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

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IN THE FAMILY COURT
AT TAURANGA

I TE KŌTI WHĀNAU
KI TAURANGA MOANA

FAM-2021-070-000074
[2023] NZFC 1340

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	[EDDIE BROOKE] Applicant
AND	[ROSIE JORDAN] Respondent

In-chambers:

Appearances: J Howell for the Applicant
P Williams for the Respondent

Judgment: 14 February 2023

AMENDED RESERVED JUDGMENT OF JUDGE S J COYLE
[IN RELATION TO APPLICATION TO EXTEND TIME – s 24 PROPERTY (RELATIONSHIPS) ACT 1976]

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[1] Mr [Brooke] and Ms [Jordan] have been in a lengthy de facto relationship; Mr [Brooke] believes for 22 years, and Ms [Jordan] for 17 years. The parties separated on [date deleted]2017. However, it was not until July 2022 that Mr [Brooke] filed applications under the Property (Relationships) Act 1976 seeking division of the parties' relationship property. Pursuant to s 24(1)(c) of the PRA, Mr [Brooke] should have filed his application within three years of the date of separation; namely, by [date deleted] 2020. Because he filed 18 months after that date, he seeks that the Court make an order extending the time for him to file his application pursuant to s 24(2) of the PRA. Ms [Jordan] deposes the interlocutory application to extend time, and additionally has made her own interlocutory applications seeking:

(a) That the proceedings are transferred from the Tauranga Family Court to the New Plymouth Family Court pursuant to r 186 of the Family Court Rules 2002.

(b) An application to remove a caveat lodged by Mr [Brooke] over a property at [address 1 deleted] lodged by him on 13 September 2017 (pursuant to s 42 of the PRA and s 142 of the Land Transfer Act 2017).

(c) An application to discharge an order that the notice of claim not lapse pursuant to s 143 of the LTA 2017.

[2] Whilst those four applications had been set down for a submissions only hearing, Mr Howell conceded on behalf of Mr [Brooke] that his opposition to the transfer application was "weak". In effect, therefore, I am able to make an order transferring the proceedings to the New Plymouth Family Court unopposed. Additionally, Mr Williams conceded that if the application to extend time is granted, then the LTA applications would not be pursued by his client if she accepted that the notice of claim should remain. However, if the notice of application to extend time is declined, then Mr Howell conceded that the LTA applications should be granted, and the caveat lodged by his client over the [address 1] property should be withdrawn. Thus, the sole issue that I have to determine in this hearing is whether to extend the time for Mr [Brooke] to file applications for the division of the parties' de facto property.

Should an extension of time be granted?

[3] The power to extend time is pursuant to s 24(2) of the PRA. The guiding principle of s 24 is providing for justice between the parties.[1] The Court of Appeal has also recognised the difficulties in correctly applying s 24 when the Court is considering and determining where the balance of justice lies.[2] Additionally, as the Court identified in *Lawrance v Van Hammerston*, consideration of granting leave to file out of time is "not a minor procedural matter".[3]

[4] Justice McMullin in the then Supreme Court held in the case of *Beuker v Beuker* the factors that need to be considered when determining an application to extend time pursuant to s 24.[4] Those factors are as follows:

(a) The length of time between the expiry of the statutory time limit and the bringing of the application.

(b) The adequacy of the explanation offered for the delay.

(c) The merits of the case.

(d) Prejudice to the respondent.

[5] The above factors have been duly recognised in subsequent cases determining applications pursuant to s 24 of the Act. In *Ritchie v Ritchie* the Court emphasised that the weight to be given to each factor should be considered against the relevant facts brought before the Court on a case by case basis. Thus, in *Saunders v Wilkinson* Judge Hikaka endorsed the *Ritchie* principles but acknowledged that it was wrong to view the merits of the substantive application as the most important factor.[5] Rather it was a combination of the *Beuker* principles which led to his Honour declining the application to extend time on the facts of that case. In *Lee v Thompson* Judge Moran declined the application despite there being only a small delay of between three to

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1 *Ritchie v Ritchie* (1991) 8 FRNZ 197, [1992] NZFLR 266 (HC).
2 *Stedmances v Stedmances* (1987) 2 FRNZ 498, 4 NZFLR 577 (CA) at p 502.
3 *Lawrance v Van Hammersteon* [2015] NZFC 1426 at [35] (FC).
4 *Beuker v Beuker* (1977) 1 MPC 20.
5 *Saunders v Wilkinson* [2013] NZFC 7970.

six months.[6] The decisive factor in that case was the lack of merit in the applicant's case.

The basis of Ms [Jordan]'s application

[6] Mr Williams, in his helpful written submissions, sets out the factors that Ms [Jordan] relies upon in opposing the application for extension of time. In his submission:

(a) A significant amount of time has passed.

(b) The delay has not been adequately explained or addressed by Mr [Brooke].

(c) Mr [Brooke]'s case is without merit.

(d) Ms [Jordan] will be significantly prejudiced, both financially and emotionally, if the application is granted.

[7] In Mr [Brooke]'s application he provides a brief explanation as to why there was delay, with that reason being that the parties were trying to engage in constructive resolution of the division of their property, and the filing of proceedings was counter-productive to that constructive approach. Whilst the application provides a brief explanation, as Mr Williams sets out, there is no explanation for the delay in his affidavit evidence, notwithstanding that he was subsequently given leave to file a further affidavit. As Mr Williams submits, an application is not a sworn statement of evidence. Thus, in Mr Williams' submission there is no evidential foundation for the reasons for the delay in filing.

[8] Mr Howell concedes in his submissions:

> …that this explanation is not strong and, while it could be seen to be laudable, it is unlikely to count as a factor in Mr [Brooke]'s favour.[7]

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6 *Lee v Thompson* [2016] NZFC 3048.
7 Mr Howell's written submissions dated 10 January 2023 at [7].

[9] However, if I decide to take into account the reasons outlined in Mr [Brooke]'s application, Mr Williams further submits that the explanation is a dishonest one. The application contains one sentence explaining the delay, that being:

> The reasons for the delay are that attempts have been made to resolve matters without resorting to Court proceedings.[8]

[10] In Mr Williams' submission the evidence of Ms [Jordan] establishes that Mr [Brooke] was not making an attempt to resolve matters, but rather was engaging in communications with Ms [Jordan] that were aggressive, threatening and abusive. As Mr Williams points out in his submissions, that behaviour has not been denied by Mr [Brooke] in his affidavit evidence in response.[9] Those texts include the following:

> Its fucking war now!! I'm your worst nightmare! Not today not tomorrow its coming!!!!
>
> Youre [*sic*] just a low life piece of shit!! Wish I'd never met you!!! love [*sic*] my kids!! you [*sic*] can't even b fucked communicating with me!! We'r [*sic*] are you??? hope [*sic*] you die!!!
>
> Then I'm com [*sic*] for you!! And everything you have I wont [*sic*] half fuc [*sic*] yes you started it you meth fry slut.[10]

[11] These are but a few examples of a number of examples referred to by Ms [Jordan] in her affidavit, and by Mr Williams.[11] Thus, it is Mr Williams' submission that Mr [Brooke] did not negotiate respectfully or in good faith, and that it would be an injustice for this behaviour to be "rewarded" by the Court in granting his application to extend time.

Discussion

[12] While I accept that evidentially the explanation is deficient, in my view I cannot ignore the statement in the application that Mr [Brooke] was attempting to pursue a negotiated resolution. Eighteen months is not a significant delay. While I accept that his communication with Ms [Jordan] was intimidating, abusive and threatening, if leave is granted that is not "rewarding" Mr [Brooke]'s behaviour. This

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8 Applications seeking leave, 19 July 2022 at [3].
9 Written submissions of Mr Williams dated 8 December 2022 at [24].
10 Ms [Jordan]'s affidavit sworn 7 October 2022 at [58] and [59].
11 At [11] of his written submissions.

is not about reward or punishment; the case is about what is just and fair and consistent with the principles of justice in deciding whether leave should be granted or not. I determine that the explanation for the delay is, just, adequate.

Merits of the case

[13] Ms [Jordan] does not accept that Mr [Brooke] has a meritorious case. On her evidence their de facto relationship commenced in 2000. Then in 2002 a property, [address 2 deleted] was purchased in Ms [Jordan]'s name, and was subsequently sold by her in 2004. In [2005] Ms [Jordan] purchased a property at [address 1] . Thus, during the currency of their de facto relationship they bought two properties and sold one. Ms [Jordan] argues that she solely contributed to the purchase of the properties in question and does not accept that Mr [Brooke] made any contributions towards the property at all. I note that Mr [Brooke] disputes this evidence and asserts that he did contribute to the properties in question. Ms [Jordan] accepts that Mr [Brooke] had a very limited financial input, but argues she paid solely for the outgoings. In addition, she submits that Mr [Brooke] has failed to disclose assets such as his [business], KiwiSaver account, [collection] and a property in [address 3].

[14] Mr Williams, in his submission, appeared to be arguing that Mr [Brooke] was unlikely to succeed in claiming 50 per cent of the relationship property as set out in his application. That appeared to be on the basis that he had made no financial or other contributions to the properties in question, all of which are registered in the sole name of Ms [Jordan]. However, those submissions appear to ignore ss 8 and 18 of the PRA. Section 8, on the face of it, provides that property purchased during the parties' relationship and any income earnt during the relationship is relationship property and falls for equal division. Section 18 recognises that contributions, both economic and non-economic, are of equal value.

[15] The irony, it seems to me, is that Ms [Jordan] is putting forward an argument that at the commencement of the Matrimonial Property Act 1976 men often sought to argue; namely, that their wives had contributed nothing because they simply stayed at home and did not work. Those arguments were soundly rejected by the Courts, and there is no justification to try and resurrect that argument simply because it was

Ms [Jordan], as a woman, who has solely provided (if her evidence is ultimately accepted) the majority of the financial resources in the context of this relationship.

[16] What I apprehend from Mr Williams' subsequent submissions is that Ms [Jordan] would seek to argue that there should be an exception to equal sharing pursuant to s 13 of the PRA. But as I set out to Mr Williams, even if Ms [Jordan] was successful in arguing there were extraordinary circumstances making equal sharing repugnant to justice, on the cases Mr [Brooke] could expect to still receive somewhere between 40 and 30 per cent of the total relationship property pool. I do not accept that Mr [Brooke]'s claim is without merit. On the basis of the affidavit of assets and liabilities filed by Ms [Jordan], there is equity in the [address 1] property of around $400,000 and a total relationship property pool of slightly less than $500,000. On the face of it, Mr [Brooke] has a claim to 50 per cent share in the equity, unless the "exception provisions" in the Act can be established. I reject the argument that Mr [Brooke]'s application is without merit.

Would granting leave give rise to serious injustice and/or significant prejudice to Ms [Jordan]?

[17] I do not accept that granting leave would give rise to serious injustice. Nor do I accept that there is significant prejudice if leave is granted. Mr [Brooke] lodged the notice of claim against the [address 1] property in 2017. Ms [Jordan] has been on notice prior to the parties' separation that Mr [Brooke] believes he has a claim against that property. Additionally, her application for the notice of claim to lapse was unsuccessful with Mr [Brooke] applying for an order that the claim not lapse and the order being made in February 2021. This is not a situation in which she has sold a property, purchased other property and acted in good faith under a belief that the property was hers and that Mr [Brooke] had no claim or no potential claim.

[18] Ms [Jordan] will be entitled to any post-separation adjustments under s 18B and there may well be an argument that a separation date as opposed to hearing date valuation or an alternative date should be fixed by the Court for the purpose of assessing the value of the parties' relationship property. I accept, as submitted by Mr Williams, that ongoing litigation will lead to increased costs and stress and distress

to his client, and that Ms [Jordan] has some significant health issues. But these costs and stresses, as Mr Howell submits, are no different to any party facing litigation, and particularly contested litigation.

[19] In this case there is a weighing between the weak evidence around the adequacy for delay, and the potential merit that Mr [Brooke] has in his applications vis-a-vis his entitlements under the PRA. It would cause a significant injustice to Mr [Brooke] to refuse to grant him leave to extend time on the basis that, prima facie at least, he is entitled to a half share of the equity which is somewhere between $200,000 and $250,000 on Ms [Jordan]'s affidavit evidence. This is not a short de facto relationship of four or five years, but rather a lengthy one of between 17 and 22 years (depending on which party's evidence is accepted as to the time in which their relationship commenced).

Determination

[20] It is my determination that the delay of 18 months is not a lengthy delay and whilst the reasons for the delay are weak, the merits of Mr [Brooke]'s claim are prima facie strong, and the totality of all of those factors has compelled me to the view that an order should be made extending time for the filing of the application. Given the concessions around the other issues I now make the following orders:

(a) I make an order extending the time for Mr [Brooke] to file his applications for orders relating to the division of the parties' relationship property, and the applications that he has filed are to be accepted for filing.

(b) I make an order transferring the proceedings from the Tauranga Family Court to the New Plymouth Family Court.

(c) I dismiss Ms [Jordan]'s applications to discharge the order that the notice of claim not lapse, and to remove the caveat against the [address 1] property.

(d) I direct the registrar of the New Plymouth Family Court to set down a r 175 judicial conference to discuss the making of directions to progress the proceedings towards resolution. That should be set down on the next available date.

(e) Counsel are to file five working days prior to that conference either a joint memorandum or separate memoranda setting out the directions that are required to progress the matter to final resolution.

S J Coyle
Family Court Judge

Signed this 14th day of February 2023 at am / pm