

EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

**NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS](http://www.justice.govt.nz/family-justice/about-us/about-the-family-court/legislation/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 TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS](http://www.justice.govt.nz/family-justice/about-us/about-the-family-court/legislation/restriction-on-publishing-judgments).**

**IN THE FAMILY COURT  
AT HAMILTON**

**FAM-2012-019-000847  
[2016] NZFC 5176**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
	THE FAMILY PROCEEDINGS ACT 1980
BETWEEN	DOMINIC ARRINGTON Applicant
AND	HAZEL SLATER Respondent

Hearing:	8 April 2016
Appearances:	J Hawker for the Applicant V Crawshaw for the Respondent
Judgment:	24 June 2016 at 4.00 pm

---

**RESERVED JUDGMENT OF JUDGE A J TWADDLE  
[Division of Relationship Property; Discovery Issues; Protest to Jurisdiction]**

---

## **Introduction**

[1] At this stage of these proceedings about division of relationship property, the Court is required to resolve interlocutory issues relating to discovery and Mr Arrington's notice of appearance under protest to jurisdiction in respect of Ms Slater's application for orders under s 182 of the Family Proceedings Act.

## **Background**

[2] After beginning a de facto relationship in 2000, Mr Arrington and Ms Slater married in 2006. They have two children, born in 2007 and 2009. The family moved to New Zealand from [name of country deleted] in December 2009. Mr Arrington and Ms Slater separated on 25 May 2011 and their marriage was dissolved on 25 July 2013.

[3] During the marriage Mr Arrington worked as [occupation deleted]. While in [name of country deleted] he was employed by [name of employer deleted]. Following his arrival in New Zealand, he worked for [name of employer deleted] but left in February 2011 following an employment dispute. He brought a claim against [name of employer deleted], which was settled by a payment to him of a lump sum of \$126,078.25 and \$56,000 for legal costs.

[4] Ms Slater initially worked as a [occupation deleted] and then cared for the parties' two children.

[5] In [name of country deleted], Mr Arrington and Ms Slater owned a home in [name of city deleted]. In New Zealand they lived in rented accommodation.

[6] The property at the date of the separation was:

- (a) Household chattels;
- (b) Two motor vehicles;
- (c) Mr Arrington's interest in the [details deleted] Pension Scheme;

- (d) Money in various bank accounts;
- (e) Money in a solicitor's trust account (the [name of employer deleted] settlement monies).

[7] After the separation Mr Arrington received tax refunds, and rental payments from the [name of country deleted] family home and a property in [overseas location deleted].

[8] On 13 June 2011 Mr Arrington settled the [name of trust deleted]. The trustees are Mr Arrington and [name of company deleted]. Mr Arrington is a director of [name of company deleted].

[9] The discretionary beneficiaries of the Trust are Mr Arrington, the final beneficiaries (the parties' children), the issue of the final beneficiaries, any trust which has as its beneficiary a beneficiary of the [name of trust deleted], any association or club primarily used for charitable purposes and any person later appointed.

[10] Mr Arrington holds the power to appoint and remove beneficiaries and trustees.

[11] On 11 July 2011 the trustees of the Trust purchased a property at [address deleted].

[12] Mr Arrington's evidence is that the purchase by the Trust was funded by a loan of [details deleted] from his mother and an advance by him to the Trust. The advance from him was, he said, funded by a loan from his [name of country deleted] bank. This evidence is not accepted by Ms Slater.

[13] Ms Slater has applied under s 182 of the Family Proceedings Act to determine the status of the [name of trust deleted] and whether the section applies to the Trust, and for an order for discovery.

[14] Mr Arrington filed an appearance under protest to jurisdiction in respect of the s 182 application. In response, Ms Slater filed an application to set aside the appearance under protest to jurisdiction.

### **Issues in substantive proceedings**

[15] The issues in the substantive proceedings as identified at present are:

- (a) The extent of the relationship property pool (including classification of any intellectual property rights acquired by either party);
- (b) The status of the [name of employer deleted] settlement monies held in the solicitor's trust account;
- (c) The status and value of Mr Arrington's superannuation policy;
- (d) The extent and status of the tax refunds received after separation by Mr Arrington;
- (e) The status of the rental funds received by Mr Arrington from the [name of country deleted] family home and the [overseas location deleted] property;
- (f) The extent and classification of any debt owing to Mr Arrington's mother;
- (g) Whether Ms Slater is entitled to compensation for economic disparity;
- (h) Whether Mr Arrington is entitled to compensation for post-separation contributions;
- (i) The status of Ms Slater's student loan repaid by Mr Arrington during the marriage;

- (j) Whether provision should be made from relationship property for child support and/or spousal maintenance;
- (k) Ms Slater's s 182 application in respect of [name of trust deleted] in the event that the application proceeds;
- (l) Ms Slater's s 44/44C claim in respect of any relationship property disposed of to [name of trust deleted].

### **Issues in interlocutory proceedings**

[16] The issues in the interlocutory proceedings, which are to be determined in this judgment, are:

- (a) Ms Slater's application for discovery;
- (b) Mr Arrington's claim for privilege;
- (c) Mr Arrington's protest to jurisdiction in respect of the s 182 application.

### *Discovery & Privilege*

[17] Since Ms Slater filed her application for discovery, some discovery has been made. Ms Slater now seeks an order for discovery in respect of:

- (a) Unredacted copies of all information concerning Mr Arrington's dispute with [name of employer deleted] regarding his compensation package, including:
  - (i) All correspondence and documents between Mr Arrington, his solicitors and representatives of [name of employer deleted];
  - (ii) An unredacted copy of Mr Arrington's employment agreement with [name of employer deleted];

- (iii) An unredacted copy of the settlement agreement between Mr Arrington and [name of employer deleted];
- (b) A full copy of the file of Mr Arrington's solicitors concerning the setting up of the [name of trust deleted];
- (c) A full copy of the file of Mr Arrington's solicitors concerning the purchase of the [address deleted] property;
- (d) A copy of email correspondence between Mr Arrington and his real estate agent between December 2009 and August 2011;
- (e) Either full details as to the current value of the fund held within Mr Arrington's [details deleted] Superannuation Scheme, or an authority for Mr White to be provided with this information for the purposes of preparing a report to the Court.

[18] Mr Arrington has provided a copy of his employment agreement with [name of employer deleted], but says that the agreement to settle his claim against [name of employer deleted] is subject to strict terms of confidentiality. He proposed that an unredacted copy of the agreement could be viewed by Ms Slater's counsel but not by Ms Slater.

[19] Mr Arrington said no solicitor's file exists relating to the setting up of the Trust, and a copy of his solicitor's file in respect of the purchase of the property has been made available, except for communications between himself and his solicitors for which he claims privilege under s 54 of the Evidence Act.

[20] Mr Arrington said he was making enquiries about email correspondence between himself and his real estate agent in respect of the purchase of a property.

[21] Ms Crawshaw submitted:

- (a) The information concerning the [name of employer deleted] settlement is relevant because there is an issue as to whether the funds

are relationship or separate property. Information is required not only as to the amount paid (which is already known) but the basis for the settlement;

- (b) The information relating to the Trust and property purchase is relevant to the s 182 application; Ms Slater's evidence was that Mr Arrington had indicated to her at separation he would purchase a home for her and their two children as well as a property for himself, which goes to any expectation Ms Slater may have had at the time the Trust was settled and the property purchased (Ms Slater's evidence on this point was not accepted by Mr Arrington);
- (c) Ms Crawshaw relied on s 12A of the Family Courts Act.

[22] Ms Hawker submitted:

- (a) It was accepted that there is a classification issue in respect of the [name of employer deleted] funds;
- (b) It is not necessary for Ms Slater to see an unredacted copy of the settlement agreement; Ms Slater cannot add anything to what is a legal issue, and as the agreement is confidential, it would be sufficient for Ms Slater's counsel to see the agreement;
- (c) Legal professional privilege is a statutory right; inspection is a matter of discretion and a very good reason is required to go behind the statutory privilege;
- (d) Mr Arrington denied ever saying he would buy a property for Ms Slater; in a discussion before the separation he said he would think about getting money to purchase a property for her to live in if shared care of the children could be negotiated; the offer was always to buy a house for the children, not Ms Slater. Ms Slater has no interest in the

Trust or the Trust property and the solicitor's files in relation to the settling of the Trust and purchase of the property have no relevance to the proceedings.

[23] Rule 141 of the Rules gives the Court jurisdiction to order discovery of documents that are or have been in the possession of another party to the proceedings and relate to a matter in question in the proceedings.

[24] The principles relating to discovery are set out in *J v P & J* [2013] NZHC 557 and *Dixon v Kingsley* [2015] NZHC 2044. In the latter case, Kos J said:

[20] In my view the following are the essential principles governing discovery in relationship property litigation:

- (a) A robust approach should be taken to discovery consistent with the purposes and principles of the Act: the need for just division, but also inexpensive and efficient access to justice.
- (b) Such discovery must not be unduly onerous.
- (c) Such discovery must be reasonably necessary at the time sought.
- (d) The scope of discovery should therefore be tailored to the need of the Court to dispose, justly and efficiently, of relationship property issues under the Act.
- (e) More substantial discovery may well be ordered by the Court where it has reason to believe that a party has concealed information or otherwise sought to mislead either the other party or the Court as to the scope of relationship property. But even here, the scope of discovery should be no more than is required for the Court to fairly and justly determine relationship property rights. It is just that in such a situation, more is likely to be required to meet that requirement.

[25] Section 12A of the Family Courts Act provides that a Family Court hearing a proceeding (including under the Property (Relationships) Act), may receive any evidence, whether or not admissible under the Evidence Act, that the Court considers may assist it to determine the proceeding.



[26] I find:

- (a) The documents sought in respect of the [name of employer deleted] compensation monies are relevant to the issue relating to the status of the monies;
- (b) I accept Ms Hawker's argument that it is not necessary for Ms Slater to see an unredacted copy of the settlement agreement;
- (c) I accept Ms Crawshaw's argument that Ms Slater has a sufficient common interest in the documents on the solicitor's file to displace the privilege conferred by s 54 of the Evidence Act; Mr Arrington and Ms Slater were living together at the time the settlement was made and there is a valid argument that part, if not all, of the money is relationship property. In these circumstances Ms Slater has a right to ascertain from the documents the basis of the reason for the settlement;
- (d) The evidence will assist the Court in determining the proceeding.

[27] With respect to discovery of the solicitor's file in relation to the Trust and property purchase, there is some evidential basis (albeit disputed) for the s 182 claim. Documents on the file (including emails between Mr Arrington, the solicitors and a real estate agent) may be relevant to the claim. In terms of s 12A, the documents may assist the Court in determining the proceedings and the protection afforded by s 54 of the Evidence Act may be displaced. Nevertheless I bear in mind the decision of the Court of Appeal in *M v L* [1997] 3 NZLR 424 where the Court said that documents which attract legal professional privilege (as a class defined by statute) are protected not only by statute but for public policy reasons. They are exempt from production unless a claim for privilege is not sustained by the Court.

[28] I have come to the view that the fairest approach would be for me to inspect the documents, pursuant to Rule 151 of the Family Courts Rules, to determine their relevance and whether the claim for privilege should be sustained.

*Protest to jurisdiction*

[29] Ms Hawker submitted:

- (a) The protest to jurisdiction is based on the proposition that there is no basis in law for the s 182 application, and that removing the application from the proceedings at this stage is appropriate. The argument is not that the Court lacks jurisdiction to consider the application, but that the basic jurisdictional requirements of the section cannot be met by Ms Slater. At the hearing Ms Hawker sought also to rely on the strike out provisions of Rule 193 of the Family Courts Rules;
- (b) The Trust was settled after the parties separated, and after Ms Slater had obtained protection and parenting orders against Mr Arrington;
- (c) Mr Arrington's evidence was that the purchase of [address deleted] was funded by loans from his mother and his [name of country deleted] bank; and that no relationship property was settled on the Trust;
- (d) In terms of s 182, Ms Slater must show:
  - (i) A nuptial settlement which was premised on the continuance of the marriage;
  - (ii) A shared expectation when the settlement was made;
  - (iii) That her expectation was defeated by the dissolution of the parties' marriage;
- (e) To come within s 182, a settlement must have been envisaged, and premised, on the continuance of the marriage, and must have been

made on one or both parties in their capacity as spouses:  
*Ward v Ward* [2009] NZSC 125; *Clayton v Clayton* [2015] NZSC 30;

- (f) There is evidence to suggest Ms Slater intended to leave the marriage before she actually did so, the separation was extremely acrimonious and Ms Slater obtained orders against Mr Arrington;
- (g) While the Trust may have been settled “during the marriage” (ie before the marriage was dissolved), the settlement was not envisaged or premised on the continuance of the marriage; by the time the Trust was settled, the marriage had ended in every way other than in law;
- (h) Settlement of the Trust was not on Mr Arrington “in his capacity as a spouse” because the relationship of the parties was well and truly over at the time of the settlement;
- (i) Ms Slater will find it impossible to persuade the Court that she had an expectation of future benefit from a trust settled after separation, using debt, in the circumstances of an acrimonious separation, where she is not a listed beneficiary and did not know about the Trust at the time it was settled;
- (j) Ms Slater does not claim she had an expectation of a benefit in the Trust;
- (k) It is irrelevant that Mr Arrington gave consideration before the separation to the idea that he would purchase a property in which the children could live if they were in Ms Slater’s care.

[30] Ms Crawshaw submitted:

- (a) The protest to jurisdiction is misconceived and is an application to strike out in disguise. A strike out application has a much higher threshold: *BH v BVW* [2012] NZFC 4898;
- (b) Ms Hawker should not at such a late stage in the argument be able to change her position so as to rely on Rule 193 of the Family Courts Rules;
- (c) The Court has prima facie jurisdiction to consider an application under s 182; the settling of the Trust falls within the wording of the section, the parties were still spouses when the Trust was settled and the settlement is one which can be categorised as “nuptial”;
- (d) The application of s 182 has been widened by *Clayton v Clayton*;
- (e) The marriage of Ms Slater and Mr Arrington did not end until it was dissolved; the marriage did not end at the separation.

[31] Rule 43 of the Family Courts Rules relevantly provides:

**43 Appearance under protest to jurisdiction**

- (1) A respondent who objects to the jurisdiction of the Court to hear and determine the proceedings in which the respondent has been served may, within the time specified in or under rule 41 for filing a notice of defence, and instead of doing so, file and serve an appearance stating the respondent's objection and the grounds for it.
- (2) ....
- (3) A respondent who has filed an appearance under subclause (1) may apply to the Court to dismiss the proceedings on the ground that the Court has no jurisdiction to hear and determine them.
- (4) On hearing an application under subclause (3), the Court,—
  - (a) if it is satisfied that it has no jurisdiction to hear and determine the proceedings, must dismiss them; but

- (b) if it is satisfied that it has jurisdiction to hear and determine the proceedings, must dismiss the application and set aside the appearance.
- (5) At any time after an appearance has been filed under subclause (1), the applicant may make an interlocutory application to have the Court set aside the appearance.
- (6) On hearing an application under subclause (5), the Court,—
  - (a) if it is satisfied that it has jurisdiction to hear and determine the proceedings, must set aside the appearance; but
  - (b) if it is satisfied that it has no jurisdiction to hear and determine the proceedings, must dismiss both the application and the proceedings.

[32] In *BH v BVW* Ryan FCJ (as he then was) said:

[8] Rule 43 is designed to provide the machinery to examine whether the Family Court in New Zealand has jurisdiction in the context of forum conveniens/conflict of laws issues. It is not appropriate to attempt to use this rule for an alternative purpose. The fact that there are no judgments that counsel can refer to me that deal with r 43, other than in the context of a forum conveniens argument, speaks volumes about the purpose of providing for the process detailed in r 43. I see the filing of a protest to jurisdiction in this circumstance as an attempt to avoid the relatively high threshold to overcome in a strike out application pursuant to r 193.

[33] I accept Ms Hawker’s submission that the use of the procedure in Rule 43 may not be limited to forum conveniens arguments, but may also apply to arguments where an act does not apply in the particular circumstances of the case.

[34] Rule 193 of the Rules relevantly provides:

**193 Striking out pleading**

- (1) The Court may order that all or part of an application or defence or other pleading be struck out if the pleading or part of it—
  - (a) discloses no reasonable basis for the application or defence or other pleading; or

...

[35] As appears from *BH v BVW*, the threshold for a Rule 193 application is “relatively high”.

[36] Section 182(1) of the Family Proceedings Act provides:

- (1) On, or within a reasonable time after, the making of an order under Part 4 of this Act or a final decree under Part 2 or Part 4 of the Matrimonial Proceedings Act 1963, a Family Court may inquire into the existence of any agreement between the parties to the marriage or civil union for the payment of maintenance or relating to the property of the parties or either of them, or any ante-nuptial or post-nuptial settlement made on the parties, and may make such orders with reference to the application of the whole or any part of any property settled or the variation of the terms of any such agreement or settlement, either for the benefit of the children of the marriage or civil union or of the parties to the marriage or civil union or either of them, as the Court thinks fit.

[37] While I see some force in Ms Hawker's submissions, I am satisfied in terms of Rule 43 that prima facie the Court has jurisdiction to hear and determine the s 182 application, essentially because the parties were still married at the time the Trust was settled.

[38] Whether the application will succeed is a different issue. This will depend to some extent on issues of fact, which should be determined in the substantive proceedings. In these circumstances, I am not in a position to find that there is no reasonable basis for the s 182 application. Taking into account the higher threshold which applies to a strike out application, I would not strike out a s 182 proceeding.

[39] I conclude that the appearance under protest to jurisdiction must be set aside.

## **Orders**

[40] I make the following orders:

- (a) Orders for discovery in terms of paragraph 55(a)(i) and (ii) of Ms Crawshaw's memorandum dated 4 April;
- (b) Ms Crawshaw is to be able to view an unredacted copy of the settlement agreement between Mr Arrington and [name of employer deleted], but no copy is to be given to, or shown to, Ms Slater;

- (c) By consent, full details and base documents relating to the valuation of Mr Arrington's [details deleted] Superannuation Fund are to be provided to Mr White;
- (d) The solicitor's file relating to the settlement of [name of trust deleted], the purchase of the [address deleted] property by the Trust and correspondence between Mr Arrington, the solicitors and any real estate agent are to be produced to the Court for me to inspect, pursuant to Rule 151 of the Family Courts Rules;
- (e) The appearance under protest to jurisdiction is set aside;
- (f) I make directions in terms of paragraph 59 and 60 of Ms Crawshaw's memorandum dated 4 April;
- (g) A 30 minute pre-hearing conference is to be allocated on the next available date;

[41] Counsel are to file memoranda as to costs, contemporaneously, within 14 days. I indicate my preliminary view that Ms Slater should be entitled to costs on a 2B basis, in respect of discovery and the protest to jurisdiction.

A J Twaddle  
Family Court Judge