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 HAMILTON

I TE KŌTI WHĀNAU
KI KIRIKIRIROA

FAM-2018-019-001148
[2021] NZFC 10898

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	MICHAEL ALEXANDER FULLERTON-SMITH Applicant
AND	GILLIAN MARY FULLERTON-SMITH First Respondent
AND	MA FULLERTON-SMITH FAMILY TRUST NO 2 Second Respondent

Hearing:	19 and 20 October 2021
Appearances:	J Sutton and Ms Lewake-Bandara for the Applicant J McGuigan for the First Respondent No appearance by or for Second Respondent
Judgment:	1 November 2021

RESERVED JUDGMENT OF JUDGE N J GRIMES

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[1] Mr and Mrs Fullerton-Smith separated 14 years ago. They signed a relationship property agreement 10 years ago that was meant to be implemented five years ago.

[2] Almost three years ago, Mr Fullerton-Smith applied to set aside the contracting out agreement he and Mrs Fullerton-Smith entered into in 1999 together with the 2011 separation agreement and for orders to be made under the Property (Relationships) Act 1976 ("the PRA") and Family Proceedings Act 1980 ("the FPA"). Given events before and after separation, the only remaining asset is a run-off farm (i.e. it has no dwelling house) that is now worth $1.6 million and owned by the trustees of the MA Fullerton-Smith Family Trust No. 2.

[3] Over 1500 pages of evidence has been filed to date. There have been various judicial conferences and a defended hearing as to discovery. Before the court is five interlocutory applications that have been considered over the course of a two-day submissions only hearing. The proceedings have been set down for an eight-day hearing with 18 witnesses.

[4] I reserved my judgment so that I could review again the submissions, evidence and authorities relied on by counsel. I am grateful to counsel for the considerable effort they have expended in trying to manage this difficult process in order to truncate the decision required of the court.

What interlocutory applications require the court's determination?

[5] The five applications before the court for consideration are:

(a) Mrs Fullerton-Smith's application for orders striking out evidence.

(b) Mrs Fullerton-Smith's application for orders that exhibits are admissible.

(c) Mr Fullerton-Smith's application for orders striking out identified evidence filed by and for Mrs Fullerton-Smith.

(d) Mrs Fullerton-Smith's application for tailored discovery.

(e) Mr Fullerton-Smith's application for orders that service and representation is not required for the beneficiaries of the second respondent being the MA Fullerton-Smith Family Trust No. 2.

[6] At the commencement of the hearing, Mr Sutton on behalf of Mr Fullerton-Smith confirmed that the application for orders that service and representation on other beneficiaries was no longer necessary because the application under the Trust Act 2019 to vary the No. 2 Trust deed so as to remove other beneficiaries as pleaded in the third amended application dated 6 May 2021 was no longer being pursued. The discontinuance of both those applications will be dealt with in the orders and directions I make.

[7] The bulk of hearing time has been consumed by the cross applications for striking out evidence, this running to in excess of 500 paragraphs across 11 affidavits. Again, I am grateful to counsel who were, during the course of the hearing, able to agree to a large number of portions of or whole paragraphs being struck out.

Brief background to the proceedings

[8] Counsel helpfully prepared an agreed statement of facts which are set out here.

[9] Michael Fullerton-Smith and Gillian Fullerton-Smith were in a de facto relationship from July 1996 and married on 15 March 1997. Mr Fullerton-Smith says they separated in December 2007. Mrs Fullerton-Smith says they separated in October 2008. The marriage was dissolved in December 2009.

[10] They have three children: [name deleted] aged 24; [name deleted] aged 22; and [name deleted] aged 19.

[11] Mr Fullerton-Smith comes from a farming family in the King Country and Waikato. Mrs Fullerton-Smith is from Scotland and was an engineer before she moved to New Zealand with Mr Fullerton-Smith in 1996. Mrs Fullerton-Smith now resides in Ireland and works as a sales manager in the international dairy industry.

[12] The assets of the relationship were held in the MA Fullerton-Smith Family Trust (No. 2) ("the No. 2 Trust"), which was settled in 1990. The only property left in the No. 2 Trust is a run-off farm. It has a value of approximately $1.6 million. The Trustees of the No. 2 Trust are the second respondents in this proceeding.

[13] The parties entered into a s 21 relationship property agreement on 15 September 1999 ("the 1999 agreement"). The 1999 agreement classified as relationship property the assets and investments in Mr Fullerton-Smith's personal name and money owned by Mrs Fullerton-Smith. The assets were then transferred to the No. 2 Trust and Mrs Fullerton-Smith was appointed a trustee.

[14] At around the same time, the No. 2 Trust had also received Mr Fullerton-Smith's remaining property and a settlement of assets owned by the No. 1 Trust, so in effect the No. 2 Trust owned all of the wealth gifted from Mr Fullerton-Smith's father. Mr Fullerton-Smith says this property is his separate property; Mrs Fullerton-Smith does not agree.

[15] During the marriage, the parties purchased a number of farms in the Waikato and in the South Island which were owned by the Trustees of the No. 2 Trust (either directly, or via shares and land-owning companies). Following the global financial crisis in 2008, which caused a material drop in milk prices, the No. 2 Trust was forced to sell its interest in the South Island farms at a significant loss. Since then, the No. 2 Trust has been forced to sell further assets to repay bank debt.

[16] Following separation, the parties attended mediation in June 2011. On 25 October 2011, the parties entered into a s 21A agreement settling all issues between the parties ("the 2011 agreement"). Mr Fullerton-Smith was represented by Mr Gudsell QC and Nielsen Law and continued to be advised by the family's firm of accountants, Bailey Ingham. Mrs Fullerton-Smith was represented by Lady Deborah Chambers QC and Harkness Henry.

[17] By the time of the 2011 agreement, the assets of the No. 2 Trust (comprised of farm holdings, Fonterra shares, livestock etc.) were to be sold with settlement to occur on or before 1 June 2016.

[18] Shortly prior to June 2016, Mrs Fullerton-Smith sought information from the family accountants, Bailey Ingham, regarding the financial position of the No. 2 Trust and sale of the farms. The parties corresponded in relation to the settlement of the 2011 agreement, but ultimately settlement was not achieved.

[19] In November 2017, the parties attended an unsuccessful mediation.

[20] In December 2017, Mrs Fullerton-Smith called for the sale of the farms under the terms of the 2011 agreement.

[21] On 18 December 2018, Mr Fullerton-Smith brought proceedings under the PRA.

[22] The Trustees of the No. 2 Trust (Mr Fullerton-Smith and Bailey Ingham Trustees Ltd) have been joined as the second respondents in the proceedings.

Cross applications to strike out evidence

[23] Parts of or whole sections of over 500 paragraphs in 11 affidavits were sought to be struck out in cross applications on the basis of:

(a) irrelevant matters or unfairly prejudicial material,

(b) inadmissible hearsay,

(c) opinion and submission,

(d) affidavits in reply that introduced new matters,

(e) duplication of exhibits,

(f) illegible exhibits.

[24] Counsel for Mr Fullerton-Smith says his client's application to strike out need only be dealt with if the court makes orders in respect of Mrs Fullerton-Smith's

applications, and that if parts of Mr Fullerton-Smith's evidence are removed then the corresponding evidence of Mrs Fullerton-Smith need also be removed.

[25] Both parties submit permitting the evidence would substantially increase the cost and time of resolving this proceeding.

The applications before the court

[26] When considering what evidence is likely to be relevant, it is important to understand what applications are before the court and the resulting issues for the court's determination.

[27] Mr Fullerton-Smith filed his third amended substantive application pursuant to the PRA and FPA on 6 May 2021. In general terms, he seeks:

(a) To be granted leave to bring his applications.

(b) That the 1999 agreement is set aside on the grounds of non-compliance with formalities, serious injustice, duress and/or undue influence and mistake.

Mr Fullerton-Smith alleges that he was mesmerised by Mrs Fullerton-Smith, that she threatened to return to the United Kingdom with their unborn child if they did not merge their property to become relationship property and that he was under Mrs Fullerton-Smith's influence when he entered into the 1999 agreement. Furthermore, he says that they and their legal advisers were operating under various mistakes in relation to the No. 2 Trust assets including those gifted to him by his father which should remain as separate property.

(c) That the 2011 agreement is set aside on the grounds of non-compliance with formalities, serious injustice and mistake.

(d) Mr Fullerton-Smith alleges that the parties including their senior counsel, accountants and the Trustees of the No. 2 Trust were mistaken

as to the ability to vary the deed of the No. 2 Trust and the quantum of the parties current accounts in the No. 2 Trust which, Mr Fullerton-Smith alleges, resulted in a substantially unequal exchange of values.

(e) If the agreements are set aside, then Mr Fullerton-Smith is asking the court to determine:

(i) identification and valuation of relationship property,

(ii) the respective shares of the parties in the relationship property,

(iii) the status and ownership of alleged separate property,

(iv) alleged diminution of value of separate property (s 17A),

(v) unequal division (s 13),

(vi) economic disparity (s 15),

(vii) contributions (s 18B) and satisfactions (s 20E),

(viii) vesting of relationship property,

(ix) the variation of the deed of the No. 2 Trust under s 182 of the FPA.

(f) If the agreements are not set aside, Mr Fullerton-Smith seeks to establish the parties' positions under the 2011 agreement. This will include issues as to:

(i) The parties current account balances, including treatment of the beach house realisation, and issues as to historic treatment of loans to the applicant in exchange for property transferred to the No. 2 Trust.

(ii) The net equity of the No. 2 Trust.

(iii) The renouncement of Mrs Fullerton-Smith to any interest she has in the No. 2 Trust and how that is to occur.

(iv) What orders are necessary to implement the 2011 agreement, including sale orders for the farm.

(g) If the 2011 agreement is set aside, but the 1999 agreement is not, then determination of the parties' interests will need to be determined pursuant to the 1999 agreement.

[28] Mrs Fullerton-Smith opposes the orders sought including on the following grounds:

(a) That there is no proper basis asserted for the allegations concerning duress, undue influence, serious injustice, mistake and non-compliance with formalities.

(b) Mr Fullerton-Smith has repeatedly affirmed and ratified both the 1999 and the 2011 agreements.

(c) Both parties were independently represented when they entered into both agreements and received extensive accounting advice.

(d) Mr Fullerton-Smith refused to sell the No. 2 Trust holdings until the Trust's main lender, ASB Bank, withdrew its support of the farms, these being sold for approximately $14 million between 2016 – 2018.

(e) Mr Fullerton-Smith and his co-trustee have at all times preferred his interests, including incorrectly allocating payments to the No. 2 Trust's current accounts to improve Mr Fullerton-Smith position to the detriment of Mrs Fullerton-Smith.

(f) Mr Fullerton-Smith has withdrawn sums from the No. 2 Trust in excess of his entitlement under the 2011 agreement.

(g) It has been 10 years since the 2011 agreement was signed during which Mr Fullerton-Smith has had sole use and enjoyment of the relationship property.

(h) The parties have relied on the agreement and organised their affairs accordingly.

(i) Mrs Fullerton-Smith has tried to resolve the position since mid-2016.

[29] By way of substantive relief, Mrs Fullerton-Smith seeks enforcement of the 2011 agreement and various adjustments to the parties' living allowances/current accounts arising from the agreement. She also seeks orders implementing the division between the parties or in the alternative, pursuant to sections 44 and 44C of the PRA. Mrs Fullerton-Smith has also brought her own substantive s 182 FPA application.

Relevant legal principles

[30] Helpfully, counsels' submissions regarding the relevant legal principles are similar.

[31] Rule 170 of the Family Court Rules 2002 ("the FCR") provides that the court may, at any stage of the proceedings, make an order determining a question of admissibility of evidence before hearing. I accept both counsel's submission that r 170 is to be approached in light of r 3 of the FCR. This provides that one of the purposes of the rules is to make it possible for proceedings in the Family Court to be dealt with as fairly, inexpensively, simply and speedily as is consistent with justice. This is also consistent with is s 1N(d) of the PRA.

[32] Rule 158 deals with the contents of affidavits and provides that:

(a) Affidavits must be limited to matters that would be admissible if the deponent was giving evidence orally at a hearing and must be limited strictly to matters in reply.

(b) The court may refuse to read an affidavit that unnecessarily sets forth any argumentative matter or is an affidavit in reply but introduces new matters.

[33] In *Brock v Norton*[1] the court stated:

> [21] Rule 158 provides the Court with discretion to refuse to receive evidence in certain circumstances. It is a discretion to be judicially exercised and, in my view, it would be difficult to refuse to accept evidence that could have an impact on the outcome of the proceedings. If, for example, an affidavit in reply introduced new material of relevance, I would be reluctant to refuse to accept that, simply because it is "new matter".
>
> [22] In similar vein, I consider that (2)(a)(i) which provides the court with the ability to refuse to accept any affidavit evidence that "unnecessarily sets forth any argumentative matter or copies of, or extracts from documents" is directed at the form in which evidence is introduced. If evidence is relevant and is not excluded as being inadmissible, then it should be received in evidence unless the manner in which that evidence is produced in the affidavit is unnecessarily argumentative or unnecessarily involves copies of, or extracts from, documents. It should not be used to prevent a Court from taking into account relevant and admissible evidence.

[34] The admission of evidence in Family Court proceedings is governed by s 12A of the Family Courts Act 1980 ("the FCA"). Section 12A(4) provides the court with the discretion to admit any evidence that it considers may assist in the determination of those proceedings, despite the evidence being inadmissible under the Evidence Act 2006.

[35] The Family Court's jurisdiction to "prune affidavits" was discussed in *Walker v Walker*[2], a decision of the High Court (Priestley J). His honour stated that:

> [11] As a matter of policy I am extremely reluctant to deter Family Court Judges from exercising their discretion at a pre-trial stage to prune affidavits.

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[1] *Brock v Norton* [2016] NZFC 468.
[2] *Walker v Walker* [2006] NZFLR 768 (HC).

> A notable feature of many Family Court files is the sheer length and prolixity of filed affidavits. An affidavit is a mechanism to place relevant factual matters before the Court. It is not a device to score points, denigrate or indulge in advocacy.
>
> [12] Given the personal and emotional and underpinning of Family Law cases, there is an understandable temptation on the part of the parties to paint a full and self-justifying picture. Sometimes such an exercise may be therapeutic. Affidavit evidence, however, is not therapy.

[36] In *Vickery v Rahiman*[3], the Court emphasised that properly prepared pleadings and affidavits will invariably help focus the parties and counsel on relevant evidential and legal issues.

[37] In summary, relevance is always the key issue when determining the admissibility of evidence, both under the Evidence Act 2006 and under s 12A of the FCA. To be relevant, evidence must have a tendency to prove or disprove anything that is of consequence to the determination of the proceeding (s 7(3)). Section 8 of the Evidence Act contains a general exclusion, so that "in any proceeding, the judge must exclude evidence if its probative value is outweighed by the risk that the evidence will (a) have an unfairly prejudicial effect on the proceeding or (b) needlessly prolong the proceeding".

Approach

[38] Given the sheer volume of challenges, I do not propose to go paragraph by paragraph. Rather, there are matters I can deal with expeditiously and thereafter when considering the issue of relevance in the context of irrelevant matters, opinion, submission, hearsay, introduction of new matters, these will be dealt with affidavit by affidavit.

[39] Both counsel provided schedules referring to the paragraphs in question and submission in relation to each. Therefore, where a paragraph is left in, I will not be referring to this as it means I have adopted the submission made by the party wanting it to remain. Where a paragraph (or portion thereof) is to be removed, I will reference this and do so on the basis that I have accepted the submission from the party wanting

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[3] *Vickery v Rahiman* [2020] NZFC 10751.

the paragraph (or portion thereof) removed. To try and deal with the number of paragraphs in any other way would be too cumbersome.

[40] At the substantive hearing, the court will be required to determine factual matters regarding the circumstances and intentions leading to the signing of both the 1999 and 2011 agreements. If they are both set aside or the 2011 agreement is set aside, then amongst other matters, the court is being asked to determine an uneven division of relationship property based on extraordinary circumstances together with an economic disparity claim.

[41] The merits of such arguments were not for debate at this hearing. The point is the arguments have been raised. Thus, any evidence concerning the dynamics of the relationship, divisions of functions within the household and the parties' intentions is clearly relevant to the issues, even if, at the end of the day, that evidence falls short of establishing the claims. Much of the evidence that I have determined remains in, is for these very reasons.

Illegible exhibits

[42] Counsel for Mr Fullerton-Smith submitted r 70 of the FCR requires that the contents of documents must be legible. Counsel for Mr Fullerton-Smith has confirmed that the legible copies of exhibit GFS – 025 of Mrs Fullerton-Smith's affidavit dated 18 July 2019 and exhibit GFS 20 – 2 of Mrs Fullerton-Smith's affidavit dated 26 October 2020 will be provided.

Duplication of exhibits

[43] There are two schools of thought regarding duplication of exhibits. Counsel for Mrs Fullerton-Smith understands best practice to be that an affidavit needs to be fulsome and include any exhibit referred to notwithstanding this may have already been exhibited to a separate affidavit by either party. Counsel for Mr Fullerton-Smith relies on rr 3 and 158(2) of the FCR that duplicate copies and extracts should be removed to streamline the evidence before the court and enable the proceeding to be resolved as fairly, inexpensively, simply, and speedily as possible.

[44] I favour the second approach, particularly in light of 1500 pages of evidence before the court. However, the parties have addressed this issue by proposing a common bundle of exhibits for the hearing. Rather than placing either party to the expense of removing exhibits at this juncture, I have, as part of the orders and directions I make, required that a common bundle of exhibits be provided for the hearing.

Mrs Fullerton-Smith affidavit dated 26 September 2019

[45] This affidavit was sworn in relation to her request for discovery. It was responding to an affidavit of Mr Fullerton-Smith dated 1 August 2019 which is not an affidavit Mrs Fullerton-Smith opposes.

[46] The application for discovery was determined by His Honour Judge Brown on 18 November 2019. The 26 September 2019 affidavit was considered for that hearing and I accept counsel for Mrs Fullerton-Smith's submission that it is now a moot point as it was not objected to at the time.

[47] Furthermore, as part of the directions I make below, counsel now need to carefully consider whether affidavits in support of interlocutory applications that have now been determined are still necessary for the hearing.

[48] There will be no amendments to this affidavit.

Affidavit of Mr Wisnewski dated 19 October 2020

[49] The deponent is the general manager of sales and operations in the global sales team at Waikato Milking Systems NZ LP for whom Mrs Fullerton-Smith works in Ireland.

[50] Mr Fullerton-Smith objects to this 14-paragraph affidavit. He submits Mrs Fullerton-Smith's recruitment to Waikato Milking Systems and her performance in the role is irrelevant and does not have a tendency to prove or disprove anything of consequence to the proceedings.

[51] Whilst a portion of the affidavit relates to Mrs Fullerton-Smith's current role, it sets out in detail her practical knowledge of the NZ dairy industry and understanding at a hands-on level. This affidavit is relevant. It responds to Mr Fullerton-Smith's claim that Mrs Fullerton-Smith made little or no contribution to the farms during the relationship.

Affidavit of Demetri Baroutsos dated 27 August 2020

[52] The deponent is Mrs Fullerton-Smith's former partner who acted as her agent to liaise with solicitors and accountants when she was trying to implement the 2011 agreement. After their separation however, Mr Baroutsos filed an affidavit supporting Mr Fullerton-Smith.

[53] The objections relate to the evidence being irrelevant, unfairly prejudicial and opinion. My findings are:

(a) Paragraph 38 – all out

(b) Paragraph 48.5 and 48.6 – all out

(c) Paragraph 50 – I strike out "I entirely reject… rubbish the" and "further as set out… in 2016"

Affidavit of Robert Ingham dated 18 August 2020

[54] The deponent was the family accountant and a trustee of the No. 2 trust. The objections relate to the evidence being opinion, speculation, submission, irrelevant, hearsay and/or unfairly prejudicial. My findings are:

(a) Paragraph 33 (a) remove "and could… made by Mrs Fullerton-Smith"

(b) Paragraph 33 (e) remove "preferring a viewpoint… regardless of merit"

(c) Paragraph 33 (h) remove "while Mrs Fullerton-Smith agents… and the facts", "flawed", "flawed forensic", "and her an unfairly… grossly unfair"

(d) Paragraph 40 – all out

(e) Paragraph 44 – remove "in which he… resolve matters"

(f) Paragraph 49 – remove "in particular… the reason is that"

(g) Paragraph 52 – remove "whereas… has not"

(h) Paragraph 53 – remove "this advice… advised him"

(i) Paragraph 72 – 81 – all out. These are opinion and submission paragraphs in circumstances where both parties have engaged experts who have reported on the matters contained in these paragraphs. Mr Ingham is not being called as an expert witness but as a factual witness.

(j) Paragraph 82 – all out

(k) Paragraph 91 – all out

(l) Paragraph 104 – remove "which are… own responsibility"

(m) Paragraph 108 remove "I was also… without permission"

(n) Paragraph 115 – all out

Affidavit of Max Lamb dated 26 August 2020

[55] Mr Lamb is now a retired lawyer who acted for Mr Fullerton-Smith in relation to gifts/settlements of his father's farming assets onto him. He acted for both parties

in relation to the 1999 agreement and provided Mr Fullerton-Smith with independent legal advice in relation to the same.

[56] Three paragraphs remain contested.

[57] Paragraphs 16, 21 and 24 – these relate to the intentions behind signing the 1999 agreement. Whilst Mr Lamb speaks of what he saw, heard and perceived; he also speaks to what he thinks Mr Fullerton-Smith intentions might have been. These are speculative and opinion in a situation where Mr Fullerton-Smith can speak to those intentions. The comments amount to legal submission. My findings are:

(a) Paragraph 16 – I strike out the first sentence starting "I am sure… now alleges"

(b) Paragraph 21 – I strike out "it appears that… I wrote to Foxley Station Ltd"

(c) Paragraph 24 – I strike out "from memory… by him and Mrs Fullerton-Smith"

Affidavit of Michael Fullerton-Smith dated 31 August 2020

[58] This is a reply affidavit to a number of Mrs Fullerton-Smith's earlier affidavits. The objections relate to the evidence being irrelevant, opinion, unfairly prejudicial, submission and/or hearsay.

[59] I strike out the following:

(a) Paragraph 37 – "from 2011 onwards… Her income"

(b) Paragraph 79 – "is fabricating… In an"

(c) Paragraph 91 – all out

(d) Paragraph 179 – remove "false" and "baseless claims"

(e) Paragraph 189 – all out except last sentence from "she is… made by me"

(f) Paragraph hundred and 92 – all out

(g) Paragraph 206 – all out

Affidavit of Gillian Fullerton-Smith dated 2 May 2019

[60] This is Mrs Fullerton-Smith's first narrative affidavit which sets out her view of background matters and the issues at hand. The objections to portions of this affidavit relate to relevance, unfairly prejudicial, opinion and submission. I strike out the following:

(a) Paragraph 30 – remove "Michael and I… and vice versa"

(b) Paragraph 52 – remove "at times the… attend training courses"

(c) Paragraph 66 – all out

(d) Paragraph 77 – remove "I believe… Inconveniencing himself"

(e) Paragraph 84 – remove "it appears… Personal drawings"

(f) Paragraph 99 – remove "this was a ridiculous accusation and"

(g) Paragraph 101 – remove "it also appears… 2012 – 2016"

Affidavit of Gillian Fullerton-Smith dated 18 July 2019

[61] This affidavit was filed in support of an application for disclosure.

[62] I strike out paragraph 13 – remove "his girlfriend and".

Affidavit of Gillian Fullerton-Smith dated 26 November 2019

[63] This affidavit was sworn in reply to those of Mr Fullerton-Smith dated 17 October 2019 and Robert Ingham dated 23 October 2019. I strike out the following:

(a) Paragraph 2 – all out

(b) Paragraph 4 – remove "until she… since then" and "sadly, Michael… members, too"

(c) Paragraph 9 – remove "who asked me… for hobbies"

Affidavit of Gillian Fullerton-Smith dated 20 October 2020

[64] This affidavit was sworn and filed to address some of the broad allegations raised throughout the evidence filed by Mr Fullerton-Smith and his supporters. I strike out the following:

(a) Paragraph 37 – remove "(I understand… against Michael)"

(b) Paragraph 38 (F) – remove "a place to… the children"

(c) Paragraph 39 – all out

(d) Paragraph 84 – remove "when I… my children" and "I am really… attack me"

(e) Paragraph 126 – remove "I think… at this time"

Admissibility of two exhibits

[65] Mrs Fullerton-Smith has applied for the redacted portions of exhibits GFS 20 – 10 and GFS 20 – 21 annexed to her affidavit dated 27 October 2020 be admissible.

[66] These exhibits are two letters from Nielsen Law to Mr Fullerton-Smith and his advisors including Mr Ingham as the second trustee of the No. 2 Trust.

[67] On 18 November 2019, Judge Brown ordered Mr Fullerton-Smith to discover "copies of all legal advice in relation to the negotiation, entering into and implementing the 2011 agreement, including all correspondence, opinions and communications" noting it is "relevant, necessary and proportionate".

[68] The two exhibits were discovered by Mr Fullerton-Smith in his affidavit of documents dated 28 February 2020 pursuant to the discovery orders of Judge Brown. He now claims privilege.

[69] Exhibit GFS 20 – 10 is a letter written on 19 August 2011 and is clarification and opinion on likely terms of settlement.

[70] Exhibit GFS 20 – 21 is a letter dated 2 December 2011 which is a follow on from a communication exchange Mr Fullerton-Smith had with Nielsen Law when Mr Fullerton-Smith queried his bill as he was unhappy with the terms of settlement. He himself exhibited a Nielsen Law letter dated 28 November 2011 to his affidavit dated 31 August 2020 having already referred to this in two earlier affidavits in 2018 and 2019. He stated he did not oppose its discovery.

[71] Mr Fullerton-Smith objects to the redacted portions being admissible on the basis the letters were mistakenly disclosed and contain reference to advice Mr Fullerton-Smith earlier received from Mr Elliott Hudson, for which Mr Fullerton-Smith has not waived privilege. During the course of the 2011 High Court proceedings, the High Court determined the communications and advice from Mr Hudson was privileged.[4]

[72] I have, pursuant to r 151 of the FCR inspected the two letters for the purposes of deciding the validity of the privilege claim or objection.

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[4] *Fullerton-Smith v Fullerton-Smith* HC Hamilton CIV-2011-419-615, 26 August 2011.

Letter dated 19 August 2011

[73] This letter is written in the context of providing advice/opinion covering matters raised at mediation, s 182 FPA, s 44C PRA and Mr Fullerton-Smith alleged separate property. It falls within the category of Judge Brown's order for discovery. However, on page 5 is a particular section in the letter headed "privilege proceedings" which relates to Mr Hudson's letters. Those letters were still the subject of the High Court litigation, this being determined seven days later.

[74] I find this section of the letter was mistakenly disclosed and in accordance with s 65(4) of the Evidence Act 2006, privilege is not waived.

[75] The section of the letter headed 'privilege proceedings' is to be redacted.

Letter dated 2 December 2011

[76] This letter was part of an ongoing communication between Mr Fullerton-Smith and Nielsen Law when he was upset at the legal advice he received which resulted in his signing the 2011 agreement. He disputed his account.

[77] The letter relates to advice received and implementation of the 2011 agreement. As such it falls within Judge Brown's discovery order.

[78] The letter briefly refers to Mr Hudson but is more related to Nielsen Law justifying the work undertaken by them and their account. Mr Fullerton-Smith has exhibited the 28 November 2011 letter that is part of this series of communication. That letter also refers to Mr Hudson. Mr Fullerton-Smith specifically waived privilege when he exhibited that letter to his affidavit. The 2 December 2011 letter is a follow up five days later after further communication with Mr Fullerton-Smith.

[79] In this instance, I find Mr Fullerton-Smith has again waived privilege. He cannot "cherry pick" which letters in this conversation are disclosed so as to support his narrative, when he himself initiated the disclosure of the 28 November 2011 letter referencing Mr Hudson.

[80] In accordance with r 150 of the FCR GFS 20 – 21 is to be admitted in evidence.

Application for tailored discovery

[81] Both parties instructed forensic accountants to provide their expert opinion on various scenarios.

[82] Mr Fullerton- Smith's expert (Mr Moriarty) was to report on:

(a) The value of property that Mr Fullerton-Smith brought to the relationship at its commencement, both in absolute dollar terms and in relative dollar terms as at the present day.

(b) The original source of the equity in the No. 2 trust at separation, on the basis the 1999 agreement is set aside, and whether there are any indications, other than any relating to the 1999 agreement, of dispositions of relationship property to the No. 2 Trust.

(c) The value of equity lost to the No. 2 Trust as a result, directly and indirectly, of the purchase of the South Island farms.

(d) The value of Mr Fullerton-Smith and Gillian Mary Fullerton-Smith's current account on the No. 2 Trust balance sheet as at 25 October 2011, on the basis that:

(i) The 1999 agreement is set aside.

(ii) The accounting is corrected, as necessary, for the $926,226 the No. 2 trust received in 2010 as a result of the security given by the Michael and Gillian Fullerton-Smith Trust over the Mt Maunganui beach house to secure loans advanced to assist the No. 2 Trust to purchase the South Island farms.

(iii) Further adjustment, as necessary, is made for:

1. Salary of $84,000 due to Mr Fullerton-Smith for post-separation work undertaken by him between 2008 and 2011 which was credited to the parties current account, rather than a separate account,

2. Drawings of $61,080 between 2007 and 2011 identified by Bailey Ingham as only being to the credit of Ms Fullerton-Smith; and

3. Children's school fees/donations/childcare paid for by the No. 2 Trust between 2007 and 2011.

(e) The value of the parties current account on the No. 2 Trust balance sheet as at current date.

[83] His affidavit was sworn on 28 August 2020.

[84] Mrs Fullerton-Smith's expert (Mr Bassett) was to report on:

(a) Assessment of the parties' total interests in the No. 2 Trust being their beneficiary current account and entitlement to net equity of the Trust under the following scenarios:

(i) scenario 1 – the 2011 agreement is upheld

(ii) scenario 2 – the 2011 and 1999 agreements are set aside

(iii) scenario 3 – the 2011 agreement is set aside, and the 1999 agreement is upheld

(b) To review and comment on the affidavit of Mr Moriarty dated 28 August 2020.

[85] Mr Bassett's affidavit was completed on 23 October 2020.

[86] As at the date of hearing, the experts had not conferred in accordance with schedule 4 of the High Court Rules 2016 although this is anticipated in the future.

[87] On 30 March 2021, Mrs Fullerton-Smith applied for an order for tailored discovery of:

(a) Full general ledger details for the No. 2 Trust from June 2011 to June 2020 and given the passage of time, full general ledger details until June 2021.

(b) IR 345 PAYE information from July 2016 to March 2019 for each month showing gross wages filed and PAYE deductions.

(c) IR 348 returns for the income tax years ending 30 June 2011 to March 2019.

(d) Mr Fullerton-Smith's tax returns from March/June 2011 to March/June 2016 and for the years March/June 2019, March/June 2020 and March/June 2021.

[88] Whilst Mrs Fullerton-Smith had also sought copies of communications between Mr Fullerton-Smith, Robert Ingham (as trustee of the No. 2 trust) and their legal advisers during 2011, that application was abandoned prior to the hearing.

[89] Mr Fullerton-Smith opposes the application not only because he says the information has previously been provided to Mrs Fullerton-Smith and her previous solicitor or her former agent (being her former partner) but also because this is the third such application and further discovery of this kind will likely require additional expert evidence. It was submitted that ample opportunity to request discovery of the documents had been given and that a further discovery order is not consistent with either r 3 of the FCR or s 1N of the PRA.

[90] In response, Mrs Fullerton-Smith acknowledges that the information may have previously been provided, however, neither she nor her present solicitor have been able to locate the information.

[91] I accept counsel for Mrs Fullerton-Smith's submission that the information is relevant to issues in the proceeding, including compilation of the No. 2 Trust accounts, treatment of PAYE/wages and Mr Fullerton-Smith's allegations of economic disparity.

[92] It was submitted, the accounting records are required to confirm the accuracy of the financial statements which have been relied on to support various claims by the parties because historically, entries have been recorded which are at odds with the 2011 agreement and that raised questions over reliability and accuracy.

[93] It was further submitted the general ledger detail would enable the expert accountants to properly assess the financial statements and, it is hoped, make the process more efficient for the court if both experts could work from the same data, so as to reduce the issues required to be brought before the court for determination. I agree. Given the differing briefs to the experts as I have set out above, it is imperative they at least use the same data.

[94] The evidence before the court shows that on 21 January 2021, Mrs Fullerton-Smith's solicitor requested the documentation in an email.[5]

[95] Mr Fullerton-Smith's then counsel responded on 28 January 2021.[6] Relevantly, this letter specified the information had already been provided to Ms Fullerton-Smith and/or her agents.

[96] Neither Mrs Fullerton-Smith nor her current counsel have located the documentation and are concerned that if it had been disclosed to Mr Demetri Baroutsos, being Mrs Fullerton-Smith former partner and agent, now supporter of Mr Fullerton-Smith, it will not be recoverable.

[97] In the circumstances, I find the opposition to resupplying documentation is obstructive and could have been easily resolved without an application being filed.

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[5] Exhibit CR 11 of Christine Ranjan's 30 March 2021 affidavit.
[6] Exhibit CR 12 of Christine Ranjan's 30 March 2021 affidavit.

[98] On the basis the information has already been supplied, then I find that Mr Fullerton-Smith had accepted it was necessary, the task not unduly onerous and that the scope of the discovery had been tailored to the needs of the court to dispose, justly and efficiently, of relationship property issues under the PRA.[7] It is not clear to me why the information could not have been re-supplied.

[99] The request was made after Judge Brown considered the first application for discovery in 2019. It falls after the experts filed their reports, seemingly on the basis that it was possible the experts had not relied on the same data.

[100] Unfortunately, given the entrenched positions of the parties, pragmatism on this particular issue has been lost.

[101] However, I accept that re-supplying the information will put Mr Fullerton-Smith and his advisers to further time and expense that is not of his making. Therefore, I grant the application on the basis that Mrs Fullerton-Smith meets the costs of two hours of counsel for Mr Fullerton-Smith's time to locate and send the requested documentation together with any photocopying charges (noting that the information could easily be sent electronically).

[102] The discovery is to take place within 10 days.

Orders and Directions

General

[103] These proceedings will be case managed by me with a pre-hearing conference scheduled for 4 pm 16 November 2021 and the hearing commencing Tuesday, 22 February 2022.

[104] No further interlocutory applications or affidavits (other than exhibiting updating valuation evidence) are to be filed without leave of the court.

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[7] *Dixon v Kingsley* [2015] NZHC 2044, [2015] NZFLR 1012 at [20].

Trusts Act application

[105] Upon application, I vary the third amended application dated 6 May 2021 to discontinue the application under the Trusts Act 2019. As a result, I discontinue the application for orders that service on beneficiaries under the No. 2 Trust and representation of the children is not required as that application is now redundant.

Admissibility of two exhibits

[106] The exhibit GFS 20 – 10 is to have the section headed "privilege proceedings" redacted.

[107] The exhibit GFS 20 – 21 is to be admitted in evidence.

Discovery

[108] The amended application is granted on the condition that Mrs Fullerton-Smith meets the costs of two hours of counsel for Mr Fullerton-Smith's time to locate and send the requested documentation together with any photocopying charges. Discovery is to take place within 10 days of this decision.

Strike out of evidence

[109] The amended evidence as a result of the strike out applications is addressed by way of redactions with each party responsible for the redactions to their and their supporters' affidavits.

[110] Prior to the pre-hearing conference, each party is to swap redacted versions of their affidavits, (where a consent position was reached and on the basis of my rulings) with confirmation of the redactions/admissions to be given at the pre-hearing conference.

[111] Counsel for Mrs Fullerton-Smith is to provide legible copies of the exhibits GFS-025 and GFS 20-2.

Costs

[112] Costs are in issue as they have been throughout these proceedings and will inevitably form a part of the substantive hearing. Rather than deal with costs on a piecemeal basis, I reserve the issue until determination of the substantive applications.

Pre-hearing conference directions

[113] The pre-hearing conference is scheduled for 16 November 2021 at 4 pm.

[114] Having conferred with one another, counsel are to file memorandum five days prior to the conference that address the following matters:

(a) Is there an agreed date of separation, noting the parties' marriage was dissolved in December 2009?

(b) What further issues/sub issues need to be determined at the hearing?

(c) Which of the witnesses are required for cross-examination, affidavits having been filed from:

(i) Michael Alexander Fullerton-Smith

(ii) Elizabeth Hassen (sister)

(iii) Charles Lawrey

(iv) Samuel Laubscher (parties' previous lawyer who handled the purchase of the South Island farms)

(v) Peter Casey

(vi) Robert Ingham (Trustee and retired accountant)

(vii) Michelle Gapes (remuneration expert)

(viii) Trevor Ross (farm hand)

(ix) Lionel Max Lamb (retired lawyer)

(x) Demetri Baroutsos (Mrs Fullerton-Smiths former partner)

(xi) Paul Moriarty (Forensic accountant)

(xii) Stanley Hall

(xiii) Scott Thirkell

(xiv) Russell Fergusson/Lockwood and associates

(xv) Gillian Mary Fullerton-Smith

(xvi) Grant Wisnewski

(xvii) Rhiannon Berry

(xviii) Samuel Bassett (Forensic accountant)

(d) Should Messrs Lamb, Ingham and Ross's evidence be taken prior to the fixture and if so remotely?

(e) How is a common bundle of exhibits to be prepared?

(f) Which affidavits are required for the hearing (i.e. are there are a number no longer necessary if they related to interlocutory matters that have been determined)?

(g) Have the experts conferred, and if so, when will their joint statement be filed and circulated? If not, why not?

(h) How is a substantive hearing to be conducted given Mrs Fullerton-Smith resides in Ireland?

(i) Estimate length of hearing time

[115] Once again, I thank counsel for their written and oral submissions which have greatly assisted me in providing a timely decision.

N J Grimes
Family Court Judge