

IN THE COUNTY COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
FAMILY PROPERTY LIST

Revised
Not Restricted
Suitable for Publication

Case No. CI-19-00064

ROSA SICILIANO

Plaintiff

v

MARIA GIUSEPPA CROCITTA (AS EXECUTOR OF THE ESTATE OF
SALVATORE SICILIANO)

Defendant

JUDGE: HIS HONOUR JUDGE P GINNANE
WHERE HELD: Melbourne
DATE OF HEARING: 29 March 2019
DATE OF JUDGMENT: 12 April 2019
CASE MAY BE CITED AS: Siciliano v Crocitta (As Executor of the Estate of Salvatore Siciliano)
MEDIUM NEUTRAL CITATION: [2019] VCC 475

REASONS FOR JUDGMENT

Subject: PRACTICE AND PROCEDURE – Application for Summary Judgment
Catchwords: Summary Dismissal of plaintiff's proceeding – whether defendant established that plaintiff's claim has no real prospects of success pursuant to *Civil Procedure Act 2010 (Vic)*.
Legislation Cited: *Civil Procedure Act 2010 (Vic)*; *Transfer of Land Act 1958 (Vic)*; *Property Law Act 1958 (Vic)*.
Cases Cited: *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27; *Ottedin Investments Pty Ltd v Portbury Developments Co Pty Ltd* (2011) 35 VR 1; *Williams v Hensman* (1861) 1 J&H 546; *Corin v Patton* (1990) 19 CLR 540.
Judgment: Application for Summary Judgment dismissed.

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr J D Catlin	J P Legal
For the Defendant	Mr A Muller	Frenkel Partners

HIS HONOUR:

- 1 The plaintiff's proceeding will not be dismissed in accordance with the relief sought in the defendant's summons dated 20 February 2019 because I am not satisfied that her claim has no real prospects of success.

The defendant's summons

- 2 The defendant's summons sought orders:
- (a) that there be judgement for the defendant under s63 of the *Civil Procedure Act 2010* (Vic) (the Act) pursuant to Rule 22.16 of the County Court (Civil Procedure) Rules 2008 (the Rules);
 - (b) alternatively, that the plaintiff's claim be dismissed pursuant to Order 23 of the Rules;
 - (c) alternatively, the plaintiff's Statement of Claim dated 10 January 2019 be struck out; and
 - (d) the plaintiff pay the defendant's costs.

- 3 A defence has not been filed.

The material before me

- 4 The plaintiff is Rosa Siciliano and the defendant is the executor of the plaintiff's deceased husband's estate and the plaintiff's daughter. Her allegations are contained in her Writ and Statement of Claim dated 19 January 2019 with the essential allegations canvassed in her affidavit sworn on 28 March 2019 in opposition to the defendant's summons and an affidavit sworn 10 October 2018 in support of an Originating Motion in Supreme Court proceedings. No point was taken about the use of that affidavit. The defendant relied in support of its summons on general principles at law and upon formal documents that are exhibited to an affidavit sworn by the defendant on 18 February 2019. That affidavit exhibited relevant documents consisting of the application for a new

folio of the register¹ and copy of the historical title search for the property in dispute at 3 Newcastle Street, Thornbury ("the Property")² and the defendant's grant of probate of the deceased's Estate on 10 December 2018.³

Factual background

5 The plaintiff and the deceased married on 13 December 1964. They remained married until the deceased died on 14 December 2012. During the marriage the plaintiff worked as a machinist. The deceased was a plasterer and, in 1975, they bought the Property. The Property was purchased by the plaintiff and the deceased as joint proprietors.⁴ The Property served as their home and remained so until the deceased's death. The plaintiff says that her consent and signature was procured by the actual undue influence of the deceased over her or, alternatively, it was unconscionable conduct by the deceased that was predicated on her vulnerability/or by reason of her special disadvantage. There was no benefit to the plaintiff from the transfer in 1999. She labours from limited English and she received no independent advice.

6 The Certificate of Title (MC-4) identifies that the plaintiff and the deceased were, at the date of change registered on title, as tenants in common in equal shares.

7 The plaintiff pleads that the deceased decided to sever the joint tenancy because he wanted to reserve or protect the Property from the consequences should he pre-decease her and she married again, and for other undisclosed reasons. The plaintiff then says that motivated by this and during a relationship of undue influence, the deceased arranged a solicitor to change the ownership of the Property from joint proprietorship to that of tenancy in common.

8 For the purpose of an application such as this brought by the defendant, the facts alleged are assumed.

¹ The Severance Document - Exhibit "MC-3"

² Exhibit "MC-4"

³ Exhibit "MC-1"

⁴ See registration on Title

9 The plaintiff says that by reason of the deceased's conduct, she has suffered loss, namely half the Property and the value of the same, and that in the premises the transfer of the Property was voidable. She seeks a number of forms of relief including damages.

The defendant's submissions

10 The defendant submitted that the plaintiff has no real prospects of success at trial because she cannot point to the loss of a right for which equity would intervene to remedy. This is because what she enjoyed was merely a benefit of survivorship which is not a "right" in a legal sense. It is no more than a potential benefit that is dependent on her *status quo* and her outliving the deceased in his guise as co-tenant. This right of survivorship is a consequence of the existence of a certain state of affairs that prevails on the death of a joint tenant. It therefore crystallises at an unknown point in time and only so far as at that point in time there exists unity between the joint proprietors in their interest, title, and possession.

11 The defendant argued that the deceased during his lifetime (as with the plaintiff during hers) was, by reason of the status of joint tenants, at liberty to dispose of his own interest in such a manner as to sever it from the joint ownership. That therefore, the plaintiff retained, as a result, nothing more than she enjoyed before the severance, that is the half value in an amount at a particular point in time. Accordingly, the plaintiff never had an interest greater than she has been left with because of her survivorship. At its highest, she had an expectation of full ownership by survivorship: subject to the right of the deceased, during his lifetime, to dispose of his own interest in such a manner as to sever it from the joint fund.

12 The authorities relied on by the defendant in support of this were not contested by the plaintiff.⁵ Neither was it contested by the plaintiff that in Victoria, a joint tenant of Torrens title land may voluntarily sever the joint tenancy without the

⁵ See *Williams v Hensman* (1861) 1 J&H 546, 557; 70 ER 862, 867 cited with approval by Mason CJ and McHugh J in *Corin v Patton* (1990) 19 CLR 540, 546

consent of the other joint tenants. A formal transfer must be registered in order to constitute a legal severance of the joint tenancy as legal title is not transferred until registration.⁶ Section 72(3) of the *Property Law Act 1958* (Vic) provides the appropriate machinery.

13 Therefore, the defendant submitted, even if the plaintiff at trial establishes unconscionable conduct or undue influence by the deceased, it cannot be said that she has suffered a wrong because all that occurred, even if by deceitful means, is what could have happened at his hand, unilaterally and unobjectionably (at least legally speaking) had the plaintiff declined to assist (assuming that, in the absence of any undue influence or unconscionability, she would have declined to execute the Severance Document). This is an assumption the defendant submitted it was safe to proceed upon by reason of the evidence as it stands thus far, because despite having sworn two affidavits, the plaintiff has not deposed that properly informed at the time she would not have executed the Severance Document.

14 Accordingly, the defendant submitted that the plaintiff retained what on the pleaded case she was entitled to, i.e. a half share of the Property and lost only the mere expectation of survivorship. There not being a legal wrong, there is nothing for equity to make right.

The plaintiff's submissions

15 The cornerstone of the plaintiff's allegations is of undue influence that procured an unjust and or fraudulent disadvantage to her. It is put by her that in consequence of the unjust disposition made by the deceased she is entitled to set aside the transfer and/or to recover damages.

16 The plaintiff says that consequent to the death of her husband the effect on her of the transfer has crystallised as one that has proved to have a significant

⁶ *Transfer of Land Act 1958* (Vic) s40.

adverse impact on her as the property she has helped pay for and lived in and maintained has not passed to her on survivorship.

- 17 The plaintiff says that she was not conscious of the transfer when it occurred but rather simply obeyed her husband in signing documents. Although he died in 2012, the plaintiff only became aware of the transaction in 2018 when she went to sell the family home in which she had been living in the years following her husband's death in 2012. When she saw her solicitor she was advised that the property was not jointly owned but in fact she was a tenant in common in which she held only half.
- 18 The facts pleaded and relied on by the plaintiff are plain. The plaintiff paid for half the house. She says she became the sole bread winner. She says she cared for the deceased and she was deceived into an arrangement whereby all things being equal she would at best get half the house on his death.

The legal test

- 19 It is proper that the law imposes a high hurdle for a proceeding to be summarily determined. The test under s63 of the Act is whether the party has a "real" as opposed to a "fanciful" chance of success.⁷
- 20 In deciding if a claim is real as opposed to fanciful requires testing the claim in conformity with the overarching purposes expressed in the Act, but balanced against a recognition of the serious consequences that a summary determination of a proceeding will have in depriving a person of the opportunity to pursue their claim. The importance of competing considerations was recognised in *Ottedin Investments Pty Ltd v Portbury Developments Co Pty Ltd*,⁸ when John Dixon J referred to a variety of non-exhaustive considerations and these include:

⁷ *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2013) 42 VR 27.

⁸ (2011) 35 VR 1; at [18]

- that if a proceeding or defence, or any particular claim, cause of action or ground of defence is hopeless, untenable, bound to fail, or could not possibly succeed, then it ought be summarily dismissed under s63;
- that s63 of the Act directs the court to make a practical judgment as to whether a claim has more than a “fanciful” prospect of success;
- that the court's discretion whether to exercise the power of summary dismissal is very wide. The discretion is to be exercised mindful of facilitating the just, efficient, timely and cost-effective resolution of the real issues in dispute between the parties. The court's powers in furthering the overarching purpose are facilitated by having regard to the objects and matters set out in s9 of the Act;
- that the court may be satisfied, on an interlocutory application, that there is no real prospect of success in a civil proceeding but nevertheless consider the dispute to be of such a nature that only a full hearing on the merits is appropriate. Whether a full hearing on the merits is appropriate is a relevant discretionary consideration in the circumstances of each proceeding;
- that the power to order summary dismissal is to be exercised with great care, as a trial upon evidence of issues raised is the well-settled approach to the determination of litigation. When proceeding on a summary application to assess the prospect of success, a judge ought to feel confident that an assessment can properly be made of whether the overarching purpose is facilitated on dismissal of the impugned claims;
- that argument directed to the issues relevant on the application, perhaps even extensive submissions, may be necessary to demonstrate that the case of the plaintiff has no real prospect of success is not ordinarily a relevant consideration.

Application of principle to proceeding

- 21 In refusing the defendant's application for relief I have arrived at my conclusion for the following reasons and very much informed by the suite of considerations referred to in *Ottedin Investments*.
- 22 The plaintiff's claim of undue influence and fraud are recognised categories of causes of action. They are not novel.
- 23 I also have not speculated about the actions that might have been available to the plaintiff had she been made aware of her husband's actions at the time she was requested to execute the documents affecting an interest in the Property and had not consented to a severance.
- 24 I am unwilling at this stage to conclude that it is a fanciful contention by the plaintiff to think that had she not been kept in the dark by her husband and apprised of the potential consequence to her she would inevitably have been precluded from legal redress in an effort to frustrate the transaction when it occurred. Whilst it is fair enough to contend, as the defendant did, that the plaintiff was required to have retained her status in relation to the property and survived the deceased in order to realize her interest, there might have been occasion by another Court at a time prior to his death to have adjusted the interest in the property or the value of the same in consequence, for example, of a dissolution of the marriage and a property rights adjustment. These options and whether they might have been pursued by the plaintiff might have turned on and been informed by the deceased having made a disclosure to the plaintiff at the time.
- 25 The defendant says that all of this this is fanciful because it is not adverted to by the plaintiff nor indeed is any other course of conduct disclosed in the plaintiff's affidavits. That is true but it is also the fact that I do not know the full extent of the evidence yet that the plaintiff will lead to support her claim of unconscionability or of fraud. Certainly prior to the deceased's death the plaintiff

might have been able to pursue relief to stop a disposition pending a claim to adjust the value of her interest in the property based on her contributions.

26 I do not presume the options that the plaintiff might have been able to avail herself of had she received impartial advice and neither do I attempt to adjudicate a hypothetical set of circumstances at this point in the proceedings. It is sufficient to conclude that I am not of that sufficient degree of satisfaction for the test for dismissal under s63 of the Act.

27 I am also satisfied that s64 of the Act would have retained some work to perform in this case had I decided the proceeding has no real prospects of success. Section 64 is a provision of wide import and there is no authoritative judicial decision on the scope of the provision referable to specific factual scenarios. Therefore, I think the provision needs to be considered on first principles. The section allows the subject of a dispute to be preserved and insulated from a s63 determination if, despite the proceeding having no real prospect of success, it should not be summarily dismissed because:

(a) it is not in the interests of justice to do so; or

(b) the dispute is of such a nature that only a full hearing on the merits is appropriate.

28 The expression "not in the interests of justice" is a phrase of wide meaning and, without needing to determine the point, I doubt has practical application here. However, had I been persuaded by the defendant that the plaintiff's claim did not have "real prospects of success", I would have preserved the proceeding because I am satisfied that the plaintiff's dispute is of such a nature that only a full hearing on the merits is appropriate. It is of such a nature because, unless and until I hear the evidence of the plaintiff, and assess the reliability of it after cross-examination, it is very difficult to determine the extent of matters factual that might have availed themselves to the plaintiff in terms of steps she might have pursued had she not been kept uninformed by her husband.

29 The plaintiff's affidavit evidence of her contributions as homemaker to her husband, the children, and to the home, while not capable of creating a greater interest than stood with her before the contentious transaction, may have been a basis for a determination or of an adjustment to the value that her interest had before the transaction occurred.

30 The extent of any obligation owed to the plaintiff by the husband's solicitor and the information that the husband's solicitor furnished is in the factual mix too and may take on a relevance before trial.

Conclusion

31 I am not satisfied that the plaintiff's claim has no real prospect of success. If I am wrong about that then I would nonetheless regard the dispute as of such a nature that only a full hearing on the merits is appropriate. Whilst the defendant was entitled to bring on the summons seeking the relief it has and before filing a defence, in my judgment, the proceeding is one that warrants a defence. My finding that I would have maintained the proceeding pursuant to s64 of the Act, had I reached the point that I was satisfied it had no real prospect of success, entails the further finding that that the proceeding is not in conflict with the overarching purposes expressed in the Act.

32 The defendant's summons is dismissed.

33 I will hear any submission on the question of costs.