IN THE HIGH COURT OF NEW ZEALAND
BLENHEIM REGISTRY

CIV-2011-406-000284
[2012] NZHC 1765

UNDER	The Property Law Act 2007
IN THE MATTER OF	an application for a sale order pursuant to ss 339-343 of the Property Law Act 2007
BETWEEN	LEO TIMOTHY COFFEY MARCELLA ANNE COFFEY BARRY MATTHEW COFFEY ANDREA MICHELLE KERWIN PAUL NESTOR KERWIN Plaintiffs
AND	TRAVIS LEO COFFEY GERARD WILLIAM COFFEY SANDRA MAREE COFFEY Defendants

Hearing: 7 May 2012
(Heard at Blenheim)

Appearances: Q A M Davies and T A Hutchinson for Plaintiffs/Applicants
D Chesterman for Defendants/Respondents

Judgment: 19 July 2012

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
[as to plaintiffs' summary judgment application]

Introduction

[1] The parties are the co-owners of a family holiday house in the Marlborough Sounds. The property has been in family ownership since 1989.

[2] The property is owned by the parties as tenants in common in one sixth shares. The plaintiffs hold four-sixths. The defendants own the remaining two shares. The shares are owned:

- Leo and Marcella (parents/plaintiffs) – two-sixths
- Barry (son/plaintiff) one-sixth
- Andrea and Paul (daughter and son-in-law/plaintiffs) – one-sixth
- Travis (son/defendant) one-sixth
- Gerard and Sandra (son and daughter-in-law/defendants) one-sixth.

[3] As the existence of litigation indicates, the family is divided over the future of the property. The plaintiffs want to sell their shares, whether as part of a full sale of the property or by sale to the defendants. They seek a suite of orders to effect a sale.

[4] Defendants oppose the orders sought. They rely on rights which they say arise by agreement or in equity. They further assert that there is a need for the Court to address the value of contributions made. The defendants say there are material factual disputes. They say that the case is unsuitable for resolution by summary judgment. They say that the breadth of discretion awarded to the Court under s 339 Property Law Act 2007 highlights the unsuitability of this case for summary judgment.

Plaintiffs' summary judgment application – the general principles

[5] The starting point for a plaintiff's summary judgment application is r 12.2(1) High Court Rules, which requires that the plaintiff satisfy the Court that the defendant has no defence to any cause of action in the statement of claim or to a particular cause of action.

[6] I summarise the general principles which I adopt in relation to this application:

(a) Commonsense, flexibility and a sense of justice are required (*Haines v Carter* [2001] 2 NZLR 167 (CA) at 187).

(b) The onus is on the plaintiff seeking summary judgment to show that there is no arguable defence. The Court must be left without any real doubt or uncertainty on the matter.

(c) The Court will not hesitate to decide questions of law where appropriate.

(d) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.

(e) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.

(f) In assessing a defence the Court will look for appropriate particulars and a reasonable level of detailed substantiation.

(g) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.

(h) Where a last-minute, unsubstantiated defence is raised and an adjournment would be required, a robust approach may be required for the protection of the integrity of the summary judgment process.

(i) Once the Court is satisfied that there is no defence, the Court retains a discretion to refuse summary judgment but does so in the context of the general purpose of the High Court Rules which provide for the just, speedy and inexpensive determination of proceedings.

Section 339 Property Law Act 2007

The legislation

[7] The plaintiffs invoke s 339(1) of the Act. It provides:

> 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.

[8] As co-owners of the property, the plaintiffs have standing under s 341(1)(a) of the Act to make this application.

[9] The matters to which the Court must have regard when considering whether to make an order under s 339(1) are set out in s 342 of the Act:

> 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:
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> (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.

[10] The Court, when making an order for sale (or other orders under s 339) may (by s 339(4) make additional orders). Those are set out in s 343 and include the requirement of payment of compensation by one co-owner to another, directions as to sale, and any other matters which the Court considers necessary or desirable as a consequence of the making of an order under s 339(1).

The breadth of the Court's discretion under ss 339-343 of the Act

[11] Orders for sale of jointly owned property were previously obtained under s 140(1) Property Law Act 1952 ("the old provision").

[12] The directory nature of the old provision meant that applications for orders were generally suitable for summary judgment. The Court was required to direct the sale of co-owned land, if the owner or owners of a moiety (or more) applied for a sale, unless the Court saw good reason to the contrary. The point is made in Hinde McMorland & Sim *Land Law in New Zealand*:[1]

> Under the former jurisdiction, where in many cases the Court had no discretion but to order either sale or partition if certain basic facts were proved, the summary judgment procedure was well suited and many claims were brought and dealt with expeditiously under that procedure.

[13] In *McMahon v McMahon*,[2] the Court of Appeal dismissed an appeal against an order for sale under the old provision. Blanchard J, delivering the judgment of the Court, noted:[3]

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1 Hinde McMorland & Sim *Land Law in New Zealand* at 13.021(a) ; see to similar effect *Sim's Court Practice* HCR 12.2.7(e) and *McGechan on Procedure* HR 12.1.11.

2 *McMahon v McMahon* [1997] NZFLR 145 (CA).

3 Ibid, at 148.

> ...the logical difficulty of applying a general discretion found in the High Court Rules [as to summary judgment] to a specific statutory provision [s 140 Property Law Act 1952] under which it has been held that there is no discretion.

[14] Blanchard J then contrasted the proposals made by the Law Commission to give the Court a discretion with the existing lack of discretion in this way:[4]

> In its preliminary paper the Law Commission suggested that the present provisions of s 140 of the Property Law Act are undesirably lacking in flexibility. In its final report, *A New Property Law Act* (NZLC R 29), delivered in 1994 the Commission put forward as part of the proposed new statute draft sections 254-257 which would, if enacted, give the Court a discretion whether to make an order for sale and allow it to take into account the relative hardship to the applicant and any other person which would be caused by the refusal or making of an order. Such a provision would enable the Court to delay a sale if it felt that there would be unfairness in dealing with one property ahead of the resolution of claims in relation to them all. But at present the Court cannot do this under s 140(1).

[15] In *McMahon*, the appellant was endeavouring to avoid summary judgment through a request for delay. The refusal of the appeal (on this point) arose out of the fact that the old provision gave the Court no discretion to delay a sale. A resort to the residual discretion to refuse summary judgment would therefore be inappropriate.

[16] The legal position markedly altered when Parliament enacted the Property Law Act 2007, incorporating many of the recommendations of the Law Commission. As observed by Fogarty J in *Holster v Grafton*:[5]

> Sections 339-342 of the Property Law Act 2007 should be understood to be remedial.

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4 Ibid, at 148-149.

5 *Holster v Grafton* (2008) 9 NZCPR 314 (HC) at [43]. The Law Commission in its Preliminary Paper (NZLC PP16 *The Property Law Act 1952* July 1991) stated that:

> 169 A difficulty with the present sections is the lack of flexibility where a half-owner applies. The court must order either a partition or a sale. It cannot refuse to make any order at all unless the application is by someone with less than a half interest...

This led the Commission to pose this question:

> Q 25 Should the court be given more flexible powers to determine questions of partition or sale between co-owners as follows:
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> - order for sale and division of proceeds
> - division in specie
> - one or more co-owner(s) to purchase share of other(s), or sale if this is not done
> - postponement of sale or division
> - no order at all?

[17] In *Bayly v Hicks*,[6] Wylie J reviewed ss 339-343 of the Act and summarised them in this way:

> ...the various provisions relevant to the division of co-owned property give the Court extensive discretions, and, together with the High Court Rules, a formidable armoury to effect a fair and reasonable division.

[18] The commentary anticipated the impact of the breadth of discretion upon the application of summary judgment procedures to applications under the Act.

[19] In Hinde McMorland & Sim *Land Law in New Zealand*, it was observed, in contrast to the position under the old provision, that:[7]

> Under the provisions of the Property Law Act 2007, however, the Court is given a wide discretion in every case as to the order to be made and both parties may raise full and detailed arguments as to the matters bearing on the exercise of that discretion. In this case, the summary judgment procedure is not so well suited to these applications and it may be that a full hearing is much more commonly required.

[20] To similar effect is the passage by David Brown in *New Zealand Land Law*:[8]

> ... but it is suggested that the suitability of applications under s 339 Property Law Act 2007 for summary judgment is far less clear, given that the court in that case emphasised that there was no real choice available to the court in response to the plaintiff's application under s 140 Property Law Act 1952. Therefore, authorities in relation to summary judgment and s 140 should be treated with caution in relation to s 339 of the 2007 Act.

Application of summary judgment procedure to s 339 of the Act

[21] Mr Davies referred me to three cases as examples of summary judgment being granted for division of property pursuant to s 339 of the Act. The granting of summary judgment in a number of cases might suggest that the commentators had been inaccurate as to their predictions as to the future of summary judgment applications under the new legislation. The brief review of those cases to which I will refer shortly does not lead to a conclusion that summary judgment will

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6 *Bayly v Hicks* HC Whangarei CIV-2009-488-000547, 19 August 2011 at [37].

7 At 13.021(a).

8 David Brown "Co-ownership" in Tom Bennion, David Brown, Rod Thomas and Elizabeth Toomey (eds) *New Zealand Land Law* (Brookers, Wellington, 2009) 393 at 6.7.08.

frequently be available in relation to contested s 339 applications. Since the hearing before me, there has been a further decision involving summary judgment to which I will also refer. It reinforces my general conclusions.

Jacobson v Guo[9]

[22] This, and the next two cases to be referred to, each involved partners whose relationship had come to an end with one remaining in the family home.

[23] In *Jacobson*, the plaintiff applied for an order for sale under s 339(1) of the Act. He also sought directions as to the sale process and an adjustment for occupation rent (s 343(f)). The defendant emphasised that she wanted the property sold and that the proceedings were unnecessary. Her submission was that the summary judgment process was inappropriate to deal with an application for division.

[24] Associate Judge Robinson noted the impact of the 2007 Act legislative amendments in this way:

> [5] It is highly likely that this change in the law may result in a situation where fewer applications for summary judgments succeed because of the increased likelihood of there being disputed facts that would need to be resolved to determine the relative hardship suffered by the parties.

[25] In contrast to that statement of the position, his Honour then noted that there was in the case before him really no defence offered to the application for sale. Both counsel had submitted a memorandum as to the competing orders which were sought as to sale.

[26] In short, the issues came down to the form of directions to be made as to sale and the making of any order as to occupation rental. In relation to the latter, his Honour noted that there were no disputes as to any significant facts which would have impacted on the decision he was to make. Otherwise, he noted, it would not be proper for the Court to make an order under the summary judgment procedure. The

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9 *Jacobson v Guo* (2008) 9 NZCPR 850 (HC).

judgment proceeded upon the basis that the facts advanced by each party were accepted.

[27] In the event, the adjustment his Honour made for occupation rental appears to have been approximately $13,000.[10]

Wilson v Bougen[11]

[28] The plaintiff applied under s 339(1) of the Act for an order as to sale of the property owned by the parties as tenants in common in equal shares. When the matter came on for hearing the defendant consented to a range of orders in relation to sale in terms of the summary judgment application. The plaintiff reserved one point as to an adjustment (away from equal sharing) by way of compensation (s 343(a)) or occupation rental (s 343(f)).

[29] Associate Judge Gendall found the plaintiff's first basis for adjustment (unequal contribution) to be unjustified.

[30] His Honour found in favour of the plaintiff's second claim, finding that occupation rental was appropriate given that the defendant had been in exclusive occupation of the property for three years with the plaintiff contributing equally to outgoings for half of that time. An adjustment for occupation rental was justified from the time the plaintiff unsuccessfully requested the defendant's consent to the sale.

[31] The amount of the adjustment was approximately $3,850.

Western v Abdoelrahman[12]

[32] The plaintiff applied for an order of sale (s 339(1) of the Act). The property was owned by the plaintiff (1,419/2,500 shares) and by his former partner and her adult son (838/2,500 shares).

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10 Ibid, at [19](m) (40 weeks at $325 equals approximately $13,000).
11 *Wilson v Bougen* HC Wanganui CIV-2010-483-000246, 14 December 2010.
12 *Western v Abdoelrahman* HC Auckland CIV-2010-404-002298, 11 March 2011.

[33] Associate Judge Matthews reviewed the circumstances relating to each of the parties. Significantly the plaintiff had the bulk of his capital tied up in the property while he remained unable to repay his other debts. No rental was being paid by his former partner or her adult children who were in occupation. The defendants wanted to remain in the property but the former partner said she was unable to purchase the plaintiff's share. His Honour found that upon sale of the property she would in fact receive approximately $400,000. His Honour reviewed the comparative hardships in detail before stating that he was satisfied that the balance between the parties favoured the plaintiff.[13] His Honour reviewed also other circumstances (which, weighed together with the comparative hardship to the plaintiff, satisfied the Judge that the property should be sold and the proceeds of sale divided equally).

[34] In relation to occupation rent (s 343(f) of the Act) his Honour declined to make any order on the basis that there would be further steps to be taken by the parties in resolution of issues under the Property (Relationships) Act 1976 where matters of occupation rent could be determined as part of an overall assessment.

The "three relationship property" cases

[35] These three cases may be viewed as closely related given their relationship property context. Each deals with a situation in which a residential property, originally intended and used by the parties as a couple as their joint residence, has come to be exclusively occupied by one only. The occupant opposes sale and is not paying occupation rent. It is unsurprising in such cases that the factor of hardship to the plaintiff is so significant as to make the plaintiff's entitlement to an order or orders clear, especially when fortified by other factors such as no true opposition to sale or a majority interest on the part of a plaintiff.

[36] There is also at least a suggestion on the facts, if not in the reasoning of the judgments in both *Jacobson v Guo* and *Wilson v Bougen*, that the sums involved by way of occupation rental ($13,000 and $3,850), modest when compared to the litigation cost of a full hearing, lent themselves to adjudication in a summary context as subsidiary conclusions flowing out of the main orders made as to sale. That does

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[13] Ibid, at [29].

not alter the fact, recognised by Associate Judge Robinson in *Jacobson v Guo*, that even in relation to a relatively modest sum, a summary judgment application relating purely to the adjustment to be made under s 342(f) would still be inappropriate for determination on a summary judgment application if there were factual disputes which could materially affect any determination in relation to adjustment.

MacKenzie v Smythe[14]

[37] The plaintiff applied for an order of partition under s 339(1)(b) of the Act.

[38] The parties shared a two house cross-lease development, the plaintiff as owner of a two-thirds share and the defendant as owner of the other one-third. There had arisen between them an acrimonious dispute resulting in deadlock.

[39] The Court found that the situation as between parties who had willingly entered into the contractual arrangements involved in a cross-lease had changed significantly from early 2011, when agreement was reached between the parties on partition and steps were taken pursuant to that agreement, before the arrangement was revoked without explanation by the defendant in August 2011.

[40] Associate Judge Gendall found that when the defendant agreed to the concept of partition and agreed to contribute towards subdivision costs to effect the subdivision she left herself with no real defence to the present application. In a detailed review of comparative hardship, together with the initial agreement as to partition, his Honour concluded that the hardship caused to the plaintiff by refusing a partition order would be substantially greater than the hardship that would be caused to the defendant by the making of such an order. The stalemate and the antagonistic position between the parties needed to be properly resolved.[15]

[41] Accordingly, Associate Judge Gendall made an order for partition but reserved judgment in relation to the particular form of the order.[16] His Honour noted that the particular form might be the subject of consideration under the continuation

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14 *MacKenzie v Smythe* [2012] NZHC 1113.
15 Ibid, at [62].
16 Ibid, at [75].

of the summary judgment application or alternatively through proceeding to full trial.[17]

[42] His Honour referred to observations in the land law commentaries as to the impact of the 2007 amendments on summary judgment procedures, and referred also to Associate Judge Robinson's decision in *Jacobson v Guo*.[18] His Honour's conclusion is summarised then:

> [74] Nevertheless, in the present case, I am satisfied that in the circumstances prevailing here the defendant acknowledged that in early 2011 she agreed to the concept of partition and to contribute towards subdivision costs to effect this and she has no real defence to the present application.

[43] The extent to which the defendant's (subsequently withdrawn) agreement to partition and to share subdivision costs was seen by the Court as removing any significant element of discretion in the case is evident in those conclusory observations of the learned Judge.

Conclusion on the cases

[44] The four cases referred to fall into two distinct categories. The first three cases may be seen as involving hardship of the clearest kind where one co-owner is running on in occupation of a previously shared residence to the exclusion of the other. In the remaining case the objective impression that the deadlock between the parties over their joint leases called for partition was reinforced (to the point that it was beyond argument) by the defendant's erstwhile agreement to that very process.

[45] There will not often be such clear concessions or indisputable facts as to effectively dictate to the Court exactly how the discretion under s 339 of the Act (or in relation to further orders under s 343) should be exercised. The four cases illustrate that there will be situations where such clarity of appropriate outcome occurs. The question I must decide is whether there is such clarity of appropriate outcome in this case. This calls for a careful consideration of the fact relating to the parties' co-ownership of the property.

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17 Ibid, at [84].
18 Ibid, at [32] and [73].

The co-ownership of the property

[46] In October 1989 Leo and Marcella obtained a contract for the purchase of bare land (2400 m²) which fronted Te Iro Bay on Arapawa Island. The property is accessible only by boat from the Tory Channel.

[47] The property was to be developed with a holiday house erected for the family. Leo and Marcella had four children. Title was taken from the outset as tenants-in-common in one-sixth shares. Leo and Marcella initially held three one-sixths. Gerard (together with his wife), Barry and Travis each held one one-sixth share. In 1991 Leo and Marcella transferred a one-sixth share to Andrea (and her husband, Paul).

[48] Leo and Marcella financed part of the purchase price of $19,500 (or thereabouts). The three sons took out a mortgage for their shares, with Travis's finance being covered by Leo and Marcella while he was not adult. Andrea and Paul paid for their share on transfer in 1991.

[49] Leo owned a house removal business. He selected a house which he had purchased at the Kikiwa Power Substation. It was relocated by barge to the property and was modified and erected.

[50] Gerard was, at the time, working in his father's business. He describes the house moved onto the site by his father as "typically picked up by him for around $3,000"). Gerard was involved in preparing the house for transportation, transporting it, preparing the site, and carrying out building and significant improvements to the house. He refers to unpaid hours by himself (and also his wife, Sandra) with Leo never paying for time worked overtime. Up to the time the house was ready to live in, I calculate that Gerard refers to some 17 days of unpaid work.

[51] Members of the family contributed in different ways to alterations and to maintenance of the property. There was in place a bank account for contributions to rates and maintenance which was funded six ways in accordance with the shares in the property. Leo continued to put time and materials into the holiday house. Gerard

continued to undertake manual work, particularly in relation to building. Travis provided some labour. Working bees were carried out when the various family members all contributed. Marcella made particular contributions to the gardening. She also provided meals.

[52] The family raised an additional loan of some $7,000 in 1996 to pay for alterations to the dining/kitchen area carried out by an independent contractor. For the purpose of funding and maintaining the property the family also carried out remunerative working bees, raising funds in excess of $20,000 for maintenance costs over the years.

[53] Over the years the various family members have used the property in varying degrees. Not all live in Marlborough. Around 2009 Leo and Marcella separated. Marcella no longer visits the property. Paul and Andrea have not used it for three years. Barry (living in Napier) had used it for one weekend in 2011. Leo had used it for three or four weekends in 2011. It is not clear on the evidence how often Gerard and Travis have been visiting.

[54] In recent years, relationships within the family have broken down with a split between the plaintiffs and the defendants. Although the joint bank account is still maintained and outgoings such as rates are met, there is no longer functional discussion between the full family as to maintenance and other matters affecting the property. Leo clearly states it accurately when he says:

> Regrettably there has been a breakdown within the family and these proceedings are necessary.

[55] The valuation evidence before the Court establishes the value of the property on 24 September 2011 as $280,000 (including $5,000 of "customary chattels"). There are also at and associated with the house property some further chattels including a motor bike, a trailer, two dinghies and furniture, which have additional value.

Leo's marketing of the property

[56] The evidence filed makes it clear that irreconcilable differences exist within the family, as between the plaintiffs and the defendants. This was so by 2011 at the latest, and probably much earlier.

[57] Leo apparently made an effort at marketing the property as early as September 2007 when he advertised it on TradeMe and registered with a local agent. Of course, he and the other plaintiffs had no ability to complete any sale without ultimately involving the defendants. On 2 September 2011, Leo listed the property for sale with a local real estate agent. The defendants saw a TradeMe advertisement. They immediately instructed their solicitors to write to the real estate company requiring that all advertising be withdrawn as the defendants had not agreed to any sale of the property, which was done on 7 September 2011. On the same day the defendants' solicitors wrote to the plaintiffs' solicitors recording that the defendants did not wish to sell the property. It was stated that:

> The actions of your clients run contrary to the previously agreed arrangements where by [sic] any party wishing to sell its respective interest would first offer their interest to the remaining land owners with the purchase price to be based on original equity contributed to the property by the selling party.

[58] It was recorded that the defendants required the arrangements previously agreed to be followed.

[59] Correspondence ensued between the solicitors. The plaintiffs identified their right to apply to the Court for sale under the Property Law Act. The defendants' solicitors wrote to the plaintiffs' solicitors on 30 September 2011, asserting the existence of an oral agreement. That was said to involve:

> ... a price equal to the exiting party's proportionate interest as recorded on the certificate of title ...

[60] Negotiations did not progress because the plaintiffs stipulated for a proportion of current market value whereas the defendants stipulated for a transfer of the plaintiffs' interests upon the basis of the "agreement" tied to original values.

[61] Communications between the family members became even more strained than previously. An email written by Travis to his father Leo on 12 October 2011 reveals a high level of hurt and animosity. It concludes, in my view extremely accurately, with the comment:

> I will separately email everyone on the batch as I totally agree with Andrea – "it's time to move on and finally sort this out."

A family agreement?

[62] The primary ground of opposition advanced by the defendants is stated in the notice of opposition to be:

> The existence of the oral family agreement the terms of which stipulated that the Te Iro Bay Property ("Te Iro Bay") was not to be sold, but that if any owner of the Te Iro Bay property wished to sell their share they were required to sell it to the remaining owners for the same amount they originally paid for their share ("the Family Agreement").

[63] The alleged oral family agreement was referred to in the notice of opposition as "the Family Agreement", which I will use for convenience. It has two parts – the agreement not to sell (which I will call the "no-sale agreement") and the set amount agreement (which I will call the "$4000 agreement").

[64] In his submissions for the defendants, Mr Chesterman also put the Family Agreement to the forefront. With reference to evidence of the deponents, it was submitted that in the event of a co-owner's sale the payment to which a surrendering co-owner would be entitled (representing the same amount as originally paid for the share) would be $4,000 per 1/6 share.

[65] That is the defendants' assertion. I turn to examine their evidence on it.

[66] Travis Coffey deposes:

> 7. I oppose the orders sought by the Plaintiffs on the grounds that there is an oral agreement between all the owners of Te Iro Bay, the terms of which are as follows ("the Family Agreement"):
>
> (a) Te Iro Bay is a family beach house that will not be sold;

(b) If any family member wishes to sell their share(s), they must offer that share to the remaining owners of Te Iro Bay at the value of the amount they originally paid for their share, which is $4000 per 1/6 share.

8. The Family Agreement was entered into at the time of the purchase of Te Iro Bay and has been repeatedly discussed and confirmed on many occasions by every owner over the past 23 years.

9. Since the purchase of Te Iro Bay, the Family Agreement has been enforced against family members who have indicated a desire to sell or buy.

10. Since the purchase of Te Iro Bay family members have made contributions to Te Iro Bay in reliance upon the Family Agreement and have acted in reliance upon the Family Agreement.

11. The Plaintiffs [sic] request for the Court to order the sale of Te Iro Bay at market value is contrary to the Family Agreement.

...

14. If the plaintiffs wish to sell their shares in Te Iro Bay they must abide by the Family Agreement and sell their share to the defendants at a value of $4000 per share.

[67] Gerard Coffey deposes:

5. There was a Family Agreement between all shareholders of Te Iro Bay the terms of which were that we would not sell Te Iro Bay and if anyone wanted out they had to sell their share to remaining owners for the same amount paid... for it i.e. $4000 per 1/6 share ("the Family Agreement"). I agree with the summary by Travis of the formation of the agreement and the content of the agreement at paragraphs [16] to [41] of his Affidavit;

6. I was present on numerous occasions when owners of Te Iro Bay discussed the Family Agreement and confirmed and enforced it, as described in Travis' Affidavit at paragraphs [42] to [48]. There were plenty of barbeques at Leo and Marcella's house, where the Family Agreement was brought up.

[68] Sandra Coffey agrees with and confirms the contents of the affidavits of Travis and Gerard. She deposes that she believes the plaintiffs' claim is contrary to the Family Agreement.

[69] The first chronological evidence of the defendants' assertions as to the Family Agreement is contained in correspondence from 2011 and 2012, which arose

after Leo had listed the property for sale.[19] The defendants' solicitors' letter of 7 September 2011, as I have quoted,[20] referred to:

> ... the previously agreed arrangements where by [sic] any party wishing to sell its respective interest would first offer their interest to the remaining land owners with the purchase price to be based on original equity contributed to the property by the selling party.

[70] In response to a request for a copy of any agreement, the defendants' solicitors responded on 30 September with this explanation:

> 2. The Agreement to which our earlier letter refers was an oral agreement and one that was repealed and affirmed by the parties on numerous occasions. This Agreement provided that in the event that one party wished to exit the property, that party would be required to first offer it to the remaining owners at a price equal to the exiting party's proportionate interest as recorded on the certificate of title to the property (being a 1/6 share in the case of Barry Coffey, a 1/6 share in the case of Andrea and Paul Kerwin jointly, and 2/6 share in the case of Leo and Marcella Coffey jointly).

[71] In the letter, the defendants went on to reject an offer made by the plaintiffs of $70,000 per 1/6 share. It was stated that if proceedings were issued by the plaintiffs:

> ... our client will seek an order directing the property be transferred to our clients in accordance with valuation method prescribed under the Agreement.

[72] Given that the allegation of the Family Agreement had been made before the plaintiffs commenced this proceeding, the plaintiffs addressed it in their affidavits.

[73] Leo Coffey, in relation to the letter dated 30 September 2011, deposed:

> 24. There have been discussions over the years about selling the bach. The discussions were more about not selling the bach than selling the bach (along the lines of "we will never sell this place"). Between those occasions there was a discussion about what might happen if we were to separate from our respective partners and need the money in a relationship property settlement.
>
> 25. In those circumstances, there may have been some discussions but those discussions were not with all owners present and in agreement, have never been recorded in writing and most likely varied depending on

[19] Above at [57]-[59]
[20] Above at [57]

who happened to be part of the conversation at the time. These conversations typically occurred out on the deck with beers in hand. I do not think anybody intended that they were legally binding.

26. If what is suggested by paragraph 2 is that a valuation is obtained and the party wishing to exit is required to offer to the remaining parties their shares at a proportion of the valuation obtained then, while there is no agreement to that effect, that is a sensible suggestion. If something else is meant by the Heinsath Alexander letter then Travis and Gerard need to set that out.

[74] Once the opposition evidence of Travis, Gerard and Sandra had been filed, the plaintiffs filed evidence in reply to the defendants' evidence as to the Family Agreement.

[75] Leo filed a supplementary affidavit in which he deposed:

15. The Defendants' defence is that there was a "family agreement". This is untrue. We have acknowledged that there may have been casual discussion that, like everybody else in New Zealand who owns a bach, we wish the bach would stay in our family forever... The family relationship has deteriorated to such an extent that all six shareholders simply cannot co-own a property together. The family arrangement alleged by the Defendants does not exist.

16. I have always believed that each of our shares in the Te Iro property were valuable, both in terms of the enjoyment it provided our family over the years, and the economic value of having land with a bach in the Marlborough Sounds. Travis and Gerard's assertion that it was agreed we would "get out what we put in" is fiction. Notwithstanding that Marcella and I "put in" quite a lot more than our children (something we have never taken issue with), we accepted the third share.

Conclusion

17. In terms of disposing of this land, there has been no concluded contract, no agreement in writing about the disposal of this land, nor is there any agreement about everybody's shares in the property other than that which is recorded on the title to the land. Now, two thirds of the shareholders want out of the property. We cannot be bullied into staying involved in a [sic] with people that, unfortunately for our family, want to derogate our characters. The content of Travis and Gerard's affidavits was upsetting and offensive.

[76] Barry deposed:

3. At paragraph 7 Travis states that a family agreement existed whereby if any family member wished to sell their share they must offer the share to remaining owners of Te Iro Bay at a value which they originally paid for their share of $4,000.00. This is incorrect. There has never been a family agreement along these lines. While I accept that we all may

> have believed that the property would never be sold, and on occasion this was discussed, my recollection is that there was never an occasion when all parties were present and where all parties formally agreed to what has been claimed by Travis and Gerard. It is my view that the claims from Travis and Gerard are incorrect. They are unrealistic and with the passing of time simply cannot be upheld. The only conversations I have ever had in relation to an "agreement" were about one party needing to pay out a spouse in the event of a divorce so the property would always stay within the family. Currently we have four out of six members of the family wanting to sell their shares. Gerard and Travis have been given an opportunity to purchase at a valuation price that they organised.

[77] Andrea deposed:

> 4. At paragraph 7 of his affidavit Travis alleges that there was an oral agreement between all the owners of Te Iro Bay. He defines this as 'the family agreement'. There was no such agreement.
>
> 5. Travis refers to the family agreement being entered into at the time of the purchase of Te Iro Bay. This is untrue. There is no way that Paul, my husband, and I could have agreed to the so-called 'family agreement' at the beginning when we were in fact not involved with the purchase. We did not buy into the property until later. Therefore there was no concluded agreement at the time the purchase was made.

[78] Andrea's husband, Paul Kerwin, deposed:

> 8. My recollection regarding a "family agreement" consist [sic] of informal comments after several beers that if any **<u>one</u>** person wanted out they got what they put in, but a figure of $4,000 was never discussed. There was never any time that a formal discussion with all shareholders took place to discuss this matter.

[79] The passages I have quoted represent the detail of evidence given concerning the alleged making of the Family Agreement.

The implementation of the Family Agreement?

[80] In his evidence in opposition, Travis deposed that there had been performance of the Family Agreement. His evidence on that subject was:

> 8. The Family Agreement was entered into at the time of the purchase of Te Iro Bay and has been repeatedly discussed and confirmed on many occasions by every owner over the past 23 years.
>
> ...

Performance of The Family Agreement

42. There have been several occasions on which members of the family have acted in accordance with the Family Agreement.

43. Around the time of the purchase of Te Iro Bay, Gerard and Sandra were married. I recall that Leo and Marcella asked Sandra to sign a document confirming that she had no ability to claim part of Te Iro Bay if they were to split up.

44. In May 1991, after the house had been moved onto the property, Leo and Marcella sold a 1/6 share to Andrea and Paul for $4000. This was well under the actual value of a 1/6 share of Te Iro Bay at the time. The work that had gone into moving the house onto the section was huge. Gerard, who was working for Leo at the time, gave up many weekends and evenings carrying out the work necessary for relocating the house and working on it on site, to prepare it to live in. I had also put in many hours. Although Leo probably acquired the house itself for nothing, this was due to the fact he owned a house removal business. Andrea and Paul would not have been able to buy a 1/6 share in a property like Te Iro Bay, had it not been for the Family Agreement.

45. A few years back, Barry and his now wife Nicky were looking to buy their own place in the Sounds. I recall Leo took them on his boat to Waikawa so that they could view a property in Mahau Sound, which had road access, which is what they wanted as they no longer wanted to rely on Leo's boat. Leo, Marcella and I were all at Te Iro Bay that weekend. We all discussed that if Barry wanted out, he would only receive the $4000 share he paid in. I understand Leo confirmed to Barry that he had to abide by the Family Agreement and as a result of this Barry decided not to sell his share.

46. On another occasion, Barry's wife, Nicky, proposed that we mortgage Te Iro Bay, to fund the purchase of another section in the Sounds and to build houses on it. This proposal was declined because we all agreed that Te Iro Bay was a family beach house and not to be used for investment purposes.

47. In recent years, Leo and Marcella have split up. I have been present during several discussions with family members including Andrea and Paul, Gerard and Andrea and Leo, where it was confirmed Marcella would only get out her share of $4000.

48. I personally have faced some difficult financial times during the recession. I have never looked to Te Iro Bay as a source of paying off debts, because of the Family Agreement. I know that Gerard has faced similar issues without seeking recourse to his interest in Te Iro Bay.

[81] Gerard also dealt with performance of the Family Agreement. He deposed:

Enforcement of the Family Agreement

7. Leo and Marcella requested that my wife Sandra Maree Coffey ("Sandra") sign a document confirming that if we separated she would

not be able to make any claim against Te Iro Bay and that Te Iro Bay was separate from our marital assets over which she may have had a claim. I was present when Sandra signed that document at Leo and Marcella's house. This event occurred shortly after Te Iro Bay was purchased, and by which stage the Family Agreement was in place. I remember the occasion because it caused some friction between Sandra and I at the time; Sandra was upset at being asked to sign it. Sandra and I were not given a copy of the document. At one point I asked Wiseheart Macnab for a copy of the document, but they had no record [sic] it. It may be that Leo and Marcella have it somewhere.

8. I agree with Travis' Affidavit at paragraph [44] where he states that Andrea and Paul's purchase of a 1/6 share from Leo and Marcella's for $4000 was in furtherance of the Family Agreement and that the true market value of a 1/6 share would have been well in excess of $4000 at that time. I was the primary person who prepared the house for removal, moved it, and then set it up on site, and carried out subsequent improvements. The time and hard labour that went into that process was enormous and highly valuable. The existence of the house on the section by the time Andrea and Paul purchased their share, made Te Iro Bay a far more valuable property than $24,000, and the market value of their share would have been much greater than $4,000 had it not been for the Family Agreement.

9. I am familiar with the situations Travis describes at paragraphs [45] and [46] where Barry and his partner wanted to sell Barry's share, so they could buy their own beach house, but they chose to remain as shareholders because of the Family Agreement. The issue was discussed within the family and we all were in agreement that they had to abide by the Family Agreement if they wanted out i.e. they would get paid out what they paid in.

10. I recall one specific occasion, when one of Barry's wife's grandparents had died, and there was talk that Barry might want to buy a batch in Tom Kane's Bay, which is in the next sound over in Port Underwood. There was a suggestion Barry might want his money out. Leo brought it up with me. I was living in Australia but was back in NZ for a holiday. Leo told me that if Barry sold he would be getting back what he put in. This occurred at Te Iro Bay. Marcella, Leo, Paul, Andrea, Gerard and Sandra were all there.

11. I am also familiar with the situation involving Leo and Marcella's split up. Following that event, Leo would come to dinner at our house and would raise the fact that all she could get out of Te Iro Bay was her $4000 share. This occurred on several occasions.

12 I recall one specific occasion during Easter 2008, I was at Te Iro Bay with Paul and Andrea, Sandra and the kids, and it was a Saturday night; Andrea made the comment that Marcella wants out and then also commented that Marcella would only get what she paid in.

13. My family has gone through some very hard financial times. I was on the verge of bankruptcy in 1998. Soon after we moved to Australia with our 3 children, we all lived in a caravan for 3 months. We then went through 2 or 3 years of financial hardship over there. Not once during

any of these times did I ever look to Te Iro Bay or my share in it, as an asset that could be sold or to improve my family's financial position.

[82] I have referred previously to Leo's reply evidence in relation to the alleged Family Agreement itself. In addition to completely rejecting the existence of such an agreement, Leo deposed specifically in relation to Travis's paragraph 43:

> 5. At paragraph 43, Travis states that following Gerard and Sandra's marriage, Marcella and I asked Sandra to sign a document confirming she had no part of the claim of Te Iro Bay if they were to separate (i.e. a "contracting out" agreement). This is untrue. We never asked Sandra or any other member of our family or extended family to sign any such agreement. I would like a copy of this document and an explanation from Travis why Paul Kerwin, Andrea's husband and Nicki, Barry's wife, were not asked to sign such an agreement.

[83] Barry refers to Travis's evidence concerning performance of the family agreement in this way:

> 6. Travis states at paragraph 44 that as part of the performance of the so called family agreement, our parents asked Sandra to sign a document confirming she had no ability to claim on the property. This is untrue. Furthermore if this was the case, then would not the same request have been made of my wife Nicki, who has never been asked to sign such an agreement.
>
> 7. At paragraph 45 Travis states that my wife and I wished to sell our share to purchase another Marlborough Sounds property. We did look at other property opportunities, however, this was always for our own investment and separate to our financial interest in Te Iro Bay. At no time in the past 25 years have I ever looked to sell Te Iro Bay and Travis' claims that Nicki and I considered doing this to invest in other properties is a total lie. There was never a family meeting to discuss this.

[84] Andrea deals with Travis's performance allegations in this way:

> 9. Travis states that Paul and I changed our minds and decided to buy our share from Leo and Marcella. They say that despite the value of Te Iro Bay was in excess of $24,000 at that stage, 'in accordance with the family agreement each share value was valued at $4,000'. This is untrue. Leo and Marcella had kept a share in the property in case Paul and I were later in a position to buy in. The purchase price had nothing to do with other shareholders, it did not affect their share at all, and was purely an agreement between Paul and I and my parents. It was not "in accordance with" an agreement.
>
> 10. Travis states that it was immediately following the purchase of Te Iro Bay, and just before Paul and I became shareholders, that it was agreed between all family members that if anybody wanted to sell their shares

> they would only get out what they put in. Considering Travis would have been 15 years old, his understanding of the situation is distorted by his age at the time. There was never any agreement that this would be the way a family member would get out of the property if required in the future. There was never an agreement between us all. In relation to contracting out agreements, Paul and I were married in October 1990, which is not long after Gerard and Sandra were married. I question the truthfulness of Travis' statement that our parents asked Sandra to sign a document which would prevent her having any claim on Te Iro Bay. Paul was never asked to sign a document. We have never seen such a document.

[85] Paul Kerwin comments briefly on the performance allegations thus:

> 7. In respect of Gerard and Travis's claims about the document that Leo and Marcella made Sandra sign, I question why they did not ask me to also sign such an agreement if this was such a contentious issue. Our share was transferred only one year later. I was never asked to sign anything.

The underlying contract - discussion

[86] In his submissions in opposition, Mr Chesterman adopted the all embracing summary of the Family Agreement contained in Travis's paragraph 8, in which it is asserted that the Family Agreement was entered into at the time of the purchase of Te Iro Bay and was repeatedly discussed and confirmed by every owner over the past 23 years.

[87] On this application, a central issue for the Court is whether the evidence arguably establishes an agreement which precludes the plaintiffs from realising their four (1/6) shares in the property for market value. The defendants' position requires the Court to accept that it is arguable that the plaintiffs locked themselves into an arrangement whereby they are required, if they exited ownership of the property in 2012, to accept in today's money a collective $16,000 while transferring to Travis and Barry equity of approximately $187,000.

[88] Interpretation of contracts is an exercise of construing objectively the intention of the parties through the words they have used. If the words used are susceptible of two possible interpretations, but one flouts commonsense, then the

Court will strive to arrive at the commercially sensible conclusion.[21] This principle assumes importance given the nature of contract alleged by the defendants.

The no-sale agreement and the $4000 agreement

[89] The defendants present the Family Agreement as having comprised two aspects – the original (1989) no-sale agreement and the subsequent (by 1991) $4000 agreement.

[90] The Family Agreement is pleaded in those two parts in the notice of opposition.

[91] The defendants rely primarily on the $4000 agreement, and wish to purchase the plaintiffs' four 1/6 shares for $16,000. Their fall-back position is that there can be no sale at all because of the no-sale agreement.

[92] I will consider the two aspects of the Family Agreement in chronological order.

[93] The no-sale agreement is identified by Travis as having been agreed to by "all family members" prior to the purchase of the property. He says that the second aspect – the "$4000 sale" – was agreed to by "all family members" after the property had been bought but prior to Andrea and Paul acquiring their interest. Gerard simply adopts what Travis deposes.

[94] On their own evidence, the defendants' assertion of a pre-purchase agreement cannot avail the defendants. It could not bind Paul and Andrea who were not owners in 1989. A simple agreement that the property would never be sold could never have been enforced by the Court. It smacks of entailed interests and is contrary to the well established principle that a registered proprietor is free to dispose of his or her title. It would be unenforceable also because it was an oral agreement relating to land; s 25(1) Property Law Act 2007; also s 2(2) Contracts Enforcement Act 1956. Finally, on Travis's own evidence, it was later overtaken by the $4000 agreement.

[21] *Vector Gas Limited v Bay of Plenty Energy Limited* [2010] 2 NZLR 444 (SC), per Tipping J at [22]

Travis does not suggest in his evidence that an earlier commitment not to sell the property was discussed and varied when the $4000 sale agreement came into place. Rather, he says that before Andrea and Paul acquired their shares there was a discussion about the right of each co-owner to sell, but only if it was to the remaining owners for $4000. The original alleged "no sale" agreement cannot assist the defendants.

[95] I turn to the $4000 agreement. I begin with the evidence of discussions and agreement.

[96] It is clear that discussions occurred between family members, from time to time, as to what would or should happen if a person wished to sell his or her interest. The plaintiffs themselves accept that such discussions occurred. The parties disagree as to whether such discussions were focused and became contractual (the defendants' view) or were very casual, aspirational discussions of a desire to keep the property within the family, and sometimes specific responses to situations such as the divorce of one of the co-owners (the plaintiffs' evidence). In a summary judgment context, it is not possible to resolve the difference. The defendants' evidence, if accepted, constitutes an arguable basis for asserting that the parties intended to have a binding arrangement between them. There are decided weaknesses in the defendants' case in this regard, including a distinct lack of detail as to exactly what discussions took place between whom – but those are matters which would be determinable at trial.

[97] A fundamental contractual difficulty with the defendants' case is the absence of certainty of terms of the agreement as it is alleged to exist by the defendants. Or, put another way, the inapplicability of such terms (as alleged by the defendants) to the present situation. The evidence of Travis was that the $4000 agreement applied to "someone" who wished to sell their share. The notice of opposition, consistently with that, pleads that:

> If <u>any owner</u>... wished to sell <u>their share</u> they were required to sell <u>it</u>...
>
> (My emphasis)

[98] There is no suggestion in the evidence (other than by the defendants asserting an original agreement that the property would not be sold) to suggest that the owners

as a group could not sell. There is equally nothing in the evidence of Travis or Gerard to suggest a discussion, let alone an agreement, concerning the situation of a group, or indeed the majority of owners, wanting to sell. That situation, on the evidence, was simply not addressed. The defendants do not allege either an agreement or the terms of an agreement in relation to that situation.

[99] The defendants' own evidence of the actual discussions (around 1990 to 1991) indicate, and logic and commonsense reinforce, that the situation being addressed in such discussions as occurred was of a member of the family wishing to sell out. That is the context in which the subsequent discussions on sale, as referred to by Travis, arose. In the most specific evidence on point, Travis refers to family discussions, that:

> ... if Barry wanted out, he would only receive the $4000 share he paid in.

[100] This evidence, relied on also by Mr Chesterman in his submissions as evidence of part performance of an oral agreement, is referable to an alleged agreement about any individual who wanted to sell out.

[101] The evidence of Travis and Gerard as to the $4000 agreement and as to the subsequent implementation of it does not incorporate any discussion or stipulation as to what would happen if, as in this case, the majority owner or owners wished to sell. That situation, on the evidence, was simply not addressed. It is not covered by any agreement. And that makes sense. The family did discuss and may have had concerns as to the situation of an individual wishing to sell up. But assuming they had covered that situation by agreement, and there had then been $4000 sales on that basis, one of the remaining owners may have ended up ultimately as a co-owner as to five one-sixths alongside a single one-sixth owner. It would be absurd to suggest that by their agreement the parties had intended to agree to a situation whereby such a five-sixths owner could be forced, if having to sell out, to sell his or her five-sixths share to the single one-sixth owner for $20,000 (5 x $4000).

[102] I find, in relation to the absence of certainty of terms, that it is not arguable that the parties, around 1990, reached an agreement that required a group of co-

owners, if wishing to sell up, to sell their interests to the remaining co-owners (or one of them) at $4000 (or any other below market sum).

[103] This is sufficient to dispose of the defendants' specific affirmative defence as to an agreement which precludes (other than by the plaintiffs' selling their shares at $4000 per one-sixth) an order for sale under s 339 of the Act.

[104] It is strictly unnecessary to then reach a determination of an allegation of part performance asserted by the defendants. I doubt that it could be found that the doctrine of part performance could apply to a $4000 agreement if such had been arguable. At least one fundamental ingredient of part performance appears to be missing. The defendants themselves do not appear to have acted in performance of the oral agreement. I adopt, with respect, the formulation of Tipping J in *T A Dellaca Ltd v PDL Industries Ltd*.[22] His Honour observed that it is clear, in terms of authority, that there must be acts relied on which are pursuant to and in performance of the contract. Such must have been the acts of the party seeking to enforce the oral agreement.

[105] There has been no conduct on the part of the defendants in performance of the alleged oral agreement. Had it been necessary, I would have found that there was no arguable part performance in this case, but I do not determine this application on that basis. There were other aspects of the defendants' part performance arguments which, on my preliminary view, were also flawed. These included a suggestion that spouses were asked to sign contracting-out agreements – a discussion which in no way relates to performance as pleaded. This and other discussions identified by the defendants do not appear to qualify as acts of part performance. But, having regard to my conclusion on the non-existence of the contract, I refrain from a decision on this.

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[22] *T A Dellaca Ltd v PDL Industries Ltd* [1992] 3 NZLR 88 (HC) at 104, 108-109.

Bars to a sale arising in trust law or in equity

[106] By s 25(2) Property Law Act 2007, a trust relating to land generally must be in writing and signed by the settlor. By s 25(4) resulting, implied and constructive trusts are exceptions, and accordingly are not required to be in writing.

[107] As an alternative to the alleged oral agreement, which I have found does not arguably exist, the defendants assert that the discussions and conduct of the parties gave rise to equitable entitlements through either a constructive trust, a resulting trust or by equitable estoppel.

Constructive trust

The elements of a constructive trust

[108] Mr Davies accepted that the required elements of a constructive trust are those identified in *Gillies v Keogh*,[23] *Lankow v Rose*[24] and *Nuthall v Heslop*.[25] The requirements are:

(a) Contribution in more than a minor way to the acquisition, preservation or enhancement of the other's assets; and

(b) A reasonable expectation that the claimant would share in those assets as a result.

[109] As expressed by Hardie-Boys J in *Lankow v Rose*,[26] adopting a Canadian formulation, the contributions must have resulted by the end of the relationship in the enrichment of one to the juristically unjustified deprivation of the other.

[110] Mr Davies did not refer to any particular case in which, as here, one registered co-owner/proprietor claims an interest in the other co-owner's share by

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23 *Gillies v Keogh* [1989] 2 NZLR 327 (CA).
24 *Lankow v Rose* [1995] 1 NZLR 277 (CA).
25 *Nuthall v Heslop* (1995) 13 FRNZ 518 (HC).
26 *Lankow v Rose*, above n 21, at 282.

way of a constructive trust. The situation of a joint title was analysed by Fisher J in *Cossey v Bach.*[27] His Honour referred to the presumption which arises in cases of registered co-ownership (albeit in that case in a de facto marriage context):[28]

> The starting point still appears to be the legal title... Without more, it may be assumed that the way in which the parties had organised their legal title was intended to reflect their underlying beneficial interests. It is for the party who seeks to rebut that inference to affirmatively establish the case for doing so... That approach must apply with at least as much force to a joint owner who seeks more than the half interest to which he or she would be entitled on the strength of the legal title.

[111] The presumption may be rebutted where the parties have by their words or conduct expressed their own proprietary formula. I adopt the four-fold test of Fisher J as to how an expressed intention may be established:[29]

(a) It must be unequivocal;

(b) It must be expressed by the party with power to dispose of the interest;

(c) It must be pertinent to current circumstances;

(d) It will usually be common but may be unilateral.

Application of the principles in this case

[112] For reasons parallel to the failure of the defendants' arguments as to the existence of an agreement in this case, any suggestion of a constructive trust must also fail. There is no unequivocality in the conduct on which the defendants rely. Furthermore, the discussions to which the defendants refer are not pertinent to the present situation. Here the defendants as minority owners seek to take over the majority's interests at a fraction of market value. The $16,000 sale price asserted by the defendants represents 8.6 percent of the $186,666 (gross) the plaintiffs would

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27 *Cossey v Bach* [1992] 3 NZLR 612 (HC) – see also *Burns v Burns* [1998] NZFLR 654 (HC) per Randerson J at 659.

28 *Cossey v Bosch*, above n 24, at 627.

29 Ibid, at 628.

obtain on a sale at the valuer's market figure. The pertinent situation arising from the discussions to which the defendants refer would have been a single owner seeking to quit his or her share. At no point do the defendants say there was a discussion in relation to a sale by majority owners. Such discussions as are alleged to have occurred do not pertain to a sale by a majority of owners.

[113] It becomes unnecessary that I consider whether any expectation by the defendants that they would benefit in the equity held by the plaintiffs, in the way they claim, was arguably reasonable. I express a serious reservation as to its reasonableness but it is unnecessary that I determine that.

Conclusion

[114] The defendants cannot point to an arguable constructive trust.

Resulting Trust

The elements of a resulting trust

[115] Resulting trusts arise in response to a presumed intention of the transferor or settlor of property.[30]

[116] Three traditional categories of resulting trusts exist:

(a) Where there is a voluntary conveyance of property;

(b) Where property is purchased in the name of another;

(c) Where the beneficial interest under a trust is not completely disposed of.[31]

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[30] Charles Rickett and Jessica Palmer "Proprietary Remedies" in Blanchard (ed) *Civil Remedies in New Zealand* (2nd ed, Brookers, Wellington, 2011) 423 at 10.3.

[31] Ibid.

[117] The fundamental enquiry is whether the transfer of property by A to B is intended by A (the transferor) to be beneficial to B. In each of the three traditional categories it is presumed that A did not intend B to acquire a beneficial interest in the property. The principles governing resulting trusts were helpfully summarised by the Court of Appeal in *Potter v Potter*.[32] In Potter, Fisher J delivering the judgment of the Court summarised the principles in this way:[33]

> Resulting trust principles
>
> [14] In the present context the essence of a resulting trust is that a person providing or contributing to the purchase price of property conveyed partly or wholly into the name of another retains a beneficial interest in the property to the extent of his or her contribution if there is nothing to indicate that he or she intended to confer the beneficial interest on the legal transferee: see, for example, *Bateman Television Ltd (in liquidation) v Bateman and Thomas* [1971] NZLR 453 (CA) and *Efstratiou v Glantschnig* [1972] NZLR 594 (CA). The settlor must have expressed no intention to dispose of his or her beneficial interest. To fill the vacuum, the law presumes an intention to retain the beneficial interest which the settlor has never effectively alienated. The trust "results" from the lack of effective disposition to another.
>
> [15] A refinement to that principle is that where the settlor transfers the legal title to property for an express purpose, the transferee receives it subject to a trust for the attainment of that primary purpose. If, for whatever reason, effect can not be given to the primary purpose effect must be given to the contingent secondary purpose of restoring the property to the settlor. The general principles are set out in *Barclays Bank Ltd v Quistclose Investments Ltd* [1970] AC 567; *Baumgartner v Baumgartner* (1987) 164 CLR 137; and *Cossey v Bach* [1992] 3 NZLR 612.
>
> [16] In either case the rationale is that notwithstanding the disposition of legal title, the settlor has retained the beneficial interest throughout, in the former case without qualification, and in the latter subject to the contingency that it would be superseded by fresh beneficial interests if and when the stated primary purpose were attained.

Submissions for defendants

[118] For the defendants, Mr Chesterman developed his submissions as to a trust primarily through reference to direct and indirect contributions and expectations.

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[32] *Potter v Potter* [2003] 3 NZLR 145 (CA).
[33] Ibid, at 152-153.

This led to a submission that the defendants have an arguable case for a constructive trust (which I have found against).

[119] Mr Chesterman, in his written submissions, then simply added:

> In the alternative, it is submitted that if... the facts do not support a constructive trust, then they support a resulting trust.

[120] For the principles applicable to the resulting trust, Mr Chesterman referred particularly to the passage in the judgment of Court of Appeal in *Potter* which I have already set out (above at [117]). Having regard to the content of the principles identified in *Potter* by the Court of Appeal, I took Mr Chesterman to be submitting that the resulting trust which the defendants claim arose to the extent of the defendants' contributions when the defendants provided or contributed to the purchase of property conveyed partly into the names of the plaintiffs.

Discussion

[121] In a summary judgment context, the resulting trust which the defendants assert would arguably exist if the evidence points to a voluntary conveyance. But the evidence is entirely against that.

[122] It is not suggested for any of the parties to this litigation that one or another were volunteers in the purchase of the property, the title of which was vested in the purchasers as tenants-in-common in one-sixth shares. In his own evidence, the defendant Travis deposes that legal ownership of the property is divided between members of the family as tenants-in-common according to one-sixth shares and that those represent "the amount they originally paid for their share". In other words, it is accepted that there was a clear understanding within the family that each (whether by way of the property purchase price or the contribution of an improvement such as the house) was contributing in proportion to the purchase of a registered interest.

[123] If the defendants were to prevail in this case, it would have to be in relation to a different trust law or equitable concept than that of resulting trust. There is quite simply no element of voluntary conveyance in this case. The present circumstances

may be contrasted with cases where unequal contribution existed and was found to give rise to a resulting trust. The High Court of Australia dealt with such a situation of unequal contribution in *Bloch v Bloch.*[34] In that case, Wilson J delivering the leading judgment said:[35]

> ... the facts present a classic illustration of the creation of a resulting trust. The property was conveyed into the name of the son, with the father having contributed part of the purchase price in circumstances which rebutted the presumption that the contribution was intended to advance or benefit the son. The contribution was not a gift. It was not a loan. The inference then arises that the father intended the son to hold the property in trust for him in a proportion corresponding to the proportion of the purchase price which was contributed by him.

Conclusion

[124] In the present case, where the initial contributions were carefully considered and are accepted by the defendants to have been proportionate, the defendants have no arguable case that a resulting trust was established.

Estoppel

The defendant's case on estoppel

[125] The defendants assert that even if the Family Agreement is unable to be enforced as a contract, the family's discussions and subsequent conduct in reliance upon it combine to estop the plaintiffs from pursuing a sale (other than a sale of the plaintiffs' shares at $4,000 per one-sixth share).

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34 *Bloch v Bloch* (1981) 180 CLR 390 (HCA).

35 Ibid, at 397; see also Underhill & Hayton *Law Relating to Trusts and Trustees* (15th ed, Butterworths, London, 1995) at 320-321.

The elements of equitable estoppel

[126] The Courts have repeatedly recognised that the modern approach to estoppel depends not so much on strict criteria as careful consideration of whether overall behaviour is unconscionable.[36]

[127] In relation to a plea of equitable estoppel there remain fundamental elements which a claimant must establish:[37]

(a) A belief or expectation which was created or encouraged through some action, representation or omission to act by the party against whom the estoppel is alleged;

(b) The belief or expectation has been reasonably relied on by the claimant;

(c) Detriment would be suffered if the belief or expectation is departed from;

(d) It would be unconscionable for the party against whom the estoppel is alleged to depart from the belief or expectation.

[128] While it was Mr Davies who (correctly) put forward these elements as the established elements of equitable estoppel, Mr Chesterman accepted them as required elements.

The element of reasonable reliance

[129] In cases involving an alleged estoppel by representation, it has been repeatedly said that there must have been a "clear and unequivocal representation" to

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[36] See *Goldstar Insurance Co Ltd v Gaunt* [1998] 3 NZLR 80 (CA) at 86, per Holland J delivering the judgment of the Court. See also James Every-Palmer "Equitable Estoppel" in Andrew Butler (ed) *Equity and Trusts in New Zealand* (2nd ed, Brookers, Wellington, 2009) 601 at 19.2.

[37] James Every-Palmer "Equitable Estoppel", above n 31, at 19.2.

give rise to the estoppel.[38] I adopt the observation by James Every-Palmer in the chapter on "Equitable Estoppel" in *Equity & Trusts in New Zealand*[39] that it is more accurate to say that what is required is for a representation to be sufficiently unequivocal to justify the other party's reliance on it. The topic of estoppel by representation was dealt with the Court of Appeal in *Lim v Ward McCulloch Solicitors Nominees Limited.*[40] In that case the appellant, Mr Lim, had pleaded (unsuccessfully in the High Court) that the respondent nominee company was estopped from denying Mr Lim's guarantee had been released. The estoppel was said to arise from a letter written to Mr Lim.

[130] Tipping J, delivering the judgment of the Court, observed at the outset that all estoppels, however classified, have an underlying unity.[41] His Honour referred to the observations of the Court of Appeal in *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd*,[42] where the Court of Appeal recognised that the broad rationale of estoppel is to prevent a party from going back on his word (whether expressed or implied) when it would be unconscionable to do so.

[131] His Honour observed that it was of no present moment whether the case before the Court of Appeal might more aptly be described as one of promissory estoppel rather than estoppel by representation.[43] He observed:

> Indeed in respect of the need for clarity of expression, there is, in any event, no material distinction between the two types of estoppel.[44]

[132] By reference to both *Spencer Bower and Turner* and to the classic statement of Bowen LJ in *Low v Bouverie*[45] and adoption of that requirement by the House of Lords in *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd*,[46] Tipping J identified the need for the language upon which the estoppel is

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38 See the cases listed in James Every-Palmer "Equitable Estoppel", above n 31, at 19.3.4 fn 169.
39 Ibid, at 19.3.4 fn 170.
40 *Lim v Ward McCulloch Solicitors Nominees Limited* (1999) 8 NZCLC 261, 922 (CA).
41 Ibid, at [17].
42 *National Westminster Finance NZ Ltd v National Bank of New Zealand Ltd* [1996] 1 NZLR 548 (CA) at 549.
43 *Lim v Ward McCulloch Solicitors Nominees Limited,* above n 35, at [19].
44 Ibid.
45 *Low v Bouverie* [1891] 3 Ch 82,102.
46 *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] 2 All ER 271, per Lord Hailsham LC at 281 and Lord Salmon at 293.

founded to be precise and unambiguous and to be reasonably understood in the particular sense required. His Honour concluded: [47]

> If in objective terms the asserted representation was not sufficiently clear and unambiguous to have been read in that sense [asserted by Mr Lim], it will not be held to have been reasonable for Mr Lim to have so understood it.

Application of the principles to this case

[133] The defendants' reliance on estoppel must fail for essentially the same reason as the constructive trust and resulting trust defences. An (arguable) commitment that a particular owner who wishes to quit his or her share will sell that share to the others for the original purchase price cannot be reasonably understood as a commitment that the same would apply if a majority of owners wished to sell. In such a situation the broad family usage which underlay the initial discussions no longer applies.

Conclusion as to estoppel

[134] On the basis of the requirement of reasonable reliance alone, the defendants' equitable estoppel pleading cannot succeed.

[135] It is unnecessary that I consider the other elements of estoppel. Some of those elements – such as whether the defendants truly acted in reliance on an expectation that they would be offered the share of others for $4,000, and as to whether it is unconscionable in the present circumstances for the plaintiffs to insist on market value of their shares – would be properly matters to be determined on evidence at trial, should such eventuate.

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[47] *Lim v Ward McCulloch Solicitors Nominees Limited*, above n 35, at [26].

Conclusion – affirmative defences

[136] I have found that none of the defendants' affirmative defences is arguable. In relation to each, largely for similar reasons, there is at least one required element of the defence which cannot be established.

[137] It thus becomes necessary to now examine the plaintiffs' application for an order of division of the property under s 339 of the Property Law Act 2007. This requires a consideration of the factors identified under s 342 of the Act.

Relevant considerations under s 342 Property Law Act 2007

Section 342(a) - Extent of co-owner's shares

[138] It is to be recalled that under s 140 of the 1952 Act, the Court was required (unless the Court saw good reason to the contrary) to make an order if the applicant had a one-half or greater share in the land that was subject to an application. As already discussed at [11]-[20] above, a fundamental consideration in amending s 140 was to grant the Court more flexible powers by including a discretion. The Law Commission in its 1994 report observed:[48]

> While there is now [in the proposed legislation] a discretion, it is likely that the court will not ordinarily refuse to make an order upon the application of such a co-owner...

[139] This observation was undoubtedly made against the background of the Commission's proposal that what has now become s 342(a) of the 2007 Act should have as its first-listed consideration the extent of respective shares.

[140] The Commission's expectation has been fulfilled in subsequent cases in which this Court has considered that a majority share of property ownership on the part of the plaintiffs is a factor to be weighed in support of an application for division.[49]

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[48] Law Commission *A New Property Law* Act (NZLC R29, 1994) at [747].
[49] For example, see *MacKenzie v Smythe*, above n 12.

[141] In this case, the plaintiffs have together a four-sixths interest in the property. This preponderance of interest is a factor significantly in favour of an order of sale.

342(b) - Nature and location of the property

[142] A distinguishing feature of this property is that it is a holiday house. It is not, as in so many cases, a full-time residential base. The evidence is that it is relatively rarely used. This no doubt flows from its comparative inaccessibility, both because it is on an island accessed only by boat and because some of the owners live a very long distance away. In relation to such a property, a range of factors may conspire to render it lightly used. Such factors may include age, disability, geographical inconvenience and antipathy between co-owners. All once saw it as a place simply for broad family enjoyment. Now, while some of their number still do, others do not.

[143] This aspect of the nature and location of the property relatively strongly favours sale. The very occasional or complete absence of use which some co-owners now enjoy militates in favour of the Court's allowing those persons to free up their equity and to put it into another form of asset (or income use) of their choosing.

[144] A further characteristic of this property to be taken into account is its state of maintenance. The purchased second-hand house was brought to the property and retro-fitted in 1990. The valuer describes its interior and exterior condition as "fair". He reports that in some areas of the house there is deferred maintenance. The valuer also records his understanding that there are some building consent and compliance issues requiring attention. Leo deposed (uncontradicted) that:

> The house is now some 21 years old and beginning to need some serious maintenance. The discussions around paying for that and working through the detail are simply not happening.

[145] Travis confirmed in his evidence that the property "now needs a lot of work" (although his comment was presented more in the context that the property should not be marketed now precisely because it does require further work and has other negative features such as its lack of code compliance).

[146] Given the antipathy between the plaintiffs and the defendants, the current state of the property and in particular the house is a further factor in favour of an order of sale. The significant risk for all owners is that a continuing lack of co-operation will lead to a continuing deterioration in the property.

Section 342(c) – Number of co-owners and the extent of their shares

[147] There are in all eight co-owners, some of whom are joint owners of a particular one-sixth or two-sixths share.

[148] The multiplicity of owners, particularly against a background where co-operation has dwindled, is a further factor favouring division.

Section 342(d) – Hardship: to applicant by refusal of order/to respondent by making of order

[149] Hardship is the fourth consideration which the Court is required to have regard to under s 342 of the Act.

[150] All the deponents in one way or another have addressed issues of hardship or the absence of hardship. I remind myself that in a summary judgment context I am assessing the case by reference to what is arguable on the defendants' case.

[151] An appropriate definition of what constitutes "hardship" is to be found in the Shorter Oxford English Dictionary:

> The quality of being hard to bear; or
> hardness of fate or circumstance

These were the dictionary definitions cited with approval by Woodhouse P in *Director-General of Education v Morrison*,[50] a case involving accommodation grants for students payable by reason of "hardship".

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[50] *Director-General of Education v Morrison* [1985] 2 NZLR 430 (CA) at 433.

[152] Cooke J observed in the same case that: [51]

> In ordinary usage hardship does not necessarily connote extreme privation or the like.

Cooke J was referring to and repeating a particular definition of "hardship" which appears in various dictionaries (including the Oxford) as an alternative to the definitions favoured by the Court of Appeal.

[153] Woodhouse P in *Morrison* referred with approval to the observation of Mayo J in *Returned Sailors' Soldiers' and Airmen's Imperial League of Australia (Henley and Grange Sub-Branch) Inc v Abbott*,[52] that the word "hardship" was:

> capable of being descriptive of adverse repercussions of every kind.

In the specific context of s 342, the concept of "hardship" was considered by Fogarty J in *Holster v Grafton*.[53] His Honour said:

> [50] "Hardship" is a value-laden criterion. It suggests an adverse effect which is of significant impact to the applicant. It has to be read consistent with the policy of the statute which respects property rights of tenants in common, but seeks to resolve conflicts fairly.

[154] This passage was referred to by Wylie J in *Bayly v Hicks*.[54] His Honour added that hardship needed to be considered both in the round and by reference to the partition proposals advanced by the parties.[55]

[155] While, mindful of the observations of the Court of Appeal in *Morrison*, not to limit the concept of hardship in s 342 of the Act to severe suffering or privation, I would not view the term as embracing mere inconvenience or disappointment. Such lesser impacts might fall for consideration under "other matters relevant" under s 342(f) of the Act but do not semantically fall within the concept of hardship.

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51 Ibid, at 436.

52 *Returned Sailors' Soldiers' and Airmen's Imperial League of Australia (Henley and Grange Sub-Branch) Inc v Abbott* [1946] SASR 270, 273.

53 *Holster v Grafton* (2008) 9 NZCPR 314 (HC).

54 *Bayly v Hicks* HC Whangarei CIV-2009-488-000547, 19 August 2011.

55 Ibid, at [61].

[156] Issues of comparative hardship frequently arise in most jurisdictions in relation to the respective interests of landlords and tenants. For example, in *National Bank of New Zealand v Choo Ming*,[56] the Court considered whether, under s 37(1) Tenancy Act 1955, greater hardship would be caused to the defendants by the grant of an order for possession than would be caused to the plaintiff by the refusal of such an order.

[157] In order to make the comparison of hardship required by s 342(d) of the Act I now turn to summarise the evidence relied on by defendants and plaintiffs respectively.

[158] In his written submissions for the defendants, Mr Chesterman summarised the "hardship in personal circumstances" for the defendants in this way:

> If Te Iro Bay is sold, Travis, Gerard and Sandra will no longer have Te Iro Bay and will not be able to afford to buy another holiday home, and certainly not a home of a type and in a location such as Te Iro Bay. When considering this factor, it is submitted the court may take into account that the very purpose of the Family Agreement was to protect from this outcome, and contributions were made in reliance upon it.

[159] The first sentence of that submission (as to inability to obtain a replacement holiday home) is at least arguable on the defendants' evidence. Travis describes himself as a self-employed property consultant but refers to having little equity in the house he owns and having significant debts to pay off. He has little money left over for holidays after paying outgoings. He deposes that he is "not sure" whether he will be able to afford to buy the property at market value if the Court orders such a sale. He says that the property is irreplaceable because it is a special place holding good memories for him. While he lives in Auckland it gives him a connection to Marlborough. Gerard has his own house removal business which he started in 2007. He lives with his wife and three children in Blenheim. He does not have savings or investments (other than his business). He deposes that the property has been a major part of his and his family's life, that it is a special place for them, and he would be upset if it was sold as he could never replace the property.

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[56] *National Bank of New Zealand v Choo Ming* [1959] NZLR 678.

[160] In response to an observation made by Mr Davies in his submissions, Mr Chesterman accepted that the holiday house property could appropriately be regarded as a luxury (a word used by Travis himself), but he submitted that the Court should place comparatively greater emphasis upon the fact that it was extremely important to family members on a personal level.

[161] Travis deposed:

> ... that was the reasoning behind the Family Agreement, so that we could always afford that luxury.

[162] The plaintiffs' focus on hardship is in relation to their present inability to free up the value of an asset which they no longer wish to retain.

[163] Leo Coffey filed the main evidence for the plaintiffs. He is recently separated from Marcella. He acknowledges that he and Marcella do not require the additional cash that would come from a sale but deposes that they certainly could do with the money. Leo is 68 years old, semi retired and is no longer using the bach much. He refers to outgoings including rates, insurance, mooring charges and maintenance costs which the co-owners continue to meet proportionately. He deposes to finding the payment of outgoings a constant reminder of the family breakdown. Leo adds that, because the property is somewhat remote in the Marlborough Sounds, access to it carries some risks at his age.

[164] Barry lives in Napier and deposes that he will realistically never return sufficiently often to Blenheim to justify the continued upkeep and financial input into the property. He regards as the most important reason for a sale of the property now the state of great disharmony between plaintiffs and defendants. He wants to be freed from co-ownership.

[165] Paul and Andrea have a delivery contract business. There was some disruption to the business because of an accident sustained by Paul in 2011. Paul and Andrea have suffered financial pressure in their business and personally. They have three children two of whom are teenagers. They do not wish to keep putting funds into the property account. They regard the current situation of the family

breakup as meaning co-ownership can no longer carry on. They would like to move on.

[166] Marcella did not give evidence of her own. Leo described her as having issues with her hip and being somewhat fragile. He says that she cannot get to the property at all.

[167] In his evidence, filed at a time when of the plaintiffs only Leo had provided an affidavit, Travis took issue with some of the personal explanation given by Leo as I have summarised it. He refers to properties owned by Leo and Marcella and deposes that Leo is a wealthy man. He rejects any suggestion that Leo is a fragile man, describing him as having "plenty of life left" and perfectly able to travel to the property alone. He describes Marcella as having no interest in the property and having nothing to do with the property since her separation.

[168] Travis characterises the rates and outgoings, split six ways, as very low.

[169] I turn to consider where the particular hardship in this case might lie.

[170] There is a degree of hardship through this deeply-divided family being tied together in co-ownership. The plaintiffs and defendants are unable to cooperate in the way co-owners should cooperate. The hostility evident in exhibited correspondence leads naturally to a situation where family co-ownership of the property has plummeted from boon to bane.

[171] While the defendants' notice of opposition suggests that it would be appropriate for the Court to refuse any relief under the Property Law Act, the alternative position adopted (that there should be a sale of the plaintiffs' shares, albeit at $4,000 per one-sixth share) appears to be their favoured position. Thus Gerard concludes his evidence by saying:

> I believe that the appropriate orders for the Court to make are for the plaintiffs to sell their shares to the defendants as per the Family Agreement at $4,000 per 1/6 share.

[172] I am satisfied that the continued co-ownership of this property by the plaintiffs and defendants together would work a hardship on the plaintiffs. As in *Bayly v Hicks*, the co-ownership needs to be resolved.[57]

[173] From a broader perspective, any disappointment or frustration for the defendants in no longer having enjoyment of or co-ownership of the property is tempered by the fact that the property does not represent a residence for any co-owner. It is an infrequently used, somewhat remote, holiday home. I have found that the defendants do not have an arguable case in relation to any of their affirmative defences (whether as to a contractual or an equitable entitlement beyond their equal share).

[174] In the absence of any enforceable right on the part of the defendants to other than their one-sixth share of equity, the hardship which they suffer comes down to the loss of occasional use of this holiday home, a possible inability to acquire an interest separately or together in a replacement holiday home, and some prospect that their equity upon sale will not, when used or invested elsewhere, increase in value in the way that the property has.

[175] That is not a detriment which outweighs the detriment which the plaintiffs would suffer through being unable to realise their equity for a sustained period. I take into account also the potential recovery by each one-sixth owner of a potential sum of over $40,000. If the defendants view their equity in the property as their means of funding holidays, the income, or indeed capital expenditure from their share proceeds, will go some substantial way towards covering the cost of annual holidays whether on a casual basis or through an interest in a time-share or similar arrangement for some years to come.

[176] I accordingly do not view the consideration of hardship as weighted in favour of the defendants. Arguably, having regard to the respect of the property rights of tenants in common which is preserved by the statutes,[58] the plaintiffs have a good

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57 *Bayly v Hicks*, above n 49, at [63].
58 *Holster v Grafton*, above n 48, at [50].

argument for saying that considerations of hardship are significantly weighted in favour of the plaintiffs.

Section 342(e) – Value of contributions to improvements or maintenance

[177] I again remind myself that this consideration arises in the context of a summary judgment application.

[178] By and large, the evidence indicates that the way in which the family looked after the property was an unexceptional family arrangement whereby everyone pitched in and enjoyed pitching in. I have found that no legally enforceable rights or expectations of unequal sharing were created. But a disproportionate share of equity would accrue to both Travis and Gerard if the Court were to limit the plaintiffs to a recovery of $4,000 on account of their individual shares with large, proportionate increases for Travis and Gerard.

[179] The evidence establishes that in the early days, in the acquisition and in the improvement of the house, Leo and Gerard may have been responsible for work and contributions which could have been quantifiably established as greater than some or all the other family members.

[180] Leo's particular contribution lay in the introduction of a house of significant value. Leo's company also absorbed costs of moving the house across country and sea and onto the section. The house appears to have been purchased by Leo's company as part of a job lot for around $3,000. Commonsense dictates (notwithstanding a suggestion to the contrary) that the $3,000 initially paid by Leo's company for this house was substantially less than its value when placed on the site.

[181] There is also the evidence of Gerard of a measure of unpaid days (around 17 as I total them in his evidence) as the site was prepared and the house retro-fitted. Gerard's evidence is supported by Travis. The evidence from the plaintiffs tends to downplay the level of contribution from Gerard and to emphasise that Gerard was paid, as an employee of Leo's company, for much or all of his work. On the other hand, Gerard's evidence seems inherently credible in asserting that many days were

worked on a voluntary basis in the context of Gerard's expectation that the family was developing the property for holidays for itself and for future generations, no thought being given to a situation where co-owners were forced to sell.

[182] The parties in this case have essentially aligned themselves in two camps. If there were to be modest recognition for unequal contribution, there would be an equally strong argument for cancelling out a recognition on the one hand for one of the plaintiffs (Leo) and on the other hand for one of the defendants (Gerard). Such a cancelling out is, on my assessment, the only realistic approach to any difference in contribution.

[183] I have some regard also to the fact that on the valuation evidence approximately 41 percent of the value of the property lies in the land. There is no significant suggestion in the evidence that contribution to improvements to the land or to the maintenance of the property have affected the value of the land. Most of the focus of the evidence has been on the very early contributions to the introduction and retro-fitting of the house itself. If there had been any recognition for contributions, it would need to have been focused on the 59 percent of the value which lies in the house. With the parties not currently agreeing on maintenance and the valuation report recognising items of deferred maintenance, there is a realistic prospect that the proportionate value of the house will be declining. This tends to reinforce the conclusion that any differences of contribution to the value of the house should not cut across the deliberate vesting of one-sixth shares and the proprietary rights in those shares.

Section 342(f) – Any other matters the Court considers relevant

[184] This is a situation of deadlock between two sets of co-owners.

[185] Associate Judge Gendall recognised in *MacKenzie v Smythe*[59] that the need in co-ownership cases to be able to break deadlock between the co-owners is a fundamental principle underlying the right to partition a property. What his Honour then added could apply with minor modification to this case:

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[59] *MacKenzie v Smythe*, above n 12, at [69].

> [69] Although the defendant is correct when she submits that at the time the parties purchased their individual properties they willingly entered into the cross-lease and contractual arrangements attaching to their respective titles, in my view this is one of those rare cases where matters between the plaintiffs and the defendant have reached a stage of acrimonious dispute and deadlock such that partition to terminate their co-ownership is appropriate.

[186] The position of the plaintiffs in the present case, as co-owners in a tenancy in common situation, is significantly stronger than that of the plaintiffs as cross-lessees in their situation. In this case, the situation is one of deadlock which manifests itself in acrimonious correspondence when issues arise, the deferring of maintenance of the property, and now engagement in High Court litigation.

[187] The aspirations of individual family members for a family holiday home which all family members enjoy and which will endure for later generations have come to be, albeit admirable, an unfulfillable dream. The dream required family cohesion. There is no cohesive family unit to allow that dream to be attained.

[188] For the defendants, Mr Chesterman submitted that there was another factor which the Court should take into account under s 342(f). Mr Chesterman identified aspects of the evidence of Leo which, he submitted, should affect the Court's consideration of the plaintiffs' application. Mr Chesterman identified:

1. Leo's attempts to market the property without permission from the defendants.

2. Leo's downplaying of knowledge of any "family agreement" when pre-litigation correspondence took place.

3. Leo's solicitors' timeframe for acceptance of sale terms at the pre-litigation stage.

4. Leo's characterisation of health and financial issues (as contradicted by the defendants).

[189] None of these complaints assist the defendants in relation to the issues which the Court has to decide on this application. Most, if not all, of the evidence identified by Mr Chesterman reinforces the extent of the breakdown between the

defendants and their parents (and indeed their siblings). There are ways in which Leo might have handled himself more appropriately and tactfully in the steps which he took to bring matters to a head. But it is now for this Court, with the deadlock which exists, to determine how to fairly resolve matters for this family.

[190] The final matter to consider under s 342(f) is the sense of family attachment to this property. While deadlock now prevails, there were good times spent by a family in acquiring, developing, tending and quite simply enjoying this family holiday house. While the animosity of the deadlock has led the plaintiffs to prefer outright sale, the abiding sense of attraction to this particular property is still evident in what Travis and Gerard have had to say. In my judgment this is a consideration which informs in this case, not whether an order under s 339(1) of the Act should be made, but rather the terms on which an order under s 339(1) should be made. The evidence of Travis appears to be that he has neither the savings nor investments to enable him to purchase the balance of a half share in the property. The evidence of Travis is somewhat equivocal. While he refers to having significant debts and little equity, he specifically states in relation to ability to purchase the property that he is not sure whether he will be able to afford to buy it. He and Gerard rejected a purchase at market value because they were insisting on purchasing the shares of other co-owners for $4,000 per one-sixth share. Now that that course will not be open to them, it is appropriate that any order the Court makes gives Travis and Gerard a reasonable opportunity to reconsider the purchase option.

Conclusion – drawing the considerations together

[191] Section 339(1) of the Act provides the legislative mechanism for division of property owned by co-owners.

[192] Of the three forms of order authorised by s 339(1), those in s 339(1)(b) (division of the property in kind among co-owners) and s 339(1)(c) (requiring one or more co-owners to purchase the share of others at a fair and reasonable price) are not applicable. The latter is not applicable quite simply because the Court cannot be satisfied that either of the defendants has the means to purchase the shares of others.

[193] I am satisfied, by reason of the considerations discussed, that the defendants have no defence to the plaintiffs' claim for an order for the sale of the property. The preponderance of relevant factors very strongly favours an order of sale. Having regard to the situation of general deadlock concerning the property, there is no arguable basis for deferring the implementation of a regime and timetable for sale.

[194] It is clearly appropriate that either Travis (for himself) and/or Gerard and Sandra (jointly) should have an opportunity of offering to purchase the property pursuant to s 343(e) on terms which I shall detail.

The method of sale

[195] The plaintiffs, in their statement of claim, set out a detailed regime for sale which they requested be part of an order of sale.

[196] Subject only to the absence of a further order relating to purchase by the defendants under s 343(e), the terms of sale proposed by the plaintiffs were all fair and reasonable. Mr Chesterman in his submissions did not (in the event that summary judgment was entered for the plaintiffs) suggest that the proposed terms were other than reasonable. I therefore substantially adopt the proposed terms subject only to minor amendments to update them in relation to issues of timing and the like.

Costs

[197] The plaintiffs have succeeded in their claims. Costs must follow the event. It is appropriate that costs be on a 2B basis.

Orders

[198] I order:

(a) Pursuant to s 339(1) Property Law Act 2007 the property (identifier MB3B/843 being Lot 1 DP5292) is to be sold and the proceeds of sale divided among its co-owners in accordance with the shares recorded on

the title to the property, subject only to the deductions referred to in this order.

(b) The parties are to confer with a view to agreeing an asking price for the property by private sale. If agreement has not been reached on an asking price by 20 August 2012, the parties (or either of them) is to request on behalf of the parties that Alexander Haywood Limited fixes an asking price and an acceptable sale price for a private sale of the property (the latter based on market value). The plaintiffs are to pay the valuer's fees in the first instance.

(c) Immediately upon the fixing of an acceptable price by Alexander Haywood Limited, the plaintiffs' four-sixths interest in the property is to be available for sale to either or both Travis Leo Coffey (in his own right) and Gerard William Coffey and Sandra Maree Coffey (jointly) for a sum equalling four-sixths of the lower of the following valuations, namely:

(i) The valuation of $280,000 being the valuation assessed by Alexander Haywood Limited as at 26 September 2011 (including customary chattels); or the acceptable sale price for a private sale of the property as now assessed by Alexander Haywood Limited pursuant to order (b) above.

(d) If the defendants or either of them wishes to exercise such right of purchase they shall do so in writing to the solicitors for the plaintiffs within 10 working days after the date of the written report of Alexander Haywood Limited pursuant to order (b) above. The settlement date for the completion of the purchase of the remaining co-owners' shares shall be five working days after the written confirmation of the exercise of the right of purchase.

(e) In the event the defendants do not purchase the property upon the expiry of the defendants' 10 day period to purchase, the property is to

be offered publicly forthwith by private sale at the asking price established by Alexander Haywood Limited, and is to be listed with Heartland Realty (John King Real Estate Limited) Blenheim. The recommendations of that firm in relation to advertising, signage and promotion of the sale of the property are to be accepted by the parties and the cost is to be borne by the plaintiffs in the first instance.

(f) If an offer is received from non-parties below the asking price or on terms or conditions not acceptable to any party and the parties are unable to agree within two working days of the presentation to them whether to accept the offer or not, the Registrar of the Court at Blenheim is empowered to decide whether or not to sell, after taking advice from Alexander Haywood Limited if she thinks necessary, and to sell the property accordingly.

(g) Pending sale, the defendants will keep the property clean, tidy and presentable for sale, and make reasonable access available for viewing, as the agent requires.

(h) If the property has not sold unconditionally, it is to be auctioned at some time during the three weeks commencing 15 October 2012, the auction to be conducted by Heartland Realty or its nominee, in accordance with that firm's usual procedure. The cost of advertising, signage and promotion and the expenses of the auction are to be paid by the plaintiffs in the first instance. The Registrar at Blenheim is empowered to decide all issues arising in relation to the sale and to sell the property at, or before or after the auction, as she sees fit.

(i) If an auction occurs, Alexander Haywood Limited is to fix a reserve price for the auction.

(j) Unless the parties otherwise agree, a firm of solicitors, independent of each party, is to be engaged to act for them all in relation to the sale. If the parties are unable to agree on the firm, the President for the time-

being of the Blenheim branch of the New Zealand Law Society is to be requested to nominate a solicitor to act for both parties. Any charges by the Society for the services will be paid by the plaintiffs in the first instance.

(k) From the proceeds of sale, whether to the defendants or to non-parties, such of the following expenses as have occurred are to be deducted:

(i) Real estate agent's commission, valuation fees and sale expenses which have not, at that time, already been paid by the plaintiffs;

(ii) all sums paid by the plaintiffs as directed in these orders, which are to be refunded to them;

(iii) any outstanding rates, insurance premiums or mooring charges on the property;

(iv) legal fees and disbursements of the firm engaged to act as the valuer.

(l) Leave is reserved to the parties to apply for any further directions reasonably required to give effect to this judgment.

(m) The net proceeds of any sales to non-parties thus derived are to be paid out to the plaintiffs and defendants in accordance with their respective shares in the property according to the Certificate of Title.

(n) The defendants are jointly and severally to pay the plaintiffs' costs of this proceeding on a 2B basis together with disbursements to be fixed by the Registrar. There is no certificate for second counsel.

Associate Judge Osborne

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