

**IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY**

CIV-2009-419-000426

UNDER Section 339 of the Property Law Act 2007

BETWEEN COUPLAND BAKERIES LIMITED
Applicant

AND BROMLEY BLOODSTOCK LIMITED
Respondent

Hearing: 28 April 2009

Appearances: A J Nolan for the Applicant
B H Dickey for the Respondent

Judgment: 30 April 2009

INTERIM JUDGMENT OF DUFFY J

This judgment was delivered by Justice Duffy
on 30 April 2009 at 9.15 am, pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Solicitors: A J Nolan P O Box 1268 Waikato Mail Centre Hamilton 3240 for the Applicant
Meredith Connell P O Box 2213 Shortland Street Auckland 1140 for the
Respondent

[1] This is an application for orders pursuant to s 339 of the Property Law Act 2007 to direct the sale of a thoroughbred mare, Princess Coup. The applicant and the respondent own equal shares in the mare. Princess Coup has been a very successful racehorse, winning several Group 1 titles. She has raced successfully in New Zealand and Australia. Unfortunately, due to a tendon injury, she has had to retire from racing. Her value is now as a brood mare.

[2] Initially the respondent was resistant to the mare being sold but it now accepts that this is the only possible outcome, given the applicant's desire to sell its share in the mare. The only remaining live issue between the parties, therefore, is the manner in which the mare will be sold.

[3] The applicant has taken steps to have the mare included in a sale of thoroughbred horses that is to take place between 4 and 6 May 2009 at the Karaka New Zealand Bloodstock sales. The mare is included in the sales catalogue and otherwise advertised as available for sale. This was done even though no authority was forthcoming from the respondent, and the usual requirement is for all owners of a horse to agree to it being included in the sales.

[4] The respondent has attempted to purchase the applicant's share, but has been unsuccessful. The applicant was offered \$1m for its share but this offer was rejected and the applicant sought \$1.1m. It seems that the respondent has been unable to meet the price set by the applicant for its share.

[5] The respondent contends that a better result will be achieved if the mare is sold at the Magic Millions sales in Australia, which are to be held in June of this year. Failing that, the respondent asks the Court to appoint an independent agent to oversee and facilitate the sale of the mare by private treaty. The respondent also points to thoroughbred sales that will take place in New Zealand in August 2009, as a final possible outcome.

[6] Since the auction of the mare can occur next week, the key issue to consider now is whether a better result can be achieved by delaying her sale until the

Australian sales in June, or by adopting one of the other alternatives for which the respondent contends.

[7] There is evidence from the applicant's witness, Mr Bruce Perry, that the same persons who are likely to attend the sales next week at Karaka are also likely to attend the sales in Australia in June. The applicant relies on this evidence to show that a fair and reasonable price can be achieved for the mare at next week's sales and that there is nothing to be gained from selling her in Australia. The respondent relies on the evidence to show there is nothing to be lost in waiting until the Australian sales, if the same buyers are likely to be present at both sales.

[8] Before making an order for sale under s 339, a Court is required to take into account the considerations set out in s 342. I consider that those considerations can also be of assistance when deciding the directions to make for the conduct of a Court directed sale. The provisions of s 343 and r 11.22 of the High Court Rules are also relevant here.

[9] The respondent has provided evidence that establishes that historically the Magic Millions sales in Australia have achieved better average and median prices than the May sales at Karaka. The Magic Millions sales have also achieved higher top selling prices than the May Karaka sales. The applicant has not filed evidence to dispute this analysis.

[10] The respondent has referred in evidence to email communications he has from the entity responsible for the Magic Millions sales confirming that a late entry of Princess Coup, even up to one week prior to the commencement of the June sales, is possible. As regards any penalty for withdrawal from the May Karaka sales, it needs to be remembered that Princess Coup was accepted for sale in circumstances where not all her owners authorised this action. This would have been known to New Zealand Bloodstock as its Director, Mr Donald McIlraith, is also the agent for the applicant and has been involved in earlier negotiations between the parties regarding the purchase of the applicant's share in Princess Coup. In circumstances where New Zealand Bloodstock has full notice of a mare's ownership and proceeds to accept her cataloguing for sale with authority from only one co-owner, the ability

to rely on the usual cancellation conditions may be doubtful. In any event, costs arising from conduct relating to the mare's disposition that is carried out prior to the making of a Court order for her sale should not be overly influential. Until the Court had ordered her sale and directed how any sale was to be carried out, there was no certainty that the pre-sale arrangements would stand. If a co-owner and applicant for orders under s 339 chooses to take steps prematurely and in anticipation of what the Court may determine, I consider it does so at its own risk in terms of any financial costs that may result.

[11] If Princess Coup is sent to Australia for sale, the owners will not be responsible for her transport costs. The sales commission in Australia is lower than in New Zealand. In Mr Bromley's affidavit, a comparative table is set out that shows that if Princess Coup is sold for NZ\$2.5m, in Australia the sales commission will be NZ\$55,000, whereas, if sold for the same price in New Zealand at the May Karaka sales, the commission will be \$141,500. There is a considerable difference in these amounts; one is nearly three times the amount of the other.

[12] There is another factor that shows no great harm will come from not selling the mare next week. If her sale is postponed for the purpose of selling her in Australia, but for some reason she is unable to travel to the Magic Millions sales, there is another sale by New Zealand Bloodstock at Karaka in August. The mare's value as a brood mare requires her to be available for service from 1 September 2009, which is when the new Southern Hemisphere thoroughbreeding season commences. The Karaka sales in August will provide the last opportunity to sell her at auction before the commencement of the next breeding season. The availability of these sales removes any potential risk to the current value of the mare if something happens between now and June to prevent the mare from travelling to Australia.

[13] There is no evidence that there is any potential risk for Princess Coup to travel to Australia. She has done so before to compete in races. I think it would now be common knowledge to most New Zealanders that thoroughbred horses travel regularly between Australia and New Zealand. The applicant has had proper notice of the respondent's evidence suggesting a better price could be achieved for the mare in Australia. The applicant could have filed reply evidence setting out any potential

risks associated with such travel but has not done so. I do not, therefore, see any reason to consider Princess Coup would be at risk of harm if she travelled to Australia for sale.

[14] If Princess Coup is not sold next week, I expect there will be agistment costs until she is sold later in the year. There is no evidence before me of these costs. Nor is there evidence from either party to show such costs are a reason for the mare being sold next week, rather than in June. I do not, therefore, propose to take them into account.

[15] There is an issue about liability to pay Australian Goods and Services tax on the mare's entry into Australia. Mr Bromley has filed evidence which suggests that tax issues of that type can be overcome, especially if the mare is sold through an Australian agent (who is willing to act on the sale) and the sale is to a buyer registered for Goods and Services tax in Australia. The applicant challenges the correctness of the Australian tax advice given in the respondent's evidence and asserts that this tax liability will effectively extinguish any financial benefits resulting from a sale in Australia.

[16] The uncertainty over payment of Australian Goods and Services tax is a factor that tells against a sale in Australia. If the respondent is correct, it is a red herring and will not be to the detriment of achieving a fair and reasonable sale price. If the applicant is correct, it will reduce the benefits of a sale in Australia. However, the impact of any uncertainty can be reduced by the respondent carrying the risk of the tax payments being more than for what he contends. If the respondent is correct in its view on the tax liability, no harm will eventuate. If it turns out that the applicant is correct, it will not be harmed if the burden of risk falls on the respondent. The respondent has already agreed that if an up front payment of Goods and Services tax is required when the mare lands in Australia, it will meet it at first instance.

[17] The applicant contends that this Court does not have jurisdiction to direct a sale of Princess Coup in Australia. The respondent contends that no extra-territoriality issues arise as the mare is currently in New Zealand and everything that

needs to be done to facilitate her sale in Australia can be organised from New Zealand. I do not accept the applicant's submission. If the Registrar/Sheriff of this Court is appointed to conduct the sale of Princess Coup, he or she can be given the necessary authority to ensure that the mare is made available for sale at the Magic Millions sales in Australia. The authority over the mare will be exercised by a New Zealand officer of the Court and can be effected from New Zealand.

[18] This is a Court directed sale where there has been initial resistance and now reluctant acceptance by the respondent that the mare in which he has a half-interest must be sold. I consider it is important that all steps are taken to ensure a fair and reasonable price is achieved for the mare. On the information available to me, I am satisfied that the best price likely to be obtained for the mare is at the Magic Millions sales in Australia, rather than the May Karaka sales. The only factor which could diminish the achievement of a better price in the Magic Millions sales is liability for Australian Goods and Services tax. I consider this can be overcome by making provision under s 343 that if the parties have a liability for this tax, any consequent loss the applicant suffers can be compensated for by adjusting the distribution of the sale price between the parties to take into account the tax liability. In this way the respondent assumes the burden of risk of its view on the tax liability being wrong. If the respondent is not willing to assume this risk, the sale of the mare at the Karaka sales can proceed.

[19] There is evidence that the applicant has suggested a reserve price of \$2m. Both parties now accept no reserve is necessary. However, the reserve price the applicant suggested is an indication of what price it thinks can be achieved if Princess Coup is sold in New Zealand. There is the possibility that she might achieve a price well in excess of \$2m in Australia. Another mare of similar quality to Princess Coup (Samantha Miss) recently sold in Australia for a record \$3.8m. If Princess Coup were to achieve an unexpectedly high sale price in Australia, but Goods and Services tax was payable, it would be unfair to require the respondent to carry the entire tax burden. The likelihood of this occurring will not be known unless and until she is sold in that country. I consider the way to provide for this possibility is to require the respondent to assume the potential risk of tax liability at

first instance, with leave to return to the Court for re-assessment of who should bear the liability once the actual circumstances of the mare's sale in Australia are known.

[20] This is a case where the parties' conduct to date reveals their inability to work in a co-operative manner to a common end for the benefit of both. In this circumstance, I consider it appropriate that the conduct of the sale of the mare be carried out through the appointment of independent agents. I do not believe that any directions the Court may make can be properly carried out by the parties, if left to themselves.

[21] The respondent has suggested the appointment of an independent agent with experience in thoroughbred bloodstock. It has suggested the name of such an entity. The applicant has not responded to this suggestion. I am in no position at present to make a decision on the appropriate appointment. Furthermore, there is some urgency in making the appointment. Steps need to be taken forthwith to ascertain if the respondent will accept at first instance the risk attached to potential liability of Goods and Services tax in Australia so that the mare can be sold there. If so, the mare needs to be withdrawn from the Karaka sales forthwith.

[22] I consider, in these circumstances, that the proper thing to do is to appoint the Court Registrar/Sheriff of the Hamilton Registry of this Court to be responsible for overseeing the sale of the mare. That appointment is to take effect from the date of the Judgment. If the mare is to be sold in Australia, the Registrar/Sheriff is to ascertain immediately if the respondent will accept the potential tax liability on the terms outlined in [19] herein. Acceptance is to be in writing. The acceptance can be sent to the Court by facsimile or attachment to an email. The respondent is to liaise with the Registry to obtain contact details for sending its acceptance. If no written acceptance is forthcoming by midday on 2 May 2009, the sale of the mare at Karaka next week is to proceed.

[23] I consider that the Registrar/Sheriff will require the assistance of an independent person knowledgeable in thoroughbred bloodstock matters, if the mare is to be sold in Australia or by means other than at the May Karaka sales next week.

[24] I direct that the parties have 10 working days in which to decide between themselves, if they are able, on an independent agent to work in partnership with the Registrar/Sheriff, for the purpose of the mare being sold in Australia or by private treaty, in the event of a private buyer willing to pay a price that is acceptable to the parties. If the parties are unable to agree on an independent agent, they are, on the expiry of the 10 working days, to provide to the Registrar/Sheriff details of the persons each would seek to have appointed as an independent agent. The Registrar/Sheriff is to refer this information back to the Court for the determination on the appointment of the independent agent. Costs incurred by this arrangement are to be deducted from the proceeds of sale of the mare.

[25] The Registrar/Sheriff, together with the independent agent, is to take all necessary steps to ensure Princess Coup is available for sale at the Magic Millions sale in June 2009. The Registrar/Sheriff and the independent agent have the power to approve and execute a sale by private treaty prior to those sales, should a buyer make an offer acceptable to both the applicant and the respondent. The parties are to comply with r 11.2(3). The Registrar/Sheriff is to have the authority referred to in r 11.2(4)(b) to enable him/her to complete the sale of the mare either in Australia or New Zealand. Pursuant to s 343 and r 11.2(4)(b), the Registrar/Sheriff is also to be vested with all necessary authority to resolve and determine any care and management issues relating to Princess Coup while she remains in New Zealand so as to ensure that she is in sound condition for sale either in Australia in the June Magic Millions sales or at the August Karaka sales

[26] Should for any reason Princess Coup not be able to travel to Australia for the Magic Millions sales in June, and should no buyer by private treaty emerge, Princess Coup is to be sold at the Karaka sales in August.

[27] The respondent raised with the Court difficulties it had in obtaining access to Princess Coup. Until the mare is sold, the respondent as a joint owner of the mare is entitled to access to her. Any issues relating to difficulties in obtaining access can be taken up first with the Registrar/Sheriff.

[28] Leave is reserved to the parties to return to Court at 24 hours' notice for further directions, if required.

Duffy J