

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 CHRISTCHURCH**

**I TE KŌTI WHĀNAU
KI ŌTAUTAHI**

**FAM-2020-009-001388
[2023] NZFC 3691**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[LDS] Applicant
AND	[MFG] Respondent

Hearing: 30 March 2023

Appearances: A Tobeck for the Applicant
D Mills-Godinet for the Respondent
C Fogarty for the [G] & [MM] Family Trust

Judgment: 14 April 2023

RESERVED JUDGMENT OF JUDGE P W SHEARER

[1] These proceedings concern the division of relationship property between [LDS] (“the applicant”) and [MFG] (“the respondent”) under the Property (Relationships) Act 1976 (“the PRA”).

[2] The main item of property in dispute is a dwellinghouse (“the house”) located at [address deleted] (“the land”). The house was built by the respondent, but it is

situated on land owned by the [G] & [MM] Family Trust (“the Trust”) which is the respondent’s parents’ Trust.

[3] The Trust was settled on 29 June 2004. The trustees of the Trust are [name deleted] (the respondent’s father), [name deleted] (the respondent’s mother), [name deleted] (the respondent’s sister) and Landsborough Trustee Services No 1 Limited (together “the trustees”). The discretionary beneficiaries of the Trust include the children and grandchildren of [the respondent’s father] and [the respondent’s mother].

[4] The parties met in 2005, shortly before the respondent finished building the house. It is agreed that the house was at lock up stage when the applicant moved in with the respondent in late 2005. They lived in the house together, and their son was born there in October 2007. The applicant and respondent married in March 2010 and separated on 1 November 2018.

[5] The respondent concedes that the house is the “family home” for the purpose of s 8(1)(a) of the PRA but makes the point that the land is owned by the Trust.

[6] The applicant has made interlocutory applications for the following orders:

- (a) that the trustees of the Trust be joined to the proceeding; and
- (b) that the respondent and the trustees allow registered valuers Luke van den Broek and Gregory Petersen (“the valuers”) to inspect the land and the house for the purpose of completing a valuation.

[7] The interlocutory matter proceeded before me at a submissions-only hearing on 30 March 2023. Prior to the hearing I had received and read written submissions, and I heard oral submissions from all three counsel. I now issue this reserved decision.

Joinder

The law

[8] The relevant rule in relation to the application for joinder is r 133 of the Family Court Rules 2002, which provides:

133 Striking out and adding parties

- (1) The Court may, on its own initiative or on an interlocutory application for the purpose, at any stage of the proceedings, and on any terms that the court considers just,—
- (a) order that the name of a party improperly or mistakenly joined (whether as applicant or as respondent) be struck out:
 - (b) order that the name of a person who ought to have been joined, or whose presence before the court may be necessary to enable the court effectually and completely to adjudicate on and settle all questions involved in the proceedings, be added, whether as applicant or as respondent.

[9] The approach to joinder is a liberal one, with the object of the rules being to provide for the inclusion of necessary parties.¹

[10] In *G v R*, in the context of a strike out application under r 133, the Court observed:²

[70] It is not the task of the Court at this juncture in the proceedings to make any orders as to the equitable ownership of any assets in either of the trusts or to make any orders as to disposition or tracing of any such assets. The issue before the Court at this hearing is merely to rule as to whether the trustees of the [the trust] should be joined in the proceedings so as to have the opportunity to participate in the proceeding.

...

[81] If a party is to be joined into a proceeding, it must be on the basis that the Court has jurisdiction to make decisions binding on that party. The jurisdiction does not exist simply on the basis of justice or convenience.

Analysis

[11] As Judge Smith said in *Golden v Herring*:³

The general test is whether the proposed party (the trustees of the Trust) will be directly affected by any order made in the proceeding.

[12] To answer that question, I need to consider the options and jurisdiction that the Family Court will have to make orders under the PRA with respect to the land.

¹ *O'Brien v Parkinson* [2021] NZHC 1193 at [19].

² *G v R* FC Porirua FAM-2007-091-892, 4 September 2008.

³ *Golden v Herring* [2020] NZFC 6031 at [6].

[13] The applicant argues that the house (being the “family home”) is now part of the land, because it is a fixture and cannot be moved. He says that because the trustees concede the house is relationship property, that makes part of the land relationship property, and on that basis the parties have an equitable interest in the land and the trustees who own the land, ought to be joined to the proceedings.

[14] The trustees and the respondent say it is not necessary to join the trustees as parties, because there is an absence of any legal basis that the land or any part of it is relationship property under the PRA. Essentially they say that the land is unequivocally owned by the Trust, which is undisputedly a third party, and that the extent of the applicant’s and respondent’s interest in the land is a bare licence to occupy and access the house on the land.

[15] It is necessary to provisionally consider what constitutes the “family home” and what jurisdiction the Court has under the PRA. “Family home” is defined in s 2 as follows:

family home—

- (a) means the dwellinghouse that either or both of 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 appurtenant to that dwellinghouse and used wholly or principally for the purposes of the household; and
- (b) includes a joint family home

[16] Mr Fogarty for the Trust submitted that for something to be “appurtenant” it has to belong or be part of. He submitted that whether the house is a fixture or not is irrelevant, because the land does not belong to the house.

[17] I consider that there is strength in that submission because the fundamental and undisputable point here is that the land is owned by the Trust. I don’t and can’t see how the Court can make orders under the PRA in respect of the land. The land is not “relationship property” as defined in any of the subparagraphs of s 8(1) and nor is it either party’s separate property. The “trust-busting” s 44C does not apply, because the land was never relationship property and in my view the land is therefore going to be outside the jurisdiction of the PRA.

[18] This case is not one of those relatively common scenarios where land or property owned by one of the parties to a relationship was disposed of to a trust during or in contemplation of the relationship.

[19] The High Court stated in *Yeoman v Public Trust*:⁴

[39] Claims for division of relationship property are heard between and bind only partners in marriage, civil unions and de facto relationships. When the Family Court determines which assets are relationship property, its decision binds only the partners. It does not make determinations that bind third parties.

[40] If one party contends that there are assets which belong in the relationship property pool, but those assets are in the apparent ownership of a third party, in the absence of agreement from the third party, proceedings against the third party may be required to establish relevant beneficial ownership. The Family Court cannot hear disputed claims that assets in the apparent ownership of a third party are beneficially owned by one of the parties in a property relationship proceeding...

[20] The associate Judge went on to say:

[44] The increased use of family trusts today will give rise to questions in identifying relationship property ... These questions are determined as between the parties to the relationship. The Family Court will apply general property law. It will declare the extent of rights held, it will not create new rights. In cases where the trustees are not the relationship partners and the trustees do not accept that a relationship partner has a relevant beneficial interest in a trust asset, the Family Court cannot make determinations at the inventory stage that will bind the trustees. Proceedings in another court are required. However, where the legal owner of an asset said to be subject to a trust is one of the relationship partners, there can be no jurisdictional objection to the Family Court deciding whether the asset is held on trust...

[21] In this case, the trustees are not one of the relationship partners, and the Family Court cannot make determinations under the PRA as to land owned by the Trust.

[22] Any constructive trust claim or argument against the Trust is a separate civil proceeding in a separate jurisdiction. Mr Tobeck acknowledged that in his oral submissions and commented that there will likely be proceedings filed in another jurisdiction.

⁴ *Yeoman v Public Trust* [2011] NZFLR 753.

[23] The position is similarly reflected in s 37 of the PRA which provides that:

37 Persons entitled to be heard

- (1) Before any order is made under this Act, such notice as the court directs shall be given to any person having an interest in the property which would be affected by the order, and any such person shall be entitled to appear and to be heard in the matter as a party to the application.

[24] This section allows for third parties to participate in hearings and be heard, but it is not an avenue for one or both parties to pursue an unresolved claim against them. The third party's interest in the property (in this case the land) is not at stake as the Court of Appeal explained in *Johanson v Johanson*:⁵

The section fairly covers cases where a third party has a security interest over property of the spouses or has a joint interest along with them. In my view it does not extend to the converse case where it is the third party who owns the property and the spouses are simply in the position of the claimants. It is prejudging such a claim to conclude that the interest of the third party owner "would be affected" by a matrimonial property order. In this case and until a constructive trust or other equitable interest is acknowledged or declared it cannot be said that the [third party's] land would be affected by a matrimonial property order.

[25] These limits on the Family Court's powers exist because any claim against a third party is a civil proceeding and such matters are outside the jurisdiction of the PRA.

[26] For these reasons I decline to join the Trust as a third party to the PRA proceeding between the applicant and respondent.

Inspection of the land and the house

The law

[27] For the application to inspect the property, the applicant relies on the inherent powers of the Court to regulate its own procedure. As was noted by the Court of Appeal in *McMenamin v Attorney-General*:⁶

⁵ *Johanson v Johanson* (1993) 10 FRNZ 578 at 580.

⁶ *McMenamin v Attorney-General* [1985] 2 NZLR 274 (CA) at 276.

An inferior Court has the right to do what is necessary to enable it to exercise the functions, powers and duties conferred on it by statute. This is implied as a matter of statutory construction.

[28] However, the Family Court Rules 2002 specifically provide for the inspection and testing of property. Pursuant to rule 208A, rules 9.25 and 9.26 of the District Court Rules 2014 apply:

9.25 Order for inspection, etc

- (1) The court may, for the purpose of enabling the proper determination of any matter in question in a proceeding, make orders, on terms, for—
 - (a) the inspection of any property:
 - (b) the taking of samples of any property:
 - (c) the observation of any property:
 - (d) the measuring, weighing, or photographing of any property:
 - (e) the conduct of an experiment on or with any property:
 - (f) the observation of a process.
- (2) An order may authorise a person to enter any land or do anything else for the purpose of getting access to the property.
- (3) In this rule, property includes any land and any document or other chattel, whether in the control of a party or not.

9.26 Notice of application

A party applying for an order under rule 9.25 must, so far as practicable, serve notice of the application on each person who would be affected by the order if made.

[29] An order for inspection will be made only where it is for the purpose of enabling the proper determination of any matter in question in the proceeding.⁷

Analysis

[30] The value of the house is certainly a “matter in question” in this proceeding. The issue is whether the value of the house can be determined without the need for a valuation of the land on which it is situated. That is because the trustees are agreeable

⁷ *Tyco Flow Pacific Pty Ltd v Grant HC Auckland CIV-2003-404-4121*, 18 March 2005 at [41].

to inspection on certain terms and conditions, including that the valuers are not to report on, photograph, or address the issue of the land and/or the land value.⁸

[31] The evidence of Mr van den Broek is:⁹

To provide an opinion of market value we must assess the land value and the overall market value to determine the value of the improvements. The value of the improvements is the difference between the property's market value and land value. To determine the market value of the subject property we must consider relevant comparable sales.

[32] No evidence has been produced by the respondent or the trustees to challenge Mr van den Broek. Further, there is no obvious prejudice to the respondent or the trustees in allowing the valuers to conduct a valuation of the house and the land.

[33] I consider that the trustees can't have it both ways. They agree that the house is relationship property and not Trust property, and that being the case the applicant ought to be free to instruct (at his own cost) a valuer of his choice to value the house, in the way that valuer considers appropriate.

[34] If the respondent takes issue with the applicant's valuation or valuation methodology, she will obviously have the right to engage her own expert and provide her own valuation evidence. Such valuation disputes are common in PRA proceedings, but they are issues for the parties to work through and which the Court can ultimately resolve, if required. I expect, however, that the Trust should allow the parties to get on with that process and cooperate with that process by allowing the parties valuers access to the property.

[35] Simply put, I agree that an inspection of the land and the house is necessary for the proper determination of an issue in this proceeding.

Orders

[36] I make orders and directions as follows:

⁸ Notice of opposition to interlocutory application to inspect property, dated 21 June 2022.

⁹ Affidavit of Luke Johan van den Broek, dated 29 July 2022, at [7].

- (a) The application to join the Trust as a party to the proceeding is dismissed.
- (b) The application for the applicant's valuers to inspect the property is granted, on the following conditions:
 - (i) Mr van den Broek and Mr Petersen are to give the trustees and the respondent at least 5 working days' notice of the proposed inspection;
 - (ii) They are to spend no longer than 4 hours undertaking the inspection.
- (c) The applicant's valuation once obtained is to be copied to the respondent's lawyer, and the respondent shall then have 8 weeks to obtain and disclose any valuation in response.
- (d) The proceedings are adjourned to case management review in 4 months (Monday 14 August 2023) to monitor the exchange of valuation evidence and for counsel to advise the further directions required.

Costs

[37] Because each party has ultimately been successful with one interlocutory application, and unsuccessful with the other, I direct that costs and the costs incurred by the Trust are to lie where they fall.

Judge P W Shearer
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 14/04/2023