SUPREME COURT OF QUEENSLAND

CITATION:	*AC v CM* [2010] QSC 384
PARTIES:	**AC** (applicant) **v** **DM** (respondent)
FILE NO/S:	SC No 241 of 2010
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court Rockhampton
DELIVERED ON:	13 October 2010
DELIVERED AT:	Rockhampton
HEARING DATE:	27 September 2010
JUDGE:	McMeekin J
ORDER:	**1. The applicant has leave to seek a property adjustment order under Part 19 of the *Property Law Act* 1974;** **2. The evidence in chief of any witness is to be provided by way of affidavit;** **3. The applicant is to file any further affidavit upon which she wishes to rely within 14 days;** **4. The respondent is to file any further affidavit upon which he wishes to rely within 28 days;** **5. Chapter 7 of the *Uniform Civil Procedure Rules* is to apply and the parties are to complete disclosure by delivery of a list of documents within 42 days;** **6. The parties are to endeavour to agree on a dispute resolution plan and failing agreement the application is to be listed for further hearing on 15 November 2010 and the parties directed to file short minutes of the orders that they respectively seek at least two days prior to the hearing;** **7. The application be adjourned to a date to be fixed; and** **8. There is no order as to costs.**
CATCHWORDS:	FAMILY LAW AND CHILD WELFARE – DE FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – APPLICATION – where applicant sought leave to apply for a property adjustment order pursuant to s 288(2) of the *Property Law Act* 1974 (Qld) – where

respondent denies any de facto relationship – where end date of relationship disputed – whether refusal to grant leave would cause hardship to the applicant – whether the discretion to grant leave to apply should be exercised in favour of the applicant

Acts Interpretation Act 1954 (Qld), s 32DA, s 260
Family Law Act 1974 (Cth), s 44(4)
Property Law Act 1974 (Qld), s 258, s 288, s 291

Baumgartner v Baumgartner (1987) 164 CLR 137
Hibberson v George [1989] NSWCA 100
In the Marriage of Jacenko (1986) 11 Fam LR 341; (1986) FLC 91-776
In the Marriage of Whitford (1979) FLC 90-612
Kennon v Kennon (1997) 22 Fam LR 1
S v B [2005] 1 Qd R 537; [2004] QCA 449

COUNSEL: T. Ryan for the applicant
A. Arnold for the respondent

SOLICITORS: Cam Schroder Lawyers for the applicant
Madden Solicitors for the respondent

[1] **McMeekin J:** On 27 April 2010 the applicant filed an application for leave to commence proceedings for a property adjustment order pursuant to s 288(2) of the *Property Law Act* 1974 ("the Act"). The respondent opposes leave being given.

[2] Section 288 of the Act provides:

(1) "A court may make a property adjustment order only if –
(a) the application was made within 2 years after the day in which the de facto relationship ended; or
(b) the court has given the applicant leave to apply.
(2) The court may give leave only if it satisfied hardship would result to the applicant or a child of the de facto partners if leave were not given."

[3] The applicant contends that she and respondent lived in a de facto relationship for about ten years. The respondent denies that there was any de facto relationship.

Is Leave Required?

[4] A question arises as to whether the applicant needs leave at all. She contends that the relationship that she maintains existed came to an end in May 2008. If so, her application is within time and no leave is required. Despite that the applicant persisted with her application. I think that she was right to do so.

[5] The confusion arises because of the state of the evidence. The applicant has sworn two affidavits and gave some short oral evidence. In her first and principal affidavit the applicant swore at paragraph 91, under the heading *"Separation Occurred – March 2008"*:

"In March 2008 I finally had the strength and courage to tell the respondent that I do not want to be with him anymore. I had enough of his abuse."

[6] At paragraph 120 of the same affidavit the applicant swore:

> "This was the Domestic Violence cycle that continued, in our dysfunctional relationship, until separation in March 2008."

[7] Contrary to those two assertions the applicant swore at paragraph 111 of the same affidavit:

> "I have suffered Domestic Violence at the hands of the respondent for the entire duration of our relationship from 1998 until the date of separation in May 2008".

[8] The applicant explained in her oral evidence that what she was endeavouring to portray by her affidavit was that in March of 2008 she had determined to end the relationship with the respondent and so advised him, but that in the intervening period between March and May of 2008 he had asked her to reconsider and she was reconsidering her decision but determined finally in May 2008 that the relationship was at an end. It would appear that in the intervening period, on the applicant's case, the respondent was asking her to resume the relationship and she was refusing to do so. It would appear that they lived separately and apart through that time, whatever had been the arrangement before. As best I can see there was no overt act or indication by the applicant to the respondent that she was seeking only a temporary separation or that she intended to return to the pre-existing relationship.

[9] The question of whether a person is a de facto partner of another must be decided in the context of the definition in s 32DA of the *Acts Interpretation Act* 1954 (see s 260 of the Act). The question is whether the applicant and respondent were "living together as a couple on a genuine domestic basis". On the applicant's case from March 2008 she and the respondent were not "living together as a couple on a genuine domestic basis". She had informed him that she did not wish to be with him anymore. They were living separately and apart. That is not altered by any approach from the respondent to ask that she reconsider that decision.

[10] There is no presumption or inference of a continuance of a de facto relationship: *S v B* [2005] 1 Qd R 537; [2004] QCA 449 at [2] per McPherson JA. In *Hibberson v George*, Mahoney JA, with whom Hope and McHugh JJA agreed, said:

> "But where one party determines not to "live together" with the other and in that sense keeps apart, the relationship ceases, even though it be merely, as it was suggested in the present case, to enable the one party or the other to decide whether it should continue."[1]

[11] I hesitate to make a determination of the question of the end date of the relationship as applications concerning preliminary issues on a busy applications day with limited evidence are poor vehicles for the determination of facts. However the parties seek a determination of the leave point as they do not wish to expend monies on what might turn out to be needless litigation. If it be a necessary prerequisite of my jurisdiction to grant leave that I make a finding of fact as to the end date of the relationship then it seems to me that the parties ceased to live as de facto partners in March 2008 and hence leave is required.

---

1 [1989] NSWCA 100 at 16.

Two Stage Process

[12] I turn then to the question of leave. It has been accepted in a number of decisions that on an application of this type the Court engages in a two stage process.[2]

[13] First, the applicant must demonstrate that hardship would be caused to her if leave were not granted. It is the consequences of the refusal to grant leave that is relevant, not the loss of the right to pursue the claim itself.[3]

[14] That being demonstrated then the applicant must show that the discretion so enlivened should be exercised in her favour. Relevant to the exercise of that discretion are factors such as the strength of the applicant's case, the extent of any delay, the explanation for such delay and whether there is any demonstrable prejudice to the respondent in allowing proceedings to commence.

The Relationship

[15] Section 288 of the Act is similar in wording to s 44(4) of the *Family Law Act* 1974 (Cth). Both Acts are concerned with the adjustment of property rights between two persons following the end of a domestic relationship. Hence decisions in that latter jurisdiction have frequently been referred to in the interpretation and application of s 288 of the Act.

[16] Generally speaking, on an application of this type, I think that I am obliged to proceed on the assumption that the applicant's facts are accepted. The applicant bears the onus of demonstrating a prima facie case, without which there could be no possibility of hardship being suffered by a refusal to allow it to proceed. I am in no position to determine disputed facts. While there must be some limitation on what might be accepted – assertions that are inherently improbable and have no independent support or matters that are demonstrably wrong for example – the principle otherwise should apply. That is the approach that has been adopted in the Family Court: *In the Marriage of Jacenko.*[4]

[17] The applicant contends, and the respondent disputes, that the relationship was one of "de facto partners" within the meaning of s 32DA of the Acts Interpretation Act 1954. The respondent says that whilst the relationship was "intimate" the parties at no time lived together. Rather they were "boyfriend-girlfriend".

[18] The matter cannot be resolved by mere assertion by the parties. The characterisation of the relationship is not straight forward as the respondent at all times maintained a residence at Blackwater where he worked. The applicant worked in Yeppoon and resided there.

[19] As I have mentioned, the legislation requires a finding that the parties were "living together as a couple on a genuine domestic basis": s 32DA *Acts Interpretation Act* 1954. The applicant's material establishes that whilst the respondent lived away from her during his working week, or whatever period applied, he was a resident in her home in Yeppoon or they lived together at a cottage at Stanage Bay, at all other times. They attended family functions together, the respondent's child was cared for

---

2 *SAM v IDP* [2007] 2 Qd R 456; [2006] QSC 344; *D v D* [2007] QSC 131; *HT v CS* [2009] QSC 051

3 See, for example, *SAM v IDP* (supra) per MacKenzie J at [16].

4 (1986) 11 Fam LR 341; (1986) FLC 91-776.

by the applicant in her home for a period, the applicant was a home maker when they were together, there were considered a couple by others, the respondent gave her an engagement ring, she paid for groceries that they shared, and the applicant managed the respondent's properties. As well it is common ground that they were in a sexual relationship for 10 years. If all this were accepted then I would be satisfied that the parties were de facto partners within the meaning of the legislation.

Hardship

[20] The first step is to determine whether the applicant has established that a refusal to grant leave would cause her hardship. In *Whitford* the Full Family Court said "hardship":

> "… is akin to such concepts as hardness, severity, privation, that which is hard to bear or a substantial detriment."[5]

[21] That characterisation of hardship as a "substantial detriment" has been adopted in cases under s 288: *SAM v IDP* (supra); *D v D* (supra).

[22] The respondent argues that no substantial detriment has been demonstrated. Accepting the applicant's characterisation of the facts, the respondent denying that there was even a relationship, the respondent argues that the applicant cannot demonstrate a prima face case or, if there is a prima face case, then the respondent asserts that it can only be to a minimal adjustment of the existing property rights.

[23] In support of that submission the respondent pointed out:

(a) There were no children of the relationship;
(b) Both were in full time employment throughout the claimed period of the relationship;
(c) There was no evidence of any joint bank account, joint borrowings, or the pooling of any monies to meet common expenses;
(d) There was no evidence of any financial contribution by the applicant to the acquisition of any property held in the name of the respondent;
(e) There was no evidence advanced by the applicant to explain how it is that she acquired properties in her name; and
(f) Whilst the applicant asserted that certain properties had been jointly purchased there was no evidence provided to justify any such inference being drawn.

[24] The applicant's case was limited to the bald assertion that if the matter proceeded then the applicant would "most probably" receive between 45% and 60% of the pool of assets. No attempt was made to demonstrate why that might be so. I assume that the assertion depends upon acceptance of the proposition that in relationships of significant length non-financial contributions can give rise to an entitlement of this order.

[25] I note that in *D v D*, Ann Lyons J accepted that in the circumstances of that case, which involved a 13 year relationship, two children and substantial non-financial contributions to the relationship by the applicant, there was "a prima facie case that she would receive a division of the assets of the relationship of between 40 and 50 per cent".[6] Mackenzie J in *SAM v IDP* had regard to "a just division of property

---

5 (1979) FLC 90-612 at 78, 144.
6 [2007] QSC 131 at [23].

consistent with current notions of the entitlements of parties to a de facto relationship."[7] I accept the appropriateness of the approaches taken in these cases.

The Applicant's Circumstances and Contribution

[26] The applicant is aged 44 years. She is in employment as a receptionist at Cam Schroder lawyers. She has previously been employed as a sales and service advisor at the National Australia Bank and as a property manager with Elders Real Estate. She earns about $690 per week. She is the registered proprietor of two properties, one in which she lives. The second property I understand is rented. The net equity in the two properties (there is a mortgage in favour of the National Australia Bank over the second property of $155,258.61) is said to be $434,740 approximately. The applicant otherwise has minimal savings, an amount of $38,956 in a superannuation fund and a ten year old motor vehicle worth she says about $7,000.

[27] Her affidavit records that when she entered into the relationship she had assets of about $150,000 consisting of $80,000 cash in a bank account, a superannuation fund of approximately $18,000 together with a second hand motor vehicle and various furniture and effects.

[28] The applicant contends that the respondent has assets which she estimates to be of a value of $2,335,000. The respondent's financial statement suggests that this is an overstatement. According to his statement the respondent is the registered proprietor of three properties all unencumbered with a total value of approximately $949,000. He holds shares to a value of nearly $615,000. He has a superannuation fund of about $409,000 and a motor vehicle, two boats and a motorbike which he values at $81,250. He thus asserts that he has net assets of approximately $1,645,250.

[29] According to the applicant, the respondent had net assets of approximately $250,000.00 at the commencement of their relationship.

[30] The respondent is aged 53 years and is employed as a miner. His gross earnings are in the order of $107,500.00 per annum. In addition he receives rental from two properties totalling approximately $780 per week as well as dividends from his shares. The dividends are described as totalling $18,000. Whether that is per annum or on some other basis I cannot tell.

[31] The applicant does not identify in her affidavit how it is that the parties have accumulated the assets that they now hold. It is evident that the respondent had a much greater earning capacity. There is a reference to the respondent inheriting $40,000 in cash and approximately $60,000 in shares in 2006.[8] The applicant then simply asserts that "both parties" have accumulated other assets although it is evident that the assets have been acquired by the parties in their individual names. No explanation is offered as to why assets have been placed in individual names if

---

7 Supra at [18].

8 Paragraph 227 of the applicant's affidavit filed 27 April 2010. The respondent does not expressly deny this although he asserts that he inherited all the shares in his portfolio other than the BHP and Bluescope shares: see paragraph 33 of the respondent's affidavit filed 20 September 2010. The present value of the claimed inherited shares is about $126,000: see the respondent's Statement of Financial Circumstances.

they have been acquired as a result of the efforts of both parties, whether financial or otherwise.

[32] The applicant asserts that throughout their relationship each was in full time employment and that she made a significant contribution by way of performing all home duties.

[33] Accepting the applicant's version of the facts her contribution to the acquisition, conservation and maintenance of the various items of realty and personalty presently held by both parties can be identified as follows:

(a) As a homemaker over a 10 year period;
(b) Spring cleaning on several occasions at the respondent's residence at Blackwater;
(c) Carrying out of cooking, cleaning and washing at the Stanage Bay residence which occurred on most weekends;
(d) Payment of most of the household expenses by the applicant;
(e) The caring for the respondent's son Brett for 3 to 4 months in 2000. As well she asserts that she provided care for the respondent's children "when they would visit";[9]
(f) The use of her skills as a senior property manager to manage properties owned by her and the respondent. This saved on fees to be paid to a real estate agent as she attended to all the necessary paperwork "for the bonds, leases, entry condition reports, rent increases and property inspections etc"[10]. As well she would attend to maintenance problems reported by the tenant and arrange for a handyman to carry out any repairs needed.[11]

[34] The basis of the applicant's claim then rests very largely on non-financial contributions, as I presently understand it. Part 19 of the *Property Law Act* does not take away the applicant's rights to seek "remedy or relief under another law": s 258 of the Act. If the applicant has prospects of obtaining relief by pursuing equitable remedies then that must be brought into account. As well the costs that are likely to be incurred in pursuing this application need to be considered – a small claim with significant costs may not be worth pursuing.

[35] Given the basis of the applicant's claim it seems probable that any equitable remedy that she could pursue, for example a constructive trust imposed on unconscionability grounds,[12] would be very limited.

[36] On a Part 19 application these non-financial contributions assume significance: s 291 of the Act. As well there are other factors relevant here. One is the state of the applicant's health. She has arthritis and "fibromalja" (*sic* – query fibromyalgia) from a fracture. She asserts that she has been taking an opiate based medication called physeptone daily for some 14 years and has received medical advice that she ought to cease taking it due to its side affects. She says that without the medication she "cannot function and cannot work". Thus her prospective earning capacity may be limited in the future. These considerations do not, as I understand the law, have any bearing on her entitlement to any equitable remedy but might well be relevant

---

9 Paragraph 224 of the applicant's affidavit of 27 April 2010.
10 Paragraph 57 of the applicant's affidavit.
11 Paragraph 58 of the applicant's affidavit.
12 Cf *Baumgartner v Baumgartner* (1987) 164 CLR 137.

under a Part 19 application: see ss 296, 297 and 298 of the Act, which require the court to consider the age and state of health of each of the de facto partners and their physical and mental capacity for appropriate gainful employment.

[37] Essentially the applicant's case is that for ten years she and the respondent shared their lives. She made a significant non-financial contribution. They commenced that relationship with the respondent having net assets of about $100,000 more than the applicant but they have ended it with the respondent having an advantage of over $1.1 million.

[38] The applicant asserted that she is in receipt of only 17% of the assets, however that assumed what seems to be an inflated view of the respondent's true asset position. The respondent contended that the applicant was in fact in possession of 21% of the asset pool. On either case the applicant has prospects of achieving a significantly greater share of the asset pool on a Part 19 application. A division even at the lower end of the applicant's expectations, and they are not unrealistic in my view if one adopts her version of the facts, would result in a significant benefit to her of several hundred thousand dollars.

[39] I am satisfied that the applicant would suffer hardship in the relevant sense if leave was refused.

Discretionary Factors

[40] The next question to consider is whether the discretion ought to be exercised in the applicant's favour.

[41] The delay here has been relatively short. It relates to a period of a little under two months, there being no precise date of separation but I assume that it occurred during March 2008 and the application was filed on 27 April 2010. Mr Arnold who appeared for the respondent conceded that there was no relevant prejudice that he could point to.

[42] The debate in the case centred on the explanation for the delay. The applicant gave evidence that she first provided instructions to her solicitors (who are also her employers) in February 2010. She had delayed in taking steps to that time, she says, because she feared for her life and safety. As well she asserts that she has, since separation, suffered from depression, loss of self esteem and panic attacks. She says that she was "extremely worried" at what response the bringing of court proceedings would trigger from the respondent. All this has been against a background, so the applicant asserts, of severe and sustained domestic violence over most of the period of their relationship.

[43] In this regard I wish to make some comment on the affidavit material. Much of the applicant's primary affidavit is concerned with her allegations concerning the respondent's character and a claimed history of domestic violence. It is not evident why the material was inserted in that affidavit. It certainly does not appear to have been inserted initially as an explanation for any delay in bringing the proceedings, as that claim, expressly at least, was not made until over four months later in an affidavit filed 9 September 2010.

[44] Generally speaking the insertion of such material in an affidavit commencing an application of this type is extremely counter productive. I am yet to have it explained to me how it is that the history related will affect any proposed adjustment of property rights. But, even if relevant, it would generally be preferable that only brief mention be made of such allegations and the inflammatory details be left until it is clear that curial determination of them will be needed.

[45] Reference was made in the course of submissions to the "Kennon factors" but counsel was unable to provide citation of any authority to assist me in understanding the point.[13] The reference, apparently, was to a decision of the Full Court of the Family Court in *Kennon v Kennon* (1997) 22 Fam LR 1 where there is consideration of the relevance of allegations of domestic violence in property adjustment applications under the *Family Law Act*. The majority (Fogarty and Lindenmayer JJ – the remaining member of the Court, Baker J, had a similar view) concluded in that case that domestic violence had relevance in this way:

> "Put shortly, our view is that where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79."[14]

[46] It may be that the applicant here would wish to assert that her non-financial contributions as a homemaker were made more arduous by her experience with the respondent but no such claim has yet been made.

[47] The respondent pointed to the lack of any explanation for the delay between the giving of instructions in February and the lodging of the application in April. Presumably the applicant relied upon her solicitor to attend to issuing the proceedings in a timely way and the solicitor failed to do so. It emerged in evidence that a letter had been written in February 2010 to the respondent by those solicitors. Thus the respondent was put on notice, within time, of the potential for an application to be brought. The failure to bring it within time seems to have been brought about by the solicitors' default. There is an explanation for the delay in consulting the solicitors which is not inherently improbable.

[48] Where the delay is evidently the fault of the solicitors and the applicant has otherwise acted reasonably I would not be inclined to let that delay weigh too heavily in the scales against the applicant. That attitude has been taken in the Family Court[15] and is considered appropriate in applications of a like nature under the *Uniform Civil Procedure Rules*.[16]

---

13 Practice Direction No 6 of 2004 requires that relevant authorities be identified in a written outline with copies to be provided to the Judge. No written outline was provided by the applicant's counsel. In case counsel's duties to the Court are not understood, no counsel should assume that any decision is one known to the Court.

14 At 25.

15 *In the Marriage of Frost and Nicholson* (1981) FLC 91-051 at 76424-76425.

16 For example. in applications under r 389 seeking leave to proceed after a two year delay: see *Tyler v Custom Credit Corp* [2000] QCA 178.

[49] Thus here the delay has been short, to the extent that the respondent has delayed in attending on a solicitor there is an explanation, the applicant did attend on a solicitor within time but the solicitor has failed to file the material in time. There is no relevant prejudice.

[50] In my view these factors heavily favour an exercise of the discretion to allow the application to proceed. .

[51] I order:

(a) The applicant has leave to seek a property adjustment order under Part 19 of the *Property Law Act* 1974;

(b) The evidence in chief of any witness to be provided by way of affidavit;

(c) The applicant to file any further affidavit upon which she wishes to rely within 14 days;

(d) The respondent to file any further affidavit upon which he wishes to rely within 28 days;

(e) Chapter 7 of the *Uniform Civil Procedure Rules* is to apply and the parties are to complete disclosure by delivery of a list of documents within 42 days;

(f) The parties to endeavour to agree on a dispute resolution plan and failing agreement the application is to be listed for further hearing on 15 November 2010 and the parties directed to file short minutes of the orders that they respectively seek at least two days prior to the hearing;

(g) The application be adjourned to a date to be fixed; and

(h) That there be no order as to costs.