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

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

NOTE: PURSUANT TO S 169 OF THE FAMILY PROCEEDINGS ACT 1980, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT THAMES

I TE KŌTI WHĀNAU
KI PĀRĀWAI

FAM-2020-075-000044
FAM-2020-070-000017
[2021] NZFC 5816

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976 THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[NINA HARTLEY] Applicant
AND	[PHIL ELWOOD] Respondent

Hearing:	16 March 2021
Appearances:	L Kearns for the Applicant G Brant for the Respondent Mr Greenwood for [Company 2] Mr Stuart for [Company 3]
Judgment:	25 June 2021

RESERVED DECISION OF JUDGE C L COOK

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[1] This reserved decision follows an interlocutory hearing dated 16 March 2021.

[2] By way of background there have been ongoing relationship property, family proceedings and family violence proceedings between Ms [Hartley] and Mr [Elwood]. This application is to determine an application filed by Ms [Hartley] for third party discovery. It is also to determine a cross application by the third parties for costs and security for costs.

Background

[3] The parties commenced a de facto relationship in June 2002. They have one son, [Lawrence], who was born on [date deleted] 2002.

[4] The major asset in dispute,[Company 1], was incorporated on 16 June 2000. The company had one hundred shares which were originally owned by the respondent Mr [Elwood].

[5] The [Phil Elwood] Family Trust was set up on 18 September 2001 and 98 shares in[Company 1] were then transferred to the trust. The trustees of the trust are [Phil Elwood], [Kourtney Elwood] (Mr [Elwood]'s sister) and [Nia Emerson]. The beneficiaries of the trust are Mr [Elwood], children of Mr [Elwood], and persons named as beneficiaries of the will of Mr [Elwood].

[6] The parties separated finally on 9 October 2019. Ms [Hartley] has been residing in the former relationship home located at [address deleted]. Applications were filed under the PRA on 29 April 2020 by Ms [Hartley]. Ms [Hartley] has also filed an application to set aside a property sharing agreement which was entered into between the parties on 18 September 2001. That agreement provides that the shares in [Company 1] and trust are Mr [Elwood]'s separate property. Ms [Hartley] is also seeking division of relationship property and compensation for economic disparity. Her position is there has been a transfer of the parties' income post separation to two other companies [Company 2] and [Company 3].

[7] There have been two interim maintenance awards made following hearings. The first order, made on 8 June 2020, by His Honour Judge Coyle provided that Mr [Elwood] was to pay to Ms [Hartley] $4,000 per month. The second order, made on 11 December 2020, provided that Mr [Elwood] was to pay Ms [Hartley] a sum of $3,000 per month. There is a third application now filed for interim maintenance.

[8] There are also applications under the Family Violence Act that are defended and are soon to proceed to a hearing.

Current applications

[9] Ms [Hartley] filed an application for a discovery order against a non-party namely [Company 2], on 11 August 2020. The directors of [Company 2] are Mr [Russell Elwood] (Mr [Phil Elwood]'s father) and [Kourtney Elwood] (Mr [Phil Elwood]'s sister). Ms [Hartley] seeks:

(i) Financial accounts for the last three years.

(ii) Bank account statements for bank account number [details deleted] for the last three years.

(iii) All other bank account statements in respect of the company for the last three years.

(iv) FishServe ACE and quota balance sheets for the last three years.

[10] That application is opposed.

[11] Ms [Hartley] also seeks particular discovery against a non-party, namely [Company 3]. The director of this company is an associate of Mr [Elwood]. In respect of this company the application is for:

(i) Bank statements in respect of all company accounts for the period between January 2019 to date.

(ii) Financial accounts for the last three years.

(iii) Fish electronic monthly harvesting returns for the period June 2019 to date.

(iv) FishServe imputed trip dates and catch amounts for the period June 2019 to date.

(v) Licence fish receiver credit invoices from 1 January 2019 to date and corresponding unloading dockets.

(vi) All correspondence and documents received from and sent to MPI.

(vii) Financial accounts for the last three years for the associated company [Company 4].

[12] Those applications are opposed.

[13] There have been cross-applications filed by [Company 2] for security for costs and costs by way of an interlocutory application dated 18 September 2020. [Company 2] seeks that the applicant pay [Company 2]'s expenses (including solicitor and client costs):

(a) arising from and incidental to the application; and

(b) in complying with any other order made on the application; and

(c) the applicant gives security for costs of a sum that the court considers sufficient;

(i) by paying that sum into court; or

(ii) by giving, to the satisfaction of a registrar, security for that sum; and

(d) the application be stayed until the sum is paid or the security given.

[14] The application for non-party costs is opposed by the respondent Mr [Elwood].

[15] [Company 3] has also filed a cross application they seek that the applicant pay [Company 3]'s expenses:[1]

(a) arising from and incidental to the application; and

(b) in complying with any other order made in the application; and

(c) requiring the applicant to give security for costs of a sum the court considers sufficient;

(i) by paying that sum into court or;

(ii) by giving to the satisfaction of a registrar security for that sum; and

(d) the application may be stayed until the sum is paid or security given, as the case may be.

[16] On 16 March 2021 this matter proceeded to a submission only hearing to determine the outstanding applications, namely the application for security and the application for costs against a non-party. There has been a considerable delay since the hearing as there have been post hearing memorandums and applications filed which required determination. I have dealt with this by a separate decision.

Legal position

[17] I deal firstly with the application for security for costs filed by the third party.

[1] By an application made on 21 September 2020.

[18] Rule 207B of the Family Court Rules 2002 (FCR) provides that r 5.48 of the District Court Rules 2014 (DCR) applies to family court proceedings. Rule 5.48 of the DCR is replicated below:

> **5.48 Power to make order for security for costs**
>
> (1) This rule applies if the court is satisfied, on the application of a defendant,—
>
> (a) that a plaintiff:
>
> (i) is resident outside New Zealand; or
>
> …
>
> (b) that there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if the plaintiff is unsuccessful in the plaintiff's proceeding.

[19] The applicant's position is that a third party does not become a defendant but merely a party to the action. Counsel refers to the decision of *Tally NDC International NV v Terra Nova Insurance Co Ltd.*[2] The submission from Ms Kearns therefore is that a third party is not a defendant for the purposes of security for costs and is not entitled to such an order. Further, that this applies even though there is jurisdiction to order a plaintiff to pay the third party's costs at the end of the trial.

[20] Even if there is jurisdiction to allow security for costs, the applicant's position is that the grounds have not been made out pursuant to r 5.48(1)(b). That r 5.48(1)(b) allows for an order for security for costs to be made if "there is reason to believe that a plaintiff will be unable to pay the costs of the defendant if a plaintiff is unsuccessful in the plaintiff's proceeding." That this is a two-stage test;

(a) Firstly, the court must be satisfied that the threshold is met; that there is reason to believe that, if unsuccessful, the plaintiff may not be able to meet an adverse costs order.[3]

(b) Secondly, the court must decide whether to exercise its discretion.

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2 *Taly NDC International NV v Terra Nova Insurance Co Ltd and others* [1985] 1 WLR 1359 (CA).

3 *Nev Mellon Electrical Ltd AAPC NZ Pty Ltd* HC Wellington CIV-2005-485-268, 13 December 2005 at [15].

[21] The applicant submits that difficulty in payment is not synonymous with inability to pay. That, as most plaintiffs are likely not to be able to pay costs with comfort, something more is required than a "reason to believe" that a plaintiff will be unable to pay the successful defendant's costs. That the plaintiff must be "outside the usual run of plaintiffs".[4]

[22] A plaintiff who is asset rich, but cash poor, is not unable to pay costs for the purposes of r 5.48(1)(b). The applicant's position is that the High Court has made it clear that security for costs is relatively exceptional and where it is likely to result in the denial of access to justice it is entirely exceptional.[5]

[23] The applicant also refers to security for costs in a relationship property context. The applicant's position is that there is an element of litigation by exhaustion in this case and that it is an abuse of process to seek security for costs merely as a tactical weapon to delay proceedings. That increasingly the courts will frown on such applications.[6]

[24] In summary, the applicant's position is that:

(1) There is no jurisdiction pursuant to the rule.

(2) Even if there is jurisdiction, Ms [Hartley] is not impecunious. Mr [Elwood] has agreed on relationship assets being valued and divided equally between them;

(a) There is the property at [address deleted] which is accepted as relationship property. It has an estimated value of $1.1 million.

(b) There is a property at [address deleted] which has been sold.

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4 *JAG v CBAR* FC North Shore FAM-2009-044-920, 17 May 2011 at [114], applying *McDonald v FAI (New Zealand) General Insurance Co Ltd* HC Auckland, CP507/95, 12 September 1997.

5 *Highgate on Broadway Ltd v Devine* [2012] NZHC 2590.

6 *JAG v CBAR*, above n 4.

(c) There is a wharf adjacent to the [recently-sold property] valued at $20,000.

(d) There is a KiwiSaver account Ms [Hartley] has had a valuation $48,171.28 October 2019 for her KiwiSaver. Mr [Elwood] has a KiwiSaver balance of $1,460.

(e) There are chattels in the family home. There are also vehicles and fishing equipment.

(f) Then there are the disputed shares in [Company 2]. Ms [Hartley]'s [forensic accountant] valued those shares at $2.2 million in total.[7]

[25] There is also alleged to be the separate property for Ms [Hartley]; a 1970 Holden Monaro valued at $85,000 and a Ford Raptor valued at $60,000.

[26] The position for the respondent is reasonably neutral in respect of the application for security, admitting that there are assets such as the [recently-sold property] which could be sold and there are assets which are available for division.

[27] The position of [Company 3], in seeking security for costs, is that there is discretion pursuant to r 143 of the FCR for the court to order that the applicant pay the expenses (including solicitor and client costs) —

(a) arising from and incidental to the application; and

(b) in complying with any other order made on the application.

[28] That the discretion to order security for costs/cost on discovery is logical. That a non-party has no ability to claim costs against a successful party as they are not party to the litigation itself. That a non-party is otherwise forced to incur costs without having any "skin in the game" and therefore without an ability to claim costs against

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7 In his affidavit of 20 May 2020.

an unsuccessful party. That consistent with this, an order against non-parties for discovery will be inappropriate until discovery between the parties is complete.

[29] The position of [Company 3] is that the court's discretion towards costs incurred by non-party is further evidenced by r 148 FCR, which relates to costs of production of documents by a non-party if discovery is ordered.

[30] In dealing with the issue of security, [Company 3]'s counsel Mr Stuart argues that *Tally* can be distinguished in that it is not binding in this jurisdiction and it relates to a third party as opposed to a non-party. That non-parties position in having their costs met is provided for in the discretion available under r 143 FCR, and that *Tally* is decided with respect to specific applicable UK court rules with respect to a third party not being granted leave to defend.

[31] That the FCR apply provisions of the DCR only when specifically incorporated within the FCR pursuant to r 5A; where any rule in the DCR is applied it is with all necessary modifications. That the definition of proceedings in the DCR is not incorporated into the FCR. That there is no definition of proceedings in the interpretation provision in the FCR, which provides a definition for application and interlocutory application only. But of note is r 207 of the FCR which applies rules 14.2 to 14.12 DCR, and which provides this court with a very wide discretion to determine costs of:

(i) any proceeding;

(ii) any step in the proceeding;

(iii) any matter incidental to the proceedings.

[32] That it is anathema for a non-party to not be permitted to seek security for its costs when, as a starting point the guiding principle is that an applicant will meet a non-party cost both in providing discovery and in responding to the application itself, otherwise a non-party has no ability to claim costs against the applicant. That this is aggravated where an applicant is impecunious.

[33] Counsel submits that r 14.8 of the DCR, with respect to the power to award security for costs, can apply vis-à-vis the applicant and these parties. That in any event non-party discovery is a proceeding in its own right and accordingly a plaintiff/defendant relationship result. While administratively this occurs under the notice of proceedings. It is in effect a proceeding against a person or entity who is not, until that application is filed, before the court.

[34] Further, that r 8.22 (costs of discovery) of the High Court Rules refers to costs in advance, which it is submitted is security for costs. That even if this is considered an interlocutory proceeding, costs are not excluded (in reliance of r 207 of the FCR) which is consistent with there being jurisdiction to award security.

[35] The submissions of [Company 3] are that the applicant has demonstrated impecuniosity by her own admission.[8] That she is significantly in debt (in the sum of $103,445.96) and that her debt is increasing. That there has been delay in the sale of the [recently-sold property]. That while the applicant has indicated a willingness to pay costs for non-party discovery from her relationship property, that is insufficient security and an insufficient response to the guiding principle. That there is likely to be ongoing delay in the relationship property and that there is likely to be ongoing substantial legal costs.

[36] [Company 2] assumes jurisdiction. They also rely on the affidavit sworn by Ms [Hartley] in respect of a relationship property proceeding; that is, that she is completely dependent on payments of approximately $4000 per month, that she is significantly in debt, and that she has increasing debt. That by her own evidence Ms [Hartley] is impecunious; at worst insolvent. They are seeking security for costs of $12,000.

Decision: security for costs

[37] Rule 5.48 specifically refers to a plaintiff and a defendant. I do not accept, even on [Company 3]'s argument, that a non-party application for security for costs is

[8] Ms [Hartley]'s affidavit of 30 July 2020 in support of an application for the Family Proceedings Act claim, at [3]-[9].

a proceeding in its own right and that a plaintiff/defendant relationship exists. If that had been the intention of the rule, the rule would have described the relationship in relation to proceedings as opposed to the specific reference to plaintiff or defendant. It goes well beyond the wording of this rule to extend this to a non-party proceeding. Therefore I accept the applicant's argument as to the difficulty with jurisdiction.

[38] I agree that the *Tally* decision is not binding in the New Zealand jurisdiction and that the decision and the Westlaw Commentary appears to refer to third parties seeking security for costs as opposed to non-parties. A third party joining civil proceedings and seeking security for costs is distinct from a non-party in Property Relationship Act proceedings seeking security for costs. Therefore, I consider that the statement and commentary about how the rule applies to third parties and the reference to *Tally* can be distinguished from the facts in these proceedings.

[39] I consider that r 5.48 of the DCR does not enable a non-party in Property Relationship Act proceedings to seek security for costs. However, as referred to in the submissions of [Company 3] r 143 of the FCR provides that the payments of non-parties expenses is at the discretion of the judge. That discretion in my view can be extended to the judge directing *when* payment of expenses is to occur. For example, requiring a party seeking discovery to pay the non-party's expenses prior to the non-party providing the discovery. Therefore, the court may make a costs order which has the effect of a security order.

[40] If the court exercises its discretion to order costs, how should that discretion be exercised? The court is not constrained by the considerations which apply to security for costs. In my view, the determination must be related to the breadth of the request for discovery, the financial position of the non-party, and the estimated expenses associated with the discovery.

[41] It is therefore necessary for me to examine the merits of the application for discovery and then come back to the issue of costs.

Discovery against non-party

[42] The relevant starting point is r 143 of the FCR which provides:

> **143 Order for particular discovery against non-party after proceedings commenced**
>
> (1) Subclause (2) applies if it appears to the court, at any stage of the proceedings (whether from evidence or from the nature or circumstances of the case or from a document filed in the proceedings) that a document or class of documents relating to a matter in question in the proceedings may be, or may have been, in the possession, custody, or power of a person who is not a party to the proceedings.
>
> (2) The court may order the person who may have, or may have had, the document or class of documents in that person's possession, custody, or power, to file and serve on every party to the proceedings an affidavit stating—
>
> (a) whether that document or class of documents is or has been in that person's possession, custody, or power; and
>
> (b) if the person had the document but has now parted with it, when the person did so and what has become of it.
>
> (3) An application for an order under subclause (2) must be made by way of an interlocutory application, and notice of the application must be given—
>
> (a) to the person from whom discovery is sought; and
>
> (b) to every other party who has filed an address for service.
>
> (4) If an order is made under this rule, the court may also order that the applicant pay to the person from whom discovery is sought that person's expenses (including solicitor and client costs)—
>
> (a) arising from, and incidental to, the application; and
>
> (b) in complying with any other order made on the application.

[43] I summarise the relevant principles as follows:

(1) Discovery must be relevant to the issues in the proceeding, reasonably necessary at the time it is sought, and not unduly onerous.[9]

[9] *MAC v MAC* FC Rotorua FAM-2007-063-652, 20 June 2011.

(2) As with discovery against a party, discovery against a non-party is not to be used as a fishing expedition.[10] However, it is not a fishing expedition if it is directed to obtain information as to a fact relevant to an issue raised in the proceedings.[11] In *Jackson v Gilbertson* her Honour Judge Skellern noted that "relevance is the test for discovery" and treated discovery against a non-party the same as discovery against a party.[12] The definition of relevance is referred to in the decision of *Compagnie Financiere Du Pacifique v Peruvian Guano Co*:[13]

> [44] "… every document relates to the matters in question in the action, which not only would be evidence upon any issue, but also which … contains information which may – not which must – either directly or indirectly enable the party requiring the affidavit either to advance his own case or to damage a case of his adversary".

(1) Further, the applicant refers the court to the Property Relationship Act principles that proceedings "should be resolved as inexpensively, simply and speedily as is consistent with justice".[14]

(2) The applicant has also referred to *Biggs*, where the court found that discovery should be proportionate to the subject matter and the parties must co-operate to facilitate discovery and manage its scope and burden.[15]

[45] The applicant's position is that this case falls within the category of cases where the court has reason to believe that a party has concealed information or otherwise sought to mislead the other party or the court as to the scope of the relationship property. Therefore, more substantial discovery may be ordered. That while the scope of discovery should be no more than is required for the court to fairly

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[10] *Adams v Adams* [2014] NZFC 10654.
[11] *Jackson v Gilbertson* [2015] NZFC 5096.
[12] *Jackson v Gilbertson* [2013] NZFC 5595.
[13] *Compagnie Financiere Du Pacifique v Peruvian Guano Co* (1882) 11 QBD 55 at 63.
[14] K Swadling *Fisher on Matrimonial and Relationship Property (NZ)* (online loose-leaf ed, LexisNexis) at 19.37A.
[15] *Biggs v Biggs* [2018] NZCA 546 at [30].

and justly determine relationship property rights, this is a situation where more is required to meet that requirement.

[46] The principle that parties will disclose relevant property and cooperate in ascertaining and dividing relationship property as inexpensively, simply and speedily as possible does not preclude tailored discovery of extensive scope, where that is proportionate to what is at stake and reasonably necessary to ascertain and divide relationship property.

[47] In *Blackley v Blackley*, the court determined that it was appropriate to look beyond financial accounts where there was a basis for doing so:[16]

> [20] With regard to these transactions, in a straight forward property case with no apparent reason for further enquiry, it might be either of very limited relevance, or oppressive, to go beyond the key financial records and to delve in depth into transactions that occurred four years ago before separation. In this regard, I agree entirely with Nation J in *Biggs v Biggs* that a spouse should not be assumed to be dishonest, and the subject of an audit, simply because of a separation. However, in a complex case, with clear evidence and legal basis to show reason for further enquiry, it will in my view generally be appropriate to order the provision of such further records, and for the Court to take a robust approach to such an order. This is consistent with the comments of Kós J in *Dixon v Kingsley* and also with the Court of Appeal decision in *M v B* where Robertson J said the law relating to relationship property disputes requires total disclosure and co-operation.

[48] In this case the applicant's position is that the discovery sought "directly relates to matters in question in the proceedings and should be provided."[17]

[49] Dealing first with the application against [Company 2], Ms Kearns in her submissions relies on the following:

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[16] *Blackley v Blackley* [2018] NZHC 2011.
[17] Submissions at [32].

(a) In April 2019 Mr [Elwood] took numerous steps to remove Ms [Hartley] from [Company 1], including cancelling the vessel registrations and ceasing trading through the company.

(b) Mr [Elwood] confirms in his evidence that one reason why [Company 1] made a loss for the 2020 financial years was that "dad through his company [Company 2] is now charging [Company 1] a market lease for crayfish quota".[18]

[50] However, there is an artificial increase on the lease, making it almost double the previous year. Mr [Elwood] conceded in a text to Ms [Hartley] that he paid the $236,000 lease twice.[19]

[51] During their relationship, Ms [Hartley] paid the lease of $230,000 to Mr [Elwood]'s father every year on behalf of [Company 1]. The payments never exceeded that amount. The additional payment of $247,500 appears to be simply moving funds out of [Company 1] to[Company 2].

[52] In 2018 there was a quota lease top up of $460,000 which was not paid until June 2019.[20] There was a further top up of $517,000 for the 2020 financial year. The applicant's submission is that those costs were effectively ruled out as contrary to industry practice by Ms [Elwood]'s own expert Mr Mark Peycher.

[53] [Megan Dunstan], Mr [Elwood]'s accountant, stated that the lease fees for the 2020 financial year have been paid for in full. In this affidavit it was also noted that [Company 1] paid a total of $275,000 to [Company 2] in respect of CRA8 ACE lease costs during the 2020 financial year. However,[Company 2] has not rendered an invoice to [Company 1] during the 2021 financial year due to issues arising out of what a fair market price will be. Ms [Hartley]'s position is that Mr [Elwood] is able to manipulate his father as a result of his father's head injury and subsequent impairment.

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[18] Narrative affidavit [Phil Elwood] 23 March 2020.
[19] Affidavit Ms [Hartley] 24 April 2020.
[20] Affidavit Ms [Hartley] 31 July 2020 at [19].

[54] Her counsel's submission also say that there have been other concerning transactions involving [Company 2]. On 23 March 2020 [Company 1] received funds totalling $320,705 from [Company 5]. Following those payments [Company 1] transferred funds totalling $247,500 to [Company 2]. [The applicant's accountant] , has sworn two affidavits where he analyses the transfers made by Mr [Elwood] to [Company 2] in the period 1 April 2009 until 14 February and considers the [Company 1] Westpac bank account detailed transfers totalling $960,000 from [Company 1] to [Company 2] for the period 28 June 2019 to 15 January 2020. After allowing for the annual lease payment of $230,000, the excess transfers total $730,000. This confirms a dramatic reversal of [Company 1]'s equity, its shareholder's equity, and a diminution of $680,460.

[55] The respondent has alleged that his father paid a deposit for his daughter's house, which the applicant alleges his daughter has advised came from her father. The respondent has conceded that [Company 2] has at least on one occasion repaid $100,000 to him when he requested it.[21]

Discovery sought from [Company 3]

[56] Ms [Hartley] is seeking discovery from [Company 3] on the grounds that:

(1) Mr [Elwood] took numerous steps to remove Ms [Hartley] from [Company 1], including cancelling the vessel registrations and ceasing trading through the company.

(2) At this time [Megan Dunstan] became the bookkeeper for [Company 1] and she was paid excessive sums of $18,460.[22]

(3) Since around April 2019 Mr [Elwood] almost ceased operating [Company 1] and has put the majority of his business through [Company 3]. Mr [Elwood] confirmed in his evidence that [Company 1] has in recent times been contracting with [Company 3]. He denies

[21] Notes of Evidence 29 June 2020, line 44 interim maintenance hearing.
[22] Affidavit Ms [Hartley] sworn 24 April 2020.

that [Company 1] operates on a cash basis. He does accept that he allows [Company 3] to use one of [Company 1] fishing vessels without payment as part of a fairly informal contractual relationship he has with them. Ms [Hartley]'s suspicion is that most of the business is based on cash transactions.

(4) The applicant alleges that Mr [Elwood] was one of the parties involved in an investigation by Ministry for Primary Industries where they were found to be underreporting how many fish they were catching in Thames and unlawfully selling them. Mr [Elwood] confirmed in his evidence that he had been interviewed in a matter involving fishing. He claimed that he had done nothing wrong and did not expect to be charged.

(5) [Company 3] was a business that was failing previously and that Mr [Elwood] injected capital to allow it to continue.[23]

(6) Mr [Elwood] deposed that on 3 April 2020 [Company 3] paid on his instructions a sum of $28,357.54 into Mr [Elwood]'s girlfriends bank account.[24] Ms [Hartley]'s position is that in 2006 Mr [Elwood] drew on the mortgage for himself and Ms [Hartley]'s home to purchase a 3-tonne snapper quota which was transferred to [Company 2]. That quota was also sold to [Marleen Cree], Mr [Elwood]'s friends' mother.

[57] The applicant filed supplementary submissions on 9 March alleging that there had been unresolved issue of discovery between the applicant and the respondent and that she was seeking further disclosure relating to the MPI investigation involving Mr [Elwood]. She noted that it was directly relevant to one of the key issues, namely the applicant's contention that the respondent is fishing for cash to hide income.

[58] In summary, Ms [Hartley]'s position is that there is evidence supporting her claims that the assets/value of [Company 1] are being transferred to [Company 2] and

[23] Affidavit Ms [Hartley] sworn 24 April 2020.
[24] Third narrative of [Phil Elwood] 22 May 2020.

[Company 3]. In the last half of 2019, [Company 1] transferred almost $1 million in funds to [Company 2]. Ms [Hartley] has produced evidence showing funds being transferred to Mr [Elwood]. In addition, there is evidence that Mr [Elwood] is fishing for cash and business being diverted to [Company 3].

[59] Mr Brant in response and on behalf of Mr [Elwood] says that the issue of discovery has been resolved. That Mr [Elwood] did not refuse to produce unloading dockets. That he gave evidence that it was not his practice to retain them, that he did not have them, and that they are not relevant to determining any issue in the proceedings. That he should be presumed to be honest and that the presumption should not be deemed to be rebutted on the basis of bald assertions by the applicant. In relation to the MPI investigation he has not been charged, does not expect to be charged, and will disclose the information if he is charged.

[60] Mr [Elwood] accepts that funds were paid to [Company 2] by[Company 1] rather than being transferred that were for payments for the CRA8 crayfish annual catch entitlement. That [Company 1] bank records have been produced. In addition, the respondent has produced all of the relevant invoices rendered by [Company 2] since separation. They have gone so far as to cross reference [Company 1] ACE records from Fish Serve with invoices from [Company 2] and other third parties in the 2001 to 2021 financial years so as to fully explain everything to the applicant.[25]

[61] The respondent's position is that the rates charged by [Company 2] for ACE are in market range and that he had produced extensive evidence showing that [Company 1] was charged for ACE obtained from entities other than [Company 2] and what it charged for the small amount of ACE that it sold to other fishing operators.

[62] Further, that the applicant can make the arguments she wishes to make without any further information from [Company 2]. That all of the information necessary to make the argument that one or some of the payments made by [Company 1] to [Company 2] were improper is already in evidence.

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[25] Respondent's affidavit 28 August 2020 at [2] and [16].

[63] The respondent's position is that there is no evidence whatsoever the respondent is fishing for cash. In respect of funds being paid by [Company 3] to Mr [Elwood]'s girlfriend, the position is that [Company 3] made a payment into Ms [Dunstan]'s bank account being money owed to [Company 1]. The applicant knows this because she was informed of it as part of the respondent's ongoing disclosure. The reason for the payment being made is set out in the respondent's evidence along with the correspondence remittance information provided to [Company 3] to [Company 1].

[64] In respect of the allegation that [Company 1] is trading through [Company 3], the respondent's position is that during 2016 to 2021 financial years [Company 1] operated both the crayfish operation in the South Island and a modest operation in the North Island catching fish such as snapper, kahawai and the like. From the 2020 financial year [Company 1] started contracting to [Company 3] rather than running its own fishing business. The reason for this and for including the registration of a [Company 1] vessel in the name of [Company 3] is canvassed at length in the evidence and previous submissions but boiled down to it becoming convenient for the respondent who is illiterate.[26] All remittance information from [Company 3] to [Company 1] which show all payments made by [Company 3] whether to [Company 1]'s account or Ms [Dunstan]'s account have been disclosed and is in the evidence. It follows that the respondent did not cease trading through [Company 1] and the respondent is not sure that the applicant really wishes to maintain that allegation. The evidence is also that [Company 1] recently established a fish vending business.

[65] The respondent's position is that the increase in ACE costs is within market range and all transfers to [Company 2] by [Company 1] are in fact payments for ACE and all supporting invoices have been produced. In summary the respondent's position is as follows:

(1) The charges for ACE from [Company 2] are within market range.

[26] Respondent's submission 4 March 2021 at [22](b).

(2) If the applicant wishes to make assertions to the contrary, then nothing can be further achieved in terms of the provision of the disclosure or discovery sought.

(3) That there has been extensive discovery provided already, being all the invoices from [Company 2] and all the payments from [Company 1] to [Company 2]. The reconciliation extensive evidence on ACE matters (including market rates) have been provided to the respondent.

(4) That the applicant can pursue her argument that [Company 1] have being paying too much for ACE without the need for any further documentation.

(5) In respect of the allegation that Mr [Elwood] gave his daughter a house deposit, the applicant is in receipt of records from the [Company 1] bank account (the respondent does not have a personal bank account). That no transfer of funds from the respondent's father to the respondent's daughter is relevant in determining any issue in these proceedings.

(6) It is acknowledged that [Company 2] transferred $100,000 to [Company 1] in the 2020 financial year. This was because [Company 1] ran short of money for operational purposes and [Company 2] agreed to return the funds. All this meant was that [Company 1] owed [Company 2] an additional $100,000.[27]

(7) In respect of Ms [Dunstan]'s charges, the respondent's professional charges are higher as a result of his illiteracy.

(8) In respect of business being diverted throughout [Company 3], the respondent has at all times admitted that he fished on a contract basis for [Company 3]. There is not a question of diverting business to

[27] Respondent's narrative affidavit 28 August 2020 at [21].

[Company 3] and there is no evidence to support a bald assertion that the respondent is fishing for cash.

(9) In respect of the allegation about the MPI raid, the respondent has not been charged and does not expect to be, therefore there is no information to provide.

(10) In respect of the allegation that [Company 3] was a failing business, there is no evidence before the court to support the position that the respondent has financially supported AFL. The fact that this allegation is even raised underscores the weak evidential basis for the discovery application. Mr [Elwood]'s position is that under oath he has said that neither himself nor [Company 1], nor the trust has gifted or loaned either a director or [Company 3] any money. Nor is there any indication that the respondent has injected capital into [Company 3].

(11) In respect of the allegation about the snapper quota, the respondent's position is that is a bona fide issue and if the applicant can establish an interest in the [Phil Elwood] Family Trust and that this trust owns the snapper (which is denied), then subject to any objection from Mr [Elwood] senior the quota will be transferred back to the trust.

Position of [Company 2]/ [Company 3]

[66] [Company 3]'s position is that the respondent [Phil Elwood] has disclosed monies paid to his company [Company 1] through its association with [Company 3]. That the extent of the discovery given by Mr [Elwood] is extensive and cuts across the need for non-party discovery.

[67] In respect of the financial accounts for [Company 4], it was removed from the company's office register on 30 July 2020. That no non-party discovery application has been filed against that company and there is no evidence to sustain the allegation.

[68] [Company 3]'s position is that the applicant's evidence purports to paint a conspiracy between the respondent [Company 3] and [Company 2] which is based on supposition, assumption and/or hearsay evidence. It is submitted that none of this can be accepted against the extensive discovery already provided by the respondent in terms of [Company 1]'s relationship to [Company 3].

[69] In oral submissions counsel also highlighted the privacy issues in providing the information sought, as well as the logistics and time which will be required to provide the information. That there is insufficient evidential foundation for the applicants to see the other side of the ledger and to satisfy the requirement for relevance for the documentation.

[70] Mr Greenwood on behalf of [Company 2] argued that the scope of the disclosure was substantial and that [Company 2] were happy to provide some information or the information sought provided costs incidental to the application are met. There is no evidence to point to a business relationship between [Company 2] and [Company 1] and no evidence of a joint venture.

Additional evidence

[71] Following the hearing being concluded I received a number of memorandum of counsel and an application to admit further evidence by the applicant of the sale of [a boat] to Mr [Elwood] senior, for what the applicant says is an undervalue.

[72] I have allowed the evidence to be admitted for the reasons as set out in my decision. Whilst the transaction does not involve [Company 2] the respondent's counsel accepts that the [Company 2] accounts show a debt owing by [Company 1] to [Company 2], which must be in error.

[73] This evidence supports the applicant's position about the financial intermingling, and lack of clear arm's length commercial arrangements between the respondent and his father and/or [Company 2]. The issue is the relevance for a third party discovery application. It is clear the boat has been disposed of. There will be a dispute as to the value it has been disposed of, which can be dealt with at the

substantive hearing. The sale agreement records the transaction as between [Company 1] and Mr [Elwood] senior. Therefore, whilst I agree that the circumstances around the sale and the lack of disclosure at the time of the sale, adds further suspicion. I do not view it as being a determinative factor to the application for third party discovery.

Determination

[74] The following facts are self-evident.

(1) Mr [Elwood] by his actions did remove Ms [Hartley] from the company.

(2) [Company 2] has dramatically increased the amount that it is charging for ACE lease costs. The nature of the financial affairs between [Company 1], [[Company 2] and [Company 3] may come under substantial scrutiny over the course of the hearing however that is not the issue that I need to determine.

[75] I accept the non-parties position that the requirements of the discovery sought are onerous.

[76] The fundamental issue is whether this is a case where, due to the respondent's conduct, there is a legal basis to show reason for further enquiry.

[77] In this case I agree that a number of questions have arisen over the nature of the arrangements between Mr [Elwood], [Company 2] and [Company 1]. In a sense Mr [Elwood] has, by removing Ms [Hartley] from her role in the company brought the focus very much upon his financial conduct. His ongoing actions such as selling [a boat] to his father to offset a debt owing to his father, yet the debt appearing in the books of [Company 2] really do not assist and I can see grounds for the concerns of Ms [Hartley].

[78] I also agree that some of the transactions raise questions about the arm's length or commercial relationship between the parties and I put it no stronger than that. For example, [Megan Dunstan] withdrawing $40,000 from [Company 1]'s bank account

in cash deposit into her bank account and the $28,000 paid to [Charlotte Baylee] (Mr [Elwood]'s girlfriend) from [Company 3] on 3 April 2020. These are simply allegations. There is an explanation provided by the respondent and the evidence has not been tested but I agree it does raise some questions.

[79] The relevant issues are:

(1) is the discovery sought relevant; and

(2) can it be addressed by the information which has been already provided.

[80] The evidence is that Mr [Elwood] has one bank account. That funds paid to himself personally or to the company will come through that bank account.

[81] I accept the respondent's argument that the evidence is currently in front of the court. There is a clear evidential foundation to cross-examine Mr [Elwood] as to payments and the rationale behind those payments.

[82] I struggle to see any further information which can be provided which will assist the applicant in proving her case. If funds are transferred back to Mr [Elwood] in some way, then they would have to be by cash, or payments to third parties associated with Mr [Elwood] as he only operates one bank account. The court has one side of the ledger already. However that may not preclude separate arrangements to benefit Mr [Elwood] having been made for example future benefit.

[83] I also need to take into consideration the onerous and expensive nature of the information sought.

[84] I accept the non-parties' position that providing the information will be onerous and that there is also the issue of commercial sensitivity. If the non-parties want to redact the information provided, that will raise further concern in respect of its veracity. Understandably, there are also concerns about providing it to counsel. While Ms Kearns can provide an undertaking not to discuss it, that in itself raises issues about her obligation to provide and share the information with her client.

[85] I have reached a view that the situation with [Company 2] can be distinguished from that of [Company 3] for the following reasons:

(a) The applicant has all the bank account information of Mr [Elwood].

(b) The issues identified against[Company 1] can be in my view dealt with by cross-examination.

(c) The discovery sought is onerous and has commercial sensitivity.

[86] However in respect of [Company 2] given the interrelationship between [Company 1] and [Company 2] and the query about how the sale of[a boat] is recorded I have reached a view that further limited disclosure is justified.

[87] I limit that information to the financial accounts for the last three years for [Company 2]. If that information raises further issues that can be identified which relates to further discovery then the matter may be brought back in front of myself for further directions.

[88] The reasonable costs of providing that information is to be borne by the applicant. The accounts are to be provided to Ms Kearns, not to be further copied if there is information which relates to third parties of a commercially sensitive nature. Counsel are to discuss how that information can be provided, if no agreement can be reached then the parties can seek further directions on seven days notice.

[89] I will consider the issue of costs. The non-parties and respondent can provide any final submissions in respect of costs within 21 days the applicant can respond 14 days thereafter. Given the nature of my decision and the limited nature of discovery, that in my view removes a need to consider the timing of costs payments and they can be considered in the normal way.

C L Cook
Family Court Judge