



Supreme Court
New South Wales

Case Name: McDonald v Ellis

Medium Neutral Citation: [2018] NSWSC 278

Hearing Date(s): On the papers

Date of Orders: 7 March 2018

Decision Date: 7 March 2018

Jurisdiction: Equity

Before: Darke J

Decision: Orders made for the appointment of a trustee for sale, and costs of the proceedings.

Catchwords: LAND LAW – Co-ownership – statutory trust for sale – whether proceedings should be adjourned to allow co-owner time to obtain taxation rulings – costs – whether costs of respective co-owners should be paid out of proceeds of sale

Legislation Cited: Conveyancing Act 1919 (NSW), s 66G

Cases Cited: Ferella v Official Trustee in Bankruptcy [2015] NSWCA 411
Kardos v Sarbutt (No 2) [2006] NSWCA 206
Meszaros v Meszaros [2017] NSWSC 1193
Ross v Ross (2010) 15 BPR 28,945; [2010] NSWCA 301
Tory v Tory [2007] NSWSC 1078

Category: Principal judgment

Parties: Narelle Marie McDonald (Plaintiff)
John Baker Ellis (First Defendant)
Margaret Clouting (Second Defendant)

Representation: Counsel:
P R Glissan (Plaintiff)

Solicitors:
Stacks Collins Thompson (Plaintiff)
Glynns Lawyers (First Defendant)
David Landa Stewart Lawyers (Second Defendant)

File Number(s): 2017/218885

Publication Restriction: None

JUDGMENT

- 1 The plaintiff is the owner of a quarter share in a property in Baden Street, Coogee ("the Property"). The first defendant is the owner of a half share in the Property, and the second defendant is the owner of the remaining quarter share. The co-owners are siblings who inherited their shares in the Property from their late grandfather's estate.
- 2 By a Summons filed on 18 July 2017 the plaintiff seeks the appointment of Perpetual Trustee Company Limited as a trustee for sale of the Property pursuant to s 66G of the *Conveyancing Act 1919* (NSW). The second defendant does not oppose the orders sought by the plaintiff.
- 3 On 18 September 2017 the first defendant filed a Cross Summons in which an order for partition was sought. The first defendant has since indicated that the Cross Summons is not to be pressed.
- 4 The matter was before the Court on 16 February 2018 for directions. It became apparent that, although no party contended that there were grounds to refuse the plaintiff's application, the parties were unable to agree on the appropriate form of orders to be made, including as to costs. Accordingly, the Court made orders directing the provision of written submissions on those matters with a view to the matter being dealt with on the papers.
- 5 Submissions have been provided in accordance with those directions. As no party has suggested that a further oral hearing is necessary, the Court will proceed to deal with the matter on the papers.

- 6 The substantive relief sought by the plaintiff is contained in paragraphs 1 to 4 and 6 of the Summons. The proposed orders provide for the appointment of Perpetual Trustee Company Ltd as trustee of the Property upon the statutory trust for sale under Division 6 of Part 4 of the *Conveyancing Act*, and ancillary matters. The plaintiff also proposes an order that specifically allows the first defendant to bid at any auction of the Property.
- 7 Subject to one issue, there is no reason why those orders should not be made. They are not opposed by the second defendant, and the first defendant has not suggested that any other form of orders would be more appropriate. They seem to me to be appropriate. So, too, is an order dismissing the Cross Summons.
- 8 The qualification referred to above arises from the submission made by the first defendant that the matter should be adjourned to 26 April 2018 to allow him to obtain private taxation rulings from the Australian Taxation Office and Revenue NSW. The first defendant proposes to obtain a ruling from the Australian Taxation Office as to whether the appointment of a trustee for sale would trigger a capital gains tax event, and a ruling from Revenue NSW as to any transfer duty consequences of a trustee sale.
- 9 I do not think that it would be appropriate to adjourn the proceedings. The plaintiff sought the consent of her co-owners to a sale more than 9 months ago, and the proceedings themselves have been on foot for more than 7 months. The first defendant has had more than adequate time to seek any private taxation rulings. There is also evidence that the plaintiff, who is 67 years of age, desires the sale in order to alleviate some financial difficulties she is facing.
- 10 Moreover, even if the appointment of a trustee for sale brought about some disadvantageous taxation consequences for the co-owners (as to which I express no view), I do not think that would afford a good reason to decline the plaintiff's application. The discretion to refuse relief under s 66G is a limited one (see *Ross v Ross* (2010) 15 BPR 28,945; [2010] NSWCA 301 at [36], cited in *Ferella v Official Trustee in Bankruptcy* [2015] NSWCA 411 at [40]). The discretion is generally not exercised unless on settled principles it would be

inequitable to allow the application (see *Tory v Tory* [2007] NSWSC 1078 at [42], cited in *Ferella v Official Trustee in Bankruptcy* (supra) at [38]). The mere existence of disadvantageous taxation consequences would not in my view make it inequitable for one of the co-owners to apply for the appointment of trustees for sale. There is of course no general jurisdiction to refuse s 66G relief on the basis of hardship or unfairness (see *Ferella v Official Trustee in Bankruptcy* (supra) at [36]-[37]).

- 11 As to costs, the plaintiff seeks an order that her costs of the Summons be paid out of the net proceeds of sale prior to any distribution amongst the co-owners. That seems to me to be appropriate and in accordance with established principles in relation to s 66G proceedings (see *Kardos v Sarbutt (No 2)* [2006] NSWCA 206 at [28]). The second defendant seeks a similar order in respect of her costs, and in my view that is appropriate also. Whilst the second defendant did not initially agree to a sale, she did so fairly soon after the commencement of the proceedings. She has not acted unreasonably.
- 12 The plaintiff submitted that the first defendant's costs should not be paid out of the net proceeds of sale. The plaintiff submitted that the defendant opposed and delayed the hearing of the Summons without any evidentiary basis, and filed a Cross Summons which was unsupported by any evidence. The first defendant did not make any submissions as to costs, even though the Short Minutes of Order the plaintiff was propounding on 16 February 2018 provided only for the plaintiff's costs to be paid out of the net proceeds of sale before distribution.
- 13 I consider that in the circumstances of this case, the first defendant should be left to bear his own costs of the proceedings. It is also appropriate to order that the first defendant pay the plaintiff's costs of the Cross Summons.
- 14 The pursuit of the Cross Summons in conjunction with the first defendant's stance in opposition to the plaintiff's application means that this is not simply a case of a co-owner declining to consent to the appointment of trustees, thereby necessitating the institution of proceedings. Depending upon the particular circumstances, it may be appropriate for such a co-owner to have their costs paid out of the proceeds of sale (see, for example, *Meszaros v Meszaros*

[2017] NSWSC 1193 at [7]-[8]). Here, I consider that the overall conduct of the first defendant amounted to unreasonable opposition sufficient to warrant a departure from the usual position that the costs be paid out of the proceeds of sale. The first defendant deposed that he was prepared to purchase the plaintiff's share in the property, but adduced no evidence of the making of any offers to her. The plaintiff deposed that neither the first defendant nor his solicitors had ever written to her or her solicitors setting out an offer to purchase her share. Nevertheless, the first defendant has withheld his consent to the appointment of trustees (without raising any substantial grounds in opposition) and has advanced a Cross Summons for a period, thereby delaying the determination of the proceedings.

15 For the above reasons, the Court will make the following orders:

- (1) Order that Perpetual Trustee Company Limited ("the Trustee") be appointed trustee of the property known as "Tamahine" situated at 21 Baden Street, Coogee NSW, being the whole of the land comprised in Folio Identifier 8/8843 ("the land") pursuant to the provisions of s 66G of the *Conveyancing Act 1919*;
- (2) Order that the land vest in the Trustee subject to any encumbrances affecting the entirety thereof but free from any encumbrances affecting any undivided share or shares therein upon the statutory trust for sale pursuant to Division 6 of Part 4 of the *Conveyancing Act 1919*;
- (3) Order that the Trustee pay out of the proceeds of sale of the land:
 - (a) Council rates, water rates, strata levies and other statutory duties or charges (if any) in respect of the land;
 - (b) real estate agent's commission and charges and any other costs of the sale of the land;
 - (c) any amount owing to any person having a secured interest in the land;
 - (d) the plaintiff's costs of the Summons, and the second defendant's costs of the proceedings; and
 - (e) the Trustee's costs of acting as trustee.
- (4) Order that the net proceeds of sale remaining after all such payments have been made be divided and distributed as follows:

Narelle Marie McDonald – one quarter;

John Baker Ellis – one-half; and

Margaret Clouting – one quarter.

- (5) Order that the first defendant is entitled to bid at any auction of the land;
- (6) Order that the first defendant bear his own costs of proceedings;
- (7) Grant liberty to the parties and to the Trustee to apply to the Court on seven days' notice for such further orders as may be necessary to give effect to these orders;
- (8) Order that the Cross Summons be dismissed;
- (9) Order that the first defendant pay the plaintiff's costs of the Cross Summons.

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