

30/84

NZWR  
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IN THE HIGH COURT OF NEW ZEALAND  
GISBORNE REGISTRY

A.14/84

982

BETWEEN:

REVELL  
of Gisborne, Storeman

Plaintiff

A N D:

BAKER  
(also known as REVELL)  
of  
near Gisborne, Femme  
Sole

Defendant

Hearing: 20 August 1984

Oral Judgment: 20 August 1984

Counsel: P Cooper for plaintiff  
J C Mathieson for defendant

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(ORAL) JUDGMENT OF HENRY J.

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The plaintiff and defendant are registered proprietors as joint tenants of a property situated at , Makaraka. They are not husband and wife, so the provisions of the Matrimonial Property Act 1976 have no relevance. In this action, which is in effect an action for partition, the plaintiff seeks an order for sale pursuant to s.140(1) of the Property Law Act 1952.

The parties lived together as man and wife for some seven years until separating in March 1984. They have two children who are presently aged 4 years and 2 years. Although defendant is not presently residing on the property there is in her favour an occupation order made on 2 August 1984 under s.21 of the Domestic Protection Act 1982.

The terms of that order are that it is to continue from 22 September 1984 "until the children cease primary education or until any Court determines otherwise or until the property is sold, whichever event happens first."

For the defendant it is submitted that there are here good reasons, within the meaning of s.140(1) of the Act, for the Court to refuse an order for sale. A joint owner has an absolute right to sever that relationship, which then converts into an ownership in common, and an owner in common has a right to bring a partition action and to obtain an order thereon, which right is in my view unaffected by the provisions of the Property Law Act 1952. (See Gray v Dawson (1910) 12 G L R 511). What s.140(1) does, in my view, is to require the Court at the instigation of one of the owners (providing he has a moiety) to order a sale instead of ordering a partition. There are only two alternatives open to the Court. The first is to require physical partition, and the second is to order a sale. As I read the section and as I understand the law to have been laid down in earlier authorities, there is no intermediate course available to the Court. The "good reason to the contrary" provision is to enable the Court in appropriate circumstances to order a partition rather than a sale, but not, in my view, to decline to do either. That this is the situation is made clear by the Court of Appeal in Fleming v Hargreaves (1976) 1 NZLR 123, 127. So far as the factual situation here is concerned, it is accepted that it is quite impracticable to partition this

property, and a sale is therefore the only alternative.

Mr Mathieson, on behalf of the defendant, invited me to hold that s.21 of the Domestic Protection Act 1982 was sufficient authority to enable the Court to refuse to make an order for sale and he submitted that a sale in these circumstances was, in effect, defeating the provisions of that section. I do not think that the 1982 Act in any way impinges upon the rights of ownership insofar as they enable the owner to seek partition, or sale if that be an appropriate alternative under s.140(1). The 1982 Act, in my view, is concerned only with the position during such time as ownership remains. At the time of its enactment the rights relating to co-ownership and the interpretation of s.140(1) to which I have referred were well-established, and if it had been the intention of the legislature to alter that law there would have been some express provisions evidencing that intention. Accordingly, I have reached the clear view that the Court has no jurisdiction, despite the establishment of the factors relied upon by Mr Mathieson and which relate only to personal hardship, to do other than order a sale, partition not being practicable.

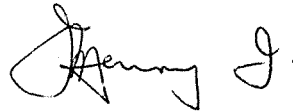
There will accordingly be orders in terms of the motion filed, but with the following amendments :

1. The reserve price of \$55,000.00 is to be amended to such figure as the parties may agree, and

failing their agreement as shall be determined by this Court on the submission of memoranda and, if necessary, following a further hearing.

2. The date of possession on any sale shall be not earlier than 6 weeks following the conclusion of any agreement for sale, whether by auction or otherwise.

In all the circumstances, it is appropriate that each party bear their own costs.



Solicitors:

Woodward Iles & Co., Gisborne, for plaintiff