IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2014-409-000567
[2015] NZHC 113

BETWEEN	COLIN KEITH KEERY Plaintiff
AND	LYSANDRA JANE SUSAN THOMAS and MARK WILLIAM THOMAS Defendants

Hearing: 3 February 2015

Appearances: D M Lester for Plaintiff
R C Dey for the first-named Defendant
No Appearance for the second-named Defendant

Judgment: 10 February 2015

JUDGMENT OF ASSOCIATE JUDGE MATTHEWS

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[1] The plaintiff (Mr Keery), the first-named defendant (Ms Thomas) and the second-named defendant (Mr Thomas) are owners of a property in Christchurch. The property was bought in 2006 and financed by Mr Keery providing $65,400, structured as an advance to Ms Thomas and Mr Thomas, who agreed to repay the debt on demand. Mr Keery has registered a caveat against the interest of Ms Thomas and Mr Thomas to support an equitable mortgage granted by them over their share in the property in his favour.

[2] Ms Thomas is a daughter of Mr Keery. Mr Thomas was her husband when the house was purchased but they separated a year later. At around that time a further caveat was registered against the interest of Mr Thomas by Legal Services Agency and shortly after that a statutory land charge was registered under s 32 of the Legal Services Act 2000. In 2010 a caveat was registered against the interests of Ms Thomas and Mr Thomas by Dorchester Finance Limited (Dorchester). This caveat

supports an agreement to repay an advance by Dorchester to a third party which Ms Thomas and Mr Thomas had guaranteed.

[3] For approximately four years, Ms Thomas and Mr Thomas (and later just Ms Thomas) lived in the house, and for the last four years Mr Keery has lived in the house with his wife. Ms Thomas and Mr Keery are estranged.

[4] At various times Mr Keery has paid sums of money to the first mortgagee, some of which are in dispute and some of which are accepted.

[5] The house was damaged in the earthquakes experienced in Christchurch in 2010 and 2011. A sum of $118,000 for repairs was received from the Earthquake Commission, and paid to the first mortgagee in reduction of its advance. The balance owing under the mortgage is approximately $92,000.

[6] In July 2014 a firm of registered valuers instructed by Mr Keery assessed the value of the property at $320,000, including $5,000 for chattels, on the basis that repairs necessitated by the earthquakes had been fully repaired.[1]

[7] Mr Keery now seeks an order that he purchase the property from Ms Thomas and Mr Thomas. He says that they do not have any equity in the property at all so he should not be directed to make any payment to them. He does, however, consent to a condition on the order he seeks that he be responsible for repaying the balance owing to Dorchester, and the balance owing to the Legal Services Agency. He applies for orders by way of summary judgment.

[8] Rule 12.2 of the High Court Rules provides:

> **12.2 Judgment when there is no defence or when no cause of action can succeed**
>
> (1) The court may give judgment against a defendant if the plaintiff satisfies the court that the defendant has no defence to a cause of action in the statement of claim or to a particular part of any such cause of action.

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[1] This is the figure in the valuation. In the statement of claim and Mr Keery's affidavit he erroneously says the valuation figure is $325,000.

...

[9] The principles the Court is to apply on an application for summary judgment are summarised in *Krukziener v Hanover Finance Ltd*:[2]

> [26] The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1 at 3 (CA). The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA). The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331 at 341 (PC). In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[10] In *Auckett v Falvey*, Eichelbaum J said:[3]

> On a summary judgment application, the onus is on the plaintiff to show that there is no defence. On the present facts, the plaintiffs are able to pass an evidential onus to the defendants by exhibiting the contract which on its face, entitles them to the remedy they now seek. The defendants are then in a position of having to demonstrate a tenable defence. However, the overall position concerning onus on the application is that at the end of the day the question is whether the plaintiffs have satisfied the Court as to the absence of a defence.

[11] I take from these authorities that the correct approach of the Court is to consider the following:

(a) Does the evidence for the plaintiff establish a position which on its face would entitle it to the remedies it now seeks?

(b) If so, has the defendant demonstrated a tenable defence?

(c) The onus which shifts to the defendant is an evidential one only; the burden of proving that the defendant does not have a defence rests throughout with the plaintiff.

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2 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187, [2010] NZAR 307.

3 *Auckett v Falvey* HC Wellington CP296/86, 20 August 1986 at 2.

[12] The orders sought by Mr Keery are under s 339(1)(c) of the Property Law Act 2007. This provides:

> **339 Court may order division of property**
> (1) A court may make, in respect of property owned by co-owners, an order—
>
> (a) ...
>
> (b) ...
>
> (c) requiring 1 or more co-owners to purchase the share in the property of 1 or more other co-owners at a fair and reasonable price.

[13] When considering an application under this provision, s 342 requires the Court to have regard to certain factors:

> **342 Relevant considerations**
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> 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:
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> (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.

[14] If the Court is satisfied that an order should be made, further consequential orders may be made under s 343.

[15] Ms Thomas opposes the making of orders in favour of Mr Keery. She says that making the orders would cause her hardship because it would be necessary for her to repay the balance now owing to Dorchester. She says that she has four children including a very young baby, works full-time, and is substantially committed, financially, to the expenses associated with her family. Having to repay Dorchester in order to clear its caveat from the title and transfer the property to

Mr Keery would cause hardship. She says Mr Keery would not suffer any financial hardship if the application were declined.

[16] Ms Thomas accepts that she and Mr Keery have contributed approximately equally to the outgoings for the property.

[17] Ms Thomas does not accept the valuation of the property provided by Mr Keery. She maintains that the property is worth more. However, she has not provided an alternative valuation, sought to have the valuation provided by Mr Keery brought up to date, or even provided an assessment of a prospective sale price from a real estate agent operating in the area in which the property is located.

[18] Ms Dey relies on a principle enunciated in *Ramsey and Ramsey v Mercer*, in which Associate Judge Bell discussed the discretion given to the Court under s 339 in the context of an application for summary judgment:[4]

> [17] In a typical summary judgment application the court applies rules of law, particularly rules as to liability, and considers whether a defendant has a defence according to those rules. In contrast, an application under s 339 requires the court to exercise a discretion, taking into account a variety of competing factors which may carry different weight according to the circumstances of each case. It is therefore understandable that an application for a summary judgment under s 339 is less straight-forward ...

[19] It is Ms Dey's position that there should be further investigation of the value of the property, and the contributions to the first mortgagee which all parties were responsible for, before an order can be considered.

Jurisdiction

[20] It will be noted that s 339(1)(c) of the Property Law Act 2007 provides for an order to be made requiring one or more co-owners to purchase the share in a property of one or more other co-owners. It does not provide for an order to be made directing those other co-owners to sell the property to a co-owner who applies for such an order. Ms Dey accepts that the Court has jurisdiction to make the order

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4 *Ramsey and Ramsey v Mercer* [2013] NZHC 2659.

sought by Mr Keery but it is necessary to consider whether such an order would bind Ms Thomas and Mr Thomas to transfer the property to him.

[21] This was noted by Wylie J in *Bayly v Hicks*:[5]

> In *Holster v Grafton* (2008) 9 NZCPR 314 (HC) Fogarty J expressed the view, obiter, that s 339(1)(c) does not expressly enable the Court to impose a sale by valuation upon a co-owner who does not wish to sell his or her share. If a valuation reprsents a fair and reasonable price then, with respect, it seems to me that the Court can require a co-owner to purchase. That is the effect of s 339(1)(c). The Court does not, however, have express power to order the other co-owners to sell. Quaere whether s 343(g) extends to permit further orders to that effect, or whether the discretion conferred by s339(1)(c) is only open when one co-owner(s) wishes to sell.

[22] This judgment was upheld on appeal without reference to this passage.[6] However, the Court of Appeal said:[7]

> [27] We see nothing in the words of these sections to indicate that the powers of the court are only to make an order for division along the lines of that sought by a party to the proceedings. The narrow jurisdiction of the past, split as it was between the Partition Acts and the 1952 Act is replaced by a broad discretion, limited by s 339(1), but beyond that turning on whatever factor appears to the court to be relevant when the broad range of factors in s 342 and the broad powers in s 343 are considered. There must be an application under s 339, and the boundaries of the discretion are set out in s 339(1). However, there is no requirement that the orders made can only be those that were specifically sought by a party. Such a restriction would unduly cramp the scope and efficient operation of what is clearly remedial legislation.

[23] Viewing the Act in this way, I am satisfied that if it is appropriate to make an order under s 339(1)(c) that Mr Keery purchase the share in the property owned by each of Ms Thomas and Mr Thomas, each of the latter parties are bound by that order, pursuant to s 339(5), as well as by any further orders that might be made under s 339(4). As a result they would be bound to give effect to the orders by transferring the property to Mr Keery.

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5 *Bayly v Hicks* HC Whangarei CIV-2009-488-547, 19 August 2011.
6 *Bayly v Hicks* [2013] 2 NZLR 401.
7 *Bayly v Hicks,* above n 6, at [27].

Discussion of the application

[24] As noted, s 342 requires the Court to have regard to stated factors. Mr Keery owns one-third of the property, and Ms Thomas and Mr Thomas also own one-third each. He therefore has a minority interest in the property. It is, however, the residence of Mr Keery and his wife. Although Ms Thomas and Mr Thomas are repaying by instalments the debt to Dorchester to which I have referred, Ms Thomas has not made any payment in respect of the property for around four years, nor has Mr Thomas for around seven years. They accept that outgoings on the property have been borne approximately equally between them and Mr Keery, reflecting occupation periods.

[25] The evidence before the Court establishes that neither Ms Thomas nor Mr Thomas has any equity in the property. The only evidence before the Court on its value is given by the valuers instructed by Mr Keery, who assess the value at $320,000. However, that is on the basis that the work required to repair the earthquake damage is carried out. The cost of that was assessed by EQC at $118,000, so the property is worth $202,000 as it stands. $92,000 is owed on the first mortgage. Therefore the presently assessed value of the equity in the property owned by Mr Keery, Ms Thomas and Mr Thomas equally, is $110,000.

[26] The share of Ms Thomas and Mr Thomas is two-thirds of that, $73,333. From that sum, however, must be deducted their acknowledged debt to Mr Keery of $65,400, which leaves them with the sum of $7,933.

[27] The evidence also establishes that Mr Keery paid arrears of mortgage instalments to the first mortgagee of $7,766.04, two-thirds of which was the responsibility of Ms Thomas ad Mr Thomas, amounting to $5,177.36. Deduction of this sum from their entitlement to the equity leaves them with $2,755.64.

[28] However, they are responsible to Dorchester, and to the Legal Services Agency, each of which asserts an interest in the property pursuant to charges over it which they have granted. Those organisations are, on the evidence, owed at least $8,800. Legal Services is owed $2,800 plus interest. The sum owing to Dorchester

is said by Ms Thomas's counsel to be between $6,000 and $9,000.[8] Taking the lower of these figures, a total of some $8,800 is owing by Mr Thomas, of which $6,000 is also owing by Ms Thomas.

[29] It follows that if the valuation provided by Mr Keery is accepted by the Court, neither Ms Thomas nor Mr Thomas has any remaining equity in the property. Ms Dey urged me to give her client more time to obtain a further valuation, but in my view it would not be just to Mr Keery to allow her to do so. This application, with the valuation annexed to the affidavit of Mr Keery, was served on Ms Thomas in September. She has had ample opportunity to provide a further valuation, and has not done so. Although Ms Dey stressed, quite reasonably, that Ms Thomas has been fully committed with an infant child since she gave birth in October, she has had time to instruct her solicitors to oppose this application and I cannot accept that she has not had time to instruct those solicitors to arrange a further valuation. I therefore proceed on the basis that the valuation provided is a fair representation of the likely market value of the property.

[30] There was further evidence from Mr Keery on further payments he says he has made to the first mortgagee but Ms Thomas takes issue with those and I find that they are not substantiated on the evidence before me. That is not to say that they did not occur, but this is an application for summary judgment and this aspect of the evidence is in dispute. I have reached my conclusions, therefore, without taking into account the possibility that Mr Keery may have made further payments.

[31] By reference to s 342(c), I conclude that neither Ms Thomas nor Mr Thomas has any equity in the property.

[32] Ms Thomas maintains she would suffer hardship if the property were to be sold, as she would be called upon to immediately repay the balance owing to Dorchester, and the debt to the Legal Services Agency would also have to be repaid. Whilst that is owed by Mr Thomas, who has not taken any steps in this proceeding, it is implicit in Ms Thomas's submission that she too may have to find the sum owing to this agency.

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[8] Counsel's submissions paragraph 30.

[33] There is some force in the submission that requiring immediate payments of these debts, which is not presently required, would cause some hardship to Ms Thomas. This is able to be alleviated by the Court imposing a condition on the order Mr Keery seeks that he pay the balance owing to Dorchester and the balance owing to the Legal Services Agency. Mr Keery will consent to an order in these terms and also consent to a condition that he pays the costs of the documentation required for this purpose.

[34] I conclude that there will be no hardship to either Ms Thomas or Mr Thomas if the order is made, but given that Mr Keery and his wife live in the property, and he is the only party with any remaining interest in it in financial terms, there would be significant hardship to him by declining the order.

[35] For these reasons I conclude that orders should be made generally as sought by Mr Keery.

Outcome

[36] I make the following orders:

1. Mr Keery will purchase the share in the property at 111 Bower Avenue, Christchurch of Ms Thomas, and the share in the property of Mr Thomas, on the conditions below.

2. The purchase shall be effected without payment of consideration by Mr Keery to either Ms Thomas or Mr Thomas. It will be effected as soon as practicable.

3. Ms Thomas and/or Mr Thomas shall within five working days of the date of this judgment provide to Mr Keery's solicitors written authority addressed to each of Dorchester and the Legal Services Agency to disclose to them the sum owed to each. These details are to be provided to Mr Keery in order for him to effect repayment of sums owed, and to arrange for releases of their caveats, and, in the case of the agency, its statutory land charge, upon payment.

4. Mr Keery will pay to Dorchester Finance Limited and to the Legal Services Agency such sums as shall be owed to those parties and charged against the property including their reasonable fees for discharge of their caveats and the statutory land charge of the Legal Services Agency.

5. Within five working days of the date of this judgment Mr Keery will request from the first mortgagee a release of the personal liability of each of Ms Thomas and Mr Thomas to the first mortgagee in respect of indebtedness secured over the property.

6. Prior to transfer of the property to Mr Keery he will provide to Ms Thomas and Mr Thomas a release of their liability to the first mortgagee or, should that not be provided by the first mortgagee, a deed of indemnity of any liability either may have to the first mortgagee for the balance of indebtedness secured over the property.

7. Each of Ms Thomas and Mr Thomas will take such steps as are reasonably necessary to effect a transfer of the property to Mr Keery pursuant to the order that he purchase their interests in the property from them.

8. Mr Keery will pay all legal fees and disbursements attendant on giving effect to the orders made, with the exception of the fees of the solicitors for Ms Thomas and Mr Thomas in relation to the transfer of the property to Mr Keery.

9. I reserve leave to Mr Keery and Ms Thomas to apply for such further or other orders as may be necessary to give effect to the substantive orders made in this judgment.

10. Ms Thomas and Mr Thomas will pay to Mr Keery costs on this application on a 2B basis plus disbursements fixed by the Registrar. The liability of Mr Thomas shall be confined to costs up to and including service of the proceeding and this application for summary judgment on him, together with disbursements thereon.

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J G Matthews
Associate Judge

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