IN THE FAMILY COURT
AT NORTH SHORE
(HEARD AT WAITAKERE)

FAM-2016-044-000109
[2016] NZFC 2668

IN THE MATTER OF	THE LAND TRANSFER ACT 1952
IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	PAMELA BOURNE Applicant
AND	JOHN BAKER Respondent

Hearing:	30 March 2016
Appearances:	R van Keisenberg for the Applicant R Collis for the Respondent
Judgment:	1 April 2016

RESERVED JUDGMENT OF JUDGE B R PIDWELL
(Section 42 PRA - Notice of Claim)

Order

A. The Notice of Claim 10197109.1 registered in favour of the Applicant over CT116A/813, Lot 2 Deposited Plan 185730 shall not lapse.

[1] The applicant has lodged a Notice of Claim under s 42 of the Property (Relationships) Act 1976 ("the Act") against land owned by a company. The respondent is the sole director and shareholder of that company. He has filed a notice for the claim to lapse. Unless the Court directs otherwise, the Notice of Claim will lapse on 5 April 2016.

[2] The onus is on the applicant to establish that she has an arguable case that the notice should remain. If she can establish that, the notice should remain to protect her rights as the non-owning spouse from being defeated.[1]

Need for urgency

[3] On 8 March 2016 the applicant filed a Without Notice application for an interim order preventing a Notice of Claim from lapsing or alternatively seeking a reduction of time for filing a Notice of Defence. His Honour Judge Neal placed the application on notice and abridged the time to seven days. He directed an urgent one hour hearing.

[4] On 21 March 2016 the respondent signed a Notice of Defence, which was filed on 24 March 2016, the last working day before the Easter holiday period.

[5] A hearing took place in the Waitakere District Court on an urgent basis on the first working day after the Easter holiday period.

[6] The prescribed periods set out in s 145 of the Land Transfer Act 1952 mean that the notice will lapse on 5 April 2016, unless the Court directs otherwise. It is within that context and the urgency of those timeframes that this decision is issued.

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[1] (*Pacific Homes Limited) In Receivership v Consolidated Joineries Limited* (1996) 32 NZLR 652 (CA); *Moriaty v Roman Catholic Bishop of Auckland* 1982 5 MPC 98

What is the applicant's evidence?

[7] The applicant deposes the following:

- She was in a de facto relationship with the respondent from 2003 to 2015.

- She met him in her capacity as a real estate agent acting for the vendor of a 20.8 hectare property at [address deleted] ("the property").

- The respondent's company, Matakana Museum Limited ("MML") purchased the property for $590.000.

- The Matakana Country Park was established on the property which she helped set up and contributed to both financially and non-financially. She contributed in part $200,000. The park now comprises a wedding chapel, woolshed, playground, restaurant, shops and equestrian centre and has an estimated worth of over $10 million dollars.

- The parties lived in apartments on the property for a number of years.

- Upon separation, she instructed counsel to write to the respondent to enter into a separation and relationship property agreement. The respondent's reply through counsel was to deny the fact that the parties were in a de facto relationship and that the respondent owned any assets.

- On 22 September2015 she registered a Notice of Claim under s 42(1) of the Act which states that the respondent is the sole director and shareholder of MMML which is the registered proprietor of the property and that her interest is a beneficial interest as a de facto partner of 13 years.

- She received a Notice to Lapse on 2 March 2016 although the notice was dated 24 February 2016.

- She summarises the relationship as being de facto partners and attaches a copy of the respondent's Will dated 2011 which leaves half his residuary estate to her and appoints her as a trustee in respect of the testamentary dispositions to [relationship details deleted].

- She summarises her contributions to the property and relationship as financially supporting him, financial contributions to the development of the property, purchasing apartments to assist with lending to develop the property, helping design, build and promote the property, finding tenants, opening the restaurant, planting and assisting with wedding functions.

- She annexes an agreement for sale and purchase of the property dated January 2014 with a sale price of $4.5 million. The sale did not proceed.

- She is concerned that the respondent is actively promoting the sale of the property which will prejudice her pending claim under the Property (Relationships) Act 1976 and a constructive/resulting/remedial trust claim.

What is the respondent's evidence?

[8] The respondent deposes the following:

- He denies that the parties were in a de facto relationship but says they were in a non-exclusive girlfriend/boyfriend relationship from 2003 to 2015.

- He met the applicant after the purchase of the property

- The property was purchased by MML as a trustee of Matakana Museum Trust which was established before he met the applicant.

- The applicant's only contribution to the Matakana Country Park was to pick colours for the fireplace blocks in the restaurant.

- The applicant did not contribute financially or non-financially to the property or relationship.

- He acknowledges the Will in 2011 but notes the testamentary disposition to the applicant would have been modest and in any event he changed the Will the following year.

[9] A historical search of the certificate of title to the property shows that it was purchased by a company called Horseworld Limited which changed its name to Matakana New Zealand Limited on 22 July 2003.

[10] His evidence is supported by an affidavit from Andrea Vujnovich who has known him since 2004 and deposes that from her perspective the parties were not in a de facto relationship.

Is the fact that the property is owned by a third party company fatal to this application?

[11] The District Land Registrar accepted the applicant's Notice of Claim filed under s 42 of the Act on 22 September 2015.

[12] The respondent challenges the application for the notice to remain on the basis that the registered proprietor of the land in question has not been served, and is not a party to these proceedings. He submits it is axiomatic that the registered owner of the land should be involved in these proceedings.

[13] Two requirements are needed to lodge a Notice of Claim. Firstly the claimant must have been in a relationship with the registered proprietor of the land, or a person who is entitled to, or is beneficially interested, in the land. [2] Secondly, there must be an unresolved claim to an interest in the land in question under the PRA.[3]

[14] In respect of the first requirement, the applicant is not asserting that she was in a de facto relationship with the registered proprietor of the land, but rather a

[2] *Arrow Farms Limited v Jackson* (1991) 7 FRNZ 561
[3] Fisher on Matrimonial and Relationship Property, at 9.17

person who is entitled to or is beneficially interested in the land, namely the respondent.

Justice Holland in *Arrow Farms Ltd v Jackson*[4] noted at 565:

> "… 'Claim to an interest' should not be defined narrowly or strictly. Whether the claim in the end will be substantiated will be a matter for the court to determine if the disputes come to final resolution".

[15] I accept that there is no provision to lodge a s 42 Notice of Claim against land owned by a third party, a trustee of a family trust or a company *merely* on the ground that the spouse is a settler or shareholder.[5] However, if the applicant has an arguable case that the respondent has a *personal beneficial* interest in the land, then a Notice of Claim is available.[6]

[16] It is accepted that the respondent is the sole shareholder and sole director of MML which is the registered proprietor of the property. He was present in Court for the purpose of the hearing. The fact the company is not formally part of these proceedings does not mean that the notice should lapse by virtue of that fact alone. In order to maintain the notice, the applicant must establish that she has been in a relationship with "a person who is entitled to or beneficially interested in the land". On her evidence she was in a de facto relationship with the respondent who she claims is entitled to or is the beneficial owner of the land by virtue of a constructive trust, or resulting trust. Therefore, the registered owner need not be a party to this application.

[17] Within the context of this application, where the respondent is the sole director and shareholder of a company, of which he alleges is a trustee of a trust, there is a need for "worldly realism".[7] In the latest *Clayton v Clayton* decision, the Supreme Court has acknowledged that the PRA is a piece of social legislation and that "strict concepts of property law may not be appropriate in the relationship property context". It would be unjust in my view for the Notice of Claim to lapse on the ground that the registered owner (MML) was not part of the proceedings, when

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[4] Above n.2
[5] *Beric v Beric Holdings Limited* 1986 2 FRNZ 522 (HC); *Cijffers v Cijffers* (1989) 5 FRNZ 694 (HC)
[6] *Heazelwood v Joie de Vivre Canterbury Limited* [2015] NZCA 215
[7] *Clayton v Clayton* [2016] NZSC 29 at [79]

the respondent is the only person or entity involved in that company, and he was present in court when the matter was argued.

Does the applicant have an arguable case?

[18] In order for the applicant to establish that the Notice of Claim should remain, she must put forward an arguable case that:

(a) The respondent has a beneficial interest in the property owned by the company (or the trust) on the basis of a constructive trust

(b) That his interest falls within the definition of property under the PRA, and

(c) That she has an interest in his interest because it potentially falls within the relationship property pool

[19] The applicant asserts that the respondent is the beneficial owner of the land, by virtue of the fact that he is the sole director and shareholder of the company which owns the land. Alternatively, if indeed the company owns the land in its capacity as trustee for a trust, he has a beneficial interest by virtue of the powers under that trust, and the property rights arising from those powers under a resulting or constructive trust. [8] She will be relying on the well known principles in *Lankow v Rose,* [9] that she has a claim to a share in his beneficial interest and increase in value of the property by virtue of her de facto relationship with him, contributions, reasonable expectation that she have an interest in the property, and that the respondent should reasonably be expected to yield her that interest.

[20] A beneficial interest under a constructive or resulting trust does fall within the definition of property under section 2 of the PRA.[10] A claim to such an interest is capable of sustaining a Notice of Claim under the PRA.[11]

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[8] The trust deed was not in evidence, so those powers could not be assessed.
[9] *Lankow v Rose* [1995] NZLR 277 (CA)
[10] See for example *Heazlewood v Joie De Vivre Canterbury Ltd* [2015] NZCA 213
[11] Above n10:, See also *Huang v Chung* [2015] NZHC 686

[21] The Supreme Court has recently said:[12]

> "the property definition in s2 of the PRA must be interpreted in a manner that reflects the statutory context. We see the reference to "any other right or interest" when interpreted in the context of social legislation, as the PRA is, as broadening traditional concepts of property and as potentially inclusive of rights and interests that may not, in other contexts, be regarded as property rights or property interests."

[22] I find that there is at least an arguable case that the respondent has a beneficial interest in the property at [address deleted] and that the applicant has a claim to that under the PRA. There is evidence of a relationship between them. It will need to be determined if it is a qualifying relationship, but there is prima facie evidence in the form to the Will and the applicant's evidence. The fact that the respondent is the sole director and shareholder of the company which owns the land establishes in my mind that he has a personal interest in it in some form. The relationship between the MML and a trust is yet to be established. Whether the applicant's claims ultimately succeed is a matter for subsequent determination, but there is an arguable case.

[23] I accept the applicant's submission that the Court must be alert to situations where a party has structured their affairs in such a way as to divest themselves legal ownership of property. The recent progress of the Clayton case through the appellate Courts shows a clear acknowledgment of the need for equity to intervene in such circumstances when the outcome would not accord with the principles of the PRA.

[24] The central purpose of a s42 Notice of Claim is to protect the non-owning spouse, so that their claim or rights are not defeated, pending resolution of the substantive issues. These parties are at the very outset of PRA proceedings.[13] It would be highly prejudicial for the Notice of Claim to lapse at this juncture.

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[12] Above n.t 7 at [38]

[13] Noting that the applicant indicated she is likely to file relationship property proceedings and resulting / constructive trust claim imminently

[25] To avoid any misunderstanding, I should make it clear that the only issue I am determining in these proceedings is whether the Notice of Claim should remain, pending the applicant's claims being resolved in a substantive way. This is an urgent decision given within the time constraints of s 145 of the Land Transfer Act and should not be relied for any findings of fact.

Signed at this day of at am/pm.

B R Pidwell
Family Court Judge