

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 MANUKAU**

**I TE KŌTI WHĀNAU  
KI MANUKAU**

**FAM-2018-092-000908**

**[2020] NZFC 6823**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	SIZHUO WEN Applicant
AND	YIMING LI Respondent

Hearing: 3 December 2019

Appearances: L Kearns and L Wang for the Applicant  
T Brown and S Zhu for the Respondent  
C Jiang for the Non-Party

Judgment: 25 August 2020

---

**JUDGMENT OF JUDGE A G MAHON**

---

[1] The applicant Sizhuo Wen was married to the respondent Yiming Li. The applicant has applied under the Property (Relationships) Act 1976 (the Act) for:

- (a) An order setting aside an agreement between the parties under s 21 of the Act dated 21 March 2016 (the agreement); and

- (b) If the above application is successful, orders for division of relationship property of the parties.

[2] This hearing addressed interlocutory applications by the applicant for discovery against the respondent and a non-party, Bo He, who is the respondent's current de facto partner.

[3] The grounds on which the applicant seeks to set aside the agreement are that to give effect to it would cause serious injustice to him as:

- (a) He signed the agreement under deceit, misrepresentation, and duress from the respondent; and
- (b) The terms of the agreement are unfair and unreasonable.

## **BACKGROUND**

[4] The applicant and respondent met in Auckland in August 2007 and began a de facto relationship in 2008. They married on 26 June 2014 and separated on 13 July 2016.

[5] The parties were students in 2007 and at the time of their marriage their only significant assets were two motor vehicles with combined value of less than \$10,000.

[6] As the applicant had become a permanent resident shortly after the parties met, he was eligible to sponsor the respondent and:

- (a) Between 29 July 2009 and 22 December 2015, he sponsored the respondent as a partner to obtain a work visa.
- (b) On 22 December 2015 he sponsored the respondent as his wife to seek permanent residence in New Zealand.

[7] On 16 April 2014 with the assistance of funds from the parents of each party in China, the parties purchased a property at Elias Court, The Gardens, Auckland, for

\$758,000. The purchase price was funded by their joint deposit of \$70,000 and the balance from family advances and a bank loan.

[8] During the marriage the applicant worked as an automotive technician. The respondent worked in the latter part of the marriage in her own business as a purchasing agent for the sale of milk powders, health and cosmetic products from New Zealand to China.

[9] On 21 March 2016 the parties entered into the agreement at the request of the respondent. The respondent said she was required to protect money advanced (but not gifted) from her parents to the parties. The applicant said that he felt forced to sign the agreement to “save his marriage” after he became aware that the respondent was having an affair with Mr He. The applicant signed the agreement against the advice of his lawyer.

[10] It is the applicant’s evidence that he first became aware of the affair in early January 2016 after seeing communications between the respondent and another person on WeChat. At that time, the applicant was not aware that on 22 January 2016 the respondent had instructed a lawyer to prepare the agreement.

[11] On 25 January the applicant says the respondent asked him to sign the agreement because the respondent was unsure about the relationship and, unless she had the certainty a financial agreement provided, the respondent intended to leave him. The respondent denies that she threatened to leave the applicant if he did not sign the agreement.

[12] The applicant said that from February 2016 he became increasingly suspicious that the respondent was having an affair as she travelled to Hamilton, Tauranga, the South Island and Beijing.

[13] The applicant further claims that at the respondent’s insistence on her return from China on 17 May 2016, the parties started sleeping in separate rooms and implementing the financial terms of the agreement.

[14] On 29 May 2016 the applicant wrote to Immigration New Zealand withdrawing sponsorship of the respondent's application for permanent residence after a conversation he claimed occurred on 27 May where the respondent told him that she wanted to separate. The respondent agreed that the parties talked about the state of their marriage on 27 May but she denies telling the applicant she wanted to separate. Rather she told the applicant that she would be sleeping in a separate bedroom in the house.

[15] On 16 October 2016, less than three months after separation, the non-party entered into an agreement for purchase of a property at [number deleted] Clayden Drive, Gulf Harbour (Clayden Drive). The applicant alleges the non-party purchased the property for him and the respondent. He also alleges the respondent contributed to the purchase cost. Settlement of the purchase occurred on 27 January 2017.

## **THE DISCOVERY APPLICATIONS**

[16] The court has directed (by consent) that the application to set aside the agreement will be heard separately. If the applicant is successful then there will be second hearing on the application for substantive orders dividing the relationship property of the parties. I will only therefore address discovery relevant to the application to set aside the agreement in this judgment.

[17] The relevance of the discovery sought by the application is set out in paragraphs 96 and 97 of the submissions of his counsel, dated 25 November 2019:

96 *The first ground for setting aside the s 21 agreement is that:*

- 96.1 In January 2016, when the respondent approached the applicant regarding signing of a s 21 agreement, their relationship was stable, genuine and good;
- 96.2 The respondent represented to the applicant that he wanted to sign a s 21 with terms favourable to [the respondent] solely for the purpose of providing her with the security over the parties' relationship and finances to keep the relationship going;
- 96.3 The applicant was in love with [the respondent] and wished to please her to keep their relationship continuing;

- 96.4 Between January and March 2016, before the s 21 agreement was signed, the respondent had taken full advantage of the applicant's love and affection for her. She threatened [the applicant] with leaving while showing considerable warmth to him;
- 96.5 On 21 March 2016, the applicant signed the s 21 agreement believing that the respondent was serious about maintaining their relationship. He waived his property rights under duress as well as in desperation to save the parties' marriage;
- 96.6 Upon signing the s 21 agreement, there was an immediate reaction by the respondent away from the relationship after she returned to Auckland from China on 17 May 2016;
- 96.7 The s 21 agreement only lasted eight weeks before the respondent triggered the implementation of the agreement, which was only five days after her return to New Zealand from China;
- 96.8 Within 16 weeks of the agreement date, the parties separated;
- 96.9 A month after the parties separated, the respondent and Mr He already had their joint ASB account established and became financially interdependent, this occurring a month earlier than the respondent and Mr He's assertions that they only started dating in September 2016;
- ...
- 96.11 On 12 October 2016, less than three months after separation, Mr He purchased the Clayden Drive property with financial assistance from the respondent;
- 96.12 As a result of those events the applicant believes:
- (a) He was deliberately deceived, misled and unduly pressured by the respondent to sign the s 21 agreement when she had already formed a relationship with Mr He and knew she was intending to separate from the applicant; and
  - (b) The s 21 agreement was a "set up" which had been manufactured by [the respondent] as a device/scheme to deprive the applicant of his relationship property rights in anticipation of in preparation for leaving [the applicant] and starting a new life with Mr He after she obtained permanent residency based on her marriage to the applicant.
- 97 *The second ground for setting aside the s 21 agreement is that:*
- 97.1 The terms of the agreement are grossly unjust to the applicant when compared with his entitlements under the Act;
- 97.2 The applicant's approximate share of relationship property at the time the agreement was entered into was \$750,000;

- 97.3 By comparison the applicant only receives approximately \$137,5000 and his motor vehicle valued at \$3000, which equates to 19 percent of the net value of relationship property;
- 97.4 The position of the respondent is significantly enhanced by the agreement compared to that of the applicant; and
- 97.5 The applicant's financial position has seriously deteriorated as a result of the agreement as he did not receive anything approaching a one-half share in the property...

## **THE LAW**

[18] The applicable rule for discovery after proceedings have commenced is Rule 141 of the Family Court Rules 2002.

### **141 Order for discovery after proceedings commenced**

(1) If a notice of defence or a notice of intention to appear has been filed, a party may apply to the court for an order for discovery of documents—

- (a) that are, or have been, in the possession of another party to the proceedings; and
- (b) that relate to a matter in question in the proceedings.

(2) An application under subclause (1) must be accompanied by an affidavit specifying—

- (a) the extent of the discovery required; and
- (b) the reasons for the discovery.

(2A) On receipt of an application made in accordance with subclauses (1) and (2), the court may order the party referred to in subclause (1)(a) to file an affidavit stating—

- (a) whether certain documents or classes of documents are or have been in that party's possession, custody, or power; and
- (b) if the party had the documents or classes of documents but has now parted with the documents or classes of documents, when the party did so and what became of the documents or classes of documents.

(3) An order for discovery—

- (a) must be in form G 15 (order for discovery of documents); and
- (b) must be served by the applicant on the party against whom the order is made.

(4) A party against whom an order for discovery is made must, within 10 working days after the service of the order or any further time the court may allow on an interlocutory application for the purpose,—

- (a) file an affidavit of documents in form G 16 (affidavit of documents); and
- (b) serve a copy of the affidavit of documents on every other party to the proceeding who has filed an address for service.

(5) If the proceedings are under the Child Support Act 1991, nothing in this rule limits the application of the secrecy provisions of that Act or the Tax Administration Act 1994.

[19] *Dixon v Kingsley* is the authority on the principles to be applied in consideration of applications for discovery in relationship property proceedings. The court held that the essential principles are:<sup>1</sup>

(a) A robust approach consistent with the purposes and principles of the Act: The need for just division, but also inexpensive and efficient access to justice.

(b) Discovery must not be unduly onerous.

(c) Discovery must be reasonably necessary at the time sought.

(d) The scope of discovery should therefore be tailored to the need of the Court to dispose, justly and efficiently, of relationship property issues under the Act.

(e) More substantial discovery may well be ordered by the Court where it has reason to believe that a party has concealed information or other sought to mislead either the other party or the court as to the scope of relationship property. But even here, the scope of discovery should be no more than is required for the court to fairly and justly determine relationship property rights. It is just that in such a situation, more is likely to be required to meet that requirement.

[20] In *Nagle v Winthrop* Judge Burns applied *Dixon v Kingsley* and made the following observations of the change in the Family Court's approach to discovery:<sup>2</sup>

[6] The law relating to discovery in terms of Property (Relationships) Act proceedings was significantly amended by a decision of Justice Kos in *Dixon v Kingsley*.

[7] As a result of this judgment the discovery regime which is applicable in the High Court and under the District Court Rules became the law. The discovery regime is that the person who has possession and control of documents must provide those documents to the other party unless that person in possession and control can demonstrate that the documents to be discovered are not relevant or a disproportionate to the issues that have to be determined by the Court. It is expected that tailored discovery will take place within a short timeframe of the proceedings being filed.

---

<sup>1</sup> *Dixon v Kingsley* [2015] NZHC 2044, [2015] NZFLR 1012, at [20].

<sup>2</sup> *Nagle v Winthrop* [2016] NZFC 10516.

[21] One of the objections raised to the discovery sought in the case at hand is that the applicant is “fishing”, which is an expression coined by Chilwell J in *AMP v Architectural Windows Limited*.<sup>3</sup> The Judge used the term “fishing” when observing that no court would order discovery if all the applicant is doing is seeking:<sup>4</sup>

...[T]o obtain information or documents by interrogatories or discovery in order to discover a cause of action different from that pleaded or in order to discover circumstances which may or may not support a baseless or speculative course of action.

[22] In rejecting an objection to discovery based on the allegation that it was “fishing” in *Security Bank Ltd v Rutherford*, Barker J observed:<sup>5</sup>

In most instances, subject to any particular criticism of a particular interrogatory, the plaintiff has endeavoured to tie the question to a part of the pleadings; in general terms, I do not consider that the bulk of the interrogatories come within the “fishing” objection.

[23] The special nature of relationship property proceedings in the context of a discovery application where often one party has limited knowledge of the assets and liabilities of the other party means that it is only from a process of discovery that the extent of such assets and liabilities can be determined, and this process is not a “fishing expedition”.<sup>6</sup>

[24] Objections are often raised to discovery of confidential documents. In *Wilson v White* the court held that there was an implied condition of confidentiality for discovered documents with an obligation on parties not to use the documents for an ulterior purpose.<sup>7</sup>

A party who has discovered documents can be confident that the limited use undertaking will apply until they feature in proceedings in open Court. At this point, that party has the option of seeking confidentiality orders if he or she seeks further protection. Otherwise the undertaking lapses.

---

<sup>3</sup> *AMP v Architectural Windows Limited* [1986] 2 NZLR 190.

<sup>4</sup> At 196.

<sup>5</sup> *Re Securitibank Ltd (No 31)* (1984) 1 PRNZ 514 at 520. See also *Jackson v Gilbertson* [2015] NZFC 5096 at [12], and *M v DB FC North Shore* FAM-2009-044-726, 30 April 2010.

<sup>6</sup> *B v B* (1978) 3 WLR 624; *Sunderland v Sunderland* [1986] 2 NZLR, at 196.

<sup>7</sup> *Wilson v White* [2005] 3 NZLR 619 at 631.



## **DISCOVERY SOUGHT FROM THE RESPONDENT**

### **Immigration files**

*The respondent's immigration files with Immigration New Zealand*

[25] The applicant seeks discovery of the respondent's immigration files on the grounds that they may contain relevant information about the state of her relationship with the applicant and/or the non-party.

[26] Further it is submitted that the files will include statements from the respondent about her finances and/or supporting documents relevant to the issue of the alleged misrepresentation by the respondent of her motive for asking the applicant to enter into the agreement (including documents/information from the non-party and her parents).

[27] There is a dispute in the evidence on the representations made by the respondent to Immigration New Zealand and whether, and if so the extent to which, she disclosed any financial arrangements with the non-party for periods relevant to the agreement.

[28] The respondent opposes discovery on the grounds it is private information and irrelevant to the issues to be considered in the application to set aside the agreement. The respondent further submits that the information sought is unduly onerous to provide.

### *Outcome*

[29] The fact that the respondent may have been having an affair with the non-party before separation does not alone meet the threshold for setting aside an agreement. If it did, many agreements would be at risk. The question is whether the information on the files, and particularly any financial information, may be relevant to the grounds of the application to set aside the agreement.

[30] The respondent has not explained why making her Immigration New Zealand files available is unduly onerous. I presume the respondent can authorise Immigration New Zealand to provide the files. The files may include information relevant to the respondent's motive for seeking the agreement. The issue of privacy of any information on the file can be addressed by conditions of release, just as the discovery of sensitive financial or medical information is protected.

[31] Disclosure can only be for the period of the relationship of the parties during which the applicant was the respondent's sponsor.

[32] The respondent is to provide the following information from her file with Immigration New Zealand for the period from opening of the file until 30 October 2016:

- (a) All documents provided by her or by others at her request to Immigration New Zealand (including from her parents and the non-party).
- (b) All communications from Immigration New Zealand to the respondent and any party referred to in [32](a) above.

**Passport showing travel records.**

*The respondent's passport showing her travel records during the relationship*

[33] The applicant seeks disclosure of the respondent's passport to establish the dates the respondent was absent from New Zealand and her destinations.

[34] The information is sought because the applicant alleges the affair between the respondent and non-party began well before separation and the respondent required the applicant to sign the agreement because of her commitment to the non-party (including financial commitment).

[35] The respondent opposes disclosure of the passport on the grounds it is private information and irrelevant to the application.

## *Outcome*

[36] As no third party is affected by disclosure of the passport of the respondent, and the relevant dates for which the disclosure was sought are dates when the parties were either in a relationship or married, this application is granted.

[37] The respondent is to provide the passport for the period from commencement of the relationship of the parties until separation in July 2016.

## **Rental accommodation**

*Documentary evidence of the respondent's rental accommodation for the period June 2016 to January 2017; and documentary evidence of rental payments to the respondent's rental accommodation for the same period*

[38] The applicant seeks evidence of any agreement by the respondent for the rental accommodation she moved to after separation in June 2016 until January 2017 and the source of rental payments.

[39] The applicant disputes the respondent's evidence that she and the non-party were not in a relationship until September 2016. He alleges that on 9 July 2016 the respondent signed a tenancy agreement for a property in Owairaka, Auckland for a period of only three months until October 2016 when the non-party signed an agreement to purchase his property and he began living with the respondent in his rental accommodation in Mount Eden Road.

[40] The applicant seeks disclosure of the tenancy information until January 2017 because it was on that date that the respondent and non-party moved to live together in Clayden Drive. The respondent and non-party agree that they were living together in Mount Eden Road from October 2016.

[41] The respondent admits that she was looking for new accommodation before the parties' separation on 13 July 2016 and says she did to because on 20 May 2016 the applicant asked Immigration New Zealand to place her application for permanent residency on hold as their relationship was in difficulty. The respondent opposes

disclosure of tenancy information as it is merely a “fishing” expedition and not relevant to the application to set aside the agreement.

### *Outcome*

[42] The status and nature of the respondent’s relationship with the non-party is relevant to the question of any misrepresentation or pressure by the respondent in relation to the signing of the agreement. Because this information is determinative of the substantive issue, I consider the application for this information to be more than a fishing expedition.

[43] The respondent is to provide all documentation for her rental accommodation in the Owairaka property, including any tenancy agreement and evidence of payments of rental for the period from execution of the tenancy agreement including deposit and periodic payments for the period of the tenancy.

### **Respondent’s bank accounts**

*Various ASB accounts in the sole name of the respondent from the date of opening of those accounts to the date of the interlocutory hearing.*

*China Construction bank account of the respondent from January 2011 to 1 June 2014 and from 20 June 2016 to the date of the hearing together with documentary evidence of the original source of funds of the respondent in this account.*

*The respondent’s Industrial and Commercial Bank of China account for the same period and on the same basis as in the previous paragraph.*

*The WeChat “Red Pocket” account of the respondent both during the relationship and subsequently.*

### *The respondent’s ASB accounts*

[44] The applicant seeks disclosure of the respondent’s four bank accounts with ASB Bank for account numbers [deleted].

[45] This information is sought as the applicant alleges the respondent contributed to the purchase of Clayden Drive close to the date of separation of the parties.

[46] The respondent opposes providing this information, again submitting that the applicant is on a fishing expedition. She should be free to conduct her finances as she chooses, the information sought is irrelevant and the request for it unreasonable.

*Outcome*

[47] The financial relationship between the respondent and non-party is relevant to the application to set aside the agreement and disclosure of a party's bank accounts is routine in proceedings under the Act.

[48] The respondent is to provide statements of the above ASB accounts from the date each account was opened until 31 January 2017.

*The respondent's Chinese Bank accounts*

[49] The respondent has provided some statements for her two bank accounts in China with the China Construction Bank and the Commercial Bank of China from 1 June 2014 to 27 June 2016 but she agreed to provide statements up to the period of separation on 13 July 2016.

[50] Full disclosure for the entire period is sought as it is alleged that the respondent transferred funds to the non-party while on her trip to China between March and June 2016 and that in the previous period of the alleged relationship between the respondent and non-party prior to June 2016 there may have been transactions between the parties. The applicant does not accept the respondent's claim that the accounts were not opened until after June 2016.

*Outcome*

[51] The question for the court is the extent to which discovery of bank records is necessary at this stage in the proceedings. Discovery must be limited to the period relevant to the interlocutory application to set aside the agreement. Is disclosure of

bank statements “to date” necessary for the purposes of the application to set aside the agreement or only to substantive proceedings, if the agreement is set aside?

[52] I am satisfied that it is relevant, and the respondent is to provide copies of statements for her Chinese bank accounts from the date each account was opened until 31 January 2017. This information is to be provided by the respondent giving the applicant authority to search the bank accounts for that period.

*The respondent’s WeChat “Red Pocket” account during the relationship and to date*

[53] The applicant has already received some information from this account but does not accept the records provided are accurate.

[54] The respondent does not know of any other way to provide the information other than in the detailed transaction history already given to the applicant. She submits that the information requested is outside the scope of the enquiry required for the application and is onerous and irrelevant.

*Outcome*

[55] The respondent has already agreed to provide the information. If the applicant can identify a different way in which the information can be provided, the information is relevant.

[56] The applicant is to provide full transaction and documentary history of her WeChat “Red Pocket” account both during the relationship and to date, in a format reasonably required by the applicant.

**The respondent’s joint account with the non-party – [account number deleted]**

[57] The applicant alleges that the respondent opened her joint bank account with the non-party earlier than she claims. The account is relevant to the financial involvement between the respondent and non-party prior to, and immediately following, separation.

[58] The respondent provided a statement page from October 2018 but she has refused to provide statements earlier than that date. Notwithstanding assertions made in the letter of 18 March 2019 from her counsel that the account was not opened until after separation, the applicant requires independent evidence to this effect.

[59] The respondent refers to her counsel's letter and submits that any financial arrangements with others after separation are private matters and not relevant to the application.

### *Outcome*

[60] Financial arrangements of a party after separation which are not relevant to relationship property are usually not subject of disclosure in proceedings. However, the allegations by the applicant of a financial commitment between the respondent and non-party change this position. Disclosure is therefore relevant but the period of discovery must be limited to entries relevant to the application to set aside the agreement.

[61] The respondent is to provide all statements for her joint account with the non-party from the date the account was opened until 31 January 2017.

### **Shares**

*Documentary evidence of the respondent's shares in China both in her own name and jointly with others both during the relationship and following separation together with valuation of the shares at the date of separation and current date*

[62] The applicant alleges that the respondent has failed to provide evidence of her shareholding in China during the marriage. The respondent denies she owned any shares yet agrees she wrote the handwritten note about her shareholding which the applicant produced.

[63] The applicant seeks an authority from the respondent to enable him to "search all documentary evidence regarding the respondent's shares in China." He also seeks evidence of value of those shares.

[64] The respondent maintains she held no shares but she can't recall why she wrote the note. Counsel for the respondent has not addressed this ground for discovery in submissions.

*Outcome*

[65] It is appropriate that the respondent disclose details of any shares she held in China during the period of her relationship with the applicant and the value of those shares.

[66] It is not appropriate that disclosure of post separation details is made unless and until the application for setting aside the agreement is successful.

[67] The respondent is to provide the applicant with the necessary authority to make enquiries of her shareholding in China and of the value of the shares for the period of the relationship of the parties.

**Financial contribution towards the acquisition of Clayden Drive**

*Documentary evidence showing the respondent's financial contribution to acquisition of and mortgage repayments on Clayden Drive*

*Documentary evidence showing the original source of those financial contributions*

[68] The applicant seeks disclosure of documentary evidence for this purchase as he alleges the respondent applied funds to the purchase immediately after separation.

[69] The respondent opposes this disclosure as the purchase was made on 12 October 2016, three months after the parties separated. It is private information of the respondent and non-party.

*Outcome*

[70] A limited disclosure of financial information to show funding of Clayden Drive is relevant to the application to set aside the agreement.



[71] The respondent is to provide:

- (a) Documentary evidence of any financial contribution by her to the acquisition of Clayden Drive; and
- (b) Documentary evidence establishing the source of any such financial contribution.

[72] The respondent is not required to provide evidence of mortgage payments on Clayden Drive as these occurred after separation and the respondent does not dispute that she lived at Clayden Drive with the non-party from settlement of the purchase in January 2017.

[73] Any further evidence about the purchase of Clayden Drive can only be provided by the non-party.

### **Remaining areas of discovery**

#### *Motor vehicles*

*Documentary evidence as to the source of funds for the respondent's purchase of and repayments of the car loan in respect of the Volkswagen and Fiat Abarth Jeep*

#### *Funds removed by the respondent from the joint ASB accounts of the parties*

*Documentary evidence of the use of funds withdrawn by the respondent in the sum of \$630,562.55 from the parties joint ASB accounts and transferred to the respondent's personal ASB account from 4 July 2016*

#### *Respondent's investment funds in the sum of \$800,000*

*Documentary evidence as to the nature of the investment*

*Documentary evidence of the original sources of funds in respect of the investment funds*

[74] Discovery is sought in these three areas for the purposes of any substantive proceedings and not in relation to the interlocutory application and will be addressed in any discovery proceedings, if the agreement is set aside.

### **APPLICATION FOR DISCOVERY AGAINST NON-PARTY – BO HE**

[75] The applicant seeks discovery against the non-party on the grounds the evidence of the respondent and non-party about the commencement date and nature of their relationship is not correct. Much of the discovery sought from the non-party is similar to discovery sought from the respondent and sought for the same reasons.

[76] The non-party submits that the discovery sought is speculative and without sufficient evidential foundation. He submits the information sought is confidential and private, without relevancy to the proceedings between the parties.

### **THE LAW**

[77] An order for discovery can be made against a non-party under Rule 143 of the Family Court Rules:

#### **143 Order for particular discovery against non-party after proceedings commenced**

(1) Subclause (2) applies if it appears to the court, at any stage of the proceedings (whether from evidence or from the nature or circumstances of the case or from a document filed in the proceedings) that a document or class of documents relating to a matter in question in the proceedings may be, or may have been, in the possession, custody, or power of a person who is not a party to the proceedings.

(2) The court may order the person who may have, or may have had, the document or class of documents in that person's possession, custody, or power, to file and serve on every party to the proceedings an affidavit stating—

- (a) whether that document or class of documents is or has been in that person's possession, custody, or power; and
- (b) if the person had the document but has now parted with it, when the person did so and what has become of it.

(3) An application for an order under subclause (2) must be made by way of an interlocutory application, and notice of the application must be given—

- (a) to the person from whom discovery is sought; and
- (b) to every other party who has filed an address for service.

- (4) If an order is made under this rule, the court may also order that the applicant pay to the person from whom discovery is sought that person's expenses (including solicitor and client costs)—
- (a) arising from, and incidental to, the application; and
  - (b) in complying with any other order made on the application.

[78] Orders for discovery against a non-party are not usually appropriate until the ordinary discovery process has been exhausted, but each case turns on its own facts.<sup>8</sup> In *Mao v Mao* the court directed non-party discovery before completion of general discovery and the Associate Judge noted:<sup>9</sup>

I am not aware of any rule or principle that would preclude the Court from making a non-party discovery order at any point after a proceeding has commenced, especially where the issue on which the discovery is sought goes to the very heart of the proceeding, and the documents sought do not appear to be in control of the other party.

[79] The same requirements of relevance and necessity which apply to general discovery also apply to applications for non-party discovery and an applicant may be required to pay any costs incurred by the non-party.<sup>10</sup>

### **Immigration files**

*All his immigration files with Immigration New Zealand ("INZ")*

[80] The applicant seeks discovery of the non-party's full immigration file for the same reason as he seeks the respondent's immigration file. That is, it may contain information to establish that the relationship of the respondent and non-party began prior to separation, either before June 2016 or earlier in the period from June 2011 to December 2013.

[81] Mr He opposes the application on the grounds his files with Immigration New Zealand are private and these files have no relevance to the application to set aside the agreement. He is concerned the applicant may have an ulterior motive for requesting the information.

---

<sup>8</sup> *Taylor Preston Ltd v Algie* HC Wellington CIV-2007-485-1443, 5 September 2007.

<sup>9</sup> *Mao v Mao* [2020] NZHC 1292 at [43].

<sup>10</sup> *Clear Communications Ltd v Telecom Corp of NZ Ltd* (1994) 8 PRNZ 200; *Wheeler v Pagetti* [2016] NZFC 4436.

## *Outcome*

[82] I have no knowledge of how long Mr He has been living in New Zealand but it appears he has lived here for some time. While there may be some basis to apply for discovery of this information as a result of documents disclosed in general discovery, it is likely the files will contain considerable information which is private and personal to Mr He (including financial information). Any documents from Immigration New Zealand that are relevant to these proceedings should be contained on the file of the respondent.

[83] The request for disclosure of the non-party's Immigration file is declined.

### **Passport showing travel records**

*The non-party's passport showing all of his travel records in the period from June 2011 to December 2013 and from March 2016 to August 2016*

[84] The applicant seeks disclosure of the non-party's passport for the period from June 2011 to December 2013 and from March 2016 to August 2016, on the grounds that evidence of the non-party's travel may show that he was in a relationship with the respondent at relevant times.

[85] No evidential basis is given for discovery of the non-party's passport on the 2011 – 2013 dates, other than the applicant's suspicion that during this period the respondent and non-party were in a relationship.

[86] Discovery of the passport for the period from March 2016 to August 2016 is sought because the applicant believes the respondent and non-party were together in China for part of this period. The evidential foundation for this belief is:

- (a) Shortly before the respondent returned to Beijing in March 2016, the applicant found evidence that Mr He had booked an airline ticket to China a week later with a first stop in Beijing and a final destination of Guangzhou. The applicant saw this information on the respondent's gmail.

- (b) The applicant says that he had a telephone conversation with the respondent while the respondent was in China and heard a “man’s voice flirting with [the respondent] in the background and the [respondent] moaned”. The respondent talked to the applicant in a perfunctory manner and quickly ended the conversation.
- (c) The sum of \$73,000 was withdrawn from the respondent’s bank accounts in China between 23 – 24 June 2016 which was when the non-party was in China. One of the withdrawals was made from the Guangzhou branch of the bank.
- (d) The non-party has failed to adequately respond to this evidence other than to deny that he received any money from the respondent during this period. He does not deny that he was in China at this time.

[87] The non-party opposes disclosure of his passport for these periods on the grounds:

- (a) A passport is a private document.
- (b) The disclosure is sought because of the applicant’s “speculative” opinion that the non-party and the respondent were dating between June 2011 and December 2013 and that they travelled together to China in March 2016.
- (c) There is no evidential basis for either claim and he denies he had met the respondent in June 2011.

*Outcome*

[88] The applicant has not established a reasonable basis to justify granting his application for discovery of the non-party’s passport for the 2011 - 2013 period.

[89] Disclosure of the non-party’s passport for the latter period is a tailored request which does not breach the non-party’s privacy to any significant degree and is

reasonably necessary to establish the ground of the application to set aside the agreement arising from the alleged relationship between the respondent and non-party.

[90] The non-party is to provide a copy of his passport for the period March 2016 to August 2016.

### **Rental accommodation**

*Documentary evidence of his rental accommodation in the period from January 2016 to January 2017*

*Documentation evidence of rental payment to his rental accommodation and the original source of funds to his rental payment in the same period*

[91] The applicant seeks discovery of this information by the non-party because of his belief that cash withdrawals by the respondent of \$2,400 on 14 June 2016 and \$600 on 26 June 2016 were payments she made towards the non-party's rent on his Mt Eden Road rental property before the applicant and respondent separated.

[92] After her three-month fixed term tenancy on Owairaka expired on 9 October 2016, the respondent lived with the non-party in Mt Eden Road until they moved into Clayden Drive in January 2017.

[93] The non-party opposes discovery of these documents on the grounds that the applicant's belief the respondent made payments for his rent in June 2016 is speculative. He denies he was in a relationship with the respondent at this period.

[94] He also submits that where he lived before the purchase of Clayden Drive and details of his rental payments are not relevant to the application.

### *Outcome*

[95] The relevance of any relationship between the respondent and non-party prior to the date they claim the relationship began is for the Judge hearing the application to set aside the agreement to determine. Disclosure of this information is not sought

to establish a new cause of action. but rather relevant evidence to the applicant's claim that the respondent and non-party were in a relationship with financial commitments before they admit.

[96] The non-party is to provide the documentary evidence requested.

**Bank accounts of non-party**

*ASB bank account no. [deleted] in Mr He's sole name*

*ASB bank account no. [deleted] in Mr He's sole name*

*ASB bank account no. [deleted] in Mr He's sole name*

[97] The applicant has not provided particular periods for which he seeks discovery or a basis for believing that there are any relevant transactions in the accounts.

[98] The non-party opposes discovery of the documents on the grounds that the reason they are sought is not clear and there is no evidential basis to justify this disclosure.

*Outcome*

[99] The applicant has not demonstrated that it is necessary for the non-party to provide statements for accounts which are in his name only. The request is not tailored to dates nor for a specified purpose. It would be premature to grant this application for discovery before general discovery is complete.

[100] This application for discovery is declined.

*ASB bank account no. [deleted] with reference "LIVE FISH"*

[101] In late 2018 the applicant discovered that the non-party was employed by Live Fish Seafood Restaurant in Auckland. The applicant claims that he saw a photo of the

respondent and non-party together on the Live Fish website on 1 January 2014. He did not retain a copy of the photo.

[102] The applicant seeks discovery of the Live Fish account because he believes that a payment of \$17,000 was deposited to a Live Fish account by the respondent in July/August 2016 from relationship property funds. The applicant does not know whether the payment was made to this account, which is the account of the Live Fish Seafood Restaurant but suggests that the payment was made to assist the non-party obtain a job with the restaurant.

[103] The non-party opposes disclosure of the information, but because it is not his account, he has not ability to do so.

#### *Outcome*

[104] It is difficult to see how a request for discovery of statements from this account is for other than speculative reasons.

[105] First, the account is not an account of the non-party and so a non-party discovery application would be required against the holder of the account, and second, it is difficult to see the relevance of the account to the applicant's application.

[106] This application is declined.

*ASB bank account no. [deleted] in the joint names of the respondent and the non-party*

[107] I have directed discovery by the respondent of this account. To address any difficulty with disclosure by the bank of a joint account on the authority of only one account holder, this application is granted in respect of the non-party's joint holding of the account.



ASB bank credit card account no. ending with 2087 in the non-party's sole name

[108] The applicant seeks disclosure of statements for this credit card account to establish expenditure by the non-party in relation to the respondent for a period before the non-party and respondent admit they were in a relationship.

[109] The non-party claims this is not his credit card account and he cannot therefore provide the information.

*Outcome*

[110] The applicant has not established that this is an account of the non-party and application is dismissed on jurisdictional grounds.

Statements of all bank accounts in the name of Bo He and/or with others in New Zealand existed in the period between June 2011 to December 2013 and from January 2016 to date

All bank accounts held in the name of Mr He and/or in joint names with others in China, including but not limited to the account number [deleted] in the period between June 2011 to December 2013 and from January 2016 to date

[111] The applicant seeks disclosure of statements for these accounts to establish whether the respondent and non-party were in a relationship at the relevant times.

[112] The non-party opposes this disclosure on the grounds the evidential basis for requesting it is unclear and there are no relevant transfers into the account.

*Outcome*

[113] The applicant has not provided a sufficient evidential basis for disclosure of statements for these accounts and the application is not sufficiently tailored to limit unreasonable disclosure.

[114] This application is declined.

Whereabouts of ¥73,000.00 (equivalent to NZ\$15,000.00) withdrawn over the period from 23 June 2016 to 24 June 2016 from the respondent's ICBC account

WeChat "Red Pocket" account in Mr He's sole name in the period from June 2011 – December 2013 and from January 2016 to January 2017

[115] It may be that after general discovery by the respondent has been completed, an evidential basis is established for discovery of this information by the non-party. Accordingly, it is premature to consider the application.

**Acquisition of [number deleted] Clayden Drive, Gulf Harbour, Whangaparaoa ("Clayden Drive")**

*The conveyancing files in relation to the purchase of Clayden Drive*

*All documentary evidence as to the sources of funds towards the payment of the deposit, balance of the purchase price and repayment of mortgage for Clayden Drive*

*The loan application form with ASB in relation to the bank loan for Clayden Drive*

[116] The applicant seeks disclosure of this information from the non-party for the same reasons he sought the bank statements from the respondent for the period around purchase of the Clayden Drive property.

[117] The non-party accepts that the respondent has contributed to the purchase price for this property. He maintains that that contribution was made after the separation of the parties because he did not sign the agreement for purchase until 12 October 2016.

[118] On this basis he submits that disclosure of these documents is not relevant to the application to set aside the agreement.

*Outcome*

[119] I have granted the application for discovery of relevant bank statements from the respondent during the period prior to separation until 31 January 2017, the date after the non-party and respondent moved into Clayden Drive.

[120] Disclosure of the documents referred to above is relevant to the applicant's application to set aside the agreement and appropriately focused.

[121] This application is granted.

**Motor vehicles**

*All documentary evidence as to the sources of funds towards the purchase and repayment of the car loan in relation to Volkswagen and Abarth Jeep vehicles*

[122] The applicant seeks discovery of all documents relating to the purchase of these motor vehicles on the grounds the respondent contributed to the motor vehicle purchases.

[123] The non-party opposes this disclosure. Both vehicles were purchased in 2017 and the non-party acknowledges that the respondent contributed towards the purchase of one of the vehicles.

*Outcome*

[124] The applicant has not established an evidential basis for disclosure of these documents in relation to his application to set aside the agreement. While there may be a basis for disclosure for the purposes of tracing funds in the event the agreement is set aside, it is premature to grant this application.

[125] This application is declined.

## **Starrysky Group Limited (“SGL”)**

*Documentary evidence as to the sources of funds towards the purchase of Mr He’s share;*

*Financial statements of SGL in the period from 17 October 2017 to 20 September 2018*

*Bank statements in the name of SGL in the period from 17 October 2017 to 20 September 2018 if any*

*GST return of SGL in the period from 17 October 2017 to 20 September 2018*

[126] Discovery of the non-party’s shares in this company arises only if the application to set aside is successful.

[127] This application is declined.

## **COSTS**

[128] Costs are reserved.

## **RESPONDENT’S APPLICATION OF DISCOVERY**

[129] It was not clear from the submissions whether there is agreement on an order being made against the applicant on the terms of the respondent’s application for discovery.

[130] If agreement has not been reached then counsel for the applicant is within 14 days to file a brief memorandum setting out any grounds for objection and the respondent has 14 days within which to reply. I will then determine the issue in chambers.

## **FURTHER DIRECTIONS**

[131] I make the following further directions in the proceedings:

- (a) Discovery is to be completed by **12 October 2020**.
- (b) Any further interlocutory applications are to be filed by **23 October 2020**.
- (c) Any responses to the further interlocutory applications are to be filed by **30 October 2020**.
- (d) There is to be a 1 ½ hour hearing (submissions only) at **10.00am on 6 November 2020** to address any further interlocutory applications and to make directions progressing the application to final hearing. Submissions for the hearing are to be filed by **2 November 2020**.
- (e) There is to be a 15 minute pre-hearing telephone conference before me at **9.00am on 2 November 2020** to monitor compliance with the directions and confirm the scope and time required for the hearing on 6 November 2020.
- (f) This file is to be case managed by me.

A G Mahon  
Family Court Judge