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

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IN THE FAMILY COURT
AT NORTH SHORE

I TE KŌTI WHĀNAU
KI ŌKAHUKURA

FAM-2019-044-000553
[2020] NZFC 7791

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[MELODY CURTIS] Applicant
AND	[JIMMY MCBRIDE] Respondent

Hearing:	8 September 2020
Appearances:	E Littlewood for the Applicant V Crawshaw QC for the Respondent
Judgment:	11 September 2020

RESERVED JUDGMENT OF JUDGE S J MAUDE
[Application for appointment of inquiror (s 38 Property (Relationships) Act) and application to strike out evidence]

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[1] Ms [Curtis] has made application to set aside relationship property agreement signed by she and Mr [McBride] on 6 March 2017.

[2] The agreement was signed some two years prior to the parties' separation, which occurred in January 2019.

[3] Ms [Curtis], if the agreement is set aside, seeks orders as to division of relationship property together with other compensatory orders pursuant to the Property (Relationships) Act (the Act).

[4] At issue at submissions hearing before me on 8 September was:

(a) Whether Ms [Curtis]'s application for appointment of an inquiror pursuant to s 38 of the Act should be granted.

(b) Whether a large portion of an affidavit sworn by a subsequent partner of Mr [McBride]'s and filed as a support affidavit by Ms [Curtis] should be removed, Mr [McBride] asserting that much of its contents are not relevant to the proceedings now before the court.

Background

[5] The parties lived in a de facto relationship from January 2014 to January 2019.

[6] An agreement was signed by the parties on 6 March 2017 pursuant to s 21 of the Act at a time when Ms [Curtis] claims that she was dependent upon Mr [McBride]'s support to gain a residency visa enabling her to remain in New Zealand with him and the parties' two children.

[7] The agreement provided that Ms [Curtis] would have no interest in:

(a) The [McBride] Trust.

(b) The [McBride] Investment Trust.

(c) Any other Trust that Mr [McBride] might benefit from.

[8] The agreement also provided that all property owned by each party at the date of execution of the agreement would remain their respective separate property.

In respect of Mr [McBride], such included:

(a) His shareholding in [McBride] Ltd.

(b) His shareholding in [another company].

[9] The parties separated in January 2019.

[10] Ms [Curtis] made application for a protection order pursuant to the Family Violence Act (the application opposed by Mr [McBride]).

[11] On 31 January 2019, Ms [Curtis] through her counsel made request for discovery.

[12] Ms [Curtis]'s request for discovery was pursued by her counsel on 4 April 2019.

[13] On 10 July 2019, Ms [Curtis] threatened court proceedings if discovery was not provided.

[14] What Ms [Curtis]'s advisors regarded as inadequate discovery was provided by Mr [McBride] on 16 August 2019.

[15] Ms [Curtis] filed the existing proceedings in September 2019.

[16] It was agreed by the parties that the time within which Mr [McBride] could respond to Ms [Curtis]'s proceedings would be extended to 20 October 2019 to enable the parties to engage in mediation.

[17] It was in October 2019 further agreed that Mr [McBride] would not need to respond to Ms [Curtis]'s proceedings until 20 November 2019.

[18] On 27 November 2019, Ms [Curtis] filed application for appointment of an inquiror pursuant to s 38 of the Act.

Parties' positions

Ms [Curtis]

[19] Ms [Curtis] argued that she executed the relationship property agreement on 6 March 2017 under duress, her evidence being that Mr [McBride] told her that he would not support her application for visa enabling her to remain in New Zealand with he and the children unless she signed the agreement.

[20] The background to the above, Ms [Curtis] said, was a relationship involving family violence making her a vulnerable person.

[21] In the context of that allegedly violent relationship, Ms [Curtis] claimed that she knew nothing of Mr [McBride]'s assets, and in particular those described above.

[22] She sought discovery from Mr [McBride], but has not received sufficient disclosure to inform her properly about Mr [McBride]'s Trust and company interests.

[23] The only satisfactory way to proceed, Ms Littlewood for Ms [Curtis] argued, was by way of appointment of an inquiror given delays in provision of discovery. The brief proposed for Mr Keith Goodall accountant, if appointed as inquiror, would involve significant inquiry authority and would require him to report on matters of fact in issue, including but not limited to:

(a) Clarification of the destination of relationship property funds paid by Mr [McBride] into [McBride] Ltd, [McBride] Trust, [McBride] Investment Trust and bank accounts in his name.

(b) The compiling of a consolidated balance sheet for the assets of Mr [McBride], Ms [Curtis], [McBride] Ltd, [the second company], [McBride] Trust and [McBride] Investment Trust.

(c) Provision of an opinion as to separation date and hearing date valuation of the shares of [McBride] Ltd and [the second company].

(d) Provision of an opinion as to separation date and hearing date value of Mr [McBride]'s digital assets, including Cryptocurrency investments.

[24] Ms [McBride]'s support deponent's evidence (a subsequent partner of Mr [McBride]'s) as to family violence is relevant, Ms [Curtis] argued, as it provides the factual backdrop to her vulnerability on execution of the parties' agreement and because:

(a) It provides evidence that Mr [McBride] sought to minimise any gain that Ms [Curtis] might obtain from relationship property division.

(b) It provides evidence of alleged property interests of Mr [McBride] not previously disclosed by him.

(c) It provides evidence of family violence against Ms [Curtis], drug and alcohol abuse and family violence against the parties' children and the deponent corroborating, Ms [Curtis] argued, her evidence of family violence.

Mr [McBride]

[25] Mr [McBride] denies any duress at the time of the agreement's signing.

[26] Mr [McBride] vehemently denies any family violence.

[27] Ms Crawshaw QC for Mr [McBride] urged that her client had provided significant disclosure already to Ms [Curtis]'s advisors, that set out in her submissions but not repeated by me in this decision.

[28] Ms Crawshaw QC argued that on 21 August she had advised Ms [Curtis]'s counsel of a list of disclosure ready to be provided on execution by Ms [Curtis] of a confidentiality undertaking.

[29] Mr [McBride], Ms Crawshaw QC argued, could not afford to contribute to an inquiry, the cost of which, Ms Crawshaw QC urged, could be up to $100,000.00. She categorised the inquiry as a fishing expedition.

[30] Ms Crawshaw QC urged that if further information was found by the court to be outstanding that then either there be:

(a) tailored discovery applications; or

(b) a s 38 inquiry funded by Ms [Curtis] alone.

Consideration

[31] The thrust of Ms Crawshaw QC's argument for Mr [McBride] was that the engagement of an inquiror was unnecessary and too costly and that discovery should be properly exhausted.

[32] The authority to order an inquiry is found in s 38 of the Act, which reads as follows:

> **38 Inquiries, and settlement of schemes**
>
> (1) The court may, on any application under this Act, appoint the Registrar of the court, or such other person as the court thinks fit, to make an inquiry into the matters of fact in issue between the parties, and to report thereon to the court.
>
> (2) A copy of every such report shall be given to the lawyer appearing for each party to the proceedings or, if any party is not represented by a lawyer, to that party. Any party may tender evidence on any matter referred to in any such report.
>
> (3) The court may, on any application under this Act, with the consent of the parties, appoint the Registrar of the court, or such other person as the court thinks fit, to settle a scheme in respect of the property comprised in the application and to submit it to the court for approval.
>
> (4) Fees payable to any person (other than the Registrar) appointed under subsection (1) or subsection (3), and reasonable expenses incurred,—
>
> (a) may be determined in accordance with regulations made under this Act; and

(b) are payable out of public money appropriated by Parliament for the purpose:

provided that, if the court thinks proper, it may order any party to refund to the Crown such amount as the court specifies in respect of those fees and expenses, and that amount shall be a debt due to the Crown by that party and, in default of payment of the amount, payment thereof may be enforced, by order of the District Court or the High Court as the case may require, in the same manner as a judgment of that court.

[33] I note as to discovery generally Kós J's observations in *Dixon v Kingsley* in which he indicated that the following principles were essential for governing relationship property litigation:[1]

(a) A robust approach should be taken to discovery consistent with the purposes and principles of the Act: the need for just division, but also inexpensive and efficient access to justice.

(b) Such discovery must not be unduly onerous.

(c) Such discovery must be reasonably necessary at the time sought.

(d) The scope of discovery should therefore be tailored to the need of the Court to dispose, justly and efficiently, of relationship property issues under the Act.

(e) More substantial discovery may well be ordered by the Court where it has reason to believe that a party has concealed information or otherwise sought to mislead either the other party or the Court as to the scope of relationship property. But even here, the scope of discovery should be no more than is required for the Court to fairly and justly determine relationship property rights. It is just that in such a situation, more is likely to be required to meet that requirement.

[34] Kós J's observations sit tidily with the s 1N principles contained within the Act, which read as follows:

1N Principles

The following principles are to guide the achievement of the purpose of this Act:

(a) the principle that men and women have equal status, and their equality should be maintained and enhanced:

(b) the principle that all forms of contribution to the marriage partnership, civil union, or the de facto relationship partnership, are treated as equal:

[1] *Dixon v Kingsley* [2015] NZHC 2044 at para [20].

(c) the principle that a just division of relationship property has regard to the economic advantages or disadvantages to the spouses or partners arising from their marriage, civil union, or de facto relationship or from the ending of their marriage, civil union, or de facto relationship:

(d) the principle that questions arising under this Act about relationship property should be resolved as inexpensively, simply, and speedily as is consistent with justice.

[35] The Family Court must take account of any power imbalances that leave one party unaware of the pool of potential relationship assets available for division, which imbalance can in itself make it difficult for an applicant to formulate an appropriate series of discovery questions.

[36] Both Ms Crawshaw QC and Ms Littlewood accepted that a s 38 inquiry is not a "last resort" only to be ordered if discovery and interrogatories have already been sought or pursued.

An inquiry is, they accepted, but one of the tools available to gather information to assist the Court.

[37] Ms [Curtis] categorised herself as having been in a relationship with:

(a) A financial knowledge imbalance.

(b) Family violence.

[38] It is not for this court at submissions hearing to make findings as to whether family violence occurred or not.

[39] There is evidence of not insignificant disclosure having been provided commencing in August 2019 by Mr [McBride] but not of disclosure between the period of January 2019 and August 2019 when initially sought.

[40] I am sympathetic to the view that a partner or spouse in a relationship where knowledge of financial information is not shared has resultant difficulty in knowing how to formulate discovery questions or to properly pursue discovery.

That situation can justifiably call for a "fishing exercise" of sorts.

[41] Plainly, the degree of imbalance in relationship and of possession of financial information informs the need for discovery and the need for an inquiry.

[42] As to an inquiry or not, where a partner has no knowledge of what to seek and distrusts the former partner's willingness to be frank and where discovery has not been forthcoming, the tool provided by s 38 of the Act is an important one.

[43] Mr [McBride] deposes that the companies [McBride] Ltd and [the second company] were used simply as vehicles for consultancy.

He may be correct, but Ms [Curtis] cannot be presumed to know such to be the case and does not, she argues, know the inquiry avenues needed to be proceeded with. An inquiror does.

[44] I return to my observation that it is not to be presumed that an applicant must exhaust discovery or interrogatory options before seeking an inquiry.

[45] It is clear that effort was made by Ms [Curtis] between January and July 2019 to obtain full disclosure without success.

[46] It is clear that the disclosure provided in August 2019 was not fulsome, if only because Mr [McBride] know in August 2020 offers significantly more disclosure than had been made available then.

[47] It is clear that a prima facie case is made out that Ms [Curtis] was subjected to controlling behaviour (rebuttable at hearing).

[48] It is alleged that Mr [McBride] has sought to minimise his risk to provision of further share in relationship property to Ms [Curtis].

[49] It is clear that the offer to provide more fulsome discovery on 21 August of this year was at the eve of hearing (21 August, with hearing occurring on 8 September).

[50] There is a strong suggestion permeating these proceedings (which suggestion is rebuttable) that Mr [McBride] has "dragged the chain".

[51] It is equally unclear why Ms [Curtis] has not been prepared to sign an undertaking of confidentiality so as to obtain the discovery offered by Mr [McBride] on 21 August.

[52] Without Mr [McBride]'s 21 August offer to provide detailed further discovery, I would have immediately granted Ms [Curtis]'s application to appoint Mr Goodall as an inquiror.

[53] I am sceptical of whether with an undertaking given by Ms [Curtis] full discovery will occur, but assuming that it does it may well be that an inquiry at significant cost will not be required or that an inquiry might be significantly refined so as to minimise cost.

[54] The discovery may be sufficient to simply enable Ms [Curtis] to engage her own accountant in the usual way to assist her formulate her case.

[55] I do not appoint an inquiror in this decision, rather I observe that the undertakings proposed by Mr [McBride] as amended at hearing should be given by her, discovery as offered being provided with then the ability to return to pursue the application for inquiry made by Ms [Curtis] in the event that the discovery provided is not adequate to enable the proceedings to progress in an appropriate and timely way.

[56] The undertaking that I view as appropriate for Ms [Curtis] to give is as follows:

> That all documents that are provided to her or her legal counsel will be treated as confidential, not to be disclosed to or discussed with anyone other than her lawyers, Ms Morris and Ms Littlewood, any other lawyer or legal adviser engaged by them and any accountant or professional adviser engaged by them and that the documents will not be used for any other purpose than the relationship property proceedings between the parties.

[57] Leave is given to return Ms [Curtis]'s application for an inquiry to me for a one-hour submissions hearing, in the event that inadequate disclosure is provided, Mr [McBride] on notice that inadequate discovery will very much raise the issue of costs.

[58] In the event that Ms [Curtis] and her advisers see fit to return to the court for the appointment of an inquiror, I anticipate that the brief sought will be refined at least in part as a result of the discovery provided as a result of Ms [Curtis]'s undertaking having been given.

Support deponent's affidavit

[59] There is much evidence given by Ms Owen in the affidavit provided by her that would not typically be regarded as irrelevant in the context of relationship property proceedings.

[60] Jealousy, recording of movements, power and control, drug and alcohol use, and family violence evidence would not typically be seen as relevant by this court in relationship property proceedings.

[61] At the heart, however, of Ms [Curtis]'s case to set aside the 6 March 2017 agreement is her assertion that there existed an imbalance of power and threat by Mr [McBride] to stand in the way of her ability to remain living in New Zealand with he and the parties' children.

[62] At the heart of Ms [Curtis]'s application for an inquiry is her assertion that Mr [McBride] was determined to ensure that she received less than her entitlement from the relationship property pool.

[63] Evidence of intent to hide or intent to minimise any claims or intent to inflict harm on Ms [Curtis] is highly relevant to the court when assessing:

(a) Imbalance of power on execution of the agreement.

(b) Whether there existed an intent to withhold information from Ms [Curtis].

[64] Evidence of a relationship involving family violence and control is highly relevant in the context of an argument that Ms [Curtis] was asked to sign the parties' agreement under duress.

[65] What evidence I allow from Ms Owen is not allowed as an indication that it is found to be true, rather allowed as the presentation of an assertion that is challengeable.

[66] I do not intend to set out the detail of each of the paragraphs contained within Ms Owen's affidavit, they being a matter of record, but proceed to determine below what is admissible and what is not admissible.

[67] Relevant and admissible is evidence depicting Mr [McBride]'s alleged determination to defeat Ms [Curtis]'s claims or of an intent to exert control over her. The following paragraphs are therefore in that category determined to be admissible:

Paragraph 7

Paragraph 9

Paragraph 11

Paragraph 12

Paragraph 14

Paragraph 15

Paragraph 16

[68] Relevant is evidence as to Mr [McBride]'s investments and assets, the following paragraphs therefore determined as admissible:

Paragraphs 20 – 26 inclusive

[69] Not relevant are paragraphs 27 to 29 inclusive.

[70] Not relevant are paragraphs 30 to 38 inclusive, which provide evidence as to behaviour relating to the parties' children.

[71] Not relevant are paragraphs 39 to 45 inclusive, which provide evidence as to Mr [McBride]'s alleged drinking or drug use.

[72] Evidence given by Ms Owen of Mr [McBride]'s alleged abusive or coercive behaviour toward her is arguably relevant as corroborative of Ms [Curtis]'s evidence of Mr [McBride]'s behaviour; however, in my view inclusion of it runs the risk of unnecessarily prolonging hearing by analysis of that relationship and of necessity, the particular dynamics at play in that relationship, so as to properly understand the relevance of Mr [McBride]'s behaviour to Ms Owen in the context of these proceedings.

I accordingly do not regard the evidence contained within paragraphs 46 to 81 of Ms Owen's affidavit as sufficiently probative to justify inclusion.

[73] Evidence of Ms Owen's phone calls to Ms Crawshaw QC's office is not relevant and is to be removed.

[74] All evidence that I have defined above as irrelevant or insufficiently probative to justify inclusion is to be deleted.

I direct that a redraft of the affidavit be re-sworn with the remaining paragraphs only included.

S J Maude
Family Court Judge

Signed 11 September 2020 at 3.45 pm