EDITORIAL NOTE: NO SUPPRESSION APPLIED.

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT AUCKLAND

FAM-2013-004-001256
[2016] NZFC 6157

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	LAURE JIZREEL TSOBGNY Applicant
AND	FRANCOIS MARIE PROFIT Respondent

Hearing:	21 July 2016
Appearances:	L Kearns for the Applicant J Thomas for the Respondent
Judgment:	21 July 2016

RESERVED JUDGMENT OF JUDGE T H DRUCE
[Re Stay]

Introduction

[1] By interlocutory, without notice, application filed yesterday, the applicant sought a stay of the judgment I delivered on 15 July. The grounds pleaded are:

(a) If implementation occurs the applicant will be severely prejudiced;

(b) If implementation occurs the respondent will receive an unfair advantage;

(c) It is in the interests of justice that a stay be granted;

(d) If no stay is granted, the applicant's right of appeal will be rendered nugatory.

[2] On considering the papers yesterday, I was not satisfied that the "irreparable injury" jurisdictional requirement of r 220(2)(a)(iv) was satisfied and I directed that the matter proceed by way of a "Pickwick" hearing this morning. Both counsel accepted that the hearing could proceed without further delay and I heard oral argument from both.

[3] In oral argument, Ms Kearns, for the applicant, relied on three key points:

(i) Any interim distribution to both parties should be fair, that is, equal between the parties. She relies on the statutory principles of the Act.

(ii) The $85,567.62 that I ordered to be distributed to the applicant is insufficient to fund the applicant's litigation costs and current related debts and is, therefore, prejudicial to her rights of access to a fair trial and, in addition, the $400,000 distribution to the respondent gives him an unfair advantage.

(iii) The distribution of $400,000 to the respondent will likely result in the applicant's right of appeal being rendered nugatory.

[4] Ms Thomas argued against all points. I incorporate her arguments into the findings that follow.

The law

[5] Both counsel accept that the legal principles to be applied are as stated in *Dimock's Franchise Systems (NSW) Pty Limited v Bilgola Enterprises Limited* (1999) 13 PRNZ 48 (CA). I note the same principles were adopted by Ronald Young J in *SMG v EWG* 26 FRNZ 162.

Findings

Will the applicant's right of appeal be rendered nugatory?

[6] I find against the applicant. I rely on my reasoning in paras [34]-[35] of the 15 July 2016. For the reasons I gave, I am unable to see any arguable case that the applicant will be entitled to more than $1.1 million of the $1.5 million held under the current restraining order even if she should be successful on all her claims.

Is the applicant bona fides in her prosecution of the appeal?

[7] Ms Kearns advises that appeal is already filed and expects it to be heard on the fast track process available in the High Court in a half-day hearing within six months. I accept the applicant's bona fides.

Will the successful party be injuriously affected by the stay?

[8] Both parties were in part successful. My finding is that both parties will be adversely affected by the granting of a stay. The applicant's current partner will receive no payments in reductions of the substantial debt owed by the applicant to him for another six months. The respondent has given evidence of having to depend on loans from friends to survive day-to-day, although I do not have the details of the amounts and persons involved. In addition, the respondent, who seeks to re-establish himself in business, will be injuriously affected by the stay in a way that is different to the applicant.

Will third parties be affected?

[9] I have already covered this in part in the previous discussion. Both parties have creditors, the applicant in particular.

Are there novel or important questions involved in the appeal?

[10] I agree with the applicant that there is an important legal issue as to whether s 8(1)(ee) operates to "catch" the otherwise $1.5 million separate property funds held under the restraining order in the ANZ Bank. On the other hand, the reasoning behind the interim distribution orders recognised the importance of the legal issue to

the applicant and full account was taken of the possibility that she might be successful in her argument in the substantive hearing. In other words, she might be awarded one half of the $1.5 million should it be classified as relationship property. This is demonstrated in the calculations that I undertook at para [34].

[11] There is also Ms Kearns' argument that fairness between the parties requires:

(a) That any interim distribution be equal; and

(b) That the applicant receive more than the sum that I ordered because she would otherwise be prejudiced in having access to a fair trial (arguing that the $85,567.62 involved will be insufficient).

[12] I find against the applicant's arguments. First, s 1M(c) provides for "a just division of the relationship property between spouses ….". It plainly does not provide for an equal division.

[13] Further, the principles provided for in s N again do not provide for unqualified equal division. Subsection (a) provides for equality of status, subsection (b) provides for the equality of all forms of contributions being treated as equal and subsection (c) requires that a just division of relationship property have "regard to the economic advantages or disadvantages to the spouses … arising from the ending of their marriage …".

[14] Further, as argued by Ms Thomas, s 19 of the Act provides:

> **Effect of Act while property is undivided**
>
> Except as otherwise expressly provided in this Act, nothing in the Act shall—
>
> (a) affect … the power of either spouse … to acquire, deal with, or dispose of any property or to enter into any contract or other legal transaction whatsoever as if this Act had not been passed; or.....

[15] I find that it has to be shown that property is susceptible to a claim under the Act before the court may prevent either party freely dealing with their property.

[16] I turn to consider Ms Kearns' argument that access to a fair hearing is a relevant consideration. First, the principles on which counsel are agreed the court should follow do not include such a consideration. Second, at para [35] of my judgment, I record my reasons for not placing weight on this argument.

Is there any public interest in the case?

[17] Neither counsel argued there was any particular public interest in the case and I agree.

Where does the overall balance of convenience lie?

[18] This litigation and the operation of the s 43 interim restraining order have continued for more than three years. Both parties have pressing needs for funds and have been reliant on third parties for personal loans. The four-year period that the funds were committed to under the New Zealand Immigration service bond have expired. Unless there is proper legal basis under the Act to restrict the owners' right to deal with their property, I consider the overall balance of convenience to favour implementation of the orders. Section 1N(b) expects parties to prosecute litigation efficiently and the court to achieve division "as speedily as is consistent with justice". Justice is already delayed in this case and the interim distribution orders that I made do not, in my view, place either parties' rights or claims at risk.

Result

[19] The application for stay of the court's 7 July 2016 judgment is refused.

[20] Should the applicant seek leave to appeal today's judgment, I have already signalled that I intend to grant leave to do so.

T H Druce
Family Court Judge