief under part 19.

[33] I am not satisfied that the respondent has set out sufficient evidence of prejudice in his affidavit, and in his own material he indicated that it was only during 2006 that he realised the applicant was out of time in bringing her claim.

[34] In all of the circumstances, therefore, I am satisfied that the discretion should be exercised and that leave should be given.

[35] Accordingly then, in the circumstances, I will make an order that the applicant has leave to seek an adjustment of the property interest between the parties under part 19 of the *Property Law Act* 1974 generally, and in particular, for that cause of action to proceed on the basis of the originating application, filed on the 21st of December 2006. I order that the application be adjourned to a date to be fixed and that there be no order as to costs.