

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

CIV 2007-419-001883

BETWEEN GRANT ADRIAN SLADE AND
CHRISTINA DAWN SLADE
Plaintiffs
AND ANNA MICHAL HEDLEY
Defendant

Hearing: 7 May 2009

Appearances: D M O'Neill for Plaintiffs
A M Hedley Defendant in person

Judgment: 8 May 2009 at 4:00pm

**(RESERVED) JUDGMENT OF ANDREWS J
[Judgment on formal proof hearing]**

*This judgment is delivered by me on 8 May 2009 at 4:00 ~~am~~/pm
pursuant to r 11.5 of the High Court Rules.*

.....
Registrar / Deputy Registrar

Solicitors:
D M O'Neill, PO Box 815, Waikato Mail Centre, Hamilton 3240 fax 07 838-9319
Party:
A M Hedley, 1406 Ruapuke Road, R D 2, Raglan 3296

Introduction

[1] Mr and Mrs Slade seek orders for sale and other orders under the Property Law Act 2007 in respect of the property at 51 Norrie Avenue, Raglan (the Raglan property).

[2] The proceeding was set down for hearing on 7 May 2009. It proceeded as a formal proof hearing, although Ms Hedley was present, and documents submitted by her were considered. At the conclusion of the hearing I indicated that I was satisfied that it is appropriate for the orders sought to be made, albeit with some amendment.

Background

[3] Mrs Slade and Ms Hedley have known each other since about 1989. For some time they were involved in business together in Raglan. From early 2005 Mrs Slade frequently made advances of money to Ms Hedley, to assist her to pay housekeeping bills and the like. Mrs Slade was able to identify advances to Ms Hedley because they comprised cash withdrawals from ATM machines, whereas she and her husband usually used their Visa card for purchases.

[4] Around Christmas 2005 Ms Hedley disclosed to Mr and Mrs Slade that she was in financial trouble. She was having difficulty meeting mortgage payments. At the time she owned three properties, one of which was the Raglan property. Ms Hedley suggested that Mr and Mrs Slade buy a half share in one of the properties.

[5] It was eventually agreed that Mr and Mrs Slade would buy a half share in the Raglan property. It was planned that the property be renovated then run as an accommodation business. Ms Hedley prepared a business and rough drawings of how the property might be renovated. Mr and Mrs Slade and Ms Hedley agreed that the purchase price would be \$200,000 which took into account the money earlier advanced to Ms Hedley.

[6] A handwritten agreement, drawn up by Ms Hedley, was signed by Mr and Mrs Slade and Ms Hedley. It set out the purchase price, requirements for payment of deposit and balance, and the targets for covering the mortgage and viability of a business. The agreement recorded that if the targets were reached they would carry on but if they were not reached the property would be sold.

[7] The purchase by Mr and Mrs Slade was duly registered. There was a mortgage to ASB Bank. Mr and Mrs Slade were required to be guarantors of that mortgage. Mr and Mrs Slade financed their payment to Ms Hedley by raising a mortgage over their own property.

[8] Mr and Mrs Slade paid lump sums to Ms Hedley during March to July 2006, totalling \$134,000. Mrs Slade continued, however, to make further cash payments to Ms Hedley, and made two repayments against the loan over the Raglan property.

[9] On about 14 July 2006 Mr and Mrs Slade and Ms Hedley were engaged in a working bee to clean the Raglan property so that renovations could commence. At that time they sat down together and worked out that the balance required to complete payment of the purchase price, taking account of all payments to Ms Hedley, was \$18,500. Mr and Mrs Slade paid Ms Hedley that sum on 5 August 2006.

[10] About this time the relationship between Mr and Mrs Slade and Ms Hedley began to sour. On 11 December 2006 Ms Hedley lodged a caveat over the title to the Raglan property to protect her half share, and on 7 March 2007 she wrote to Mr and Mrs Slade claiming that they had not completed payment of the half share, and demanding payment of other costs.

[11] Further, although the property has been tenanted, rates have not been paid fully, and interest and penalties have accrued. Mr and Mrs Slade have not received any money from rent and were not aware, prior to 1 February 2007, that rates were not being paid. Rates have been paid spasmodically since then. At Mrs Slade's instigation, some rental payments were directed towards rates.

Proceedings

[12] Mr and Mrs Slade issued proceedings on 12 December 2007 seeking a partition order, an order for sale, and consequential orders as to distribution of the proceeds of sale. They applied for summary judgment. That application came before Associate Judge Faire on 3 July 2008. In his Minute of that date Judge Faire recorded that:

The parties now agree that an order for sale should be made. I make such order.

That order has not been put into effect, as the parties later agreed that Ms Hedley would buy Mr and Mrs Slade's share in the Raglan property for \$215,000.

[13] Judge Faire also noted that additional matters had been raised by (then) counsel for Ms Hedley, including an issue as to whether Mr and Mrs Slade had paid the purchase price and performed their obligations as purchasers.

[14] A statement of defence and counter-claim was filed by Ms Hedley's solicitors on 17 September 2008. In her counter-claim she alleged that Mr and Mrs Slade owe her \$41,500 and that they had failed to make required contributions to the costs of renovations.

[15] Amended statements have been filed. Mr and Mrs Slade now claim for:

- a) An order for Partition;
- b) An order directing the sale of the property;
- c) An order as to distribution of the proceeds of sale;
- d) An order that the discharge of the ASB mortgage be met from Ms Hedley's share of sale proceeds; and
- e) An order that Ms Hedley meet all costs of and incidental to the sale.

[16] Mr and Mrs Slade also seek an order for payment of a half share of rental payments received by Ms Hedley, net of rates payments, but excluding any interest and penalties payable on the rates.

Ms Hedley's non compliance with timetable orders

[17] In a memorandum filed by Mr O'Neill, counsel for Mr and Mrs Slade, on 25 March 2009, it was recorded that Ms Hedley had not filed an affidavit of documents, due to be filed on 6 October 2008. In the light of the fact that this proceeding was set down for hearing on 7 May 2009, Mr O'Neill had asked that Ms Hedley attend to her discovery obligations, but that had not occurred.

[18] On 31 March 2009 Ms Hedley's counsel sought leave to withdraw. Ms Hedley had been refused legal aid, and there had been no constructive response to efforts to communicate with her. Leave was granted to counsel to withdraw by Asher J on 1 April 2009. His Honour's Minute noted that Ms Hedley should ensure that the timetable was adhered to.

[19] The proceeding was listed for mention in the Chambers List before me, on 8 April 2009. Mr O'Neill advised that Ms Hedley had still not provided discovery. My Minute of that date (sent to Ms Hedley both at her home address and to her former solicitors with a request that they forward it on) recorded that if discovery and witness statements (required to be served by 9 April 2009) were not provided it was highly likely that an "unless" order would be made when the proceeding was next called on 22 April 2009. The Minute further noted that the effect of an "unless" order is that Ms Hedley would be debarred from defending the proceeding.

[20] On 22 April 2009, before Harrison J, Mr Wilkin appeared as counsel for Ms Hedley. Mr Wilkin undertook to use his best endeavours to ensure that Ms Hedley's default in meeting obligations was rectified immediately. Harrison J made further timetable orders, to be complied with by 4pm on 29 April 2000. His Honour noted that he was satisfied that it was in the interests of justice that Ms Hedley be allowed a final indulgence to defend the proceeding. The orders included an order that Ms Hedley pay costs of \$1,000 to Mr and Mrs Slade.

[21] Subsequently, Ms Hedley lodged a number of documents in court, together with what appear to be statements of her evidence and that of two other persons. She has not paid the costs order and she noted that she could not afford to pay for legal representation. Mr Wilkin has not represented Ms Hedley since his appearance on 22 April 2009.

Formal proof hearing

[22] At the hearing on 7 May 2009, having heard from Mr O'Neill and Ms Hedley, I ordered that Ms Hedley be debarred from defending the proceeding.

[23] However, Ms Hedley was advised that she could remain in court, and Mr O'Neill would be asked to respond to matters raised in her statements and documents. The hearing then proceeded on a formal proof basis, with evidence called from Mrs Slade, Mr Slade and Ms Kerapa, a local real estate agent. Mrs Slade was recalled in order to address certain matters arising from Ms Hedley's statements and documents.

[24] At the conclusion of the hearing the parties were advised that I was satisfied that:

- a) The full purchase price of \$200,000 had been paid by Mr and Mrs Slade;
- b) Ms Hedley had received rent for the property but Mr and Mrs Slade had not received a share of that rent;
- c) Although Ms Hedley had counter-claimed for payment of \$41,500, that money is not payable to her by Mr and Mrs Slade;
- d) Pursuant to Ms Hedley's agreement to purchase the property (made shortly after the summary judgment hearing) Ms Hedley is required to pay Mr and Mrs Slade \$215,000;

- e) Mr and Mrs Slade are entitled to receive from Ms Hedley a half-share of rent received on the Raglan property, less rates paid (except for interest and penalties) up to 27 March 2009;
- f) Ms Hedley is entitled to receive a half-share of rental for the Raglan property at \$300 per week (less rates as above) from 28 March 2009 (on which date Mrs Slade commenced occupation of the property) up to the date of settlement of the sale of the property;
- g) It is appropriate for an order to be made that the Raglan property be sold and that Ms Hedley's caveat be removed;
- h) Mr O'Neill is to provide draft orders for approval. These orders will provide for the sale of the property at auction, with the auction to take place no earlier than 5 June 2009 (to provide Ms Hedley with an opportunity to purchase the property herself) and with the costs of the auction, real estate agents costs, and solicitors costs in relation to the sale, to be shared between Mr and Mrs Slade and Ms Hedley;
- i) Ms Hedley may attend at the property to uplift her belongings. In this respect it is noted that Mrs Slade has advised the court that some items listed by Ms Hedley in her documents have already been removed.

[25] Accordingly, orders are made as follows:

1. That the property situated at 51 Norrie Avenue, Raglan, having a legal description being an estate in fee simple being 831m² more or less Lot 1 Deposited Plan South Auckland 2488 with identifier SA51D/527 (South Auckland Registry) ("the property") is to be immediately placed on the market for auction to be auctioned no sooner than Friday, 5 June 2009.
2. The Defendant has the option to complete the purchase of the Plaintiffs' half share of the property for the sum of \$215,000.00 plus interest at the rate of 8.4% on that sum to be calculated from 3 July 2008 down to the date of settlement, prior to the auction.
3. In the event that there is an auction, then the following payments are to be made upon the sale of the property:-

- i) The mortgage is to be repaid.
 - ii) The real estate agent's fees and auction fees to be deducted from the gross proceeds.
 - iii) Any outstanding rates due to the local Council are to be deducted from the gross proceeds.
4. From the net sale proceeds, after deduction of the sums set out in 3 above, the Plaintiffs are to receive either:-
 - a) \$215,000.00 plus interest due on that sum at 8.4% to be calculated from 3 July 2008 down to the date of settlement; or
 - b) Half of the net sale proceeds, whichever sum is greater.
5. Any penalties and interest due on any outstanding rates are to be paid from the Defendant's share.
6. Jo Watson of Otorohanga, Solicitor, is to undertake the conveyancing with legal costs to be shared.
7. Caveat No. 7155523.1 lodged by the Defendant against the Plaintiffs' share in the property is to be removed.
8. The Plaintiffs are entitled to judgment for their share of the rental proceeds received by the Defendant in the sum of \$17,558.00 plus interest at the Judicature Act rate of 8.4%, such interest payable on the judgment sum from 28 March 2009.
9. The Defendant is to receive half the share of any rental of \$300.00 per week from 28 March 2009 down to the date of settlement after any rates have been deducted for that period.
10. The Defendant may attend at the property to uplift her belongings. The Plaintiffs have advised the Court that some items listed by the Defendant have already been uplifted.
11. The Plaintiffs are entitled to costs on a 2B basis in the sum of \$28,480.00 and disbursements of \$4,010.00 as set out in the Schedule annexed to this judgment (as submitted by Mr O'Neill).

SCHEDULE

Disbursements

Filing fee on statement of claim	\$1,100.00
Filing fee on amended statement of claim (2)	\$ 180.00
Filing fee on statement of defence to counterclaim	\$ 90.00
Setting down fee	\$2,600.00
Sealing judgment	<u>\$ 40.00</u>
	\$4,010.00

Costs

Category 2 rate \$1,600.00 per day

Band B costs

1.0 Commencement of proceedings	3.0
2.0 Commencing of defence to counterclaim	2.0
4.5 Affidavit of documents	1.5
4.10 Memoranda for various conferences:- 3/7/08, 25/8/08, 18/11/08, 1/4/09	4 x .4 = 1.6
4.11 Appearances at conferences/mentions 25/2/08, 5/3/08, 7/4/08, 3/7/08, 28/7/08, 25/8/08, 18/11/08, 15/12/08, 1/4/09, 8/4/09, 22/4/09	11 x .2 = 2.2
5.1 Preparation of summary judgment documents	0.6
5.3 Preparation for summary judgment defended hearing	0.5
5.4 Appearance at defended summary judgment hearing	0.5
7.1 Preparation of evidence to be used at trial	2.7
7.2 Preparation of issues, authorities, selecting documents for common bundle and all other preparation	2.5
9.1 Appearance at hearing	0.5
13.0 Preparation for case management conference	0.2
4.18 Sealing judgment	<u>0.2</u>
	17.8
17.8 x \$1,600.00 =	\$28,480.00