SUPREME COURT OF QUEENSLAND

CITATION:	*Fleming v Fleming & Anor* [2016] QSC 215
PARTIES:	**LAURENCE BRIAN FLEMING** (applicant) **v** **ERIC NOEL FLEMING** (first respondents) **MARIE LUCILLE NEWMAN** (second respondent)
FILE NO/S:	SC No 4145 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Ex tempore 2 September 2016
DELIVERED AT:	Brisbane
HEARING DATE:	2 September 2016
JUDGE:	Ann Lyons J
ORDER:	**Orders in terms of the draft set out at para [37].**
CATCHWORDS:	*Property Law Act* 1974 (Qld) s 38(1), s 41(2)(a) *Comptroller of Stamps v Christian & Another* [1991] VicRp 52; [1991] 2 VR 129 (22 October 1990) *Ex Parte Eimbart Pty Ltd* [1982] Qd R 398 *Segal v Barel* (2013) 84 NSWLR 193; [2013] NSWCA 92
COUNSEL:	F Redmond for the applicant K W Wylie for the first respondent A S Marinac for the second respondent
SOLICITORS:	Appleton Kreb Lawyers for the applicant SK Lawyers for the first respondent Duffield & Associates for the second respondent

The current application

[1] This is an application by Laurence Brian Fleming for the appointment of trustees of real property and of chattels to vest in the trustees to be held on statutory trust for sale pursuant to s 38(1) and s 41(2)(a) of the *Property Law Act* 1974 (Qld) (PLA).

[3] The property in question is farming land and is on two lots, Lot 20 and Lot 30. The property is known as *Rathkeale* and it is situated 25 kilometres west of Monto. The chattels consist of livestock, plant and equipment, which is used in the farming operation. The affidavit material indicates that Lot 20 and Lot 30 are unencumbered.

The issues in dispute

[4] The first and second respondents do not resist the appointment of a statutory trustee for the sale of the chattels pursuant to s 41(2)(a) PLA, but with respect to the property, the first respondent and the second respondent both seek the appointment of a statutory trustee for partition pursuant to s 38(4) of the PLA. That is resisted by the applicant.

Background

[5] The applicant and the two respondents are siblings. They are the registered owners of Lots 20 and Lot 30 as tenants in common in equal shares. That property has been in the parties' family for generations. Indeed, their grandmother inherited the property and sold it to the parties' father. The three siblings all grew up on the property together with another brother Michael James Fleming, who died on 6 October 2011.

[6] It would seem that when the parties' father died in September 1992, the current applicant, Laurence, and Michael, who is now deceased, were appointed executors of their father's estate. Their mother was living on the property alone. The will of the father provided that all of his property was to be held by his executors on trust and it permitted their mother to use, occupy and enjoy the property, or to receive the net rents, profits and income arising there from during her lifetime, and on her death, the will provided that it was to be divided equally between his children then living.

[7] In his affidavit sworn 2 September 2016, Eric Noel Fleming states that immediately after their father's death, the current parties (Laurence, Eric and Marie), together with their brother Michael, met with their mother at the home. A proposal was discussed whereby Eric, the first respondent, was to come home to run the farm under the direction of the executors and to look after the parties' mother. He agreed to do so. Eric argues that doing so was in exchange for the payment of wages, as well as car payments, registration and running costs. In any event, it is clear that he did move back in 1992 and, it would seem, took care of their mother and managed the farm. Eric states that he has never received payment of any wages. It would seem that, pursuant to his affidavit, Eric swears that he has undertaken some improvements to the property, which includes replacing fences, erecting new fences, constructing cattle yards and dams, as well as installing water tanks, bores and a septic system.[1]

[8] One of the executors, Michael, died in October 2011 and the parties' mother died in July 2013. The current dispute then arose between Eric and Marie on one hand and Laurence on the other. Laurence wanted the property sold and still wishes to do so. There was a mediation in 2014, which failed. In any event, there has been the transfer of the real property into the names of the parties as tenants in common, which was done in September 2015.

[1] Affidavit of E N Fleming sworn 4 July 2016, Court Document #17.

[9] As I have indicated, the first respondent opposes the sale of the property and instead seeks an order for the appointment of trustees for partition, pursuant to s 38(4) of the PLA, so he can live and work on the property and that the property can remain in the family. The first respondent argues, and this is essentially supported by the second respondent, that it would be more beneficial to all parties to partition the property. The second respondent deposes to a belief that it would also be in her interests, including both financial and personal, for the property to be partitioned rather than sold. Ultimately, the proposal by the first and second respondents is that *Rathkeale* be partitioned such that the applicant becomes the sole owner of Lot 30 and that the respondents become joint owners of Lot 20 as tenants in common in equal shares. Lot 20 is the lot which has the family home on it.

[10] The outline of submissions from counsel for the applicant sets out the relevant and uncontroversial principles in relation to the appointment of statutory trustees for sale. There is no dispute about the relevant law. Section 38(1) is in the following terms:

> "(1) Where any property (other than chattels personal) is held in co-ownership the court may, on the application of any 1 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 the statutory trust for sale or on the statutory trust for partition."

[11] As noted by counsel for the applicant, McPherson JA in *Ex parte Eimbart Pty Ltd*[2] and *Goodwin v Goodwin*[3] stated that whilst there is a discretion whether to make an order under the section there is generally no defence to an application under s 38 of the PLA.

[12] There is no doubt that applications for the appointment of statutory trustees for sale are by far the more common application under s 38 and are considered the "preeminent statutory remedy to resolve disputes between co-owners".[4] An application for partition is however recognised as a "genuine alternative".[5] I note however that an order for sale is afforded "some primacy" given the onus in s 38(4) on the applicant for partition to establish a partition is more beneficial. Section 38(4) PLA states:

> "If, on an application for the appointment of trustees on the statutory trust for sale, any of the co-owners satisfies the court that partition of the property would be more beneficial for the co-owners interested to the extent of upwards of a moiety in value than sale, the court may, … appoint trustees of the property on the statutory trust for partition, …".

[13] A recent appellate authority in New South Wales that considers the equivalent of that section is *Segal v Barel*[6] where the relevant considerations were discussed:

> "25. But it is important to pay attention to the way the statute works. If one co-owner applies for partition and there is no counter-claim for sale, the only question the court will have occasion to consider is whether or

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[2] [1982] Qd R 398.
[3] [2004] QCA 50, at 4.
[4] *MacDonald, McCrimmon, Wallace and Weir* Real Property Law in Queensland 3rd edition at [8.530], p257.
[5] Ibid.
[6] (2013) 84 NSWLR 193; [2013] NSWCA 92.

not there should be partition. No question of sale will arise; nor will any question of "preferred remedy". Likewise, if one owner seeks the appointment of trustees for sale and is not met by a counter-claim for partition, the question of termination of co-ownership by sale will be the only question to be decided and there will be no issue of "preferred remedy". If, however, there are competing claims - one for the appointment of trustees for sale and the other for the appointment of trustees for partition - the position will be that, having regard to s 66G(4), the claim for partition will not succeed unless the person pressing that claim satisfies the court that partition is, in the sense referred to in s 66G(4), "more beneficial" than sale. The co-owner who advances the competing claim for sale, by contrast, is not called upon to show that that remedy is "more beneficial" than partition.

26. If the co-owner claiming partition does not satisfy the court that partition is more beneficial than sale, the only remaining alternative would be sale of the property. This does not mean that sale is the "preferred remedy", only that once the court is not satisfied that partition is the more beneficial remedy, sale of the property remains as the only remedy available.

27. If, however, the co-owner claiming partition does satisfy the court that partition is more beneficial than sale, it does not follow that the court must order partition. The court still retains a discretion to choose the remedy of partition over sale

28. Because of the additional onus that an applicant for the appointment of trustees for partition must always discharge when pitted against an applicant for the appointment of trustees for sale, the situation is not in truth one of choice between two equally available alternatives.

29. Once that onus is discharged, however, the court is in a position to choose between the two outcomes according to the justice of the case. That is the point that Kearney J made in *Hayward v Skinner* (1981) 1 NSWLR 590, a case the judge cited in connection with the proposition that sale should not be regarded as the "preferred remedy". Kearney J referred (at 593) to the possibility that, although partition had been shown to be more beneficial than sale for the owners interested as to more than one-half, there "may, for example, be circumstances imposing considerable hardship on a minority of co-owners if the greater benefit to the majority should prevail". It is only after the s 66G(4) condition is satisfied that any notion of equally available alternatives comes into play."[7]

[14] There is no doubt that for an order for partition to be made, the first respondent must demonstrate that the partition is more beneficial than a sale to the majority of co-owners and that the court ought exercise its discretion. So there are two factors: whether it is more beneficial; and whether the discretion should be exercised in that regard.

[7] Ibid, at [25]-]29].

[15] The applicant and the respondents are joint owners as tenants in common of Lot 20 and Lot 30. It is clear that the proposed partition would result in the applicant becoming the sole owner of Lot 30, the respondents being the joint owners of Lot 20 as tenants in common in equal shares.

[16] I note in the submissions of counsel for the first respondent the submissions in relation to the definition of "partition". It would seem that that the word "partition" is not defined in the Act. However, counsel for the first respondent refers me to a decision of *Comptroller of Stamps v Christian & Another*[8], cited in *Segal v Barel,*[9] which approved the definition of the term in *Halsbury's Laws of England*. I will repeat that definition because it is of assistance. In the *Comptroller of Stamps v Christian & Another,* the following definition from Halsbury was quoted:

> "When The Laws of England was first published by the Earl of Halsbury … it contained the following passage, para 1512: 'The legal term "partition" (a) is applied to the division of lands, tenements and hereditaments belonging to co-owners (b) [the co-owners may be joint tenants, tenants in common or co-parceners] and the allotment among them of the parts (c), so as to put an end to community of ownership between some or all of them (d)."

[17] There are several notes to that. One note, which is (c), reads:

> "Thus if three persons are co-owners, tenants in fee simple, of Blackacre, Whiteacre, and Greenacre, the transaction by which one of them becomes the sole owner tenant in fee simple of Blackacre, another of Whiteacre and a third of Greenacre, is a partition.
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> The note to (d) reads: 'Thus in the example just given ... a transaction by which one person becomes sole owner of Blackacre, while the other two remain co-owners of Whiteacre and Greenacre, is a good partition."[10]

[18] I note that definition. I accept that the partition proposed here falls within the definition.

[19] The essential issue is whether the partition proposed is more beneficial than the sale. In determining whether it is more beneficial than the sale, it is clear that the starting point is that the partition must be more beneficial for the majority of co-owners. In the present application, it is the first respondent's submission that the partition would be more beneficial for all co-owners, including the applicant.

[20] Having had regard to the valuation of Denis Gregory Cupitt dated 10 August 2016, which is exhibited to his affidavit,[11] it would seem to me to clearly be the case. On the basis of that valuation, the individual values of Lot 20 and Lot 30 exceed the in globo value of Lot 20 and Lot 30. Mr Cupitt's affidavit indicates that the individual values of Lot 20, which is $350,000, and Lot 30, which is $200,000, exceed the in globo value, which is $450,000. He sets out the reasons for the greater individual values on the basis that both lots in globo are considered too small to be classed as an economic living area, but each

[8] [1991] VicRp 52; [1991] 2 VR 129 (22 October 1990).
[9] [2013] NSWCA 92.
[10] Ibid, at 140.
[11] Affidavit of D G Cupitt sworn 30 August 2016, Court Document #33.

individual lot may be sold as a small, rural home site.[12] That type of analysis was considered as appropriate in the decision of *Hayward v Skinner*:[13]

> "Thus, a sale in globo, while realizing the true market value of the property, would apparently not yield as much as a sale in portions. Sale in portions faces the risk of the back portions not yielding their proper value. A division in portions based on valuation has the inherent element that the actual market value may not be received. However, there do not appear to be any special qualities or considerations attaching to the subject land to preclude a true and proper value being fixed by valuation of the respective portions. This latter approach appears to me to be the fairest and most suitable course to adopt.
>
> Therefore, I consider that the defendants have not only established that it would be more beneficial to them as representing the majority of co-owners that partition should be ordered …".[14]

[21] That analysis was also adopted in a number of other decisions including *Larkham v Barber*[15] where in globo sales analysis was similarly considered.

[22] I note that Mr Cupitt swears, with respect to the potential sale of the properties, that when the mining boom existed, many of the miners, for tax advantages, purchased rural properties, but with the current downturn, there is little or no interest in these types of rural properties any longer. He states that similar sized properties across Bukali Scrub Road and abutting the northern boundary of Lot 20 have been on the market for a considerable period of time with the selling agent reporting slow interest from possible purchasers and numerous alternative properties to compare with and negotiate price. He notes the market is "not strong".[16]

[23] It would seem therefore that should trustees be appointed for sale, there is no guarantee that a sale would, in fact, occur in the short to medium term, or that a competitive price could be obtained if the properties went to market at a forced auction, which is the conventional approach in such cases as this.

[24] On that basis, it would indeed seem to me to be the case that a partition would financially benefit all co-owners. In addition, the costs incurred by the trustee are relevant factors and I accept the submission that the proposed partition would be substantially less expensive than a sale, as the partition would require no subdivision and all of the costs usually associated with the sale would not be incurred. I am satisfied, therefore, that the first factor has been satisfied.

[25] The issue which remains is whether the discretion should be exercised. In determining whether to exercise the discretion, it seems that the court needs to choose between the two outcomes in the justice of the case. The discretion is at large, but there are a number of factors which have been identified in a series of decisions, including whether partition would result in hardship to a minority co-owner as well as emotional considerations of

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[12] Ibid.
[13] (1981) 1 NSWLR 590 at 594-595.
[14] Ibid, at 594-595.
[15] (1998) NSW Conv R 56, 641.
[16] Affidavit of D G Cupitt sworn 30 August 2016, Court Document #33.

the co-owners. Those factors were both considered in *Hayward v Skinner* and in *Segal* as outlined above.

[26] In my view, the discretion should be exercised in favour of a partition for a number of reasons. Firstly, it seems that the financial factors favour all of the parties. It would seem clear to me that the partition, on the face of it, should not cause hardship to the minority co-owner, in that he would take possession of Lot 30, which has a value greater than one-third of the value of Lot 20 and 30 collectively. The farm has been in the family for generations and the first and second respondents grew up on the farm, as did the applicant. That can be taken into account. I also accept that there have been improvements to the farm undertaken by the first respondent since 1992 and the applicant will clearly get the benefit of those improvements.

[27] When effecting a partition, there is always an issue as to whether there should be payment of equality money between co-owners. The equality money has been described in a number of decisions. In *Segal v Barel*[17] it was held:

> "[42] The concept is a simple one. If, as here, there are two co-owners holding in equal shares, any partition should see them receive parts of equal value. For any one of many reasons, it may be impossible to achieve that precise result. The owner who receives the part of smaller value may then be regarded as having given part of his or her half-share to the recipient of the part of greater value. Monetary adjustment by way of 'equality money' – sometimes called 'equality of partition' or 'owelty of partition' … – will be required in such a case."

[28] In determining whether it should be paid, consideration is given to any increase in the value to the land that has been brought about by means of expenditure of one of the co-owners.

[29] Normally, then, it would seem that the course that should occur is that the court would order the trustees to make all inquiries to make payment of a quality money reflecting those principles. However, it seems that in order to avoid unnecessary expense and further litigation, the first respondent submits that no order be made for equality money in this instance, notwithstanding the windfall that would be realised by the applicant by such an order.

[30] Counsel for the second respondent also argued that there is a strong financial benefit for all parties in pursuing partition rather than sale and adopts the submissions of the first respondent. In particular counsel agrees that there should be partition of the two allotments in the terms proposed and that Lot 30 be transferred to the applicant and Lot 20 to the respondent as tenants in common in equal shares. There is also agreement to the proposal that equality money should not be paid to any party. The second respondent also agrees that the chattels, particularly livestock and farming equipment, be sold, and that the proceeds be utilised to meet the trustee's costs. It is clear that the second respondent's approach is largely dominated by non-economic factors as she considers that she is under an obligation in honour to ensure her brother is not forced to leave a home he has occupied by common consent for over 20 years whilst caring for the parties' late mother.

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[17] [2013] NSWCA 92; 84 NSWLR 193 at 202.

[31] In relation to costs the second respondent agrees that each party should bear its own costs of the application.

Costs

[32] The second respondent departs from the submissions of the first respondent and submits that, given the windfall to the applicant, which is in the order of $25,000, the applicant should bear any costs relating to the appointment and performance of the trustees which are not met by the sale of the chattels.

[33] The issue of costs in applications of this type was canvassed extensively in *Barel v Segal* (No 3),[18] where it was noted that the usual starting point is that the costs of both parties of having trustees of sale appointed are paid out of the proceeds of sale. I note that although *Barel v Segal* (No 3) was subsequently overturned by the New South Wales Court of Appeal, the trial judge's canvassing of the issue of costs remains relevant:

> "[9]. The usual starting point for applications under Section 66G of the *Conveyancing Act* 1919 is that the costs of both parties of having trustees for sale appointed are paid out of the proceeds of sale. That point was made in *Kardos v Sarbutt (No 2)* [2006] NSWCA 206 and in *Equity Proceedings with Precedents (New South Wales)* by Neville and Ashe. In *Kardos v Sarbutt*, Brereton J said at [28], Basten JA and Hunt AJA agreeing:
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> > In partnership proceedings, it was once the rule that no costs would be given up to the decree directing the account, a position that was not departed from except in cases of gross misconduct [*Hawkins v Parsons* (1862) 8 Jur (NS) 452; *Parsons v Hayward* [1862] EngR 793; (1862) 4 De GF&J 474]. The prevailing rule nowadays is that the costs of both parties of an action for dissolution are paid out of the partnership assets, unless there is some good reason to the contrary [*Hamer v Giles* (1879) 11 Ch D 942], except where the action is one which in substance is to try some disputed right, in which case the unsuccessful party will be ordered to pay the costs [*Hamer v Giles*; *Warner v Smith* (1863) 9 Jur (NS) 169]. The costs of taking accounts, although disputed, are usually defrayed out of the partnership assets [*Butcher v Pooler* (1883) 24 Ch D 273; *Newton v Taylor* (1827) 19 Eq 14]. *Similarly, in proceedings under Conveyancing Act, s 66G for the appointment of trustees of sale of jointly held land, the costs are usually paid out of the proceeds, the rationale being that the costs of such an application are an incident of joint ownership.*
>
> (emphasis added)".

[34] There is not a lot of authority on this, because most cases refer to sale rather than partition. It would seem that, based on the case law outlined above, the general principle is that the costs come out of the sale of the chattels. Whilst the value of the chattels has not been quantified there should be an order in the terms sought. I also agree with the submission

[18] [2012] NSWSC 1319

of counsel for the first respondent that the first respondent prepare an annexure to the draft orders which clearly identifies the farming chattels.

[35] The parties are otherwise to bear their own costs of the proceedings.

Orders

[36] For the reasons outlined above, I consider that there should be orders in terms of the draft which has been submitted by the first respondent.

[37] The orders are as follows:

1. Pursuant to s.38 of the *Property Law Act* 1974 (Q.) (**PLA**), Andrew Guy Johnson and Ashley John Stanton (the Trustees) be appointed trustees of the land described at Lot 20 on Crown Plan YL402 (**Lot 20**) and Lot 30 on Crown Plan YL918 (**Lot 30**), such land being collectively known as "Rathkeale", and situated 25 kilometres west of Monto, in the State of Queensland (**the Land**);

2. The Land thereupon vest in the Trustees to be held by them upon trust to partition the same, such that:

   (a) Lot 30 be transferred to the Applicant in its entirety; and

   (b) Lot 20 be transferred to the First Respondent and Second Respondent as tenants in common in equal shares;

3. The Trustees, following partition of the Land, make no payment to any of the Applicant, First Respondent or Second Respondent of equality money;

4. That pursuant to s.41 of the PLA, the Trustees be appointed trustees of all chattels associated with the Rathkeale farming business (**the Chattels**);

5. That the Chattels thereupon vest in the Trustees to be held by them upon trust to sell the same and to stand possessed of the net proceeds of sale, after payment of the Trustees' reasonable costs and expenses associated with the sale of the Chattels and the partition of the Land, and after payment of any rates, taxes, costs of insurance or repairs associated with the partition of the Land and sale of the Chattels, for the Applicant, First Respondent and Second Respondent in equal shares;

6. Should the Trustees' costs and reasonable expenses incurred in partitioning the Land and selling the Chattels exceed the proceeds realised following sale of the Chattels, the Applicant, First Respondent and Second Respondent are liable to the Trustees for such expenses, in the amount of one third of such expenses for each of them, and the Trustee is entitled to not transfer title in the Land to any one of the parties unless and until such debt is paid by that party;

7. The Trustees be entitled to sell the Chattels by such means as they deem appropriate in the circumstances including, but not limited to, sale by auction or private treaty;

8. The Applicant, First Respondent and Second Respondent are entitled to make offers on the Chattels for consideration by the Trustees; and

9. The parties bear their own costs of this proceeding.