

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE

<https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/>

NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE

<https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/>

**IN THE FAMILY COURT
AT AUCKLAND**

**I TE KŌTI WHĀNAU
KI TĀMAKI MAKĀURAU**

FAM-2018-004-000707

FAM-2018-004-000708

[2022] NZFC 1389

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
AND	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	LESLEY JENNIFER PRICE Applicant
AND	ANDREW RAYMOND PRICE Respondent
AND	VIVIENNE SMALLEY Second Respondent

Hearing: 16 February 2022

Appearances: Z Wackenier for the Applicant
Respondent appears in Person
No appearance by or for the Second Respondent

Judgment: 16 February 2022

ORAL JUDGMENT OF JUDGE L de JONG
[PRA: enforcement – sale of family home & transfer to High Court]

Introduction

[1] On 19 July 2021 (“2021 judgment”) I released a reserved judgment arising from a five day hearing that ended on 25 February. The hearing was about property interests under the Property (Relationships) Act 1976 (“PRA”) and s 182 of the Family Proceedings Act 1980 (“s 182”).

[2] The dispute as between Mr and Mrs Price was complicated by the fact they have interests in three different legal entities that each required different legal approaches. This included property in their own names, company shares owned by their family trust, and property owned by their various companies.

[3] The 2021 judgment allowed Mr Price until 20 September 2021 to buy out his wife’s share of the family home and Manuwai Fields Limited shares. On 23 September orders arising from the 2021 judgment were sealed.

[4] On 26 January 2022 I made an order for costs. I also directed today’s half day hearing to deal with interlocutory applications dated 23 December 2021 filed by Ms Price to enforce the 2021 judgment. One interlocutory application seeks orders to give better effect to the 2021 judgment by selling the family home so Ms Price can receive her share of relationship property. Another interlocutory application seeks to transfer the proceedings to the High Court so orders can be made to enforce aspects of the 2021 judgment that the Family Court does not have jurisdiction to.

[5] For the purpose of this hearing counsel for Ms Price relies on her memorandum dated 23 December 2021. Mr Price filed submissions dated 6 and 9 February 2022.

Sale of the family home

[6] Ms Price granted Mr Price an extension to buy out the share of relationship property but he has not. The only way Ms Price feels able to receive her share is if an order is made for the sale of the family home. She proposes an order for sale by the registrar involving Barfoot & Thompson to sell the family home by auction with a reserve price. She seeks particular orders for distribution of the sale proceeds.

[7] Mr Price continues to receive legal advice but remains a litigant in person for the purpose of these proceedings. Essentially his position is that he has done his best to buy out Ms Price's share but could not do so in the time allowed because of the effects of COVID-19 lockdown, the unwillingness of his bank to conclude matters within the allotted timeframe (which fell within Alert Level 4), and the lack of co-operation from Ms Price to sign documentation once we moved into Alert Level 3.

[8] Mr Price is at his wit's end. He feels he has done everything he can to conclude matters.

[9] Ms Price is also at her wit's end. She feels she has been very patient and tolerant but is yet to receive her share of relationship property while Mr Price holds all the property.

[10] Throughout the proceedings Mr Price has wanted to retain all property interests and buy out Ms Price's share. It is for this reason the 2021 judgment allowed time for him to explore whether he could do that. However, matters have not been concluded. Mr Price acknowledges his bank was not prepared to finance the total buy out of Ms Price's share of relationship property within the timeframe provided by the Court.

[11] The reality of the situation is that during the hearing process it was obvious to everyone, apart from Mr Price, that the only way he would be able to buy out Ms Price's share would be to sell something.

[12] The time has now come to order the sale of the family home. Under s 33 of the PRA I have wide powers to give effect to my 2021 judgment. In my 26 January 2022 minute I remarked¹ about Mr Price's conduct at the hearing.

[13] In my view the only effective way of managing the sale of the family home, and distributing the sale proceeds, is to make orders authorising the sale by the registrar. The orders will also provide for the terms of sale, deduction of the cost of sale, and distribution of the sale proceeds. I note in Ms Wackenier's memorandum in support of her applications that she has proposed a firm of solicitors for the purpose of carrying out the conveyancing. There is no reason why the registrar could not use that legal firm but I will leave it to the registrar to take steps as appropriate.

[14] The calculations that have been carefully prepared in the supporting memorandum relate to the division of relationship property. I note however that the calculations do not include Ms Price's relationship property entitlement in respect of Manuwai Fields Limited. Ms Price intends to file High Court proceedings to secure her half share in that company. It appears on the face of it that the only way her half share can be realised is to seek an order for sale of property owned by that company. That involves enforcement action this Court does not have jurisdiction to deal with.

[15] I note in terms of the orders I intend to make today that the reserve price will be fixed at the value of the last valuation of the family home. It is anticipated by the parties that the family home will realise more than \$3.8 million but it is important there is a reserve price.

[16] There will also be directions in terms of the orders which will give Barfoot & Thompson authority to access the property, subject to them giving notice to Mr Price at least 24 hours beforehand by email. Barfoot & Thompson will be entitled to bring with them prospective purchasers. This might include representatives of the prospective purchaser to carry out, for example, a building inspection.

¹ Paragraph 10(e) of minute dated 26 January 2021.

[17] An order will be made that Mr Price vacate the property no later than seven days before the settlement date, and leave the property in a clean and tidy condition.

[18] The sale orders will be subject to payment of various expenses related to the sale. The balance will be divided equally between the parties, subject to some payments. There are two payments in particular that will be deducted from Mr Price's half share for payment to Ms Price. They include almost \$360,000 to adjust relationship property and nearly \$47,000 costs.

[19] I note that interest will attach to the figure of approximately \$360,000. The interest will be payable at the rate of five per cent from 20 September. That is the date given by the Court for Mr Price to make payment.²

[20] The issue of interest was raised today for the first time. I note that originally interest was covered by the District Courts Act 1947 at s 62B. In accordance with that Act, the District Courts (Prescribed Rate of Interest) Order 2011 applies. It is suggested by counsel that this order still applies. The prescribed rate is five per cent. I note under the old 1947 order that interest does not attract to orders for costs.

[21] I observe after discussion with counsel for Ms Price that s 62B of the District Courts Act 1947 remained in force until January 2018 when the Money Claims Act 2016 came into effect. Under s 10(1) it is mandatory to award interest. However, under s 20(1) of that Act no award of interest can be made on costs. For this reason I have separated out the amounts and only applied interest in relation to the larger figure.

Ms Price seeks costs in respect of the current interlocutory applications. I intend to reserve leave for her to make that application. I suggest that application be filed within the next 10 days. Mr Price will have an opportunity to file any response within 10 days thereafter and the file is to be referred to me with a view to considering whether costs are awarded. On the face of it Ms Price is entitled to an order for costs because

² To this extent the interest runs from the date that payment was due rather than the date Ms Price's entitlement was calculated.

she will be wholly successful today. The reality of the situation, as I indicated earlier, is that property needs to be sold to allow Ms Price to receive her interest.

Transfer to the High Court

[22] The second aspect to today's proceedings involve the application for transfer of proceedings to the High Court. Ms Price seeks a transfer of the file to the High Court. This relates to two aspects. The first concerns Manuwai Rail Trust which is the parties' "family trust." The second is Manuwai Fields Limited, the shares of which are relationship property.

[23] As to the first matter, the family trust owns shares in three companies operated by Mr and Ms Price. Two of the companies involve businesses that sell furniture and fabrics. They are Ambiance Interiors (1994) Limited ("Ambiance") and Diva International Limited ("Diva"). Mr Price has continued to run both businesses since the parties separated. The businesses operated from a commercial building owned by the parties' third company. That is, Biobject Limited ("Biobject").

[24] The family trust was settled in December 2005 and owns 45% of the Ambiance shares and 49% of the Diva shares. The parties own the balance of shares. The family trust owns all the shares in Biobject.

[25] Ms Smalley is an independent trustee of the family trust. Mr and Ms Price are the remaining trustees. The trustees are the second respondents in these proceedings. Ms Smalley was served with the original proceedings but did not take any steps. The proceedings were advanced on the basis that she will abide the decision of the Court.

[26] In the 2021 judgment the trustees of the family trust were ordered to resettle a half share of the trust entitlement on trust to Ms Price and her children on the same terms as the existing family trust deed. Mr Price recognised this may result in the need to sell the business and/or Biobject commercial building if the family trust is unable to pay Ms Price a half share in the entitlement to the family trust.

[27] However, the result is that it has not been possible to resettle the family trust. The Family Court only has limited powers to deal with the situation and Ms Price therefore seeks a transfer of the file to the High Court where enforcement steps can be taken.

[28] I note at this point that, when Mr Price had an opportunity to address the Court, he attempted to revisit matters dealt with at the substantive hearing. He remains disaffected and believes everything is unfair.

[29] The second matter of concern for Ms Price is Manuwai Fields Limited. Mr Price incorporated Manuwai Fields Limited in 1988 (“MFL”). MFL purchased a 10 hectare Karaka rural lifestyle block in May 2013. There is no dispute between the parties that the Karaka property was purchased during the relationship and that the MFL shares are relationship property.

[30] Under the 2021 judgment Mr Price was ordered to pay Ms Price a half share of the value of the MFL shares. The MFL shares are valued at \$3.67 million for relationship property purposes. There was a Kiwibank loan of around \$800,000 that must be taken into account which is registered against the family home. Other adjustments are required in relation to shareholder accounts and advances by the parties to other companies. Mr Price wanted to retain the MFL shares and the 2021 judgment provided for him to buy out Ms Price’s share by 20 September last year. As I say, this has not happened. Ms Price now wants to take enforcement steps that the Family Court does not have jurisdiction to climb.

[31] I note there are a number of provisions which this Court can rely on to transfer the proceedings to the High Court including s 38A(2)(c) of the PRA, s 141(6) of the Trusts Act 2019 and the Companies Act 1993. Ms Price intends to file further applications in the High Court.

[32] I am satisfied there are special reasons to transfer the proceedings to the High Court so that enforcement steps can be taken in respect of the family trust under s 182 of the Family Proceedings Act 1980 and Ms Price’s relationship property interest in the shares of Manuwai Fields Limited.

ORDERS & DIRECTIONS

[33] I make the following orders and directions:

- (a) An order is made for the sale of [location deleted] Auckland, being all of the property compromised and described in certificate of title 332/162 on the following terms:
 - (i) the registrar is directed to execute all listing, sale and transfer related documents regarding the sale of the subject property by auction with Barfoot & Thompson (Carl Madsen) with a reserve price of \$3.8 million unless otherwise agreed in writing by the parties.
 - (ii) any representative of Barfoot & Thompson (and prospective purchasers) is authorised to access the subject property for the purpose of facilitating the sale provided Mr Price is given at least 24 hours' notice by email to [details deleted]
 - (iii) Mr Price is ordered to vacate the subject property no later than seven days before the settlement date for sale of the subject property, and leave the property in clean and tidy condition.
 - (iv) the sale proceeds of the subject property are to be applied towards Barfoot & Thompson's sale related fees, sale related legal fees and disbursements, outstanding charges in respect of the property such as rates and mortgages registered against the said property. The balance of the sale proceeds are to be divided equally between the parties subject to Ms Price receiving from Mr Price's half share the following:
 - (i) the sum of \$359,841 plus interest calculated at five per cent per annum from 20 September 2021 to the date of payment; and
 - (ii) the sum of \$46,699.50 costs.

- (b) Leave is granted to Ms Price to bring the proceedings back to court on 48 hours' notice by way of memorandum for the purpose of making any further orders or directions necessary or desirable to give effect to these orders.
- (c) The Family Court file is transferred to the High Court for enforcement steps to be taken arising from the 2021 judgment of this Court in respect of Manuwai Fields Limited and Manuwai Rail Trust.
- (d) Leave is reserved to apply for costs arising from this hearing.

Judge L de Jong

Family Court Judge | Kaiwhakawā o te Kōti Whānau

Date of authentication | Rā motuhēhēnga: 18/02/2022