

DISTRICT COURT OF QUEENSLAND

CITATION: *Remme v McGuigan* [2020] QDC 88

PARTIES: **VIDAR REMME**
(Applicant)
v
TONI LOUISE MCGUIGAN
(Respondent)

FILE NO/S: 2585 of 2019

DIVISION: Civil

PROCEEDING: Application

ORIGINATING COURT: District Court Brisbane

DELIVERED ON: 15 May 2020 (Ex Tempore)

DELIVERED AT: Brisbane

HEARING DATE: 15 May 2020

JUDGE: Reid DCJ

ORDER:

- (i) Paragraphs 2 and 3 of the application filed 8 May be struck out;**
- (ii) The name of the respondent be changed from Toni Louise McGuigan to Toni Louise;**
- (iii) The whole of the sum of \$42,691.35 presently in the trust account of the statutory trustees be paid to the applicant; and**
- (iv) That the respondent pay 50% of the applicant's costs of the application before Her Honour Judge Loury.**

CATCHWORDS: STATUTORY TRUSTEES- APPLICATION – DISTRIBUTION OF SUM HELD IN TRUST AFTER SALE - where the respondent lived at the property- where the respondent failed to purchase the property- where the statutory trustee gave notice to respondent to vacate – where the property was then sold – where \$42,691.35 is presently held in the trust account - where the applicant applies for distribution of sum in the trust account- whether the sum presently in the trust account should be paid to the applicant – terms of initial agreement to purchase property- loan from applicant- respondent's failure to meet all mortgage payments and outgoings as agreed- where applicant meets such expenses

APPEARANCES: Applicant in Person
Respondent in Person

- [1] This matter has its genesis in the appointment of statutory trustees for sale of a Ningi property. The appointment of those trustees was made by an order of her Honour Judge Loury QC DCJ on 1/08/2019.
- [2] The order included provisions for the occupation and meeting of expenses up to sale by the statutory trustees. Pursuant to the order:
 - (i) the respondent (then Ms Toni McGuigan but who has since changed her name by deed poll to Ms Toni Louise) was entitled to make offers to purchase the property, for consideration by the trustee (Order 3); and
 - (ii) pending sale, the respondent was to pay all outgoings on the property including rates and charges, insurance and, importantly, all mortgage repayments (Order 7).
- [3] The respondent, who at all relevant times occupied the property, was also required to vacate it by 1 November 2019, unless the statutory trustee agreed otherwise (Order 9).
- [4] Order 12 provided for the proceeds of the ultimate sale of the property to be paid in the following way:
 - (i) first, in payment of all necessary selling costs;
 - (ii) second, in discharge of the mortgage;
 - (iii) third, in payment of the statutory trustee's costs and expenses; and
 - (iv) fourth, the net proceeds were to be held by the statutory trustees in trust "pending further order of the court or agreement of the parties".
- [5] After negotiations with the respondent, designed to allow her to purchase the property or at least for her daughter to do so, failed to result in a sale, the statutory trustees gave to the respondent notice to vacate, as they were entitled to do under

the terms of the order. With some reluctance the respondent did so and the property was sold. Settlement was effected in March 2020.

- [6] The statutory trustees have filed an affidavit of Mr Godden, one of the trustees attesting to there being \$42,691.35 held in trust.
- [7] The application before me relates to the distribution of that sum, as foreshadowed by Order 12(d) of the order of 1 August 2019. The applicant filed that application on 8 May 2020.
- [8] That application was filed in the relief that the sum held in trust was in fact \$45,647.00. The applicant also sought an order that the respondent pay to the applicant a further sum, said to be \$22,876.03, which he asserted was owed to him by the respondent, together with an order that “there be a punishment, prosecution of the defendant [sic], if she does not pay as the defendant [sic] is proven to breach/ignore court orders”.
- [9] In this application, No. 2585 of 2019, the correct description of Mr Remme is “applicant” and that of Ms Louise (formerly Ms McGuigan) is “respondent”. The parties should maintain those descriptions.
- [10] The jurisdiction of the court in this matter relates to the appointment of statutory trustees and related matters. That includes the distribution of the money held in trust, the subject of the present application. It does not, however, enable an applicant, merely on filing an application and affidavit, to seek to obtain a judgment in relation to a different, though perhaps related, cause of action he may have against Ms Louise. There is in addition no jurisdiction to punish or prosecute Ms Louise.
- [11] Accordingly, I strike out paragraphs 2 and 3 of the application of 8 May 2020.
- [12] Before turning to the question of how the sum in trust ought be distributed there is one further matter I need to briefly address.
- [13] I have already said that the affidavit of Mr Goddon discloses having the sum of \$42,691.35 in trust. A copy of the trust account statement is attached to the affidavit indicating how that figure is calculated.

- [14] The applicant's belief that some \$45,647.00 was held in trust appears to be because that was the sum in the account as at 30 March 2020. That figure has since been reduced, as a result of payments by the statutory trustees in respect of work by the applicant in preparing the property for sale, and by an electrician. In the circumstances the applicant conceded that the correct amount in trust was as stated in the statutory trustee's affidavit.
- [15] Accordingly, the order I am to make today relates to the distribution of the sum of \$42,691.35 attested to by Mr Godden.
- [16] In support of his application that the whole sum should be paid to him, the applicant submits that the agreement between he and the respondent, reached at the time they agreed to purchase the property, was that:
- (i) he arranged for a bank to give a loan in the sum of \$280,000 to enable purchase of the property and it was further agreed the respondent would pay all mortgage repayments in respect of that loan;
 - (ii) he lent to the respondent \$40,000 in cash, interest free, but that was to be repaid to him, particularly in the event that she purchased his interest in the property which she was to do as soon as she could;
 - (iii) the respondent was to live in the home, but was to meet all outgoings in respect of her doing so.
- [17] The applicant's position about these matters is most clearly set out in an affidavit filed in these proceedings on 30 July 2019, at a time he was legally represented.
- [18] The affidavit also discloses that subsequently, and contrary to the agreement, the respondent failed to pay those mortgage payments and he therefore paid them, or some of them, from 14 September 2017 to 17 June 2019 in the sum of \$20,486.99. He also attests to her having failed to pay, and therefore his paying, outgoings totalling \$3,351.95 and that the \$40,000 loan has not been repaid.
- [19] In addition, the applicant says he deposited \$270,000 of his own funds into a CBA offset account, on 16 October 2017, which reduced interest payments on the loan to zero, for the period from 16 October to 20 February 2018, when he withdrew over \$262,000 from that offset account. The exact interest saving as a result of this

deposit of funds into the offset account is not identified in the affidavit material. Nor, I might interpose, is the exact amount of the sum withdrawn. It is referred to in paragraph 17 of his affidavit of 30 July but there is a typographical error and so no figure is clearly identified, other than it was over \$262,000.

- [20] It can be readily seen that, if correct, the applicant has paid, or not received by way of loan repayments, well in excess of the sum held in trust, which he says ought be paid to him.
- [21] Discerning the nature of the respondent's case is more difficult.
- [22] She says, in a written outline of argument that she "denies any existence of any agreement between the applicant and the respondent in respect of the property at this time" (my underlining).
- [23] She submits that from 17 August 2015 to 31 March 2020 she contributed \$55,013.89 to the cost of purchase of the property and ongoing expenses including mortgage payments. She submits the applicant's contribution over that same time was some \$67,131.10.
- [24] She says the registered ownership of the property was 80/20 in the applicant's favour and so the contributions made by her were more than a one fifth share of these total expenses of \$122,144.99.
- [25] She seeks payment of \$30,584.89, based on a calculation of what she should have paid, being 20% of the total outgoing.¹ She further submits that the balance of the funds should then be distributed 80/20 in the applicant's favour. The effect of such an order would be that the applicant would receive \$9,685.16 and the respondent the balance, namely \$33,006.19.
- [26] The applicant submits that "there is no debt owing to the applicant" in respect of the original agreement they made to allow then to purchase the property for her to reside because, although there had been a previous agreement (and she does not dispute that this was as identified by the applicant in his affidavit) the applicant

¹ 20% of 122,149.99 is 24,429.99. If this is deducted from her payments of \$55,013.89 one arises at the sum she seeks, namely 30,884.89.

breached that by applying to have the statutory trustee appointed. She submits in paragraph 11 of her submissions:

“There is no available defence to the applicant’s assertion of any debt when the previous agreement was not recognised by the court.”

[27] This submission is confused and confusing. Insofar as the respondent herself submits that there is no available defence to Mr Remme’s assertion, I assume that was some sort of typographical error by her.

[28] But her submission that the earlier agreement “was not recognised by the court” appears without foundation. I can see no basis for her so asserting. Indeed the order of Judge Loury QC, which required the respondent to pay mortgage payments and outgoings, appears to be entirely consistent with the applicant’s asserted position in respect of the original agreement.

[29] The respondent’s submission that the earlier agreement was somehow “voided” by the applicant seeking to appoint statutory trustees is simply wrong. She does not allege that she and the applicant made any arrangement different to that he contends for.

[30] The applicant’s view of the matter is strongly supported by material attached to his affidavit of July 2019, including emails from the respondent of 2 May and 25 May 2017 being Exhibit VR/2 to that affidavit.

[31] Indeed in her submissions relied on before her Honour Judge Loury QC the respondent submitted:

- (i) she accepted the applicant had lent her \$40,000 in cash, interest free;
- (ii) he would “provide” the \$280,000.00 mortgage, being 80% of the purchase price of \$320,000;
- (iii) she would pay all costs in relation to the purchase of the property, including monthly mortgage payments, and “all ongoing costs of ownership”.

[32] In the circumstances the respondent’s opposition to the payment of the money in trust to the applicant is utterly without foundation.

[33] I therefore order:

- (i) Paragraphs 2 and 3 of the application filed 8 May be struck out;
- (ii) The name of the respondent be changed from Toni Louise McGuigan to Toni Louise;
- (iii) The whole of the sum of \$42,691.35 presently in the trust account of the statutory trustees be paid to the applicant.

[34] Having heard submissions on costs and having taken into account that, once the property was co-owned, and in the absence of agreement, the only way to determine the matter was to appoint statutory trustees, and the fact that their appointment was in this case complicated by the respondent's opposition to that appointment, I will order that the respondent pay 50% of the applicant's costs of the application before Judge Loury, and, further, that she pay any outlays or other expenses incurred by the applicant in respect of his application on 8 May 2020, all such costs to be assessed on the standard basis.