

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

Jud 8364

M. 1296/82

BETWEEN JULENE BURSTALL of  
Auckland, Married Woman

Applicant

AND ROBERT TENNYSON BURSTALL  
of Auckland, Company  
Director

Respondent

Hearing: 12th July, 1984

Counsel: Crew in Support  
Williams to Oppose

Judgment: 11 July 1984

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JUDGMENT OF SINCLAIR, J.

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The Applicant commenced proceedings against her husband for orders under the Matrimonial Property Act 1976 following their separation on 11th February, 1981. The parties were married on the 27th November, 1970 and have one child born the following year. According to the wife's affidavit there was unhappiness from an early stage in the marriage.

In 1974 the husband set up a trust under which there was transferred to the named trustees, Peter John Dew and Eric Joseph Schroder, the matrimonial home and 3,750 shares in a company in which the husband had been the principal shareholder. Mr Dew is the husband's solicitor while Mr Schroder is the husband's Accountant.

Over the years it appears from the affidavits that

the husband's business interests expanded and there have been certain transactions as between the husband and the trustees of the trust which now the wife desires to have examined, particularly in view of her apparent belief that some of the transactions have been carried out to defeat her rights under the Matrimonial Property Act.

The amended notice of motion for orders under the statute was filed in November last and besides referring to the matrimonial home and certain shares and other items such as bank accounts, insurance policies and chattels including a boat, the application goes on to seek orders pursuant to S.44 of the Matrimonial Property Act 1976 in relation to the following dispositions of property by the husband to the trustees:

- (a) The transfer by the husband to the trustees of the matrimonial home on the 7th August, 1974.
- (b) The transfer by the husband to the trustees of 8,750 shares in Television Engineers Supplies Associates Ltd on the 25th May, 1974.
- (c) The transfer by the husband to the trustees of 11,000 shares in Tesa Holdings Limited on the 21st March, 1979.
- (d) The allocation by Television Engineers Supplies Associates Ltd of 27,709 shares to the trustees and 10,279 shares to the husband on the 15th March, 1979.
- (e) The transfer of 3,246 shares held by the husband in Television Engineers Supplies Associates Ltd

to Tesa Holdings Ltd on the 21st March, 1979.

- (f) The transfer of 8,750 shares held by the trustees in Television Engineers Associates Ltd to Tesa Holdings Ltd on the 21st March, 1979.
- (g) The transfer of 10,279 shares held by the husband in Television Holdings Supplies Associates Ltd to Tesa Holdings Ltd on the 2nd July, 1979.
- (h) The transfer of 27,709 shares held by the trustees in Television Engineers Supplies Associates Ltd to Tesa Holdings Ltd on the 24th February, 1981.

As will be seen from the above, some of the dealings are not only as between the husband and the trustees, but are inter company transactions in which the trustees became involved. In addition there are some incidental matters referred to in the application which the wife seeks to investigate. One of her concerns is, of course, that some of the transfers may well have taken place for inadequate consideration and she instances one particular transaction which occurred in May, 1974, when 8,750 shares were transferred by the husband to the trustees, those shares being in Television Engineers Supplies Associates Ltd and the consideration appears to be \$126,250. Mrs Burstall states that she wishes to know whether that figure was realistic or an under-value.

The present application is for orders for discovery against both the husband and the trustees and an order that the husband and the trustees do answer certain interrogatories which have been put before the Court.

When the proceedings were originally issued an application was made under S.37 of the Matrimonial Property Act 1976 seeking directions to serve the trustees and such an order was duly made. Under S.37 the Court is empowered to direct that notice of the application shall be given to any person having an interest in the property which would be affected by any order made by the Court and any such person is entitled to appear and be heard in the matter as a party to the application.

While the trustees are not named as a respondent in the application at the moment, they have given an address for service and Mr Williams accepted that for all practical purposes insofar as this application was concerned he would accept that the trustees could be treated as a party to the proceedings. If that were not his attitude it may well be that some formal steps would have to be taken pursuant to Rule 90 of the Code of Civil Procedure to have the trustees formally joined as a Respondent.

Insofar as the discovery and interrogatories are concerned, it is accepted on behalf of the husband that he should make discovery and that certain of the interrogatories should be answered by him, but that no such order should in the meantime be made against the trustees as it is considered that once the husband makes discovery and answers certain of the interrogatories the wife will then have all the information which she needs to bring these proceedings to a hearing and a conclusion.

In addition, it was submitted that as Mr Dew is still Mr Burstall's solicitor as well as being a trustee, his

dual role could result in an attempt to obtain from him answers to interrogatories which were in fact privileged, but if the same interrogatories were put to Mr Schroder he may not be able to claim privilege and that therefore the Court should be wary as to the way it approached the request to interrogate the trustees.

Mr Crew, on behalf of the wife, submitted that in matrimonial matters it all too often happens that a wife knows little or nothing of the financial arrangements made by the husband and that it is only by going on what really may be described as a fishing expedition that she can get the information to which she is entitled and which would enable her to pursue her rightful claims as against her husband. In support of that argument he referred to an English decision of B v. B (1973) Fam. 181 where, indeed, that very fact was recognised by Dunn, J. at page 191 when he said the following:

"It is another feature of such proceedings that one party, usually the wife, is in a situation quite different from that of ordinary litigants. In general terms, she may know more than anyone else about the husband's financial position; she will know at first hand of the standard of living of the family during the marriage; she will know about the furnishings and equipment of the matrimonial home, and of the physical possessions of the husband, and perhaps the approximate amount of cash kept in the house. She may also know, from conversations with the husband in the privacy of the matrimonial home, the general sources of his wealth and how he is able to maintain the standard of living that he does. But she is unlikely to know the details of such sources or precise figures, and it is for this reason that discovery now plays such an important part in financial proceedings in the Family Division.

"Applications for such discovery cannot be described as 'fishing' for information, as they

"might be in other divisions. The wife is entitled to go 'fishing' in the Family Division within the limits of the law and practice."

I accept that as a general proposition, but even so the Court must be careful to ensure that interrogatories do not become oppressive and that they should be restricted to the actual matters which are in issue. Thus, in this regard it is interesting to reflect upon the provision of S.44(1) of the Matrimonial Property Act 1976 which lays the foundation for empowering the Court to deal with any property where the Court is satisfied that that property has been dealt with otherwise than in good faith and for valuable consideration. Subsection (1) provides as follows:

"Where the High Court or a District Court or a Family Court is satisfied that any disposition of property has been made, whether for value or not, or by direction of or in the interests of any person in order to defeat the claim or rights of any person under this Act, the Court may, on the application of that second named person, make any order under subsection (2) of this Section.

Thus there is some force in Mr Williams' argument that it is the conduct of the husband which is to be looked at to determine whether or not in the circumstances he has acted in such a way as to attempt to defeat the rights of the wife in all or any of the property referred to in the motion.

I think the Court must be careful when approaching an application such as the present one to ensure that it does not make an order which may be oppressive to the trustees in that it may put them in an invidious position in relation to information which they have and which may

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have come into their possession or the possession of one of them in a privileged way. I am of the view that there are other ways of dealing with the situation and accordingly I intend to follow a course of action which I trust will provide the necessary solution.

Insofar as the application for discovery is concerned, at the present time I will direct that such an order be made against the husband and that he file his affidavit of documents within 14 days after service of the order, but that in respect to the trustees the question of discovery be reserved. This will then leave it open to the wife to apply further should the discovery made by the husband prove to be inadequate or insufficient for the purposes of the litigation.

Likewise at the moment I intend to order that the husband only answer certain of the interrogatories which have been put before the Court and that there should be no such order as against the trustees at the moment. I expressly reserve the wife's right to apply further in relation to interrogatories, so far as the trustees are concerned, but once again I am hopeful that the answers which will be supplied by the husband will prove adequate for the wife's purposes.

Insofar as the interrogatories are concerned, and which are to be answered by the husband, many of the 54 interrogatories which were submitted I consider to be far too wide. While I acknowledge that the interrogatories have been grouped in a fashion so as to direct them against each specific asset, with some general interrogatories at

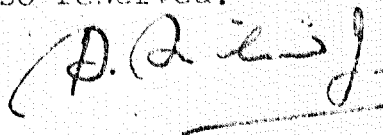
the end, I am of the opinion that some are far too wide. For example: the first interrogatory is related to whether or not the prospect of a claim by the applicant against her husband under the Matrimonial Property legislation was a factor in deciding to set up the family trust in May 1974. That is quite a proper interrogatory. The third interrogatory is framed in the following way:

"Have the trustees discussed with the Respondent all decisions made by them as trustees?"

The answer to that in all probability is in the negative, but the next interrogatory goes on to require the trustees to specify the decisions made by them without discussions with the Respondent if the answer to the third interrogatory is in the negative. One wonders just exactly where those two interrogatories would end, particularly when the trustees would in all probability not refer to the husband their act in signing a cheque for, say, tax, rates or insurance or other outgoings on the matrimonial home. To my mind interrogatories of that nature are just far too wide.

In all the circumstances as at the present time I will direct that the Respondent answer the following interrogatories within 14 days after service of the order with leave being reserved to the Applicant to apply further under this head if necessary. The interrogatories which are to be answered are as follows: 1, 2, 7, 9, 13, 15, 19, 21, 25, 26, 28, 32, 34, 38, 40, 44, 45, 47, 48, 49 and 52.

The question of costs is also reserved.

  
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