EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

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/COURTS/FAMILY-COURT/LEGISLATION/RESTRICTIONS-ON-PUBLICATIONS.

IN THE FAMILY COURT
AT CHRISTCHURCH

FAM-2015-009-001415
[2016] NZFC 4035

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	ANNIE CHANCELLOR Applicant
AND	YED JENKINS First Respondent
AND	VAL JENKINS Second Respondent
AND	DANIEL JENKINS Third Respondent

Hearing: 15 April 2016

Appearances: Ms Marsden appears for the Applicant
Ms Whalan appears for the Respondents

Judgment: 19 May 2016

RESERVED JUDGMENT OF JUDGE R J MURFITT
Preliminary Discovery - Rule 140 Family Court Rules

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[1] The applicant and first respondent lived together for about six years, marrying on 31 July 2009 and separating on 14 May 2013.

[2] The land, on which they lived [details deleted], is owned by a family trust known as [name of trust deleted]. The second respondents are trustees of that.

[3] There were no children of the marriage, [details deleted].

[4] No agreements have been reached in relation to ownership of property, but a draft deed was forwarded to her in September 2013 which records in the schedules that Mr Jenkins was to retain all assets in his name including his interests in the "Jenkins partnership". Ms Chancellor was to retain all property in her name, including specifically a property located on [name of road deleted] of [size details deleted].

[5] On 6 November the applicant filed an application for discovery prior to the commencement of substantive proceedings, pursuant to Rule 140 Family Court Rules 2002. In particular she seeks of the first and second respondents an affidavit of documents in relation to an extensive list of documents set out in paragraph four of her application.

[6] The matter proceeded by way of a submissions only hearing on 15 April 2016.

The law

[7] Rule 140 provides:

> *Discovery and inspection of documents*
>
> **140 Order for discovery before proceedings commenced**
>
> (1) Subclause (2) applies if—
>
> (a) a person (the **intending applicant**) is or may be entitled to claim in the court relief against another person (the **intended respondent**); and

(b) it is impossible or impracticable for the intending applicant to formulate the intending applicant's application without reference to a document or class of documents; and

(c) there are grounds for a belief that the document or 1 or more documents of that class may be or may have been in the possession, custody, or power of a person (whether the intended respondent or not).

(2) If, on the application of the intending applicant made before any proceedings are brought, the court is satisfied of the matters stated in subclause (1)(a) to (c), it may order the person referred to in subclause (1)(c) to file and serve on the intending applicant an affidavit stating—

(a) whether that document or (as the case requires) a document of that class is or has been in his or her possession, custody, or power; and

(b) if it has been, but is no longer, in his or her possession, custody, or power, when he or she parted with it and what has become of it.

(3) An application under subclause (2) must be made by way of an interlocutory application made on notice—

(a) to the person from whom discovery is sought; and

(b) to the intended respondent.

[8] There are therefore three conditions which must exist before the Family Court can exercise its discretion to order such discovery. They require:

(a) That the intending applicant "is or may be entitled to claim….relief against… the intended respondent".

(b) That it is impossible or impracticable for the intending applicant to formulate her application without reference to the document of class of documents for which discovery is sought.

(c) There are grounds for believing that the documents may be or may have been in the possession, custody or power of a person (whether the intended respondent or not).

[9] The third of these criteria is not relevant because there is no dispute that the first or second respondents have or have had within their control the documents on which this application focuses.

[10] The real issue which they raise is the possible viability of any claim by the applicant and the practicality of her filing proceedings even without discovery.

[11] Ms Whalan, in her submissions, also raises a challenge against the power of the Family Court to Rule on equitable matters such as the existence of a constructive trust.

[12] For the applicant, Ms Marsden seeks discovery to prosecute a claim under the Property (Relationships) Act and or s 182 of the Family Proceedings Act. A third possible cause of action which might arise depending on the contents of the discovered documents relates to a constructive trust against [name of trust deleted].

[13] Rule 140 is modelled on its equivalent in the High Court Rules, where Rule 8.20 is the relevant provision.

[14] Decisions under Rule 8.22 are relevant in interpreting how Rule 140 should be applied see Collins J in *G v P*[1].

[15] It is clear from that case that Rule 140 must be determined consistently with the social objectives of the legislation under which the proposed claim would be brought. That case related to a proposed claim under the Child Support Act.

[16] Here the relevant purpose of the Property (Relationships) Act 1976 is contained in s 1N which refers to the :

> *"principle that questions arising under this Act about Relationship Property should be resolved as inexpensively, simply, and speedily as is consistent with justice"*

[17] Ms Marsden refers also to the principles contained in s 1N(b) and (c), which relates to the principle that all forms of contribution to a marriage partnership are treated as equal, and that a just division of Relationship Property has regard to the economic advantages or disadvantages to the spouses arising from their marriage.

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[1] 2015 NZFLR 423

[18] An applicant cannot embark on a mere fishing expedition by launching a claim for discovery. In *Exchange Commerce Corp Limited* v *NZ News Limited*[2] the Court said:

> "the words 'may be entitled' cannot be read as enabling any disgruntled person to obtain discovery in the hope that it may provide material to mount a claim…what must be shown is an inability to refer to a particular document or class of documents which inability inhibits formulation of the applicants claim. It follows that the words 'may be entitled' contemplate evidence circumstances showing at least the real probability of the existence of a claim against someone"

[19] Ten years later the Court of Appeal in *Hetherington Limited* v *Carpenter*[3] again provided important guidance to much the same effect. The Court said:

> "discovery will not be available merely because it is possible that it may disclose a claim. [Rule 140] is not a mechanism to encourage fishing expeditions. There must be some foundation established such as will make it just that the respondents should be put to the trouble and suffer the intrusion on the affairs which an order will involve…the Court cannot be intended, at the stage of pre-commencement discovery, to reach any conclusion as to the likelihood of ultimate success at trial… the essential concern… [is]… to sort out the real from the fishing, rather than to prejudge the merits of a case at a preliminary stage".

[20] Pre-commencement discovery has been considered by Judge L J Ryan in the context of a relationship property claim in *JAS v MAT*[4]. In that case the applicant was seeking pre-commencement discovery in respect of relationship property, and a trust. The respondents argued that the intending applicant could formulate a claim without such discovery. Judge Ryan directed discovery saying at paragraph seven:

> "unlike Civil proceedings where documentation relating to quantum falls into a different category, in proceedings under the Property (Relationships) Act quantum often does need to be determined to properly formulate a claim. This will enable

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[2] [1987] 2 NZLR 160 at 164
[3] [1997] 1 NZLR 699 at 704
[4] Family Court North Shore FAM-2009-44-2343 14 April 2010

> the intending applicant to better define the issues to be resolved and in relation to transactions between the intended respondent and the … family trust it may indeed be decisive as to whether or not there are grounds to pursue a claim under s 44C".

[21] The recent decision of *Clayton v Clayton*[5] is also germane. There, at paragraph 36, the Court considered circumstances in which a discretionary trust settled prior to a marriage might be a nuptial trust for the purposes of the Courts exercise of section 182 jurisdiction. Justice Glazebrook observed:

> "one view may be that once a marriage has taken place and the spouse indentified, then there will be the necessary connection with the marriage. Even if that is not the case, however, it may be that each disposition of property to such a trust after marriage could constitute a post nuptial settlement".

[22] This follows from the concept that a Trust, once established by a deed is not a locked cupboard, but one which is opened each time a further disposition is made to it.

[23] The relevance of this, of course, is that dispositions made by the first respondent to [name of trust deleted] after the commencement of the relationship might well be dispositions open to attack under s 44C. They might also give rise to jurisdiction under s 182 Family Proceedings Act to vary.

[24] In her submissions Ms Whalan says at paragraph 43 there were no subsequent settlements during the course of the relationship that would make the Trust vulnerable to attack. However there is no evidence of this and the applicant is expected to rely on the truth of that submission without having the opportunity to independently explore the facts.

[25] It is in my view unarguable that the applicant might well have a claim either under the various provisions of the Property (Relationships) Act or the Family Proceedings Act to assets now owned by [name of trust deleted]. Whether that is so or not can only be properly assessed once the discovery which the applicant thinks necessary has been made.

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[5] [2015] NZSC 30

[26] It may well be, as I indicated to Ms Marsden during submissions, that once discovery is made, the applicant might embarrassingly expose her own property to claim, while [name of trust deleted] remains beyond reach. Ms Marsden forthrightly acknowledged that, and said that was a risk the applicant must run, and the risks could not be assessed without the pre-commencement discovery she seeks.

[27] Ms Whalan at paragraph 63 of her submissions urged me to take the view the appropriate course was for the applicant to launch her proceedings, and then seek discovery after the filing of the Notice of Defence. Certainly, the applicant could embark on that course of action, but it would be one of greater complexity and cost to the applicant and also the respondents than the course she has now taken. Pre-commencement discovery will enable the applicant to decide whether or not she has a claim at all, whether it is worth pursuing by litigation, and the scope of any claims that might be justifiable.

[28] In my view, the applicant has established the grounds required under Rule 140 to justify a pre-commencement order for discovery.

[29] No arguments were advanced as to whether discovery, if ordered, should apply to all of the documents referred to in the application or only some of them. I assume, therefore, the order for discovery which I now make should apply to all those documents referred to in paragraph four and paragraph five of the application.

[30] I am obliged to counsel for the comprehensive submissions which they have filed.

R J Murfitt
Family Court Judge

Signed in Christchurch on 19 May 2016 at 11:45am