

SUPREME COURT OF QUEENSLAND

CITATION: *Simonidis Steel Lawyers Brisbane Pty Ltd v Johnston & Ors; Green v Johnston* [2015] QSC 81

PARTIES: **In SC No 2878 of 2014:**

SIMONIDIS STEEL LAWYERS BRISBANE PTY LTD
ACN 133 652 614
(applicant)

v

KELVIN BRIAN JOHNSTON

(first respondent/plaintiff by counterclaim)

**ELIZABETH KYLIE JOHNSTON ALSO KNOWN AS
ELIZABETH KYLIE GREEN**

(second respondent/first defendant by counterclaim)

MICHAEL PATRICK DONNELLY GREEN

(third respondent/second defendant by counterclaim)

In SC No 11608 of 2014:

ELIZABETH KYLIE GREEN

(applicant)

v

KELVIN BRIAN JOHNSTON

(respondent)

FILE NO/S: SC No 2878 of 2014

SC No 11608 of 2014

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING
COURT: Supreme Court at Brisbane

DELIVERED ON: 20 March 2015

DELIVERED AT: Brisbane

HEARING DATE: 20 March 2015

JUDGE: Philip McMurdo J

ORDER: **Delivered ex tempore on 20 March 2015:**

In SC No 2878 of 2014:

- 1. The first respondent's counterclaim be struck out.**
- 2. The first defendant is ordered to pay the costs of the second and third defendants' application and of the counterclaim against them, assessed on the**

standard basis.

In SC No 11608 of 2014:

The originating application for appointment of trustees be stayed pending further order.

CATCHWORDS:

Family Law Act 1975 (Cth)

Property Law Act 1974 (Qld), s 38

Ex parte Eimbart Pty Ltd (1982) Qd R 398, cited

Goodwin v Goodwin & Anor [2004] QCA 50, cited

National Australia Bank Ltd v Pasupati [2011] NSWSC 540, cited

Norris v Norris (1985) 1 NSWLR 472, considered

Stefanoski v Stefanoski (1983) FLC 91-367, cited

Wang v Zhao [2012] NSWSC 706, cited

Wardley Australia Limited v Western Australia (1992) 175

CLR 514, considered

Williams v Williams (1979) 1 NSWLR 376, cited

FAMILY LAW AND CHILD WELFARE – THE FAMILY LAW ACT 1975 (CTH) AND RELATED LEGISLATION 0 JURISDICTION – MATRIMONIAL CAUSE – PROPERTY OF THE PARTIES – OTHER MATTERS – application for appointment of trustees for sale under s 38 of the *Property Law Act 1974 (Qld)* – whether jurisdiction under s 38 should be exercised when there are existing or prospective proceedings between parties in a court exercising jurisdiction under the *Family Law Act 1975 (Cth)* – whether the court should exercise its discretion to refuse or stay the application because of the existence of orders made by the Federal Magistrates Court

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – the respondent was unsuccessful in his application and his counterclaim struck out – no basis to depart from the general rule that costs follow the event

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – where the applicant in the originating application had no recoverable costs and submitted no order for costs be made – where the respondent was unsuccessful in his application and his counterclaim was struck out – no basis to depart from the general rule that costs follow the event – where the second and third respondents sought costs against the first respondent on the indemnity basis – whether the counterclaim was made for a collateral purpose – no finding made that the counterclaim was not based upon genuine belief – no warrant for imposition of indemnity costs

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM

CIVIL PROCEDURE RULES AND PREDECESSORS – PLEADING – application to strike out counterclaim – counterclaim failed to comply with the pleading rules – whether the counterclaim could be made consistently with *UCPR* r 178(1) – subject matter of the counterclaim was not related to or connected with the original subject matter of the proceeding – counterclaim struck out

REAL PROPERTY – PARTITION OF LAND – STATUTORY TRUST FOR SALE OF PARTITION – STAY OF PROCEEDINGS – application for appointment of trustees for sale under s 38 of the *Property Law Act 1974* (Qld) – whether jurisdiction under s 38 should be exercised when there are existing or prospective proceedings between parties in a court exercising jurisdiction under the *Family Law Act 1975* (Cth) – whether the court should exercise its discretion to refuse or stay the application because of the existence of orders made by the Federal Magistrates Court

COUNSEL:

In SC No 2878 of 2014:

D J Kelly for the applicant and for the second and third respondents/first and second defendants by counterclaim
The first respondent/plaintiff by counterclaim appeared on his own behalf

In SC No 11608 of 2014

D J Kelly for the applicant
The first respondent appeared on his own behalf

SOLICITORS:

In SC No 2878 of 2014:

Rogers Barnes & Green for the applicant and for the second and third respondents/first and second defendants by counterclaim
The first respondent/plaintiff by counterclaim appeared on his own behalf

In SC No 2878 of 2014:

Rogers Barnes & Green for the applicant
The first respondent appeared on his own behalf

HIS HONOUR: There are two applications before the Court. The first is made by Ms E.K. Green against Mr Johnston for orders under section 38 of the *Property Law Act 1974* for the appointment of trustees for the sale of a property which they jointly own at Ballandean.

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The second application is in another proceeding in which Mr Johnston is the first defendant, Ms Green is the second defendant and her brother, Mr Green, a solicitor, is the third defendant. The plaintiff in that proceeding is another firm of lawyers

unrelated to Mr Green's firm. The application in that proceeding relates to a counterclaim made by Mr Johnston not only against the plaintiff but against Ms Green and Mr Green. It seems that although they are named as defendants in the proceeding they were joined not by the plaintiff but by Mr Johnston by his
5 counterclaim.

I go first to the application under the Property Law Act. The parties, that is, Ms Green and Mr Johnston, were married and there were proceedings between them which were in the Federal Magistrates Court, as the Federal Circuit Court then was.
10 Those proceedings were concluded by consent orders which were made on 24 July 2012. The orders included provisions for the sale and disposition of the proceeds of sale of the Ballandean property the subject of this section 38 application. The orders provided that the parties were to take all steps necessary to effect a sale of that property as well as an associated business and that they were to cause the property to
15 be listed with a real estate agent at a certain price or such other price as agreed between them.

By paragraph 18 of that Court's orders it was provided that in the event that a contract of sale was not made within three months of the orders, then the parties were
20 to do all acts and sign all documents and pay all moneys equally necessary to procure a sale of the Ballandean property by way of a public auction. The auctioneer was to be someone mutually agreed by the parties or, failing their agreement, as appointed by the REIQ. The reserve price, unless agreed by the parties, was to be nominated by the auctioneer. And the auction was to take place within six weeks after what was
25 described as the "deadline date for sale by way of private treaty".

By paragraph 19 of those orders it was provided that in the event that the Ballandean property was not sold by auction or by private negotiation within 14 days after the first auction, then the parties would do all acts and sign all documents and pay all
30 moneys equally necessary to procure a sale by way of a second auction to take place within six weeks of the first auction and otherwise upon the same terms and conditions as applied to it.

Paragraph 20 made extensive provision for the distribution of the proceeds of sale.
35 The proceeds were to be paid, firstly, in payment of the agent's commission, advertising and auction costs, if any, and the legal costs of sale; secondly, in payment of a sum of \$5000 to Ms Green in repayment of a loan made by her to Mr Johnston and for a certain purpose; next, in payment of another relatively small sum in favour of Ms Green; and the balance net proceeds were to be paid to the respective lawyers
40 for the parties to be held in trust. The proceeds were to be paid in equal shares to those two firms. And the order provided that those proceeds would form part of the pool of assets available for division between the parties.

Paragraph 25 of the orders provided that forthwith upon the settlement of the sale of
45 the Ballandean property, Mr Johnston was to disclose to Ms Green certain details of income and expenses associated with it up to and including the date of settlement of the property. The orders also contained extensive provisions in relation to the calculation of capital gains tax on a sale of the Ballandean property. And then by paragraph 32 it was ordered that Ms Green was to be paid from the sale proceeds

held by the two firms in their trust accounts an amount calculated in accordance with a formula which was there set out.

5 In the events which have occurred, the stage for which provision was made by paragraph 19 of those orders was reached. There was originally a listing of the Ballandean property for sale followed by an auction which occurred on 10 November 2013. When the property was not sold at that auction, paragraph 19 of the orders required the parties to do all things and pay all moneys necessary to procure a sale by a second auction, but that did not occur. In her affidavit in this proceeding Ms Green 10 explains the non-occurrence of the second auction by saying that the first auction was held at a cost to the parties of a little under \$3000 and that, as at the date of her affidavit, which was 2 December 2014, she had not the financial resources to pay either her contribution towards the auctioneer's costs of the November 2013 auction or any further auctioneer's costs for a second auction. She explains her financial 15 incapacity by reference to circumstances including what she says was a lack of financial contribution towards the raising of the children of the parties following their separation in 2010.

20 It would therefore appear that notwithstanding the terms of the orders which I have summarised, Ms Green took the view that she should not contribute to the cost of either of these auctions essentially because she says she was unable to do so. It also appears that the amounts in question are not large. Her share of the cost of the first auction was less than \$1500 and I infer that the cost of the second auction would not be significantly greater than that amount so far as her contribution is concerned.

25 Instead of participating in a sale of the property according to what remain as existing orders of that Court, Ms Green has chosen to come to this Court to seek orders for the appointment of trustees for sale under section 38. The economy of that course may be open to doubt except when it is remembered that she applies through the firm of which her brother is a principal. The question is whether in these circumstances 30 this Court should exercise its discretion to refuse or stay the application because of the existence of the orders made by the then Federal Magistrates Court.

35 I was referred to some authority on a related question, which is whether the jurisdiction under section 38 or its analogues in other jurisdictions should be exercised when there are existing or prospective proceedings between the two co-owners in a Court exercising jurisdiction under the Family Law Act 1975. In *Norris v Norris* (1985) 1 NSWLR 472 Priestley JA, with whom Pope JA agreed, said at 478 that where there are pending proceedings in the Family Court and – in that case - the 40 Supreme Court of New South Wales and the subject matter in that Court formed part of the matter in the Family Court it was preferable for the Family Court to deal first with the larger matter which includes the part for which the Supreme Court had jurisdiction.

45 The authorities, in New South Wales at least are to the effect that there is no jurisdictional impediment to an application such as the present one being determined in a State Supreme Court where the property is amongst the subject matter of proceedings in the Family Court or now the Federal Circuit Court under the Family Law Act but that as a matter of discretion the usual approach would be that described 50 by Priestley JA: see *Stefanoski v Stefanoski* (1983) FLC 91 367, *Williams v Williams*

(1979) 1 NSWLR 376, *National Australia Bank Limited v Pasupati* [2011] NSWSC 540, and *Wang v Zhao* [2012] NSWSC 706.

5 It is well established that the power under section 38 although a discretionary power is usually exercised where the Court is asked to do so by a co-owner because of the importance of the section 38 remedy as an element of the co-owner's proprietary interest. In *Ex parte Eimbart Pty Ltd* (1982) Qd R 398 at 402 McPherson J, as he then was, said that:

10 *Where there is no trust or perhaps other fiduciary obligation it is difficult to conceive of circumstances in which the discretion, if any conferred by the word "may" in section 38(1) of the Property Law Act or its New South Wales equivalent, would ever be exercised against the appointment of statutory trustees.*

15 See also *Goodwin v Goodwin & Anor* [2004] QCA 50 per McPherson JA with whom the other members of the Court agreed.

20 However, the present case presents a relatively unusual circumstance and not one of a kind which was present in the cases to which I have just referred. In this case, the Court is asked to make an order for which there is or would be a tension with an existing order made by another Court. I accept that in broad terms, the orders which are sought under section 38 are directed towards achieving a substantially similar outcome so far as the sale of the Ballandean property is concerned as the orders
25 which stand in the (now) Federal Circuit Court.

30 However, there are some points of potential inconsistency. The existing orders require the parties to cause the property to be auctioned. They do not provide for the appointment of independent trustees to effect a sale. Therefore, the existing orders do not provide for the disposition of any part of the proceeds of sale for the remuneration of trustees. It may be that, especially in the circumstances in which these two parties now find themselves, the appointment of independent trustees would be beneficial for effecting a sale at the best price. But if the Court was to order in terms of the originating application, the result would be that at least in
35 respect of the trustee's remuneration, the orders made by this Court would be inconsistent with the existing orders for the disposition of the sale proceeds.

40 There is at least one other difference between the proposed orders and the existing ones, which is in relation to setting a reserve. The existing orders would leave that matter to the auctioneer absent an agreement between the parties about it. The proposed orders would leave that to the trustees. Again, there may be reasons in this case, at least after this passage of time why it would be preferable to have independent trustees fixing the reserve price. But the point is that, again, the making of the proposed orders would have the effect of providing an inconsistency with the
45 existing orders.

50 More generally, the sale of this property and the disposition of its proceeds are matters which are under the supervision of the Federal Circuit Court which ultimately is to assess the entitlement of Ms Green to some of the sale proceeds according to the formula which is set out in the existing orders. I have mentioned the

relevant provisions of the orders in that respect as well as in related respects such as the calculation of capital gains tax. Now, it may be that the existing orders might be construed to the effect that a sale of the Ballandean property under those orders could be effected by the proposed sale by trustees appointed by this Court. But if there is a doubt about that it is better that it be avoided. In any case, it would seem to me inconsistent with judicial comity for this court to appoint trustees to act under its supervision in a way which would effectively intervene with the operation of the orders of the other Court.

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10 I have mentioned the explanation, such as it is, for Ms Green's non-performance of the orders made in the Federal Magistrates Court. I should add that there is no indication of any practical impediment to the parties returning to that Court for further orders, if required, to give effect to their settlement reflected in the present consent orders in that Court.

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20 I accept, as was submitted for Ms Green, that the present case is different from the New South Wales cases to which I have referred in that the making of the section 38 order would not interfere with a proceeding under the Family Law Act which was yet to be concluded. Instead, here of course that proceeding has been concluded, at least to the point of these consent orders. However, the reasoning in those cases is nevertheless instructive. I have explained already why in my view it would be in appropriate for this Court to effectively intrude on the operation of the orders of the other Court. I am therefore of the view that the originating application should be stayed until further order.

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30 I turn now to the other application, in which Ms Green and Mr Green apply for the summary dismissal of the counterclaim against them. The original proceeding here was brought by the firm of lawyers which acted for Mr Johnston in the family law proceedings which I have discussed and which resulted in those consent orders. That firm sues for outstanding fees and expenses. The amount claimed is a little under \$50,000. But the claim is in this Court, it would appear, because the plaintiff also seeks some proprietary orders to which it says it is entitled according to its contract with Mr Johnston.

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40 Mr Johnston counter-claims against the plaintiff, complaining, effectively, about the outcome of those proceedings. It is unnecessary to discuss the various matters of his complaint against the plaintiff. It is sufficient to say that, as I will discuss, those complaints do not include a complaint about the provision of electricity to the Ballandean property which is the subject of his complaint, at least against the third defendant.

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50 Mr Johnston and Ms Green purchased the Ballandean property in 2008. Mr Green's legal practice acted, Mr Johnston says, as their solicitors in that transaction. He says that the Ballandean property has a feature in relation to its electricity supply which detracts from its value and which would be very expensive to remedy. The problem appears to be that electricity is supplied to this property through another property. It is unnecessary to further describe the difficulties which that causes or is said to cause in the ownership of the Ballandean property. But Mr Johnston says that the solicitors should have discovered this problem in conducting their searches before settling the purchase.

As I have noted, there is no complaint that the plaintiff firm, which is quite unrelated to Mr Green's practice, was in some way negligent or in breach of duty insofar as this problem with the electricity supply is concerned. In particular, there is no
5 allegation within the counterclaim that in advising Mr Johnston about the settlement which resulted in the consent orders in the Federal Magistrates Court, the plaintiff in some way failed to advise him in respect of this defect with the electricity.

The counterclaim has a number of obvious difficulties on its face. One which was
10 not pressed today comes from its form and the way in which in vary many respects it fails to comply with the pleading rules. That is not surprising when it is kept in mind that Mr Johnston is not a qualified lawyer and has prepared the document (and presented his argument here) without a lawyer. Another difficulty is that although the intended case against Mr Green's practice is apparent, the basis for a
15 counterclaim against Ms Green in respect of this electricity question is not so apparent. In the result however, these problems with the counterclaim are not critical, because of the three submissions which were advanced for the striking out of the counterclaim made against Ms Green and Mr Green, I find that one is persuasive and warrants the order which is sought.

I should mention, however, the other arguments. The first was that Mr Green should
20 not have been joined as the relevant defendant so far as his practice is concerned because that practice was conducted through a company. The evidence plainly shows that it is presently conducted through a company. The affidavit evidence does
25 not demonstrate that this was the position in 2008. In discussing that matter with Mr Green's counsel I was informed that Mr Green would be able to give oral evidence about that fact. But that proposal did not go further because, in any event, it is not so plain that the proposed case against Mr Green personally would be struck out summarily as having no prospect of success.

The other argument advanced by the applicants' counsel was that the cause or causes
30 of action against Mr Green and perhaps Ms Green are statute barred. The conveyance was in 2008 and it's said that more than six years had passed before the filing of this counterclaim. The submission was not persuasive for two related
35 reasons. One is that the precise causes of action upon which Mr Johnston counterclaims are not so clearly identified by what is put forward as his pleading as to enable it to be said that there are only causes of action which had certain limitation periods which must have expired by the relevant date. Secondly, there is the
40 instruction of the High Court in *Wardley Australia Limited v Western Australia* (1992) 175 CLR 514 at 533 that limitation questions should be decided in advance of a trial only in the clearest of cases.

I come then to the third argument, which is persuasive. It is that this counterclaim
45 cannot be made consistently with rule 178(1) of the Uniform Civil Procedure Rules because the claims against Ms Green and Mr Green are not related to or connected with the original subject matter of the proceeding. I have described that subject matter. As I have emphasised, there is nothing in the proceeding between the
50 plaintiff and Mr Johnston which involves a complaint that that legal firm failed to advise him in any way in respect of the problem with the electricity.

The subject matter of the counterclaim against Mr Green and Ms Green is quite distinct. It relates to events and circumstances which were years prior to the events and circumstances the subject of the proceeding between the plaintiff and Mr Johnston. Mr Johnston submitted that there was a connection, at least in the fact that
5 the Ballandean property was the subject of consent orders, which he says resulted from the plaintiff's breach of duty in acting for him. But in my view, that is not a connection of the kind which is required by rule 178. Therefore, for that reason the counterclaim made by Mr Johnston against Ms Green and Mr Green must be struck out and it will be so ordered.

10 The remaining questions concern costs. On the originating application by Ms Green, Mr Johnston, being unrepresented, has no recoverable costs and I accept, as was submitted for Ms Green, that there should be no order for costs on that application. On the application in 2878 of 2014, Mr Johnston has been unsuccessful. Ordinarily
15 the costs would follow that event. Mr Johnston submitted that this would be inequitable. But having heard his submissions, it seems to me that they do not provide any basis for departing from the ordinary rule in this case.

20 For Mr Green and Ms Green, costs were sought upon the indemnity basis. It was suggested that Mr Johnston had made this counterclaim really for some collateral purpose. But no finding could be made that he does not have a genuine belief in the case which he sought to raise by this counterclaim, at least from the present evidence. The applicants did write to Mr Johnston, pointing out difficulties with his counterclaim but he persisted. Of course he is without legal representation and it
25 cannot be inferred that he persisted in the knowledge that his counterclaim was irregular, and in particular, inconsistent with rule 178. In the circumstances, there is no warrant for the imposition of indemnity costs. The order in that proceeding will be that the first defendant pay the costs of the application by the second and third defendants and of the counterclaim against them, to be assessed on the standard
30 basis.