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

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IN THE FAMILY COURT
AT DUNEDIN

I TE KŌTI WHĀNAU
KI ŌTEPOTI

FAM-2021-012-000428
[2022] NZFC 1033

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[HENRY BENINI] Applicant
AND	[LIANNA WOODROW] Respondent

Hearing:	4 February 2022
Appearances:	B L Gray for the Applicant J G O'Neill for the Respondent C B Cumberland as Counsel to Assist
Judgment:	4 February 2022

JUDGMENT OF JUDGE E SMITH

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[1] This is a defended interlocutory application as to whether a notice of claim by the applicant placed on the respondent's property should be sustained or not.

[2] The applicant registered a notice of claim as against the respondent's property on the basis that he believed he had an actionable claim to it under the Property (Relationships) Act 1976 ("the Act").

[3] On 25 September 2021, the respondent lodged a s 143 Land Transfer Act 2017 ("LTA") notice of application to lapse the notice.

[4] On 8 October 2021, the applicant gave notice under s 143(3)(a) of the Land Transfer Act 2017 to the Registrar-General of Land that the notice of claim does not lapse.

[5] Under s 143(3)(b) of the LTA, the notice would have lapsed, unless within 20 working days after the date on which the applicant gave notice to the Registrar-General of Land under s 143(3)(a) of the Act, the applicant served an order that the notice not lapse, or interim order to that effect, or an order adjourning the application.

[6] The statutory timeframe for the court orders sought to be served on the Registrar-General of Land would have expired on Monday 8 April 2021.

[7] Accordingly, on 4 November 2021, the applicant filed in the Family Court at Dunedin, the following:

(a) a substantive application pursuant to s 25 of the Property (Relationships) Act 1976 to divide relationship property as between him and the respondent (together with a narrative and RP1 affidavit); and

(b) an interlocutory application without notice for an order that a notice of claim under s 42 of the PRA not lapse.

[8] Her Honour Judge Manuel considered that without notice application on the on 4 November 2021 and made an order adjourning the application, with a direction for an urgent submissions-only hearing on that interlocutory application.

[9] This is that directed submissions-only hearing, to determine whether the notice of claim does not lapse or be sustained.

Parties Positions

[10] This is a matter where almost all material factual matters are highly contested, if not the evidence diametrically opposed.

[11] For the applicant to have a claim to any relationship property he would have to be initially successful in one of two arguments being sustained, being either:

(i) the parties were in a qualifying de facto relationship of over three years' duration (he claims five years, nine months); or

(ii) if a qualifying de facto relationship existed and, if it was under three years, the Court will not be able to make an order for division unless it is satisfied there has been a substantial contribution to the relationship by the applicant and a failure would result in serious injustice (s 14A PRA).

[12] The applicant claims:

(a) the parties were in a five-year nine-month de facto relationship from October 2014 to 16 August 2020; and

(b) The property the respondent purchased (with monies advanced to her by her parents) was purchased during the relationship, as a home for both of them and in which they subsequently lived together.

[13] The respondent's position is that there were three de facto relationships all of short duration as follows:

(i) January 2015 to August 2016;

(ii) March 2017 to May 2017;

(iii) 9 May 2019 to 3 June 2020.

[14] For the respondent's part, it is argued further:

(a) that the applicant's contribution did not extend beyond living expenses at any time;

(b) he has made no contributions, financial or otherwise, beyond his weekly contribution to household expenses;

(c) In that regard, it is argued he has failed to show contributions beyond the norm, and, irrespective of whether he has made a substantial contribution, it will nevertheless be argued that serious injustice would not result from an order under the Act being declined.

(d) Further for the respondent's part, she argues the first relationship (as claimed by her) of January 2015 to August 2016 was of short duration. It is not alleged by the applicant that he made a substantial contribution to the de facto relationship, he made no capital contributions;

(e) The second relationship was also of short duration. It may be disregarded by virtue of s 2E(2) of the PRA;

(f) The earlier relationships, concluding over five years ago, and over four years ago respectively, the respondent is going to argue any claim in respect of those is out of time.

(g) With respect to the third relationship of May 2019 to June 2020, the respondent will argue is of short duration and it cannot be reasonably arguable that an order would be able to be made in respect to the family home under s 14A, as the relationship was short, there was no child of the relationship, no contributions over the norm were made, and the failure to make an order would not result in serious injustice.

(h) In particular, the respondent relies on the evidence that when she bought the property at [address deleted] on 17 July 2015, she used a deposit provided by her parents.

The Law

[15] The purpose of a notice of claim under s 42 of the PRA is to protect an interest in property which could be the subject of a relationship property claim. If the applicant can prima facie establish an arguable claim, then it would not be appropriate to order the removal of the notice of claim.

[16] The Court must therefore determine whether the applicant has a reasonable arguable case for the interest claimed. The applicant has the burden of proof on the balance of probabilities. Even once that onus is established, the Court still retains the discretion to remove the notice, but the discretion is to be exercised cautiously, so as the Court would first need to be completely satisfied the applicant's legitimate interests would not be prejudiced by a lapse.

[17] The application requires the application to put forward a reasonable argument that either a qualifying relationship existed or if the relationship is short duration that he made a substantial contribution to the relationship, to satisfy the Court that a failure to make substantive orders under the Act would result in serious injustice under s 14A(2) of the PRA.

[18] The purpose of the notice is to protect the applicant's reasonably arguable interest arising out of the Act. In that regard, the applicant need only establish a reasonable argument that his account of the relationship be preferred.

[19] Counsel for the applicant referred to the content in *Fisher on Matrimonial and Relationship Property* on the grounds for removal of a notice, in which the learned author provided the following applicable regime:[1]

> (1) On a motion for removal of notice of claim or a motion for order that a notice of claim shall not lapse, the general basis upon which the Court operates is similar to the law developed in relationship to caveats. That is, the following substantive grounds for removal arise:

[1] Robert Fisher (ed) *Fisher on Matrimonial and Relationship Property* (online looseleaf ed, Lexis Advance) at [9.28].

(a) Where third parties have acquired an equitable interest in the land inconsistent with the continued operation of the notice of claim by virtue of a transaction with the registered proprietor prior to the lodging of the notice of claim;

(b) (probably) where creditors have established prior right to the land by charging order, execution or adjudication and bankruptcy before the lodging of a notice of claim;

(c) where continued operation of the notice of claim is not necessary for the protection of non-owner substantive rights under the Act as against the other party;

(d) where the non-owner's conduct would make it inequitable to afford priority to the notice of claim; and

(e) (doubtfully) in the exercise of an overriding judicial discretion to remove notices of claim.

[20] For the respondent's part, she argues, and I accept, that the principles for sustaining a caveat are reasonably imported into considerations and arguments as to the sustenance of a notice in these circumstances. Those principles, with respect to a caveat at least, were set out in *Philpot v Noble Investments Limited* at paragraph 26, as follows:[2]

(a) The onus is on the applicants to demonstrate that they hold an interest in the land that is sufficient to support the caveat, but they need not establish that definitively;

(b) It is enough that the applicants put forward a reasonably arguable case to sustain the claim of interest;

[2] *Philpot v Noble Investments Ltd* [2015] NZCA 342

(c) The summary procedures involved with the applications of this nature are not suited to the determination of disputed questions of fact. An order for removal of a caveat will only be made if it is patently clear that the caveat cannot be maintained – either because there is no valid ground for lodging it in the first place or because such a ground no longer exists;

(d) When an applicant has discharged the burden upon it, the Court retains a discretion to remove the caveat which it exercises on a cautious basis. Before it does so, the Court must be satisfied that the caveators' legitimate interest would not be prejudiced by removal.

Decision

[21] It would be fair to say that the PRA proceedings are in their infancy (although much material has already been amassed). Only affidavits of the parties are to hand. Clearly, there is going to be affidavit evidence of other critical deponents, if not more documentary evidence to determine the existence of a de facto relationship or not and critically its length. Even from those affidavits to hand, they show a diametrically opposed version of the evidence and the facts and the parties' interpretation as to behaviours of the other.

[22] I hasten to add that determining whether a qualifying relationship and its length exists having regard to the indicia at s 2D of the PRA can be notoriously difficult, the matters highly factually overlaid and very often the subject of detailed significant cross-examination, and the need for the court to untangle, often over large periods of time, conflicting evidence, including documents advanced in support of different propositions. The Court is also required to make interpretations of behaviours as to be indicative, or not, of that relationship. This is, in my view, almost utterly impossible and certainly imprudent to try and do so just on the untested affidavit evidence that is to hand today.

[23] At best, the Court can only form an impressionistic view as to the evidence and the strength of the parties' respective cases and even that is susceptible to error.

However, to cauterise and summarise the strength of the applicant's case from the affidavit and documentary evidence to date. It is an essential claim of:

(a) the parties cohabitated for periods of time (highly disputed as to the extent and nature of the cohabitation);

(b) the extent and nature of the use of a joint bank account for five years (highly disputed as to the monies that were deposited, withdrawn, the purposes for that, and during which periods of time);

(c) holding themselves out as in a relationship;

(d) living together when [the property] was purchased;

(e) going overseas together for holidays (alternative interpretation is suggested by the respondent as to why that occurred).

[24] On careful reading of the respondent's affidavit to date, there appeared, to a degree, cogent reasons advanced by her, together with specified dates and supposed evidence of others that would suggest that the applicant's deposed evidence as to the length and nature of the relationship cannot be sustained, or that at least her evidence is to be preferred. In addition, while the respondent provides responses to the extensive bank account information provided in terms of joint accounts, that would be the subject of cross-examination.

[25] I have reached the position that while this may not ultimately be found, there is an arguable case demonstrated in the pleadings **to date** that the parties lived in a de facto relationship, and at least one of some months is conceded by the respondent sufficiently to demonstrate it is reasonably arguable.

[26] The respondent, for her part, had not advised the reason for her opposition for the notice continuing. Her counsel today indicated there is no obligation on her to do so, given the onus is on the applicant to establish an arguable case, and advised the Court that the respondent sought to refinance the current mortgage. If that is the case,

it is the first the applicant had heard of it and had not been approached as to whether he would agree or not to that case.

[27] Balancing all matters, I have reached the view that an arguable case is demonstrated.

[28] For the above reasons therefore, I make an order that the notice of claim is not to lapse but is to be sustained until further order of the Court.

[29] There shall be no order as to interlocutory costs and any costs can be dealt with at the conclusion of the substantive hearing.

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Judge E Smith
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 24/03/2022