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LOW PRIORITY

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

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M. NO. 753/95

IN THE MATTER of the Property Law Act 1952

BETWEEN A.T. HOWELL

Plaintiff

A N D H.M. HOWELL

Defendant

Hearing: February 9, 1996

Counsel: S. Fleming for Plaintiff
A. Corry for Defendant

Judgment: 14 FEBRUARY 1996

JUDGMENT OF MASTER ANNE GAMBRILL

Solicitors for Plaintiff

Rennie Cox Garlick & Sparling
DX CP 28002, Auckland

Solicitors for Defendant

Barry & Company
PO Box 47200, Auckland

I have before me an application for Summary Judgment. The application was filed in July last year. The Plaintiff is jointly registered as the owner of a property with the Defendant. The Plaintiff seeks to invoke the provisions of s.140 of the Property Law Act 1952 by way of Summary Judgment. The Defendant is presently living in the house and I understand would wish to purchase the house.

The parties originally became interested in the property and it was purchased in the Plaintiff's parents' names in 1979 because of statutory requirements applicable to the Defendant at that time under the Land Settlement Promotion & Land Acquisition Act 1952 . The parties entered into a de facto relationship, lived as man and wife, built a house on the property and there are three children of the relationship, the eldest being 14 years old at this time. The relationship is therefore of a relatively long term in a family sense.

The Court does not have very much jurisdiction in this matter. It is limited by the provisions of s.140 of the Property Law Act 1952. Counsel for the Plaintiff has carefully prepared submissions, outlined the history of the relationship and the various papers that had been before the Court. An important decision is Dale v. McCullough CP.411/87 (Auckland Registry). Counsel relied on that decision and properly referred me to Sayles v. Sayles (1987) 1 PRNZ 95, distinguishing in that case a decision where His Honour Justice Wylie had taken into account the practicality of the situation and the nature of the Summary Judgment procedure. Whilst this case was relied on by the Defendant, the Plaintiff's Counsel in her submissions, distinguished this case and I accept the basis on which she distinguished it in relation to the present case. She relied on the submission that the Court cannot refuse to either order a sale or partition and referred me to Revell v. Baker (1984) 3 NZFLR 20 at 21.

The Plaintiff submits she is entitled to a judgment for sale as there is no possible defence in law. She is a joint tenant and neither party has requested a partition. The Plaintiff does not consent to the purchase of the property by the Defendant.

The Plaintiff in this case has satisfied me there is no genuine defence. The relationship is terminated and the parties are entitled to finality determining the ownership of the property. Counsel for the Plaintiff referred to the discretion and noted the decision in Sayles (supra) but made clear to the Court there was a decision made before the case of Pemberton v. Chappell [1987] 1 NZLR 1.

I accept the decision to refuse Summary Judgment in the exercise of a discretion is a very narrow one. The wishes of the parties cannot usually determine whether a discretion should be exercised. It is really, in many cases, only extraneous statutory matters that can impact upon such a decision, for example, the decision might effectively produce a result that would prevent the determination of proceedings under other statutory rights. See Waipa District Council v. Electricity Corporation of New Zealand [1992] 3 NZLR 298. In that case it was held that the Court had a residual discretion "to refuse an application for Summary Judgment where justice so requires" - page 303.

Counsel for the Plaintiff outlined the reasons why I should not exercise my discretion and noted the cases where Summary Judgment has been ordered. The Defendant's case relies on the following facts:

(a) There is a dispute as to the parties' interests in the property. The Defendant claims the Plaintiff is not entitled to a 50/50 division. Counsel refers to the Defendant's evidence. She says that the presumption that the parties take proportionate to their contribution has not been rebutted and it is

inequitable for the Plaintiff to assert her rights when the Defendant maintains he has made substantially greater contribution to the purchase but is faced with a situation where the Plaintiff is attempting to force him out of the property by its sale. She noted that the Defendant is prepared to undertake to purchase the Plaintiff's shares and pending that purchase, the Defendant is prepared to pay the Plaintiff $150,000.

As the Plaintiff has made it clear she wishes to seek an order under s.140(1) and (2) and does not give consent under s.140(3), the Defendant's rights to purchase from the Plaintiff do not and cannot arise in this hearing today.

Counsel for the Defendant noted that unlike some other decisions, more particularly Riepen v. Leone CP.183/86 (Rotorua Registry), the parties have not established their equal interests and this will be a matter for the Court to determine subsequently. She says that the parties' respective interests are not going to be known before a hearing in this matter and I should adjourn this application for an order for sale until the parties have had a hearing and determined their respective interests in the property. The proceeding for determining the parties' shares under M.894/95 is set down for hearing in the week commencing 13 May 1996.

In my view, in the length of the time the parties have purported to own this property jointly and on a joint basis and confirmed that joint ownership by the execution of a Joint Family Home application in 1989 which was registered but which I realise may have no legal validity, the parties have clearly entered into a situation where they have put themselves at risk of an application under s.140 if the relationship breaks down. Once that situation has arisen the Plaintiff is prima facie entitled to an order.

The Defendant's Counsel says that the Court can see good reasons to the contrary why an order should not be made. The matter can be deferred until the hearing in M.894/95 has been determined and there is a first hearing date given in May. I do not think the Plaintiff is obliged to wait as long as is suggested. The proceedings have been adjourned since October last to allow the parties to explore the possibility of settlement. Clearly they are at arm's length and they are not able to effect a settlement without Court intervention.

I am satisfied the Plaintiff is entitled to make the application, the requirements of the subsections are satisfied and she is entitled to a Summary Judgment order for sale of the property. There is no consent so s.140(3) does not apply. I sympathise with and understand the Defendant's wish to buy the Plaintiff out and know where he stands in terms of the purchase price but, as said by His Honour Justice Smellie in Dale v. McCullough (supra), "I have no jurisdiction to refuse the Plaintiff's application for an order on that basis". Similarly I have no jurisdiction to require the Plaintiff to sell to the Defendant at the valuation the Defendant proposes. I can, however, give directions as to the mode of sale and I would expressly allow both the Plaintiff and the Defendant the right to bid at sale on the appropriate terms. I believe the Plaintiff is entitled to sale and this can be accomplished in a manner in which the parties can bid.

I have also noted the argument that has been advanced that I am pre-determining the ownership of the proceeds of sale and it is neither practical nor right for these proceeds to arise and have to be held in a bank account pending determination of the ownership of the proceeds by the Court. Whilst in practical terms the argument may be attractive, in law there is nothing that I am aware of that derogates from the Plaintiff's right to sale by taking into account this practical and possibly costly solution allowing moneys, arising through a sale, to be placed in a bank account until the parties' interests are

determined. I am aware too, that if the Defendant is living in the property, there are various issues that often arise before this Court that can act to the detriment of the vendors of the property and reduce the price of the sale. As I see it the parties have been unwilling to resolve their differences. Therefore I am going to make the following orders:

The property herein is to be sold by public auction. The auctioneer to be a real estate firm operating in the district. If Counsel are unable to agree to the firm to be instructed within seven days, the matter is to be referred to the Real Estate Institute for it to nominate the auctioneer to conduct the sale of the property within a further 14 days. The Plaintiff and Defendant are to put up equal costs of this auction prior to sale within a further seven days of the nomination of the auctioneer. It is customary to require payment these days I believe before a property can be advertised for sale and auction costs can amount to a substantial amount. I am told from the Bar that the property is freehold and neither party is without means and I believe they can carry these costs. Thirdly, at the date the property is auctioned both the Plaintiff and Defendant are entitled to bid. Fourthly, as the Plaintiff's claim is no greater than one moiety, neither the Plaintiff nor the Defendant will be called upon, if either is a successful bidder, to pay more than half the purchase price and half apportionments into the solicitor's trust account to complete the purchase of the property. The full auction costs can be deducted by that solicitor forthwith from the funds and paid to the auctioneer leaving the balance as such on trust to be determined by this Court at the substantive hearing. Finally, if there is dispute over the reserve in any way and Counsel cannot agree, each party may ask the valuer they have already instructed to place a valuation for reserve purposes on the Court file and the Court can settle the reserve. These steps are all to be taken prior to 28 March 1996 and I would trust that the property will then be available for auction in the last week in April. There is no

doubt that the settlement moneys will probably not have to be paid until after the date of the Court hearing on 13 May 1996. The Defendant is to make the key of the property available to the auctioneer and inspection arrangements are to be available to the auctioneer and interested parties on 24 hours notice.

The Plaintiff has succeeded in obtaining Summary Judgment and is entitled to costs of $2,000 plus disbursements on this application. I trust that Counsel or their solicitors can adjust these out of the moneys they will be handling on behalf of both parties. Leave is specifically reserved for Counsel to see me at any time to put in place further orders to ensure the conduct of the sale particularly if there is dispute about the auctioneer, the valuation or the reserve. A short conference will be arranged on about 7 days notice.

MASTER ANNE GAMBRILL