

SUPREME COURT OF QUEENSLAND

CITATION: *Kerr v Short* [2014] QSC 199

PARTIES: **DEBRA JAYNE KERR**
(applicant)

AND

DAVID MICHAEL SHORT
(respondent)

FILE NO/S: BS No 6611 of 2014

DIVISION: Trial

PROCEEDING: Application

DELIVERED ON: 30 July 2014

DELIVERED AT: Brisbane

HEARING DATE: 30 July 2014

JUDGE: Atkinson J

ORDERS:

1. **That pursuant to Section 38 of the *Property Law Act 1974 (Qld)* Peter Sheehy (“the trustee”) be appointed as Trustee for Sale of the real property at 22 Laurier Street, Annerley and described as Lot 311 on RP 37992, County of Stanley, Parish of Yeerongpilly, Title Reference 50913537 (“the property”) and that the property vest in the trustee for the purposes of sale.**
2. **That the Trustee be entitled to sell the property by such method as he deems appropriate in the circumstances including but not limited to sale by auction or by private treaty.**
3. **That either of the current co-owners be entitled to make offers on the property for consideration by the Trustee.**
4. **That in the event of sale by private treaty the Trustee shall determine the appropriate marketing of the property including listing price from time to time, the appointment of any agent or agents for the sale of the property and the terms and conditions of such appointment or appointments.**
5. **That in the event of sale by auction:-**
 - a) **the Trustee shall determine the appropriate marketing campaign for the property including a marketing budget for advertising, the appointment of any agent or agents for the sale of the property and the terms and conditions of such appointment or appointments;**
 - b) **the Trustee shall determine the reserve price**

- for the auction after consultation with the auctioneer and considering any recommendations of the auctioneer;
- c) should either of the parties be the successful bidder at auction the Trustee is authorised to sell to that party without a requirement that the purchasing party pay a deposit at the time of execution of the contract;
 - d) the Trustee may, but is not obliged to obtain a valuation of any of the property if he deems that appropriate for the purposes of assistance in the determination the reserve price at any auction.
6. That the Trustee is authorised to expend money on the property in preparation for its sale using the recommendations of any agent in that regard, and for its marketing or advertising and that the amount of such expenditure be paid for equally by the Applicant and Respondent.
 7. That pending sale, the Applicant and Respondent shall pay or cause to be paid all outgoings on the property including rates, local authority charges, body corporate charges (if any), and maintain adequate fire and general insurance on the property and provide evidence of same to the Trustee as requested by him from time to time.
 8. That the Trustee is hereby indemnified by the owners or co-owners of the property against any claims made against them upon becoming registered owners as trustee on title, consequent upon a failure to pay any of the outgoings of the nature described in the preceding Order.
 9. That pursuant to Section 38 of the *Property Law Act 1974* (Qld) the property be vested in the trustees, subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided share, to be held by the trustees on the statutory trust for sale.
 10. That the parties to these proceedings be at liberty to purchase the property upon terms that he or she should not be required to pay any deposit and that he or she may set off against the purchase price the value of his or her share in the property.
 11. That upon settlement of the sale, the sale proceeds shall be paid or held, as the case may be, in the following manner:-
 - a) Firstly in payment of all necessary selling costs including agent's commissions, legal costs, marketing and advertising costs and all other necessary costs incurred in the sales;
 - b) Secondly in discharge of any liabilities secured against the property by registered mortgages;
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- c) **Thirdly in payment of the trustees costs and expenses incurred in effecting the sale and when the sale is settled;**
 - d) **Fourthly to hold the remaining balance on trust by the Trustee pending further order or written agreement concerning the distribution of the said monies as between the parties, or between the parties and any other such person asserting an interest in the said monies.**
12. **That the Trustee is entitled to charge all reasonable costs and disbursements incurred by the Trustee in performance of his obligations pursuant to these Orders and that his fees and expenses be a first charge on trust monies.**
 13. **That there be liberty to apply to all parties and the Trustee on 5 day's notice, one party to the others.**
 14. **That the respondent pay the applicant's standard costs of and incidental to this application, with such costs to be paid from the respondent's share of the net sale proceeds of the property prior to disbursement of that share to the respondent. In the event that the respondent purchases the property, such costs shall be added to the purchase price payable by the respondent.**

CATCHWORDS: REAL PROPERTY – PARTITION OF LAND – STATUTORY TRUST FOR SALE OR PARTITION – SALE – where the applicant and the respondent are co-owners of a property as joint tenants – where the applicant applies for an order under s 38 of the *Property Law Act* appointing a trustee for the sale of the property – where the property is unencumbered, uninhabited, untenanted, and not income producing – whether a statutory trustee for sale should be appointed

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – JURISDICTION AND GENERALLY – GENERALLY – where the respondent submits that the jurisdiction of the Supreme Court to make an order under section 38 of the *Property Law Act* is removed by the *Family Law Act* once an application has been made to the Family Court which asserts that that Court has jurisdiction – whether the Court has jurisdiction to make an order under section 38 of the *Property Law Act*

Family Law Act 1975 (Cth), s 90RC, s 90SB
Property Law Act 1974 (Qld), s 38

COUNSEL: S Farrell for the applicant
A Ehlers for the respondent

SOLICITORS: Barry Nilsson for the applicant
Rostron Carlyle for the respondent

HER HONOUR: On 17 July 2014, Debra Jayne Kerr filed an originating application in this Court that pursuant to section 38 of the Property Law Act, Peter Sheehy be appointed as trustee for the sale of real property at 22 Laurier Street, Annerley, described as Lot 311 on real property 37992, County of Stanley, Parish of Yeerongpilly, title reference 50913537 (“the property”) and for consequential orders. Also filed on 17 July 2014 was the affidavit of Peter Sheehy, consenting to be the statutory trustee for sale. He is amply qualified to fulfil that role competently, ethically, and effectively.

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10 Section 38(1) of the *Property Law Act* provides, that where any property is held in co-ownership the court may, on the application of any one or more of the co-owners, and despite any other Act, appoint trustees of the property and vest the same in such trustees subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided shares, to be held by them on statutory trust for sale or on
15 statutory trust for partition.

It has been said that the right to reply for the appointment of a statutory trust for sale is an incident of co-ownership. The parties – the applicant, Ms Kerr, and the respondent, David Michael Short – are co-owners holding legal title as joint tenants.
20 There is no encumbrance upon the title. The parties agree that the moneys used to purchase the property were provided entirely by a third party, although they disagree about the nature of the terms on which those moneys were provided, the applicant asserting that it was a gift; the respondent asserting that it was a loan. That is not capable of being determined in proceedings of this type, and should I order a
25 statutory trust for sale, the trustee will be ordered to hold the proceeds on trust, pending the determination of the question of whether or not any of the proceeds should be paid to the third party, Pauline Collins.

The applicant has satisfied me that the property, being co-owned as joint tenants, is one that should, in the ordinary course, be sold. It is unencumbered, uninhabited, untenanted, and not income producing. There does not seem any point in it continuing in its present state of co-ownership. Ordinarily, this would be a perfectly unexceptionable case for the appointment of a statutory trustee for sale.
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35 The respondent, however, has put forward an argument to the contrary. It has been quite difficult to have the respondent’s legal representatives articulate precisely the nature of their application, which has been for the matter to be adjourned, or the basis for that application, but it appears to be as follows.

40 The sworn material on which the respondent seeks to rely is an affidavit from his solicitor, Nick Proctor, sworn yesterday and filed by leave today. It swears to instructions from his client that the funds used to purchase and improve the property were provided as a loan from an unrelated third party. He also swears that he has received a demand for repayment of that loan, and that he has received a copy of
45 draft District Court proceedings from the third party’s solicitors, seeking repayment of the loan. He then swears that he filed proceedings in the Family Court yesterday, seeking a property settlement.

The submission by the respondent is that the jurisdiction of the Supreme Court to make an order under section 38 of the *Property Law Act* is removed by the *Family*

Law Act once an application has been made to the Family Court which asserts that that Court has jurisdiction. It is further submitted that the question of whether or not this Court retains its jurisdiction to determine whether or not it has jurisdiction may not be decided by this Court, but must be decided by the Family Court. The latter
5 assertion is incorrect. It only has to be stated to show that this Court, as a superior court of the State, has the jurisdiction to determine whether or not is has jurisdiction.

However, there remains the question of whether or not the jurisdiction of this Court to make the orders sought has been removed by the *Family Law Act*. Prior to the
10 referral of power over property division in de facto relationships to the Commonwealth, the State had power over that matter, and the jurisdiction was given to the courts of this State by the *Property Law Act*. However, certain powers were referred to the Commonwealth, and the *Family Law Act* has consequently been amended to deal with those matters.

15 So the question is, therefore, what, if any, jurisdiction remains with this Court. Jurisdiction of courts is dealt with in the *Family Law Act* in Part V. Jurisdiction in de facto financial causes is dealt with in Division 2 of Part V. In that Division, section 90RC deals with the relationship between that Act and State and Territory laws.
20 Section 38 of the *Property Law Act* is, of course, a State law. Section 90RC(2) provides that Parliament intends that the de facto financial provisions are to apply to the exclusion of any law of a State to the extent that the law deals with financial matters relating to the parties to de facto relationships arising out of the breakdown of those de facto relationships, and deals with those matters by referring expressly to
25 de facto relationships. However, subsection (3) of section 90RC provides that despite subsection (2), Parliament does not intend that the de facto financial provisions are to apply to the exclusion of a law of a State in relation to a financial matter relating to the parties to a de facto relationship arising out of the breakdown of the relationship if, inter alia, the court cannot make an order under this Part in
30 relation to that financial matter because of section 90SB. In other words, where a relevant federal court cannot make an order because of section 90SB, the jurisdiction of this court would remain.

35 Section 90SB provides the circumstances in which a court under the *Family Law Act* may make a financial order in relation to a de facto relationship. Those circumstances are therein set out, where the court is satisfied that the de facto relationship lasted for at least two years, where there is a child of the de facto relationship, where the party to the de facto relationship who applies for an order made substantial contributions of a particular kind, and a failure to make the order or
40 declaration would result in serious injustice to the applicant or that relationship is or was registered under a prescribed law of a State or Territory. There is sworn evidence before me that none of those circumstances applies. There is no sworn evidence before me that any of those circumstances does apply. In fact, even if I were to take the non-sworn evidence by the respondent at its highest, it would not
45 appear that any of those circumstances apply.

I am not satisfied that the jurisdiction of this court to make an order in these circumstances – where the sworn evidence before me is that the de facto relationship was for a period of less than two years, there are no children, the finances were
50 provided wholly by a third party – that there is any reason why I should decline to

exercise jurisdiction. I accordingly will exercise my jurisdiction under section 38 of the *Property Law Act*.

5 The respondent has then submitted that notwithstanding any finding of jurisdiction by me I should decline to or delay the exercise of the power. Given the circumstances of the property: uninhabited, untenanted, and no party has made any assertion that they live or wish to live in it or has any particular attachment to the property, there is no reason for it to be continued to be held in this unsatisfactory state. And, in my view, the property should be sold and sold promptly. The third
10 party is asserting no interest in retaining the property, merely on receiving the proceeds of the sale. There is no discretionary factor against the sale of the property going ahead. I therefore make the following orders:

- 15 15. That pursuant to Section 38 of the *Property Law Act 1974 (Qld)* Peter Sheehy (“the trustee”) be appointed as Trustee for Sale of the real property at 22 Laurier Street, Annerley and described as Lot 311 on RP 37992, County of Stanley, Parish of Yeerongpilly, Title Reference 50913537 (“the property”) and that the property vest in the trustee for the purposes of sale.
- 20 16. That the Trustee be entitled to sell the property by such method as he deems appropriate in the circumstances including but not limited to sale by auction or by private treaty.
- 25 17. That either of the current co-owners be entitled to make offers on the property for consideration by the Trustee.
- 30 18. That in the event of sale by private treaty the Trustee shall determine the appropriate marketing of the property including listing price from time to time, the appointment of any agent or agents for the sale of the property and the terms and conditions of such appointment or appointments.
- 35 19. That in the event of sale by auction:-
 - a) the Trustee shall determine the appropriate marketing campaign for the property including a marketing budget for advertising, the appointment of any agent or agents for the sale of the property and the terms and conditions of such appointment or appointments;
 - 40 b) the Trustee shall determine the reserve price for the auction after consultation with the auctioneer and considering any recommendations of the auctioneer;
 - c) should either of the parties be the successful bidder at auction the Trustee is authorised to sell to that party without a requirement that the purchasing party pay a deposit at the time of execution of the contract;
 - 45 d) the Trustee may, but is not obliged to obtain a valuation of any of the property if he deems that appropriate for the purposes of assistance in the determination the reserve price at any auction.
- 50 20. That the Trustee is authorised to expend money on the property in preparation for its sale using the recommendations of any agent in that regard, and for its marketing or advertising and that the amount of such expenditure be paid for equally by the Applicant and Respondent.

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21. That pending sale, the Applicant and Respondent shall pay or cause to be paid all outgoings on the property including rates, local authority charges, body corporate charges (if any), and maintain adequate fire and general insurance on the property and provide evidence of same to the Trustee as requested by him from time to time.
22. That the Trustee is hereby indemnified by the owners or co-owners of the property against any claims made against them upon becoming registered owners as trustee on title, consequent upon a failure to pay any of the outgoings of the nature described in the preceding Order.
23. That pursuant to Section 38 of the *Property Law Act 1974* (Qld) the property be vested in the trustees, subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided share, to be held by the trustees on the statutory trust for sale.
24. That the parties to these proceedings be at liberty to purchase the property upon terms that he or she should not be required to pay any deposit and that he or she may set off against the purchase price the value of his or her share in the property.
25. That upon settlement of the sale, the sale proceeds shall be paid or held, as the case may be, in the following manner:-
- a) Firstly in payment of all necessary selling costs including agent's commissions, legal costs, marketing and advertising costs and all other necessary costs incurred in the sales;
 - b) Secondly in discharge of any liabilities secured against the property by registered mortgages;
 - c) Thirdly in payment of the trustees costs and expenses incurred in effecting the sale and when the sale is settled;
 - d) Fourthly to hold the remaining balance on trust by the Trustee pending further order or written agreement concerning the distribution of the said monies as between the parties, or between the parties and any other such person asserting an interest in the said monies.
26. That the Trustee is entitled to charge all reasonable costs and disbursements incurred by the Trustee in performance of his obligations pursuant to these Orders and that his fees and expenses be a first charge on trust monies.
27. That there be liberty to apply to all parties and the Trustee on 5 day's notice, one party to the others.
28. That the respondent pay the applicant's standard costs of and incidental to this application, with such costs to be paid from the respondent's share of the net sale proceeds of the property prior to disbursement of that share to the respondent. In the event that the respondent purchases the property, such costs shall be added to the purchase price payable by the respondent.
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