

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

**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.GOV.T.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS](http://www.justice.govt.nz/family-justice/about-us/about-the-family-court/legislation/restriction-on-publishing-judgments).**

**IN THE FAMILY COURT  
AT NORTH SHORE**

**FAM-2016-044-000168  
[2017] NZFC 9059**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[LIAN YEHL Applicant
AND	[SHU CHEN] Respondent

Hearing: 9 November 2017

Appearances: J Ding for the Applicant  
D Liu for the Respondent

Judgment: 13 November 2017

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**RESERVED JUDGMENT OF JUDGE S J MAUDE  
[Determination as to real estate agents and solicitors to be engaged for sale of  
family home and as to interim distribution]**

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[1] Mr [Lian Yeh] (Mr [Yeh]) and Ms [Shu Chen] (Ms [Chen]) are parties to relationship property proceedings.

[2] The parties have agreed that their family home situated at [address deleted] must be sold.

[3] The parties have not been able to agree the terms of sale or how the proceeds received from the sale should be held pending finalisation of these proceedings.

[4] The Court is asked to determine:

- (a) What real estate agency is to be responsible for the marketing of the property.
- (b) What the instructions to the agency as to sale methodology is to be.
- (c) What law firm is to undertake the conveyancing in respect of the sale and is to hold the proceeds received from the sale.
- (d) Whether interim distribution should be made from the sale proceeds to Ms [Chen].

### **Background**

[5] The parties, according to Mr [Yeh], ended a four-and-a-half year de facto relationship in 2015.

There is dispute as to whether, in fact, the relationship between the parties was as Mr [Yeh] has set out, or whether it was a relationship of short duration.

[6] The parties' family home is registered in the name of Ms [Chen], though a notice of claim seeking to protect Mr [Yeh]'s relationship property interests has been registered against the title to the property.

[7] Proceedings were commenced in this Court in March 2016.

[8] Significant delays in progressing the proceedings have been occasioned as a result of dispute between the parties as to discovery and delays in the filing of all relevant evidence.

[9] Following aborted settlement conference on 8 February of this year I, in a minute issued by me, observed that neither party had filed affidavit evidence as to the tracing of funds claimed to have been transferred from China to the parties by their families.

[10] Mr [Yeh], when agreement was achieved that the family home be sold, proposed that Mr [Kung] of [real estate agency 1], Takapuna be engaged as real estate agent to market it.

He proposed that the law firm [law firm name deleted] be the solicitors to act and to hold the sale proceeds pending resolution of the proceedings.

[11] Ms [Chen] did not accept Mr [Yeh]'s proposition, arguing that:

- (a) Mr [Kung] was only an associate sales person with [real estate agency 1].
- (b) Mr [Kung] was based at Takapuna not Albany, where the home is.
- (c) Mr [Kung] had entered the real estate industry only in 2013.
- (d) Mr [Kung] was a friend of Mr [Yeh]'s.

[12] Ms [Chen] proposed that [real estate agency 2], Albany, and in particular Ms [Xioaming Hsia], be engaged as real estate agents to market and sell the property.

She proposed Ms [Hsia], arguing that:

- (a) She had 20 years of real estate agent experience.

- (b) She had been [real estate agent 2's] number one international sales consultant in the years [years deleted].
- (c) She and Ms [Hsia] had no relationship.

[13] Ms [Chen] proposed that her solicitors act in respect of the necessary conveyancing relating to the sale of the home and that they hold the proceeds pending distribution.

[14] Mr [Yeh] did not accept Ms [Chen]'s proposition.

[15] In August of this year, Mr [Yeh] became aware that without consultation with him Ms [Chen] had signed an exclusive listing of the family home with Ms [Hsia] at [real estate agent deleted].

[16] Despite opposition expressed in correspondence, Mr [Yeh] found that Ms [Chen] had arranged for a [date deleted] 2017 auction of the home.

[17] Mr [Yeh] applied successfully to restrain the sale on a without notice basis on 18 October.

[18] Ms [Chen] applied to discharge the restraining order issued by the Court, and on 27 October it was either agreed, or Judge McHardy in the Family Court determined that, for pragmatic reasons with no prejudice arising, the 29 October auction should proceed.

[19] The auction proceeded, but failed to attract any bids.

[20] Ms [Chen] gave birth to a child in [month deleted] of this year, and continues to either live in the home or tenant it (that being an issue as between the parties).

### **Decision as to real estate company to be engaged**

[21] Mr [Yeh] complained that Ms [Hsia] of [real estate agency 2] and Ms [Chen] have been less than transparent with him.

[22] He now asks the Court to order that an agency be engaged as determined by the Institute of Real Estate Agents.

[23] Ms [Chen] argues that Ms [Hsia] competence is established, that she and [real estate agency 2] are seized of the marketing of the home with much work on sale already undertaken, and that to now engage replacement agents would create delay in what could be a falling market.

[24] Ms [Hsia] and [real estate agency 2] have been on notice as to Mr [Yeh]'s interest in the family home, he having registered a notice of claim against the title to it.

[25] I have little doubt that the parties have displayed a complete unwillingness to cooperate with each other in a matter as simple as the engaging consensually of an agency to market their home.

[26] I have little doubt that [real estate agency 2] and Ms [Chen] have been less than transparent with Mr [Yeh].

[27] The property to be sold was the parties' family home.

[28] There is a presumption in law that, assuming a three-year de facto relationship, Mr [Yeh] has a 50 percent interest in the home.

[29] Mr [Yeh] is entitled to transparency.

[30] I have little confidence in the parties to cooperate.

[31] An independent agency must be engaged.

[32] I observe that [real estate agency 2] (Ms [Hsia]) have unsuccessfully had the listing of the home since [month deleted] of this year, and it may well be that engagement of a new agency will bring new life to the marketing process and a new pool of buyers to view the property.

[33] The registrar is to consult with the Institute of Real Estate Agents and, having done so, to determine the real estate agency to be engaged for the purpose of marketing of the parties' family home, the agency not, however, to be either [real estate agency 1 or real estate agency 2].

[34] The agency engaged is to within 14 days of engagement recommend to the parties the method of sale to be undertaken.

[35] The parties are to accept the recommendation of the agency engaged and to sign the proposed listing documentation.

[36] If auction, the reserve is to be \$1.4 million unless agreed otherwise.

[37] If sold by negotiation, both parties are to agree the sale price, it not however in the absence of agreement to be less than a sale price of \$1.4 million.

#### **Law firm to act in respect of sale and to hold proceeds**

[38] For the reasons set out above, there must be an independent law firm engaged to undertake the conveyancing relating to the sale of the family home and to hold the sale proceeds.

[39] The registry is to consult with the President of the Auckland District Law Society and to nominate then what firm of solicitors is to be engaged.

[40] The firm engaged is to conduct the conveyancing relating to the sale of the family home, and from the sale proceeds received to:

- (a) Repay mortgage debt secured over the home.
- (b) Pay legitimate real estate agent's costs and related sale costs.
- (c) Pay its own reasonable costs.

Hold the balance on interest bearing deposit pending resolution of these proceedings subject only to any interim distribution order made by the Court or agreed in writing by the parties.

### **Interim distribution**

[41] Ms [Chen] asks that she receive by way of interim distribution one half of the sale proceeds received from the sale of the family home less the sum of \$100,000.00 to be taken from her half share, that sum to be held to cover the possibility that Mr [Yeh] may, when the proceedings are concluded, be entitled to receive a sum greater than a one-half share.

[42] Ms Ding referred me to *CDH v IAP*<sup>1</sup>, in which Judge Geoghegan set out the ten factors typically considered in determining whether an interim distribution of relationship property should be made, they being:

- (i) The purpose and principles of the Act.
- (ii) The needs and circumstances of the applicant.
- (iii) The purpose for which interim distribution is sought.
- (iv) The applicant's likely share of relationship property.
- (v) The respondent's ability to give effect to an order.
- (vi) The length of time until the hearing of the substantive issues.
- (vii) Delays to date, and who had caused them.
- (viii) Any uncertainty as to the applicant's entitlement under the Act.
- (ix) The effect of an order on the parties' willingness and determination to finalise their claims.

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<sup>1</sup> FC Tauranga FAM-2009-070-817, 11 January 2011.

(x) Whether or not the respondent had dissipated relationship property.

[43] I accept the above principles.

[44] The parties' family home is their primary asset.

[45] I have observed that whether the parties' relationship was a short-term relationship or one of three years or longer is in dispute.

[46] If determined not to be a relationship of short duration, the Act imposes a presumption of equal sharing as between the parties, subject of course to the possibility that an unequal division could be provided for pursuant to s 13 of the Act, which provides that unequal sharing may be ordered where there are extraordinary circumstances that would make equal sharing repugnant to justice.

[47] Whether the parties' relationship was a relationship of short duration or not is an issue for determination at hearing.

[48] Other issues displayed in the proceedings that might impact on division of relationship property proceeds include:

- (a) Post-separation loans.
- (b) Chattel division.
- (c) Mr [Yeh]'s claim for either payment of a share of rental collected from the home by Ms [Chen] or for occupational rental.
- (d) Mr [Yeh]'s claim that a diminution in value has resulted from Ms [Chen]'s actions, or lack of actions.
- (e) Ms [Chen]'s claim for one half of the sale proceeds of a [make and model deleted] motor vehicle.

[49] The Court's ability to project any thought on the issue of what a possible outcome to the proceedings might be is impacted by the fact that the discovery process has not yet concluded.

[50] The Court must not allow an interim distribution that runs the risk of encroaching on Mr [Yeh]'s potential entitlement.

[51] The Court must also be mindful of the need to ensure that a reasonable incentive remains for Ms [Chen] to participate actively in drawing the proceedings to a close.

That is all the more apparent as a result of the parties' inability to resolve consensually even the most mundane of matters, such as those that I have determined above.

[52] Mr [Yeh] complained that Ms [Chen] had not set out in any detail:

- (a) Her rationale for an interim distribution.
- (b) Her specific needs in respect of interim distribution.
- (c) Quantification of monies required to meet her need.

[53] I accept Mr [Yeh]'s observations.

[54] Ms [Chen] has now an approximately [number deleted]-month old child.

[55] It is likely that Ms [Chen] has some need.

[56] It does not flow that Ms [Chen] has a greater need than Mr [Yeh] to re-enter the real estate property market now.

[57] Ms [Chen] and her child's needs may well be met in the short term by renting a home, particularly given that presumably she would be assisted when purchasing a home by knowing how much capital she will receive from the sale of the parties' home.

[58] The issue of interim distribution, in my view, is more appropriately dealt with following the sale of the home, when the proceeds available will be known and when Ms [Chen] has set out with some specificity her specific needs and what funds are required to meet them.

[59] I decline to order an interim distribution in favour of Ms [Chen] at this time.

[60] I reserve the issue of costs to be determined when the outcome of the substantive proceedings is known.

S J Maude  
Family Court Judge

*Signed 13 November 2017 at            am.*