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

IN THE FAMILY COURT
AT MANUKAU

I TE KŌTI WHĀNAU
KI MANUKAU

FAM-2019-092-000028
[2021] NZFC 2251

IN THE MATTER OF	Property (Relationships) Act 1976
BETWEEN	[HARSH PANIKKAR] Applicant
AND	[INDIRA SHARMA aka INDIRA PANIKKAR] Respondent

Hearing:	22 January 2021
Appearances:	Mr Chaudhay for the Applicant Ms Kaur for the Respondent
Judgment:	15 March 2021

RESERVED DECISION OF JUDGE KMSH TAN

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[1] This matter was set down for a two-hour hearing to deal with the interlocutory application made by the applicant on 9 January 2019 for an order for sale of the former family home situated at [address deleted]. The interlocutory application was filed at the same time as the substantive proceedings.

[2] The issues for determination are:

(1) Should an order for sale be made?

(2) If the court declines to grant an order for sale can the court vest the family home in the respondent?

(3) Costs.

Background

[3] The parties married on [date deleted] 2000. There are two children from the marriage [Daya] and [Aasmi] born in 2009 and 2014.

[4] The parties separated in April or July 2018[1].

[5] During the party's marriage, they acquired the property situated at [address deleted –"the family home"][2], Auckland. They are registered as joint owners of the property.

[6] Post separation, the respondent has remained living at the property with the two children. It is the respondent who has been responsible for the payment of the mortgage and associated house expenses since the parties separated.

[7] The substantive proceedings and interlocutory application were filed in January 2019. The respondent was subsequently served, and she filed a notice of defence dated 27 May 2019 on 31 May 2019, but it was not accompanied by supporting affidavits. The supporting affidavits were not affirmed until 20 February 2020 and filed on 24 February 2020.

[8] The respondent in her affidavits sets out her opposition to the interlocutory application for an order for sale. In terms of the substantive proceedings she seeks to buy out the applicant's share in the family home. She wants to keep the home because it is the home that she lives in currently with the children.

[9] As part of the background to the relationship the respondent deposed to being subjected to family violence from the applicant throughout their seventeen-year

[1] The exact date of separation is not agreed to between the parties.
[2] It also has a council address of [deleted].

marriage. She says such violence resulted in physical injuries to her requiring hospitalisation and the conviction and imprisonment of the applicant.

[10] There is in force a final protection order in favour of the respondent against the applicant.

[11] The current care arrangements for the children are reflected in a final parenting order which provides the respondent with day-to-day care and reserves to the applicant contact supervised by an approved supervised contact centre.

[12] The most valuable item of relationship property is the [family home]. The other items of property are the parties respective Kiwisaver accounts, a car and the children's savings accounts.

[13] Throughout the course of the proceedings the parties through counsel have attempted to resolve matters by consent. This is evident by the number of adjournments sought and granted for this to occur.

[14] The interlocutory application was first set down for a hearing on 2 October 2020, in a short cause fixture list. The matter did not proceed as the court was advised that the interim issue of sale had been resolved. The hearing was adjourned for seven days in anticipation of a consent memorandum being filed.

[15] A consent memorandum was never filed as no agreement was reached. As a result, the matter was set down for another two-hour hearing for 22 January 2021.

Issue one: Should an order for sale be made?

[16] The substantive submission of the applicant is that the court should order the sale of the family home now so that the parties can obtain the best price on the open market as property prices have surged post the covid19 lockdown.[3] The applicant accepts that he resiled from the agreement that was communicated to the court on the 2 October because he received advice that the price he was agreeing to was not the

[3] Paragraph 7, Submissions of Counsel for the Applicant dated 19 January 2021.

current market price for the property and on the open market a much higher sale price could be achieved which would benefit both parties therefore not being prejudicial to the respondent. His prime reason for seeking that the court order the sale now is around obtaining the best market price. It was submitted on behalf of the applicant that it would be unfair to him if the relationship home was given to the respondent for a lower price. He just wants what is fair.

[17] The applicant accepted that, if the property was sold now that the proceeds from sale would need to sit in a trust account undisbursed until all relationship property matters had been resolved or there was an agreement between the parties for an interim distribution.

[18] The applicant argued that in addition to obtaining a better price the necessity for the property to be sold now is that it will allow the parties a clean break from the relationship and to make plans moving forward[4].

[19] The applicant does not see his position as unreasonable as he says he is just motivated by getting the best price for the home. When the applicant's counsel was asked about the impact it would have on the children if the home is sold - specifically that the children would have nowhere to live and obtaining another property whilst the funds from the sale were still held in a trust account might be a barrier to purchasing another home the response was that the respondent might be able to get an interim distribution of funds. The parties have not presented the court with any agreement on interim distribution in the event an order for sale were to be made and given the history of the parties I doubt the parties could reach an interim agreement without further court intervention.

[20] The respondent opposes such sale on the open market. The crux of her opposition is that she has made a reasonable offer to purchase the property from the applicant and this will provide stability and continuity for the children. She submits she has not in any way delayed the negotiations to sought matters out and she was still offering a fair price being the middle valuation of two previous registered valuations obtained prior to 2 October 2020. Post separation she had continued to pay all the

[4] Refer paragraph 34 of counsel for the applicant's submissions dated 1 October 2020.

costs of the property. She has finance arrangements from the bank to be able to purchase out the applicants share at the middle value of the valuations obtained prior to the October 2020 hearing date.

[21] The applicant has not convinced me that there is any urgent need for the court to order the sale of the property prior to the final determination of matters. His primary reason for seeking a sale now is to take advantage of a speculative residential property market. Decisions of the court on interlocutory matters for the division of relationship property should not be based on speculation of the residential property market. The applicant is being opportunist in his approach. His interlocutory application was made on 9 January 2019 some 12 months prior to Covid-19's impact on the residential property market in Auckland. His reasons expressed when he made the initial application was that the respondent was not engaging with him on the division of relationship property and the respondent has been in occupation of the home since July 2018 and whilst she pays the mortgage, the property could achieve a superior weekly rental if rented out to a third party.[5] There seems to be some contradiction in this reasoning.

[22] The applicant has not shown that he is suffering any undue detriment due to the actions of the respondent in refusing to agree to the sale of the home on the open market. This is not a situation where the respondent is residing in the property without being responsible for all its outgoings. She is taking sole responsibility for the mortgage payments, rates and insurance which could be akin to occupation rent (though I make no determinative finding about occupation rent here). While there may be a short fall in what she is paying from what could be obtained by rent on the open market and again I don't make any determination on this, the reality is the applicant, who is perusing the sale is not out of pocket by having to pay for his own current accommodation as well as the costs of the family home of which the respondent and the children have the benefit of living in[6]. While the applicant may not currently have access to the equity he is entitled to with the division of relationship property neither does the respondent. This goes in my view to the need to have the substantive proceedings resolved with speed rather than supporting an interlocutory

[5] Affidavit of the applicant, sworn 9 January 2019, paragraph 11
[6] The respondent has an occupation order in her favour made under the Domestic Violence Act 1995.

sale of the home at this juncture. The final resolution of all property matters is what is needed for both parties not a piecemeal approach.

[23] The applicant has not shown that it is in the interests of justice to have the home sold now when I weigh this against the potential detriment to the children of the relationship if they were to have nowhere to live whilst the substantive proceedings remain unresolved and funds from any earlier sale are held in a trust account.

[24] I decline to make the order for sale.

Issue two: If the court declines to grant an order for sale can the court vest the family home in the respondent?

[25] This was an issue that was discussed at the hearing and of which counsel had the opportunity to file further written submissions after the hearing.[7]

[26] It was clear from the previous minutes of the court setting the matter down for a hearing on two earlier occasions that the issue being dealt with at the short cause hearing was the interlocutory application for an order for sale. There have been no interlocutory applications filed on behalf of the respondent at all in these proceedings asking the court to make an order vesting the relationship home in her for a particular price. To remedy this issue counsel for the respondent made an oral application at the hearing for an order that the "family home be vested in Ms [Sharma] for the benefit of the children, and for the Applicant's half share of equity pursuant to an average value between the two valuations on file be held in an independent trust account pending final resolution of matters."[8] At hearing I questioned whether the Court should accept the oral application and if it had the powers to provide the remedy sought.

[27] Both counsel in their subsequent written submissions agree that s 25(3) provides the court with jurisdiction whereby the court may at any time make any order or declaration relating to the status, ownership, vesting, or possession of any specific property as it considers just. I agree with these submissions.

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7 The submissions for the respondent are dated 3 February 2021 and for the applicant in reply dated 5 February 2021.

8 Counsel for the respondent's submissions dated 3 February 2021, paragraph 10.

[28] The issue is whether I should make the order as the respondent seeks in the circumstances of this case at this juncture because it is just to do so.

[29] For the respondent it is submitted that:

(a) Notwithstanding no interlocutory application was made in advance the remedy is available and the respondent knew of her position in terms of vesting of the family home in her since 20 February 2020;

(b) The documents filed since have been consistent with this so her position should come as no surprise and so if the Court deals with the matter now it is not unfairly prejudicial to the applicant;

(c) The applicant had agreed at one point to the vesting, but subsequently withdrew his agreement;

(d) The applicant has not addressed the need for an updated valuation sufficiently and information he has provided about value is flawed;

(e) The respondent has a Final Occupation Order under the Domestic Violence Act in her favour;

(f) The applicants position has no regard for the parties' two young [children].

[30] The applicant opposes the court at this juncture vesting the property in the respondent given an interlocutory application was not filed and the respondent had ample time to make the proper application. It is also submitted on his behalf that vesting in an interlocutory application should not be made without consent where there is absence of either an agreed value or updated registered valuation.[9]

[31] I have considered the submissions filed and the oral arguments made before me at the hearing. I determine that the court should not exercise its discretion at this

[9] Submissions of Counsel for the Respondent dated 5 February 2021.

juncture to vest the property. The reasons for this are that the interlocutory hearing was not set down to consider the vesting issue. While vesting of the property in the respondent was signalled by the respondent in her response as a remedy it was in the context of the substantive proceedings and never signalled as being something sought as an interlocutory remedy.

[32] Secondly the vesting issue is tied up in a dispute about the value of the family home. There is no meeting of the minds between the parties about the current value of the home or how it should be determined. Value is a significantly disputed fact in these proceedings which will need determination at a substantive hearing. At the interlocutory hearing the dispute on valuation was not properly canvassed or pleaded in a way that a factual determination could be made on the evidence presented about what is the appropriate value to be attributed to the family home. Neither party got to cross examine any of the authors of the valuation evidence before the Court nor was the valuation evidence put before the Court in a proper evidential form. It was clear from the submissions of the respondent that she disputed at least one of the valuations and disputed the market appraisals given by two real estate agents approached by the applicant.

[33] I determine that the vesting of the family home in the applicant and the value of the family home is a matter to be resolved at the substantive hearing. What should happen with the relationship home by sale on the open market or sale to the respondent should fall for determination at the substantive resolution of the proceedings when matters of valuation can be properly determined as well as any other adjustments that need to be considered that will ultimately play a part in determining what sum each party is entitled to from the division of property. To determine this at an interlocutory hearing focused on whether an order for sale should be granted is unjust.

Issue three: Costs

[34] The respondent seeks increased costs against the applicant. Her reasons for this are that his actions in getting matters resolved has been unreasonable and resulted in uncertainty, delays in the resolution of matters and increased expenses to her.

[35] The applicant argues that an increase of costs of 25% (from a standard category 2 scale) is justified and submitted that:

(a) The applicant unreasonably and unnecessarily increased the respondents' time and expenses associated with the determination of the application for sale of the family home;

(b) After agreeing to the respondent's proposal in relation to the home and after the consent memorandum was prepared, he reneged at the last minute;

(c) The applicant has taken no steps to progress his position about the higher value of the home that could be obtained on the open market, and

(d) The applicant's pattern of behaviour shows vexatiousness and continuing oppressive and controlling conduct towards the respondent.

[36] The applicant does not contest the costs issue in the event the order for sale is made. It was his counsel's submission that the price that could be achieved if sold on the open market would more than compensate for any prejudice and delay. In oral submissions at hearing the applicants counsel submitted that his position was that if he was successful with his application, he agreed to pay costs. If he was not, then he did not agree. This was a somewhat unusual approach to take as ordinarily the position of a party would be in the reverse.

[37] The applicant also took the position his change of mind was not unreasonable given he is only motivated by getting the best price for the property which would

benefit both parties not just him. He submitted he has not taken further proactive steps to pursue a sale of the home due to this outstanding application.

[38] The interlocutory application was filed with the substantive proceedings on 9 January 2019. The proceedings did not progress for some time due to counsel making requests for adjournment as they were working on a resolution[10]. No resolution was forthcoming, so the interlocutory application was set down for hearing on 2 October 2020. Counsel advised the court that the interim issue of sale was resolved so the hearing did not proceed. That was unfortunately a premature stance.

[39] Both parties agree that the applicant subsequently resiled from the position he had communicated that he had agreed to the property vesting in the respondent as opposed to being put on the open market to be sold at a higher price. The applicant in his evidence said "The reason for this was after this court date I was talking to some real estate agents who advised me that they can get me a much higher price for the same of the [family home] than the $660,000.00."[11]

[40] The respondent is not legally aided.

[41] Section 40 of the PRA provides the Court unfettered discretion (both to granting and quantum) to award costs.

[42] Rule 207 of the FCR gives the court discretion to award costs in any proceeding and permits application of any or all the cost provisions in rules 14.2 to 14.12 of the District Court Rules 2014 (DCR) in exercise of the discretion. In broad principle, costs follow the event in the absence of reason to the contrary and any departure must be a considered and particularised exercise of the discretion.

[43] On the interlocutory application the applicant has been unsuccessful. I am satisfied that this is case where costs should follow the event and there is nothing in what the applicant has submitted that convinces me that there are any circumstances

[10] On 28 August 2019 counsel filed a joint memorandum seeking an adjournment for 6 weeks to monitor settlement negotiations. On 23 October 2019 counsel for the respondent sought a further adjournment to monitor the filing of updated evidence.
[11] Paragraph 4, Affidavit of the applicant affirmed on 20 January 2021.

that justify a departure from this approach. In fact, the applicant has conceded costs are appropriate albeit with the rider only if he is successful.

[44] I have considered if an uplift is appropriate, but I am not satisfied that the applicants' position of changing his mind (i.e. disagreeing to the vesting of the property in the respondent) is so unreasonable that it justifies the 25 percent uplift sought by the applicant. I have not at this juncture determined that vesting in the respondent is the just order to make for the final division of relationship property. It may well be. It may not. This is to be determined later.

[45] I accept that the applicant's change of mind would have caused the respondent distress and inconvenience and leaves her in an uncertain position about the future of the family home. Nevertheless, until a consent position is signed in writing and orders made by a court a matter is not finally concluded. It serves as a note to counsel that hearing time should not be vacated until the parties have signed a consent memorandum and orders as per the consent are made by the court prior to the vacation of a hearing. If this does not occur there is always the risk a party can change their mind.

[46] Accordingly, my determination is as follows:

(a) The interlocutory application for an order for sale is declined.

(b) The interlocutory oral application to vest the family home in the respondent is declined.

(c) Costs on a 2B scale as set out in the draft schedule of costs attached to the submissions of counsel for the respondent date 19 January 2021 are awarded against the applicant. For clarity there is to be no uplift to the costs scale.

Further Directions

[47] The substantive proceedings need to be progressed to resolution so I make the following timetabling directions to progress matters:

(a) The applicant has 21 days to file any further evidence in support of the substantive proceedings. This includes any valuation evidence. If he seeks to rely on any comparative market analysis from any real estate agent, then the agent should swear the appropriate affidavit evidence.

(b) The respondent has a further 21 days to file anything in reply and in support of her position including any expert evidence on value.

(c) The matter is set down for a case management review on Tuesday 27 April to monitor compliance with the above timetabling directions. Counsel are to file submissions for the CMR confirming that the matter is ready to be set down for hearing, the number of witnesses and the length of time needed for the hearing. The matter is then to be transferred to centralised fixtures to be allocated a prehearing conference and date for the hearing of the substantive proceedings. I am of the view the matter will need at least 1 day.

KMSH Tan
Family Court Judge