

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE

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**IN THE FAMILY COURT
AT AUCKLAND**

**FAM-2018-004-000313
[2018] NZFC 3885**

BETWEEN

PETER BERIC
Applicant

AND

JOANNA MAITLAND CHAPLAIN AND
SIMON HOLM EADY AND OLAF GUY
EADY
Respondents

Hearing: 10 May 2018

Appearances: V Bruton QC and P Brown for the Applicant
Mr Williams and F McGeorge for the Respondents

Judgment: 28 May 2018

RESERVED JUDGMENT OF JUDGE P WHITEHEAD

[1] The applicant seeks an occupation order pursuant to s 27 Property (Relationships) Act 1976 in respect of Flat 1, [address deleted] (hereinafter called 'Flat 1').

Background History

[2] For convenience and completion there is attached to this judgment at appendix "A" a chronology of events prepared by counsel for the applicant, which sets out in detail the historical events leading to the application for an occupation order under s 27 Property (Relationships) Act 1976.

[3] In summary, on 12 March 1965 Roy McElroy (hereinafter called 'Roy') settled a trust which was unnamed at the time, but later known as "*D M Eady Family Trust*" (hereinafter called 'the trust') with himself and Olaf Eady as trustees. The power to appoint trustees was held by Roy during his lifetime and after his death by executor of his will. The discretionary beneficiaries were his step-daughter, Diana Maitland (hereinafter called 'Diana') and her children.

[4] Roy's wife Joan (hereinafter called 'Joan') purchased [Flat 1] on 16 April 1973 and she and Roy occupied Flat 1.

[5] On 30 June 1975, Joan, by agreement for sale and purchase, sold Flat 1 to Diana for a purchase price of \$62,500 which appears never to have been paid. On the same date, Diana formally acknowledged to the trustees of the D M Eady Family Trust that she had purchased Flat 1 on behalf of the trust and that she held the property of the Flat upon trust for the trust.

[6] Diana was subsequently appointed as a trustee of the trust in June 1980 and her mother Joan passed away in 1983, with Roy continuing to occupy the flat.

[7] On or about 1 July 1986, or early 1987 according to the respondents, the applicant and Diana commenced living together at [Property 3 details deleted], a property that Diana purchased in April 1970. Together with Roy and another party,

Diana also purchased [Property 2 details deleted] in the Bay of Islands on behalf of the trust, which the applicant and Diana used as if it were their property.

[8] On 11 October 1988, Diana became sole registered owner of the occupation licence for Flat 1 and on 6 March 1989, Diana received a transfer of the shareholding in High Point Apartments Limited from the executors of her late mother.

[9] Diana then transferred the High Point shares and licence to occupy to Roy, herself, Olaf Guy Eady and Christopher Horton as trustees of the trust on 8 February 1991.

[10] Roy continued to occupy the flat until May 1992 and the flat was then rented through to 1994. The flat was then renovated extensively and at considerable cost, using the proceeds of sale of Diana's property at [Property 3].

[11] At the end of 1994, after the death of Roy, Diana and the applicant moved into the newly renovated flat.

[12] Diana was diagnosed with breast cancer in 2001 and in 2012 with secondary breast cancer and was given some two or so years to live. The applicant provided significant care to her over this period of time and until her death.

[13] She signed a new will leaving the applicant the right to live in the flat for one year following her death.

[14] The next significant event was on 22 December 2012 when there was a fracas at a family social gathering, when the husband of one of the trustees assaulted the applicant and he made a complaint to the police, which he subsequently withdrew.

[15] In 2015, the trustees of the trust were Diana, Olaf Eady, Simon Eady and Joanna Chaplain. In 2016, Diana sought to retire as trustee of the trust and to have her interest paid out due to her ill health; and so that she would have something to leave to the applicant.

[16] She subsequently renounced her interest in the trust and was paid \$500,000 by the trustees for her interest, which was assessed by KPMG.

[17] In February 2017, Diana gave a letter to the applicant requesting a separation and the end of the relationship as a result of the previous fracas between the applicant and Joanna Chaplain's husband. However, the parties never separated and continued to live together in the flat.

[18] The trust was wound up on 3 April 2017 and a new trust established called the "*ECI Trust*". Assets from the trust were gifted to the trustees of the ECI Trust and the [Flat 1] Occupation Licence was transferred to Olaf Eady, Joanna Maitland Chaplain and Simon Holme Eady. Diana resigned as a director and shareholder of High Point Apartments Limited.

[19] A final will was made and executed by Diana on 4 February 2018 and she died some six days later.

[20] On 13 March 2018, the applicant was served with a trespass notice in respect of Flat 1 and he was prevented from returning to his home. As a result, the applicant has moved in with his daughter.

[21] The applicant seeks occupation of the flat and at the age of 78 says that he was in a de-facto relationship with Diana for 32 years and lived in the flat for some 25 years

The Law

[22] Section 27 Property (Relationships) Act 1976 provides:

27 Occupation orders

- (1) The court may make an order granting to either spouse or partner, for such period or periods and on such terms and subject to such conditions as the court thinks fit, the right personally to occupy the family home or any other premises forming part of the relationship property.

- (2) Where an order is made under subsection (1), the person in whose favour it is made shall be entitled, to the exclusion of the other spouse or partner, personally to occupy the family home or the other premises to which the order relates.
- (3) An order made under subsection (1) against a spouse or partner shall be enforceable against the personal representative of the person against whom it is made, unless the court otherwise directs.
- (4) An order made under subsection (1) by the District Court or the Family Court is enforceable as if it were an order for recovery of land made pursuant to [section 79\(2\)\(c\)](#) of the District Court Act 2016.
- (5) In proceedings commenced after the death of one of the spouses or partners, this section is modified by [section 91](#).

[23] Section 91 provides:

91 Qualifications on application of sections 25 to 34 and 43 to 44F

- (1) The court must not make an order in proceedings commenced after the death of one of the spouses or partners unless it is satisfied that one of the spouses or partners has died.
- (2) When the court makes an order under [section 27\(1\)](#), the surviving spouse or partner is entitled personally to occupy the family home or other premises to which the order relates, to the exclusion of any other person who would otherwise be entitled to occupy the family home or those premises.
- (3) The court may not make an order under [section 28](#) in favour of a surviving spouse or partner unless,—
 - (a) at the time of the making of the order, the tenancy of the dwellinghouse is vested in the personal representative of the deceased spouse or partner; and
 - (b) either—
 - (i) at the time of the making of the order, the surviving spouse or partner is residing in the dwellinghouse; or
 - (ii) at the date of the death of the deceased spouse or partner, the deceased spouse or partner was the sole tenant of the dwellinghouse, or was a tenant in common with the surviving spouse or partner.

[24] It is argued by the applicant that –

- (a) Until the transfer to the licence to occupy to Diana's three children on 5 April 2017, the trustees of the trust shared a common intention that the flat was Diana's to do with as she wished.

[25] It is accepted that the applicant and Diana occupied the flat for some 25 years to the exclusion of any other party and further that she applied some \$300,000 plus of the sale proceeds from [Property 3] to the improvements made to the flat. But with respect to that argument, she occupied the flat by the will of the trustees and her occupation could have ended with a majority vote of the trustees. She acknowledged from 30 June 1975 that she was holding the property on trust for the trust, notwithstanding that it was not formally transferred until a later date.

[26] The Court therefore, does not accept that the trustees shared a common intention that the flat was Diana's to do with as she wished.

- (b) It is argued thus, at least to the extent of its registered ownership of the apartment, the DM Eady Family Trust was a sham.

[27] Reference is made to *JFC Mezhdunarodniy Promyshlenmy Bank v Pugachev* [2017] EWHC 2426 Chancery and *OA v Wilson* [2008] 3 NZLR 45. Reference is also made to *Webb v Webb* (CA, Cook Islands, Misc CA7/17, 24 November 2017).

[28] Both counsel spent considerable time on submissions relating to the trust being a sham.

[29] However, it was recognised by counsel for the applicant that if there was no sham, then there was no relationship property interest in the flat by either party. The difficulty with raising an issue of a sham, is that the scope of the Family Court's equitable jurisdiction is not defined. The issue that the Court is being asked to consider is the validity of the trust formed not by either party to the de-facto relationship, but rather by Diana's step-father. Diana's interest in the trust has only ever been as a discretionary beneficiary and in the Court's determination, that makes the validity of the trust more certain.

[30] There is an argument (not raised by either counsel) that the Family Court does not have jurisdiction to find a trust as a sham trust, as that requires the exercise of the High Court's inherent jurisdiction – (refer *F v W* [12009] 2 NZTR 19-024 (HC)). But the High Court has also ruled the Family Court does have the power to ascertain if a trust is validly constituted for the purposes of determining ownership of trust property – (refer *Yeoman v Public Trust Limited* [2011] NZFLR 753 (HC)).

[31] In *Yeoman v Public Trust Limited* at page 40, Associate Judge Bell states the Family Court cannot hear disputed claims that assets in apparent ownership of a third party are beneficially owned by one of the parties in a relationship property proceeding. But, His Honour found that where an asset is apparently owned by one or both relationship parties and a third party contends to have a beneficial interest in that asset, the Family Court can decide the extent of that third party's interest at this inventory stage.

[32] In this case, the attempt is to ask the Family Court that the asset and apparent ownership of the trust is beneficially owned by one of the parties, that is Diana, by reason of the trust being a sham and it would appear from Associate Judge Bell's decision that the Family Court cannot hear such disputed claims as there is no equitable jurisdiction to do so.

[33] In fairness to the applicant, Ms Bruton QC did state that she was not seeking that this Court determine that the trust was a sham, rather that it may be open to consider that the trust was a sham. If that was the case, the Court would then be asked to step around the trust and determine that there was an interest by the applicant in the flat as the family home, the flat being relationship property, or at least possibly relationship property.

[34] As stated, the Court is not being asked to find that the trust is a sham. Nor could it do so on the available evidence before it. Therefore, the Court must accept that the flat is owned by the trust with a claim by the applicant that Diana had a beneficial interest in it. This falls within the first category referred to by Associate Judge Bell in *Yeoman* (above).

- (c) The apartment was beneficially owned by Mrs Eady.

[35] The Court has determined that is not the case. The apartment was owned by the trust, of which Diana was a discretionary beneficiary until she was removed as a beneficiary of the trust having renounced her interest in it on 22 September 2016.

[36] The trust then disposed of its assets and wound itself up on 3 April 2017 with the establishment of the “*ECI Trust*” which took over the assets from the trust which were gifted to it by the trustees of the “*ECI Trust*”. At the present time, therefore, and at the date of Diana’s death the association of Diana to the trust has been totally removed and the trust assets transferred by the trustees to the “*ECI Trust*” on the trust being wound up. Diana therefore held no interest in the trust at her death.

- (d) As the apartment/licence to occupy was Diana’s and the applicant’s family home, they were relationship property.

[37] Section 1M of the Property (Relationships) Act 1976 states:

1M Purpose of this Act

The purpose of this Act is—

- (a) to reform the law relating to the property of married couples and civil union couples, and of couples who live together in a de facto relationship:
- (b) to recognise the equal contribution of both spouses to the marriage partnership, of civil union partners to the civil union, and of de facto partners to the de facto relationship partnership:
- (c) to provide for a just division of the relationship property between the spouses or partners when their relationship ends by separation or death, and in certain other circumstances, while taking account of the interests of any children of the marriage or children of the civil union or children of the de facto relationship.

[38] Clearly, the Act relates to property of married couples and of couples who live together in a de-facto relationship.

[39] As submitted by counsel for the respondent, for property to be relationship property in terms of the Act, it must be owned in some aspect by one of them, or one of them would have a beneficial interest in that property.

[40] “*Family Home*” is defined as –

- (a) Means the dwellinghouse that either or both the spouses or partners use habitually or from time-to-time as the only or principal family residence, together with any land, buildings or improvements pertinent to that dwellinghouse and used wholly or principally for the purposes of the household; and
- (b) Includes a joint family home.

[41] To qualify as a “*family home*”, it must satisfy the requirement, in my determination, under s 1M, that is, it must be owned by one or other or both of the parties.

[42] Counsel for the applicant asks the Court, in terms of s 27(1) to grant an order providing the right of the applicant personally to occupy the family home. She defines the “*family home*” as the flat. She asks the Court for a bold interpretation of the words “*family home*” being restricted to a place where the parties habitually have their principal family residence, but not requiring that it be part of the relationship property. This argument is clearly in the alternative to the claim by the applicant that the trust is a sham.

[43] Whilst it is accepted that in terms of the definition of a family home the flat was the principal residence, it cannot, in my determination, qualify as a family home under the Property (Relationships) Act and in particular under s 27(1) because it is not owned by one or either of the parties or both of them.

[44] In reaching this decision I refer to the following judgments which support the position adopted by the Court:

- *R v R* [2010] NZFLR 555.

[45] In this decision, Judge Burns determined there needed to be three elements in respect of an occupation order –

- (i) there had to be a family home as defined;
- (ii) one or both of the parties had to be the beneficial owner of the property; and
- (iii) the property interest in question had to be relationship property.

I agree with Judge Burns determination.

- *Gao v Elledge* [2003] NZFLR 378.

[46] In this decision, the Court determined that there would be no jurisdiction for an occupation order if the property was owned by a family trust unless one or both of the parties has a beneficial interest in the trust assets and that interest is relationship property.

[47] In that case there was an apartment transferred into a trust for the parties' benefit. The trust terms obliged the sole trustee to act on direction of the parties as beneficiaries and transfer the property to them if so directed. The effect was to vest a beneficial interest of the trust property in the husband and wife; and because the parties settled the trust, their beneficial ownership of the apartment was relationship property. This is distinguishable from the current situation where Diana had no such right to direct the trustees to transfer the flat to her.

- *Keats v Keats* [2006] NZFLR 470.

[48] In this decision, Judge Grace determined that the parties were purely discretionary beneficiaries and therefore there was no right, nor interest that was property under s 2. All the parties had was a mere expectancy.

- *[Name deleted] v [Name deleted]* (Family Court Hamilton, 2008-019-992, 11 March 2009).

[49] The surviving de-facto partner was unable to obtain an occupation order as there was no beneficial interest in the home held in trust.

[50] The deceased had a right to reside with whomever he permitted to reside with him, but that ended on his death. The survivor in that case was not a beneficiary and there was no right to an occupation order.

[51] These two cases are in the Court's determination similar in outcome to the case before this Court.

[52] Accordingly, the applicant's case must fail for an occupation order and the application is dismissed.

[53] Whilst the Court has some sympathy for the predicament of the applicant, it must be said that in answer to the applicant's submissions as to fairness and justice, that this is a Court of law and not of morals.

[54] Counsel sought further directions and orders, but unfortunately those were not able to be addressed given the time that was available to the Court in respect of this hearing. It is sought that the proceedings be transferred to the High Court, but there are proceedings for interim spousal maintenance and spousal maintenance and the Court is uncertain whether it is sought that those proceedings also be transferred. Ordinarily they would be dealt with in this Court, at least at the interim spousal maintenance stage.

[55] I make the following directions noting that in respect of costs, because of the rather high-handed manner in which the applicant's occupancy was terminated, I have determined that costs should lie where they fall on this application:

1. The Registrar is to allocate a judicial conference as soon as possible for the issue of transfer to the High Court and spousal maintenance applications to be considered; and what directions are sought.

2. Costs in respect of the current application determined by this judgment are to lie where they fall.

P Whitehead
Family Court Judge