NZLR

27/6

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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND

A 1090/82

691

BETWEEN KEYSER

Plaintiff

A N D SMITH

Defendant

Hearing: 5 and 6 June 1984

Counsel: S C Ennor for Plaintiff
D K Wilson for Defendant

Judgment: 21 June 1984

JUDGMENT OF HILLYER J

This is a writ in which Keyser, the plaintiff, claims against Smith, the defendant, a declaration that she is the beneficial owner of a dwellinghouse and land situate at Seaview Road, Milford.

The plaintiff arrived in this country from Australia in 1971 and met the defendant. A relationship developed between them and from approximately October 1971 until October 1978 they lived together. The defendant provided accommodation and matters connected therewith, such as electricity and telephone (other than toll calls), the plaintiff provided food and similar other household mattters.

While the plaintiff was living with the defendant they frequently used to go down to Whitianga where the defendant owned two properties. The plaintiff said that she gave considerable assistance to the defendant in building or rebuilding the houses at Whitianga. The defendant agreed that she had assisted and said he did not wish to denigrate the

extent of that assistance. I am satisfied however that the plaintiff's references to carrying many tons of timber, many tons of fibrolite and many tons of gibraltaboard and of assisting in cutting and fixing all of this material were substantially exaggerated. I formed the view that the plaintiff assisted the defendant in the course of her association with him to the extent that she found it interesting but that her efforts were not such as to give any substantial claim to the defendant's bounty.

Equally, I thought the allegations made by the plaintiff that during the time she was living with the defendant he was continually borrowing money from her and she was continually paying for his haircuts, drycleaning etc and that the defendant was substantially indebted to her, were not accurate. I formed the opinion that the plaintiff was not one to be put upon and that the defendant's assessment that by and large, although moneys were borrowed, it was a mutual matter and that if anything the credit balance lay on his side, was more accurate.

The plaintiff did appear to have a somewhat worldly side to her nature. She said that although she had agreed to pay $100 per week to the defendant in circumstances I shall later describe, she had stopped payment of that amount in September 1983 in the hope that the financial embarrassment that would cause him would be to her advantage in this litigation and would make him more amenable to accepting her allegations.

In the course of their relationship the defendant purchased a property at Dominion Street, Takapuna and the parties lived there in the same stable de facto relationship. By about October 1978 however the relationship between them had deteriorated and the plaintiff moved out of Dominion Street to a property she rented at Palmerston Road. She paid a rental of $50 per week for this property. Unfortunately however, the property was put on the market and sold. The

plaintiff described the resentment she felt at the number of possible purchasers who were shown through the property and there was apparently some discord between herself and the landlord. Eventually a notice to quit was served and on 14 December 1979 the plaintiff arrived home to find that all her belongings had been moved out of the property. In particular, a menage of approximately 20 cats which she had, had also disappeared. She rang the defendant in some distress and although he says it was inconvenient for him, at her request he agreed to her coming back to live at Dominion Street.

He thought it was to be a temporary arrangement but she did not take that view. The defendant ascertained that her furniture had been put in storage and her cats in a cattery at Titirangi and the plaintiff recovered these and brought them to the defendant's home. The defendant said that he hoped that their previous relationship might develop again but after a few months it became apparent that that hope was not to be realised and it was obvious that the defendant became anxious that the plaintiff should leave his home. That anxiety was no doubt compounded by the somewhat devasting conditions in which the defendant was forced to live with the influx of upwards of 20 cats and kittens to his home. To his credit, in his evidence-in-chief, he said little about the conditions that were thus created and it was only when I specifically asked him to describe them that it became apparent just how appalling his house had become. He referred in particular to the smell of cat faeces and urine, to the shredding of the wallpaper and the furniture, and to the ubiquitous nature of the kittens and their nursing mothers.

Unfortunately however, it was not easy to find a place for the plaintiff to rent. Not only may there have been some resistance on the part of a landlord to his house being subjected to the damage described to me by the defendant, but the cats required a home which was suitable for them in the sense that some garden and absence of traffic was necessary.

For some time while the plaintiff was at Palmerston Road, after she had been advised that the property was being sold, she and the defendant had been actively engaged in trying to find a place she could rent, but without success. Again, after the plaintiff moved into the house at Dominion Street the parties looked for accommodation that she could rent, without success. Eventually the defendant suggested that a place should be purchased in which the plaintiff could live. The defendant says that he intended buying a property himself as an investment and that this would have the double benefit of providing accommodation for the plaintiff. This property, the defendant says, was to be let by him to the plaintiff. The plaintiff on the other hand says that the defendant's idea was that she should become the owner of the place. The defendant would buy it and she would pay him a weekly sum "to cover the mortgage". She says that the defendant told her that this would be a form of compulsory saving which would be very good for her and that although initially she might have to suffer certain hardships in paying more than she could comfortably afford, eventually, with the build up of her equity, inflation and her increase in wages, she would find that she was able to make the payments more comfortably.

A number of properties were looked at, in particular a property at Albany. This property was obviously too expensive for either of the parties to purchase but the defendant made an arrangement with a colleague under which they would tender for the property in partnership and a tender for the sum of $60,000 odd was put in. It was not successful but I mention the matter because the suggestion in relation to that property was that the plaintiff should lease it. A figure of $50 per week was suggested which clearly was far less than the outgoings on that property would have been. It does appear however that no concluded arrangement was ever reached and that the property would have been used as well by the defendant's partner for the purpose of grazing horses etc.

The plaintiff says that the defendant made a number of calculations in which he arrived at the maximum amount that could be paid for a property, having regard to the amount that the plaintiff could pay per week. The defendant says that this was because he wanted a rental that would cover his outgoings on the property. The plaintiff says it was because she would be buying the property and paying for it out of her wages. She said that she was receiving only $134 clear per week, that her cats cost her of the order of $15 to $20 per week for food etc. Therefore the rental she was prepared to pay for a property would have been only $50 per week. Anything over that sum she says she would not have paid unless she was getting some extra benefit from it in the nature of an interest as owner in a property. The defendant arrived at a figure of approximately $25,000 which he said was the maximum amount he could afford to pay for a property, having regard to the fact that the plaintiff was able to pay a maximum of $70 per week, he says, for rent and the parties looked at a number of properties.

At the beginning of June 1980 however, by which stage the plaintiff had been living at the defendant's home for nearly six months, the parties saw an advertisement in Saturday morning's New Zealand Herald for the property mentioned at 8 Seaview Road, Milford. The price was $35,000. They went to look at it with a land agent and decided that it was suitable for the plaintiff and her cats. They discussed its purchase and the defendant says that he decided to buy it but told the plaintiff that she would have to pay $100 per week. Again he says this was to be rent. The difference between the $70 that had previously been discussed and the $100 was to be made up by the plaintiff letting one of the bedrooms to a boarder. It was anticipated she would get $30 per week for this. The defendant says that on that basis the plaintiff was prepared to move into the property and he was prepared to buy it.

The defendant had on fixed deposit a substantial sum, of the order of $8000 to $10,000, which he was able to use for

the purchase of the property. This amount had come from the sale of one of two properties he had owned at Whitianga.

Some negotiation took place as to the purchase price of the property at Seaview Road and eventually it was purchased for the sum of $33,000. To this had to be added stamp duty, legal fees etc and the total purchase price was approaching $34,000. The defendant raised through his solicitors a mortgage for $25,000 at an interest rate of 18% reducible to 15.5% for prompt payment and completed the purchase.

It is noteworthy that the whole of the negotiations for the purchase of the property and the raising of the mortgage were not only carried out entirely by the defendant but the plaintiff did not appear to know any details of the negotiations. She did not know the final purchase price. She thought there had been two mortgages raised. She did not know the interest rate. She did not know the basis on which it was suggested by the defendant she should pay $100 per week. She says the defendant said that she would be able to cover outgoings on the property for that amount. She said that the defendant wanted to pay the rates on the property for her and that clearly she could not pay any insurance. She did not know how much cash the defendant had contributed to the purchase of the property and she appeared to consider that that money so contributed by the defendant was to be a loan to her with no date fixed for repayment and no interest payable on it. She had no contact with the mortgagee and her sole responsibility, according to her, was to be the payment of $100 per week to the defendant out of which presumably the defendant would meet all outgoings and as a result of which she appeared to consider she would be able to build up an equity in the property. She said

> " The agreement being that I would pay the mortgage and that when such a time had elapsed that I had sufficient equity in the house, that it would be refinanced and that his initial deposit would be refunded to him."

The defendant on the other hand says the $100 was fixed because that was the maximum amount the plaintiff could pay, even having regard to the possibility of getting a boarder at $30 per week. It does appear that the plaintiff did at some stage get a boarder into the property but apparently the boarder did not last very long.

> " Q. Did you also discuss the likelihood of you taking in a boarder?
>
> A. Never
>
> Q. At Seaview Road?
>
> A. Never
>
> Q. Was that mentioned at all?
>
> A. Never. I subsequently did for a short period but it was unsuccessful. I was very resentful at having a stray person about my home. But it was certainly never discussed. In fact Mr Smith would have been more than aware of the fact I would [have] found that an extremely ahborrent situation because during [the] 14 months I had lived in Palmerston Road I had told him many many times how very much I enjoyed the luxury of living on my own. "

The defendant said that the plaintiff had two tenants. When the first tenant proved unsatisfactory she got another. The plaintiff said that she subsequently got a further job taking photographs in restaurants at night to assist in her finances.

It does appear that the defendant was somewhat tolerant of the plaintiff as regards money matters. One of the accounts rendered by him more than a year after the plaintiff had moved out of Dominion Street makes reference to an amount of $253.34 still owing by the defendant for toll calls placed by the plaintiff while she was living in the defendant's home. These were, he said, to her family in Australia

After the plaintiff moved into the Seaview Road property the defendant apparently continued to assist her by building a run for her cats and the parties maintained some degree of friendship.

There was an incident that occurred about Christmas 1980. According to the plaintiff the defendant resented her having a gentleman friend at the house. The defendant said he called at the house mid morning on a Saturday to continue with the building of the cat run and was asked to go by the plaintiff who came to the front door in her night attire. The defendant deduced that she had been in bed with someone else. There was apparently an exchange of words and the defendant wrote a letter which has been produced in which he referred to their relationship and expressed his continuing love for the plaintiff.

Mr Ennor for the plaintiff pointed to some words in the letter which he said indicated that the plaintiff was the owner of the property but I do not take that meaning from the words. At the very most they are equivocal; a reference to feeling responsible for her and a reference to the home providing her with security are in my view equally consistent with the defendant's statement that he meant that because he still felt affection for the plaintiff she would not have to worry about being evicted as she might have with another landlord and as had happened at Palmerston Road.

The defendant said that at some stage in their relationship the plaintiff had mentioned that she had a legacy in Australia and that he had suggested she bring this over to New Zealand to buy a house here. He said that the plaintiff had said that she did not want to bring the money to New Zealand because she thought that (as indeed proved to be the case) the New Zealand dollar was likely to be devalued and that she was contemplating going back to Australia at some time in the future. The plaintiff denied such a conversation and said that there was no legacy in Australia. I do not get much

assistance from this evidence. If the plaintiff was contemplating returning to Australia that would of course be an inhibiting factor in her purchasing a property in New Zealand.

Evidence was called from other witnesses to support the plaintiff's allegations. An aunt of the defendant said that the defendant had told her that he had "bought a house for Jille". When questioned she said that she assumed that the defendant was going to give the house to the plaintiff. The defendant said that he might well have said that but that it meant only that he was buying a house in which the plaintiff could live. Two colleagues of the defendant also gave evidence. One said that the defendant said that he had bought a house for the plaintiff. The other said that the defendant said he had bought a house for the plaintiff to live in. In my view neither added anything substantial to the plaintiff's story.

On behalf of the defendant another colleague of the defendant said that he had overheard and even offered odd comments to conversations between the plaintiff and the defendant in which the parties were talking about the amount of rent the plaintiff could pay the defendant. These conversations however were not specifically referable to the Seaview Road property and again I do not find them of great assistance.

I am left with a direct conflict between the parties.

I note that the insurance on the property was of the order of $125 and the rates $312 for the first full year. That is a total of $437. On a purchase price of $33,000, assuming an interest rate of 15.5% which is what was being paid on the mortgage and which the defendant might reasonably expect if he had lent his capital permanently, the outgoings on the property would have been of the order of $350 a year more than he was receiving. Clearly on that basis the plaintiff's $100 per week would not result in her building up any equity in the

property. Equally, there seems to be no good reason why the defendant should go to all the trouble of buying the property, making himself responsible for it and suffering a substantial loss each year unless he was to benefit by getting the capital gain that could be expected from the ownership of a property.

I note that the defendant is a quantity surveyor accustomed to making calculations and he impressed me in the witness box as being sensible. He gave his evidence with moderation and I thought accurately. He did not exaggerate and I formed a favourable impression of his honesty. He was not inexperienced in buying and selling property and making capital gains.

The onus of course, as was accepted by Mr Ennor, of establishing that the property which is in the name of the defendant was being held by the defendant in trust for the plaintiff, would be on the plaintiff. Such onus is only on the preponderance of probabilities and not the heavier onus contended for by Mr Wilson for the defendant.

It may be that the plaintiff genuinely thought that the property was going to be hers. I have difficulty in seeing on what basis she could really believe that her $100 per week was going to be sufficient to enable her to buy the property. She said that she would never have agreed to pay $100 a week unless she thought she was going to be the owner. But unless both parties thought she was going to become the owner there could be no agreement to that effect. It may that that there was no meeting of minds and that the defendant intended to buy the property for himself and the plaintiff thought she was buying it. I do not think that is the case. But if there was no contractual relationship between the parties the plaintiff must still fail in her claim.

At the time the property was purchased both parties agreed that the relationship between them, while friendly, was not intimate. The plaintiff described it as "cool". I cannot

accept that there was any good reason in their relationship to explain why the defendant should go to these lengths to buy a property for the plaintiff to own. All the responsibility was his and the plaintiff could have moved out of the property at any stage she chose leaving him with a place which may well have been in the same condition as he described his own place being after the plaintiff had been living in it with her cats.

I hold that the $100 per week that the plaintiff agreed to pay was payment for rent. The plaintiff obviously wanted to leave the property at Dominion Street, perhaps not as much as the defendant wanted her to, but her chances of finding a place with the peculiar problems that she had, were such that the extra she had to pay may well have seemed to her to be the only solution to the problem.

For the Defendant Mr Wilson raised further defences. He said that since this was an allegation of a trust and there was no writing to evidence it, the plaintiff would have been prohibited from enforcing the trust by the provisions of the Contracts Enforcement Act 1956 or the provisions of s 7 of the Statute of Frauds Act which was in force at the time of the purchase of the property. That of course has now been replaced by the Property Law Amendment Act 1980 which came into force on 13 January 1981. Such a plea however will not avail against an agent who buys for an undisclosed principal. The principle is that the courts will not permit the Statute of Frauds to be an instrument of fraud; 16 Halsbury's Laws of England (4th ed) para 1308; Rochefoucauld v Boustead [1897] 1 Ch 196; Levy Ltd v Tracey [1948] NZLR 317; Bannister v Bannister [1948] 2 All ER 133. Had the trust been made out in this case by parol evidence I should have had no hesitation in holding that the defendant was not entitled to rely on the absence of writing to defeat the trust.

Mr Wilson further suggested that there was no consideration for the trust. In my view the agreement to pay $100 per week was consideration. The courts will not enquire

into the adequacy of consideration. The fact that the $100 was inadequate to cover the costs of the property was only an indication that no trust was entered into. Had the sum, for example, been $200 per week, that would have been an indication that there was a trust but it would not have had to be that much to be consideration for the creation of the trust. That argument equally would not have prevented my holding there was a trust.

As I said, the plaintiff, for the purpose, she said, of putting financial pressure on the defendant in relation to this litigation, ceased payment of the $100 per week in September 1983. The parties have agreed that if the $100 per week was rental, as at 3 June 1983 there would be a sum of $4026.01 owing by the plaintiff to the defendant. I therefore give judgment on a counterclaim for the defendant against the plaintiff for that amount, together with the sum of $100 per week from 3 June down to the date of judgment.

The Defendant is entitled to costs. In reply to a question from me he said he thought the property was worth $80,000 so there was possibly an amount of something over $50,000 in issue. In the circumstances however I consider that I should also have regard to the amount he had invested in the property. I allow costs as on a claim for $25,000, with costs and disbursements to be fixed by the Registrar if necessary. Certificate granted for one extra day. No costs are allowed on the counterclaim because no new issue was involved.

P Millyn J

<u>Solicitors</u>
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