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NOT
RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No 143/88

BETWEEN R P JOHNSTON

Plaintiff

A N D M R JOHNSTON

Defendant

Hearing: 10 April 1989

Counsel: J S Kos for the Plaintiff
W V Gazley for Defendant

Judgment: 22nd May 1989.

INTERIM JUDGMENT OF MASTER J H WILLIAMS QC

This application comes before me in the guise of an application for directions but in reality it is an application by the plaintiff for an order that the defendant file a verified list of documents discovering all documents which are or have been in his possession relating to all matters in question in this proceeding together with timetable orders consequential on such an order.

The matter has had an unfortunate history. The parties were married on 5 February 1972. They separated on 16 October 1986. The marriage has now been dissolved and the plaintiff has remarried.

These proceedings relate to the dispute between the parties under the Matrimonial Property Act 1976. They were commenced on 10 March 1988, apparently following unsuccessful negotiations between the parties and their then solicitors. Mrs Johnston (as I shall continue to call her) filed a lengthy affidavit in support of her statement of claim. I shall refer to that again. Mr Johnston, on 28 April 1988, filed and served a similarly lengthy affidavit.

On 30 March 1988 Mr Johnston issued a notice for discovery against Mrs Johnston. She replied similarly on 11 April 1988 and followed that with a detailed verified list of documents sworn on 20 April 1988 in response to her husband's notice. He has filed no verified list of documents in response to her notice despite two letters from her solicitor on that topic in May 1988 and February 1989 calling for that to be done.

As far as can be gleaned from the pleadings filed to date, by the time their 14½ year marriage came to an end, the parties had acquired a number of assets of fairly considerable value but a major problem in this matter is that some of those assets were derived from separate property, some are matrimonial property and Mrs Johnston avers she cannot distinguish which is which and whether all their assets have been disclosed. This gives rise to a number of difficulties which must be resolved on this application.

The parties are both professionally qualified people, she a solicitor and he a chartered accountant, but Mrs Johnston

says that during the course of the marriage most of their business and financial matters were dealt with by Mr Johnston alone. She claims that as a result of that, although she is able to give a deal of detail in her affidavits concerning items of property, she cannot be sure that she is able to identify all the assets owned by either or both of the parties at the date of separation.

That matter leads on to the next which is that Mrs Johnston avers that since the separation she has been almost wholly denied access to the matrimonial home and thus has been unable to obtain access to documents at the matrimonial home which might enable her to identify all the assets owned by either or both of the parties. Mr Johnston denies that Mrs Johnston has been denied access to the matrimonial home. I am not able to resolve that conflict but it is probably of little importance in dealing with the application with which I am concerned.

The final difficulty is that Mr Johnston in his affidavit in opposition to Mrs Johnston's application gives considerable details of assets and then deposes "...that there is no other matrimonial property of which I have knowledge". That statement of course makes Mr Johnston the arbiter of what is or is not matrimonial property and therefore rather begs the central question in this matter. In his affidavit sworn in opposition to Mrs Johnston's application for directions he again deposes that "there was, and is, no other matrimonial property of which I have knowledge" and that "even if other 'items of matrimonial property' are in question I have already deposed there is none"

and he says, in relation to Mrs Johnston's allegation that there may be other items of property of which she is unaware that "there are no such items of property". These comments, in my view, suffer from the same objection but I do note that in para 3 of Mr Johnston's affidavit in opposition to Mrs Johnston's application for directions he deposes:

"I swear that there is no property, matrimonial or otherwise, that is not part of the present proceedings"

It seems to me that that statement can only be taken as a sworn assertion by Mr Johnston that the affidavits of the parties identify every asset or interest in any asset owned by either or both of the parties as at the date of separation whether legally or beneficially and whether or not that asset is or is not "property" or "matrimonial property" within the meaning ascribed to those terms by the Matrimonial Property Act 1976

The final difficulty in dealing with this matter is that the plaintiff originally instructed Messrs Rudd Watts & Stone to act on her behalf. It seems that that firm at some stage instructed Mr G L Turkington to act as counsel. Mr Turkington made, it seems, considerable progress towards settling the claim but the plaintiff, on or about 2 March 1989, withdrew her instructions from Messrs Rudd Watts & Stone and Mr Turkington and instructed Messrs Russell McVeagh McKenzie Bartleet & Co at Wellington to act on her behalf. Messrs Luke Cunningham & Clere apparently acted for Mr Johnston until 13 November 1987 when Mr Gazley was instructed to act for him. It may be noteworthy that on 16 May 1988 Mr Johnston's then solicitors wrote to Mr Gazley

saying that to try and "reduce inspection within sensible limits" there were six areas which they then detailed in respect of which they sought supporting documents. Later, no doubt in response to Mrs Johnston's notice for discovery, Mr Johnston gave Mr Gazley a cardboard box full of documents claimed to relate to matrimonial property and on 7 June 1988 perusal of that box was offered to Mr Turkington who both declined to inspect its contents and, it is claimed, said that he did not require Mr Johnston to comply with the notice for discovery. The parties and Messrs Gazley and Turkington apparently met on 10 June 1988 in order to discuss settlement. Progress was made and the file notes of that meeting show that the parties were to address the outstanding issues. Over the succeeding months further progress seems to have been made towards a settlement to the point where Mr Johnston now claims that all that requires to be done is for Mrs Johnston to check the documents and figures which he has supplied so that there can be a consent order dividing up the assets listed in the affidavits of the parties on an agreed equal basis.

In the light of the history of the matter one senses a degree of irascibility in Mr Johnston's affidavit. He complains that Mrs Johnston does not seem to be making any genuine effort to try and settle what he sees as relatively straightforward litigation but in this I believe he rather overstates the position. It is commonplace in applications under the Matrimonial Property Act 1976 for the former spouses to regard anything said or produced by the other with the gravest suspicion. Secondly, the fact that there is litigation between

the parties has in part at least been at Mr Johnston's insistence on having the matter concluded by way of Court orders. And thirdly, although there is now a considerable amount of detail before the Court concerning the matters at issue between these parties, much of it still consists of schedules produced by Mr Johnston or his solicitor rather than the prime documents on which those schedules are presumably based and there is a refusal to provide details of some assets such as Mr Johnston's superannuation, long service leave and holiday pay without Mrs Johnston demonstrating that she is entitled to share in those assets as matrimonial property, rather than providing the details of those payments and leaving the question as to whether or not Mrs Johnston has any entitlement in respect of those assets for decision by the Court. He also complains that Mrs Johnston's application is in effect a "fishing expedition" and that all the responsibility for providing the information which she seeks is on him but that, it seems to me, is a necessary result, if Mrs Johnston's allegations prove to be correct in this respect, of Mr Johnston being the party principally involved in the parties' financial affairs and retaining most of the business records when the marriage broke down.

In those circumstances, having considered the matter as carefully as possible, I am led to the conclusion that, despite Mr Johnston's objections, Mrs Johnston is entitled to compliance by Mr Johnston with the notice for discovery served on him on 11 April 1988 but having regard to the state of the pleadings and in particular the sworn statement by Mr Johnston which I set out

earlier in this judgment, the time which has elapsed since the parties separated and since these proceedings were issued and the other matters to which I have referred earlier in this judgment, I am not prepared to order general discovery.

At the hearing of this matter, Mr Gazley also applied under R 437(5) for directions relating to the provision by Mrs Johnston for discovery additional to that which she has already made. I consider that this is an appropriate case to grant that application in the hope of bringing the parties to the point where the litigation can be settled or heard with despatch.

There will therefore be orders that the parties provide lists of documents verified by affidavit and in accordance with the Rules relating to the following matters in question in this proceeding:

(a) 11 Laurie Avenue, Auckland:

Mr Johnston says he has received only the contract and a Trust Account statement. Mrs Johnston is to discover all other relevant documents including all receipts and payments in relation to the property. She is to discover any further documents she may have relating to the repayment of the second mortgage referred to in para 6(iii) of her affidavit sworn in 8 March 1988. She is to identify by letter and discover any documents which she has relating to any dispute concerning the rent. Mr Johnston is to identify by letter and discover any documents which he has relating to his assertion that the amount in the joint account attached

assertion that the amount in the joint account attached as Exhibit A to his affidavit sworn on 28 April 1988 and filed herein "represents more than rent alone".

(b) 10 Wilkinson Street, Wellington:

This property appears to be accepted as having been the matrimonial home of the parties at the date of separation and there does not seem to be any suggestion that a valuation date other than the date of hearing is appropriate. In those circumstances, if not already attended to, Mr Johnston is to make available to a valuer selected by Mrs Johnston access to the property to enable that valuer to value the same as at the date of inspection and, if either party considers it appropriate, as at the date of separation. Mr Johnston is to provide details of the amount owing under any mortgage of the matrimonial home as at the present time and, if appropriate, as at the date of separation. Mr Johnston is also to provide, if required by Mrs Johnston, a schedule showing the cost of the alterations to that property carried out by the parties prior to separation and the cost of the items purchased by the parties before separation for incorporation into that property but not in fact incorporated prior to that date together in each case with such supporting statements and invoices as will enable Mrs Johnston to verify the accuracy of those figures.

(c) Family chattels excluding motor vehicles:

Mr Johnston has provided a valuation of the chattels in

his possession as at 13 April 1987. Mrs Johnston is to advise as to whether a valuation at that date is acceptable to her and if not at what date or dates she wishes those chattels to be valued. Mr Johnston is then to obtain a valuation of all matrimonial chattels other than motor vehicles in his possession at the date of separation and remaining in his possession at the date specified. Mrs Johnston is to provide a valuation of the matrimonial chattels in her possession at the present time valued as at the dates she specifies.

(d) Tyrone Building, Main Street, Katikati:

It seems from the draft order annexed as Exhibit I to Mr Johnston's affidavit in opposition to Mrs Johnston's application for directions that this property has now been sold. That sale will presumably overcome Mrs Johnston's request to have that property valued. Mr Johnston, if requested by Mrs Johnston, is to provide details of all rent received for that building from the date of separation down to the date of sale and details of the leases of the same. He is also to provide details of any indebtedness owing on that property as at the date of separation and as at the date of sale and details of all outgoings paid since separation together in each case with discovery of all bank statements, deposit slips, statements of account, invoices and other documentary detail as is necessary to enable Mrs Johnston to check the veracity of those matters.

(e) Shares:

Mrs Johnston has exhibited lists of the shares owned by either or both of the parties as at 2 October 1986 and 4 November 1986. Mr Johnston's Exhibits F(i) and F(ii) set out what he says were his shareholdings as at 16 October 1986 and at an undeterminable date in April 1988 with details (Exhibit G(i)) of his share sales since 16 October 1986. Mr Johnston is to discover all documents which he has which will enable Mrs Johnston to check the veracity of what Mr Johnston says were his holdings as at 16 October 1986. Mrs Johnston is to provide a schedule with similar supporting documents for all shares held by her on 16 October 1986. In each case those schedules and supporting documents will need to evidence sales contracted before separation but in respect of which the sale proceeds were not received until after that date. Each of the parties is to provide a statement showing what has become of those shareholdings since the date of separation including accounting for all sales, purchases from sale proceeds, dividends, bonus issues and other changes arising out of the shareholding as at the date of separation and to discover in each case all such supporting documents as are necessary to enable the other party to check the veracity of that statement.

This order also applies to the funds and security

documents held by either or both of the parties in BNZ Finance Ltd as at the date of separation unless Mrs Johnston signifies that she accepts Exhibits H(i) and H(ii) to Mr Johnston's affidavit as correctly identifying that debenture stock in which case discovery will be limited to such documents as may be necessary to enable Mrs Johnston to check the veracity of those exhibits.

(f) Bank accounts:

In para 7 of Mr Johnston's affidavit sworn on 28 April 1988 he lists what he says are the relevant details of all bank accounts in the name of either or both of the parties as at the date of separation. He is to discover all such documents as are necessary to enable Mrs Johnston to check the veracity of that statement. She is similarly to provide details of all bank accounts in her name as at the date of separation and discover the necessary supporting documents.

(g) Superannuation, long service leave and holiday pay:

Mrs Johnston is to advise whether she accepts that Exhibit I to Mr Johnston's affidavit sworn on 28 April 1988 correctly represents the payment received by Mr Johnston from the Cable Price Downer Superannuation Fund and the calculation thereof and if not what documents she requires to be discovered, possibly including the superannuation deed, to satisfy her on that score. Whether or not she has any entitlement to the moneys paid to Mr Johnston following the separation

of the parties can then be a matter for determination by the Court.

Similar orders apply to the payment to Mr Johnston of superannuation and holiday pay on 16 January 1987.

(h) Life insurance:

Exhibits K(i) and K(ii) to Mr Johnston's affidavit sworn on 28 April 1988 appear to give the surrender values of his life insurance policies as at 6 May 1987 and 2 July 1987. Mrs Johnston is to advise if she requires the surrender values to be provided as at the date of separation. If she does, Mr Johnston is to obtain those surrender values and discover such documents as are necessary to enable Mrs Johnston to check the veracity of those statements. Mr Johnston says that he requires Mrs Johnston to provide particulars of life policies which she may have had at 16 October 1986. I am not prepared to order this in view of Mrs Johnston's statement that she had no such policies.

(i) Motor vehicles:

In the affidavits there is a conflict between the parties as to the values to be ascribed to the 1985 Isuzu Piazza and the 1981 Alfa Romeo motor vehicles but the draft order (Exhibit I to Mr Johnston's affidavit sworn in opposition to Mrs Johnston's motion for directions) suggests that the parties have agreed on the values to be ascribed to those motor vehicles. If

that suggestion is incorrect then Mrs Johnston is to provide a valuation by a licenced motor vehicle dealer of each of those vehicles as at the date of separation (as best as can now be managed) and is to discover such documents as may be necessary to enable Mr Johnston to check the veracity of those valuations.

(j) Building Society shares:

Mrs Johnston is to state whether she accepts that Exhibit L to Mr Johnston's affidavit sworn on 28 April 1988 comprises all the Building Society shares held by Mr Johnston as at the date of separation. If not, Mr Johnston is to swear a further affidavit stating that be the case if in fact it is the case. There does not seem to be any need for further discovery in this respect.

(k) Stock:

Mrs Johnston is to state whether she accepts Exhibit M to Mr Johnston's affidavit sworn on 28 April 1988 as comprising all the stock owned by the parties at the date of separation as para 14 of that affidavit avers. Mr Johnston is to discover all documents necessary to enable Mrs Johnston to check the veracity both of the particulars of the livestock owned by the parties as at the date of separation and of the disposal of the same.

(l) Beach Road, Katikati, and Mulgan Street, Katikati:

Mr Johnston asserts that neither of these properties is matrimonial property or that at the date of separation

the parties had no "property" in those lands within the meaning ascribed to that term by the Matrimonial Act 1976. That is obviously a matter for argument at the hearing. Mr Johnston is to discover all documents relating to the acquisition or proposed acquisition by either or both of the parties of those lands or any interest therein together with a valuation of the same as at the date of separation and as at the present time, such discovery to include such details as Mr Johnston has relating to the dispute referred in para 6 (xvii) of Mrs Johnston's affidavit sworn on 8 March 1988 together with all documents relating to the proposed subdivision of those lands, the scheme devised by the parties to minimize their liability to taxation on the subdivision of those lands and details of all town planning applications and appeals. That discovery is to include all documents relating to any debts incurred in relation to the proposed acquisition and subdivision of those lands and details of all items of developmental expenditure in respect thereof.

(m) Debts:

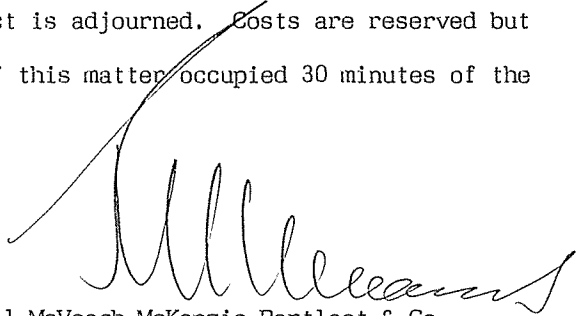
Mr Johnston is to advise by letter whether he pursues the recovery of the whole or part of the debts and expenditures listed by him in Exhibits N, O and P to his affidavit of 28 April 1988. If he does then he is to discover all documents on which those schedules are based and as are necessary to enable Mrs Johnston to verify the accuracy of the same.

It goes without saying that compliance with the above orders is not to be taken as indicating in any way whether any of the items are matrimonial property or separate property or indeed "property" at all nor whether there is to be an equal or unequal division of matrimonial property between the parties whether because of substantially greater contribution, misconduct or any other reasons. The intention of these orders is to ensure that all relevant matters are before the Court to enable the parties to present full argument in respect of the same and to enable the Court to determine all matters in issue.

In order to accelerate compliance and so as not to encumber the Court file with unnecessary affidavits, the acceptance or otherwise of the various statements in the affidavits and mentioned in the detail of the orders set out above may be done by letter rather than by affidavit with those letters being exhibited to affidavits later if necessary.

In making these orders, I have done my best to identify what seemed to me to be the matters in issue between these parties arising from their affidavits and in relation to the application for directions and for discovery. I recognize that some of the points raised are matter of inference only and in some respects the passage of events may have made the affidavits outdated. In view of that, leave is reserved to either party to apply further to amend this order or for such further or other orders relating to direction and discovery as may seem appropriate. Until the orders set out herein are complied with,

it does not seem appropriate to make a timetable order and the application in that respect is adjourned. Costs are reserved but I note that the hearing of this matter occupied 30 minutes of the Court's time.

A handwritten signature in cursive script, appearing to read 'R. McVeagh McKenzie Bartleet & Co.', written in black ink.

Solicitors:

Russell McVeagh McKenzie Bartleet & Co,
Wellington, for the Plaintiff

W V Gazley for the Defendant