IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA551/2020
[2021] NZCA 295

BETWEEN	CONRAD CHRISTIAN ROBERTSON Appellant
AND	MARTIN JAMES ROBERTSON Respondent

Hearing: 24 June 2021

Court: Kós P, Brewer and Davison JJ

Counsel: R J Hollyman QC and K B Dillon for Appellant
G J Kohler QC for Respondent

Judgment: 5 July 2021 at 9 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Kós P)

Introduction

[1] Two brothers, boatbuilders by trade, have fallen out. They dissolved their partnership 25 years ago or more. One brother continued the business alone from a boatyard beside the Mahurangi River in Warkworth. The land on which the boatyard lies is about 8.3 hectares in extent. It is now worth in excess of $7 million. It is still

owned by the two brothers as tenants in common in equal shares. They cannot agree what should be done with it.

[2] Walker J said, "They are unable to agree on sale or division of the property. Their intentions for the property diverge and are essentially incompatible".[1] So the Judge made the decision for them. She said the land should be sold at public auction, with the proceeds divided.[2] Predictably perhaps, there is an appeal.

Background

[3] The brothers purchased this land in the early 1980s and continued a family boatbuilding business there. In 1995 they dissolved their partnership. Conrad bought Martin out and again continued the boatbuilding business. Martin continued as a boatbuilder elsewhere in Warkworth and the Auckland area.

[4] Conrad's business entered into a lease with the two brothers as landlords. This lease expired in December 2007. A holding-over provision provides the business may continue to occupy the premises on a monthly tenancy at the existing rent if the parties are unable to agree new terms. They have been unable to do so. The rental now being paid is significantly below market rent. The lease provides that neither party is required to carry out structural repairs or weatherproofing. Some of the structures currently used by the boatbuilding business are now in need of repair or overhaul.

[5] Since as far back as 1996 the parties have exchanged offers and counter-offers. None reached resolution. As the Judge put it, "[t]he relationship between the two is now strained".[3]

[6] Conrad wishes to expand and modernise the boatbuilding business by constructing new buildings on the site. To do that, he will need to become owner of the property. He has therefore applied for orders under s 339 of the Property Law Act 2007.

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1 *Robertson v Robertson* [2020] NZHC 2272 [Judgment appealed] at [1].
2 At [90]. The order was made under s 339(1)(a) of the Property Law Act 2007.
3 At [15].

[7] Martin wishes to redevelop the property in whole or part for residential housing. His evidence is that he has wanted to redevelop the land since its first acquisition. He agrees orders should be made. Just different ones to those sought by Conrad.

What the law provides

[8] Conrad's application invokes s 339 of the Property Law Act, by which a Court may order the sale or division of property. It provides in relevant part:

> **339 Court may order division of property**
>
> (1) A court may make, in respect of property owned by co-owners, an order—
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> (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.
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> …
>
> (3) Before determining whether to make an order under this section, the court may order the property to be valued and may direct how the cost of the valuation is to be borne.
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> (4) A court making an order under subsection (1) may, in addition, make a further order specified in section 343.
>
> (5) Unless the court orders otherwise, every co-owner of the property (whether a party to the proceeding or not) is bound by an order under subsection (1) (and by any related order under subsection (4)).
>
> …

[9] Section 342 of the Act then sets out a series of mandatory relevant considerations in making the s 339 assessment:

> **342 Relevant considerations**
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> A court considering whether to make an order under section 339(1) (and any related order under section 339(4)) must have regard to the following:

(a) the extent of the share in the property of any co-owner by whom, or in respect of whose estate or interest, the application for the order is made:

(b) the nature and location of the property:

(c) the number of other co-owners and the extent of their shares:

(d) the hardship that would be caused to the applicant by the refusal of the order, in comparison with the hardship that would be caused to any other person by the making of the order:

(e) the value of any contribution made by any co-owner to the cost of improvements to, or the maintenance of, the property:

(f) any other matters the court considers relevant.

[10] Finally, s 343 sets out further associated powers of the Court:

343 Further powers of court

A further order referred to in section 339(4) is an order that is made in addition to an order under section 339(1) and that does all or any of the following:

(a) requires the payment of compensation by 1 or more co-owners of the property to 1 or more other co-owners:

(b) fixes a reserve price on any sale of the property:

(c) directs how the expenses of any sale or division of the property are to be borne:

(d) directs how the proceeds of any sale of the property, and any interest on the purchase amount, are to be divided or applied:

(e) allows a co-owner, on a sale of the property, to make an offer for it, on any terms the court considers reasonable concerning—

(i) the non-payment of a deposit; or

(ii) the setting-off or accounting for all or part of the purchase price instead of paying it in cash:

(f) requires the payment by any person of a fair occupation rent for all or any part of the property:

(g) provides for, or requires, any other matters or steps the court considers necessary or desirable as a consequence of the making of the order under section 339(1).

[11] In *Bayly v Hicks* this Court confirmed s 339 as conveying a broad discretion, even enabling an outcome not advanced by either party, so long as statutory limitations

and natural justice are observed.[4] But the complaint here is not that the Judge did something novel. It is that she did not. Let us look at what was asked of her, and then what she did.

What orders were sought

[12] In his originating application of 27 November 2019, Conrad sought an order that the property be sold at public auction. It was to be sold without reserve, and with the parties free to bid, but subject to a one-year lease in favour of his business at commercial rates. That is, he sought an order under s 339(1)(a).

[13] Then in an amended application dated 9 March 2020, Conrad sought either the above (but with a reserve fixed by the Court) or alternatively an order for partition of that part occupied by his business (which he then might purchase at a fair market value fixed by the Court) with the balance sold to either party on the same basis. That is, he sought orders either under s 339(1)(a) or under a hybrid combination of s 339(1)(a) and (b). It was that amended application he pursued before the Judge, albeit in reverse order of preference.[5]

[14] Martin instead sought orders that the land be sold at auction, but subject to a nine-month deferred settlement. That was because he would have needed to sell other property of his own if he were the successful bidder.

What the Judge decided

[15] The Judge concluded that the fact that neither party could design a mutually advantageous partition proposal, despite years of attempted negotiation, indicated that a partition was not a practical option. The brothers were unable to work productively together. Significant time and effort would be required to reach agreement, obtain resource consents and decide on questions such as roading and easements. A final partition plan would require resource consent and potentially further court hearings.[6] On the other hand, the Judge found that a sale had advantages. Conrad had

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4 *Bayly v Hicks* [2012] NZCA 589, [2013] 2 NZLR 401, at [27] and [46].
5 Judgment appealed, above n 2, at [5]–[6].
6 At [82].

acknowledged in affidavits to the Court that he would be able to relocate his business. If he were not the successful bidder, he would instead have a large sum of money, and time to relocate.[7]

[16] Accordingly, in an interim judgment the Judge indicated her intention to order sale by public auction, the parties cooperating in the auction and paying one half of the marketing and other costs of auction. The auction would also be subject to an agreed reserve figure filed in Court.[8] Provisionally, settlement would take place either within six or nine months (with a further six or three-month lease to Conrad's business, on commercial terms) at the purchaser's election.[9]

The appeal

[17] Conrad's notice of appeal asserts, first, the Judge was wrong not to order partition. Secondly and alternatively, that she was wrong not to make an order requiring Conrad to purchase Martin's share in the property at a fair and reasonable price based on the valuations provided.

[18] In his written submissions Conrad now concedes a partition is unlikely to work because of the degree of animosity between the two brothers. Instead he seeks an order that he be allowed to buy out Martin's share based on the valuations the parties exchanged in mid-2020. It is said the Judge failed to consider an order under s 339(1)(c) whereby a Judge can order a co-owner to purchase a share in the property of another co-owner at a fair and reasonable price.

[19] Conrad says that the Judge failed to give sufficient weight to the "extreme hardship" he would face if a sale was ordered in the way she proposed. Location on the river was essential to the business, and sale of the property otherwise than to Conrad would bring to an end his business, built up over 40 years and employing 20 people who live in the locality. There was no evidence by Conrad or Martin that there was land within the greater Warkworth area currently for sale or lease with

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7 At [83].
8 At [36] and [90].
9 At [92].

appropriate zoning where Conrad could move his business and which would enjoy similar river access.

[20] Mr Hollyman QC, who did not appear for Conrad below, did not pursue a further, peripheral appeal point concerning a condition as to removal of a limitation as to parcels.

Discussion

[21] We do not think the Judge erred. We can state our reasons briefly.

[22] First, the power to make orders under s 339(1) plainly engages judicial discretion. The unchallenged premise is that the existing tenure cannot continue. That much is common ground. Exactly *how* it is to come to an end, in the absence of agreement, engages the Judge's discretion. There will be room for different views about the right remedy in all the circumstances. This Court will not interfere with a s 339 order unless one of the *May v May* prerequisites applies.[10] That is, the Judge must have: (1) made an error of law or principle; (2) failed to take into account some relevant matter; (3) taken into account an irrelevant matter; or (4) otherwise been "plainly wrong".

[23] Secondly, the criticism made of the Judge by Conrad is that she did not adopt a proposition he did not advance. In a kaleidoscopic catalogue of changing proposals, Conrad now opens an entirely new page. In his affidavit evidence Conrad had said:

> After discussing these concepts with David Heaney QC, *I came to the conclusion that the only realistic solution was to put the property up for sale by way of auction* which would allow either Martin or me to bid at the auction if we did not think the price was sufficiently high. For my part, if the price obtained at auction was extraordinarily high, I would probably let it be sold to a third party and move my boat building business.

And:

> I would still be prepared to do something like that [partition into two parts] but if that does not happen then for me to carry on in the future with my business *I need to see the property put up for auction*. If the price achieved at

[10] *May v May* (1982) 1 NZFLR 165 (CA) at 170, approved in *Kacem v Bashir* [2010] NZSC 112, [2011] 2 NZLR 1 at [32].

> auction is such that I can afford to buy it, then I will do so. If the price is vastly greater than I can justify then I will accept the property being sold to a third party and move my boat building business.
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> (Emphasis added).

So Conrad's original (and ultimate, alternative) case supported the stance taken by the Judge. By no means can it be said that the Judge erred in overlooking a contrary proposition that no one had advanced.

[24] Thirdly, the underlying premise for the appeal is that Conrad cannot now move his business, should he fail to be the successful bidder at auction. This is said to constitute extreme hardship such that the Judge should have disregarded Conrad's own contrary application for a sale by auction, or partition (which he now accepts is unworkable) and dreamed up something else entirely. Not only is that unsupported by the evidence, but it is in fact contrary to his earlier affidavit evidence, as set out in the preceding paragraph. The new arguments as to difficulty based on zoning were exactly that: arguments in submissions, not evidence. Mr Hollyman rightly avoided them. It would be quite unjust to Martin to permit a 90-degree turn now to be made in Conrad's case, without pleading or evidence, and without Martin having the opportunity to adduce contrary evidence.

[25] Finally, we consider the Judge would have been quite wrong to have made an order in the terms sought in Conrad's notice of appeal and written submissions based on 2020 valuations. In a rampant property market, it is unlikely the valuations represent the current market value, and therefore a fair value for the land in terms of s 339(1)(c). In short, Conrad's new idea also represents a price advantage to him, at Martin's cost, and is unconscionable. A further difficulty with the idea is that there is a 22 per cent difference between the valuations, and Conrad's written submissions asked that we prefer the lesser one (although he said he would abide the Court's decision if we affirmed sale under s 339(1)(a)). Both delay and the delta in these outdated valuations demonstrates a fundamental problem with what is proposed.

[26] Mr Hollyman at once recognised that what was advanced in the written submissions could not sensibly be maintained. Instead he suggested new valuations and a referee in the event of disagreement. None of this met favour with Martin, whose

counsel, Mr Kohler QC, vehemently objected to the appeal developing on the fly. Mr Kohler said, not inaccurately, that a public auction was the best place to identify value, either brother could bid, and each would have the bidding advantage of receiving back half of any premium paid.

[27] Inasmuch as we find the Judge did not err, there is no basis for us to explore Conrad's new suggestions.

Result

[28] The appeal is dismissed.

[29] The appellant must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Cameron Fleming and Associates, Auckland for Appellant
Heugh M Kelly, Wellsford for Respondent