EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: PURSUANT TO S 35A OF THE PROPERTY (RELATIONSHIPS) ACT 1976, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B, 11C AND 11D OF THE FAMILY COURT ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE https://www.justice.govt.nz/family/about/restriction-on-publishing-judgments/

IN THE FAMILY COURT
AT WAITAKERE

I TE KŌTI WHĀNAU
KI WAITĀKERE

FAM-2019-090-000320
[2020] NZFC 2984

IN THE MATTER OF	PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	JUNG HEE LEE Applicant
AND	YANG WONE LEE Respondent

Hearing:	1 May 2020
Appearances:	A Malone for the Applicant TW Kwon for the Respondent
Judgment:	7 May 2020

RESERVED JUDGMENT OF JUDGE B R PIDWELL
(Protest to jurisdiction and forum conveniens)

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[1] The parties are married and own property in New Zealand. They spend some time in New Zealand, and some time in Korea where they originate from. The applicant wife says that they separated in 2003 but the marriage has not been dissolved. She seeks orders to divide relationship property. The respondent husband objects to this Court determining proceedings.

Procedural history

[2] On 14 May 2019, the applicant filed an application under the Property (Relationships) Act 1976 (PRA) for orders dividing relationship property together with a narrative affidavit and a PR1 affidavit.

[3] The respondent was personally served in New Zealand on 24 May 2019 at an Auckland home address. He did not file any documents in response and the applicant sought the allocation of a formal proof hearing.

[4] The Court directed that a judicial conference be convened to determine (*inter alia*) whether an order should be made for the respondent to attend for examination. The conference occurred on 6 December 2019.

[5] The preceding day, the respondent filed an appearance under protest to jurisdiction, stating that the Republic of Korea had jurisdiction to determine the proceedings. His counsel did not appear at Court on 6 December 2019.[1]

[6] At the conference, Judge Parsons directed that:[2]

> [5] Pursuant to s 7 Property (Relationships) Act, it is clear that the Act does apply to at least some of the property in dispute, and that there is sufficient evidence to suggest that the applicant has been domiciled in New Zealand in terms of s 7(2) of the Act. There appears to be inaccuracy in his stated understanding of the law, and with no valid protest as to jurisdiction before the Court and the matter is to proceed.

[7] The respondent was directed to file a notice of defence and affidavit by 10 January 2020. If he failed to do so, the Court stated:[3]

> [7] If he fails to do so, then he will be prevented from further defending the application for failure to comply with Court direction. The matter will need to be directed to a hearing for him to be ordered to attend to give evidence under way of examination pursuant to rr 400 and 402 Family Court Rules, and for him to produce documents that have been requested.

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[1] *Lee v Lee* FC Waitakere FAM-2019-090-320, 6 December 2019 (Minute of Judge E B Parsons).
[2] At [5].
[3] At [7].

[8] On 10 January 2020, counsel for the respondent filed a memorandum stating *inter alia*:

(a) That the Court may not make a ruling on the issue of jurisdiction without proper presentation and argument by the parties;

(b) That the Court should resolve the issue of jurisdiction before advancing further to the substantial issue;

(c) That appearance under protest to the jurisdiction is not an application prescribed in the Family Court Rules 2002 (FCR) which requires concurrent supply of evidence in the form of affidavit; and

(d) That hearing and deciding on the jurisdiction issue may only take place when the applicant makes an application to set aside the appearance in accordance with rr 43(5) and (6) of the FCRs, or alternatively, when the respondent makes an application under r 43(3) of the FCRs.

[9] On 23 March 2020, the applicant filed an interlocutory application to set aside the protest to jurisdiction under r 43(3).

[10] The Court allocated a two hour submissions-only hearing to determine the jurisdictional argument, in particular the respondent's protest to jurisdiction and related forum convenience argument.

General facts

[11] As the respondent has not filed any evidence, these facts are not to be relied upon for the purpose of any further Court determination as they are extracted from the untested evidence filed by the applicant and the submissions of the respondent.

[12] The parties were married in Korea on 2 August 1978. They have two adult children. They moved to New Zealand in 1994.

[13] The applicant's evidence is that they separated in 2003 but their marriage has not been dissolved.

[14] In 2007, the applicant engaged a lawyer who prepared a draft separation and property agreement which she signed. It records the date of separation as 19 March 2003. The respondent did not sign it.

[15] The applicant registered a notice of claim on a home owned by the respondent at [address deleted], Glendene (the Glendene property), which is registered in his sole name and in which he still resides.

[16] The applicant says that between 2007 and 2019, the parties lived intermittently between New Zealand and Korea. At times, they both stayed at the Glendene property.

[17] The respondent accepts that he receives the New Zealand Superannuation payment, which he can only be eligible for if he is ordinarily resident in New Zealand.[4]

[18] The applicant claims a share in a relationship property pool comprising:

(a) The Glendene property;

(b) Proceeds of sale of the former home at [street number deleted] Taupaki Road, Kumeu;

(c) Proceeds of sale of [street number deleted] Beresford Square, Auckland;

(d) Proceeds of sale of a fishing charter business;

(e) Proceeds of sale of a section in South Korea; and

(f) Bank accounts and cash.

[4] New Zealand Superannuation and Retirement Income Act 2001, s 8.

[19] The respondent submits that the applicant is a Korean domicile but accepts that he is domiciled in New Zealand and accepts that he owns property in New Zealand. He says the parties have carried on their lives as a married couple after 2003 until the commencement of these proceedings, though is not clear as to when he says they separated.

Legal parameters

[20] Rule 43 of the Family Court Rules 2002 provides:

> **43 Appearance under protest to jurisdiction**
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> (1) A respondent who objects to the jurisdiction of the court to hear and determine the proceedings in which the respondent has been served may, within the time specified in or under rule 41 for filing a notice of defence, and instead of doing so, file and serve an appearance stating the respondent's objection and the grounds for it.
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> (2) The filing and serving of an appearance under subclause (1) is not, and must not be treated as, a submission to the jurisdiction of the court in the proceedings.
>
> (3) A respondent who has filed an appearance under subclause (1) may apply to the court to dismiss the proceedings on the ground that the court has no jurisdiction to hear and determine them.
>
> (4) On hearing an application under subclause (3), the court,—
>
> > (a) if it is satisfied that it has no jurisdiction to hear and determine the proceedings, must dismiss them; but
> >
> > (b) if it is satisfied that it has jurisdiction to hear and determine the proceedings, must dismiss the application and set aside the appearance.
>
> (5) At any time after an appearance has been filed under subclause (1), the applicant may make an interlocutory application to have the court set aside the appearance.
>
> (6) On hearing an application under subclause (5), the court,—
>
> > (a) if it is satisfied that it has jurisdiction to hear and determine the proceedings, must set aside the appearance; but
> >
> > (b) if it is satisfied that it has no jurisdiction to hear and determine the proceedings, must dismiss both the application and the proceedings.
>
> (7) The court, in exercising its powers under this rule, may do so on any terms and conditions that may be just and, in particular, on setting aside the appearance may—

(a) extend the time within which the respondent may file and serve a notice of defence; and

(b) give any directions that may appear necessary regarding any further steps in the proceedings.

(8) To the extent that an application under this rule relates to service of process effected outside New Zealand under DCR 6.23 or DCR 6.24 (as applied by rule 130(2)(a) or (b)), it must be determined under DCR 6.25 (as applied by rule 130(2)(c)).

(9) But both this rule and DCR 6.25 (as applied by rule 130(2(c)) are subject to section 27(1) of the Trans-Tasman Proceedings Act 2010, which provides that a New Zealand court cannot stay a civil proceeding before it on forum grounds connected with Australia otherwise than in accordance with subpart 2 of Part 2 of that Act.

[21] The respondent initially relied on the above rule to protest the jurisdiction of the Court.[5] However, he now concedes that the Court does have *prima facie* jurisdiction under s 7 of the Property (Relationships) Act 1976 which provides:

7 Application to movable or immovable property

(1) This Act applies to immovable property that is situated in New Zealand.

(2) This Act applies to movable property that is situated in New Zealand or elsewhere, if one of the spouses or partners is domiciled in New Zealand—

(a) at the date of an application made under this Act; or

(b) at the date of any agreement between the spouses or partners relating to the division of their property; or

(c) at the date of his or her death.

(3) Despite subsection (2), if any order under this Act is sought against a person who is neither domiciled nor resident in New Zealand, the court may decline to make an order in respect of any movable property that is situated outside New Zealand.

[22] The respondent also concedes that the property at issue includes immovable property in New Zealand and moveable property in New Zealand and elsewhere. It is further conceded that, at the date the application was made, the respondent at least was domiciled in New Zealand, by living here for at least 6 months each year and being the recipient of a New Zealand superannuation scheme. The applicant's evidence is

[5] Appearance under protest to jurisdiction dated 5 December 2019 and memorandum to the Court dated 10 January 2020.

that she is also domiciled in New Zealand for at least some of the time. Therefore, pursuant to r 43(4)(b), the protest to jurisdiction is set aside.

[23] The respondent also raised a forum conveniens argument within the protest to jurisdiction appearance and for the sake of completeness, the Court heard argument on that issue.

Forum conveniens

[24] Given that this Court has jurisdiction to determine these proceedings, the onus is now on the respondent to demonstrate that New Zealand is the forum non conveniens.[6] The Court must be satisfied that there is some other available forum with competent jurisdiction which is more suitably able to determine the interests of the parties.[7] It is a fact-specific enquiry.

[25] The questions, therefore, for this Court are:

(a) What factors provide a real or significant connection between the subject matter of the claim and the foreign forum?; and

(b) If those factors show that the other forum is more appropriate or suitable, do the interests of the parties and ends of justice dictate otherwise?

[26] Mr Kwan for the respondent relies on the decision of *Wang v Yin* where the High Court considered that a Taiwanese Court was the better forum for a PRA claim.[8] However, in that case, the parties had already settled their relationship property in accordance with Taiwanese law and one party was seeking to overturn that. Understandably, the New Zealand courts considered that as a settlement had taken place under Taiwanese law, the Taiwanese Court was the more suitable forum for that

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[6] *Liu v Yang* [2015] NZHC 2965, [2016] NZFLR 567 at [18].
[7] At [16], citing *Spiliada Maritime Corporation v Cansulex* [1986] 3WLR 972, [1987] AC 460 (HL), *Howson v Howson* HC Hamilton CP52/01, 2 May 2002 and *Gilmore v Gilmore* [1993] NZFLR 561 at 564, per McGechan J.
[8] *Wang v Yin* [2008] 3 NZLR 136.

determination. That decision distinctly differs from this case where no property settlement has taken place.

[27] Ms Malone for the applicant relies on *Liu v Yang* which held that PRA proceedings should remain in New Zealand because not only were there two immovable pieces of property in New Zealand and none in China, but also because other Court proceedings were extant in New Zealand relating to the same property.[9] The Court held that the New Zealand courts should retain jurisdiction.

[28] Neither case is easily comparable to the current facts before the Court as presented on the minimal evidence filed.

What factors provide a real and significant connection between the subject matter of the claim and the foreign forum?

[29] Mr Kwan argues that the Court should decline jurisdiction on the basis that the proceedings would be better determined in a Korean Court because of the following factors:

(a) He claims there are a number of movable and immovable properties in Korea compared to only one immovable property in New Zealand. However, the applicant has described the relationship property pool (as stated in her PR1 affidavit) as predominantly being in New Zealand, as both the property and the proceeds of sale were located in New Zealand, with only movables outside of New Zealand. She does not identify any immovable property outside of New Zealand. The only immovable is the Glendene property;

(b) The details of the property in Korea are not clear and difficult to discover in New Zealand Court proceedings. However, the applicant does not claim any immovable property in Korea and both parties are able to undergo discover in either country. This is not an unusual situation for parties who have links to other jurisdictions;

[9] *Liu v Yang*, above n 6.

(c) Production of witnesses and evidential documents relating to the properties in Korea will be costly, inconvenient, and uncertain. Once again, it is unclear if there is any property in Korea being considered in the relationship property pool, and evidential hurdles can be addressed by remote participation if needed;

(d) The New Zealand Court has no jurisdiction over immovable properties in Korea, therefore, New Zealand Court proceedings cannot dispose of all relationship property issues at once. However, it is unclear whether the Korean Court, when asked, has any jurisdiction over immovable property in New Zealand, i.e. the Glendene property. Mr Kwan could not assist the Court with that issue;

(e) The Korean Court's decision as to immovable property in New Zealand is enforceable here. This Court is unclear on whether a Korean Court's decision about real property in New Zealand would be enforceable, and despite the submission, Mr Kwan could not assist the Court in providing any legislative or case law authority on this point;

(f) The parties lived together in Korea for a greater period of time than in New Zealand. This is not a material factor;

(g) The applicant has business interests in Korea. However, such an interest can be taken into account in PRA proceedings as it is a movable item (s 7(2));

(h) The source of the money used to purchase a property in New Zealand was money they had earned in Korea. Again, this is not relevant to the Court's jurisdiction or ability to determine rights under the PRA;

(i) The applicant and respondent are not fluent in English so their costs will be higher. This is not a material factor. The Court often determines proceedings using interpreters which are funded by the Court;

(j) The applicant is a Korean domicile and lives in Korea, thus, will need to travel to give evidence. That is not a barrier to the Court determining these proceedings. She has chosen to file her application here; and

(k) The respondent lives in Korea for about half of the year and will not incur costs if the proceedings are determined in Korea. That is also not a relevant factor.

[30] I cannot identify any significant connection between the main subject matter of the claim (in particular, the Glendene Property and movable assets) and the Korean forum.

[31] Mr Kwan submits that the Korean Court is fair and competent, has appropriate laws to distribute relationship property and that neither will be disadvantaged if a Korean Court determines their relationship property division. However, he also submits that under Korean law, a married couple may apply for division of matrimonial property only when it is accompanied by an application for the divorce. If a divorce is not granted, no division of property can take place. He further submits that this couple cannot divorce in Korea as no application for divorce has been filed in a Korean Court and there are no grounds upon which the parties could seek a divorce in Korea, which requires one of the parties to have committed an offence that justifies a divorce, or there is agreement to divorce.[10]

[32] Thus, although Mr Kwan submits that the Korean Court is more suitable to determine a division of property, he simultaneously argues that the Korean Court has no jurisdiction because the parties are not divorced and have no grounds to seek a divorce in Korea. Accordingly, there is no other forum available to determine the applicant's claim.

[33] It is abundantly clear that the predominant items of property are in New Zealand, including an item of real property in which the respondent lives. It is unclear to me whether any Court outside of this jurisdiction would have the ability to make a determination on the division or sale of that piece of real estate. There is no

[10] Appearance under protest to jurisdiction dated 5 December 2019.

other forum available to the applicant to determine her claim to that property, or other property elsewhere.

[34] Accordingly, I am not satisfied that any other forum is more convenient than the New Zealand Court. The respondent has not discharged the onus of proof that a stay should be granted in respect of this proceeding on the ground of forum non conveniens. As such, his protest to jurisdiction must fail.

Costs

[35] The applicant seeks costs. As she has been successful and, in my view, put to unnecessary costs due to the unlikely success of the respondent's challenge to the jurisdiction identified by the Court from the outset, costs will issue. Costs will be awarded on a schedule 2B basis unless a memorandum is filed within 14 days seeking indemnity or increased costs. If that occurs, the respondent has the right of reply within 14 days and an issue of costs is to be referred back to chambers for a determination.

Further directions

(a) The respondent is directed to file an affidavit of assets and liabilities (PR1), notice of defence and narrative affidavit within 28 days;

(b) The registrar is directed to allocate a 30 minute judicial conference thereafter; and

(c) Counsel are to file a memorandum three workings days prior to that judicial conference in accordance with the Auckland Family Court guidelines for PRA proceedings.

Signed at Waitakere this 7th day of May at 9 am.

B R Pidwell
Family Court Judge