LAYING YOUR CARDS ON THE TABLE; DISCLOSURE ROULETTE

Introduction

Information is power.

All too often in relationship property cases practitioners are confronted with one spouse managing the finances, and thus holding the key to all financial information, while the other spouse is content to acquiesce, relying on the level of trust within the relationship. On separation, that imbalance is often brought into sharp focus.

The spouse with knowledge of the parties’ assets and liabilities is at a distinct advantage. The spouse with limited understanding of the parties’ financial position is required to either carry out their own detective work, or pay to have their legal adviser or forensic accountant do so. Even then, assets are not discovered. In a recent article by Jay Shaw quoted in Footnote 1, he referred to a matrimonial property survey in the United Kingdom where it was reported that:

• 94% of UK family lawyers have had cases in the last five years with significant concealed or missing assets were discovered.
• 55% of family lawyers said that such assets were revealed in 1 in 10 cases.
• 25% said that 1 of 5 of their cases uncovered significant concealed assets.

In New Zealand, as elsewhere, the time and cost in pursuing discovery is increasingly prohibitive because of delays in the Court process, and the increasing complexity of property ownership including the high incidence of family trusts.

The purpose of this paper is to:

1. Review relevant case law in respect of disclosure.
2. Compare how disclosure is dealt with in Australia and England.
3. Set out the statutory basis for initial disclosure in New Zealand.
4. Summarise what avenues are available to obtain further disclosure.
5. Propose a simple reform to ensure that relationship property cases can be dealt with as inexpensively, simply and speedily as is consistent with justice.

Recent case law

The following cases provide a useful overview:

_Dixon v Kingsley_

The case most often cited in terms of the Court’s attitude to disclosure in relationship property cases is now _Dixon v Kingsley_. That case involved a partly successful appeal against a Family Court’s refusal to make discovery orders. At issue were value of further shares acquired by the respondent from a departing shareholder/employee a few months after separation.

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1 Family Advocate 17 (Spring) 2015 – 28 to 29 Business valuations for relationship property purposes; non-disclosure and misstatement, Jay Shaw.
2 Section 1N(d) of the Property (Relationships) Act 1976 [PRA]
3 Dixon v Kingsley 2015 NZFLR 1012
The Court held that discovery should follow five essential principles:

- A robust approach should be taken.
- Discovery must not be unduly onerous.
- Discovery must be reasonably necessary at the time sought.
- The scope of discovery should be tailored to just and efficient disposal of the case.
- More substantial discovery may be ordered if a Court has reason to believe information has been concealed.  

Kos J held that the circumstances of Ms Kingsley’s acquisition of the additional 10% shareholding was relevant to the proceedings, and the privacy interests of the 3 shareholder/employees was not a matter that justified limiting discovery. Any concerns about privacy could be dealt with by controlled production and inspection and accordingly tailored discovery was ordered. The Court noted that, if in the future, the appellant could show direct relevance, then further discovery would also be ordered.

*White v Hewett*  

In an earlier decision that year the Court deemed that the additional discovery sought of the applicant’s bank and credit card statement was not reasonably necessary at the present point of time and that on the face of it there would seem to be more than adequate information discovered on which the respondent could rely. It was determined that she was unnecessarily seeking further information in what was little more than a *fishing expedition*. Her application for further and better discovery was therefore declined.

*Fisher v Fisher*  

In this case the High Court set aside the Family Court orders whereby the parties had been required to make full Peruvian Guana type discovery. The parties had subsequently agreed that tailored discovery would be more appropriate. The application to stay execution of the discovery orders was dismissed but the parties were required to provide discovery in terms to be agreed between them in 21 days of the judgment outlining the scope of discovery and a timetable for inspection of documents. Leave was specifically reserved for either party to seek further directions as to discovery if necessary.

*Starr v O’Meehan*  

The Family Court was faced with an application to set aside a s21 agreement. Non-party discovery has been sought against a general practitioner, psychotherapist and counsellor who were engaged between 2011 and 2012 to assist the parties with relationship difficulties. There was no consideration of litigation at the time. The applicant had alleged abuse and that the parties had jointly disclosed abuse to non-parties during their relationship and before its conclusion. The respondent denied these allegations in their entirety and sought privilege to attach to the non-parties files and notes. The issue was whether the information was confidential, whether disclosure would unnecessarily prolong the substantive application and whether the confidential information should be protected in the public interest. The Court determined that the respondent was unable to rely on privilege and disclosure was ordered. There were careful directions made anonymising the non-parties names with directions made as to the use of the evidence.

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4 *Dixon v Kingsley* [2015] NZFLR 1012 para [15, 16, 18 and 20]  
5 *White v Hewett* [2015] NZHC 1749  
6 *Fisher v Fisher* [2015] NZHC 2693  
7 *Starr v O’Meehan* [2015] NZFC 4458
In a further Family Court decision the Court noted that one of the primary aims of discovery was that parties should not be taken by surprise if proceedings go to trial. The principles of s 1 (N) of the PRA or Rule 3 FDR were best achieved through cooperation. While discovery would not be ordered where the applicant was doing no more than “fishing” (AMP Society v Architectural Windows Ltd) the Court determined that the applicant had properly made refined discovery requests and provided a reasonable basis for why further discovery was required. Orders were made to ensure that all proper and reasonable requests for discovery and production were made and met.

In two recent cases the court has considered the impact of discovery orders made against third parties resident overseas. In this case the respondent had unsuccessfully sought a contempt order against the plaintiff. The Court declined to make such an order noting that prior to the plaintiff travelling to China he was required to respond to an order for tailored discovery not an order for standard discovery under Rule 8.7. The Court did not accept therefore that an order for tailored discovery necessarily included a requirement to disclose any other documents which might be seen as alternatives to the specific documents sought. Furthermore the Court determined that the tailored discovery could only relate to documents available to the plaintiff in New Zealand.

Similarly in Zeng v Cai the plaintiff sought an adjournment of a substantive hearing pending his application for discovery of conveyancing files. The Court ruled that once the lawyers had sworn their affidavits as to the contents of the files, those affidavits should be provided to the defendants and they should in turn depose whether they held any further documents beyond those disclosed by the lawyers. Documents disclosed in the proceedings were only to be used for the purpose of the proceeding. Discovery orders were made against a non-party to make compliance as straight forward as possible to encourage him to provide the documents sought recognising that because he was outside the jurisdiction any order would not be enforceable unless he came to New Zealand.

The husband and wife were trustees together with the appellant a professional trustee. The husband has ceased to cooperate part way through the litigation and did not swear and file an affidavit until shortly before the relationship property hearing despite court orders that he should do so earlier. Despite the trust having significant capital, the trustees reduced the trust to insolvency and failed to give the wife a clear exposition of what happened to the trust post-separation. The trustee had been ordered to pay $60,876 of total costs on a 3 C basis with a 30% uplift. Those costs were upheld on appeal on the basis that the trustees had failed to openly disclose information about the trust and related entities post-separation.

In the Court of Appeal decision in Clayton the Court confirmed the obligation on parties to relationship property proceedings to make full and frank disclosure of all relevant information in order to ensure that the Court was in a position to make appropriate orders for the ascertainment and division of relationship property under the Act. The Court went further and stated:

“if a party who had or has relevant information available for that purpose fails to disclose it in a proceedings, the Court may draw such inferences as it considers appropriate including the adverse inference that the information would not have assisted that party if it had been disclosed.”
Brainich v Ward\(^\text{13}\)

In a very recent decision the issue was whether a s 38 enquiry under the PRA was a remedy of “last resort” as had been held by the Family Court. In a particularly helpful decision Heath J reviewed the relevant authorities both in relation to a s 38 enquiry and disclosure generally. The Court’s response to the particular means by which to remedy an inadequate disclosure of information may differ:

> “depending upon the stage of the proceedings, evidence about the way in which a party has previously complied with (or undermined) Court orders or directions, and the need (or otherwise) for an independent person to undertake relevant enquiries. The Court must be astute to act in the most appropriate way to procure any information deficit.”\(^\text{14}\)

Furthermore the Court determined that without being exhaustive in terms of determining the types of terms of any order the Court should:

1. take into account whether a particular remedy is reasonably necessary or unduly onerous;
2. tailor the order to information required to enable parties to receive competent advice;
3. capture financial information that is needed for it to determine relationship property proceedings in a timely fashion to ensure a “just division” of relationship property.\(^\text{15}\)

The Court determined that while in some cases it might be right to say that a s 38 enquiry will not be imposed until after less intrusive remedies, there may be circumstances:

> “…in which the Court is so lacking in confidence about the ability of a person to provide adequate disclosure of assets and liabilities that it is driven to the conclusion that an independent enquiry is more likely to yield the information sought than an oral examination of the party in default. The Family Court must determine the best means by which any information deficit can be remedied including a s 38 enquiry…”

> “…The more serious the default, the more intrusive the remedy is likely to be.”\(^\text{16}\)

In the end the Court was satisfied that a s 38 enquiry should be made and specified the powers to be conferred on the s 38 appointee.

Guidelines

From the above cases the following guidelines emerge:

1. An unfocused enquiry will be regarded as a fishing expedition and disallowed.
2. If relevance is established on a proper evidential basis coupled with a tailored discovery request, it is likely that the application will be granted.
3. Where obstruction is encountered and/or disclosure is not made, the Court will need to determine which remedy is most appropriate including the possibility of a s 38 enquiry. Costs are likely to be ordered.
4. Trustees are not immune from the requirement to provide disclosure in the context of a relationship property case.

\(^{13}\) Brainich v Ward [2016] NZHC 2481

\(^{14}\) Ibid Para [44]

\(^{15}\) Ibid Para [45]

\(^{16}\) Ibid Para [54 to 55]
How foreign jurisdictions deal with disclosure

Australia

In an early Australian decision the full Court of the Family Court of Australia held the following:

"whether the non-disclosure is wilful or accidental, is a result of misfeasance, or malfeasance or nonfeasance, is beside the point. The duty to disclose is absolute. Where the Court is satisfied that whole truth has not come out it may readily conclude the asset pool as greater than demonstrated. In those circumstances it might be appropriate to err on the side of generosity to the party who might otherwise be seen to be disadvantaged by the lack of complete candour." 17

Rule 13.01 of the Family Law Rules 2004 provides that each party to a case has a duty to the court and to each other party to give full and frank disclosure of all information relevant to the case in a timely manner.

The rules have a special division for the duty of disclosure in financial cases. A “financial case” includes an application relating to the property of the parties to a marriage, or of a de facto relationship after breakdown of the relationship. Rule 13.04 lists the documents of which full and frank disclosure must be made. These include:

(a) the party’s earnings, including income that is paid or assigned to another party, person or legal entity;

(b) any vested or contingent interest in property;

(c) any vested or contingent interest in property owned by a legal entity that is fully or partially owned or controlled by a party;

(d) any income earned by a legal entity fully or partially owned or controlled by a party, including income that is paid or assigned to any other party, person or legal entity;

(e) the party’s other financial resources;

(f) any trust:

(i) of which the party is the appointor or trustee;

(ii) of which the party, the party’s child, spouse or de facto spouse is an eligible beneficiary as to capital or income;

(iii) of which a corporation is an eligible beneficiary as to capital or income if the party, or the party’s child, spouse or de facto spouse is a shareholder or director of the corporation;

(iv) over which the party has any direct or indirect power or control;

(v) of which the party has the direct or indirect power to remove or appoint a trustee;

(vi) of which the party has the power (whether subject to the concurrence of another person or not) to amend the terms;

(vii) of which the party has the power to disapprove a proposed amendment of the terms or the appointment or removal of a trustee; or

17 Kannis v Kannis [2002] FAM CAT 1150
over which a corporation has a power mentioned in any of subparagraphs (iv) to (vii), if the party, the party’s child, spouse or de facto spouse is a director or shareholder of the corporation;

(g) any disposal of property (whether by sale, transfer, assignment or gift) made by the party, a legal entity mentioned in paragraph (c), a corporation or a trust mentioned in paragraph (f) that may affect, defeat or deplete a claim:

(i) in the 12 months immediately before the separation of the parties; or

(ii) since the final separation of the parties; and

(h) liabilities and contingent liabilities.

At the same time as a person files, or responds to, a financial case, they must file a financial statement.  

Rule 13.07 contains a general duty of disclosure in all cases. The duty applies to each document that is or has been in the possession of the party disclosing the document and is relevant to an issue in the case.

In a report of the Australian Law Reform Commission in March 2011 a summary was given of the obligation to disclose documents in the Family Court of Australia. The duty of disclosure was noted as being absolute. The duty is imposed from the start of pre-action procedures for a case and runs until the case is finalised. In financial cases these rules involve the exchange by the parties of details of assets, income and liabilities, and disclosure using a list of documents. A party must continue to make disclosures as circumstances change and as documents are created or come into the party’s possession or control.

The parties to a property case have an additional obligation to exchange documents before the first court date and before a conciliation conference. At least two days before the first Court date, parties are required to exchange copies of their three most recent taxation returns, superannuation documents, statements of business activity in the last year, and a valuation of all property the value of which has not been agreed, as well as details of any corporations, partnerships or trusts in which a party has an interest.

England

England’s Family Court procedure is governed by the Family Procedure Rules. The Rules contain a two stage process for disclosure in applications for “financial remedy”.

Under Rule 9.14, once an application (i.e. case conference) has been filed, both parties must, not less than 35 working days before the first appointment, simultaneously exchange with each other and file in the Court a financial statement in the form referred to in Practice Direction 5A.

The second stage is contained in Rule 9.14(5). Not less than 14 days before the first appointment each party must serve a statement of issues and a questionnaire. The questionnaire can request what further documents each party requires.

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18 Family Law Rules 2004 Rule 13.05
19 Managing Discovery, Final Report, Discovery of Documents in Federal Courts ALRC Report 115
20 Referring to IN the Marriage of Kannis (2203) 30 Fam LR 83
21 Family Law Rules 2004 (Cth) rr 13.01, 1.05, 1.08(1)(b)
22 Family Law Rules 2004 (Cth) rr 12.02, 12.05
23 Family Law Rules 2004 (Cth) rr 12.02
24 Emphasis added. This of relevance when considering the reforms proposed later in this paper
At the first appointment the Court must determine: whether any questions seeking information under Rule 9.14(5) must be answered; what documents requested under Rule 9.14(c) must be produced.\(^25\)

The Court must also give directions about: the valuation of assets; obtaining and exchanging expert evidence; the evidence to be adduced by each party. If no further directions appointment is necessary the Court must direct the case to a Financial Dispute Resolution (FDR) appointment.

Between the first appointment and the FDR a party is not entitled to the production of any further documents except in accordance with directions given in the first appointment, or with the permission of the Court.

Under the Rules the parties also have an option to provide discovery before an application is filed. The Pre-Application Protocol states what the parties should do if they elect to carry out voluntary disclosure. The Protocol is annexed to Practice Direction 9A of the Rules.

Under the Protocol, if parties carry out voluntary disclosure before the issue of proceedings the parties should exchange schedules of assets, income, liabilities, and other material facts using the financial statement as a guide to the format of the disclosure. Documents should only be disclosed to the extent that they are required by the financial statement. **Excessive or disproportionate costs should not be incurred.**\(^26\)

**High Court Procedure in New Zealand**

In New Zealand Rule 8.4 of the High Court Rules provides for initial disclosure. After filing a pleading, a party must serve on the other parties at the same time as the service of that pleading, a bundle consisting of:

- (a) **All of the documents referred to in that pleading; and**

- (b) **Any additional principle documents in the filing party’s control that that party has used when preparing the pleading and on which that party intends to rely at the trial or hearing.**

There are some exceptions and qualifications to the Rule and the Court may make orders pursuant to Rule 7.48 if a party fails to comply with the requirement to make the disclosure.

**Family Court Procedure in New Zealand**

The specific rules in relation to relationship property proceedings are provided for in Rules 388 to Rule 416 of the Family Court Rules 2002. On 31 March 2014, Rule 45 of the Family Courts Amendment Rules (2) 2014 replaced the previous affidavit of assets and liabilities with Schedule 8 Form PR(1). This was an improvement on the previous form in that it provided greater detail and specificity of assets and liabilities to be disclosed. It required the party to differentiate between legal and beneficial ownership and those assets in respect of which a claim was made that the property was that party’s separate property. It remained however a notoriously difficult form to complete for parties and practitioners alike. Furthermore the requirement for valuations, proof and supporting documentary evidence to be exhibited to the affidavit was not mandatory and therefore routinely ignored.

**Remedies to Obtain Further Disclosure**

In *Brainich v Ward*\(^27\) the Court referred to the four types of interlocutory orders that can be made to ensure all relevant financial information is before the Court when it hears a relationship property application. The Court may:

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\(^{25}\) Rule 9.15 Family Procedure Rules

\(^{26}\) This is also of relevance when considering the reforms proposed

\(^{27}\) *Brainich v Ward* [2016] NZHC 2481 Para [41]
1. order discovery of documents;\textsuperscript{28}

2. order the administration of interrogatories;\textsuperscript{29}

3. direct an examination of a recalcitrant party; or\textsuperscript{30}

4. direct a s38 enquiry.\textsuperscript{31}

**Proposals for reform**

Further steps taken in PRA cases however involve undue delay and considerably greater cost. Disclosure should be made at the outset of proceedings so such further interlocutory steps are not then required. The options in terms of reform in relation to disclosure under the PRA could be said to include the following:

1. A requirement for general discovery to be provided in every case utilising the civil rules whereby parties are required to file affidavits of all relevant documents at the outset of the proceedings.

2. A more tailored requirement for initial disclosure similar to that provided through Rule 8.4 of the High Court Rules.

3. A two-stage process of disclosure as occurs in Australia and England.

4. Better “front-end” disclosure whereby source documents are required to be provided at the time of initial filing.

In the end, any reform must be consistent with Principle 1N(D) of the Act. The last option therefore provides the most cost-effective and efficient process. Furthermore the current statutory legislation and rules are in place and would require a relatively minor amendment to the form of the affidavit to ensure that source documentation was provided at the outset.

It is proposed therefore that:

1. The standard affidavit of assets and liabilities is amended. A tracked-changed proposed affidavit is annexed.\textsuperscript{32}

2. There is a mandatory requirement that every party to a PRA proceeding must exhibit as schedule “A” to the affidavit the following source documentation as follows:

   (a) At least QV valuations for all real estate referred to in the affidavit.

   (b) Their tax returns for the last three years.

   (c) Any trust deeds in respect of which they are a trustee.

   (d) The last three years financial accounts for all entities in which they have an interest as a shareholder.

   (e) All superannuation/life insurance/Kiwisaver policies together with proof of the amount in each as at the date of separation.

\textsuperscript{28} Family Court Rules 2002 Rules 140 to 155.

\textsuperscript{29} Family Court Rules 2002 Rule 137

\textsuperscript{30} Family Court Rules 2002 Rule 400(2)(a)

\textsuperscript{31} Family Court Rules 2002 Rule 400(2)(b)

\textsuperscript{32} The wording in paragraph 2 is included in the new certificate. The double-negatives are removed in paragraph 3, 12, 14 and 15.
(f) A certificate from each of their banks detailing their credit and debit amounts in every account in which they have an interest as at the date of separation.

3. In addition every party must sign and exhibit a certificate in the form annexed as Schedule “B” to the affidavit.

The provision of the source information set out in Schedule A is not onerous. QV valuations can be accessed online and contain helpful information as to title references, and comparative property dealings. Parties can provide their own tax returns which include information as to income earned from all sources. The existing PR(1) already requires recent financial statements and trust deeds to be exhibited as set out in paragraphs 7 and 8. Furthermore, parties can authorise their banks at any time to provide a statement of the balances in all of their various accounts. Bank information requests are routinely required in respect of auditing and assurance standards and the completion of end of year financial accounts for companies.33

At paragraph 2 of the existing PR(1) a statement is included to the effect that a party making a false statement in the affidavit could result in any order of the Court being set aside and criminal proceedings being brought against them. That paragraph is however generally overlooked when the affidavit is sworn. The adverse inference clause in the proposed certificate simply reflects the decision in Clayton.

Conclusion

At present the source documentation set out in schedule A tends to be the further information which is required to be sought on an application for further disclosure after the proceedings have been commenced. Any inconvenience or cost in obtaining that information at the outset, will be more than offset by the savings in terms of further interlocutory proceedings being avoided.

A simple addition to the standard PR(1) form in which source documents are exhibited as a schedule would significantly assist in ensuring that disclosure is made at the outset of proceedings to ensure that a proper assessment of the relationship property pool can be made then. Similarly, a second schedule containing a certificate incorporating the penalties and sanctions which can arise if disclosure is not made or false statements are made, would remind the party of their absolute obligations to provide full disclosure. It would also serve as a timely reminder to the practitioner to ensure that the initial documentation is completed in every respect.

These simple reforms would at least in part ensure that Principle 1N(D) of the Act is complied with and avoid the ever increasing costs of seeking further disclosure through, what is already at times, an unduly laborious court process.

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33 See for example guidance statement GS016 Bank confirmation request issued by the Auditing and Assurance Standards Board Australian Government (see particularly pages 25 to 27)