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

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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2022-070-000463
[2023] NZFC 8072

IN THE MATTER OF	THE ESTATE OF HAROLD JAMES LOWE
BETWEEN	MARGARET ANNE LINDSAY Applicant
AND	JEANINE LAMB CAMERON JAMES LOWE MERVYN DOUGLAS WEST First Respondents
AND	JEANINE LAMB CAMERON JAMES LOWE Second Respondents

Hearing:	27 July 2023
Appearances:	D Fraundorfer and A Needham for the Applicant K Yarrall on behalf of N Batts for the First Respondents V Crawshaw KC and J Niemand for the Second Respondents
Judgment:	30 August 2023

RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO JURISDICTION TO MAKE AN OCCUPATION ORDER OR TENANCY ORDER AND ANCILLARY FURNITURE ORDER (PROPERTY RELATIONSHIPS ACT 1976)]

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[1] Ms Lindsay and the late Mr Lowe were in a de facto relationship for a number of years. During their relationship they lived in a property at [address deleted] Mount Maunganui, the ownership of which was held by the Harry Lowe Family Trust. Mr Lowe died on 21 August 2021, and ever since Ms Lindsay has remained living in the [property]. While initially she remained there with the agreement of the second respondents, they expressly communicated their intention that she needed to vacate the property on or about 20 August 2022. Ms Lindsay accordingly applied to the Court for an occupation order and an ancillary furniture order pursuant to the Property (Relationships) Act 1976 or in the alternative a tenancy order and an ancillary furniture order. The making of either an occupation order or a tenancy order, and consequently the ancillary furniture order, is opposed by the second respondents.

[2] The first respondents simply abide the decision of the Court, and Ms Yarrall who appeared for the solicitor for the executor and trustee of Mr Lowe's estate, was granted leave by me to withdraw from the hearing. What I need to decide therefore is whether to make an occupation order or a tenancy order; it is accepted that if I make either of those orders I should then make the ancillary furniture order.

Background

[3] Ms Lindsay's claims arise out of her relationship with Mr Lowe and comprise the following claims against:

(a) Mr Lowe's estate pursuant to the PRA and Family Protection Act 1955.

(b) The Harry Lowe Family Trust based on a constructive trust argument.

[4] There is a dispute as to the date of the commencement of the de facto relationship between Ms Lindsay and Mr Lowe. Ms Lindsay contends that the de facto relationship commenced in 2001. However, on behalf of the second respondents, Mr Lowe's daughter, Jeanine Lamb, asserts that the earliest possible commencement date for the de facto relationship was sometime in 2011. In the context of the applications before me I am not required to resolve that issue.

[5] Mr Lowe settled the trust on 16 September 2001. Ms Lindsay asserts that he did so six months after the commencement of their de facto relationship. If Ms Lamb's evidence is accepted, then it would have been settled on the trust some 10 years prior to the commencement of their relationship.

[6] Ms Lindsay is not a beneficiary of the trust, either by name or by class. It is Mr Lowe's adult children, and their children who are discretionary beneficiaries.

Occupation Order

[7] The issue that arises on the facts of this case is whether there is jurisdiction to grant an occupation order when the property is not owned by either of the parties but is instead owned by the trust.

[8] Section 27(1) empowers the Court to make an occupation order providing for Ms Lindsay "the right personally to occupy the family home or any other premises forming part of the relationship property". Mr Fraundorfer relies on a decision of his Honour Judge Burns in *R v R*.[1] In that case, his Honour found there was jurisdiction to make an occupation order in respect of the family home that was owned by a trust. In reliance upon that decision, Mr Fraundorfer submits that the [property] is the family home as defined in the PRA. Alternatively, he submits that pursuant to the substantive claims (ss 44 and 44C of the PRA, and the constructive trust claim) Ms Lindsay has "a property interest" in the [property]. Mr Fraundorfer relies upon *Price v Hardie*[2] also in support of his arguments.

[9] Section 27(1), however, provides that the "property interest" must be in a dwellinghouse owned by one or both of the parties. The issue therefore as between the two propositions is identical; can an occupation order be made against a property owned by a trust?

[10] Ms Crawshaw submits that the Family Court decisions relied upon by Mr Fraundorfer have been superseded by the High Court decision of Powell J in

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1 *R v R* [2010] NZFLR 555 at [44].
2 *Price v Hardie* [2003] NZFLR 481.

Lobb v Ryan[3] where his Honour found that there was an absence of jurisdiction to make an occupation order where ownership of what would have normally been classified as the "family home" was held by a trust. At [25] his Honour stated:

> It is this latter point that is critical in the present case. Specifically, s 27(1) of the PRA 1976 makes it clear that occupation orders can only be made in respect to the personal occupation of "the family home or any other premises forming part of the relationship property". It follows that if 23 Orakei Road is not relationship property then the Family Court had no jurisdiction to make an occupation order in favour of either party.

[11] The issue that then arises is whether the [property] was relationship property or not. Mr Fraundorfer submits that it is because it falls within the definition of a family home in s 2 of the PRA. The definition of a "family home" is:

> A family home is defined in s 2 of the PRA as meaning "the dwelling house that either or both of the spouses or partners use habitually or from time to time as the only or principal family residence…".

[12] Mr Fraundorfer submits that it is usage that gives rise to the classification of the family home and not ownership. I disagree. I prefer and accept the submissions of Ms Crawshaw. If it was simply usage, then as Ms Crawshaw submitted, there would be no need for s 44, or indeed s 44C, as usage would dictate the property was the family home, and therefore was relationship property pursuant to s 8(1)(a) of the PRA. Similarly, if usage was the criteria, then a property that was rented by parties would on the face of it become a family home, although it would not be governed by s 8(1)(a) as that requires acquisition. This point was addressed in *Keats v Keats* where the Court stated that it may only grant occupation orders over the family home if one or both of the parties are the beneficial owners of that home.[4] In this case Ms Lindsay has no interest (either defined or beneficial) in the trust at all.

[13] Additionally, Powell J's decision in *Lobb v Ryan* emphatically resolves the issue. Mr Fraundorfer urges me to distinguish that case on the basis that, unlike in this case, the trustees of the trust in the *Lobb v Ryan* decision had passed a resolution/ reached an agreement that Mr Lobb and Ms Ryan were permitted to occupy the

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3 *Lobb v Ryan* [2020] NZHC 834.

4 *Keats v Keats* [2006] NZFLR 470. See also *Beric v Chaplin* [2018] NZFC 3885 where the Court at [43] stated that where neither party has a beneficial interest in the trust or they have merely discretionary beneficial interests, there is no jurisdiction to grant occupation orders under s 27.

Orakei Road property.[5] Furthermore, he relies upon the Court of Appeal leave decision where the Court stated at [25]:[6]

> We add that it has been argued that a resolution giving the beneficiaries exclusive rights to possess the home (provided that right has not come to an irreversible end) is sufficient for the Court to have jurisdiction under s 27. This is a question of law that might warrant leave in an appropriate case. (Footnote omitted)

[14] I do not accept Mr Fraundorfer's submissions. Firstly, the Court of Appeal declined leave to appeal Powell J's decision, and thus his decision remains as the binding statement of law. Secondly, the situation referred to by the Court of Appeal decision in [25] above is entirely different from the facts of this case. As I will set out below it is clear that the agreement for Ms Lindsay to remain in the property has come to "an irreversible end".

[15] Thirdly, the decision of Powell J is a statement of fundamental legal principles reaffirming that trust property is not relationship property as a matter of law. His Honour's statement at [30] and [31] of his decision sets this out clearly as follows:

> Although commentary exists to the effect that relationship property subsequently settled on trust by a spouse should not lose its classification as relationship property by virtue of settlement, limited authority is provided for this position. Rather, this position is inconsistent with well settled principles of trust law and, more broadly, with the ability to otherwise contract out of the PRA 1976. In essence, where parties agree to settle their relationship property on trust, they are, subject to the terms of the particular transaction, no longer legally the owners of that property, and any rights they receive solely in their capacity as discretionary beneficiaries of that trust should not typically be deemed relationship property. Any approach whereby trust property is converted into relationship property ought to be developed cautiously and in a principled way to prevent the erosion of the foundational principles of trust law and to ensure property rights are not simultaneously identified both as the property of the trustees and the property of the spouses.
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> In the present case, where neither party asserts that 23 Orakei Road is relationship property, I can see no good or principled reason why the trustees' resolution set out above, which explicitly grants the right to occupy to Mr Lobb and Ms Ryan in their capacity as the "primary discretionary beneficiaries" should be interpreted as being some form of relationship property. I therefore conclude that as the right to occupy given to Mr Lobb and Ms Ryan by the trustees of the [trust] was not relationship property the Family Court did not have jurisdiction to make an occupation order over 23 Orakei Road

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5 *Lobb v Ryan* at [28].
6 *Lobb v Ryan* [2021] NZCA 425.

[16] Mr Fraundorfer, in his submissions, referred to a number of Family Court decisions, all of which predated the decision of Powell J, in which the Family Court had made an occupation order. However, as Duffy J set out in the *DN and LN v Family Court at Auckland & Ors* decision the doctrine of stare decisis applies, and the Family Court is bound to follow the decision of Powell J.[7] As her Honour stated at [28]:

> …when a Court of lesser jurisdiction ignores the binding decisions of a senior Court this threatens adherence to the rule of law.

[17] Finally, I note that the Law Commission Report of 2019 on the possible reforms to the PRA itself noted that consideration should be given to granting the Court greater powers over trust property as trust property is not relationship property.[8]

[18] It is my determination that, following Powell J's decision of *Lobb v Ryan*, the legal position is emphatically clear. Because the property is owned by a trust, there is no jurisdiction to make an occupation order in relation to the [property].

Should the Court Make a Tenancy Order?

[19] In the alternative, Mr Fraundorfer submits that should I determine that an occupation order could not be made, that I should nevertheless make a tenancy order in favour of Ms Lindsay pursuant to s 28 of the PRA. On the face of it the power in s 28(1) is wide as it allows the Court "at any time" to make an order vesting in either spouse or partner the tenancy of any dwellinghouse. However, as Ms Crawshaw sets out in her submissions, that seemingly wide discretion is limited by subs (1A) which states that:

> The court may not make an order under this section unless, at the time of the making of the order, —

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7 *DN and LN v Family Court at Auckland* et al [2019] NZHC 210.

8 Law Commission *Review of the Property (Relationships) Act 1976* (NZLC R143. 2019) at 15.83. The Law Commission identifies that there are potential issues relating to the inability to make occupation orders in relation to a home that is not relationship property. The Law Commission goes on to recommend that a Court should have powers under the new Act to grant an occupation order at any time in respect of the family home, regardless of whether it is relationship property or separate property; in respect of property held on trust where either or both partners or any child of the relationship are beneficiaries or either or both partners are trustees of the trust; or in respect of any other premises forming part of the relationship property (at R94).

(a) the spouse or partner against whom the order is made (the other party) is or was the sole tenant of the dwellinghouse, or is or was a tenant holding jointly or in common with the applicant; and

(b) the other party is a tenant of the dwellinghouse; and

(c) either spouse or partner is residing in the dwellinghouse.

[20] Thus, in Ms Crawshaw's submission, I cannot make a tenancy order unless I am satisfied that the late Mr Lowe is or was the sole tenant of the [property], or alternatively Mr Lowe and Ms Lindsay were joint tenants of the property. Additionally, I need to be satisfied that Mr Lowe was a tenant of the [property], and that either he or Ms Lindsay is residing in that property. I agree with Ms Crawshaw's submission that the words "may not" in subs (1A) in reality mean must not. As Ms Crawshaw submits on the clear facts of this case Mr Lowe and Ms Lindsay were not tenants of the [property]. They simply lived in it effectively pursuant to a licence to occupy. In *Luyk v Luyk* her Honour Judge Manuel held at [59] that:[9]

> While "tenancy order" and "tenant" are undefined in the PRA, oral tenancies and licences fall within the term "the tenancy of any dwelling house" under s 28(1) of the PRA.

[21] Mr Fraundorfer submits that the wording of the correspondence between counsel has effectively created a tenancy as between the trustees and Ms Lindsay. In particular, Mr Fraundorfer referred to exhibit S of Ms Lindsay's affidavit of 19 August 2022 which was a letter from the second respondents' solicitors to Ms Lindsay's solicitors. The relevant paragraph states:

> Additionally, we need to again raise the issue of your client's tenancy of the property. A letter of 23 December 2021 to your client was clear and we again questioned whether she took any steps to source alternative accommodation when she was on notice since then, but she does not have a beneficial interest under the trust (and frankly, nor did Harry have a vested interest either). Additionally, our client advised [*sic*] having had no response from your client to a further notice on her tenancy given some three months ago. Our clients are taking steps to obtain a market rental appraisal and may be prepared to consider if it is viable for your client to remain on the basis of paying full market rent. Is your client likewise prepared to meet market rental? But again, we point out that this cannot continue indefinitely because before too long, repairs on the property will need to proceed and that cannot occur whilst your client is in occupation.

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9 *Luyk v Luyk* [2020] NZFLR 617.

[22] That correspondence is not, as Mr Fraundorfer asserts, evidence of a tenancy. While there was an agreement between the then trustees of Mr Lowe's trust and Ms Lindsay for her to live in the property for a period of time, that agreement cannot in any way be classified as a tenancy. Rather, it was a licence to occupy. The email communication at exhibit S is no more than an offer of a potential tenancy. There is no evidence in the documents before the Court that that offer was ever accepted, and indeed as I understand the evidence, it was not as Ms Lindsay resides in the property while making no financial contribution towards it at all at present; additionally, there is no evidence that she has paid any form of rental. It is my determination that there is no evidence that she has held a tenancy in relation to the property. Furthermore, it is my determination that whilst she may have had a licence to occupy, that was for a defined period which has clearly expired, and there has been no agreement as to the terms of a subsequent licence to occupy entered into between the parties. Thus, in terms of s 28(1A) of the PRA, Ms Lindsay was not a tenant of the dwellinghouse.

[23] Ms Lindsay's case is, however, made even more difficult because of the qualifications on the application of s 28 contained in s 91(3) of the PRA. This section applies because of Mr Lowe's death. Section 91(3) provides that:

> (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] Again, as a matter of statutory interpretation, the wording of "the Court may not" effectively means the Court must not or should not make an order unless the factors set out in subs (3) and (a) and (b) are established. They are not. As at this Court date, being the time at which I am being asked to make a tenancy order, the

tenancy of [the property] is not vested in the executors of Mr Lowe's estate. Nor, as at the date of the death of Mr Lowe, neither Mr Lowe nor Ms Lindsay were the sole tenant of the [property], and nor do they have a tenancy in common.

[25] In conclusion, there is simply no jurisdiction as a matter of statutory interpretation, to make either an occupation order or a tenancy order in favour of Ms Lindsay.

[26] Mr Fraundorfer also sought to argue that because of claims made by Ms Lindsay pursuant to s 44, s 44C and the constructive trust arguments, that the making of a claim constitutes a relationship property interest. I disagree with that submission. Firstly, if Ms Lindsay is successful in relation to her constructive trust claim, that is a claim against the trustees of the trust, and it will be for them to pay out Ms Lindsay any amount fixed by the Court. The foundation for the constructive trust claim is centred in equity, and not in the provisions of the PRA. There will be no consequent relationship property interest.

[27] Secondly, I agree with Ms Crawshaw's submission that the making of a claim does not create an interest. Whilst I accept, as submitted by Mr Fraundorfer, that it can create an interest for the purpose of the registration of a notice of claim, because of the particular wording of s 28 and s 27, the making of a claim does not confer a right of occupancy of the family home or any other premise forming part of the relationship property. That is, the making of a claim in and of itself does not usurp the principles set out in the *Lobb v Ryan* decision that property owned by a trust is not relationship property. There is therefore no family home or other proprietary interest unless and until such time as a determination is made as to whether to grant the s 44 application. The s 44C application, if successful, only allows an award out of relationship property or separate property, not out of trust property; although I accept, that given the recent jurisdiction conferred on the Family Court Trusts Act, there may be more of an ability to seek redress from the trust. Whether that is so or not is yet to be determined.

Conclusion

[28] As a consequence, I determine that there is no jurisdiction to make either an occupation order or a tenancy order; consequently, the ancillary furniture order cannot be made either.

[29] While I have enormous sympathy for Ms Lindsay and the predicament she finds herself in, for the reasons I have set out, there is simply no jurisdictional basis for me to make the orders that are sought.

Orders

[30] I accordingly make an order dismissing Ms Lindsay's applications for an occupation order, tenancy order and ancillary furniture order. Costs are reserved until the conclusion of the proceedings.

Directions

[31] In relation to the substantive proceedings, I agree with Ms Crawshaw that they need to be progressed. I apprehend from her closing submissions that there are outstanding issues of discovery. Accordingly, I make the following directions:

(a) Any application for an order for discovery is to be filed and served within 21 days of the date of the release of this judgment.

(b) If discovery is consented to then I would invite counsel to file a joint memorandum setting out the agreed orders, and that can then be referred to a Judge in chambers.

(c) Alternatively, if a notice of opposition to the discovery is filed, then that will need to be set down with a registrar for a one hour submissions only hearing.

(d) In any event the registrar is to allocate a pre-hearing conference no earlier than six weeks' time. Five working days prior to that conference

counsel are to file either a joint memorandum or separate memoranda setting out directions that are required to progress the matter to hearing so that final resolution can be achieved in relation to the outstanding issues. In that memorandum counsel should address:

(i) The issues for determination.

(ii) Directions for the filing of any further evidence.

(iii) Witnesses required for cross-examination.

(iv) Estimated length of hearing.

(v) Suggested directions to facilitate the hearing itself (such as filing bundles of documents and submissions).

[32] There is no need for anonymisation in terms of s 11(b) of the Family Court Act 1980. Therefore, this case can be referred to by the parties' actual names.

S J Coyle
Family Court Judge

Signed this 30th day of August 2023 at am / pm