

PUBLIC VERSION

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

**CA427/2018
[2018] NZCA 546**

BETWEEN

SOPHIE ANNABELLE BIGGS
Appellant

AND

STEPHEN TIMOTHY BIGGS
First Respondent

STEPHEN TIMOTHY BIGGS AS
TRUSTEE FOR THE TIM BIGGS FAMILY
TRUST
Second Respondent

LAGUNA BAY CAPITAL PTY LIMITED
AS TRUSTEE FOR THE LAGUNA BAY
CAPITAL TRADING TRUST
Third Respondent

LB MANAGEMENT PTY LIMITED AS
TRUSTEE FOR THE LAGUNA BAY
CAPITAL MT TRUST
Fourth Respondent

Hearing: 3 October 2018

Court: Miller, Woolford and Collins JJ

Counsel: DAT Chambers QC for Appellant
M J McCartney QC for First Respondent
J F Anderson QC for Second to Fourth Respondents

Judgment: 30 November 2018 at 2.00 pm

JUDGMENT OF THE COURT

A The application to adduce further evidence on appeal is granted.

B The appeal is allowed in part.

- C** The documents specified at [61], [67], [70] and [71] are discoverable.
- D** The timetabling of discovery is remitted to the High Court.
- E** The interim payment to be made by the first respondent to the appellant is increased to \$400,000, to be paid immediately. The payment is to be made on the terms fixed by the High Court.
- F** The appeal is otherwise dismissed.
- G** The first respondent must pay the appellant costs for a complex appeal on a band B basis and usual disbursements.
- H** No order for costs on the matters covered at the teleconference of 20 August 2018.

REASONS OF THE COURT

(Given by Miller J)

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Introduction

[1] This is an interlocutory appeal in a proceeding brought to ascertain and distribute the relationship property of Sophie and Tim Biggs, whom we will call the wife and the husband respectively.

[2] The appeal is most immediately concerned with discovery, regarding which the wife says that the High Court Judge, Nation J, denied her access to information needed to establish and quantify her entitlement to, among other things, a share of

the husband's separate property under s 9A of the Property (Relationships) Act 1976 (the Act).¹

[3] The wife also says that the Judge erred in his approach to an interim payment to be made by the husband. He ordered that the husband pay \$200,000 rather than the \$400,000 she sought, and he directed that that sum be deducted from an interim payment of \$1.5 million to be made to her when the matrimonial home at Queenstown, which is on the market, is sold.² He also directed that the husband is to receive \$1.5 million from the proceeds of sale although no such order was sought.³

[4] Finally, the wife also says that the Judge was wrong to refuse her an order that the husband must pay her legal and expert witness costs on an interim basis.⁴

[5] The husband applied before the hearing to adduce further evidence on appeal. The application was abandoned in respect of one witness, Mr Moriarty. We are otherwise satisfied that the evidence is cogent, fresh and relevant updating evidence and grant the balance of the application accordingly.

The parties' relationship

[6] The parties began living together in January 2010 and married on 31 December 2011. Their daughter was born on 12 November 2012. They separated between December 2013 and November 2014, and they separated finally on 27 January 2016.⁵

The husband's business interests

[7] The husband was formerly a commodities trader, first with Credit Suisse and then on his own account. He was already wealthy when the relationship began. The wife says that his assets were worth about AUD 20 million. His principal business interest during the relationship was that of a fund manager for unit trusts that invest in farms in Australia. These activities were carried on through a number of trusts and

¹ *Biggs v Biggs* [2018] NZHC 1592, [2018] NZFLR 580 at [287]–[296] [HC judgment].

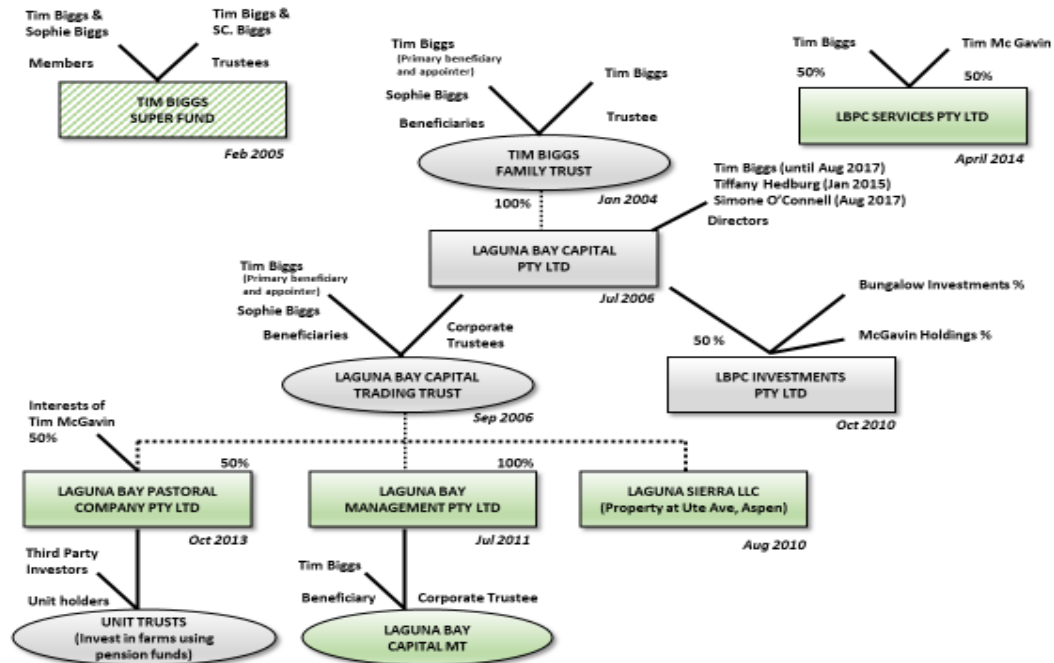
² At [409].

³ At [388].

⁴ At [409]–[410].

⁵ The husband says there were two separate relationships, but nothing turns on that for present purposes. The “first” relationship, at three years and 11 months, was not of short duration.

companies. We reproduce below a diagram of the entities with which the husband was involved. It was current during the hearing below:



It will be seen that the second to fourth respondents all appear on the diagram. The Tim Biggs Family Trust, the Laguna Bay Capital Trading Trust and the Laguna Bay Capital MT Trust were settled respectively on 22 January 2004, 27 September 2006 and 4 July 2011. The wife is a secondary or eligible beneficiary (by description as a spouse, not by name) of the first two trusts.

[8] The Tim Biggs Family Trust owns all the shares in Laguna Capital Pty Ltd. That company is said to receive distributions from the Laguna Bay Capital Trading Trust and the Tim Biggs Family Trust. The diagram shows that it also owned half the shares in LBPC Investment Pty Ltd, a company incorporated on 11 October 2010.

[9] The diagram shows that the Laguna Bay Capital Trading Trust owned 50 per cent of the shares in Laguna Bay Pastoral Company Pty Ltd (LBPC), which is said to have been the husband's principal business focus. LBPC is a fund manager. It appears to have been established to allow institutional and non-institutional investors to invest in the farming industry. It establishes unit trusts, each of which owns a farm or farms, and it manages the farms. There are presently two such unit

trusts. We understand that LBPC has no beneficial interest in them. It receives fee income, at least some of which is performance-based.

[10] The diagram shows that the remaining 50 per cent of LBPC was owned by interests associated with Tim McGavin, who was the husband's business partner. Mr McGavin is the chief executive of LBPC and a full-time employee, responsible according to the husband for overseeing management of the farms. The husband was a director and says he was not full-time. That is in dispute for reasons which will become apparent. As the Judge recognised, he appears nonetheless to have been a key person, with substantial but not exclusive responsibility for LBPC's efforts to attract investors.⁶

[11] The Laguna Bay business has evidently been successful.⁷ Funds under management appear to have increased substantially during the relationship. The wife claims that the husband's net worth increased to approximately AUD 59 million. The wife claims an interest in the gains, saying that they derive from relationship property (funds taken from the couple's joint bank accounts), or represent unpaid remuneration/salary left in the business, or are attributable to her contributions.

[12] The husband and Mr McGavin have parted company in business under a document described as a binding terms sheet dated 26 July 2018. It crystallises the value of the husband's Laguna Bay interests at that date, except for an entitlement to a share of trailing commission which subsists for several years. The payment that was made to the husband on settlement is a substantial sum, but as we go on to explain it does not follow that the discovery still sought is proportionate to the wife's claim to a share of any increase in value of his interest. In addition, his interests are entitled to a percentage of trailing commissions paid to LBPC by investors in two funds.

[13] The husband has resigned as director of relevant Laguna Bay entities and there is evidence from Tiffany Hedberg, a director of the third and fourth respondents, that LBPC has ceased to co-operate with discovery now that the third respondent no longer owns half of its shares. Ms Anderson QC, who appeared with a watching brief

⁶ At [249].

⁷ We use this term when it is not necessary to distinguish among the various entities.

(the Judge refused discovery against the third and fourth respondents, and there has been no appeal from that order), confirmed that those are her instructions. This raises an issue about whether any relevant discovery ought to be made by the husband or by Laguna Bay under a third-party discovery order. We address that issue briefly at [75] below.

[14] The proceeding was to be tried in October 2018, but this appeal has forced an adjournment until March 2019. The date of valuation of relationship property is normally the date of trial.⁸ The above narrative suggests that there are several dates at which the Court might wish to quantify the wife's claim to a share of an increase in the value of the husband's separate property.

The pleadings

[15] For purposes of this appeal the argument focused on s 9A of the Act, which the wife invokes to claim that the husband's separate property has become their relationship property.⁹ Her claims fall into three categories.

Relationship property acquired during the relationship

[16] The wife pleads that a number of assets are relationship property, having been acquired during the relationship. They include interests acquired during that period in the Tim Biggs Family Trust, Laguna Bay Capital Trading Trust and Laguna Bay Capital MT Trust and the husband's loan accounts with the latter two entities and Laguna Bay Capital Pty Ltd. She acknowledges that the three trusts are otherwise the husband's separate property.

[17] The husband says that these assets supposedly acquired during the relationship are mere investment vehicles for pre-existing separate property that retains its character as such.

⁸ Property (Relationships) Act 1976, s 2G(1).

⁹ She also brings claims in reliance upon ss 15, 17, 20E, 32, 44, and 44C of the Property (Relationships) Act, under s 182 of the Family Proceeding Act 1980, and in equity. It is not said that these claims require discovery additional to that warranted for the s 9A claims.

Increases in value of, or income or gains from, separate properties that were attributable in part or whole to the application of relationship property

[18] The wife pleads that funds were paid from the parties' joint Westpac accounts to the husband's entities. The amount paid is said to have comprised five specific payments totalling NZD 3,494,268. (We understand this to be the amount the wife now claims, rather than the two amounts of NZD 1,483,401 and AUD 3,484,008 pleaded.) The husband admits these payments but denies that they contributed to the value of his separate property. He says that the third respondent owed him a substantial sum when the relationship began. From time to time it made repayments of this loan and he applied those monies to relationship property. A few payments were made from the joint account to the third respondent for particular reasons having nothing to do with his separate property, and they merely reduced the balance of the loan that the third respondent owed him throughout. It follows, he says, that no relationship property was applied to separate property, nor did any increase in the value of separate property result.

[19] The wife also pleads that part of the husband's salary and income was applied to his separate property. The husband actually received AUD 635,000 from these entities during the period. The wife's claim is that that sum was less than market remuneration for his valuable services and the difference represents relationship property left in the business, perhaps for tax reasons. The husband denies that his salary was artificially low. We express no view about the merits of the wife's claim in law so far as it rests on s 9A. For present purposes, as will be seen, it does not require discovery additional to that required under this judgment or already made.

Increases in value of, or income or gains from, separate property that were attributable in part or wholly to the wife's actions

[20] The wife pleads that her actions contributed in these respects by performing the role of homemaker and caregiver for the couple's child, by entertaining corporate clients, and by assisting and supporting the husband with his various business ventures. She says that he worked "extremely long hours" on Laguna Bay business. Her contribution is not confined to specific separate property.

[21] The husband denies these claims. He says that he shared parenting duties equally, that the wife did not contribute to his work with clients, that his role at Laguna Bay was not unduly time-consuming, and that he exited his role with Laguna Bay when the couple reconciled and moved to Queenstown, so that no question arose of the wife contributing by releasing his time for business purposes.

The elements of a claim under s 9A(1) or 9A(2)

[22] The section provides:

9A When separate property becomes relationship property

- (1) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part) to the application of relationship property, then the increase in value or (as the case requires) the income or gains are relationship property.
- (2) If any increase in the value of separate property, or any income or gains derived from separate property, were attributable (wholly or in part, and whether directly or indirectly) to actions of the other spouse or partner, then—
 - (a) the increase in value or (as the case requires) the income or gains are relationship property; but
 - (b) the share of each spouse or partner in that relationship property is to be determined in accordance with the contribution of each spouse or partner to the increase in value or (as the case requires) the income or gains.
- (3) Any separate property, or any proceeds of the disposition of any separate property, or any increase in the value of, or any income or gains derived from, separate property, is relationship property if that separate property or (as the case requires) those proceeds or the increase in value or the income or gains are used—
 - (a) with the express or implied consent of the spouse or partner that owns, receives, or is entitled to them; and
 - (b) for the acquisition or improvement of, or to increase the value of, or the amount of any interest of either spouse or partner in, any property referred to in section 8(1).
- (4) Subsection (3) is subject to section 10.

[23] Subsections (1) and (2) both characterise as relationship property certain qualifying increases in the value of, or income of gains from, separate property. Subsection (1) applies where the increase was attributable to the application of

relationship property, while subs (2) applies where the increase was attributable to the actions of the other spouse.

[24] In *Rose v Rose* the Supreme Court described the elements of a s 9A(1) claim as follows:¹⁰

[27] A claimant under subs (1) of s 9A asserting that an increase in the value of separate property should be treated as relationship property bears the onus of proof and must establish:

- (a) that the subject property (which is separate property of the other party) has increased in value; and
- (b) that such increase in value is attributable, wholly or in part, to the application of relationship property.

So the whole of the increase will be relationship property if it was attributable in part to the application of relationship property. The contribution made by relationship property must be more than trivial or minimal.¹¹

[25] Turning to this case, the s 9A(1) claim focuses on specific, identified payments from the Westpac joint accounts. The Court must be satisfied that this money was relationship property, that it was applied to the husband's separate property, that the value of the separate property increased, and that there was a more than a trivial causal connection between application and increase. All of these elements are in dispute. As we understand his case, the husband says that money from the joint account was not relationship property and the payments merely reduced loans that he had made from separate property, precluding any question of following it into any separate property that increased in value.

[26] As the Supreme Court went on to explain in *Rose v Rose*, s 9A(2) differs in several respects from s 9A(1):

[38] ... First, rather than showing, as under subs (1), that an increase in the value of separate property of the other party is attributable in whole or in part to the application of relationship property, the claimant under subs (2) must show that it was attributable to the claimant's actions. Secondly, the nexus between those actions and the increase in value can be either direct or indirect. Thirdly, although the result of establishing these elements, that is, that any part

¹⁰ *Rose v Rose* [2009] NZSC 46, [2009] 3 NZLR 1.

¹¹ At [30].

of the increase (other than the merely trivial or minimal) was caused directly or indirectly by the claimant's actions, is that the whole of the increase is relationship property, subs (2) directs that the share in that increase of each of the parties is to be determined in accordance with their respective contributions to the increase in value.

[27] So s 9A(2) requires a contribution made by the wife to separate property, rather than to the relationship. This is an important distinction.¹² The contribution may take any form recognised by the Act. The court being satisfied that a causal connection exists between contribution and separate property, the wife's share depends on her contribution. These the section treats as questions of fact. Speaking generally, the Act does not rely on an onus of proof, except in the sense that an applicant will fail unless they can point to something in the evidence that supports their claim;¹³ rather, it requires that a court be satisfied a state of affairs exists and envisages that the court will divide relationship property using a broad evaluative judgment.¹⁴ We observe that in *Rose v Rose*, which concerned a farming business and a marriage of long duration, the Supreme Court stated that the necessary causal connection will be established unless it can "truly be said" that the increase was not in any material way derived from the conduct of the non-owning spouse.¹⁵ The larger point being made was not that there is an onus but that contributions under the Act may be both indirect and presumptively valuable.

[28] We observe that the wife's claim under s 9A(2) attaches generally to the husband's business interests. As noted, she says that she contributed to an increase in their value directly, by hosting clients of the business, and indirectly, by releasing the husband's time so that he could attend to business. The husband denies all of this, partly because he contributed equally to family life and partly because he was not required to invest a large amount of time in the business, especially in the latter part of the relationship. This feature of his defence distinguishes this case from those in which the parties agree that the husband devoted himself single-mindedly to business.

¹² Compare Law Commission *Review of the Property (Relationships) Act 1976: Preferred Approach* (NZLC IP44, 2018) at [2.106].

¹³ *Nation v Nation* [2003] NZFLR 740 (HC) at [59]; affirmed on this point in *Nation v Nation* [2005] 3 NZLR 46 (CA) at [68]–[72].

¹⁴ *M v B* [2006] 3 NZLR 660 (CA) at [38]–[39] and [49]–[50] per Robertson J.

¹⁵ *Rose v Rose*, above n 10, at [44].

Here the nature, timing and duration of any contribution that she made is in issue, but so too is his role at Laguna Bay and the amount of time he spent on its business.

Our approach to the issues

[29] We approach the issues in an order that differs from that adopted by counsel. We deal first with discovery, then with payment of the wife’s costs, and lastly with the interim distribution issues. It is sensible to do so because, as will be seen, our conclusions on each issue inform the next one.

The discovery standard in relationship property cases

[30] Discovery in this case is governed by the High Court Rules 2016, under which an adverse documents test has replaced the former “train of inquiry” test.¹⁶ Discovery should be proportionate to the subject-matter, and the parties must co-operate to facilitate discovery and manage its scope and burden.¹⁷ There is no need to gloss the rules by emphasising a need for co-operation and economy in relationship property litigation, since the rules are now well aligned with the objectives of the Act. It envisages that the parties will disclose relevant property and co-operate in ascertaining and dividing relationship property as inexpensively, simply and speedily as possible.¹⁸ That principle does not preclude tailored discovery of extensive scope,¹⁹ where it is proportionate to what is at stake and reasonably necessary to ascertain and divide relationship property.²⁰

[31] Relationship property litigation may exhibit characteristics that bear on discovery and may call for judicial management. This is always a question of fact. For example, one party, usually the wife, may have a valuable interest in property the details and value of which she knows little about. Sometimes antipathy may lead the parties to destroy value through litigation rather than share it through compromise.

¹⁶ See the discussion in *Dixon v Kingsley* [2015] NZHC 2044, [2015] NZFLR 1012 at [12]–[14].

¹⁷ High Court Rules 2016, r 8.2.

¹⁸ Property (Relationships) Act, s 1N(d).

¹⁹ High Court Rules, r 8.8.

²⁰ *Blackley v Blackley* [2018] NZHC 2011 at [20].

[32] In this case, the husband says another dynamic is at work: the wife is abusing discovery. He claims she is trying to embarrass him in a business in which confidentiality of information is paramount, by refusing to co-operate and by insisting on unnecessary and intensive discovery of his separate property. He says that the discovery sought is disproportionate, for although his separate property is valuable the wife's claim to it is both minor and weak; the claim is confined to a short period of time; further discovery is unnecessary under s 9A(1) because information about relationship property allegedly applied to separate property is already disclosed and causation is manifestly absent; and there is no viable claim under s 9A(2) because she made no contribution to separate property. It will be seen that these allegations rest to some extent on facts that are in dispute, and to some extent on assumptions about the nature of the wife's claim under s 9A.

[33] The Judge criticised the wife's approach to discovery. Ms Chambers QC, for the wife, submitted that in doing so he took the wrong approach. Citing *Dixon v Kingsley*,²¹ the Judge emphasised that discovery must be inexpensive and efficient, tailored, and not unduly onerous.²² He added that it must be relevant to the issues, and realistic.²³ He followed *J v P*, in which Mallon J held that discovery must be limited to what is reasonably necessary.²⁴ He held that the parties' attitudes to the litigation may inform the court's assessment of whether information has been concealed.²⁵ Ms Chambers' ultimate complaint was that the Judge read too much into these authorities, leading him to take a hostile approach to the application because the discovery sought is expensive and time-consuming.

[34] We agree that it is necessary to focus on the rules, for which any judicial restatement is likely to be an imperfect substitute, but the authorities cited are not wrong and we do not think the Judge applied the wrong test. He recognised that tailored discovery may be ordered, where it is relevant and proportionate and there is reason to believe that a party has not complied with their obligations. The wife's real complaint, as will be seen, is that he did not accept that all of the requests for discovery

²¹ *Dixon v Kingsley*, above n 16.

²² HC judgment, above n 1, at [80].

²³ At [82] and [85].

²⁴ *J v P* [2013] NZHC 557 at [33].

²⁵ HC judgment, above n 1, at [81] and [86].

made by her advisor, Mr Lyne, were relevant and proportionate, or that Mr Lyne was co-operating with the husband's advisors as he ought to do, or that the husband was being obstructive.²⁶ This complaint goes to the merits of the wife's application, to which we next turn.

[35] We make one further observation about the approach to discovery. Ms Chambers submitted that a court ought to order discovery of any document that a relevantly qualified expert, such as the wife's advisor Mr Lyne, thinks relevant. Nation J inevitably rejected that submission, which would assign control over discovery to an agent of one of the parties.²⁷ In this case that would be a bad idea, as we go on to explain. If an inquiry is necessary, a court may appoint its own expert under s 38 of the Act to conduct it.

The discovery sought

[36] The husband has discovered a great deal of material, much of it obtained through the previous co-operation of LBPC. Some of it was volunteered for purposes of unsuccessful mediations. We focus on those categories of documents that are still in dispute.

[37] Mr Lyne appears to have been engaged in 2016. He commenced his requests for discovery with a list of 124 categories of documents.²⁸ It is evident that he sought to establish a market value of the entire business by reference to not only financial statements but also internal management documents such as business plans dealing with future prospects, and to examine inter-entity transactions, to verify the husband's role in the business, and to establish income potentially available to the husband. Much of this information has been discovered, though the husband does not necessarily accept that it is relevant or material.

[38] We observe that what remains in issue appears to relate largely to the claim under s 9A(2). For purposes of s 9A(1) there is a good deal of specific information already in evidence about payments from and to the joint bank accounts.

²⁶ At [290].

²⁷ At [79].

²⁸ In a letter of 22 August 2016 which is attached to his first affidavit, sworn on the same date.

The misconduct rationale for specific discovery

[39] The Judge found that the wife's approach to discovery rested on the premise that Mr Lyne needed to audit the Laguna Bay entities, going behind financial statements that were prepared for normal reporting purposes to review material that descended to corporate ledgers and accountants' working papers.²⁹ Mr Lyne denies this, but in our opinion this characterisation of his approach is justified. The wife says that it is permissible because the husband is being evasive. The Judge rejected this claim.³⁰

[40] The Judge's narrative of discovery and evaluation of the parties' conduct is found in the judgment below.³¹ We generally agree with it and need not repeat it. We observe that it is not clear from the (incomplete) record before us what specific knowledge Mr Lyne had of the nature and potential value of the wife's claim when he prepared the list of requested documents dated 22 August 2016. His second affidavit (there are nine) suggests he adopted the starting assumption that all of the husband's interest in Laguna Bay may be relationship property, which quite plainly is not the case.³² The level of detail requested is extraordinary, and the work he proposes to do is a major exercise if undertaken at that level of detail. He appears to have taken it for granted that the exercise of obtaining and analysing all this source information is proportionate because the value of separate property is large, when the real measure of proportionality for s 9A(2) purposes is the contributions made over a relatively short period of time.

[41] Mr Lyne also saw this as a forensic exercise from the outset. Documents sought in his original list included, for example, copies of all email correspondence between the husband and seven named people, apparently Laguna Bay staff, from 1 January 2010 to present date, internal management reports for Laguna Bay Pastoral, accounting working papers used to prepare financial statements, and general ledger extracts.

²⁹ HC judgment, above n 1, at [273] and [290].

³⁰ At [138]–[143].

³¹ At [88]–[137].

³² In the third statement of claim, dated 16 February 2018, the wife accepts that the principal Laguna Bay entities are his separate property.

[42] We find it unsurprising that this instantly adversarial approach met with some resistance and also did not impress the Judge. It led to affidavits from the husband's advisor, Mr Moriarty, to the effect that Mr Lyne was refusing to co-operate with, among other people, the accountant, Mr Chotai, who actually prepared the financial statements for Laguna Bay entities. (We observe that Mr Chotai is one of the people whose emails with the husband Mr Lyne sought.) It is said that Mr Lyne has misinterpreted information in obvious ways, perhaps because he has not taken these opportunities.

[43] There is also plausible evidence that some of the information sought is considered highly commercially sensitive by LBPC's investors and Mr Lyne has refused to accept that the information is not necessary or that a summary of or proxy for it may suffice. For example, Mr Lyne wants the list of all LBPC investors, all LBPC's fee agreements, all LBPC financial projections and budgets, documents about the establishment of the LBPC unit trusts, all LBPC investment committee "information packs" and minutes, and copies of roadshow presentations. All of this material is understandably sensitive.

[44] The Judge found that:³³

[138] I have read and considered:

- (1) the correspondence between the parties' solicitors during the separation;
- (2) the parties' affidavits that have been in the case books prepared for the High Court hearings on 12 June 2017 and 18 March 2018; and
- (3) the detailed affidavits of Mr Lyne and Mr Moriarty.

[139] I am satisfied that Mr Biggs has never withheld documents or information for the purpose of consciously obstructing any claim he thought Ms Biggs might have. I accept that his concerns about confidentiality have been genuine. Different information has been provided as negotiations have developed or as claims have developed and been clarified.

[140] The accounts, bank statements, tax returns and various other documents supplied were sufficient to allow Mr Lyne to have a clear understanding as to how all the entities were related and to see what has happened to the assets and liabilities of those entities on a year-by-year basis.

³³ HC judgment, above n 1.

The information has been sufficient for him to raise specific queries as to matters of concern to him, even as to amounts that were modest in the scheme of what is generally at issue in these proceedings. When he raised such concerns, which were at odds with evidence given by Mr Biggs or opinions expressed by Mr Moriarty, they were answered promptly, in detail and with reference to documents which could reasonably be referred to in support of the responses which were being provided.

[141] Ms Chambers submitted detailed discovery, including full ledgers, was sought because Mr Biggs had concealed information ... Ms McCartney dealt comprehensively with the alleged anomalies in her submissions.

[142] I am satisfied that the allegations have been satisfactorily explained and answered through the information which Mr Biggs has provided with his affidavits and the documents provided to Ms Biggs' advisers, both before and since those allegations were made.

[143] The evidence before the Court does not provide any reasonable basis to justify Ms Chambers' submissions to me in March 2018 that Mr Biggs' conduct in this case is akin to that of the husband in *SM v LFDB*. I note also that Ms Chambers made this submission despite Davidson J saying in his judgment of 12 October 2017 that there was no evidence here of it being Mr Biggs' objective to prevent Ms Biggs from pursuing litigation to a conclusion "by a process of financial attrition."

(Footnote omitted.)

[45] We are not persuaded that Nation J was wrong to make these findings. This conclusion has significant implications for the further discovery still sought, as we explain below, and also for the costs application.

The specific material now in issue

[46] The material which is still sought falls into 20 categories (a few of which we combine in our discussion below). As signalled at [13] above, there is an issue about whether some of the documents are within the husband's control for discovery purposes.³⁴

³⁴ We record that the Judge held at [227] that the "control" standard is wider than the former "possession, power or control" standard, citing *Guttenbeil v Tower Insurance Ltd* [2012] NZHC 2106; and *Wentworth Retreat (2009) Ltd v Dell Inc* [2017] NZHC 1627. This conclusion was not in dispute before us.

LBPC's Board reports, senior management reports, reports recording assets under management, funds and group performance including operational reports or similar and financial reports from year ended 30 June 2014 to the present

[47] This claim concerns LBPC's interests in the unit trusts. Quarterly investor reports have been discovered and are admittedly of significant assistance but they are "not sufficiently comprehensive to provide the type of information needed to fully and accurately value these assets". Disclosed terms sheets establish an entitlement to a trailing commission. That entitlement is founded on income and realisations, and it makes relevant "future likely performance, calls on capital, acquisitions, realisations, returns and profits".

[48] The husband says that quarterly investor reports and holding statements provide all necessary information including industry changes, operational activity and plans, and financial position and performance. Gains including those on disposal are disclosed in financial statements. He contends that these documents are held by LBPC and are subject to strict confidentiality obligations imposed by investors and also Australian regulatory control.

[49] The Judge refused this disclosure, as with the other categories below, on the ground that it was unnecessary in light of information already discovered, and oppressive.³⁵ He also observed that some of the information was not in the control of the respondents.³⁶

[50] We preface our findings by observing that it appears this discovery is relevant to the wife's claim under s 9A(2). It is not apparent that she seeks to trace the relationship funds referred to at [18] above into specific items of separate property (although Mr Lyne suggests it is possible, his affidavits do not appear to identify such property). It does not seem that Laguna Bay is a capital-intensive business (recalling that it is a fund manager with no beneficial interest in properties under management.) Its value appears to be a function of its entitlement to fees.

³⁵ HC judgment, above n 1, at [288]–[289] and [295].

³⁶ At [232]–[234].

[51] This context leads us to make several important points about the wife's claim:

- (a) We adopt the working assumption that she will prove her claim to have made a substantial contribution by hosting and entertaining clients and by releasing the husband so that he could devote long hours to the business. For s 9A(2) purposes, a contribution of the kind she claims to have made is not presumptively less valuable than his.
- (b) The assets that are the subject of Mr Lyne's requests are admittedly separate property. The wife's claim is confined to a share of their increase in value between, at the outside, the date the relationship began and the date of trial.
- (c) That share rests on her contribution, as just noted, and also a causal link between that contribution and the property concerned. The need for a causal link to property, rather than the relationship, is a distinguishing feature of a claim under s 9A(2). We will assume for present purposes that the husband played a key role in procuring investors and that such contribution may have materially increased funds under management and hence the value of LBPC. The wife's contribution may be correspondingly significant.
- (d) However, any increase in value may have a number of causes that are independent of either party, ranging from macroeconomic decisions taken by central bankers to weather conditions on the farms. Other people, such as Mr McGavin, presumably contributed. Section 9A recognises a partner's indirect contributions, as explained at [27] above, and the "causative potency and remoteness" of such contribution must be decided on the evidence led at trial.³⁷ But in *Rose v Rose* the Supreme Court held that fairness will usually require that increases

³⁷ R L Fisher (ed) *Fisher on Matrimonial Property* (online ed, LexisNexis) at [11.46].

in value attributable to causes independent of either party, such as inflation, remain separate property.³⁸

- (e) The causal effect of the husband's (and hence the wife's) contribution during the relationship may also reduce with time. Those contributions presumably ceased by the date of final separation on 27 January 2016 and the trial will be held more than two years later;
- (f) The recent sale of the business has fixed its value as between Mr McGavin and the husband as at the date the terms agreement was signed, 26 July 2018, save for an entitlement to trailing commissions. There is no reason to go behind that transaction, the details of which have been disclosed;
- (g) The wife's claim to a share of trailing commissions is affected by the fact that the husband now has a reduced claim to those commissions under the term sheet. Counsel gave us to understand that under the term sheet the husband's entitlement is half what it formerly was. The foregone entitlement presumably has been capitalised in the sum paid on settlement;
- (h) It is likely that a valuation of LBPC that reflected future income would employ a number of alternative valuation methodologies. It could be fixed by some industry standard multiple of funds under management, or by a price-earnings ratio, fixed as at the date of sale. This would be appropriate for a mature funds management business, and it would eliminate the need for much of the discovery sought. Mr Lyne's requests suggest that he has in mind an approach, perhaps based on a discounted cashflow model, in which he offers an opinion about (by way of example) the prospect that the funds will grow or the risk that investors will dismiss LBPC before the funds mature. That approach

³⁸ *Rose v Rose*, above n 10, at [47] and [50]. The wife's 40 per cent share in that case was attributable to the couple's heavy indebtedness, for which she was jointly liable, and the financial contribution made by her wages.

can be justified to the extent that LBPC is in a growth phase, but it must be discounted for the many uncertainties affecting future income and it requires intensive analysis. It is not apparent to us that the analysis Mr Lyne evidently has in mind will add value to the wife's claim, especially since the cashflow forecasts given to investors have been discovered.

- (i) Ultimately, the wife's share will be determined as a matter of overall assessment rather than precise calculation.

[52] For these reasons we do not accept Mr Lyne's premise that it is necessary to "fully and accurately" value the unit trusts that LBPC administers. In our opinion the discovery sought in this category is unlikely to have any material effect on the outcome but will add substantially to the burden of discovery. Nation J was right to refuse it.

Financial statements for 2017 and 2018 for Laguna Bay Fund 1 Pty Ltd and LBPC

[53] These statements are sought to assess accurately the value as at current date, to show the "makeup of assets" owned, and to understand financial performance. June 2017 and November 2017 management accounts are already in evidence. The husband says he cannot provide accounts prepared after he notified his intention to resign as a director. They are no longer available to him. The wife complains that he had ample opportunity to ask for these before resigning.

[54] We are not prepared to order discovery by the husband. There is affidavit evidence that he does not hold this material and LBPC, which does, has ceased to co-operate. There is no reason not to take that evidence at face value. So third-party discovery would be required. We are not persuaded that it would add anything to the information already discovered.

Non-redacted trust deed for Laguna Bay Agricultural Fund 1

[55] Trust deeds have been provided by LPBC on a redacted basis. Mr Lyne says that the redacted portions of the deed for this fund provides vital information on the size of the fund, its maximum size, gearing, [] []

] remuneration of the manager and [

]. He says this information is relevant because it allows him to estimate the likely trailing entitlement. This is a question of proportionality. For reasons given above we do not accept that the High Court will need to estimate trailing commissions with precision as at the date of its valuation. The rate at and basis on which it is payable are sufficiently confirmed by the binding term sheet. The performance of the funds to date is sufficiently evidenced by financial statements disclosed, and investor reports sufficiently predict future performance to the limited extent that it remains relevant to this proceeding.

Any and all financial projections, budgets and forecasts for LBPC prepared since inception in 2010 through to current date excluding 2017 forecasts provided

[56] As this request indicates, forecasts for 2017 have been provided. Early budgets have been replaced by actual financials, and as noted investor reports have been disclosed. Also disclosed is an indicative or limited scope valuation by Grant Thornton which was prepared in April 2017. Grant Thornton was instructed to value the equity in LBPC for purposes of an employee share scheme.³⁹ We note that the valuation excludes potential performance fees.

[57] Mr Lyne says that forecasts are normally requested by a valuer. Perhaps they are, but we do not accept that they are reasonably required here.

All investment committee meeting information provided to committee members and minutes for the year ended 30 June 2014 to current date

[58] This has been requested to verify the size of the funds and capital raisings, the expectation of return, performance prospects and anticipated holding periods. This committee presumably monitors performance and future prospects of the funds.

[59] For the reasons already given, we do not consider further material about performance and prospects is necessary. The material already provided should suffice.

³⁹ HC judgment, above n 1, at [237].

Roadshow presentations, marketing material, prospectuses, investor statements and similar for period January 2010 to current date

[60] This information is sought for the same reasons as the previous category. So far as it concerns information about performance and future prospects, we consider it unnecessary for the reasons we gave there.

[61] However, investor presentations and marketing material and prospectuses are relevant to the extent that they identify the husband's role in the business at dates during the relationship and allow the Court to gauge the extent of his commitment to the business. It is evident that the wife already has some such material. We respectfully disagree with the Judge's view that such material is of marginal assistance at best and so does not warrant discovery.⁴⁰ It will not disclose anything about the wife's contribution, but the husband has put his own commitment to the business in issue by denying that the wife released his time to attend to it, and the issue has significant implications for the wife's claim. This discovery is directed to the husband's role, so commercially sensitive information may be redacted. This may facilitate third-party discovery, which may be required to the extent that this material is not now in the husband's control.

All accounting work papers used or produced in preparing LBPC financial statements for the financial year ended 30 June 2014 to current date

[62] This is said to be necessary because work papers provide a much greater level of detail of transactions making up financial statements, support schedules, reconciliations and journals.

[63] We do not accept that this material is necessary. There is much force in the criticism that it assumes a need to audit the financial statements. As the Judge found, and we agree, there is no reason to suppose that anything has been concealed, or that the financial statements are anything other than true and fair.⁴¹ We recognise that Mr Lyne does not accept that an audit is his objective. He appears to accept that the financial statements are accurate but says that more detail is required because they

⁴⁰ At [247]–[251].

⁴¹ At [290].

were not prepared for relationship property purposes. We reject this assertion. It is true that such statements might not suffice to the extent that the Court is required to examine particular transactions evidencing the application of relationship property to separate property, but that is not the point of this discovery request; as noted, the further discovery sought is focused on the claim under s 9A(2).

General ledger of LBPC for the year ended 30 June 2014 to current date

[64] This is sought for the same reason, a desire to examine all LBPC transactions in greater detail. It is justified in part because the ledger is said to be electronic and so can be given to Mr Lyne without significant effort. For the reasons just given, we do not accept that this material need be discovered.

Work-related email correspondence between the husband and five named Laguna Bay individuals, including Mr McGavin, and the husband's calendar and travel records throughout the relationship

[65] This information is sought partly to verify the risks, prospects, background and value of property interests, partly to explain the treatment of items in LBPC accounts, and to establish the remuneration and role of Ms Hedberg. We reject the application to that extent, for the reasons already given; sufficient information has been discovered.

[66] The information sought is however relevant to the extent that it evidences the husband's role and time commitment at Laguna Bay and supports, or not, his claim that he withdrew from the business when the couple moved to Queenstown. The Judge considered this discovery would be oppressive and unnecessary given that a broad-brush assessment will be made.⁴² In our view, the information sought is important for the reasons given at [51(a)] and [51(c)] above. We observe that the wife has given evidence about the husband's travel commitments in an affidavit dated 14 April 2016 but it is not clear to what extent this is common ground, and in any event it is not the full measure of the husband's commitment of time to either business or family.

⁴² At [264].

[67] The discovery requested is material, but it is also potentially extensive and burdensome. To keep discovery in proportion, we direct that it be limited to a) the husband's calendar and travel arrangements; b) emails between the husband and Mr McGavin evidencing the nature of the husband's role; and c) what may be termed metadata for email traffic between the husband and the other named persons except Kevin Cairns, Pablo Sitjar, Anna Palmer and Enrique Fynn. The metadata comprises the number and dates of emails between the husband and those addressees, including Mr McGavin. Except as provided under b), the content need not be discovered. We reject Mr Lyne's claim that because he can be given an electronic 'dump' this is a low-cost exercise. If the content were disclosed it would be appropriate for someone, presumably at LBPC, to review the emails for relevance and commercial sensitivity, and to redact information about transactions and performance that we have held need not be discovered. No such concerns should attach to the metadata. Once placed in a database it can be used to show patterns of interaction between the husband and Laguna Bay during the relationship.

[68] This order attaches to the husband on the basis that this information may be in his control. The orders made will address Laguna Bay's legitimate concerns. Differing somewhat from the Judge,⁴³ we consider that the husband cannot excuse himself by pointing to obligations of confidentiality owed to or by Laguna Bay; that can be addressed by appropriate undertakings and confidentiality orders if, which seems unlikely, the information we have ordered raises such concerns. (The Judge's decision as to discoverability ultimately did not turn on this point,⁴⁴ and he made orders as to confidentiality which were not in dispute before us.⁴⁵) If the information is no longer within his control he must swear an affidavit to that effect.

Copies of all tax return and accounting work papers used to prepare tax returns or financial statements for entities associated with the husband, from 30 June 2009 to current date, along with general ledgers

[69] This information is sought partly because it gives much greater detail of transactions making up financial statements. It appears to cover all Laguna Bay

⁴³ At [235].

⁴⁴ At [234].

⁴⁵ At [359].

entities. We consider the request unnecessary and disproportionate. The financial statements are adequate.

[70] However, there have been a number of journal entries, including correcting entries, relating to funds moving between the parties' joint accounts and the husband's entities, and these may possibly have some relevance to the wife's claim under s 9A(1). For example, it appears that wages to the wife were initially credited to the husband's loan account with the third respondent but this was reclassified in the relevant ledger. This is one example of a number of alleged applications of relationship property to separate property that are listed in appendix 3 to Mr Lyne's affidavit of 10 July 2017. The husband's explanation is that initial coding was done by employees using accounting software and later checked by his accountants. Documents supporting these transactions must be discovered to the extent that has not already been done (it is not clear from the schedules we have, since these bundle together general ledgers for all Laguna Bay entities).

Documents detailing investments (including loans and advances) in which Mr Biggs has an interest being Angel Asset Pty Ltd, Angel Asset Unit Trust, Southern Cone Group and Kangella Investments

[71] These are all said to be investments made by the husband during the relationship. The husband says that these have been disclosed as accounts receivable. The wife wants to know whether they are more accurately characterised as investments, in which case they may have a greater value. We accept that discovery ought to be made of documents evidencing the character and source of these advances or investments.

To the extent not already provided details since 2009 to the current date of the following investments including Laguna Bay Pastoral Crop Fund No 8, Boundary Bend, PrimeAg, AACO, Cowal, Sea Farms Group, Regis Resources (RRI.ax), Beadell Resources (BDR.ax), Luiiri Gold Ltd, Geopacific Resources, Lion Selection Group, Strategic Energy Resources, Troy Resources, Silver Lake Resources, Metals X Ltd, Foran Mining Corporation and Tandou. Documents to include the acquisition and disposal reports.

[72] This information is sought because these are said to be investments made by the husband. He responds that this list came from a LBPC marketing document

reciting past success in investments, and the actual investments and their performance are shown in the financial statements that have already been provided.

[73] We are not persuaded that this material is necessary. It appears that there will be an issue about whether increases in the value of the husband's separate property were due to the performance of pre-relationship assets such as these. However, financial statements recording the performance of these investments have been disclosed.

All communications, presentations, emails, letters, investor statements and any other communications and reports to and from a named major investor in the Laguna Bay Agricultural Fund 1

[74] The named investor is said to be the largest in this fund. We do not accept that it is necessary to discover this material. So far as it evidences the husband's role at Laguna Bay, it is covered by the discovery already ordered. We observe that the wife does not claim to have contributed specifically to securing this investor and evidently is already familiar with the husband's role regarding it; she says that he flew to the United States with Mr McGavin, missing a family engagement, and made a successful pitch to the investor.

Who must make discovery

[75] The discovery that we have ordered must be made by the husband. To the extent that the information concerned is not within his control, he must swear an affidavit confirming that. We are not in a position to make orders against LBPC, which is not a party to this appeal, nor the other respondents since there was no appeal from the Judge's decision so far as it affects them. Any such application will need to be taken up in the High Court. We indicate that should such application be necessary the High Court may consider whether to order the husband to pay the costs of such discovery in the first instance, to give him an appropriate incentive to obtain the material at least cost.

Order that the husband pay the wife's accounting and legal fees on an interim basis

[76] The wife seeks an order that the husband pay her reasonable forensic and valuation expenses and her reasonable legal expenses from the date of the High Court decision on 29 June 2018. She asks that the reasonableness of these costs be assessed in the first instance against the costs incurred by all the respondents. She proposes that such payments be subject to any further order of the High Court as to her contribution on determination of the substantive proceedings. She contends that the order is appropriate having regard to the parties' relative financial position, the husband's recalcitrance in providing information, and the impossibility of presenting her case adequately without the expert and legal assistance that that the order would permit. She emphasises that this is not a pre-emptive costs order; rather, it shifts the burden of costs on a provisional basis. The costs may ultimately be deducted from the wife's share of relationship property.⁴⁶

Jurisdiction

[77] It is not in dispute that a court has jurisdiction to make an order of the kind sought under s 40 of the Act, which provides:

40 Costs

Subject to any rules of procedure made for the purposes of this Act, in any proceedings under this Act the court may make such order as to costs as it thinks fit.

[78] The leading case is *C v C [Costs]*.⁴⁷ The Family Court ordered that the husband pay the reasonable valuation expenses of the wife as a disbursement, and on appeal John Hansen J confirmed that jurisdiction existed to make such orders on an interim basis pending resolution of the proceedings.⁴⁸ He identified relevant considerations as the parties' relative financial strength, the husband's resistance to disclosure of information, and the wife's inability otherwise to investigate

⁴⁶ Orders in very similar terms were made in *Romanes v Romanes* [2017] NZFC 9928 at [50]–[51].

⁴⁷ *C v C [Costs]* [2009] NZFLR 322 (HC).

⁴⁸ At [23]–[25].

the husband's position and secure a just result.⁴⁹ Leave to appeal was refused by this Court, which was in no doubt that the s 40 jurisdiction extended so far.⁵⁰

[79] We confirm that the jurisdiction under s 40 extends to ordering that one party pay the other's costs and disbursements of the proceeding on an interim basis pending final disposition. The jurisdiction must be exercised in a proceeding under the Act, and the costs concerned may include experts' fees that are commonly incurred as a disbursement. It is to be exercised in accordance with the Act's purposes and guiding principles, notably those of securing a just division and ensuring that relationship property issues should be resolved as inexpensively, simply, and speedily as is consistent with justice.⁵¹ We emphasise that these objectives address both the quality of the substantive outcome and the cost-effectiveness and speed of the process by which it is reached.

[80] We accept Ms Chambers' submission that an order may be justified where shortage of funds may otherwise compromise a just result by precluding a party from investigating their entitlement and presenting their case on a more or less equal footing. It is not a prerequisite to such order that the other party be shown to have behaved in an obstructive manner, so delaying resolution and raising costs. Nor is it a prerequisite that the applicant should otherwise be unable to pay their own costs, since the costs jurisdiction ought to serve not only a just substantive result but also the inexpensive, simple and speedy resolution of the proceeding. An order may serve the legislative expectation that the parties will behave co-operatively and volunteer the disclosure that is reasonably necessary.⁵²

[81] The jurisdiction is not reserved for exceptional cases, but an interim costs order creates powerful incentives and a court should be circumspect when acting on information that may prove to be wrong. It is not invariably true that the party who holds information is being recalcitrant, as this proceeding shows: Nation J concluded, and we agree, that on the now reasonably comprehensive record the wife's advisors have demanded more information than the proceeding warrants, and they have also

⁴⁹ At [13] and [26].

⁵⁰ *C v C* [2009] NZCA 319 at [6].

⁵¹ Property Relationships Act, ss 1M(c) and 1N(d).

⁵² *M v B*, above n 14, at [49].

been insensitive to reasonable concerns about the confidentiality of information belonging to non-parties.⁵³ To that extent the husband's resistance has been justified. (By contrast, in *C v C Hansen J* was satisfied that the husband had made little genuine effort to place necessary financial information before the courts.⁵⁴) We add that a court that makes such an order must accept responsibility for supervising it as closely as may be required. It must also be conscious of a risk that the order will engender argument over the justification for costs and reasonableness of the amounts to be paid.

[82] Courts may adopt strategies to manage the latter risk. For example, where the application for costs rests on a claim that the applicant cannot otherwise afford justice, a court may be met with complaints that the costs could be met if only the applicant lived more frugally. That has happened to some extent in this case. A court may choose to gauge such a complaint against the living standard of the former household.

[83] Similarly, we accept that, as the wife requests here, the reasonableness of an applicant's costs can be gauged by comparing them to those of the respondent. Australian courts have sometimes used "dollar for dollar" orders to cap what the applicant may be paid and discourage complaints that their costs are excessive.⁵⁵ That may be sensible where the respondent appears to be taking a no-expense-spared approach to their own costs; it not only ensures a level playing field but also discourages scorched-earth behaviour. In other cases, an applicant's costs may exceed those of a respondent who is in control of information about relationship property and is simply refusing to co-operate.⁵⁶ As these examples illustrate, any order must be tailored to the particular circumstances of the case.

[84] The court enjoys a degree of protection against error if satisfied both that there exists a pool of relationship property and that the applicant's entitlement appears sufficient to reimburse the costs on a final reconciliation. However, those are not

⁵³ HC judgment, above n 1, at [14] and [19].

⁵⁴ *C v C [Costs]*, above n 47, at [13].

⁵⁵ *G and T* [2003] FamCA 1076, (2004) FLC 93-176 at [105].

⁵⁶ In *Osferatu v Osferatu* [2012] FamCA 408, at [39]–[40], Watts J cited a 1992 survey from the American Bar Association finding that applicants often face higher costs because they must pay for discovery.

prerequisites to an order.⁵⁷ Although it must be conscious of a risk of injustice to the respondent, a court may order a respondent to pay even if the costs may have to be met from their separate property.⁵⁸

[85] Where there is a pool of relationship property available, an interim distribution to the applicant against their pleaded and plausible share offers an alternative to a costs order. It meets the objective of allowing the applicant to fund the proceedings, and it offers several important advantages over a costs order. First, there is in principle no cause for reticence about an interim distribution from property of the parties that happens to be controlled by one of them, still less so where the respondent is using that property to pay their own costs.⁵⁹ Second, the applicant is best placed to monitor the behaviour of their agents — the experts and lawyers — and an interim distribution preserves a direct incentive to do so. Third, because that supervisory responsibility remains with the applicant, an interim distribution should eliminate any need for judicial supervision.

The application in this case

[86] The Judge refused the wife an order under s 40. He addressed the application together with her application for an interim distribution. He accepted that a payment, whether by interim distribution or costs, should allow the wife to meet reasonable and necessary legal and accounting costs.⁶⁰ He also accepted that there is a fund available, because the relationship home, which is worth about [a substantial sum] is relationship property that will be shared equally.⁶¹ He did not criticise her costs of living. But having regard to his conclusions about the wife's conduct of the litigation, he held that any payment should make it clear to her and her advisers that, subject to any final costs order, her legal and expert costs will be paid from her share of relationship property.⁶² He held that the Court should not encourage the wife and her advisers to think there is an unlimited fund at her disposal, available to pursue claims in a manner

⁵⁷ *SM v LFDB* [2013] NZHC 1056 at [29]–[30].

⁵⁸ For this reason in *SM v LFDB*, above n 57, Ellis J was careful to evaluate the competing claims. She found it more likely than not that the property in issue was relationship property: at [40].

⁵⁹ *In the Marriage of E F and R Zschokke* (1996) 20 Fam LR 766 (FamCAFC) at 777.

⁶⁰ HC judgment, above n 1, at [407].

⁶¹ At [400]. For purposes of the application before Nation J, the husband accepted that the Judge need not take into account his claim under s 13 of the Act: at [373].

⁶² At [406].

inconsistent with the Act's objectives.⁶³ Rather than award costs, he ordered that the husband fund an interim distribution pending sale of the home.⁶⁴

[87] We have summarised the wife's arguments above. The husband supports the Judge's reasoning.

[88] We consider that the Judge was right to refuse an order under s 40 in this case, but for different reasons. First, we accept that the wife has a need of funds. She has sworn affidavits deposing to her circumstances, which indicate that she has had cashflow problems, needing to borrow from family. It must be assumed that her claim to a share of separate property may be vindicated, and we accept that valuation and legal costs reasonably associated with the claim will be considerable. The parties' affairs are complex, justifying the use of skilled advisers. The husband has not acted unreasonably, but he has sometimes resisted discovery only to yield when the wife's advisers persisted.

[89] Second, the Court should not seek to discourage the wife from prosecuting her claim as she sees fit by leaving her in a position of relative disadvantage. So far as the Judge took a contrary view, we consider that he was wrong. However, we have explained at [85] above that an interim distribution is sometimes a better way to meet an applicant's need for funding. This is such a case. There is available a substantial pool of relationship property, in the form of the relationship home, that can fund an interim distribution and meet the wife's costs. On a conservative basis, her relationship property claim extends to not less than half the home's net worth.

[90] Third, the Court was provided with no budget or proposed cap on costs. The sum payable under a costs order should be both reasonable in the circumstances and ascertainable.⁶⁵ The order sought was open-ended, which would confer considerable discretion on the wife and her advisers. Perhaps there are cases in which that is a permissible course, but this is not one of them.

⁶³ At [408].

⁶⁴ At [409]–[410].

⁶⁵ *In the Marriage of F I and J Hogan* (1986) 10 Fam LR 681 (FamCAFC) at 686. In that case an appellate court overruled an open-ended costs order and replaced it with a fixed sum.

Interim distributions

[91] The Judge made an order for sale of the home at Queenstown and we understand it is on the market. Both parties now live in Australia. As noted, the Judge ordered an interim distribution of \$1.5 million to each of them.⁶⁶ He also ordered that in the meantime the husband must pay the wife \$200,000, which is to be reimbursed to the husband when she receives the interim distribution.⁶⁷ We have already summarised his reasons for making these orders. As noted, the wife sought an immediate payment of \$400,000 and she resists an interim distribution to the husband.

Jurisdiction

[92] The jurisdiction to order an interim distribution is found in s25, which provides:

25 When court may make orders

- (1) On an application under section 23, the court may—
 - (a) make any order it considers just—
 - (i) determining the respective shares of each spouse or partner in the relationship property or any part of that property; or
 - (ii) determining the relationship property or any part of that property between the spouses or partners:
 - (b) make any other order that it is empowered to make by any provision of this Act.
- (2) The court may not make an order under subsection (1) unless it is satisfied,—
 - (a) in the case of a marriage or civil union,—
 - (i) that the spouses or civil union partners are living apart (whether or not they have continued to live in the same residence) or are separated; or
 - (ii) that the marriage or civil union has been dissolved; or
 - (b) in the case of a de facto relationship, that the de facto partners no longer have a de facto relationship with each other; or

⁶⁶ HC judgment, above n 1, at [388].

⁶⁷ At [409].

- (c) that one spouse or partner is endangering the relationship property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation or property or earnings; or
 - (d) that either spouse or partner is an undischarged bankrupt.
- (3) Regardless of subsection (2), the court may at any time make any order or declaration relating to the status, ownership, vesting, or possession of any specific property as it considers just.
 - (4) To avoid any doubt, but without limiting subsection (3), if proceedings under this Act are pending, the court, if it considers it appropriate in the circumstances, may make an interim order under that subsection for the sale of any relationship property, and may give any directions it thinks fit with respect to the proceeds.
 - (5) This section is subject to the other provisions of this Act.
 - (6) In proceedings commenced after the death of one of the spouses of partners, this section is modified by section 91.

[93] We make several points about this provision:

- (a) On application made, a court may divide relationship property, which includes relationship property that acquired that status under s 9A, and make any order that the Act empowers it to make. Those orders extend to an order under s 15A requiring that one party compensate the other out of separate property in qualifying circumstances.
- (b) The power arises where (relevantly) the parties are separated, but notwithstanding that jurisdictional restriction the court may at any time make an order relating to the status, ownership, vesting or possession of any specific property even if the parties are not yet separated.
- (c) The power to make such order at any time expressly extends to an interim order for the sale of relationship property and disbursement of proceeds. It is not in dispute that this power extends to ordering a party to make payment out of relationship property under their control, without directing that specific property be realised for the purpose.

The interim payment of \$200,000 to the wife

[94] The Judge reasoned that under s 25(3) he might order this payment against the husband's interests in the home and in superannuation investments to which the wife has a claim.⁶⁸

[95] We observe that neither asset was to be realised before the interim payment was made. The Judge had it in mind that the husband might pay from what he claims is his separate property.⁶⁹ Whether a court can order an interim payment from ascertained separate property is a controversial question.⁷⁰ We need not answer it here, because the wife's relationship property claim extends to other relationship assets under the husband's control,⁷¹ including a share in the husband's separate property under s 9A, and we accept that the jurisdiction to make interim orders extends to that property although its status remains to be finally determined. The criterion under s 25 is the interests of justice. In this case the Court need not be concerned about a risk of injustice to the husband, because the Judge found that the payment will not embarrass him financially and the wife's share of the home is more than enough to recompense him for the payment.⁷²

[96] Turning to the merits, we accept Ms Chambers' submission that the Judge's approach to the interim payment sought was too conservative. The wife has a credible claim to an interest in the husband's separate property, she is in need of funds for the litigation, and the payment will be set off against the interim distribution to the wife from the pending sale of the home, so protecting the husband's position. The sole reason to take a conservative approach to an interim distribution is that it must be funded in the short term, pending sale of the house, from property that the husband says is separate.

[97] Rather than return the issue to the Judge to reconsider the payment in light of this judgment, we will simply order that the husband forthwith pay the amount the wife

⁶⁸ At [400].

⁶⁹ At [401].

⁷⁰ *SM v LDFB*, above n 57, at [31]; and *Cossey v Bach* [1992] 3 NZLR 612 (HC) at 639; compare *Owen v Thomas* [2014] NZHC 2200 at [22]–[27].

⁷¹ Including, for example, other real estate and vehicles and household chattels.

⁷² HC judgment, above n 1, at [405].

sought, \$400,000. This payment is to be made on the terms ordered by the Judge, meaning that it will be reimbursed to the husband when the house proceeds are available.⁷³

The interim payment to the husband

[98] The Judge dealt with this issue shortly. The wife resisted any distribution to the husband, arguing that he might have to pay her substantial sums from other property. The Judge considered that the risk that the husband would not pay a judgment debt is negligible. Apart from saying that there was no reason why the husband should not be paid an equal sum, he did not otherwise explain why the order was made.⁷⁴ There is no suggestion that the husband is in need of the funds.

[99] On appeal, Ms Chambers pointed out that the husband did not formally apply for an interim distribution. However, the wife sought an order that she receive half of the proceeds and the rest be held in trust, and he responded by seeking that each party be paid \$200,000 with leave to apply for more. He subsequently modified his position to suggest that a sum be held back and the balance distributed equally. In our opinion the Judge effectively made the payment to the husband a condition of the payment to the wife. We consider he was entitled to do so. We observe that the husband appears to have kept up the home since separation, paying substantial outgoings, and it is not unjust that he too should receive an interim distribution from relationship property.

[100] The wife accepts that the husband will be entitled to half the proceeds of the home. Her position is that it is inevitable that he will have to pay the wife significantly more than half of the proceeds. Ms Chambers pointed to the claims we have discussed and also the wife's economic disparity claim under s 15. She acknowledged that the Judge considered the enforcement risk and accepted that it is unlikely that the husband will elect bankruptcy rather than pay. She argued, however, that enforcement, which will need to take place offshore, will be complex, expensive and slow. Further, the Act is not concerned with formal equality; it has

⁷³ At [409].

⁷⁴ At [369].

regard to the economic advantages and disadvantages arising from the end of the marriage, and it takes account of their vastly different financial positions.

[101] We are not persuaded that the Judge was wrong. He was right to release a substantial sum to the parties as soon as the house is sold, and because the home is very valuable the orders leave a substantial sum that will be held in trust for distribution in accordance with the Court's judgment. We accept that the husband may have to pay more, but there is no reason to suppose that he cannot or will not meet a judgment against him. That being so, the Judge need not deny him an interim distribution. We do not share what we take to be counsel's concern that by doing so the Judge discounted the wife's claims to separate property, or to a greater share of relationship property. His approach was appropriately neutral. We have gone to some pains to explain at [23]–[28] and [51](a) and [51(c)] above that the wife has a substantive claim under s 9A if the Court finds in her favour on the evidence led at trial.

Result

[102] The application to adduce further evidence on appeal is granted.

[103] The appeal is allowed in part.

[104] We make an order that the documents at [61], [67], [70] and [71] are discoverable. As noted, it may be necessary for questions of third-party discovery to be addressed in the High Court.

[105] The timetabling of discovery is remitted to the High Court. It is a question of case management and must be fitted into the trial timetable.

[106] The interim payment to be made by the first respondent to the appellant is increased to \$400,000, to be paid immediately. The payment is to be made on the terms fixed by the High Court.

[107] The appeal is otherwise dismissed.

[108] The wife's requests for discovery must have contributed substantially to costs, and most of them have been declined. Nonetheless, her success is sufficiently substantive to warrant costs in the usual way. The first respondent must pay the appellant for a complex appeal on a band B basis and usual disbursements.

[109] In addition, Brown J reserved costs on various matters he addressed in a minute following a teleconference on 20 August 2018.⁷⁵ In the circumstances we do not consider those matters warrant a separate costs award, and we make no order for costs on the matters covered at the teleconference on 20 August 2018.

Solicitors:
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⁷⁵ *Biggs v Biggs* CA427/2018, 20 August 2018 (Minute of Brown J) at [18].