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

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IN THE FAMILY COURT
AT THAMES

I TE KŌTI WHĀNAU
KI PĀRĀWAI

FAM-2017-075-000064
FAM-2017-075-000061
[2019] NZFC 3644

IN THE MATTER OF	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	[RENATA MERRITT] Applicant
AND	[ANDRE CARR] Respondent

Hearing:	3 May 2019
Appearances:	K Hoult for the Applicant (via telephone) M Bradley for the Respondent (via telephone)
Judgment:	3 May 2019

ORAL JUDGMENT OF JUDGE C L COOK

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[1] This oral decision follows an interlocutory hearing to resolve an application for specific discovery that was made by Ms [Renata Merritt]. That application was made on 14 September 2018. The application is opposed by her former de-facto partner Mr [Carr]. I am grateful to counsel for the comprehensive submissions both oral and written.

[2] Firstly, I touch on the background. The context of this application is made in the context of Ms [Merritt]'s application for orders under the Property (Relationships) Act 1976. The parties were in a de-facto relationship from 1998 until final separation in April 2017. There was a period of separation in 2014 and the parties entered into a s 21 agreement on 9 March 2015. Thereafter they reconciled, and it is accepted that the final date of separation was 13 April 2017.

[3] There are no children from the relationship but both parties have children from previous relationships. The assets are a real property and a business described as [company name deleted] Limited, referred to as [the company], motor vehicles and chattels. There have been a number of interlocutory applications which have been filed following the original application under Property (Relationships) Act. Mr [Carr] filed applications for restraining orders and to remove a notice of interest on the title back last year.

[4] There is also an application for interim maintenance which is made by Ms [Merritt] under the Family Proceedings Act 1980. It was hoped that this application would be dealt with, with the current application but for a number of reasons that has not been possible. That is going to need to be dealt with as soon as possible by the Court.

[5] I turn now to the legal position. Both counsel are agreed on the approach to be taken legally. The jurisdiction for this application comes from rule 141 Family Court Rules 2002. There have been a number of recent decisions which have helped clarify the approach that is to be taken by this Court in respect of applications for discovery.

[6] I refer specifically to the decision of *Dixon v Kingsley* which sets out the essential principles as follows:[1]

> (a) A robust approach should be taken which is consistent with the purposes and principles of the Act. The need of just division but also inexpensive and efficient access to justice.
>
> (b) Such discovery should not be unduly onerous.

[1] *Dixon v Kingsley* [2015] NZFLR 1012.

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

(d) The scope of discovery should be tailored to just and efficient disposal of the case.

(e) More substantial discovery may be ordered if the Court has reason to believe that information has been concealed.

[7] That decision was cited, with approval by the Court of Appeal, in the decision of *Biggs v Biggs* [2018] NZCA 546.[2] I also agree and endorse the comments which have been made by the High Court in the decision of *White v Hewett*:[3]

(a) Full disclosure and transparency is required however, the scope of discovery must be determined by relevance and reasonable necessity.

(b) The need for transparency is not justification for a far more onerous discovery than otherwise would be necessary.

[8] I now turn to the respective approach of each of the parties because in this case it is relevant to the decision that I make. Ms Hoult, on behalf of Ms [Merritt], stressed particularly in her oral submissions that the context of the applications was very important. She highlighted that:

(a) Mr [Carr] is facing criminal charges against Ms [Merritt] and that there has been a, in her words, "Money go round."

(b) In this case the suggestion is that Mr [Carr] has been hiding or not disclosing material assets.

(c) There is a complete lack of trust.

(d) In this case, essentially, since the parties separated for a short period in 2014 far more extensive discovery than normal discovery orders are required.

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[2] *Biggs v Biggs* [2018] NZCA 546.
[3] *White v Hewett* [2015] NZHC 1749.

[9] Mr Bradley, on behalf of Mr [Carr], points out that the criminal charges and general climate of distrust is irrelevant and that the bulk of the information is available to Ms [Merritt] as, for example, the bank accounts in the parties' joint names. Therefore, the onus does not fall on Mr [Carr] to provide everything. His argument is that the application for discovery is overly far reaching, overly onerous and is, in some respects, a fishing expedition.

[10] I agree with the general proposition, of course, that the parties' conduct is irrelevant to the relationship property proceedings unless it relates to the extent and nature of their property. There is no evidential nexus that I can see between the alleged, (I understand that they have not been disposed of), criminal behaviour on the part of Mr [Carr] against Ms [Merritt]. In any event I understand that that behaviour relates to events post separation.

[11] There is however, in my view, evidence which is set out in Ms Hoult's memoranda that there have been quite substantial movements of money around the separation period in July 2017. I do view that there is some relevance to the parties' separation back in 2014. But, in my view, my approach to this case comes back to really the first principles which are set out in the cases. I need to look and examine the application in each of its parts in respect of the issue of relevance and consider whether the request for discovery is unduly onerous in relation to its relevance.

[12] In my view, I do make a comment that Mr [Carr] has not been overly co-operative in the provision of bank statements. I would have thought perhaps, and it is easy with the benefit of hindsight, that a full exchange of bank statements at the outset may have prevented these issues escalating further. But that is the position the Court and the parties find themselves in. Therefore, I now turn to the specific requests for discovery and address them. I follow the submissions of counsel for the applicant in respect of the order of discovery sought.

[13] I turn, firstly, to the bank statements for [Andre Carr] trading as [the company]. There are two sub accounts here and this is for the account [number deleted] with prefixes 00 and 01. Discovery is sought by the applicant from when the accounts were opened in 2014 to the date of the affidavit of documents. There has been disclosure

provided by Mr [Carr] in respect of the 01 account. That disclosure, by my reading, runs from 1 April 2014 to 16 May 2018. So, the disclosure would be for the 00 account and for the 01 account post 16 May 2018.

[14] In my view there is a strong presumption in favour of an obligation of full disclosure in respect of this account. The reason for that is that it is clearly accepted that this entity was relationship property and there needs to be transparency in respect of all the transactions which have occurred both pre and post separation in respect of that. I note that the 01 disclosure has been backdated to 2014 and I also note my understanding that the applicant Ms [Merritt] has been unable to see those accounts.

[15] There have also been a number of transfers into accounts and in respect of this account I do not think there is an argument that there are any privacy issues which would prevent there being disclosure in respect of these accounts. Therefore, in respect of these accounts I direct that Mr [Carr] provide statements from the accounts from when the accounts were opened to, either, the accounts being closed or up until the date of the swearing or confirmation of the affidavit of documents which I will direct at the conclusion.

[16] Now turning to accounts in Mr [Carr]'s name. These accounts are [number deleted] with the prefixes 01 and 00. In respect of those accounts they have been disclosed, both the 01 and 00 accounts, for the period of 1 April 2017 through to 16 May 2018. The issue really, as I understand, is the length of disclosure as the applicant seeks disclosure dating back to April 2014. Mr [Carr] says that that is overly onerous, that there is no factual foundation for say prior to, perhaps, July 2017 and that there has not been any form of orchestration by him to hide or dissipate the money.

[17] I agree to an extent that it is a very lengthy period of time in which the disclosure is sought and it is somewhat onerous. I also think that given that I have made full disclosure in regard to [the company] accounts that if there is anything further that arises then some specific questions may need to be asked in the form of interrogatories. But, I do consider a period of some time prior to separation would be appropriate which would just give a better picture of movements within those

accounts. So, I make a direction that the accounts, being the 01 and the 00 accounts, be disclosed from 1 April 2016.

[18] The next issue is, should the disclosure continue up until the date that Mr [Carr] swears or confirms his affidavit of documents. Mr Bradley points out that the 01 account was frozen in October 2017 and therefore is not relevant. Therefore, it is only the 00 account. That has already been provided until May 2018. It may be that there has been some relationship property income which has come into that account and could be relevant. Accordingly, I make a direction that that account be provided up until the swearing or confirmation of the affidavits.

[19] I now turn to the joint accounts and that is the account [number deleted] with the prefixes 00 and 01. This is called the [account name deleted]. The argument by Mr Bradley, on behalf of Mr [Carr], is that Ms [Merritt] has had access to those joint accounts up until July 2017 and has the authority and ability to obtain those accounts. Therefore, it should not fall on Mr [Carr] to provide them.

[20] The issue for me I think really just boils down to one of convenience, possession and control. If one party has possession of the paper accounts then they should be provided to the other party. So, on the presumption that Mr [Carr] or the accountant has possession of those accounts on a paper basis they are to be provided to Ms [Merritt] within 21 days to be photocopied and returned 14 days thereafter. If neither Mr [Carr] or the accountant has paper copies of those accounts or copies which are available to be provided to Ms [Merritt] they should not be responsible nor should it be on their heads to obtain copies of those accounts. It is a matter for Ms [Merritt] to seek out those accounts, I presume, from the bank. Again, that applies to [the company] accounts and any accounts there. Of those accounts, the joint accounts, the parties would need to have the same presumption in regard to access.

[21] I now turn to the ANZ account. This is account [number deleted] with prefixes 00 and 01. The information I have is that this is a personal account which was opened by Mr [Carr] post separation. Disclosure is sought in respect of any statements for those accounts in Mr [Carr]'s name or in the name of any entity associated with

Mr [Carr] held with ANZ from the date of opening those accounts until the date of the affidavit of list of documents.

[22] The argument for Mr [Carr] is that the relationship property entitlement crystallises at the date of separation and that Mr [Carr] is entitled to privacy post separation in respect of his affairs and his spending. I would agree with that in the normal course of events. However, in this case the parties had a business together and Mr [Carr] has continued to operate that business up until very recently as I understand. I just mention at this stage that there have been some severe health issues for Mr [Carr] and in making this decision, of course, I simply need to proceed with matters on the basis of the application in front of me. But, on a human level of course there must be sympathy for Mr [Carr] in respect of his health condition

[23] But, coming back to my decision in my view there is some relevance in respect of the disclosure of the ANZ accounts because of the ongoing income which has been received. So, I am going to make an order that those accounts be disclosed up until the date of the list of documents. It seems to me that that is maybe relevant for the purposes of resolving the relationship property matters between the parties. I make an order that there be disclosure of any accounts either in Mr [Carr]'s name or in any entity associated with Mr [Carr] held with the ANZ bank or any other bank which have been existing as at the date of separation. There has been mention of Westpac accounts but Mr [Carr] indicates that he does not have any Westpac accounts. There was also a request for disclosure of statements of any accounts in Mr [Carr]'s name and I have made that order accordingly.

[24] I now turn to the issue of the bonus bonds. Mr [Carr] has provided a statement as at separation for the bonus bonds for the period of 14 July 2015 through to 11 July 2017. That is two years' worth of statements and there is no evidence or evidential foundation that I have to go beyond that period. The bonus bonds would be valued as at the date of separation so apart from Mr [Carr] providing the number for the bonus bonds, which I think is a relevant matter, I am not going to make any further orders in respect of disclosure in respect of the bonus bonds.

[25] For the sole trader business Ms [Merritt]'s interlocutory application seeks specific discovery in respect of the sole trader business operated by Mr [Carr]. Mr [Carr]'s position is that there is not any further information which has not been disclosed and all the information is with the accountant in any event. Given the climate of distrust between the parties I think this matter can be addressed simply by Mr [Carr] in his affidavit confirming that he has provided all information and that there is no further information in respect of the business which can be provided. Certainly, if there is any further information which is held by Mr [Carr] or within his power and control he needs to provide that to Ms [Merritt] in terms of a determination of the parties' interests under the Property (Relationships) Act.

[26] I now turn to the issue of the [membership deleted] shares. Again, there is a request that there be specific discovery in regard to those shares. Mr [Carr]'s position is the shares are in the name of the business. That may be the case and may be taken into consideration in respect of the overall business valuation. But, if there is any separate documentation at all then it needs to be disclosed. So, Mr [Carr] is ordered to disclose any documentary information related to the [membership] shares which is in his possession and/or control or simply confirm by way of an affidavit that there is nothing further which is in his possession or control that has not been disclosed.

[27] Similarly, I turn now to the application for outstanding discovery in respect of the life insurance. Mr [Carr] says that the information has been provided. Ms [Merritt] says that there is further information which should be disclosed. She says, and it is alluded to at paragraph 23 of the submissions of Ms Hoult, that there is another insurance policy which matures when Mr [Carr] turns 80. Mr [Carr] is directed to include, within his affidavit to be sworn, details of any policies which were existing or held in his name, possession or control at the date of separation together with any documentary evidence detailing the nature and value of the policies.

[28] I now turn to the issue of child support. Ms [Merritt] has made an application for disclosure of Mr [Carr]'s child support payments which were made during the course of the relationship. That obligation or liability concluded some five years ago in 2014. In my view, given the fact that that liability did not arise as at the date of separation and the amount of time which has passed between the liability occurring

and now that it would be unduly onerous for Mr [Carr] to have to provide further information in respect of that liability. Ms Hoult indicated that it could possibly form the basis of an extraordinary circumstances argument but in the context of the parties' lengthy relationship duration and in the absence of any evidence which would support an unequal division of the parties' property I am not prepared to order discovery upon that basis alone.

[29] I now turn to the issue of the personalised plates. Ms [Merritt] sought documentary confirmation of any motor vehicles and/or registration plates held by Mr [Carr] and/or held on his behalf save for those already disclosed. Clearly, as identified in the minute of His Honour Judge Coyle those plates have a separate and identifiable value and it is clearly a source of conflict between the parties.

[30] The obligation is on Mr [Carr] if he has possession and/or control of any further information he needs to provide that information to Ms [Merritt] and her counsel. If he does not he needs to confirm that he has provided all he has. So, I therefore make an order that he is to provide any further documentary evidence and that is to include any sale and purchase agreements in regard to the plates or any documentation in respect of purchase or sale in respect of the plates as at the date of separation or in the alternative, confirm under oath that there is no further disclosure which can be provided in his possession or control.

[31] Second to last, I turn to the vehicles. There has been a specific list of vehicles which has been identified at paragraph 82 of Ms [Merritt]'s affidavit sworn on 29 January. She sets out a list of motor vehicles which is supported by documents in exhibit G to that affidavit. Disclosure is sought of documentation relating to each of those vehicles. Clearly, it is not an obligation on Mr [Carr] to value any of those vehicles. But, again, if there is any documentation in regard to sale and purchase of those vehicles either at separation, post separation or prior to separation then any information in respect of the vehicles needs to be provided by way of an affidavit filed by Mr [Carr]. He is specifically, in his affidavit, to respond to paragraph 82 of Ms [Merritt]'s affidavit. If his position is that there is nothing further, then again specifically he is to address that within his affidavit.

[32] Finally, there is the issue of chattels. Ms [Merritt]'s position is that disclosure is sought in regard to the remaining outstanding chattels. Mr [Carr]'s position is that he has only received a painting and there are no other chattels in his possession or control. Again, he is just to confirm that under oath.

[33] Accordingly, I make orders in terms of this decision. If there are any issues in respect of clarification and/or implementation of the terms of these orders leave is given to counsel to bring matters back in front of the Court on five days' notice. But, I make an order that Mr [Carr] is to file, within the next 28 days, an affidavit including the discovery as sought. There can be any response filed by Ms [Merritt] within 28 days thereafter. If this matter has not already been allocated a further event it is to be allocated a further judicial conference to try and address the way forward in respect of these matters. Of course, I make that order within this decision in respect of the provision of the accounts for inspection and any accounts held by Mr [Carr] or the accountant.

[34] If counsel wish to be heard in respect of the issue of costs on an interlocutory basis I will allow timetabling of submissions and counsel can consider that. But, in my view the issue of costs should be properly reserved pending the resolution of the substantive issues between the parties as Ms [Merritt] has been successful in some aspects of the application and unsuccessful in others.

C L Cook
Family Court Judge