SUPREME COURT OF QUEENSLAND

CITATION:	*Malouf & Anor v Cameron & Ors* [2024] QSC 3
PARTIES:	**MICHAEL CALILE MALOUF** (applicant) **HEIDI BELINDA MIDDLETON** (applicant) **v** **JILL ALEXIA CAMERON** (first respondent) **NOOSA NORTH SHORE INVESTMENTS PTY LTD** (second respondent) **IAN MILNE DIXON CAMERON** (third respondent)
FILE NO:	BS11830 of 2023
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	10 January 2024
DELIVERED AT:	Brisbane
HEARING DATE:	6 and 8 November 2023
JUDGE:	Sullivan J
ORDER:	
CATCHWORDS:	REAL PROPERTY – PARTITION OF LAND – STATUTORY TRUST FOR SALE OR PARTITION – TRUSTEES – where the applicants seek the appointment of trustees for the sale of land pursuant to s 38 of the *Property Law Act 1974* (Qld) – where pursuant to s 40 of the *Property Law Act 1974* (Qld) the applicants seek that the applicants and the first respondent be allowed to purchase the land on any sale by the trustees and obtain a credit for the purchase price corresponding to the individual interests – where the applicants own a one-half share in the land – where the first respondent owns a one-half share in the land – where the third respondent opposes the orders sought to be made *Conveyancing Act 1919* (NSW), s 66G *Limitation of Actions Act 1974* (Qld) *Property Law Act 1974* (Qld), s 37, s 37A, s 38, s 40, s 43 *Trusts Act 1973* (Qld), s 90 *Bunnings Group Ltd v Asden Developments Pty Ltd* [2014] 1

Qd R 493, cited
Callahan v O'Neill [2002] NSWSC 877, cited
Ex parte Eimbart Pty Ltd [1982] Qd R 398, cited
Ferella v Official Trustee in Bankruptcy [2015] NSWCA 411, cited
Foundas v Arambatzis [2020] NSWCA 47, cited
Goodwin v Goodwin [2004] QCA 50, cited
Green v Johnston [2015] QSC 81, cited
Groch v Knights [2018] NSWSC 1365
Lewin v Lewin [2019] NSWSC 380, cited
McLaughlin v Cunningham [2023] NSWSC 350, cited
McPaul v Massignani & Anor [2023] QSC 98, considered
Ngatoa v Ford (1990) 19 NSWLR 72, cited
Nullagine Investments Pty Ltd v Western Australian Club Inc (1993) 177 CLR 635, cited
Ranger v Ranger [2009] QCA 226, cited
Re Permanent Trustee Nominees (Canberra) Ltd v Coral Sea Resort Motel Pty Ltd [1989] 1 Qd R 314, cited
Schnytzer v Wielunski [1978] VR 418, cited
Simonidis Steel Lawyers Brisbane Pty Ltd v Johnston & Ors; Williams v Legg (1993) 29 NSWLR 687, cited
Wilson v Strzelcykowski [2016] QCA 227, cited

COUNSEL: J Sargent for the applicants
The respondents appeared on their own behalf

SOLICITORS: Hickey Lawyers for the applicants
The respondents appeared on their own behalf

Introduction and Parties

[1] The applicants, Mr Michael Malouf and Ms Heidi Middleton, seek, *inter alia*, the following principal relief:

(a) pursuant to s 38 of the *Property Law Act 1974* (Qld) (the "**Act**"), the appointment of a Mr O'Kearney and a Mr Elliott as trustees for sale of land at 337 Teewah Beach Road, Noosa North Shore (the "**Noosa Land**");

(b) pursuant to s 40 of the Act, orders that each of Mr Malouf, Ms Middleton and the first respondent, Ms Jill Cameron, be allowed to purchase the Noosa Land on any sale by the trustees, and obtain a credit for the purchase price corresponding to the individual interests which they hold in the Noosa Land.

[2] Mr Malouf and Ms Middleton bring the originating application on the basis that they presently own a one-half share in the Noosa Land.

[3] The other half share of the Noosa Land is registered in the name of Ms Cameron.

[4] Ms Cameron, the first respondent, consented to a proposed order, effectively in terms of the originating application. Ms Cameron only appeared on the second day of the hearing. On that occasion, she represented herself.

[5] The second respondent, Noosa North Shore Investments Pty Ltd as trustee for the NNS Trust ("**NNS**"), is a trust company owned by Ms Cameron's son, William Cameron ("**Mr Cameron Junior**"). NNS has also consented to the same proposed order. NNS did not formally appear in the proceeding, but its sole director, Mr Cameron Junior, assisted his father in the proceeding.

[6] Mr Cameron Junior advised that whilst NNS was not opposing the order, this was, in part, because his father was actively opposing it.

[7] NNS is a party to this proceeding because in the middle of 2023, a deed was entered into by Ms Cameron obliging her to sell to NNS one half of her 50 per cent interest in the Noosa Land. The sale under the deed was not to settle prior to a registered mortgage over the Noosa Land being released.

[8] The third respondent to this proceeding is the former husband of Ms Cameron, namely Mr Ian Cameron ("**Mr Cameron Senior**").

[9] Mr Cameron Senior is a party to this proceeding because in mid-2023 he also entered into a deed with Ms Cameron whereby she agreed to transfer the other half of her 50 per cent interest in the Noosa Land to Mr Cameron Senior. The transfer of this interest in the Noosa Land was also not to take place prior to the registered mortgage being released.

[10] It is Mr Cameron Senior who actively opposes the orders which are sought to be made.

[11] For the purposes of the hearing, I gave leave for Mr Cameron Junior to assist Mr Cameron Senior. Without any disrespect to Mr Cameron Senior, it was evident that he had hearing problems and he had decided not to make use of the available Court apparatus which may have assisted him to better hear the proceedings. Mr Cameron Senior represented himself in the proceedings.

Contentions

[12] Mr Cameron Senior's contentions may be broadly grouped into five bases of opposition to the proposed orders.

[13] The first basis for opposing the relief is that Mr Cameron Senior contended that there is some radioactive sand on the Noosa Land and that this sand needed to be removed before any sale could take place.

[14] The second basis for opposing the relief is that there is currently a Family Court proceeding on foot and it is submitted that no order ought to be made until the Family Court proceeding is disposed of.

[15] The third basis for opposing the relief is that there is currently a registered mortgage over the Noosa Land which is the subject of a dispute, and it is contended that no order ought to be made until the dispute is resolved.

[16] The fourth basis for opposing relief is that it was said that the conduct of Mr Malouf in particular, but implicitly Ms Middleton as well, leading up to and including the bringing of this originating application was vindictive such that no order ought to be made.

[17] The fifth basis for opposing the relief is that the proposed s 40 order under the Act is said to be unfair as it would not allow NNS or Mr Cameron Senior to have the benefit of a credit for the purchase of the land and, accordingly, they would be prejudiced.

Background facts

[18] The Cameron family has had a part ownership of the Noosa Land for some decades. The evidence before the Court does not adequately disclose the full ownership history of the Noosa Land. However, it is apparent that some form of Cameron family ownership seems to have existed at least from 1979.

[19] On or about 17 April 1980, the National Australia Bank registered a mortgage over the entirety of the title of the Noosa Land.

[20] In 1998, Ms Cameron and Mr Cameron Senior separated.

[21] On 26 May 1999, the National Australia Bank registered mortgage was transferred to a company called Arcobaleno Pty Ltd. This was done through a registered transfer of the mortgage. At this date, one or both of Mr Cameron Senior and Ms Cameron were co-owners of the Noosa Land, together with persons from outside of the Cameron family.

[22] In addition to the mortgage transfer document, there was an accompanying Deed of Covenant entered into between the National Australia Bank Limited and Arcobaleno Pty Ltd. It, in part, provided:

> "(1) The Transferee agrees to purchase and the Bank agrees to transfer to the Transferee all of the Bank's interest, rights and privileges as Mortgagee under that mortgage.
>
> (2) The consideration for the transfer will be the balance owed by the mortgagors to the Bank on the date of completion, which is to be no later than two days after the date of this Deed is completed by both parties.
>
> (3) The consideration is to be paid in exchange for the following documents duly completed:
>
> - Transfer of Mortgage
> - Statutory Declaration of Service of Notice of Default and copy of notice
> - Statutory Declaration of Service of Notice of Intention to exercise Power of Sale and copy of such notice…"

[23] The consideration stated in the mortgage transfer document was $122,276. Presumably, this is what was owed by the mortgagors to the National Australia Bank at the time.

[24] By 2000, Ms Cameron had commenced Family Court of Australia proceedings against Mr Cameron Senior.

[25] On 25 January 2002, his Honour, Justice Warnick of the Family Court made orders in that proceeding. Part only of those orders is exhibited to an affidavit of Mr Cameron Senior. That part of the order which is exhibited provides, in effect, *inter alia*, that the Cameron interest in the Noosa Land was to be transferred solely into the name of Ms Cameron. The Order provided that Ms Cameron was to then hold a public auction for the sale of the interest after it had been registered in her name.

[26] A Queensland Land Title Registry search dated 2 August 2023 shows that in 2015 Ms Cameron held a 50 per cent interest in the Noosa Land. As at the date of the search, the ownership of the Noosa Land was as follows:

(a) Jill Alexia Cameron - Tenants in Common - one half;

(b) Kay Teresa Cohen - Tenants in Common - one sixth;

(c) Janice Marie Herron - Tenants in Common - one sixth;

(d) Sharon Janet Pie - Tenants in Common - one sixth.

[27] On or about 23 April 2022, the whole of the Noosa Land was taken to public auction. At about this time, Mr Malouf became aware of the Noosa Land and the auction. The Noosa Land failed to sell at that auction, and Mr Malouf had subsequently been informed by the real estate agent involved that the property had been passed in with no genuine interest.

[28] By 28 April 2022, Mr Malouf was interested in purchasing the whole of the Noosa Land. Mr Malouf identified that his interest was originally for a potential commercial use, ancillary to an integrated resort which his family company was developing at Noosa Heads.

[29] In or around May 2022, Ms Middleton was introduced to the Noosa Land by Mr Malouf. Ms Middleton is the partner of Mr Malouf. By the latter part of 2022, Mr Malouf and Ms Middleton were interested in purchasing the Noosa Land for the purpose of building a residence on it for themselves and their children.

[30] On 9 September 2022, Mr Malouf and Ms Middleton submitted an offer to purchase the entirety of the Noosa Land. That offer was submitted via the real estate agent who had acted on the prior unsuccessful auction of the Noosa Land in April 2022. That offer was not accepted. Ms Cameron, through her solicitor, advised at that time that she was not in a position to move forward with the sale of the Noosa Land. However, Mr Malouf was later informed by the real estate agent, that the agent had received a call from Ms Cameron expressing a willingness to sign a contract once she was in a position to do so.

[31] Mr Malouf started discussions about the acquisition of the Noosa Land with Ms Cameron and her representatives from mid-November 2022. These discussions continued into late June 2023. Mr Malouf deposed to the various dealings that he

had during this time with Ms Cameron directly and with her solicitor, as well as with the real estate agent that had previously acted in the auction.

[32] Mr Malouf's affidavit material exhibited various pieces of written communications exchanged between Mr Malouf on the one part, and variously Ms Cameron, her solicitor and the real estate on the other part. The communications are consistent with Ms Cameron being keen to sell her interest in the Noosa Land to Mr Malouf and Ms Middleton up until late June 2023.

[33] As part of these dealings, Ms Cameron had identified that there were issues arising from the orders of the Family Court. This was obviously a reference to the then 21-year old order of Justice Warnick, which required Ms Cameron to sell her 50 per cent interest in the Noosa Land by public auction. That is what had been attempted in April 2022 via an auction of the whole of the Noosa Land.

[34] Mr Malouf then sought to work with Ms Cameron, with a view to he and Ms Middleton purchasing the 50 per cent interest at such a public auction. Ms Cameron, at one time, raised the possibility of going back to the Family Court to get a variation of the Court order.

[35] On 20 April 2023, Ms Middleton and Mr Malouf entered into a contract to purchase the Herron one-sixth interest in the Noosa Land. The contract had a special condition in favour of the purchasers that made the contract conditional on Ms Middleton and Mr Malouf successfully purchasing the interest owned by Ms Cameron in late June 2023.

[36] On 2 June 2023, Ms Middleton and Mr Malouf entered into a contract for the purchase of each of the Cohen and Pie one-sixth interests in the Noosa Land. That contract had a special condition which had a broadly similar effect to the one contained in the Herron contract.

[37] In short, there were special conditions which allowed Ms Middleton and Mr Malouf to exit each of the contracts if they were not successful in buying the 50 per cent interest which Ms Cameron held in the Noosa Land by late June 2023.

[38] Prior to the proposed public auction occurring, Mr Malouf identified to Ms Cameron his and Ms Middleton's intention to make an offer at the public auction calculated on a particular basis. Mr Malouf disclosed this calculation to Ms Cameron. In part, it used an amount that he believed reflected the likely reserve price from the prior public auction. The terms of the offer also sought to factor in an assumed cost needed to discharge the disputed registered mortgage.

[39] Shortly before the proposed auction Ms Cameron decided not to take the property to auction. On 21 June 2023, Ms Cameron sent an email to Mr Malouf as follows:

> "I am sorry to let you know that I have decided to withdraw my property from auction on June 23. I know you and Heidi will be disappointed, but circumstances have arisen which means that I will not be proceeding with the auction. I wish it could have been a better outcome for you both, however unfortunately my decision has been difficult, but I believe it is the right one.
>
> I wish you both all the happiness for your future together."

[40] On 21 June 2023, Mr Malouf wrote to the solicitor for Ms Cameron as follows:

> "In reliance on our previous discussions with Jill, we are committed to the purchase of the land. Jill's last minute advice to cancel the auction just modifies our acquisition process.
>
> We intend, tomorrow morning, to waive the benefit of Special Condition 5 in both the Cohen/Pie and Herron contracts to enable us to proceed with the purchase of the 50 per cent share. The relevant provision is copied below and is identical in both contracts.
>
> Once on title, and as Tenants in Common with Jill, we will then move immediately to make application for the statutory sale of the entire property under s 38 of the *Property Law Act* (Qld) *1974* where we will look to acquire the balance share. I will leave you to explain the potential financial implications of this approach to Jill.
>
> The easier path would be to proceed with the auction on Friday. Tom will need swift notice if the auction is reinstated to ensure the entire process is not compromised."

[41] On 22 June 2023, Mr Malouf further wrote to the solicitor for Ms Cameron and stated as follows:

> "I confirm I have now instructed Hickey Lawyers to affirm the contracts for Cohen/Pie and Herron. Settlement under these contracts is 2 August 2023. Unless we have reached an arrangement with Jill prior to that time, we intend making immediate application for the statutory sale of the entire property.
>
> I confirm we have also reached agreement regarding the transfer of the mortgage from Arcobaleno. Ben Cohen will be able to confirm this. A draft deed is currently being prepared to evidence this arrangement."

[42] Whilst the material is not clear on the exact date, it appears that Mr Malouf and Ms Middleton later acquired the shares in the entity Arcobaleno Pty Ltd, rather than obtaining a transfer of the registered mortgage to themselves personally. This resulted in them having control and ownership of the mortgagee.

[43] Consistent with Ms Cameron's expressed view, the public auction did not proceed.

[44] On 7 July 2023, based on Mr Malouf's instructions, the solicitors for Mr Malouf waived the benefit of the special condition on the Herron contract so that it became unconditional.

[45] Within two hours of that occurring, Mr Malouf's solicitors wrote an email to the solicitors for Ms Cameron stating that Mr Malouf and Ms Middleton would enforce the sale of the Noosa Land via the appointment of statutory trustees for sale.

[46] Mr Malouf and Ms Middleton subsequently made the Cohen and Pie contract unconditional by waiving the benefit of the special condition.

[47] On 12 July 2023, Mr Malouf received an email from Mr Cameron Junior stating, amongst other things, that he was the son of Ms Cameron, that he had signed an unconditional contract with Ms Cameron, that his family had a long association with the land of some 45 years, that he too wished to build a house on the Noosa Land, that he would offer to purchase the share held by Ms Middleton and Mr Malouf, and that he would be bidding at an auction if a statutory trustee was appointed.

[48] The reply of Mr Malouf was that he was not interested in selling the interest in the Noosa Land held by Ms Middleton and himself, nor was he prepared to consider a sale. He indicated that he would proceed to resolve the deadlock by a statutory sale.

[49] On 2 August 2023, the contracts with Herron, and Cohen and Pie settled, and Mr Malouf and Ms Middleton had thereby acquired a 50 per cent interest in the Noosa Land.

[50] Mr Cameron Senior exhibited a copy of a deed which appeared to operate as an obligation for the sale of half of Ms Cameron's 50 per cent interest in the Noosa Land to NNS. That deed contemplated that a more usual form of contract for the sale of land would be entered into at a later date. The consideration for that purchase was said to be $2.4 million plus the amount required to be paid to the mortgagee under the registered mortgage to secure a discharge of that mortgage. The settlement date for that sale was said to be 30 November 2023, but the deed required the registered mortgage to be removed prior to settlement.

[51] The same deed operated as between Ms Cameron and Mr Cameron Senior. It contained an obligation to transfer half of Ms Cameron's 50 per cent interest in the Noosa Land to Mr Cameron Senior. That transfer obligation was also subject to the registered mortgage being discharged first.

[52] At the hearing of this proceeding, NNS and Mr Cameron Junior were not said to have become registered proprietors. It was clear that the registered mortgagee had not been discharged from the title of the Noosa Land.

Statutory provisions and general principles

[53] For the purposes of this originating application, the following sections of the Act are relevant:

> **37 Definitions for div 2**
>
> In this division—
>
> *co-owner* has a corresponding meaning and includes an encumbrancee of the interest of a joint tenant or tenant in common.
>
> *co-ownership* means ownership whether at law or in equity in possession by 2 or more persons as joint tenants or as tenants in common.
>
> **37A Property held on *statutory trust for sale***
>
> Property held upon the *statutory trust for sale* shall be held upon trust to sell the same and to stand possessed of the net proceeds of

sale, after payment of costs and expenses, and of the net income until sale after payment of costs, expenses, and outgoings, and in the case of land of rates, taxes, costs of insurance, repairs properly payable out of income, and other outgoings upon such trusts, and subject to such powers and provisions as may be requisite for giving effect to the rights of the co-owners.

…

38 Statutory trusts for sale or partition of property held in co- ownership

(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.

…

(3) Where the entirety of the property is vested at law in co-owners the court may appoint a trustee corporation either alone or with 1 or 2 individuals (whether or not being co-owners), or 2 or more individuals, not exceeding 4 (whether or not including 1 or more of the co-owners), to be trustees of the property on either of such statutory trusts.

(3A) On such appointment under subsection (3), the property shall, subject to the *Trusts Act 1973*, section 90, vest in the trustees.

…

(6) In relation to the sale or partition of property held in co-ownership, the court may alter such statutory trusts, and the trusts so altered shall be deemed to be the statutory trust in relation to that property.

(6A) Without limiting the power of the court so to alter the statutory trusts, the court shall, unless for good reason the court otherwise directs, so alter the statutory trusts as to provide in the case of the statutory trust for partition that—

(a) any encumbrance which, prior to the appointment of the trustees, affected any undivided share shall continue to extend and apply to any such share; and

(b) any mortgage created for raising equality money shall rank in priority after any such encumbrance.

(7) Where property becomes subject to such statutory trust for sale—

(a) in the case of joint tenancy—a sale under the trust shall not of itself effect a severance of that tenancy; and

(b) in any case—land shall be deemed to be converted upon the appointment of trustees for sale unless the court otherwise directs.

(8) This section applies to property held in co-ownership at the commencement of this Act and to property which becomes so held after such commencement.

…

40 Right of co-owners to bid at sale under statutory power of sale

(1) On any sale under a statutory trust for sale the court may allow any of the co-owners of the property to purchase whether at auction or otherwise on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase money or any part of the purchase money instead of paying the same, or as to any other matters as to the court seems reasonable.

…"

[54] The general principles applicable to the exercise of the power under s 38(1) of the Act were recently summarised by the Chief Justice in *McPaul v Massignani & Anor* [2023] QSC 98. At [24]-[28] Bowskill CJ observed as follows:[1]

"[24]The purpose of orders for sale by statutory trust is "to provide a statutory mechanism for terminating the co-ownership of land when the co-owners fail themselves to agree on the manner in which the co-ownership shall be terminated".[2] As Wilson J (with the agreement of Muir and Gotterson JJA) said in *Bunnings Group Ltd v Asden Developments Pty Ltd* [2014] 1 Qd R 493 at [45]: "The statutory scheme for the appointment of statutory trustees for sale reflects the commercial reality that it is generally easier to sell the entirety than it is to sell a fractional interest, let alone a fractional interest that is encumbered.

[25] Whilst it has been confirmed that the power to appoint a statutory trustee under s 38 is discretionary,[3] the circumstances in which that discretion would be exercised against the making of an order, when one is sought by a co-owner, are very limited.

[26] As McMurdo JA said in *Wilson v Strzelcykowski* [2016] QCA 227 at 2-3: "The nature of a court's discretion under s 38(1) of the Property Law Act 1974 is confined in that ordinarily the discretion will be ordered in favour of the appointment of trustees for sale, essentially because the remedy under s 38 is a valuable ingredient of a co-owner's proprietary interest."

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1 *McPaul v Massignani & Anor* [2023] QSC 98 at [24]-[28].

2 *Nullagine Investments Pty Ltd v Western Australian Club Inc* (1993) 177 CLR 635 at 650; referred to in *McLaughlin v Cunningham* [2023] NSWSC 350 at [33].

3 See, for example, *Re Permanent Trustee Nominees (Canberra) Ltd v Coral Sea Resort Motel Pty Ltd* [1989] 1 Qd R 314.

> [27] His Honour referred to the statement made in *Goodwin v Goodwin* [2004] QCA 50, by McPherson JA with the agreement of Williams JA and McMurdo J (as his Honour then was), that "[i]t is well settled that, to an application under s 38 of the Property Law Act… there is practically speaking no defence". That is because the statutory right conferred by s 38 is an incident of the property of a co-owner.[4]
>
> [28] In relation to the New South Wales equivalent,[5] in *Foundas v Arambatzis* [2020] NSWCA 47 at [63] the Court of Appeal of New South Wales (White JA, Bell P and Basten JA agreeing) said: "Although an order under s 66G is discretionary, such an order is almost as of right, unless on settled principles it would be inequitable to make the order. An order may be refused if the appointment of trustees for sale would be inconsistent with a proprietary right, or the applicant for the order is acting in breach of contract or fiduciary duty, or is estopped from seeking or obtaining the order … Hardship or general unfairness is not a sufficient ground for declining relief under s 66G …"[6]

[55] The authorities also support that generally the parties are not under an obligation to negotiate to end the co-ownership before applying to the Court.[7]

[56] Where the application is brought by a co-owner of a substantial holding, a respondent to an application for an order under s 38 of the Act will bear a forensic onus to show why the order should be refused. In that respect, I refer to the observations of Young CJ in *Callahan v O'Neill* [2002] NSWSC 877 at [8], where in the context of the New South Wales equivalent of s 38, his Honour observed as follows:[8]

> "[8] It is fairly clear that, as a general rule, any co-owner holding at least 50% of a parcel of real property is entitled almost as of right to an order for partition or sale under s 66G of the *Conveyancing Act*. It is only in situations where it would, under settled principles, be inequitable to permit such an application, including cases where there has been a contract not to make an application that the order may be refused. This appears from cases such as *Ngatoa v Ford* (1990) 19 NSWLR 72 and *Williams v Legg* (1993) 29 NSWLR 687."

[57] I will have regard to these general principles when considering Mr Cameron Senior's bases of opposition.

First basis of opposition - presence of radioactive sand

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4 *Ex parte Eimbart Pty Ltd* [1982] Qd R 398 at 402; *Ranger v Ranger* [2009] QCA 226 at [14].
5 Section 66G of the *Conveyancing Act 1919* (NSW).
6 See also *Ferella v Official Trustee in Bankruptcy* [2015] NSWCA 411 at [36] to [42].
7 *Lewin v Lewin* [2019] NSWSC 380 at [41].
8 *Callahan v O'Neill* [2002] NSWSC 877 at [8].

[58] Some decades ago, the Noosa Land had been used in association with a sand mining operation. This resulted in the presence on a part of the Noosa Land, of one or more stockpiles of sand with fairly low levels of radioactivity. Mr Cameron Senior gave evidence that this sand is stockpiled behind a main lagoon, where Mr Cameron Senior says a house may be built. He says the stockpile is approximately 10,000 cubic metres in size.

[59] Mr Cameron Senior says that sometime in the past, he, his former wife and partners had processed and sold some sand that had been part of the stockpile.

[60] Mr Cameron Senior says further that the stockpile was subsequently deemed to be a public risk by the Queensland State Government. He expressed the view that this was a major contributing factor to why the Noosa Land had not received any real interest in the previous sales campaign, and why it was passed in at the public auction.

[61] Mr Cameron Senior's affidavit material exhibited a search of the Queensland Environmental Management Register, which shows that the Noosa Land has been included on that register. He has also exhibited an email from the real estate agent who conducted the public auction in April 2022. That email was dated 12 January 2022 and raised concerns about the upcoming public auction. It appears that this email was written on the basis that the agent had only recently become aware of the issue concerning the radioactive sand. The agent recommended that the owners obtain expert reports covering potential land use and remediation, which could then be made available to the agent and any potential buyers.

[62] The contention by Mr Cameron Senior was to the effect that as the property is entered on the Environmental Management Register, this register entry and the presence of the sand would present detrimentally to any prospective purchaser. He submitted that trustees should not be appointed for the sale of the Noosa Land while the sand is still present. He submitted that the potential removal process could cost significant money. On his case, the Camerons could do the removal job themselves. He submitted that the existence of the sand and the deemed public health risk by the State Government was reason enough for there not to be a statutory sale.

[63] I reject these contentions and submissions.

[64] First, the radioactive sand has been present on the Noosa Land for decades.

[65] Mr Cameron Senior's affidavit material contains a final government report on the radioactive sand dated 5 August 1997. No one has removed that stockpile of radioactive sand since that time.

[66] The presence of the radioactive sand and the entry on the Environmental Management Register is simply a feature of this land which will have to be disclosed to any potential purchaser. The radioactive sand's presence does not provide a basis for refusing the orders sought.

[67] Whilst it is not necessary to go further on this issue, I note that my rejection of the contentions and submissions advanced is also consistent with a broader general principle which emerges from the authorities. That principle may be stated in the following terms, the fact that a property could sell for more if improvements were

made and the sale delayed, is not generally a good reason for refusing an order for sale.[9] Even if the evidence was sufficient to support a finding that removal of the sand could be achieved by Mr Cameron Senior through his resources and that the removal would produce a net benefit on the sale price, this would not provide a proper basis to refuse the s 38 order sought in the present case. The evidence before the Court, in any event, does not allow such findings to be made.

[68] For all of these reasons, the presence of the radioactive sand and the entry on the Environmental Management Register is not a basis for refusing the s 38 order in the circumstances of this case.

Second basis of opposition - existence of Family Court proceedings

[69] Mr Cameron Senior submitted that the orders should not be made, because there was still a Family Court proceeding on foot, which proceeding touched upon the Noosa Land. His contention was that no order should be made until the Family Court proceeding was somehow brought to finality.

[70] It is difficult to understand from the affidavit material before the Court, what exactly is the state of the Family Court proceeding between Mr Cameron Senior and Ms Cameron.

[71] It would seem that a Family Court proceeding was commenced some 23 years ago, which led to the order of his Honour Justice Warnick. That order is now some 21 years of age. It had made provision for the transfer of all of the Cameron held interests in the Noosa Land to Ms Cameron, with a further order for her to sell it by public auction.

[72] Some two decades later, it seems Mr Cameron Senior has instigated fresh but related proceedings in the Federal Circuit Court and Family Court of Australia (Division 2). Whilst there is no direct evidence before me in affidavit form, I was told from the Bar table by Mr Cameron Senior that he had unsuccessfully sought an order from the Family Court to try and stop the public auction of the Noosa Land which had been held in April 2022.

[73] There is some indirect evidence consistent with this statement from the Bar table. Mr Cameron Senior's affidavit material exhibited an order of Judge Glass of the Federal Circuit and Family Court of Australia (Division 2) made on 22 April 2022. The proceeding number recorded on that Order is BR2367 of 2022. Order 1 provided that, "All extant interim applications are dismissed." This may have been an order dismissing the court process to the extent it sought injunctive relief to stop the auction.

[74] The order also provided that mediations were to take place and that Mr Cameron Senior was to pay Ms Cameron's costs in an amount which was fixed. All other extant applications were to be adjourned until 1 August 2022 for a compliance and readiness hearing. It is apparent that his Honour Judge Middleton has subsequently listed the proceeding for a further compliance and readiness hearing on 2 February 2024.

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9 *Groch v Knights* [2018] NSWSC 1365 at [31]-[33].

[75] A compliance and readiness hearing in the Federal Circuit and Family Court of Australia (Division 2) is not a hearing for final relief. It is akin to a directions hearing to test the readiness of a matter for a potential final hearing.

[76] There was no other material before the Court which properly explained what the current Federal Circuit and Family Court of Australia (Division 2) proceeding sought to do in relation to the 50 per cent interest in the Noosa Land held by Ms Cameron.

[77] In addition, Mr Cameron Senior points to there being a Bill before Parliament called the *Property Law Bill 2023* which, in part, provides for an amended s 43 of the Act as follows, "(1) The Court may adjourn or stay a proceeding under subdivision (2) or (3) in relation to property at any time before it has made a final order if a co-owner starts, or has started, a family law proceeding in relation to the property." This amended section, if passed, would have an operation over orders sought to be made pursuant to s 38. Mr Cameron Senior submits by reference to the Bill, that this Court should adjourn or stay the proceeding pending the outcome of the current Family Court proceeding.

[78] I reject the contentions and submissions of Mr Cameron Senior that the existence of the Family Court proceeding, or alternatively, the Bill before Parliament, provide appropriate bases for declining to make the s 38 order sought.

[79] First, this is not a case where two parties to a marriage are the only co-owners of the entire property in question.

[80] It has long been recognised that an adjournment order or a stay order may be appropriate where the only owners of the co-owned property are spouses engaged in litigation in the Family Court.[10] This is because the Family Court will usually be considering a division of the total spousal property. When the Family Court formulates and orders final relief, including in respect of co-owned property which is wholly owned by the spouses, an extant application for a proposed s 38 order, will almost always become unnecessary and be overtaken by the Family Court's final orders.

[81] The position here is entirely different. Fifty per cent of the Noosa Land is currently owned by Mr Malouf and Ms Middleton. Both of them are strangers to the marriage of Ms Cameron or Mr Cameron Senior, and are not parties to the Family Court proceeding. A matrimonial dispute between Mr Cameron Senior and Ms Cameron is not a proper basis for refusing a s 38 order sought by fifty per cent co-owners, who are strangers to the marriage.

[82] Secondly, his Honour Justice Warnick made an order some 21 years ago for the distribution of matrimonial property between spouses. That order vested a 50 per cent interest in the Noosa Land solely in the name of Ms Cameron. That order contemplated that Ms Cameron would sell that property. The April 2022 auction represented an attempt at such a sale. The intent of the order was to reduce the interest of Ms Cameron in the Noosa Land to a monetary fund. A s 38 order is not inconsistent with the ultimate goal of that Family Court order, in that it will reduce Mrs Cameron's interest into such a monetary fund.

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

[83] Thirdly, some 21 years after the original order of Justice Warnick, Mr Cameron Senior and Ms Cameron have purportedly entered into a deed which may have been trying to achieve some different result in respect of a 25 per cent interest in the Noosa Land. Whatever Mr Cameron Senior and Ms Cameron are seeking to achieve as between themselves, it provides no proper basis for this Court declining to make an order under s 38 of the Act, in circumstances where the order has been sought by strangers to the former marriage who hold a 50 per cent interest in the Noosa Land.

[84] Lastly, Mr Cameron Senior's reliance upon the Bill before Parliament is misconceived. Until that Bill is passed as an Act, it is not a law of this State. In any event, the provision which I was taken to in the Bill and which I have set out above, as a matter of substance broadly reflects the current authorities. Whilst I do not have to decide the matter, if the amendment had been operative, I would have exercised the discretion contained in the amendment to not stay or adjourn the current originating application. Mr Malouf and Ms Middleton are strangers to the marriage, and the Family Court proceeding between Ms Cameron and Mr Cameron Senior would not have justified a refusal to make the s 38 order sought by them in the circumstances of this case.

Third basis of opposition - existing mortgage

[85] The third basis upon which Mr Cameron Senior seeks to oppose the order is the existence of the registered mortgage over the entirety of the Noosa Land in favour of Arcobaleno Pty Ltd and the existence of a dispute about what may or may not be secured under that mortgage.

[86] Mr Cameron Senior's affidavit material exhibited a letter from Russells, who were a law firm acting for him, Mr Cameron Junior and Ms Cameron. The letter was dated 7 July 2023 and had been written to Bartley Cohen, who was then said to be acting for Arcobaleno Pty Ltd, the mortgagee. It provided, in part, as follows:

> "We record that whilst the mortgage in favour of the National Australia Bank Limited (NAB) was assigned to your client, any loan agreements with the NAB and indeed the debt, were not in fact assigned. We are instructed that after entry into the Deed of Covenant with the NAB dated 26 May 1999, your client's former solicitors, James Byrne & Rudz wrote to Mr Ian Cameron by letter dated 17 June 1999 giving him notice of the assignment of the mortgage (not the debt) to your client.
>
> We understand that whilst no agreement was entered into with Arcobaleno Pty Ltd as to the terms of the debt, the parties did agree that interest would accrue on the sum of $120,276.00 from 26 May 1999 at the rate of 7% simple interest.
>
> Since that time, your client has taken no steps whatsoever to seek repayment of the debt, nor has it made a demand for payment. That is, a period in excess of 24 years has passed with your client doing nothing.

> Our client's view is that any claim made by your client for the repayment of the debt now is out of time pursuant to the *Limitation of Actions Act 1974* (Qld).
>
> If the debt was payable now (which is denied) on our calculations, the amount due including principal and interest would be $323,298.55 as at today's date…"

[87] Russells, on behalf of their clients, sought a release of the mortgage within seven days. They stated that the firm anticipated receiving instructions to make an application for appropriate orders if the release was not forthcoming. As at the time of the hearing, there had been no determination about what, if anything, was owing under the mortgage.

[88] Mr Malouf's final affidavit exhibited certain historical documents. These included a copy of the original registered mortgage from 1980, a copy of the transfer of that mortgage from the NAB to Arcobaleno Pty Ltd from 1999, and a Deed of Covenant between the NAB and Arcobaleno Pty Ltd, also from 1999. In addition, he exhibited a letter from James Byrne & Rudz to Mr Cameron Senior dated 17 June 1999 advising of the assignment of the mortgage. The letter stated that the amount purportedly owed under the mortgage at that date was $120,276, which was said to continue to accrue interest at the rate of 13 per cent per annum. He also exhibited a facsimile from James Byrne & Rudz to Mr Cameron Senior dated 28 November 2001. The facsimile contained a further purported calculation of interest on the mortgage debt said to be owed to Arcobaleno Pty Ltd. The interest rate stated in the facsimile was 13 per cent.

[89] Mr Malouf purported to depose to the fact that there was currently a debt of $1,037,720.74 secured by the mortgage in favour of Arcobaleno Pty Ltd. This debt was said to be calculated on the basis of the original transfer sum of $120,276, using the RBA historical lending rates for small businesses, overdraft, and variable.

[90] Mr Malouf of course cannot give direct evidence of the debt as he had no personal knowledge of the original debt.

[91] Turning to the mortgage document itself. The terms and conditions of the registered mortgage record that it secured, in effect, all monies owed to the bank. Clause 1 provided, *inter alia*, as follows:

> "The Mortgagor will pay to the Bank on demand in writing all moneys which are now or may from time to time hereafter be owing or remain unpaid to the Bank in any manner or any account whatsoever by the Mortgagor…"

[92] Clause 2 provided that interest accrued on any amount which was owed, *inter alia*, as follows:

> "The Mortgagor will pay interest to the Bank on all moneys from the time being owing or remaining unpaid as aforesaid at the rate charged by the Bank from time to time upon overdrawn accounts computed as from the day or respective days of the same respectively becoming owing…all such interest as aforesaid to be considered as

> accruing from day to day and to be payable as and when demanded…"

[93] Pursuant to clause 2, the interest rate on the debt was the rate charged by the NAB from time to time upon overdrawn accounts, and the interest was to be compounding with daily capitalisation.

[94] For the purpose of this proceeding, I make no finding in relation to what, if anything, is owing under the registered mortgage. This was not a proceeding for the determination of such an issue. Arcobaleno Pty Ltd is not a party to this proceeding. It is sufficient to note that there is a dispute which exists between Arcobaleno Pty Ltd on the one part, and Ms Cameron as registered owner on the other part, as to what may be owing.

[95] Mr Cameron Senior, who is not a registered owner, contends that the order under s 38 should not be made until the mortgage dispute has been determined.

[96] I reject that contention by Mr Cameron.

[97] Section 38(1) of the Act deals expressly with registered mortgages over the entirety of co-owned property. It provides as follows:

> "…where any property (other than chattels personal) 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 to 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 petition."

[98] In accordance with that section, a statutory trustee for sale cannot sell through a registered mortgage. Any new purchaser of the entirety of the Noosa Land would purchase it subject to the mortgage. The mortgage would remain registered if not otherwise released by the mortgagee on the settlement.

[99] Ordinarily, the existence of a mortgage would not be a proper basis to reject the making of an order under s 38 of the Act.

[100] My only reservation in this case arises from Mr Malouf and Ms Middleton having acquired the shares in Arcobaleno Pty Ltd.

[101] In circumstances where there is a dispute as to what, if anything, is owing under the registered mortgage, a potentially unbalanced position arises on the sale of the Noosa Land as between Mr Malouf and Ms Middleton on the one part, and other third party purchasers on the other part. Third party purchasers would be met with uncertainty as to what may be owed under the mortgage. This may realistically result in such third party purchasers having a reduced interest in or desire to purchase the property compared to Mr Malouf and Ms Middleton, who own and control the mortgagee.

[102] To address such concerns, Arcobaleno Pty Ltd offered to provide an undertaking to release the registered mortgage on the basis that the amount of $1,037,720.74 plus interest from 9 November 2023 up to the date of settlement of the sale by the

Trustees be placed into a trust account pending determination of the dispute. The interest would be calculated by applying the RBA lender indicator rate for "small business; variable; overdraft" published from time to time, with the interest being capitalised on a daily basis. The RBA rate is not the NAB rate for overdrawn accounts, but for the purposes of preserving a sufficient fund, pending resolution of the dispute, I am satisfied that it can stand as proxy for the relevant NAB rate for overdrawn accounts. It will be necessary for such an undertaking to be provided in respect of the actual order I intend to make. The order I propose to make is not identical to the draft order about which the previous undertaking was proffered. If the undertaking is given to the Court by Arcobaleno Pty Ltd, then the order will be made.

[103] That sum will be held in a trust account by the Trustees pending the resolution of the dispute as to the amount owed under the mortgage.

[104] In accepting this undertaking, I have acted on the basis that this Noosa Land appears on the evidence to have a value well beyond the amount which the undertaking deals with. In forming this view, I have relied, in part, on the amounts which Mr Malouf and Ms Middleton were prepared to pay to acquire Ms Cameron's 50 per cent interest and the amount which NNS was prepared to pay Ms Cameron for a 25 per cent interest in the Noosa Land.

[105] There is a real benefit to all owners in ensuring that the mortgage will be released on a sale of the Noosa Land. This will allow the Noosa Land to be marketed and sold in a way which will allow all potential purchasers to have confidence that they will receive an unencumbered title to the Noosa Land.

Fourth basis of opposition - allegation of vindictiveness

[106] The fourth basis upon which Mr Cameron Senior opposes the order is on the ground that Mr Malouf and Ms Middleton, or either of them, are motivated by vindictiveness in their seeking to obtain the s 38 order.

[107] Mr Cameron Senior contends that this is evident from the fact that after Ms Cameron informed Mr Malouf that she would not be taking her half interest in the Noosa Land to auction, Mr Malouf subsequently made the Herron, and Cohen and Pie contracts unconditional.

[108] Mr Cameron Senior contends that Mr Malouf could have walked away from the transaction because the special conditions for those other contracts were not met.

[109] Further, Mr Cameron complains that Mr Malouf was communicating with the real estate agent from the prior failed auction, and the solicitor for Ms Cameron, in relation to the potential purchase of Ms Cameron's half interest at a further proposed public auction. Mr Cameron Senior says this also discloses Mr Malouf's vindictiveness.

[110] I reject these contentions.

[111] The notion of vindictiveness in the authorities has most commonly arisen where there is a competition between a possible sale by trustees, as opposed to a partition. The authorities have recognised it may be more appropriate on certain occasions to

order a partition where the sale was being sought out of vindictiveness or animosity.[11]

[112] The arguments before the Court in this proceeding have not raised a partition as a live alternative.

[113] In any event, the evidence does not support vindictiveness or animosity on the part of Mr Malouf and Ms Middleton. I set out the basis for this conclusion below.

[114] First, Mr Malouf and Ms Middleton were entitled to purchase the other half share of the Noosa Land which was owned by persons other than Ms Cameron. The fact that the contracts for the purchase of those interests were conditional when Mr Malouf and Ms Middleton found out that Ms Cameron was not prepared to take her 50 per cent interest in the Noosa Land to public auction, does not thereby result in Mr Malouf and Ms Middleton acting vindictively by making those contracts unconditional.

[115] Mr Malouf and Ms Middleton were both interested in buying the Noosa Land. There was nothing inappropriate or wrong with their wanting to buy the Noosa Land for either a business purpose or to build a residential premises.

[116] Secondly, there was nothing wrong with Mr Malouf being transparent with Ms Cameron about what he was prepared to pay for the 50 per cent share of the Noosa Land at a public auction. The Family Court order had required there to be a public auction of the Noosa Land. There had, in effect, already been a public auction in April 2022, at which time the Noosa Land was passed in with no real interest.

[117] Mr Malouf and Ms Middleton were seeking to work with Ms Cameron, the real estate agent from the prior auction and Ms Cameron's solicitor, to put together a minimum offer which would be made at a public auction for the purchase of the half interest which Ms Cameron owned in the Noosa Land. Given the entire Noosa Land had been previously passed in with little interest, presumably Ms Cameron would have been interested in achieving at least a guaranteed minimum bid at such a public auction. Ms Cameron could always control any reserve at such a public auction. Indeed, Ms Cameron ultimately elected not to proceed with the public auction, as was her right.

[118] By his email of 25 May 2023, Mr Malouf was being open with Ms Cameron about the minimum he was prepared to bid for at the auction. Part of that communication from Mr Malouf also included the requirement by Mr Malouf that Ms Cameron would seek Mr Cameron Senior's consent to the auction and if Mr Cameron Senior did not consent, then all necessary steps were to be taken by Ms Cameron to respond to any claims or litigation that Mr Cameron Senior might bring in response.

[119] On 29 May 2023, Ms Cameron responded, *inter alia*, as follows:

> "Hope this all goes well now Michael. I will deal with Tom Offermann now [a reference to the real estate agent] and letting Ian Cameron know of the auction by orders of the Court."

[120] None of these actions constitute vindictive conduct by Mr Malouf.

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11 *Schnytzer v Wielunski* [1978] VR 418 at [427]-[428].

[121] Mr Cameron Senior also relied upon an email chain which had been exhibited to his final affidavit as Exhibit T.

[122] That email chain commenced with an email from the real estate agent to the solicitor for Ms Cameron on 19 June 2023. It apparently attached standard auction terms and conditions (which attachment was not exhibited to the affidavit). The introductory paragraph to the email was as follows:

> "Hello Mark,
>
> Attached are the standard auction terms and conditions. We wish to be prepared in the event of someone without the capacity or intention to complete the purchase bids just to spoil the auction outcome. The contract requires the first $400,000 of the deposit to be paid immediately upon signing, which is also repeated in clause 9 of the attached standard auction terms.
>
> …"

[123] The email then set out a number of suggested "precautions" to deal with the concerns expressed. They included:

(a) only allowing registered bidders at the auction;

(b) anybody registered being required to produce photographic ID; and

(c) informing them expressly of the requirement of paying the first $400,000 immediately."

[124] It also set out, as part of the precautions, what was to occur if the highest bidder did not immediately pay the $400,000 deposit. It included the possibility of the under bidder being given the opportunity to sign a similar contract if, "we are satisfied that they are genuine (like the current pre-registered buyers)". It concluded, "Mark [a reference to the solicitor for Ms Cameron], we look forward to your comments and advice on behalf of your client."

[125] A copy of that email had obviously been sent to Mr Malouf at, or shortly after, the time when the initial email was sent to the solicitor. Mr Malouf then responded that he had initially been intending to attend with a bank cheque, but his bank had indicated it no longer issued bank cheques. Mr Malouf indicated that he could also pay by a real time gross settlement mechanism, which he expected would be an immediate transfer, but may only be confirmed and guaranteed on the next working day. As an alternative, he offered to pay $400,000 on the day prior to the auction, but indicated that would be unusual, although he was happy to cooperate.

[126] The real estate agent responded by email to Mr Malouf, copied to the solicitor for Ms Cameron, noting that there was an extremely high probability that Mr Malouf and Ms Middleton would be successful at the auction and accordingly suggested the $400,000 be paid prior to the auction. He continued as follows, "in the event that it needs to be refunded, we can action the refund that same day."

[127] I do not find the conduct of Mr Malouf's communications in the email chain as indicating vindictiveness. He and Ms Middleton wished to purchase the Noosa Land and were prepared to meet the required initial payment for the proposed public

auction. That preparedness does not constitute vindictive conduct or evidence a vindictive motive for his proceeding.

[128] As identified above, the auction did not go ahead.

[129] Thirdly, at that time, Mr Malouf and Ms Middleton had conditional contracts in their favour for the purchase of the other half interest in the Noosa Land. They made plain to Ms Cameron that they intended to complete these contracts and that they would seek a sale by a statutory trustee if agreement could not otherwise be reached. Again, this does not constitute vindictive conduct or disclose a vindictive motive in seeking the s 38 order.

[130] I see nothing in these facts as supporting that Mr Malouf and Ms Middleton were acting vindictively in subsequently seeking the appointment of statutory trustees for sale of the Noosa Land. The evidence supports that they wished to purchase the whole of the Noosa Land so that they could build a residential home. The mere fact that they are recent owners of a 50 per cent interest in the Noosa Land does not convert their conduct in seeking the s 38 order into vindictive actions.

Fifth basis of opposition - s 40 relief prejudicial

[131] The fifth basis upon which Mr Cameron Senior opposes the order concerns s 40 of the Act. Section 40 of the Act provides the Court with a discretion to allow any co-owner of the property to purchase the property on any terms as to the setting-off of the value of their interest in the property against any part of the purchase money, as the Court sees reasonable.

[132] Mr Cameron Senior's contention is that the order will be unfair as it will not allow him to use an interest in the Noosa Land as a set-off against any purchase monies he might have to pay if he were to buy the Noosa Land from the Trustees.

[133] In this case, the registered proprietors are Mr Malouf and Ms Middleton as to 50 per cent of the Noosa Land and Ms Cameron as to 50 per cent of the Noosa Land. Mr Cameron Senior is presently not a registered owner of the Noosa Land.

[134] The registered mortgage of the Noosa Land has not been released, accordingly there is no present obligation to transfer Ms Cameron's 25 per cent interest to him pursuant to the deed between Ms Cameron and himself. Indeed, no such transfer had occurred at the time of the hearing. In such circumstances, it would not be appropriate to provide Mr Cameron Senior with a right to set-off the value of Ms Cameron's interest in any purchase by him from the Trustees.

[135] Subject to the issue raised below, it would have been appropriate to make an order that the current registered proprietors may purchase the Noosa Land, whether at auction or otherwise, on terms that any of them may set off the value of their existing share in the Noosa Land against the purchase price, which are:

(a) for the applicants cumulatively: 50 per cent; and

(b) for the first respondent: 50 per cent.

[136] I note that this form of order is one which both Ms Cameron and NNS have consented to.

[137] The difficulty I have identified with the applicant's proposed order sought in its current proposed terms is the interaction between the s 38 and s 40 components. The draft order pursuant to s 38 contemplates that the following sums will be deducted from the monetary purchase price before any distribution:

(a) $1,037,720.74 (plus interest accruing to the date of settlement, calculated as referred to above);

(b) the payment of all costs and expenses necessary to effect settlement of the Noosa Land, including, but not limited to, council rates, all outgoings (including electricity, gas, telephone), water rates and other statutory invoices payable in relation to the property, agent's commission, valuation costs and auctioneer and auction expenses;

(c) legal costs and disbursements for the sale of the Noosa Land;

(d) the trustee's fees, costs and expenses incurred for the sale of the Noosa Land; and

(e) the applicants' and first respondent's costs of the application.

[138] Only then will the remaining balance be paid to the applicants and to the first respondent in proportion to their 50 per cent interests in the Noosa Land.

[139] The problem arises from the s 40 component of the applicants' proposed order, which contemplates the set-off of the value of a purchasers' existing interest in the Noosa Land (i.e. the applicants' or Ms Cameron's relevant interest) against the purchase price prior to the payments contemplated by the s 38 components identified in paragraph [137] above. That operation of the proposed orders would be inequitable.

[140] This can be illustrated by a hypothetical example of Mr Malouf and Ms Middleton as purchasers. Under the proposed s 40 component of the proposed order, they would likely set off 100 per cent of their 50 per cent interest against the purchase price. As a result, they would only have to pay half of the overall purchase price in terms of money. In that scenario, the money paid at settlement would then represent, in its entirety, only the value of Ms Cameron's 50 per cent interest in the Noosa Land. This would result in all of the s 38 component sums set out above in paragraph [137] being taken solely from Ms Cameron's share of the proceeds. That is clearly inequitable and unacceptable. In the given example, each of the s 38 component amounts set out in paragraph [137] above should be paid equally from Mr Malouf's and Ms Middleton's proceeds on the one part, and Ms Cameron's proceeds on the other part.

[141] Whilst I am minded to make an order under s 40 in favour of both Mr Malouf and Ms Middleton on the one part, and Ms Cameron on the other part, it can only be done where the s 38 components amounts set out above are contributed equally from the respective 50 per cent interests.

[142] The current orders proposed by the applicants do not achieve this. Accordingly, I cannot presently make such a s 40 order.

[143] I am willing to hear the parties further on a form of order which could be made in accordance with these reasons to address this issue. I will adjourn the hearing of the s 40 relief to allow further submissions to be made. Such submissions will also have to confront the issue that a number of the sums identified in paragraph [137] above will not necessarily be specifically fixed in sums certain at the time of settlement.

Conclusion

[144] I find that the affidavit material supports both of the proposed trustees as being appropriate persons to be appointed under a s 38 order. They have both provided their written consent.

[145] Before making any final order, I will hear from the parties as to whether any further specific order should be made in respect of the fees, costs and expenses of the proposed trustees.

[146] I have otherwise modified the proposed order into a form which I would be prepared to make. That proposed order is Annexure "A" to these reasons. I will provide an opportunity to Arcobaleno Pty Ltd to consider the proposed order and then indicate if it is prepared to provide the undertaking.

[147] After orders are made, I will hear the parties on costs.

ANNEXURE "A"

SUPREME COURT OF QUEENSLAND

REGISTRY: BRISBANE
NUMBER: 11830/23

First Applicant	**MICHAEL CALILE MALOUF**
	AND
Second Applicant	**HEIDI BELINDA MIDDLETON**
First Respondent	**JILL ALEXIA CAMERON**
	AND
Second Respondent	**NOOSA NORTH SHORE INVESTMENTS PTY LTD ACN 669 067 332 AS TRUSTEE FOR THE NNS TRUST**
	AND
Third Respondent	**IAN MILNE DIXON CAMERON**

ORDER

Before: Justice Sullivan

Date: 22 December 2023

Initiating document: Originating Application filed 20 September 2023

UPON THE UNDERTAKING OF ARCOBALENO PTY LTD, GIVEN BY ITS COUNSEL, TO RELEASE ITS REGISTERED MORTGAGE AT THE SETTLEMENT OF ANY SALE OF THE PROPERTY AS DEFINED IN PARAGRAPH 1 OF THE ORDER OF THE COURT, ON THE BASIS THAT THE SUM IDENTIFIED IN PARAGRAPH 4(a) OF THE ORDER OF THE COURT IS PAID AT SETTLEMENT TO THE TRUSTEES DEFINED IN PARAGRAPH 1 OF THE ORDER OF THE COURT TO BE HELD BY THE TRUSTEES IN ACCORDANCE WITH PARAGRAPH 4(a) OF THE ORDER OF THE COURT,

THE COURT ORDERS THAT:

1. Pursuant to section 38 of the *Property Law Act 1974* (Qld) (**Act**), Glenn Thomas O'Kearney and Timothy Elliott are appointed as trustees (**Trustees**) for the sale of the

property described as Lot 1728 on Crown Plan M37789, Title Reference 12376116 situated at 337 Teewah Beach Road, Noosa North Shore, in the State of Queensland (**Property**).

2. The Property vest in the Trustees subject to encumbrances affecting the entirety, but free from encumbrances affecting any undivided shares, to be held by the Trustees on statutory trust for sale on terms set out in section 37A of the Act.

3. The Trustees be authorised to:

   (a) have possession of and access to the Property for the purpose of the trust;

   (b) appoint a national commercial real estate agent or agents to market the Property for sale and to assist in the sale of the Property;

   (c) market and promote the Property for sale by such advertising and other means over such a period of time as the Trustees consider appropriate; and

   (d) effect the sale of the Property in such a manner as the Trustees think fit and on such terms as the Trustees think fit.

4. That on completion of the sale of the Property, the proceeds of sale will be distributed in priority as follows:

   (a) The amount of $1,037,720.74 plus interest from 9 November 2023 up to the date of settlement of the sale by the Trustees:

      (i) calculated at the RBA Lending Rate for small business; variable; overdraft, published from time to time;

      (ii) with interest being capitalised daily,

      to be held by the Trustees in an interest-bearing account pending further order of the Court in relation to registered mortgage no. 601640125, or agreement between the parties to this proceeding and Arcobaleno Pty Ltd.

   (b) in payment of all costs and expenses necessary to effect settlement of the Property, including, but not limited to, council rates, all outgoings (including electricity, gas, telephone and council rates), water rates and other statutory imposts payable in relation to the Property, agent's commission, valuation costs and auctioneers and auction expenses;

(c) in payment of legal costs and disbursements incurred for the sale of the Property;

(d) in payment of the Trustees' fees, costs and expenses incurred for the sale of the Property;

(e) in payment of the costs in paragraph (6) below;

(f) the remaining balance to be paid:

(i) to the applicants - 50 per cent; and

(ii) to the first respondent - 50 per cent.

5. The Trustees have liberty to apply on 5 days' notice in writing to any interested party.

6. The applicants' and first respondent's costs of this application be paid out of the proceeds of sale of the Property before distribution in accordance with paragraph 4(f) above.

7. The s 40 Property Law relief sought in the originating application be adjourned to a date to be fixed.

Signed:_____