IN THE HIGH COURT OF NEW ZEALAND
DUNEDIN REGISTRY

CIV-2014-412-000069
[2014] NZHC 3220

BETWEEN	CASTLE MARSDEN TRUST LTD Plaintiff
AND	SUSAN MARGARET VOWLES and SOUTHERN TRUSTEES 2005 LIMITED Defendants

Hearing: 10 December 2014

Appearances: L A Andersen for Applicant (Plaintiff)
B C Nevell for Respondents (Defendants)

Judgment: 15 December 2014

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
on plaintiff's summary judgment application

Introduction

[1] The parties (through their respective trusts) bought a Wanaka house property (the property) to be the family home of Phillip Marsden and Susan Vowles. And so the property was used until Mr Marsden and Ms Vowles separated in 2013. Ms Vowles has since had exclusive occupation of the property, residing there with her six children, the youngest two also being Mr Marsden's children.

The claim

[2] The plaintiff (the Marsden trustee) seeks an order under s 339 Property Law Act 2007 for the sale of the property to the Marsden trustee, on summary judgment.

[3] The defendants (the Vowles trustees) oppose any s 339 order. Their notice of opposition states a number of grounds of opposition but in his submissions Mr Nevell narrowed the basis of opposition to hardship under s 342(d) of the Act.

What is not in issue

[4] Certain facts are not in issue:

(a) Ms Vowles and Mr Marsden began a romantic relationship in 2007;

(b) Ms Vowles had four children by a previous marriage (now aged between nine and 15 years);

(c) Ms Vowles and Mr Marsden lived for a period in a Luggate property owned by the Vowles trustees;

(d) In 2009, their twin daughters were born;

(e) In 2010 the (Wanaka) property was bought to be a home for Ms Vowles, Mr Marsden and the six children;

(f) The $627,000 purchase price of the property was paid by:

- $286,074.22 paid by the Vowles trustees from the proceeds of the sale of their Luggate property; and

- Funds from two loans from the National Bank totalling $380,000 (with a balance not needed for the purchase being distributed to the two trusts);

At the same time as the two National Bank loans were arranged, a third loan of $23,500 was obtained from the National Bank to refinance debt of Mr Marsden's company, Kea Electrical Limited.

(g) The property was purchased by the Marsden trustee and the Vowles trustees respectively as tenants-in-common in equal shares;

(h) Given that the Marsden trustee was contributing no capital, the parties agreed that the Marsden trustee would be responsible for:

- All loan repayments on the National Bank loans; and
- All rates and insurance payments; and
- Any other outgoings associated with the property.

(i) In June 2013, the parties borrowed a further $40,000 from the ANZ Bank;

(j) The Marsden trustee made principal and interest payments on the four loans and paid rates and insurance payments while Ms Vowles and Mr Marsden lived together;

(k) Ms Vowles and Mr Marsden separated in June 2013, Mr Marsden then moving out of the property;

(l) Ms Vowles has since been on the Jobseeker benefit;

(m) Ms Vowles receives some child support ($104 per month) from her first husband for her older four children and significant child support ($2,317.25 per month as at November 2014) from Mr Marsden for the twins;

(n) For a period after June 2013, the Vowles trustees contributed an estimated 50 per cent of the weekly mortgage payments and outgoings, now reduced to less than 50 per cent by covering only the first two loans (together with a share of outgoings);

(o) The Marsden trustee, from June 2013, contributed equally to all three National Bank loans, subsequently fully covering the third loan, and has contributed equally to outgoings;

(p) The Marsden trustee, following separation repaid $20,000 of the ANZ loan and has subsequently (from an inheritance received by Mr Marsden) paid the balance on the ANZ loan of $27,000;

(q) Mr Marsden's income is currently $3,800 per fortnight;

(r) The Vowles trustees currently would be able to pay from Ms Vowles' income $350 per week for rental of a property (whether the (Wanaka) property or another);

(s) The current Government Valuation of the property is $655,000, while the single registered valuation in evidence puts it at $640,000 as at 16 September 2013;

(t) The Vowles trustees would be financially unable to purchase another property if the (Wanaka) property were sold.

Disputed factual matters

[5] There are areas of disputed factual material, which in a summary judgment context this Court cannot resolved. I summarise the areas of difference.

Mr Marsden's earlier contributions

[6] Mr Marsden, in the initial affidavit in support of the summary judgment application, did not refer to any payments he had made before the purchase of the property. Ms Vowles provided the first affidavit in opposition. In explaining the history of the purchase of the property, she deposed that Mr Marsden had not made a capital contribution to the purchase price and that the couple made an agreement that Phillip would pay all interest and capital payments on the mortgage until his contribution to the equity in the property equalled Ms Vowles' contribution.

[7] Mr Marsden filed a reply affidavit in which he asserted that the Marsden trustee had before the purchase of the property made a number of payments by way of loan to Ms Vowles totalling $74,630. Mr Marsden deposes that this sum was to be "set-off against the cash contribution" made by the Vowles trustees towards the purchase of the property.

[8] He says that it was agreed that the Marsden trust "would be responsible for all loan repayments for all three loans".

[9] Ms Vowles understandably had to file a further response to this reply evidence. She refutes Mr Marsden's allegations as to there being a loan between Mr Marsden and herself. Her denial is plausible.

The VW Combi van proceeds

[10] Mr Marsden, in his reply affidavit, deposed that following purchase of the property a VW Combi van owned by the Marsden trustee was sold for $30,000 with that money contributed to the bank loans taken out to purchase the property.

[11] In response, Ms Vowles notes that Mr Marsden produced no documentary evidence to support the claim as to the payment of the proceeds. She deposes that her recollection is that the proceeds of the sale of the van were applied towards payment of the credit card held in the name of Mr Marsden's then business, Kea Electrical Limited (Kea). Ms Vowles produces the National Bank loan statements (for the three National loans) and notes that none of them shows a $30,000 lump sum payment.

The funding of alterations

[12] In his reply affidavit, Mr Marsden deposed that the Marsden trustee had funded renovations on the property, involving a bathroom, office and the hot water system. He refers to these being "an estimated contribution of $56,000".

[13] In her response, Ms Vowles correctly notes that Mr Marsden did not produce any documentary evidence. Ms Vowles deposes that Mr Marsden completed some of the work himself and used industry contacts to get other work done at reduced rates. Ms Vowles accepts that some money was contributed to the cost of the renovations but she thinks the cost was paid either by Mr Marsden personally or through his company Kea. She deposes that she does not believe that the total cost of the renovations would have exceeded $30,000.

Mr Marsden's contributions combined

[14] In a summary judgment context, Mr Marsden's evidence as to contributions is such that it remains arguable that much and possibly all of the alleged contributions were not covered by any agreement that they be brought into account as a Marsden trust contribution to the property. It is arguable that Mr Marsden's capital contribution (apart from any principal repayments effected through regular payment) was nil.

Mr Marsden's Toyota van

[15] Mr Marsden, again in reply evidence, deposed that Ms Vowles possesses a Toyota van worth approximately $25,000 which is owned by the Marsden trust. Ms Vowles accepts that she has the Toyota van in her possession which she uses to transport the family. She deposes that she believes that the true value is around $13,000–$15,000.

[16] Mr Marsden establishes no relevant connection between the van and the property. Mr Andersen did not submit that there was such a connection and did not pursue this issue in submissions. I regard the van as irrelevant.

The Marsden trustee's loan repayments after purchase

[17] In his reply affidavit, Mr Marsden exhibited bank statements for the period from purchase in 2011 to 31 March 2013, showing all payments of principal and interest over the period. He calculated the recorded payments as being:

Interest	$59,167.75
(Principal	$43,438.99)
Total payment	**$102,606.74**

[18] Ms Vowles, in reply evidence, suggested that Mr Marsden's figures were overstated. She gave alternative calculations. It transpired at the hearing that she also had miscalculated. The correct figures for the period April 2011 to September 2013 were:

Interest	$51,643.05
Principal	$38,213.38
Total	**$89,856.43**

[19] Ms Vowles deposed that she believed that, of the Marsden trust's loan payments, only principal repayments (she had calculated them at $33,744.29) should be considered as contributions to the equity of the property. The need to obtain the loan finance and therefore to pay interest arose from the fact that the Marsden trust (unlike the Vowles trust) did not have capital to contribute. On the recalculated figures, Mr Marsden's principal repayments on the three National Bank loans (to 31 September 2013) amounted to $38,213.38.

[20] It is clearly arguable that the extent to which the Marsden trust's loan payments might be taken into account in assessing the equity of the respective party's interest in the property is significantly less than the $102,606.74 (for the period up to 31 March 2013) as suggested by Mr Marsden in his reply evidence. The appropriate figure may be closer to the figure of $38,213.38.

Ability of the Vowles trustees to compensate the Marsden trustee for use of equity

[21] For the Marsden trustee, Mr Andersen submits that the Vowles trustees, while seeking to retain the benefit of occupation of the property, are not in a position to compensate the Marsden trustee for the use of Marsden's equity.

[22] This submission is based on an assumption that the Court must accept as beyond argument Mr Marsden's evidence on contributions. I do not view Mr Marsden's evidence as conclusive of the assertions made. Upon that basis, the Vowles trustees arguably have a greater interest in the equity in the property: it is not beyond argument that an appropriate adjustment if called for could later be made.

The current value of the property

[23] There is no evidence as to the current value of the property.

[24] The registered valuation produced by Mr Marsden is a valuation at 16 September 2013. The Court is not entitled to assume that the property's value

some 14 months later is the same. It is possible that the parties have equity in a property that is of greater value than in September 2013.

The Marsden trustee's ability to make loan payments

[25] Mr Marsden has deposed that he (personally) does not want to continue to fund the mortgage (meaning the loan payments). He says that the Marsden trustee is dependent upon Mr Marsden's providing money if the Marsden trustee is to be able to meet its continuing obligations. He says the Marsden trustee has no other source of funds.

[26] In his submissions for the Marsden trustee, Mr Andersen submitted that it will suffer hardship if a sale order is not made as it will face liquidation should Mr Marsden not be willing or able to continue to fund the mortgage.

[27] There is no evidence that Mr Marsden cannot fund the loan payments, and it is at least arguable that he can. Mr Marsden has not deposed that he will not continue to fund the mortgage. There must be some likelihood, by reason of the legal obligations involved and the risk of a mortgagee sale, that he will continue to fund the payments. On the other hand, if the Marsden trust's entitlement to equity is in the region of $38,213.38 (representing its principal repayments), the Marsden trustee may be inclined on a commercial basis to sacrifice any equity in order to avoid having to continue substantial annual payments on an indefinite basis.

Relief pursuant to s 339 Property Law Act 2007

[28] The Marsden trustee's first prayer for relief in its statement of claim was for an order (pursuant to s 339(1)(c)) requiring it to purchase the Vowles trustees's share in the property. It sought an order quantifying the share of each as a half-share of the equity on the basis the property has a value of $640,000.

[29] The Marsden trustee's alternative prayer for relief was for any other order under s 339(1) which the Court considers appropriate.

[30] In his submissions for the hearing, Mr Andersen on behalf of the Marsden trustee abandoned the request for an order requiring the Marsden trustee to be the purchaser. Instead, an order for sale is sought.

[31] On this basis, s 339 of the Act relevantly provides:

> **339 Court may order division of property**
>
> (1) A court may make, in respect of property owned by co-owners, an order—
>
> (a) for the sale of the property and the division of the proceeds among the co-owners; or
>
> (b) …
>
> (2) An order under subsection (1) (and any related order under subsection (4)) may be made—
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) only after having regard to the matters specified in section 342.
>
> (3) Before determining whether to make an order under this section, the court may order the property to be valued and may direct how the cost of the valuation is to be borne.
>
> (4) A court making an order under subsection (1) may, in addition, make a further order specified in section 343.
>
> …

[32] Section 342 (as referred to in s 339(2)(d)) provides:

> **342 Relevant considerations**
>
> A court considering whether to make an order under section 339(1) (and any related order under section 339(4)) must have regard to the following:
>
> (a) the extent of the share in the property of any co-owner by whom, or in respect of whose estate or interest, the application for the order is made:
>
> (b) the nature and location of the property:
>
> (c) the number of other co-owners and the extent of their shares:

(d) the hardship that would be caused to the applicant by the refusal of the order, in comparison with the hardship that would be caused to any other person by the making of the order:

(e) the value of any contribution made by any co-owner to the cost of improvements to, or the maintenance of, the property:

(f) any other matters the court considers relevant.

[33] Section 343 of the Act (as referred to in s 339(4)) provides for additional orders which the Court may make when making an order for sale. Those include the requirement of payment of compensation by one co-owner to another, directions as to sale, and any other matters which the Court considers necessary or desirable as a consequence of the making of an order under s 339(1).

Summary judgment in relation to sale orders under s 339 of the Act

[34] This is a plaintiff's summary judgment application, to which r 12.2 High Court Rules applies. The Court may give judgment against the defendant only if the plaintiff satisfies the Court that the defendant has no defence to the proposition that the property must be sold.

[35] I considered the relationship between the breadth of the Court's discretion under s 339–343 of the Property Law Act and the Court's summary judgment jurisdiction in *Coffey v Coffey.*[1] I adopt the following passage from my judgment, in which I recognised that the summary judgment procedure will often be inapt for the making of an order of division under the 2007 Act, with a full hearing more appropriate:

> *The breadth of the Court's discretion under ss 339-343 of the Act*
>
> [11] Orders for sale of jointly owned property were previously obtained under s 140(1) Property Law Act 1952 ("the old provision").
>
> [12] The directory nature of the old provision meant that applications for orders were generally suitable for summary judgment. The Court was required to direct the sale of co-owned land, if the owner or owners of a moiety (or more) applied for a sale, unless the Court saw good reason to the contrary. The point is made in Hinde McMorland & Sim *Land Law in New Zealand*:[2]

---

1 *Coffey v Coffey* [2012] NZHC 1765.

2 Hinde McMorland & Sim *Land Law in New Zealand* at 13.021(a) ; see to similar effect *Sim's Court Practice* HCR 12.2.7(e) and *McGechan on Procedure* HR 12.1.11.

> Under the former jurisdiction, where in many cases the Court had no discretion but to order either sale or partition if certain basic facts were proved, the summary judgment procedure was well suited and many claims were brought and dealt with expeditiously under that procedure.

[13] In *McMahon v McMahon,*[3] the Court of Appeal dismissed an appeal against an order for sale under the old provision. Blanchard J, delivering the judgment of the Court, noted:[4]

> ...the logical difficulty of applying a general discretion found in the High Court Rules [as to summary judgment] to a specific statutory provision [s 140 Property Law Act 1952] under which it has been held that there is no discretion.

[14] Blanchard J then contrasted the proposals made by the Law Commission to give the Court a discretion with the existing lack of discretion in this way:[5]

> In its preliminary paper the Law Commission suggested that the present provisions of s 140 of the Property Law Act are undesirably lacking in flexibility. In its final report, A New Property Law Act (NZLC R 29), delivered in 1994 the Commission put forward as part of the proposed new statute draft sections 254-257 which would, if enacted, give the Court a discretion whether to make an order for sale and allow it to take into account the relative hardship to the applicant and any other person which would be caused by the refusal or making of an order. Such a provision would enable the Court to delay a sale if it felt that there would be unfairness in dealing with one property ahead of the resolution of claims in relation to them all. But at present the Court cannot do this under s 140(1).

[15] In *McMahon*, the appellant was endeavouring to avoid summary judgment through a request for delay. The refusal of the appeal (on this point) arose out of the fact that the old provision gave the Court no discretion to delay a sale. A resort to the residual discretion to refuse summary judgment would therefore be inappropriate.

[16] The legal position markedly altered when Parliament enacted the Property Law Act 2007, incorporating many of the recommendations of the Law Commission. As observed by Fogarty J in *Holster v Grafton*:[6]

---

3 *McMahon v McMahon* [1997] NZFLR 145 (CA).

4 Ibid, at 148.

5 Ibid, at 148-149.

6 *Holster v Grafton* (2008) 9 NZCPR 314 (HC) at [43]. The Law Commission in its Preliminary Paper (NZLC PP16 *The Property Law Act 1952* July 1991) stated that:

> 169 A difficulty with the present sections is the lack of flexibility where a half-owner applies. The court must order either a partition or a sale. It cannot refuse to make any order at all unless the application is by someone with less than a half interest...

This led the Commission to pose this question:

> Q 25 Should the court be given more flexible powers to determine questions of partition or sale between co-owners as follows:
>
> - order for sale and division of proceeds
> - division in specie
> - one or more co-owner(s) to purchase share of other(s), or sale if this is not done
> - postponement of sale or division
> - no order at all?

> Sections 339-342 of the Property Law Act 2007 should be understood to be remedial.

[17] In *Bayly v Hicks*,[7] Wylie J reviewed ss 339-343 of the Act and summarised them in this way:

> ...the various provisions relevant to the division of co-owned property give the Court extensive discretions, and, together with the High Court Rules, a formidable armoury to effect a fair and reasonable division.

[18] The commentary anticipated the impact of the breadth of discretion upon the application of summary judgment procedures to applications under the Act.

[19] In Hinde McMorland & Sim *Land Law in New Zealand*, it was observed, in contrast to the position under the old provision, that:[8]

> Under the provisions of the Property Law Act 2007, however, the Court is given a wide discretion in every case as to the order to be made and both parties may raise full and detailed arguments as to the matters bearing on the exercise of that discretion. In this case, the summary judgment procedure is not so well suited to these applications and it may be that a full hearing is much more commonly required.

[20] To similar effect is the passage by David Brown in New Zealand Land Law:[9]

> ... but it is suggested that the suitability of applications under s 339 Property Law Act 2007 for summary judgment is far less clear, given that the court in that case emphasised that there was no real choice available to the court in response to the plaintiff's application under s 140 Property Law Act 1952. Therefore, authorities in relation to summary judgment and s 140 should be treated with caution in relation to s 339 of the 2007 Act.

[36] In *Coffey v Coffey,* I proceeded to review three cases which could be viewed as involving hardship of the clearest kind where one co-owner was running on in occupation of a previously shared residence to the exclusion of the other.[10] In each case an order for sale was made. The three cases are *Jacobson v Guo; Wilson v Bougen;* and *Western v Abdoelrahman.*[11] In none of those cases does it appear there was a child or children of the marriage residing in the home at the time of the application.

---

7 *Bayly v Hicks* HC Whangarei CIV-2009-488-000547, 19 August 2011 at [37].

8 At 13.021(a).

9 David Brown "Co-ownership" in Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey (eds) *New Zealand Land Law* (Brookers, Wellington, 2009) 393 at 6.7.08.

10 As summarised at [44].

11 *Jacobson v Guo* (2008) 9 NZCPR 850 (HC); *Wilson v Bougen* HC Wanganui CIV-2010-483-246, 14 December 2010; *Western v Abdoelrahman* HC Auckland CIV-2010-404-2298, 11 March 2011.

[37] In *Coffey v Coffey* itself, I recognised that there will be situations where there are such clear concessions or indisputable facts as to effectively dictate to the Court exactly how the discretion under s 339 of the Act (or in relation to further orders under s 343) should be exercised.[12] In that case, by summary judgment, I made an order for the sale of the property owned by members of family. The property was owned by family members in one-sixth shares. It was a family holiday house purchased when the family was united but by the time of the litigation the plaintiffs and defendants were deadlocked, unable to cooperate on matters requiring cooperation between co-owners. Such is the relatively unusual type of case where there is such clarity of appropriate outcome as to render summary judgment appropriate.

[38] Subsequently, in *Shaw v Haven Trustee Ltd,*[13] the Court was asked, on a summary judgment application, to order sale of a property co-owned by a married (but subsequently separated) couple. After separation, Mrs Shaw remained in the house with the two children of the marriage. Mr Shaw asserted hardship through the debt he was having to service. Mrs Shaw opposed relief under the Property Law Act and also suggested that she had claims under the Property (Relationships) Act 1976 and the Family Proceedings Act 1980. In determining that the issues arising under s 339 Property Law Act were not suited to summary judgment and should go to a hearing, Asher J observed:[14]

> [43] Mr Shaw's claims to hardship are not accepted by the Haven Trust. Mrs Shaw on behalf of the trust claims that she is the primary carer of the children and that they need to stay in the home. There will be hardship to them if there is an order for sale. This is not accepted by Mr Shaw. The discretionary factor of hardship to "any other person" appears to be couched in s 342(d) in deliberately wide terms. In itself this could include third parties who will suffer harm if an order is granted, here Mrs Shaw and the children. The children are still beneficiaries of the trust.
>
> [44] Therefore, even if Mrs Shaw's PRA and FPA claims fail, there are hardship issues between the two trusts to be determined under s 339, and it may be that the Haven Trust would obtain an order under s 339 different from that sought by Mrs Shaw. There will be issues also as to what the parties' respective contributions should be, and their relevance. It is too early to carry out that exercise.

---

12 At [45].
13 *Shaw v Haven Trustee Ltd* [2013] NZHC 2961.
14 At [46].

> [45] If Mrs Shaw's s 44 PRA claim succeeded, the s 339 balancing exercise would not arise as there would be no co-ownership. If the s 182 claim only was successful, Family Court orders made relating to that property would have to be considered. I accept that there could be orders made which provided compensation under other provisions of the PRA, but whether any could or would be made cannot be predicted. A sale now under s 339 could render the PRA and FPA claims in the Family Court nugatory.

Considerations informing the discretion in this case

Section 342(a) – Extent of co-owner's shares

[39] While the parties are tenants-in-common in equal shares, the arrangements acknowledged by both parties mean that the Marsden trustee was to bear the cost of loan payments until a point of equalisation of capital contribution was achieved. Precisely how that was to be achieved was not spelt out at the time and is open to argument. On the evidence, it is arguable that the Marsden trustee's payments to date fall well short of achieving equalisation of capital payment and that, in practical terms, the Vowles trustees remain entitled to a much greater share in the property.

[40] The Law Commission, in its 1994 report,[15] recommended that the Court have a discretion in relation to the making of division orders. It nonetheless observed that the Court was unlikely ordinarily to refuse to make an appointment on the application of a co-owner who holds a one-half (or greater) share in a property. Hence the first-listed consideration – as to the extent of respective shares – under the current s 342(a). On the facts of this case, the plaintiff has no preponderance of interest. It arguably has significantly less than a half interest.

Section 342(b) – Nature and location of the property

[41] Mr Andersen submitted that, by reason of its characteristics (a two storied residential property) and its location (within walking distance of activities and a school in Wanaka), the property should be readily saleable.

[42] The matters focused upon by Mr Andersen more logically influence the form of order that should be made under s 342, assuming any order is made.

---

[15] Law Commission *A New Property Law Act* (NZLCR 29 June 1994) at [747]; see also the Commission's observations in its Preliminary Paper – above n 6.

[43] It is arguable in this case that it is the special characteristics of the property for the family which lives there that is most relevant to the decision as to whether to make an order at all.

[44] The house was specifically chosen by Ms Vowles and Mr Marsden for purchase by the trusts because it could accommodate the family of eight within walking distance of children's schools and friends in the neighbourhood. It was altered after purchase to make it suitable. It remains the primary residence of Ms Vowles, the twin children of Ms Vowles and Mr Marsden and the four older children from Ms Vowles' previous marriage (all still infants).

Section 342(c) – The number of other co-owners and the extent of their shares

[45] There are no co-owners other than the parties.

Section 342(d) – Hardship to applicant by refusal of order or to any other person by making of order

[46] I adopt my observations in *Coffey v Coffey,* as to the concept of "hardship":[16]

> [151] An appropriate definition of what constitutes "hardship" is to be found in the Shorter Oxford English Dictionary:
>
> The quality of being hard to bear; or
> hardness of fate or circumstance
>
> These were the dictionary definitions cited with approval by Woodhouse P in *Director-General of Education v Morrison*, a case involving accommodation grants for students payable by reason of "hardship".
>
> [152] Cooke J observed in the same case that:
>
> > In ordinary usage hardship does not necessarily connote extreme privation or the like.
>
> Cooke J was referring to and repeating a particular definition of "hardship" which appears in various dictionaries (including the Oxford) as an alternative to the definitions favoured by the Court of Appeal.
>
> [153] Woodhouse P in *Morrison* referred with approval to the observation of Mayo J in *Returned Sailors' Soldiers' and Airmen's Imperial League of Australia (Henley and Grange Sub-Branch) Inc v Abbott*, that the word "hardship" was:

---

16 *Coffey v Coffey,* above n 1.

> capable of being descriptive of adverse repercussions of every kind.
>
> In the specific context of s 342, the concept of "hardship" was considered by Fogarty J in *Holster v Grafton*, His Honour said:
>
> > [50] "Hardship" is a value-laden criterion. It suggests an adverse effect which is of significant impact to the applicant. It has to be read consistent with the policy of the statute which respects property rights of tenants in common, but seeks to resolve conflicts fairly.
>
> (footnotes omitted)

[47] I also respectfully adopt in this context a passage from the conclusions of Asher J in *Shaw v Haven Trustee Ltd* as already cited,[17] in which His Honour observed:

> The discretionary factor of hardship to "any other person" appears to be couched in s 342(d) in deliberately wide terms. In itself this could include third parties who will suffer harm if an order is granted, here Mrs Shaw and the children.

[48] Mr Nevell raised a particular issue in relation to the correct interpretation of s 342(d), which appears to be novel. Mr Nevell notes that under s 342(d) the Court in relation to the hardship caused by refusal of the order is to have regard to the hardship that is caused "to the applicant". This in turn is clearly a reference back to the applicant who makes the application referred to in s 339 of the Act.

[49] Mr Nevell's submission is that when considering the hardship caused by refusal of an order in this case, the Court is restricted on the facts of this case to the hardship caused to the Castle Marsden Trust Ltd. On Mr Nevell's approach, the Court could not consider the hardship to Mr Marsden personally, such as through his personal payments to the trust to enable it to make the loan repayments.

[50] Mr Nevell's submission, if correct, would have the potential to limit the Court's power in relation to the division of property under the Property Law Act of effectiveness in relation to the relatively common situation in New Zealand where property interests are held through family trusts.

---

17 *Shaw v Haven Trustee Ltd,* above n 13.

[51] For the Court, in cases where the applicant is a family trust have ability to consider the hardship considerations outlined in s 342(d), Mr Andersen submitted that the purposive approach to interpretation, mandated by s 5(1) Interpretation Act 1999, should be adopted. Mr Andersen suggested that the word "applicant" in s 342(d) might be construed broadly so as to include those interested in a family trust which is the applicant.

[52] As I heard limited submissions in relation to the issue of interpretation, I refrain from expressing a concluded view as to the correct interpretation of s 342(d) in relation to an application made by a trust.

[53] Whether or not s 342(d) is necessarily to be given the literal interpretation advanced by Mr Nevell, the catch-all provision of s 342(f) would entitle the Court, provided the Court finds the established facts relevant, to take into account the consequences of the making of an order for persons who are not the applicant but take an interest through the applicant. The comparison of hardship issues as between two trusts was precisely an exercise envisaged by Asher J in *Shaw v Haven Trustee Ltd*[18]

[54] It is not possible for the Court, on the limited evidence on this summary judgment application, to reliably conclude that the hardship either to the Marsden trust or to Mr Marsden and its other beneficiaries will substantially outweigh the hardship to others. There is uncertainty on key issues, including just how much equity the Marsden trustee has tied up in the property. Much of its case as to hardship and as to sale appears to have been predicated on the proposition that the Marsden trustee's contributions were $300,236.74. Mr Marsden's position is summarised in the concluding paragraph of his reply affidavit in which he states:

> In light of the Castle Marsden Trust contributions being greater than the contributions made by the S M Vowles family trust I believe the order for sale should be made.

---

[18] *Shaw v Haven Trustee Ltd,* above n 13, at [44].

Section 342(e) – Value of contributions to improvements or maintenance

[55] Disproportionate contributions to improvements or maintenance of the property will logically count for something when the initial contributions have been equal. But, having regard to the recognised inequality of capital contribution at the outset, Mr Marsden in this case prays in aid subsequent contributions as part of the calculations whereby he suggests that the Marsden trustee's capital contribution now at least equals the Vowles trustees' contribution. It is not appropriate for him to then also receive recognition for maintenance and the like under s 342(e) as such would involve a double recognition for the same payment.

[56] There is nothing therefore to particularly consider under s 342(e).

Section 342(f) – Any other relevant matters

[57] Ms Vowles invites the Court to place special importance on the family context. Mr Marsden himself deposed that the property was purchased so that he and Ms Vowles could live together "as our family home". He then adds that that purpose was frustrated when they separated. It must be likely, given Mr Marsden's affidavit evidence and the circumstances relating to the size of the house purchased, that there were two aspects to the purchase, namely as a home for Mr Marsden and Ms Vowles and also as the home to accommodate the children as a family. It is only the first of those goals which could be said to have been "frustrated" when the couple separated. The property still serves as a family home for seven (of the eight) people.

[58] Ms Vowles has deposed that relationship property matters and childcare arrangements have yet to be finalised between Mr Marsden and herself. She does not accept that it is fair to deal with issues of ownership, sale and division of sale proceeds without regard to family matters and living arrangements for the six children who live there and call it their home. She says that she intends to pursue an application to the Family Court for determination of relationship property, with discovery available to identify all assets. She deposes to a belief that Mr Marsden has superannuation entitlements and a life insurance policy. She deposes to having no idea whether he has bank accounts or investments in either Australia (where he

has worked) or in the United Kingdom (where his family is from). I accept Mr Nevell's submission for the Vowles trustees namely that there are a number of matters which Ms Vowles might pursue with genuine motives in the Family Court.

[59] To date Ms Vowles has not been able to secure legal aid for the purpose of a relationship property application. There is the further complication of potential argument in the relationship property context as to whether dispositions of relationship property have occurred through the contributions to the property owned by the two trusts.

[60] A third "other relevant matter" may lie in the risk of a mortgagee sale should Mr Marsden stop funding the Marsden trust to enable it to maintain loan payments. Mr Nevell accepted that the risk of a disadvantageous sale by the mortgagee is a relevant consideration.

[61] A final "other relevant matter" which emerged most clearly in counsels' oral submissions is the substantial distance between the parties on the measure of Mr Marsden's contributions to the property and the extent to which he has equity.

[62] Mr Marsden wishes to retain the ability to argue that out of any proceeds of sale he should receive recognition for at least the following:

(a) his principal reductions ($38,213.38 to 30 September 2013) (with a further year's payments, unquantified, to date);[19]

(b) a loan to Ms Vowles of $74,630;[20]

(c) the value of alterations estimated at $56,000;[21]

[63] Ms Vowles, on the other hand, rejects Mr Marsden's right to have recognised anything other than the principal repayments. Even in relation to the principal repayments (to 30 September 2013) there is a dispute in that Ms Vowles would

---

19 See [18] above.
20 See [7] above.
21 See [12] above.

deduct $11,462.30 from the $38,213.38 upon the basis that Mr Marsden was responsible for payment of the third loan.

[64] The difference between the parties on the extent to which the Marsden trust is entitled to recognition for its contributions has implications for the distribution of proceeds of sale. If, for instance, the Marsden trust's interest in the proceeds were limited to the $38,213.38 principal repayments, Ms Vowles could plan with a measure of certainty as to the level of proceeds which the Vowles trustees would take from a sale. Her transition to a new home for herself and the children would be more assured.

[65] As matters stand, Mr Andersen accepted in the course of his submissions that the degree of difference between the parties as to their respective entitlement to the proceeds of sale is unsuited to resolution through summary judgment. He accepted that there would have to be a mechanism, perhaps through a trial as to respective entitlements, before the parties could achieve a distribution of proceeds.

[66] A final "other relevant matter" arises from the fact that the parties did not fully define the arrangements in relation to the property. As it was to be a home, it would have been prudent for them to agree what would happen in the event of their separation. They did not do so. Had they done so, one could envisage an agreement would have been made entitling the person with primary care of children to remain in the home for a transition period. The precise measurement of contribution and how "equality" would be achieved was also not spelt out. Uncertainty now exists as to who is entitled to what. These areas of uncertainty have left the parties and counsel with difficulties to negotiate through since the separation. It is not surprising that litigation ensued and has reached the point of a summary judgment hearing. But the continuing impact of uncertainties as to contractual entitlements has resulted in a situation where the clarification of important factual matters, and the unravelling of legal issues, has been taking place as late as the hearing itself. Mr Andersen's concession that the Court cannot define entitlements to the proceeds of any sale except by a trial process led him to also accept that any order of sale would have to involve also an order that the proceeds of sale be retained pending clarification of entitlement.

[67] These matters suggest that, while a Property Law Act application was an entirely appropriate step, the Court is ill-equipped at this point of the litigation to make the comprehensive set of orders which should accompany an order of sale, so as to enable the parties to move on with their lives. On the other hand, with the additional time to a trial, it can be reasonably expected that the remaining factual and legal issues can be worked through so that the facts and the legal entitlements are clearer if not conclusively agreed. The Court will then be in a position to take the parties' ownership interests, against a largely uncontroversial background, and make the fully informed judgment which best allows s 339 of the Act to work.

[68] A trial will involve more delay and continuing expense for the parties. On the other hand, Mr Marsden and Ms Vowles entered into the co-ownership arrangements which were and remain complicated by uncertainties as to entitlement in the event of circumstances such as those which have arisen. I view the issues as to entitlement to equity as key among the uncertainties.

[69] The Court must balance the fact that any immediate order of sale would mean Ms Vowles would be without access to her significant capital to move on and Mr Marsden for his part would be maintaining loan payments which involve not only his capital contribution but also interest (in addition to child support payments). The balancing of those considerations needs to take into account the fact that the Court on any order of sale may make a financial adjustment in relation to the benefit of occupation which one party has had.

Conclusion – drawing the considerations together

[70] Upon a review of the specific considerations which arise under s 342 and the other considerations to which I have referred, I am not satisfied that at this point an order of sale is clearly the appropriate resolution. There may be some difficulty or even hardship for the Marsden trustee in maintaining its current level of contributions. But it is arguable that the Marsden trust's capital contributions still sit well below those of the Vowles trust with, consequently, a reasonable expectation that the Marsden trust's continuing contributions should be the greater. If there is subsequently more accurate information on which reliable conclusions can be drawn

following a hearing, and it emerges that Ms Vowles should fairly account for some occupation rent, then that course will be open at the appropriate time, whether under s 343 of the Act or otherwise.

[71] I also find that the difference between the parties on their entitlements in equity through contribution to the property – unresolvable in a summary judgment context, must count against making any order of sale on summary judgment. The financial considerations facing Ms Vowles in the event she is to move herself and the six children to different accommodation are complex. Depending upon the levels of equity which the Marsden trustee and the Vowles trustees respectively hold, it is conceivable that the Marsden trustee may be able with proceeds in hand to achieve a property purchase. A just outcome in that context may be that Ms Vowles and the children have the ability to move at the one time out of the existing property into a newly purchased property. That is a proper goal for Ms Vowles to have and would be a proper consideration for the Court in determining the precise form of any sale order that should be made. The factual permutations are too many and varied for the Court to reach a clear view, in a summary judgment context, of the appropriate outcome.

[72] Nothing in these comments is intended to give Ms Vowles or the Vowles trustees the impression that, but for these complications, I would have refused summary judgment. Ms Vowles appears to have taken the position that the Marsden trustee should be effectively locked into co-ownership of the property so long as the children remain children. That is an unrealistic goal. The Marsden trustee may have little equity in the property while being expected to maintain substantial annual payments in relation to the property (at the same time as Mr Marsden personally is meeting significant financial obligations on account of the twins).

[73] By declining judgment, I effectively provide to the parties the opportunity to bring to a conclusion at a single hearing both the determination of their respective interests in the property and (assuming a trial Judge is prepared to grant an order of sale) definition of the appropriate supplementary orders to deal with matters such as any entitlement to occupation rent; the identification of respective entitlements to equity; and the payment of proceeds of sale.

Costs

[74] The appropriate course is to adopt the Court of Appeal's practice outlined in *NZI Bank Ltd v Philpott,*[22] which is to reserve costs.

Orders

[75] I order:

(a) The plaintiff's application dated 6 June 2014 is dismissed;

(b) The costs of the application are reserved;

(c) The defendants are to file and serve their defence within the period prescribed by the High Court Rules;

(d) The proceeding is adjourned to a case management conference at 2.30 pm, 25 February 2015 by telephone (Associate Judge Osborne), with counsel to file by 18 February 2015 either a joint memorandum or separate memoranda dealing with all Schedule 5 matters.

Associate Judge Osborne

Solicitors:
L A Andersen, Barrister, Dunedin
Ben Nevell Law, Dunedin

[22] *NZI Bank Ltd v Philpott* [1990] 2 NZLR 403 (CA).