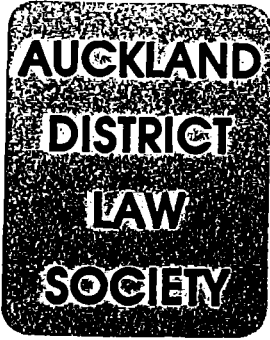


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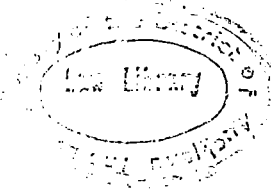
C. James [Signature]

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. NO. 2019/90



15 APR 1991



BETWEEN K.D. KIRK
Plaintiff

A N D W.J. HEWITT & S.M. CLARK
Defendants

C.P. NO. 2020/90

BETWEEN K.D. KIRK
Plaintiff

A N D W.J. HEWITT & C.A. CLARK
Defendants

ADDENDUM TO JUDGMENT OF MASTER ANNE GAMBRILL
DATED 13TH MARCH 1991

It has been drawn to my attention that I had misunderstood certain factual matters and the relationship between the Defendants. Paragraph 2 on page 2 should be amended by the deletion of the second sentence in the paragraph and substitute therefor:

"The contest is between Mr. Kirk the majority shareholder, and the other owners."

My thanks to Counsel for drawing my attention to this matter.

[Signature]

MASTER ANNE GAMBRILL

March 25, 1991

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. NO. 2019/90

BETWEEN K.D. KIRK

Plaintiff

A N D W.J. HEWITT & S.M. CLARK

Defendants

C.P. NO. 2020/90

BETWEEN K.D. KIRK

Plaintiff

A N D W.J. HEWITT & C.A. CLARK

Defendants

Hearing: March 6, 1991

Counsel: Miss Bates for Plaintiff
Mr. Thomas and Mr. Jenkins for Defendants

Judgment: 13 March 1991

JUDGMENT OF MASTER ANNE GAMBRILL

I have before me an application for Summary Judgment. The proceedings were issued on 3rd December 1990. There are two claims. The Plaintiff and the Defendants in C.P.2019/90 are the owners in the following shares of a thoroughbred gelding named "Iron Leader", namely Mr. Kirk as to 75%, Mr. Hewitt as to 12.5% and Miss S.M. Clark as to 12.5%. The Plaintiff no longer wishes to continue owning his share in the horse in association with the other owners. There is no legal partnership and the parties

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clearly own their shares in the proportions specified hereinbefore, therefore the Plaintiff seeks an order pursuant to s.143 of the Property Law Act 1952 that the horse be sold. Counsel accept that there would need to be an order for further directions pertaining to the sale after further inquiry if I was minded to make the order.

The second claim under C.P. No. 2020/90 is in respect of a more successful filly named "Reno Belle". Mr. Kirk owns a 62.5% share in the horse, Mr. Hewitt 25.0% and Miss C.A. Clark 12.5%. Mr. Hewitt is the father of the Misses Clark who own the 12.5% shares in each horse, so in fact it is a contest between Mr. Kirk and the other owners.

I am informed from the Bar and the affidavits show that "Reno Belle" has been a successful horse. "Iron Leader" is not yet successful.

Section 143 of the Property Law Act reads as follows:

"143. Division of chattels -

(1) Where any chattels belong to persons jointly or in undivided shares, the persons interested to the extent of a moiety or upwards may apply to the Court or a Judge thereof for an order for division of the chattels or of any of them, according to a valuation or otherwise, and the Court or Judge may make such order and give such consequential directions as the Court or Judge thinks fit."

There is little case law in respect of this section. The

Court has a discretion whether to order a sale.

The Defendants clearly do not want to sell their interest in the horses or dispose of the horses. They say they do not wish to dispose of the interest, they cannot afford to buy the Plaintiff out and that because of the circumstances, the Plaintiff should pay their costs. The Defendants say the Court has a broad discretion, the Plaintiff is attempting to force them into a sale because of the value of the horses, particularly "Reno Belle", the issues associated with this ownership and the implications are such that the matter ought to be accorded a full hearing. They also raise the issue whether it was necessary for an account to be taken because of the financial matters that may be in dispute between the parties.

The Defendants say that the case can be distinguished between those of Riepen v. Leone CP.183/86 (Rotorua Registry) dated 9th February 1987, Doogue, J. and Dale v. McCullough CP.411/87 (Auckland Registry) dated 15th June 1987, Smellie, J. both of which relate to applications made in reliance of s.140 of the Property Law Act 1952. With that view I can concur and can distinguish these cases. It is my view this application must be looked at strictly within the confines of the wording of s.143 of the Property Law Act 1952.

The Defendants had already opposed the matter being brought on for hearing and the reading of certain material in the affidavits. Within the affidavits there are factual matters raising disputes as to the disbursement of funds that were the result of winnings and various matters relating thereto. I have disregarded much of the material and all material relating to distribution of funds, the issue being in my mind whether the Plaintiff can make the application under s.143 of the Property Law Act 1952. Furthermore, it is clear that if I were to make the orders sought there would need to be further orders as to directions and implementation of the order for sale and further evidence and orders made in this Court relating to the distribution of the moneys presently held and any proceeds of sale.

The only issue before the Court today is whether the Court can and should make an order under s.143 of the Property Law Act 1952. The Court clearly has a jurisdiction which it can exercise under s.143 of the Property Law Act 1952 and any owner of 50% or more of the chattels may apply to the Court seeking that the Court will exercise such jurisdiction.

I believe the only case that is of assistance in the dispute before me is Hargreaves & Anor v. Fleming [1975] 1 NZLR 209. There is comment within that decision as to the meaning of s.143 of the Property Law Act 1952 and where it

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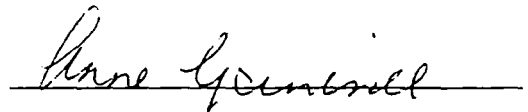
is suggested that the Act seems to envisage only a physical partition of chattels, the Court therein, following the practice of the Chancery Court on the dissolution of a partnership, held that the Court may direct a sale if it is impractical to divide the chattels. Both Counsel accepted that the only orders that could be made in the present circumstances would be for the sale of the chattel. It could not be ordered that either party should retain the chattel and buy the other shareholders out.. Counsel also referred me to Ferrari v. Beccaris [1979] 2 NSWLR, 181, where it was clearly accepted a race horse should be sold.

In this case the Defendants say the Plaintiff is trying to persuade me of a dispute which was of his own making to force the sale of a valuable asset. The Plaintiff said that as the owner of a more than 50% share in a valuable asset which he now does not wish to hold in ownership with the Defendants, he is entitled to ask the Court's assistance to force the sale.

In terms of the wording of the section of the Act, the unwillingness of the greater part of the parties who hold the major share in an asset to continue to own it, I am persuaded that it is a proper case to order the sale of the asset. I cannot envisage a situation where the Court would require a Plaintiff, owning more than 50% share in the asset, to maintain his share and the associated expenses that would arise therefrom in maintaining a race horse to

enable the Defendants as minor shareholders, to benefit therefrom if continued ownership was beneficial. There are also the difficulties faced in the administration of the day to day ownership of a horse faced by not only the parties herein, but the stable owners if the owners are not ad idem.

Leave is reserved for Counsel to seek further directions as to the manner of sale, the timing of sale, the conduct of the sale, etc. As I understand from Counsel, it has been accepted that if I order a sale, neither party is entitled to buy the other party out. Accordingly there will be an order directing that the race horses "Iron Leader" and "Reno Belle" be sold, the terms and conditions of such sale to be fixed by this Court upon the application of either the Plaintiff or Defendant on 14 days notice to the other party. The costs are reserved pending the making of further orders herein. The hearing took one hour.



MASTER ANNE GAMBRILL

Solicitors:

Mark L.F. Saunders, Auckland, for Plaintiff
B.M. Laird, Orewa, for Defendants

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

C.P. NO. 2019/90

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Plaintiff

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JUDGMENT OF MASTER ANNE GAMBRILL
