

**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/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS](http://www.justice.govt.nz/courts/family-court/legislation/restrictions-on-publications).**

**IN THE FAMILY COURT  
AT AUCKLAND**

**FAM-2014-004-000630  
[2016] NZFC 1920**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	PADMA JOSHI Applicant
AND	SURESH JOSHI Respondent

Hearing: 8 March 2016

Appearances: Lady D Chambers QC for the Applicant  
A Fisher and C Farry for the Respondent

Judgment: 11 March 2016

---

**RESERVED JUDGMENT OF JUDGE D A BURNS**  
**[In relation to application for occupation by applicant wife pending  
sale of two properties]**

---

[1] I presided over a hearing on 20 May 2015 between the parties. I heard interlocutory applications for an order for sale, occupation, discovery, interrogatories and procedural directions.

[2] I issued a reserved judgment on 8 June 2015. I made an order for sale of two properties situated at [address 1 deleted], Auckland and [address 2 deleted],

Auckland. I adjourned the applicant's application for a temporary occupation order for both properties for a limited time for certain purposes. I directed that if the respondent husband failed to comply with the directions given by the Court to present the properties at best for sale then the application for interim occupation could be reheard by the Court on 48 hours notice. I made other ancillary directions.

[3] That judgment was the subject of an appeal to the High Court. I am told that the appeal was abandoned either the day before or on the day of the hearing of the appeal. I am not aware of any application for stay being filed.

[4] The applicant considered that the directions of the Court to implement the order for sale were not carried out by the respondent and she sought for occupation to be granted to her. That case was set down before me on 24 November 2015. I considered the application and the steps taken by the respondent prior to that hearing and for the reasons set out in my minute of 24 November 2015 I accepted the assurances given by the respondent through his counsel that all steps were being taken to properly implement the order for sale and to achieve the best prices possible for both properties.

[5] I adjourned the application for occupation to the registrar's list in mid-February 2016 and granted leave to bring that back before me by way of memoranda on 24 hours notice. I directed that the respondent continue to market the properties and set an auction date in mid-February 2016. I made other ancillary directions to advance the proceedings.

[6] The Court received an application dated 16 February 2016 where the applicant sought temporary occupation of the two properties, entitlement to act as an agent for the respondent and ancillary orders for enforcement based on the non-compliance by the respondent of implementing the orders of the Court. That was supported by an affidavit by the applicant dated 16 February 2016. The application was opposed. I directed it be set down for an urgent hearing. That hearing took place before me on 8 March 2016. Lady Chambers QC appeared for the applicant. She was present. Ms Antonia Fisher QC appeared for the respondent together with Ms Farry for the respondent who was also present. The Court received written

submissions from both counsel. The issue for determination is whether the application for occupation pending the implementation of an order for sale by the applicant is granted or not and if so, what other orders need to be made ancillary to ensure that the properties are sold.

### **Submissions**

[7] Lady Chambers submitted in summary as follows:

- ◆ the respondent husband was in breach of the orders of the Court and continued to do so
- ◆ he could not be trusted to implement the Court orders
- ◆ that as he wanted to acquire both properties from the marriage partnership. Therefore he was in a conflict of interest in presenting the properties at best for sale. It was contended that he really wanted to present them as such that he would limit the number of persons interested or try and have the price reduced
- ◆ that the delay in implementation was solely caused by the respondent. She pointed to the chronology of events that happened since 24 November 2015. She argued that chronology spoke for itself. She recorded that the respondent had two months since the hearing on 24 November 2015 to prepare the properties for sale by final inspection dated 25 January 2016 but had once again failed to do so. She submitted that as a result of the inaction by the respondent the applicant had been out of her capital for over two years. That the respondent had control of the three major assets of the marriage, namely the business and the two properties. She submitted that the delay in compliance had been a tactic adopted by the respondent and that he deliberately continued to delay resolution. She submitted that the only way to achieve a proper sale at market price was to place the process in the hands of the applicant who would present the properties as best for sale, get the work done and that

she could be trusted to do so. Lady Chambers submitted that the respondent could no longer be trusted to implement the orders of the Court. She submitted that he had failed to comply with the notice served by the local Council on the parties. That he adopted a deliberate tactical strategy of delaying sale because delay was suiting him

- ◆ that he had acted fraudulently and produced documents to the bank and to the Court which were inconsistent. That as a result of his actions he lacked credibility. She did not accept that there was bona fides in the further issues raised by the respondent of asbestos or leaks.

[8] Ms Fisher submitted in summary as follows:

- ◆ that this was a case where there were two versions of the events and that the respondent's version was as plausible as that of the applicant's
- ◆ that there was a genuine explanation for the delay
- ◆ that the asbestos issue which had been raised recently had been overlooked by the real estate agent and she pointed to documentation to establish this
- ◆ that there were genuine reasons why this could not occur but that one of the properties could be placed on the market forthwith and the other one would have to be the subject of work. That this could be undertaken as soon as possible. He therefore contended that one could be sold now and the other one as soon as the work was done
- ◆ that he had complied with all of the requirements of the real estate agent's and had been cooperative. That in fact he was the one that was being prejudiced by the delay and he did not want delay any further but have been presented with new requests which necessitated work being done

- ◆ that at the suggestion of the real estate agent he had sought advice from occupational health consultants regarding the asbestos at [address 1 deleted]
- ◆ that there will be significant cost in getting the rectification work done and delay. She pointed to the correspondence between solicitors with respect to the situation and now contended that it was appropriate rather than selling both properties at the same time (as ordered by the Court already) that [address 2 deleted] could be sold forthwith with [address 1 deleted] waiting for the work to be done. She sought directions to allow for the work to be done on [address 1 deleted] to deal with the asbestos issue and for the matter to remain under the control of the Court. He produced the report from Dowdell & Associates Limited in support of his case. He also filed affidavit evidence in reply to that of the applicant

[9] In reply Lady Chambers submitted:

- ◆ that it was not appropriate to split both properties separately for sale
- ◆ that they were adjoining properties and there was significant advantage in selling them together
- ◆ it was submitted that there was a deliberate strategy in trying to sell them off separately with the [address 2 deleted] property being presented in a way currently which did not maximise the price
- ◆ that this was a further tactical ploy

[10] Having considered the competing applications I now make the following orders:

- (i) I grant the application for interim occupation for the specific purpose of selling both properties to the applicant and direct that the respondent vacate both the properties and make them available. As one of the properties has tenants in it pursuant to

the Residential Tenancies Act there will need to be 42 days notice given of the intention by the applicant to take occupation as she is taking occupation of the properties herself owned by the parties. Therefore the occupation order will commence 42 days after the date of this judgment. I leave it entirely to the applicant as to whether she seeks to have the tenants vacate the property or whether she wishes them to continue in occupation;

- (ii) I appoint her to act as agent on behalf of the respondent for both properties;
- (iii) I direct that the applicant is to take steps to assess and quantify the cost of remedying the notice to fix at [address 2 deleted] and obtain quotations from qualified contractors. The issue of the cost associated with obtaining quotations and the remedial is to be reserved. I authorise the applicant to undertake that work. The apportionment of costs associated with that to be the subject of further hearing;
- (iv) I direct that the applicant seek to obtain quotations and any work with respect to remedying the leaky issues at [address 1 deleted] and to forthwith arrange for the repairs;
- (v) I direct an assessment be made of the cost associated with testing for asbestos in the ceiling at [address 1 deleted] and for the cost of the remedial work;
- (vi) Both parties are to cooperate with obtaining short-term finance from the bank for the costs associated with attending to the above work and having it done so that both properties are presented the best for sale;

- (vii) I authorise the applicant to tenant one or both properties at her discretion and she is to receive the rental costs which she is to use firstly in paying the mortgage; and secondly, in any costs associated with doing the remedial work;
- (viii) I direct that the rental amounts being received by the respondent are from the date of this judgment to be paid to by the tenants to the applicant;
- (ix) I direct the applicant is to be responsible for arranging for the work to be done on the properties. She is to implement the order for sale on the same terms and conditions as the order for sale already made. She is to invite the respondent to sign any documentations such as listing authorities, mortgage applications etc but he fails to do so within 24 hours of presentation she is authorised to sign on his behalf as agent.

[11] I make these orders for the following reasons:

- (a) On 24 November I gave a final warning to the respondent that if he did not implement the orders of the Court then on the next occasion there would be no other choice for the Court but to grant the application brought by the applicant for occupation;
- (b) The application for occupation and implementation of the sale has been before the Court for nearly a year. The chronology presented by the applicant clearly demonstrates that the Court can have no faith further in the respondent in implementing the terms and conditions of the order for sale. I consider that he has adopted a tactical approach to delay and it is designed to enable him to acquire the two properties at a low price from the marriage partnership. I therefore accept that the submission made by Lady Chambers that he is in a conflict of interest and it is no longer appropriate therefore to place him with

responsibility of implementing the order for sale. I do not accept that the reasons for the delay that he has advanced are genuine;

- (c) With respect to the asbestos issue he was fully aware of this some time ago. I do not accept that it is appropriate to blame the real estate agent for the issue. It was his responsibility to present the properties for sale. He should have confronted that issue about a year ago and has failed to do so. He is endeavouring to say that this is a new issue which was overlooked by the agents but as far as the Court is concerned he was fully aware of this issue and it is inappropriate to divert responsibility;
- (d) I consider that if I give him one further opportunity to take steps that the Court will be in a similar position that it is in March in a few months time and I anticipate a further excuse or a further reason for delay arising;
- (e) It was clear at the first hearing that took place before me in May of 2015 that the respondent was seriously troubled by what he considered to be a conduct by the applicant which she denied. It was clear to me that he had another agenda. Because he was in occupation and there was a potential effect on his business I made orders in anticipation that those will be complied with. He appealed my judgment which he is fully entitled to do but did not make an application for stay of the order for sale. He simply did not take steps to implement the order (without leave of the Court) and then abandoned his appeal around the date of hearing. As a result there was a further delay. He assured the Court and made promises in November 2015 which were recorded by me in my minute. It was expected that the properties would be placed on the market for sale by way of auction in February 2016. This has not happened. I do not accept his explanation and the Court simply cannot wait any longer where the applicant is significantly disadvantaged by the delay. I see no other alternative to cure the prejudice to her other than to grant her

application and place the responsibility of doing the work and presenting the properties for sale in her hands. This will be significant hardship to her because she does not have the income from the business but nevertheless the Court has now got to the position where there is no other option;

- (f) I do not accept that the properties should be sold separately and see significant advantage to a purchaser of them being presented for sale together. They are adjoining and it is possible that a purchaser may see benefit in having both properties. It is likely therefore that the price achieved at auction will be higher if sold together rather than separately. I do not accept the argument presented that the agents had recommended that the notice issued by the Council should not be attended to. On reading the letters from Barfoot and Thompson in my view this is not what is said. Accordingly whether that issue is attended to will now be the judgment of the applicant;
- (g) The prejudice to the applicant is now so great it outweighs any detriment to the respondent
- (h) The leave provision that has already been issued by the Court to come back for urgent directions still remains in full force.

Dated at Auckland this 11<sup>th</sup> day of March 2016 at

am/pm

D A Burns  
Family Court Judge