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IN THE FAMILY COURT
AT CHRISTCHURCH

I TE KŌTI WHĀNAU
KI ŌTAUTAHI

FAM-2017-009-001786
FAM-2018-009-000029
[2021] NZFC 1637

IN THE MATTER OF	THE CHILD SUPPORT ACT 1991
	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	MARGARET-MARY COUGHLAN AKA MARGARET-MARY ENRIGHT Applicant
AND	SHANE ANTHONY ENRIGHT Respondent

Hearing:	15 February 2021
Appearances:	G Brodie for the Applicant J W A Johnson for the Respondent
Judgment:	25 February 2021

JUDGMENT OF JUDGE M J HUNT

Introduction

[1] In these proceedings the applicant seeks retrospective orders in relation to child support issues.[1] Ms Coughlan's claim is that Mr Enright should be subject to a retrospective adjustment in relation to child support for the periods 2000 to 2017, except for the 2011 year.[2] She also seeks a variation to a spousal maintenance agreement.[3]

[2] The parties married in 1991 and had four children, now ranging in age from 21 to 26 years. A settlement of property matters in 2007 was reached and the marriage was dissolved in 2008.[4]

[3] The essence of the applicant's complaint is that the respondent did not pay appropriate child support according to his means, both capital and income, and that that should now be addressed by way of a lump sum payment. She says the burden of meeting the needs of the children fell disproportionately and unfairly on her. Added to that is the issue of whether all that was payable under the settlement agreement was paid and whether an amendment to the time specified for payment can be made to address any limitation issues.

[4] The retrospective nature of the proceedings, and the legal issues involved, make these proceedings complex. Further, the assets that the applicant says the respondent has access to is largely derived from arrangements made by the respondent's father and subject to claims by his siblings in a variety of ways. Those challenges have yet to be fully resolved and proceedings are ongoing. This proceeding has, at various points, been delayed or deferred pending progress on the issues between the respondent and siblings. A clear picture is yet to emerge.

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[1] Application for a departure from formula assessment in special circumstances including application for retrospective departure dated 9 November 2017.
[2] Paragraph 1 application dated 9 November 2017.
[3] Application dated 22 February 2019 relying on section 182(2) Family Proceedings Act.
[4] Dated 4 July 2007 including at paragraph 11 to 14 provisions relating to financial support that the applicant seeks to vary.

[5] One of the ongoing contentious areas between these parties has been the extent to which disclosure is required and this hearing principally relates to issues of disclosure/discovery and privilege.

[6] Some of the issues identified for the purposes of this hearing were resolved at hearing or between parties prior to the hearing or are capable of resolution in a straightforward way.

[7] The issues that can be dealt with summarily are:

(a) An extension of time for the applicants to file an application for a ruling in respect of the privilege claimed for a valuation of property owned by Southern Lakes Holdings Limited commissioned by the applicant on or about June 2019. The direction that it be filed was given in a minute on the 2 September 2019 but was not filed until 24 July 2020. Mr Brodie said he sought some expert advice which accounted for the delay. While I share the respondent's concern about the delay this is granted as there is no discernible prejudice that cannot be addressed by way of a costs order;

(b) The respondent's request for further discovery by the applicant of the particulars specified in the submissions dated 15 February.[5] This was conceded by Mr Brodie and is to be completed within 28 days of the date of this decision;

(c) A request for disclosure of any additional valuations of the farm assets held by the respondent. The respondent asserts there are none and the discovery is therefore complete. This has not been challenged. No further directions are therefore required;

(d) The applicant wishes to have access to the District Court file for family protection proceedings lodged in the Manukau Court. This is being

[5] Schedule 1B of the submissions.

addressed by the relevant parties in that proceeding and a Judge in that Court and no further direction is required.

[8] The issues that do require a more considered analysis and determination are:

(a) Does privilege attach to the June 2019 valuation in the possession of the respondent?

(b) Can the tender document submitted by a third party to the respondent (or the company) which has been disclosed to Mr Brodie on his undertaking not to make further disclosure be further distributed to the applicant and her other advisers?

(c) A further issue emerged during the proceedings as to whether the application of s 180 of the Family Proceedings Act 1980 had been discontinued in its entirety or only the part relating to the trust. Mr Brodie maintains the application to set aside the settlement agreement was not discontinued or not intended to be and remains to be determined.

Privilege

[9] Ms Coughlan seeks discovery by Mr Enright of a valuation completed in or about June 2019 for Mr Enright's purposes. Mr Enright describes the valuation in the following terms:[6]

> 11. After the High Court hearing, and before the appealing, there were attempts made to settle the litigation referred to above. In my request, the June 2019 valuation was prepared for SLH (Southern Lakes Holdings Limited) to assist in, and inform the parameters for, those negotiations. Settlement offers were made but none were accepted …

[10] The document has been discovered but privilege is claimed.[7] The issue of whether privilege applies and whether there are any other circumstances in which the document should be disclosed was the focus of the submissions only hearing.

[6] Paragraph 11 affidavit dated 8 September by Shane Enright.
[7] Affidavit dated 21 August 2019 by Shane Enright under part 2 for which privilege is claimed.

Extensive submissions were heard from Mr Brodie for the applicant and Mr Johnson for the respondent.

[11] Both counsel agree s 57 of the Evidence Act 2006, in particular s 57(2), applies:

> **57 Privilege for settlement negotiations, mediation, or plea discussions**
>
> (2) A person who is a party to a dispute of a kind for which relief may be given in a civil proceeding has a privilege in respect of a confidential document that the person has prepared, or caused to be prepared, in connection with an attempt to mediate the dispute or to negotiate a settlement of the dispute.

[12] There is no dispute that a person is entitled to invoke privilege in relation to documents procured in an unrelated civil dispute as long as he or she is entitled to the s 57 privilege in the first place.[8]

[13] It is accepted that the document has been discovered on the basis that it may have some relevance to the current proceedings although there was also some debate about that. Mr Brodie said that it is "a red hot" piece of evidence relating to the proposition that Mr Enright's capital position was such that at the relevant time, or subsequently, he should and could pay substantially more child support than he actually paid. Mr Johnson says it has much less relevance because of the timing relative to the years that have been challenged.

[14] The 2019 valuation, Mr Brodie said, would usefully supplement the evidence from a forensic accountant – Mr Keith Yardley. Mr Yardley recorded that he had placed particular emphasis on the farming trend statement contained in the accounts but noted at paragraph 36:[9]

> The farming trend statements includes a figure for total farm assets which is intended to indicate the market value of the company farm assets. These figures have been prepared by the Company Accountants and there is no indication as to how they have been arrived at. I/we (sic) have no way of verifying them without the benefit of formal valuation advice and evidence. I am aware that valuations obtained for the purposes of other litigation would suggest that the value of the land owned by the company is significantly higher than that used by the accountants in the most recent trend statements.

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[8] *New Zealand Institute of Chartered Accountants v Clarke* [2009] 19 PRNZ 246 per Keane J.
[9] Mr Yardley's affidavit dated 22 May paragraph 36.

[15] I accept at this stage that the information contained in the report might have some relevance to the basis upon which Ms Coughlan advances her case. However, I express no conclusion on the merits of that or whether the valuation will be determinative of any material issue as that was not what was examined in the course of the hearing and is subject to challenge.

[16] The assertion of privilege relates to the circumstances in which the document was prepared and the nature of the privilege which attaches to the document. The first issue is whether the document is confidential. On that point Mr Enright's evidence does not make clear what was done with the document, that is whether it was disclosed to third parties, and whether the disclosure was couched on the basis of it being without prejudice or in some other way having confidentiality attached to it. The submissions filed on behalf of Mr Enright maintain:

> Counsel for Ms Coughlan submits that for the 2019 valuation to be confidential it must have been kept confidential and disclosure of it to the other parties to the dispute will be sufficient to destroy that confidentiality. It is not accept (sic) that disclosure to the parties to that dispute, being the related litigation that was the subject matter of the settlement negotiations, would destroy confidentiality, there is no evidence in this proceeding that the 2019 valuation was disclosed to the parties to the related proceedings or was not otherwise kept confidential.

[17] Whilst Mr Enright could have been more forthright about exactly what did or did not happen to the document, I accept that on the face of it, and in the context of these proceedings, there is no evidence that the document has been published or more widely distributed such that it is not confidential.

[18] I consider that the document is likely to have been confidential because it was prepared for the benefit of Mr Enright (and/or related interests) to initiate settlement discussions. If it was disclosed in the context of those settlement discussions it seems more likely that such disclosure was made without prejudice and with an expectation of confidentiality. There may also have been information supplied of a confidential kind by Mr Enright in order to assist the valuer in reaching any opinion.

[19] The significance of the document being confidential is that the question of whether or not there has been a subsequent waiver then arises. Section 57(3) provides

for the circumstances in which privilege might be set aside. As Fitzgerald J said in *Smith v Shaw*:[10]

> [36] Referring with approval to these extracts of Robert Walker LJ's judgment, Lord Clarke, delivering the judgment of the Supreme Court in *Oceanbulk Shipping and Trading SA v TMT Asia Ltd*, said that "[t]he without prejudice rule is thus now very much wider than it was historically. Moreover, its importance has been judicially stressed on many occasions".[11] Of course, the statutory settlement privilege in this jurisdiction is similarly not limited to "admissions", but applies to "any communication" intended to be confidential and made in connection with an attempt to settle or mediate the relevant dispute.[12]

[20] Further, in *Smith v Shaw* Walker J said:[13]

> [19] I gratefully adopt the principles set out in the earlier Judgment of Fitzgerald J as follows:[14]
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> (a) Following a review by the Law Commission of the Evidence Act 2006, s 57(3)(d) was inserted on 8 January 2017 by s 21(4) of the Evidence Amendment Act 2016.
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> (b) Settlement privilege is not limited to "admissions" but applies to "any communication, intended to be confidential and made in connection with an attempt to settle or mediate the relevant dispute".[15]
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> (c) There have always been recognised exceptions to privilege in connection with without prejudice communications. One of these is where the privileged communication is being used "as a cloak for perjury, blackmail or other unambiguous impropriety".[16]
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> (d) The importance of the privilege is such that its boundaries should "not be lightly eroded".[17]
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> (e) The 'without prejudice' rule is founded partly in public policy and partly in the agreement of the parties.[18]

[21] Applying these principles to this case I accept that the document is confidential and was produced for the purposes of settlement negotiations by the respondent in other proceedings. I cannot conclude that it was released or that the confidentiality was waived as with regard to any other party to that litigation. I cannot rule out that

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[10] *Smith v Shaw* [2020] NZHC 238.
[11] *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662 at [27].
[12] *Unilever Plc v The Proctor and Gamble Co,* above n 6, at 2444.
[13] *Smith v Shaw* [2020] NZHC 1229.
[14] *Smith v Shaw* [2020] NZHC 238 at [34]-[42].
[15] At [36].
[16] At [37], citing *Unilever Plc v The Proctor and Gamble Co* [2000] 1 WLR 2436 (CA) at 2444.
[17] *Oceanbulk Shipping and Trading SA v TMT Asia Ltd* [2010] UKSC 44, [2011] 1 AC 662 at [30].
[18] *Smith v Shaw* at [35]*, Unilever Plc v The Proctor and Gamble Co* [2000] 1 WLR 2436 (CA) at 2443-2444.

the document contains confidential aspects provided by Mr Enright for the purposes of those settlement discussions.

[22] Whilst Mr Brodie made something of his view that the valuation was important to his client, that does not persuade me that the valuation should be produced. Nor am I persuaded that there is a public interest aspect of this matter that requires that privilege be set aside.

[23] It may be that during the evidence the knowledge of Mr Enright about the potential value of his property becomes an issue, but that can be addressed if and when it arises. I am not satisfied that the sequence of statements made by Mr Enright up to this point, many of which pre-date the valuation, can be regarded as putting Mr Enright in the position where, in effect, he has denied the content of the subsequent valuation or misrepresented its significance. Disclosure is not called for to correct some impropriety in the proceedings. The statements made in pleadings by Mr Enright after the valuation go only so far as to dispute Ms Coughlan's views on his financial position by saying they are not correct.

[24] The ultimate purpose of Mr Brodie in having access to the valuation is the limited capacity/resources of Mrs Coughlan to undertake her own valuation. That is not persuasive as a basis upon which privilege should be set aside.

[25] I am satisfied that privilege applies to the 2019 valuation based on the information I have received. As such disclosure of it is not required at this point in the proceedings. The application for disclosure of the valuation is declined.

Tender document

[26] So far as disclosure of the tender document is concerned, that has already been distributed to Mr Brodie on limited terms. I am not sure how this was consistent with claims of an expectation of confidentiality in the tender process. If it has commercial sensitivity, then the extent of that was not made clear.

[27] That document can now be provided to Ms Coughlan and her advisers upon appropriate assurances that they in turn use it only for the purposes of this litigation.

It is not to be made "public" or disseminated beyond the scope of this case and is only to be disclosed for the purpose of obtaining advice in relation to this case.

[28] Mr Brodie is to ensure that each recipient, including Ms Coughlan, acknowledges in writing the limited scope of the access to the document and the prohibition on publication or dissemination beyond the scope of this case without further order or consent.

Section 180 Family Proceedings Act application

[29] So far as the withdrawal of the s 180 application is concerned, I accept that it was Mr Brodie's intention only to withdraw that part of the application that sought to set aside the settlement as a nuptial settlement and not the aspect which it sought to vary the Relationship Property Agreement.

[30] I accept that the court order in that regard is not unequivocal and that no prejudice has arisen at this point. I make it plain the claim, as it relates to the settlement of the Enright Trust, is the only aspect that has been abandoned and the claim in relation to the relationship property agreement remains on foot.

[31] I accept both aspects are identified in the application and reliance is placed on s 180(2) for setting aside the agreement but I can see no prejudice that has arisen from the confusion and the exercise of requiring that a further application be filed would be meaningless. This litigation is far from complete and the reinstatement of that provision or clarification of the situation is appropriate.

[32] However, this is the second occasion on which a lack of clarity or inadvertence has resulted in confusion and the applicant is clearly on notice that compliance with specified timeframes and care regarding any concessions is called for going forward.[19]

[19] The proceedings were struck out for want of prosecution on 22 November 2018 and reinstated by Judge Walsh on 7 December 2018 after explanation and apology from counsel.

Costs

[33] Mr Enright has been substantially successful on the privilege argument and in those circumstances as it has been a discrete application I consider costs should be fixed now. Any submissions are to be filed within 21 days of receipt of this decision and any response within 21 days thereafter. Submissions to be limited to 5 pages and costs will be determined on the papers.

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Judge M J Hunt
Family Court Judge

Date of authentication: 27/02/2021
In an electronic form, authenticated electronically.