

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

**CIV-2013-404-003273
[2013] NZHC 3265**

UNDER the Property Law Act 2007
IN THE MATTER of an application under s 339 of the Act for
the sale of the property and the division of
the proceeds among the co-owners and for
orders under s 343 of the Act
BETWEEN PAMELA COOPER
Plaintiff
AND DAVID JOHN FRANCIS PONGI
Defendant

Hearing: 5 December 2013
Appearances: M Keall for Plaintiff
No appearance for Defendant
Judgment: 9 December 2013

JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 9 December 2013 at 9.30 am
pursuant to R 11.5 of the High Court Rules.

Registrar / Deputy Registrar

Date.....

Introduction

[1] The plaintiff, Pamela Cooper, is a co-owner of a house at 755 West Coast Road, Oratia. She previously owned the house herself but under a property sharing agreement dated 17 June 2009 she and her adult foster son, David Pongi, agreed to purchase the property jointly. Ms Cooper now wishes to terminate the agreement and have the house sold. But Mr Pongi will not co-operate in that process. Ms Cooper has applied for an order under s 339 of the Property Law Act 2007 that the property be sold and, after accounting for various expenses connected with the property, the proceeds distributed between her and Mr Pongi.

[2] Under s 339(1)(a) the Court may make an order for the sale of property owned by co-owners and the division of the proceeds among them. The prerequisites set out at s 339(2) are that any such order must not contravene s 340(1). This relates to restrictions on the subdivision of land and is not relevant to the present case. Further, an order can only be made on an application made and served in the manner required by s 341. This has been done. Finally, an order can only be made after regard to the matter specified in s 342. These matters are:

- (a) The extent of the share in the property of the co-owner;
- (b) The nature and location of the property;
- (c) The number co-owners and 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 maintenance of the property;
- (f) Any other matters that the Court considers relevant.

Grounds for the application

[3] When Ms Cooper and Mr Pongi entered into the agreement, the notional purchase price of \$450,000 was satisfied by Ms Cooper contributing her equity of

\$200,000 and Ms Cooper and Mr Pongi jointly borrowing \$258,000 from the ASB Bank.

[4] Ms Cooper and Mr Pongi both lived at the property until December 2009. During that time they shared the outgoings, including the mortgage payments. However, the relationship between them broke down and Mr Pongi moved out of the property in December 2009. Shortly afterwards he began withdrawing funds from the joint ASB account maintained to meet mortgage payments. Ms Cooper had resolved to terminate the property-sharing agreement.

[5] Under the agreement:

- (a) Except as otherwise agreed the co-owners were to jointly meet all outgoings (clause 2);
- (b) Upon the sale, transfer or other disposition of the property the net proceeds were to be divided so that the first 200/450th of the sale proceeds would be paid to Ms Cooper and the balance applied against any mortgage with the surplus divided between Ms Cooper and Mr Pongi equally (clause 7);
- (c) Either party could give notice in writing to the other of a desire to terminate the agreement. In that event the party who received the termination notice would have the first option to purchase the other party's share. If that option is not exercised within three months upon the date of the notice then the other party shall have the option to purchase the remaining share. If neither party exercises the option to purchase the property is to be immediately placed on the market for sale at a price agreed on (clause 8).

[6] In February 2011 Ms Cooper gave Mr Pongi notice of her wish to terminate the agreement. This notice was in the form of a letter from Ms Cooper's solicitor, Mr Jury, hand delivered by Ms Cooper's daughter. It invited Mr Pongi to exercise his right to purchase Ms Cooper's share. There was no response to the notice and no response to subsequent emails from Ms Cooper and letters from Mr Jury advising that Ms Cooper did not wish to purchase Mr Pongi's share and wished instead to sell the

property. Mr Pongi was been served with this application on 31 July 2013 but has not contacted Ms Cooper or her solicitor and has taken no steps.

[7] The property is a two-storey, three-four bedroom house set on 1,442 square metres of land and has a current market value of \$446,000. Ms Cooper is now 68 years old. The property is too big for her. The house and garden are too large and difficult for her to maintain. Ms Cooper has continued to meet the mortgage payments but is finding it increasingly difficult to do so on her relatively modest income of \$47,000 before tax.

[8] I am satisfied that there will be hardship to Ms Cooper if the property is not sold. I am also satisfied that there will not be hardship to Mr Pongi if the property is sold since he has not lived at the property for some time and shown no interest in either living there in the future or purchasing Ms Cooper's share. He will receive his share of any surplus. For these reasons there will be an order under s 339.

Form of orders

[9] Ms Cooper wishes to arrange the sale of the property immediately, have the mortgage cleared and the costs connected with the sale paid from the proceeds before the remaining funds are distributed in accordance with the agreement. In addition, she has deposed that she has paid for all of some costs such as rates and insurance and mortgage payments for which Mr Pongi was equally liable under the agreement. She seeks to have that share of the costs repaid to her from the amount to which Mr Pongi would be entitled from the proceeds.

[10] Ms Cooper provided updating information as to these payments. I am satisfied that:

- (a) Between 17 June 2009 and 29 November 2013 Ms Cooper and the defendant jointly made mortgage repayments totalling \$90,132.45. Mr Pongi's share of those mortgage payments was \$45,066.23 but his actual contribution was only \$24,943.82. Mr Pongi therefore owes Ms Cooper \$20,122.41;
- (b) Mr Pongi owes Ms Cooper \$3,703.03 in relation to his share of the rates that Ms Cooper has paid;

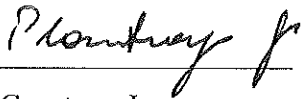
- (c) Mr Pongi owes Ms Cooper \$1,281.36 in relation to his share of the insurance.
- (d) Ms Cooper has incurred costs of \$6,417.96 in preparing the property for sale. This includes painting, carpeting, waste disposal and repairs.

[11] I make the following orders:

- (a) The property at 755 West Road, Oratia, Auckland, being all that parcel of land comprising 1442 square metres more or less and being part Lot 80 deposited plan 18816 in Certificate of Title NA1038/129 North Auckland be sold by public sale to be organised by the plaintiff or her agent;
- (b) In the event that the defendant fails or refuses within 24 hours of an email being sent to him requesting that he sign any authority to sell, agreement for sale and purchase or other document required to effect the sale of the property, including a private individual client authority and instruction for an electronic transaction, the plaintiff is authorised to execute such document or documents for and on behalf of the defendant;
- (c) The proceeds of sale of the property are to be disbursed in the following priority and manner:
 - (i) The payment of the amount due and owing under the mortgage as at the date of payment;
 - (ii) Payment of any real estate agent's commission and legal fees incurred by the vendors in connection with the sale of the property;
 - (iii) Payment of any marketing costs in relation to the sale;
 - (iv) Payment to the plaintiff of \$6,417.96 as reimbursement for costs relating to preparation of the property for sale;

- (v) The first 200/450th of the balance of the sale proceeds to the plaintiff;
- (vi) Subject to order (vii) below the remainder of the sale proceeds to be divided equally between the plaintiff and defendant;
- (vii) From the defendant's share the following sums are to be deducted and paid to the plaintiff's solicitors:
- \$20,122.41 together with 50 per cent of repayments made in relation to the mortgage from 29 November 2013 down to the date of sale;
 - \$3,703.03 together with 50 per cent of total rates paid in relation to the property from 29 November 2013 down to the date of sale;
 - \$3,327.72 together with 50 per cent of house maintenance costs in relation to the property from 17 May 2013 down to the date of sale; and
 - \$1,281.36 together with 50 per cent of insurance costs in relation to the property paid from 21 November 2013 down to the date of sale.
 - Costs on this application of \$17,910 plus disbursements of \$1,230;
- (viii) The balance owing to Mr Pongi is to be held by Duncan King Law on trust in interest-bearing account in Mr Pongi's name. Duncan King is to notify Mr Pongi that it is holding the funds and seek instructions as to payment.

[12] The plaintiff has leave to apply for further directions.


P Courtney J