

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

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

**CIV-2023-463-000010
[2024] NZHC 587**

UNDER Senior Courts Act 2016 and the
Property Law Act 2007
AND
IN THE MATTER of a statement of claim
BETWEEN SILVANA LILIANA WIREPA
Applicant
AND JEWELL MARINA WIREPA
First Respondent
ESTHER WILSON
Second Respondent
ANGELINA KINGI
Third Respondent

Hearing: 12 March 2024
Appearances: N Robertson for Applicant
Judgment: 20 March 2024

JUDGMENT OF ANDERSON J

This judgment was delivered by me on 20 March 2024 at 3:00 pm
pursuant to r 11.5 of the High Court Rules 2016.

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Registrar/Deputy Registrar

Solicitors: Sanderson Weir Limited, Auckland

Introduction

[1] The plaintiff, Ms Silvana Wirepa,¹ applies for orders pursuant to s 339(1)(a) of the Property Law Act 2007 concerning a property at 8361 State Highway 35, Waihau Bay, Ōpōtiki.²

[2] The defendants to the claim were determined by directions of Associate Judge Taylor dated 21 April 2023 and they were served in accordance with directions as to service then made.³ The defendants have not taken any formal steps in this proceeding. On application by Silvana, the matter was set down for formal proof by Associate Judge Taylor on 12 February 2024.⁴ The matter came before me on 12 March 2024.

Formal Proof

[3] Rule 15.9 of the High Court Rules 2016 provides:

15.9 Formal proof for other claims

- (1) This rule applies if, or to the extent that, the defendant does not file a statement of defence within the number of working days required by the notice of proceeding, and the plaintiff seeks judgment by default for other than a liquidated demand.
- (2) The proceeding must be listed for formal proof and no notice is required to be given to the defendant.
- (3) After a proceeding is listed for a formal proof hearing, no statement of defence may be filed without the leave of a Judge granted on the ground that there will or may be a miscarriage of justice if judgment by default is entered, and on such terms as to time or otherwise as the Judge thinks just.
- (4) The plaintiff must, before or at the formal proof hearing, file affidavit evidence establishing, to a Judge's satisfaction, each cause of action relied on and, if damages are sought, providing sufficient information to enable the Judge to calculate and fix the damages.

¹ As three of the people involved share a last name, I refer to them by their first names.

² The Property.

³ *Wirepa v Wirepa* HC Auckland CIV-2023-463-10, 21 April 2023 (Directions minute one of Associate Judge Taylor).

⁴ *Wirepa v Wirepa* HC Auckland CIV-2023-463-10, 12 February 2024 (Directions minute two of Associate Judge Taylor).

- (5) If the Judge before or at the formal proof hearing considers that any deponent of an affidavit filed under subclause (4) should attend to give additional evidence, the Judge may direct accordingly and adjourn the hearing for that purpose.

[4] Rule 15.9 provides a mandatory procedure. It does not offer any advantage over allowing a matter to run its course at trial other than the restriction on the late filing of a statement of defence.⁵ In other words, the Court must be satisfied as to the plaintiff's evidence just as it would had the proceeding gone to trial.⁶ The Court must be cautious of the fact that a plaintiff's evidence is untested.⁷

Background

[5] The Property is general land following the registration of status order 89081 on 19 August 1968. "General land" in substance refers to ordinary privately owned freehold land.

[6] It is 883 metres squared and largely steep, covered in shrubs and trees. There is a small (unconsented) bach on the Property. As at 12 January 2023 the Property was valued at \$342,000.

[7] Silvana is an owner of a 17/24 share in the Property. The remaining shares are owned by:

- (a) her sister and the first defendant, Jewell Wirepa (3/24); and
- (b) the administratrix of the estate of her uncle, Ivan Wirepa (4/24).

[8] The administratrix of Ivan's estate died in 2022 without having completed the required administration and distribution. Ms Esther Wilson, the second defendant, is the daughter of the administratrix. Ms Angeline Kingi, the third defendant, is Ivan's only daughter.

⁵ *Neumayer v Kapiti Coast District Council* [2013] NZHC 1106 at [8].

⁶ *Ferreira v Stockinger* [2015] NZHC 2916 at [35].

⁷ *Tech Voice Data Ltd (in liq) v Ovenden* [2015] NZHC 2766 at [2]; *Kaikoura Freight Ltd (in liq) v Collins* [2017] NZHC 1490 at [6]; and *Zeng v Cai* [2018] NZHC 2548 at [56].

[9] None of the owners occupy the Property. In April 2018 Silvana arranged for the Property to be tenanted to a relative. The tenant paid \$18,700 in rent from April 2018 to August 2022. Since then, the Property has been rented for \$100 on a week-by-week basis to a third party to store a self-contained caravan. I was advised from the bar that this arrangement has come to an end. The Property does not comply with Healthy Homes standards and is presently unable to be rented as a residential tenancy.

[10] On 13 September 2022 Silvana's solicitors wrote to each of the defendants to advise of Silvana's intention to make an application for a sale order and to invite each of them to respond as to their position on the sale. The first defendant, Jewell, responded expressing a desire for the Property to be sold. No response was received from the other defendants.

[11] Since the administratrix's death, no steps have been taken to commence an application to appoint a new administrator to the estate. Due to the vacancy in the position of administrator, the parties are unable to complete a voluntary sale. Silvana therefore applies for an order for sale pursuant to s 339(1)(a) of the Property Law Act.

Jurisdiction

[12] Section 339 of the Property Law Act provides:

- (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.
- ...

[13] Section 342 provides:

342 Relevant considerations

A court considering whether to make an order under section 339(1) (and any related order under section 339(4)) must have regard to the following:

- (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 comparison with the hardship that would be caused to any other person by the making of 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.

[14] The significance of each factor will depend on the particular circumstances of the case.⁸

Should an order for sale be made?

[15] I am satisfied that an order for sale of the Property as sought is appropriate for the reasons outlined below.

⁸ *Styler v James* [2020] NZHC 713, (2020) 20 NZCPR 804 at [24].

Extent of plaintiff's share and other co-owners

[16] The sale is sought by a party with a significant majority share (70 per cent) and supported by another, so by co-owners together holding close to 85 per cent of the Property. The position of the only remaining share of 16.67 per cent is confounded by the vacancy in the administration of Ivan's estate.

[17] A transmission to the administratrix of Ivan's estate was registered on the title to the Property on 22 February 2006. However, she died on 10 June 2022. The position of administrator does not devolve to the executor of that person's estate. Accordingly, there is a vacancy in the administration.⁹

Nature and location of the Property

[18] I outlined the nature of the Property earlier. A large part is extremely steep and covered by shrubs and trees. The one unconsented building encroaches on other land. The 2019 rating valuation of \$205,000 attributes all value to the land.

[19] The Property is in Waihou Bay some 84 kilometres from Ōpōtiki and 127 kilometres from Whakatāne.

[20] Silvana lives in remote New South Wales. Jewell lives in Australia also. The Property is very remote to both of them. Ms Kingi is understood to live in Auckland, which is also distant from the Property. Ms Wilson lives in the Ōpōtiki area but her involvement in the case is as survivor of the administratrix of Ivan's will. She has no status as regards the Property given that the position of administrator does not devolve and she has no claim to benefit from the Property.

Value of the contributions made by Silvana

[21] Silvana has completed renovations and improvements to the Property. In 2005 she spent \$20,672 on a range of renovation work. Over a period of nine months, she spent approximately 30 hours per week of her own time arranging materials and

⁹ *Public Trustee v Registrar-General of Land* [1927] NZLR 839 (HC) at 846.

organising that renovation work. In 2018 Silvana organised/undertook further work that required her to fly from Australia (where she resides) to New Zealand.

[22] The defendants have not contributed to the outgoings or maintenance of the Property.

Hardship to Silvana if the order is not made compared to hardship caused by making the order

[23] Silvana is unemployed. She lives in Australia on a small irregular income. She does not want to return to the Property. Silvana says the continued ownership of the Property is a strain on her mental health and will cause her financial hardship.

[24] Silvana bears the burden of the rates on the Property. She has negotiated with the Ōpōtiki District Council to have late payment penalties remitted and to pay the rates and arrears at a sum of \$50 per week. Silvana has also previously organised the insurance on the Property.

[25] The bach and boundary fence on the Property encroach the land adjoining State Highway 35. This requires remediation. Silvana has been in contact with Waka Kotahi who estimate the costs to rectify those issues at \$20,500–\$26,500 plus GST. Silvana does not have the financial means to pay those costs.

[26] As noted above, the Property does not meet the Healthy Homes standards. Silvana says she does not have sufficient funds to fund the investment required for the Property to meet that standard.

[27] Between 2018 to 2023 rental income derived from the Property totalled \$19,300 while expenses amounted to \$44,308. This leaves over \$25,000 in expenses that are not offset by rental income. Silvana has contributed at least \$9,821 of her own money to the expenses of the Property but does not have the financial means to continue to meet expenses and the defendants have made no contribution. Silvana's affidavit recorded that the interim arrangement whereby income of \$100 per week was received for storage of a caravan was to come to an end shortly. As noted above, I was advised from the bar that the arrangement did come to an end in January 2024.

[28] Ms Robertson described Silvana's financial position as perilous. Silvana is herself tied up in legal proceedings over her own property in Australia, which is causing severe financial strain, and is where she wishes to focus her efforts and attention.

[29] Silvana also advises that she continues to suffer from a chronic and complex post-traumatic stress disorder. The medical certificate confirming this is from 2019, although she refers to a specific stress event in just the last year that has caused a deterioration in her condition. Silvana's condition is said to have arisen from incidents associated with her brother, who lives adjacent to the Property.

[30] The combination of all the above matters mean that if an order for sale is refused there will be significant hardship on Silvana. She is out of pocket for the costs she incurred and has not been recompensed for the work she herself did. She will continue to face the financial and mental strain of managing the Property. She will have funds tied up in a property that is inaccessible to her when she is in need of funds elsewhere.

[31] This is not a situation where there is comparative hardship to other parties. Jewell supports the sale, and the Property is not used or practicably accessed by her either. Similarly, Ms Kingi is distant from the Property and has never used it. The sale would potentially mean that there were some funds in the estate that would facilitate the appointment of an administrator. On the face of it, a sale is in the interests of all parties potentially interested in the Property.

Summary

[32] In summary, an order for sale is appropriate in view of the following:

- (a) The extent of Silvana's ownership of the Property.
- (b) Silvana's sister supports the sale and together they hold 85 per cent.
- (c) The issue with the remaining share arises due to the vacancy in the administration of Ivan's estate.

- (d) Silvana has made significant contributions without support from others for which she should be reimbursed. She faces considerable hardship if she is required to continue to administer the Property and if she cannot access the funds tied up in it.
- (e) Silvana's own circumstances support the sale, given that she lives in Australia and needs to focus on litigation with her property and her life there.
- (f) Silvana's sister Jewell also lives overseas, and Ivan's daughter Ms Kingi lives in Auckland. Neither use the Property and it would appear to be in their interests that it be sold.
- (g) The Property itself would appear to require expenditure to be made tenable and faces an encroachment issue.

Form of orders

[33] The Court has further powers and discretions provided in s 343 of the Property Law Act to make orders necessary to facilitate the sale of the Property and provide for appropriate division of the proceeds.

[34] I discussed the specific orders proposed with Ms Robertson and proposed/discussed some minor changes. Ms Robertson reflected these in draft orders submitted following the hearing. I make orders as set out in this draft, allowing for any adjustments necessary to reflect income received or outgoings met since 31 December 2023 (the date of Silvana's affidavit) and with an addition for leave to return to the Court if that becomes necessary. The orders I make are as follows:

1. The following orders are made pursuant to s 339(1)(a) and s 343 of the Property Law Act 2007:
 - (a) the Property to be sold by deadline private treaty after a marketing campaign of no less than 4 weeks or such other method of sale as is recommended by the real estate agent appointed pursuant to 3(b) below:
 - (b) Debra Gibbons AREINZ of McDowell Real Estate Limited trading as the Professional real estate agency or other suitable

real estate agent is to be appointed and authorised to act as real estate agent for the purpose of marketing and sale of the Property.

- (c) The plaintiff shall be authorised to accept an offer for the sale of the Property of not less than \$300,000.00.
 - (d) The plaintiff shall be authorised to sign on behalf of Jewell and Ivan's Estate all documents that may be required to sell the property including, for the avoidance of doubt, the Listing Agreement and any Agreement for Sale and Purchase of Real Estate (as required).
 - (e) The plaintiff's lawyers, Sanderson Weir Limited, are authorised to act on behalf of both the plaintiff and the defendants in respect of the conveyancing of the Property.
 - (f) Once the Property is sold, a Registrar of the court will seal a further court order to vest ownership of the Property in the new purchaser on the settlement date. Such order will be held by Sanderson Weir and certified for registration in Landonline by a solicitor of Sanderson Weir acting as the conveyancing solicitor vendors, pending settlement taking place.
2. The Proceeds from the sale of the Property shall be disbursed in the following priority and manner:
- (a) In payment of such commission, marketing costs and other sums as are contractually payable to the real estate agency contracted to sell the Property.
 - (b) In payment of all outgoings due on the Property and other costs of sale, including such reasonable legal costs are directly attributable to the conveyancing for the sale of the property, rates arrears and/or other apportionments.
 - (c) In payment of the reasonable legal costs and disbursements for making this claim including the application for directions in the sum of \$20,407.50, which represents \$18,078.00 for fees including GST and \$2,329.50 for disbursements (refer to the table set out in Schedule A) to the account of the plaintiff, in respect to any invoices already paid by the plaintiff and to Sanderson Weir in respect of any amounts that remain unpaid.
 - (d) The sum of the deficit of funds due to Silvana from the money and time expended of \$25,008.63 on the Property subject to any adjustment for income received and outgoings met since 31 December 2023.
 - (e) The balance of the proceeds of sale be divided according to the ownership interests of the parties as follows:
 - (i) Silvana as to a 17/24 share.

- (ii) Jewell as to a 1/8 share.
- (iii) If, as at the date of the sale, a vacancy remains in the administration of Ivan's Estate, then Ivan's Estate's 1/6 share to be paid to the High Court or to a solicitor as stakeholder pending a new administrator being appointed to Ivan's Estate.

3. Leave is reserved to apply for variation of the detail of these orders.

Orders associated with sale

[35] By way of explanation, as regards facilitating the sale itself, it is proposed that there be a sale by private treaty by a suitable real estate agent after a marketing campaign of no less than four weeks. If the real estate agent now recommends an alternative method of sale, that is to be adopted. The proposed orders set out sensible arrangements for listing, conveyancing and for the mechanism for signing on behalf of Jewell and Ivan's estate.

[36] The orders seek authorisation to accept an offer of not less than \$300,000. This figure is appropriate in light of:

- (a) The Property's registered valuation at \$342,000 (including GST if any) as at 12 January 2023.
- (b) A real estate agent's opinion in November 2022, that offers between \$300,000 and \$360,000 could be expected.
- (c) The Property has a 2019 rating valuation of \$205,000 which was all attributed to the land value.

[37] While this information was more current when the proceeding was filed in May 2023, it would be burdensome to require the valuations to be revisited. The real estate agency will be seeking to obtain the best price for the Property, as will Silvana.

Deductions from proceeds before distribution

[38] The orders as to distribution of proceeds outline that the proceeds be disbursed in payment of all expenses and outgoings plus the reasonable legal fees of the current application.

[39] Payment of the legal costs is appropriate given that the order is necessary in view of the vacancy in the administration. Ms Robertson provided a schedule of the legal fees and disbursements of the application which are reflected in the orders made. I am satisfied these are reasonable.

[40] The orders provide for Silvana to be reimbursed for the unrecouped sums she has outlaid and compensated for the work she did on the Property (the latter discounted by 70 per cent) to reflect her interest in the Property. I have reviewed the expenditure and claim for work and I am satisfied it is legitimate and the claim is properly made. I have amended the draft order to allow for any necessary adjustment to account for outgoings paid by Silvana and income received from the Property since Silvana's affidavit was sworn.

Distribution of proceeds

[41] The balance is then to be divided as per the percentage shares. If there is no administrator of Ivan's estate at the date of sale, the share held by Ivan's estate is to be paid to the High Court or to a solicitor as stakeholder pending a new administrator being appointed.

Leave reserved to apply for variation

[42] I have included leave to apply to vary the orders. This does not affect the order for sale but is intended to enable a mechanism to address issues that may arise with implementing the sale and distributing the proceeds.

Result

[43] Silvana's application for an order for sale is successful. I make the orders set out in paragraph [34] above.

Anderson J