

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

**I TE KŌTI MATUA O AOTEAROA
TE ROTORUA-NUI-A-KAHUMATAMOMOE ROHE**

**CIV-2021-463-000031
[2023] NZHC 1666**

UNDER Sections 339 and 343 of the Property Law Act 2007

IN THE MATTER of an Application for Division of Property Among Co-Owners

BETWEEN WALTER EARNEST SWANSON
Plaintiff

AND AMANDA EILEEN NORRIS
Defendant

ANZ BANK NEW ZEALAND LIMITED
Interested Party

CHRYSTAL NAPIA SWANSON,
SAPHYRE NAPIA SWANSON and JAYDE
SHAKHAN HEEMI THOMAS
Interested Party

Hearing: On the papers

Counsel: P A Kirk for Plaintiff

Judgment: 30 June 2023

JUDGMENT OF HARVEY J

*This judgment is delivered by me on 30 June 2023 at 2 pm
pursuant to r 11.5 of the High Court Rules.*

.....
Registrar / Deputy Registrar

Solicitors:
O'Sullivan Clemens Lawyers, Rotorua

Introduction

[1] By will dated 16 February 2020, Tewiremu Napia Swanson appointed his brother, Walter Swanson, solicitor of Rotorua as his sole executor and trustee. Since the death of the deceased, Mr Swanson has been attempting to finalise the estate, including the selling of 58 Taharangi Street, Koutu, Rotorua. That process has been complicated, Mr Swanson says, by the difficulties between himself and the deceased's ex-wife, the defendant, Amanda Norris. Ms Norris owned a half-share in the property. In short, Mr Swanson says that Ms Norris has failed to co-operate to finalise the estate by moving back to the property, refusing to properly engage in the orderly preparation of the property for sale and refusing to accept responsibility for the payment of liabilities and a splitting of the proceeds. Instead, Mr Swanson says Ms Norris has been obstructive and has damaged the property which has required him to outlay significant sums in having the property repaired and prepared for sale.

[2] On 7 December 2021, following a formal proof hearing Harland J authorised Mr Swanson to proceed with the sale and made orders enabling him to do so without Ms Norris' involvement.¹ The Judge also granted a series of in-principle deductions from Ms Norris' share of the proceeds. However, the quantum of these deductions was to be established by affidavit and fixed by further order of the Court. Mr Swanson now seeks those further orders for reimbursement of costs incurred from Ms Norris' share of the net proceeds.

[3] The issue for determination is whether the plaintiff has sufficiently established the quantum of the reimbursement claimed against Ms Norris regarding:

- (a) the cost of repair and/or any devaluation in the property due to Ms Norris' negligence or neglect;
- (b) any utilities charges related to the property during Ms Norris' occupation;
- (c) fair occupational rent; and

¹ *Swanson v Norris* [2021] NZHC 3342.

(d) any other compensation and/or reimbursement claimed which is not expressly covered by Harland J's orders.

[4] For completeness, I note from the outset that as Ms Norris has not engaged in the proceedings thus far, only Mr Swanson's side of the argument has been articulated.

Background

[5] Ms Norris and the deceased were married but separated in about May 2019. As part of their separation arrangements, their joint ownership of the property at 58 Taharangi St was severed into tenants in common in equal shares. The property was subject to an ANZ mortgage.

[6] The deceased died on 22 February 2020. As mentioned, Mr Swanson is the sole executor and trustee of the will.

[7] After the deceased's death Ms Norris took possession of the property and has been the sole occupant. However, according to Mr Swanson, no outgoings on the property have been paid by Ms Norris including rates, utilities, insurance and mortgage payments. Mr Swanson paid rates and a payment to Hot Swap Loan out of the estate funds. There were then insufficient funds in the estate, so Mr Swanson personally made house insurance and utilities payments.

[8] On 20 April 2021, Mr Swanson sought orders and directions per ss 339 and 343 of the Property Law Act 2007 for the sale of the property and distribution of net proceeds. He confirmed that all relevant parties were served but took no steps. As foreshadowed, a formal proof hearing was held before Harland J on 3 December 2021. A judgment was delivered on 7 December where the following orders were issued:²

A. An order for the sale of 58 Taharangi Street, Rotorua, repayment of the ANZ Mortgage and the division of the proceeds among the co-owners pursuant to s 339 of the Act.

B. Orders pursuant to s 343 of the Act as follows:

² At [33].

(a) The defendant is to vacate the property and to arrange for any people she has permitted to stay at the property to also vacate it, no later than 5.00 pm, 14 January 2022.

(b) The plaintiff shall, after 5.00 pm, 14 January 2022, have sole occupation of the property to enable him to facilitate the sale of the property, but shall not be authorised to offer the property for sale prior to 5.00 pm, 11 February 2022.

(c) The plaintiff is authorised to fix a minimum/reserve price for the sale of the property.

(d) The plaintiff has the sole right to select the real estate agent/s and to determine the sales and marketing process.

(e) The Court Registrar is to sign any listing agreement required to facilitate the sale of the property.

(f) The Court Registrar shall sign any sale and purchase agreement, Authority and Instruction Form, Tax Statement and any other documentation required to be signed by the defendant to facilitate the sale.

(g) The defendant's share of the proceeds of sale is to be charged with the cost of any repairs necessary for sale, or any devaluation in the property due to her negligence or neglect, however the quantum of the cost of any such repair and/or devaluation are to be established by the plaintiff in a further affidavit and are to be subject to a further order of the Court.

(h) The plaintiff is authorised to arrange for the proceeds of the sale of the property and any interest on the purchase amount to be held in his solicitor's trust account to be divided or applied in accordance with a further of the Court.

(i) Expenses associated with the sale of the property including but not limited to real estate agent fees and legal fees, are authorised to be deducted from the sale proceeds.

(j) The defendant is to pay for any utilities charges related to the property during her period of occupation, such charges to be deducted from her share of the sale proceeds, however if applicable, the quantum of this is to be established by the plaintiff in a further affidavit and is to be subject to a further order of the Court.

(k) The defendant is to pay a fair occupation rent, such rent to be deducted from her share of the sale proceeds. The quantum of this is to be established by the plaintiff in a further affidavit and is to be subject to a further order of the Court.

[9] Harland J then reiterated that the plaintiff was to file a further affidavit outlining the costs of any repairs necessary for sale or any devaluation in the property caused by negligence or neglect caused either by the defendant or others she has allowed to remain in the property.³ The affidavit was also to outline the quantum of

³ At [34].

any utilities deductions, occupational rent and any other compensation which is not covered by the orders quoted above.⁴

[10] Ms Norris was informed of the outcome of the proceeding by letter of 16 December 2021 from O’Sullivan Clemens Law. She was invited to engage directly with Mr Swanson or the law firm to resolve matters without further orders. Mr Swanson confirmed that despite the order the defendant refused to vacate the property. He received information on 26 April 2022 that he should obtain a possession order. That was then sealed on 1 June 2022. Around 27 June 2022, Mr Swanson confirmed that the defendant was removed from the property.

[11] The property was then tidied up by Mr Swanson, the deceased’s son and some contractors. According to Mr Swanson it was in a “terrible” condition compared to when he viewed it the week the deceased passed away, and it required significant repairs and clearing.

[12] Eventually, a sale and purchase agreement was entered into on 20 October 2022 for \$470,000. Mr Swanson confirms that the sale was completed on 24 January 2023 but that a subsequent positive methamphetamine test meant that the purchase price had to be reduced by \$10,000. Because of the overall delay in selling the house the mortgage had accumulated defaults, further interest and penalties. As part of settlement the bank required the defendant’s overdraft be repaid.

[13] Mr Swanson filed his further affidavit on 21 June 2023 which was referred to me along with memorandum of counsel dated 22 June 2023. In the circumstances, I accept that this matter can be dealt with on the papers.

Plaintiff’s submissions

[14] Ms Kirk for the plaintiff submitted that final orders should now be made to bring this outstanding matter to a conclusion. Counsel confirmed that the plaintiff seeks orders that the net sale proceeds from the sale of the property of \$288,610.73 along with any interest be distributed forthwith.

⁴ At [34].

[15] Before any distribution, counsel seeks payment of \$6,453.69 to the plaintiff to reimburse him personally for payments made towards Vero House Insurance of \$5,040.97, Mercury Energy of \$493.31, Armstrong Security of \$420.40, the Glass Guys of \$197.51 and Mr Green of \$301.50. The balance of the net sale proceeds, and any interest can then be divided equally between the estate and Ms Norris, subject to adjustments to be paid out of the defendant's share.

[16] First, in the context of rates and personal financial affairs, counsel contended that \$2,646.29 should be paid from the defendant's share to the estate being her half share of the Rotorua Lakes Council rates and Hot Swap loan payments paid by the estate. Added to that is \$493.25 to the estate to reimburse it regarding payment of the defendant's overdraft with ANZ. Secondly, that \$8,960.93 is paid to reimburse the estate regarding the mortgage defaults, interest and penalties. Thirdly, that \$1,596.74 be reimbursed for utilities along with any further penalties and collection costs accrued to Genesis Energy for electricity used between 26 February and 29 July 2020 from the defendant's share of the proceeds.

[17] Fourthly, that \$442.44 is paid to the deceased's son to reimburse him for the expenses he personally incurred cleaning and readying the property for sale. An additional \$1,500.05 to reimburse him for flights from his residence in Australia and \$4,452 for his labour is also sought. Fifthly, payment of \$20,000 is sought as an adjustment for devaluation to the property caused by the defendant due to her negligence and neglect. Sixthly, a payment of \$33,577.50 to the estate is sought for occupational rent during the period the defendant occupied the property.

[18] Counsel argued that the plaintiff is also entitled to costs against the defendant on a 2B basis. In total, those costs amount to \$30,472.50 and \$4,632.25 for disbursements.

Legal principles

[19] Section 339 of the Property Law Act empowers the Court to make orders for the division of property owned by co-owners on the application of one of those co-owners:

339 Court may order division of property

- (1) A court may make, in respect of property owned by co-owners, an order—
 - (a) for the sale of the property and the division of the proceeds among the co-owners; or
 - (b) for the division of the property in kind among the co-owners; or
 - (c) requiring 1 or more co-owners to purchase the share in the property of 1 or more other co-owners at a fair and reasonable price.
- (2) An order under subsection (1) (and any related order under subsection (4)) may be made—
 - (a) despite anything to the contrary in the Land Transfer Act 2017; but
 - (b) only if it does not contravene section 340(1); and
 - (c) only on an application made and served in the manner required by or under section 341; and
 - (d) only after having regard to the matters specified in section 342.
- (3) Before determining whether to make an order under this section, the court may order the property to be valued and may direct how the cost of the valuation is to be borne.
- (4) A court making an order under subsection (1) may, in addition, make a further order specified in section 343.
- (5) Unless the court orders otherwise, every co-owner of the property (whether a party to the proceeding or not) is bound by an order under subsection (1) (and by any related order under subsection (4)).

[20] Section 342 lists factors the court must have regard to in considering an order under s 339(1) (and any related further orders):

- (a) the extent of the share in the property of any co-owner by whom, or in respect of whose estate or interest, the application for the order is made:
- (b) the nature and location of the property:
- (c) the number of other co-owners and the extent of their shares:
- (d) the hardship that would be caused to the applicant by the refusal of the order, in contrast with the hardship caused to any other person by the order:

- (e) the value of any contribution made by any co-owner to the cost of improvements to, or the maintenance of, the property:
- (f) any other matters the court considers relevant.

[21] It is well settled that s 339(1) of the Property Law Act can be applied to enable a sale of a property from an unwilling co-owner in appropriate circumstances.⁵ When a co-owner has failed or refused to engage in the sale process, this will often mean an application under s 339 is even more appropriate.⁶ The short point is that the section is remedial and the Court has a wide discretion. In *Bayly v Hicks* the Court of Appeal confirmed that s 39 enable a Judge to consider what is the most just and practical way through an impasse like the present before the Court.⁷

[22] A court making an order under s 339(1) may make further ancillary or additional orders specified in s 343.⁸ While s 343 sets out specific further orders the court may make, it also broadly empowers the court to make any further order that “provides for, or requires, any other matters or steps the court considers necessary or desirable as a consequence of the making of the order under s 339(1)”.

[23] Finally, because the matter is proceeding by formal proof, I must be satisfied by the evidence as to the appropriate quantum.⁹

Discussion

[24] Consideration of the factors set out in s 342 is relevant. Ms Norris is entitled to a 50 per cent share of the net proceeds of sale due to her ownership interest as tenant in common in equal shares. The Court must therefore respect her interest in the

⁵ See, for example, *Lake Hayes Property Holdings Ltd v Petherbridge* [2014] NZHC 1673, (2014) 15 NZCPR 590 at [62]–[64]; *Keery v Thomas* [2015] NZHC 113 at [20]–[23]; *Bunyan (as executors of the estate of Bunyan (deceased)) v Parish* [2016] NZHC 2225 at [44]–[45]; and *Minehan v McGuigan* [2020] NZHC 1686, (2020) 21 NZCPR 135 at [29]–[30]. For the contrary view see *Holster v Grafton* (2008) 9 NZCPR 314 (HC), *Forgarty J* did not necessarily exclude the possibility, but stated that that power would not be readily exercised given the remedial nature of ss 339 – 343 and basic value and respect for property rights.

⁶ A factor considered by *Muir J* in *Bunyan (as executors of the estate of Bunyan (deceased)) v Parish*, above n 5, at [44]–[45].

⁷ *Bayly v Hicks* [2012] NZCA 589, [2013] 2 NZLR 401 at [32].

⁸ Property Law Act 2007, s 339(4).

⁹ *Ferreira v Stockinger* [2015] NZHC 2916 at [33]–[36].

property, especially in the present circumstances where the orders sought will be made without her engagement. That of course is not for want of trying by Mr Swanson. The evidence confirms that Ms Norris has failed or refused to engage in any sensible dialogue with Mr Swanson to settle the deceased's estate. Her current residence is unknown. I infer that contacting Ms Norris is also difficult if not impossible.

[25] I have carefully reviewed Mr Swanson's affidavit and the attached documentation, along with his previous affidavits. From that assessment, four principal conclusions emerge.

[26] First, as to Mr Swanson's personal claims, the memorandum and draft orders seek reimbursement of \$6,4359.69. However, Mr Swanson states that he received a refund of \$1,508.31 and in his affidavit seeks only \$5,040.97. There is no explanation for this discrepancy or why the refund has been omitted from the draft orders. In addition, although the cost of the house insurance policy is provided in attached documents there is no proof of payment for the 9 December 2021 and 5 December 2022 payments. However, taking account of the fact Mr Swanson is a solicitor his deposition that these insurance payments were paid is credible. I consider the correct sum Mr Swanson should be repaid from the sale proceeds is the \$5,040.97 he personally claims in his affidavit. I am satisfied this falls within the terms of the order at [34] of Harland J's judgment being "other compensation or reimbursement claimed by the plaintiff against the defendant".

[27] Secondly, the rates and personal financial affairs. I am satisfied from the Rates Settlement Request documents dated 25 November 2020 and 20 April 2021 respectively that the rates figures (which includes the Hot Swap loan) are accurate and Ms Norris should pay \$2,646.29 being her half share of the rates. I have also confirmed the figures of \$493.25 being half of the defendant's personal debt paid off by the estate as part of the settlement conditions of the bank.

[28] The balance of the mortgage at the date of the deceased's death was \$117,061.22.¹⁰ At the date of settlement the mortgage was \$135,306.34. Half of the difference comes to \$9,122.56 which I am satisfied should be recoverable from Ms Norris' share of the sale price.

[29] In relation to utilities I have confirmed from the evidence the figure of \$1,596.74 and agree that figure plus any penalty and collection costs should be deducted.

[30] Thirdly, the costs of repair. The Bunnings receipts total \$272.90. They are self-evidently for cleaning supplies. The remainder of the receipts relate to petrol purchased at Z and BP. There is no explanation of their relation to the cost of repair. It may be that they were incurred by, for example, trips to the dump and to suppliers for goods used in the clean up and repair of the property. But again, there is no evidence that is the case. In a formal proof I must be satisfied as to the evidence.

[31] The plaintiff claims \$1,500.05 in flights to and from Melbourne for the defendant's son to travel to Rotorua to assist with undertaking repairs. I do not consider, at first instance, it is reasonable for this cost to be claimed against Ms Norris because the cost is not reasonably incidental to repairing the property. I accept that if professional cleaners were hired to undertake the work that the deceased's son undertook then the rate *may* have been higher, but the cleaning supplies would not have to have been purchased. However, if Mr Swanson provides evidence that the total cost of the deceased's son's wages, cleaning supplies and flights would be less than or comparable to a reasonable quote of a contractor to undertake the same work, I would be prepared to allow the adjustment.

[32] There is the cost of labour at \$21.20/hr which at the time was minimum wage. I accept this fall within the costs of repair. However, Mr Swanson states in his affidavit that the deceased's son worked from 31 August 2022 to 7 October 2022, Monday to Friday. Even accounting for the deceased's son working on 26 October 2022, a public

¹⁰ This is taken from the loan account documentation, annexed at "K" of Mr Swanson's 21 June 2023 affidavit, showing the balance as at 20 February 2020. The figure in Mr Swanson's affidavit appears to be incorrect despite referencing this document. I prefer the primary evidence.

holiday, this amounts to only 28 days rather than the 30 days stated. Accordingly only \$4,155.20 in wages is the proper amount.

[33] On the issue of devaluation, Mr Swanson says in his 21 June 2023 affidavit that he was unable to get a valuation immediately following the deceased's death and prior to Ms Norris' occupation. Property valuers indicated a sale value of \$450,000–\$490,000 and \$450,000–\$500,000. Emails from respective valuers stated they could not see the inside of the property but noticed damage to the windows and proceeded on the basis there was some damage inside. As mentioned, the property sold for \$470,000 but this was reduced to \$460,000 after a positive methamphetamine result. To the best of Mr Swanson's knowledge the deceased did not use methamphetamine and Ms Norris did. Further, Mr Swanson says, in effect, that due to the delays caused by Ms Norris' uncooperative conduct, this meant that any sale price was affected by the post 2021 market decline. There was, accordingly, he says, a loss of possible profit. Even so, I do not consider there is sufficient information to justify the \$20,000 sought.

[34] Mr Swanson claims occupational rent at a rate of \$555. Mr Wesche from Professionals advised Mr Swanson that a rent of \$450–\$500 per week would be available based on a rental appraisal dated 14 July 2021. This was based on the property being a three-bedroom property. Ms Ratahi from Eves provided an estimate of \$555. This was on the basis the property was four bedrooms, using an available average of \$455 for a three-bedroom house and adding \$100 for the extra bedroom. There is no available evidence as to whether the house is three or four bedrooms. Again more information is required to confirm what the appropriate rate should be.

[35] I accept that costs on a 2B basis are appropriate.

[36] In summary, I consider that the orders sought should be made regarding the reimbursements that have been established on the evidence, subject to any error correction I have identified. As to the areas highlighted requiring further evidence, I the best course of action is for Mr Swanson to file a supplementary affidavit confirming, clarifying or providing sufficient evidence to support the claims made.

Decision

[37] The amounts confirmed in this judgment and set out in the orders below may be deducted from the sale proceeds (in the case of the plaintiff's personal costs) or the defendant's share of the sale proceeds.

[38] Mr Swanson is directed to file a supplementary affidavit covering:

- (a) the relevance of the petrol receipts to the cost of repairing the property;
- (b) whether the total cost of engaging the deceased's son, including the cost of labour, flights and cleaning supplies is comparable or less than a reasonable quoted price of a contractor undertaking the same work;
- (c) further information as to property devaluation in the market over the period of the defendant's delay;
- (d) any further information to support a devaluation figure of \$20,000; and
- (e) the number of bedrooms in the house and any other information pertinent to rental valuation (for instance, whether all bedrooms are legally habitable bedrooms).

[39] I will then consider the remaining proposed adjustments on the papers.

[40] Costs are awarded on a 2B basis along with disbursements as claimed, and the cost of the supplementary affidavit referred to at [38] if it is filed.

[41] The plaintiff is to arrange for service of this decision on the defendant personally or by way of substituted service.

Orders

[42] I order that the net sale proceeds from the sale of 58 Taharangi Street, Koutu, Rotorua ("the property") totalling \$288,610.73 together with any interest are distributed as follows:

- (a) There is to be an initial adjustment of \$5,040.97 to the plaintiff, Walter Swanson to reimburse him for costs personally incurred for payments he has made towards the property including to Vero House Insurance, Mercury Energy, Armstrong Security, The Glass Guys and Mr Green.
- (b) The balance of the net proceeds and any interest is then to be divided equally between the estate of Tewiremu Napia Swanson (“the estate”) and the defendant Amanda Eileen Norris, subject to the following adjustments which are to be paid out of the defendant’s share:
 - (i) \$2,646.29 to the estate for rates (including the Hot Swap Loan);
 - (ii) \$493.25 to the estate in relation to the defendant’s individual overdraft which ANZ required to be paid out of sale proceeds;
 - (iii) \$9,122.56 to the estate to reimburse it in relation to the mortgage defaults, interest and penalties;
 - (iv) \$1,596.74 plus any penalty and collection costs that have accrued to Genesis Energy for power used between 26 February 2020 and 29 July 2020 at the property;
 - (v) \$272.90 to the deceased’s son to reimburse him for expenses he personally incurred cleaning and readying the property for sale and \$4,155.20 for his labour;
 - (vi) costs on a 2B basis and disbursements; and
 - (vii) any such sum made by further order(s) of the Court consequent on Mr Swanson filing a supplementary affidavit.

[43] To avoid doubt, the adjustments may be made immediately but distribution to the defendant may be delayed until the adjustments referred to at [42](b)(vii) above are finalised.

Harvey J