SUPREME COURT OF QUEENSLAND

CITATION:	*SAM v IDP; IDP v SAM* [2006] QSC 344
PARTIES:	**SAM** **(applicant)** **v** **IDP** **(respondent)** **IDP** **(applicant)** **v** **SAM** **(respondent)**
FILE NO/S:	BS8642 of 2006 BS7608 of 2006
DIVISION:	Trial Division
PROCEEDING:	Originating Applications
ORIGINATING COURT:	Brisbane
DELIVERED ON:	20 November 2006
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2006
JUDGE:	Mackenzie J
ORDER:	**In 8642/06:** **1. That pursuant to s 288(1)(b) of the *Property Law Act 1974* (Qld), the applicant be granted leave to apply for a property adjustment order notwithstanding that such application has not been made within two years after the day on which the parties' de facto relationship ended.** **2. That the application for property adjustment referred to in paragraph 2 of the originating application be adjourned to a date to be fixed.** **3. That the applicant pay the respondent's costs of and incidental to the application for leave to apply for a property adjustment order.** **In 7608/06:** **1. That the application be adjourned to a date to be fixed.** **2. That costs be reserved.**

CATCHWORDS: FAMILY LAW AND CHILD WELFARE – DE-FACTO RELATIONSHIPS – ADJUSTMENT OF PROPERTY INTERESTS – OTHER MATTERS – where de facto spouse applied for leave to apply for a property adjustment order under Part 19 of the *Property Law Act 1974* (Qld) – where more than two years have elapsed since the relationship ceased – where the applicant had a sufficient explanation as to the delay – whether the applicant would suffer 'hardship' if denied leave to apply

REAL PROPERTY – PARTITION OF LAND – STATUTORY TRUST FOR SALE OR PARTITION – QUEENSLAND – where de facto spouse applied for appointment of trustees for sale under s 38 *Property Law Act 1974* (Qld) – where applicant unable to continue to meet mortgage repayments – where respondent concurrently applied for leave to apply for a property adjustment order – whether application should be adjourned

Family Law Act 1975 (Cth) s 44(4)
Property Law Act 1974 (Qld) s 38, s 288(1)(b)

Deves v Porter (Unreported, Supreme Court of New South Wales, Campbell J, 1 August 2003), cited
In the Marriage of Neocleous (1993) 113 FLR 451, followed
In the Marriage of Whitford [1979] FLC 90-612, followed
In the Marriage of Mackenzie [1978] FLC 90-496, followed

COUNSEL: W Westbrook for the applicant/respondent
J D Hogan for the respondent/applicant

SOLICITORS: South & Geldard Solicitors for the applicant/respondent
Hartley Family Law Services for the respondent/applicant

[1] **MACKENZIE J**: By an originating application 7608 of 2006 filed 17 September 2006 IDP applies for the appointment of statutory trustees for sale pursuant to s 38 of the *Property Law Act 1974* in respect of two contiguous lots, Lots 18 and 19, in Rockhampton. SAM who resides in a house on Lot 19 has by originating application 8642/06, applied for leave to apply for a property adjustment order under Part 19 of the *Property Law Act*. Leave is required to commence those proceedings because more than two years have elapsed from when the de facto relationship relied on ended. It is common ground that the relationship which had begun in July 1986 finally ended on 5 July 2002 when IDP moved out of their home. There had been separations and attempted reconciliations from the previous November or December; which month depends on which account is most accurate.

[2] In March 2002 SAM had consulted a solicitor about her entitlements but a subsequent attempt at reconciliation brought that to an end. After the final separation she did nothing about the property settlement until she received a notice

of a proposed resolution in respect of a company, Tantis Pty Ltd, of which she and IDP were directors. IDP held four shares while she held one share. The resolution, which had the effect of providing for only one director, was passed. IDP assumed that office.

[3] On 2 June 2003 a letter was sent to IDP's then solicitors seeking advice whether they had instructions to act in relation to finalising property matters between IDP and SAM. The solicitors replied that they did not have such instructions. About two months later, her solicitors inquired of her if she had any instructions but she did not respond.

[4] She explained her delay in initially pursuing a property settlement by saying that she felt intimidated by IDP. By mid 2003 she was unwell and in pain. In April 2004 she was operated on for bowel cancer and subsequently underwent chemotherapy one day a week for six months while continuing to work. She says her oncologist advised her to avoid stress and confrontation during her treatment. During 2005, she says she worked at AMH from 6.45 am to 3.30 pm and that because of her state of health she was exhausted by the time she got home. She says that her focus was on restoring her health rather than pursuing a property settlement.

[5] It may also be observed that during this period she was living in the home on Lot 19 rent free and apparently without paying her share of the rates or any mortgage payments, while IDP was paying one-half of the rates and the mortgage payments. In circumstances where the issue of a financial settlement had not been raised by IDP, there was, no doubt, no incentive for SAM to agitate it herself.

[6] According to IDP he began steps to sever his financial ties with SAM in May 2006. In October 2005 he had been diagnosed with renal cell carcinoma with possible metastasis in the lung. He underwent surgery to remove his left kidney and a nodule in his lung. He was also diagnosed with diabetes. He can now only perform light duties and is unable to continue to meet ongoing mortgage payments.

[7] The proposal put to SAM in the solicitors letter of 8 June 2006 was that IDP would make one more mortgage payment and one further rate contribution and then make no more, as he was not receiving any benefit from the property. In a previous letter of 17 May 2006 a proposal was put, "in the spirit of compromise and on the basis that the matter does not proceed to court" that the proceeds of sale of Lots 18 and 19 be divided equally between the parties notwithstanding his greater entitlement because of his greater financial contributions.

[8] Standing in isolation, that may have appeared a generous offer, but the actual financial situation involving the parties is more complicated. At the time the relationship began, IDP and his then wife had a business carried on by a trust of which Tantis Pty Ltd was trustee. His then wife and he were directors of Tantis. After the property settlement with his then wife in mid 1987, he retained the business, a motor vehicle worth about $13,000 and half of a coin collection, valued at $7,000. SAM had about $10,000 derived from land owned with her former partner and a motor vehicle worth about $4,500 together with savings of $4,000. She was employed in IDP's business prior to and after the de facto relationship began and she says she contributed to it financially from her savings. She became a director of Tantis Pty Ltd, acquiring IDP's ex-wife's share in it.

[9] A number of aspects of expenditure are set out in the affidavits of IDP and SAM. The most significant of them for present purposes are those relating to Lots 18 and 19 and the acquisition of an investment property in 1995. Lot 18 was purchased in about 1985, funded by a joint bank loan. Further loans were borrowed to build the home now occupied by SAM. Income from the business was used to repay the loan which, according to her, was discharged in 1991. There is no clear statement to the contrary elsewhere in the evidence as far as I can see. In 1988, Lot 19 was acquired using $19,500 either lent or gifted by SAM's mother. It is not possible or necessary to resolve the character of that money for present purposes.

[10] In about 1995 Tantis Pty Ltd purchased a commercial building for about $446,000, fully borrowed from a bank. In 1998, an extensive refit was done to accommodate an incoming tenant. The bank loan was refinanced and building society loans were taken out, secured by a mortgage over the investment property and first and second mortgages over Lots 18 and 19.

[11] In November 2004, the investment property was sold for $1.3m. One of the issues, if there are Part 19 proceedings, will concern disbursement of the net proceeds of about $1.23m. The second mortgage over Lots 18 and 19 was discharged and payments of about $21,000 were made in discharge of debts of IDP. He also paid $130,000 into his superannuation benefit and another $130,000 towards purchasing a $380,000 property at Morayfield. That property is subject to a mortgage the balance of which is not stated in the material. Leaving aside the payment of the personal debts, an issue that is said, on SAM's behalf, to need exploration is the implications of the still existing mortgage over Lots 18 and 19 not having been discharged at the time the investment property was sold, when the debt secured essentially related to financing the investment property. SAM says that she did not know of the sale of the investment property until recently. It is also noted that it is not clear what happened to the business conducted by the parties. There is a reference in IDP's affidavits to a "current business"; whether that is essentially the same business or a new business is not, as far as I can find, explained in the material. It is apparent that complex accounting may need to be done for the purposes of any Part 19 proceedings. It is against that background that the issues to be determined in the two applications must be considered.

Application for leave

[12] Section 288 of the *Property Law Act* provides as follows:

> "288 Time limit for making application
>
> (1) A court may make a property adjustment order only if—
>
> (a) the application was made within 2 years after the day on 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 is satisfied hardship would result to the applicant or a child of the de facto partners if leave were not given."

[13] There is a two step process involved. In *In the Marriage of Whitford* [1979] FLC 90-612 at page 78, 144 it is said:

> "Thus, on an application for leave under sec. 44(3), two broad questions may arise for determination. The first of these is whether the Court is satisfied that hardship would be caused to the applicant or a child of the marriage if leave were not granted. If the Court is not so satisfied, that is the end of the matter. If the Court is so satisfied, the second question arises. That is whether in the exercise of its discretion the Court should grant or refuse leave to institute proceedings."

[14] The application was made about two years two months out of time. The reasons advanced by SAM for the delay and some other observations have been summarised earlier. It is not an unreasonable inference that each for their own reasons did not agitate the need for a property adjustment in a timely way. Those factors are relevant to the exercise of the discretion if hardship is established. "Hardship" in the context of s 288(2) has been discussed in relation to similar provisions (eg s 44(4) *Family Law Act 1975* (Cth)).

[15] It is commonly accepted that the concept of "hardship" in this kind of provision requires the court to be satisfied that the person seeking leave must demonstrate that they will suffer a substantial detriment if leave is not granted; see for example *In the Marriage of Whitford*, which was applied in *In the Marriage of Neocleous* (1993) 113 FLR 451, where Lindenmeyer J said:

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

(See also the analysis of relevant cases by Campbell J in *Deves v Porter* [2003] NSWSC 625).

[16] In *In the Marriage of Mackenzie* [1978] FLC 90-496 Strauss J said that the loss of the mere right to litigate a claim is not the hardship to which s 44(4) of the *Family Law Act* referred. He went on to say:

> "…What amounts to a substantial detriment will depend on the circumstances of the applicant or a child of the marriage. In an appropriate case, the loss of something of comparatively little value may constitute a substantial detriment… The loss of the mere right… to litigate a claim… is not the hardship to which subs(4) refers. It is the hardship which would be caused by the loss of that right, with which the subsec is concerned. … A party or the parties may have chosen to leave the financial and property relationships of the parties unchanged for the time being, in order to provide for children during their infancy, or for a spouse until remarriage, or until some other change in the circumstances of either of them should occur. Obvious examples are where the matrimonial home has been left in joint names or where a joint business venture has been continued after the dissolution of the marriage. If then the situation arises in which the justice of the matter requires that their financial or property

> relationships should be resolved or adjusted. …hardship in the relevant sense may result to an applicant if an applicant is not granted leave to institute proceedings."

[17] The notion of explicit forbearance that may underlie those examples is not necessarily present in this case but the situation is analogous. The fact that nothing has been done to settle matters between the parties, if the motivation is driven by individual perceptions of self interest, should not lead to a more restricted outcome.

[18] On the evidence I am satisfied that the applicant has shown to the required standard that she will suffer hardship. The substantial detriment she will suffer is that if she is precluded from making a claim, her capacity to obtain a just division of property consistent with current notions of the entitlements of parties to a de facto relationship will be significantly limited. The relationship was of relatively long duration. If she has to rely on equitable remedies, the prospects of her obtaining an outcome within the range she might obtain in Part 19 proceedings are not promising. In this case, that detriment extends beyond mere deprivation of the right to bring proceedings. She will probably suffer a real and substantial detriment.

[19] The next question is whether the discretion should be exercised. The respondent submitted that leave should not be granted. It is undoubtedly correct, as the respondent submits, that the applicant was aware at all times of her right to apply for orders consequential upon the end of the de facto relationship. The applicant has attempted to explain why she did not focus on taking steps within the prescribed period. There is, of course, also the inference that this was a case where the applicant was residing in a home acquired as property of the relationship on favourable terms and that the respondent had control of the business and the investment property. Each was using, to their own advantage, part of the property in existence at the time of separation.

[20] It is open to the inference that neither was concerned over this situation until circumstances changed, in the form of the respondent's ill health which seems to have been the catalyst for his wish to dispose of Lots 18 and 19. When faced with the possibility that she might get only half the proceeds of the sale of Lots 18 and 19 without account being taken of the kinds of things that would ordinarily be taken into account in Part 19 proceedings, the present application was made by SAM.

[21] It is therefore not a case that can properly be characterised as one where the parties, being aware of their rights, have been neglectful of their own interests and belatedly tried to bring proceedings. Rather, while the *status quo* existed to the advantage of each in their own way, an inference open may be that neither was inclined to bring the matter to a head.

[22] In my view, the respondent's proposition that the benefit of cost free residence in the home on Lot 18 counts against a finding of hardship oversimplifies a situation that is likely to require complex analysis to establish the respective rights of the parties in Part 19 proceedings, for the reasons stated earlier.

[23] I am satisfied that the discretion in s 288(2) should be exercised in favour of giving leave to the applicant to commence proceedings under Part 19.

Appointment of trustees for sale

[24] But for the complication arising from the Part 19 proceedings, the applicant would ordinarily be entitled to an order appointing trustees for sale. The grant of leave to bring proceedings for a property adjustment order means that the courts' discretionary powers under Part 19 are enlivened. The capacity of the court to fashion an order designed to achieve a just division of property of former de facto partners, especially where the facts of the case may make it appropriate to make an order adjusting rights of the parties in respect of property held as tenants in common by the parties, has to be taken into account in deciding whether to appoint trustees for sale.

[25] One of the practical problems about retaining the premises comprising Lots 18 and 19 *in specie* is that there is evidence that the applicant's circumstances have materially changed, casting doubt on whether he will continue to pay mortgage instalments. If the mortgage instalments are not paid, the mortgagee may go into possession and the property will be sold. It may be that, if neither party has the financial capacity to service the loan, the property may have to be sold in any event.

[26] There is no evidence enabling a safe conclusion to be drawn whether there is any practical alternative to the property being sold at this point. If there is no practical alternative, an order appointing trustees for sale would seem appropriate; but whether provision should be made for preservation of the proceeds to await the outcome of the Part 19 proceedings would also need to be resolved. In the circumstances it seems appropriate not to make an order immediately but to adjourn the application to a date to be fixed to enable the parties to address whether there is any practical alternative to making an order under s 38 of the *Property Law Act* and, if not, what orders should be made with respect to disbursement of the monies derived from sale. Directions designed to bring the matter to a conclusion as soon as possible might also be addressed.

Orders

[27] In 8642/06:

1. That pursuant to s 288(1)(b) of the *Property Law Act 1974*, the applicant be granted leave to apply for a property adjustment order notwithstanding that such application has not been made within two years after the day on which the parties' de facto relationship ended.
2. That the application for property adjustment referred to in paragraph 2 of the originating application be adjourned to a date to be fixed.
3. That the applicant pay the respondent's costs of and incidental to the application for leave to apply for a property adjustment order.

In 7608/06:

1. That the application be adjourned to a date to be fixed.
2. That costs be reserved.