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

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IN THE FAMILY COURT
AT WAITAKERE

I TE KŌTI WHĀNAU
KI WAITĀKERE

FAM-2022-090-000425
FAM-2022-090-000544
[2023] NZFC 7210

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	JING AN Applicant
AND	HAIMING FENG Respondent

Hearing:	4 July 2023
Appearances:	C Braybrook for the Applicant D Zhang for the Respondent
Judgment:	12 July 2023

RESERVED JUDGMENT OF JUDGE KEVIN MUIR

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[1] Ms Jing An is applying for orders dividing relationship property. She says that she and Mr Haiming Feng were in a de facto relationship between August 2015 before separating in April 2020. As a result, she claims an interest in a home owned by him which she says is the family home.[1]

[2] Ms An also says that money that was transferred from China by Mr Feng using Ms An's Chinese bank account is relationship property. The funds concerned are approximately NZ$200,000. However, she does not say what the source of the money is nor why she believes it is relationship property. It appears to be common ground that money was transferred, and that Mr Feng used a Chinese bank account in Ms An's name and that he had control of that Chinese bank account to enable those transactions to occur.

[3] Mr Feng does not accept that the parties were in a de facto relationship. He appears to be asserting that a relationship was entered into by Ms An solely for the purposes of obtaining New Zealand residency. He says in the alternative, that if there was a de facto relationship it was for a duration of less than three years. On his account any relationship commenced in June 2016 and ended either in May 2018 or January 2019.

[4] This decision is not about resolving any of those differences. It is about the evidence that the parties intend to use to assist the Court in answering those issues.

The Issues

[5] Mr Feng seeks to strike out four paragraphs of an affidavit Ms An swore on 28 August 2022 and four paragraphs of an affidavit she swore on 2 October 2022. That application is made principally on the basis that the paragraphs are irrelevant or that any probative value is outweighed by its prejudicial effect.

[6] Ms An has attached three residency or visa applications to her affidavit of 2 December 2022 as Exhibits A, F and G. Together they consist of over 600 pages.

[1] Situated at [address deleted], Henderson and acquired by Mr Feng in May 2002 with its CV said to be $900,000 in Ms An's PR1 affidavit.

Ms An refers to parts of those applications, not the entire documents. Mr Feng asks that the irrelevant pages be removed or Ms An file an affidavit which refers to or annexes only the relevant pages. It is Ms An's contention that the Court does not have jurisdiction to make the orders sought and that the entirety of those documents are relevant.

[7] Mr Feng has issued interrogatories against Ms An. Ms An has answered some of the interrogatories and has filed an objection to answer in relation to several of the interrogatories. Mr Feng says that some of her answers are insufficient. He also says that her objections are not valid and she should be required to answer some of the interrogatories that she has objected to.

Relevance and Admissibility

[8] The touchstone for all evidence that is filed in the Family Court is that it must be relevant. Information contained in an affidavit that is not relevant is not evidence. Evidence is relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.[2]

[9] Section 8 of the Evidence Act says that evidence must be excluded if its probative value is outweighed by the risk that the evidence will have an unfairly prejudicial effect on the proceeding or needlessly prolong the proceeding.

[10] Rule 3 of the Family Court Rules requires the Courts to ensure that proceedings are dealt with "… *as fairly, inexpensively and speedily as is consistent with justice* …".

[11] Lawyers who act for parties in proceedings in the Family Court have an obligation, so as far as possible, to promote conciliation.[3] The Family Court has an obligation to ensure that proceedings are conducted in a moderate and reasonable tone.

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[2] Section 7(2) Evidence Act 2006.
[3] Section 9A Family Court Act 1980.

[12] The Family Court has a discretion to admit any evidence that it considers may assist it in the determination of the proceedings, even if it is inadmissible under the Evidence Act.[4] That discretion is not however as it is sometimes described an "*any evidence rule*". Unless evidence is relevant and reliable it should not be admitted under s 12A of the Family Court Act. If it is not relevant, or not reliable it is not evidence – it has no probative value.[5] The Family Court rightly remains reluctant to admit evidence that does not conform to the principles in the Evidence Act unless there are compelling justifications for admission.

[13] Rule 170 of the Family Court Rules allows the Court at any stage of the proceeding to make an order as to the admissibility of evidence. Rule 158 of the Rules permits the Court to refuse to read an affidavit that unnecessarily sets forth any argumentative matter or that is an affidavit in reply but introduces new matters.

[14] The purpose of affidavits is to place relevant factual matters before the Court. They are not a "*device to score points, denigrate or indulge in advocacy*".[6] In *Donovan v Graham,* McGechan J emphasised that affidavits should not be "*allowed to mushroom with irrelevance piled upon irrelevance, accusation upon accusation and with the parties becoming increasingly and unproductively inflamed*".[7]

The Evidence Objected To

[15] Paragraphs 21–25 of Ms An's first narrative affidavit affirmed 18 August 2022 are headed "*Recent Events*". They deal with an allegation that in January 2022 Mr Feng threatened and assaulted Ms An leading to charges which he pleaded guilty to.

[16] That is an event that occurred long after the date Ms An says the parties separated. Ms An says the evidence confirms a dynamic that existed during the relationship. She does not say how that "*dynamic*" is relevant to the matter at issue in the relationship property proceeding. There is no claim under s 13 alleging

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[4] Section 12A Family Court Act.
[5] *Indy v Oh* [2006] NZFLR 137 at [22] where Judge Murfit made it clear that hearsay and opinion evidence maybe admitted but "the touchstone will always be relevance and reliability".
[6] *Walker v Walker* [2006] NZFLR 768 at [11].
[7] *Donovan v Graham* (1991) 4 PRNZ 311 at 313.

extraordinary circumstances justifying an unequal division of relationship property. There is no claim that there were any post-separation actions which might justify an award of compensation.

[17] In the affidavit of 2 December 2022 at paragraph 9, Ms An was purporting to respond to Mr Feng's assertion that her paragraphs 21–25 had no relevance. She said, "*the respondent's response is typical of his controlling and abusive behaviour*". I agree with Mr Feng that that statement is inadmissible. It is not evidence. It is not even a fact. It is a statement of opinion or submission. It does not help the Court in determining any relevant issues.

[18] In paragraph 42 of that same affidavit, she essentially repeated the allegations of assault in January 2022, annexing a copy of the police report and recorded that she had been granted a temporary protection order.

[19] Once again there is no claim for relief in the application for division of relationship property nor any indication anywhere in the affidavit evidence filed that any of the events that occurred some two years after separation are relevant to the application for division of relationship property.

[20] Ms An's counsel suggested in submissions that evidence had been included in support of a potential application under s 103 of the Evidence Act as to mode of evidence. In other words, Ms An might be intending to apply for orders about an alternative way to give evidence because she has been subjected to violence by Mr Feng.

[21] There is certainly no indication in the affidavit that was the reason it was included. I find in any event, that it is inappropriate to include allegations of that kind in a narrative affidavit or an affidavit in reply. When an application is made as to mode of evidence, a brief affidavit can and should be filed which covers any relevant factual matters.

[22] While it is perhaps unlikely that the mind of a District Court Judge might be prejudiced or influenced by irrelevant prejudicial evidence in the same way that a jury might be influenced, it is nonetheless inappropriate to file evidence if its principal purpose appears simply to be to paint the opposition in a bad light. That observation applies particularly in proceedings in the Family Court given the obligation of lawyers to promote conciliation. It is the role of lawyers to filter the evidence to ensure that only relevant evidence is included.

[23] Paragraphs 21 to 25 of Ms An's affidavit of 18 August and paragraphs 39 and 42 of her reply affidavit are to be struck out. If the affidavits are included in any bundle those paragraphs are to be deleted.

Lengthy Exhibits

[24] Ms An's affidavit in reply sworn 2 December 2022 has page numbers, both to the evidence that precedes the jurat and for all of the exhibits. It is numbered consecutively up to page 643. It is a bulky and unwieldy affidavit.

[25] The majority of those pages are taken up by three exhibits – Exhibit A which is a partnership-based temporary visa application filed by Ms An in November 2016; Exhibit F which is a partnership-based temporary visa application filed by Ms An in January 2018, and Exhibit G which is a residence application submitted in May 2018.

[26] There is no index to the exhibits which makes locating the relevant Exhibits A to I difficult.

[27] Exhibit A is referred to in only two places in the affidavit. At paragraph 5 where Ms An says that she and Mr Feng met in April 2015 she refers to Exhibit A and says, "*the respondent's letter in support confirms the same*". She does not say where in Exhibit A the respondent's letter in support appears. Exhibit A runs to 229 pages.

[28] The second visa application, Exhibit F, is referred to at paragraph 24 where she refers to the circumstances surrounding a miscarriage and says that Exhibit F "… *contains a letter written by the responding confirming this*" (meaning her account

of the miscarriage). She does not say where in Exhibit F the letter of support appears. Exhibit F runs to approximately 111 pages. She does not say why any other parts of Exhibit F are relevant.

[29] The third residence application, Exhibit G, is referred to in paragraph 25. Ms An says that friends and neighbours were aware of the relationship and knew it was genuine and that they planned to have children. She refers to letters that the neighbours have provided in support to send to Immigration. Once again, she does not say where in Exhibit G those letters of support are. Exhibit G runs to approximately 258 pages.

[30] Clearly it was not necessary to file approximately 600 pages of evidence if those were the only relevant parts.

[31] There has been a regrettable tendency by parties litigating in the Family Court to file bundles of documents or affidavits which contain many pages or exhibits which are not referred to anywhere in the evidence and which do not feature in cross examination or even in counsel's submissions when the matter proceeds to a defended hearing. It is not a practice that is to be encouraged. It is a practice that breaches Rule 3 of the Family Court Rules and s 8 of the Evidence Act. There is a real risk that the inclusion of very lengthy documents which are not directly relevant will unfairly prejudice the proceeding and needlessly prolong it.

[32] Mr Feng asks that Ms An refile her reply affidavit specifying the parts of documents that she relies on.

[33] Ms An's response is to assert that the Family Court does not have jurisdiction to require Ms An to particularise which pages of her annexure she seeks to rely on. She refers to *Wihongi v Broad* saying that the Family Court only has the jurisdiction expressly provided for by a statutory enactment.[8]

[8] *Wihongi v Broad* [2020] NZFLR 585.

[34] Of course, the Family Court does have inherent power to control its jurisdiction and inherent jurisdiction to regulate its own procedure. Where matters are not expressly provided for in the Family Court Rules or any other enactment Rule 15(1)(b) requires a Judge to deal with the matter "*in a way decided by the Judge, in light of the purpose of these rules, if the Judge considers the matter cannot be dealt with under provisions of these rules dealing with similar matters*".

[35] In addition to this statutory power, it is well established that all Courts have the inherent powers necessary to act effectively within their jurisdictions.[9] These are described by the Supreme Court in *Zaoui v Attorney General* as "*ancillary and relate to process. They enable the Court to exercise its statutory functions, powers and duties, and to control its processes*".[10]

[36] As such, making the order is not an unlawful step outside the Court's jurisdiction as it seeks to direct procedure within the Court's statutory jurisdiction. It would instead be an exercise of its inherent powers. This means that, even if the Court lacked the statutory power under r 15(1)(b) to make the relevant orders, the order would still be valid as the Court has the inherent power to regulate its own procedure.

[37] It is unhelpful and frustrating for a Family Court Judge and for opposing parties to be faced with an affidavit or exhibits that run to hundreds of pages with no index, no tabs or file dividers indicating where each exhibit stops or starts, and no reference in the evidence to the page number that is relied on in support of the fact or proposition asserted.

[38] Ms An says that the entirety of the Immigration applications are relevant because they contain evidence about:

(a) The length of the parties' relationship;

(b) Contemporaneous evidence about the nature of the parties' relationship; and

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[9] *R v Connelly* [1964] AC 1254 at 1301 (Lord Morris).
[10] *Zaoui v Attorney General* [2005] 1 NZLR 666.

(c) Evidence that the applicant was not in a relationship with another individual.

[39] If it were not for that submission, I would be inclined to exclude all parts of those exhibits other than the parts that are specifically referred to by Ms An in her evidence. I accept however, that it is reasonable for the exhibits to remain on the Court file in their entirety. Ms An may for example be intending to use other parts of them for the purposes of cross examination should this matter proceed to a hearing.

[40] Ms An is however, required to file an affidavit which refers by page number to those parts of the affidavit that she says are relevant and in particular so which refers the Court (and Mr Feng) to the documents that she is referring to in paragraphs 5, 18, 24 and 25 of her affidavit dated 2 December 2022.

Interrogatories

[41] The notice to answer for interrogatories Mr Feng issued at 8 December 2022 asks 21 questions. Mr Feng accepts that answers are not required to questions 5.9, 5.18 and 5.21.

[42] Ms An now accepts that she can answer interrogatories that she was previously unable to answer because she did not have access to her bank account in China. However, she requires time to do that because she wants first to have the bank statements that she has obtained translated into English. She says she has been able to obtain bank statements for the past five years.[11] Ms An can now answer questions 5.2, 5.16, 5.17, 5.19 and 5.20. I direct that she is to file her answers verified by affidavit on or before 16 August 2023 which allows the six weeks she says she would need to have the bank statements translated.

[43] Mr Feng says that the interrogatories focus on two issues or topics:

(a) The timing of the breakup, which Mr Feng says occurred in mid-2018; and

[11] The motion came in the form of submissions from counsel. It is not yet in affidavit evidence.

(b) The origin and nature of moneys transferred from Ms An's Chinese and ANZ bank accounts.

[44] Having viewed the notice to answer interrogatories, I am satisfied, with the exception of questions 5.9, 5.18 and 5.21, that the interrogatories asked are appropriate. The information sought is relevant. The information sought is likely to exist in the sense that the questions are questions that Ms An can answer and the interrogatories are not vexatious or oppressive.[12]

[45] In considering the interrogatories I am taking account of the object or purpose of the interrogatories which are helpfully summarised at [36] of *Aivita Healthy New Zealand Ltd v Unipharm Healthy Manufacturing Co Ltd.*[13]

[46] Answers to interrogatories must:

(a) Be specific and substantial;

(b) Not be perfunctory;

(c) Not be evasive;

(d) Be correct to the knowledge, information and belief of the person giving the answer.[14]

[47] Ms An has answered eight of the 21 interrogatories asked. She has objected to answer 12 interrogatories. I deal with each interrogatory below using the number of the question.

[5.1]

[48] Here Ms A was being asked when she handed over control of her bank account to Mr Feng. She has responded saying, "Not long after", 8 July 2016. Now that she

[12] See *McMichael v Attorney General* [2022] NZHC 2119 at para 3.
[13] *Aivita Healthy New Zealand Ltd v Unipharm Healthy Manufacturing Co ltd* [2021] NZHC 1401.
[14] *Henwood v Radio New Zealand Ltd* (1993) 2 NZPC 129.

has access to her Chinese bank statements, she may be in a better position to answer this question with more precision. She is to provide a more detailed answer or tell the Court why she cannot.

[5.10] and [5.11]

[49] Mr Feng asked Ms An whether she accepted his explanation at paragraph 39 of his narrative affidavit that he transferred money from his Chinese bank account to her Chinese bank account, converted it to New Zealand dollars, transferred that money to her ANZ account and then to his New Zealand bank account.

[50] [5.11] asks Ms An if she does not accept his explanation and what is incorrect about his explanation. Ms An's answers are evasive. She now has access to her Chinese and New Zealand bank accounts. I require her to provide a responsive and substantial answer. Does she disagree with Mr Feng's explanation? Which parts of paragraph 39 does she disagree with?

[5.15]

[51] At paragraph 41 of his narrative affidavit, Mr Feng said he transferred 947,500 RMB using Ms An's bank accounts. She was asked at 5.14 and 5.15 whether she accepted that evidence. If not, what her position was. Now that she has access to her bank account, she is in a position to answer with full particularity and she should do that.

[52] Similarly, now that she has access to the bank accounts she is in a position to answer, and has agreed to answer 5.16 and 5.19.

Objections to Interrogatories

[53] The grounds on which interrogatories can be objected to are set out in District Court Rule 8.40(1). They are as follows:

8.40 Objection to answer

(1) A party may object to answer an interrogatory on the following grounds only:

(a) that the interrogatory does not relate to a matter in question between the parties involved in the interrogatories:

(b) that the interrogatory is vexatious or oppressive:

(c) that the information sought is privileged:

(d) that the sole object of the interrogatory is to ascertain the names of witnesses.

[54] Again, using the numbers from the interrogatories as headings, these are addressed below.

[5.3]

[55] Ms An's objection is on the basis that question "Why were these transactions made?" is outside her knowledge and is knowledge that Mr Feng holds. That is an issue that she could have given as an answer rather than a valid ground for objection, but it need not be addressed further.

[5.4] to [5.6]

[56] Mr Feng is asking here whether there were arguments between them in April and May 2018, whether the arguments were about whether the relationship would continue and whether the parties separated in May 2018. Ms An objects on the basis that the interrogatories amount to evidence of facts and dispute and that the applicant has already provided her evidence. I do not consider that either of those are valid objections. Given Mr Feng asserts that separation occurred in about May 2018, Ms An's position as to the existence and nature of any arguments is directly relevant.

[57] The question in [5.6], "Do you accept that he broke up with you in May 2018?" can and should be answered.

[5.7] and [5.8]

[58] Mr Feng exhibits a document as FHM25 which he says is a promise by Ms An not to make a claim against his property. She is asked whether she accepts that she was requested to put that in writing and whether she had signed or seen any documents similar to Exhibit FHM25. Ms An says she has already provided her evidence in this respect. She has not. She has denied that she signed FHM25 but it is reasonable for Mr Feng to ask whether she had seen or signed any documents similar to the document he exhibits – presumably for example, as a draft or the like. It is also reasonable and relevant for him to specifically and clearly ask whether she was asked to put in writing that she would not make a claim.

[5.12] and [5.13]

[59] The question as to whether or not she has been able to access her bank accounts after separation and whether she is able to access her bank account now are relevant and should be clearly answered. I do not consider that the answer that she gave at paragraph 47 of her affidavit in reply sufficiently answers these very particularised questions.

Orders and Directions

[60] Ms An is to provide full and particularised amended answers to the interrogatories as directed by 16 August 2023.

[61] Ms An is to file an affidavit which identifies the page numbers of the documents within Exhibits A, F and G of her affidavit of 2 December 2022 which she is referring to and relying on. If there are any other specific parts of that extensive exhibit which she says are particularly relevant they should also be identified. That affidavit is also to be filed by 16 August 2023.

[62] If costs are sought, submissions are to be filed on or before 24 July 2023. They are to be limited to five pages. Ms An should first however, clarify whether she is in

fact in receipt of Legal Aid for these proceedings and she is to do that on or before 19 July 2023.

[63] Any submissions in response are to be limited to five pages and are to be filed by 1 August 2023. Schedules containing scales of costs can be in addition to the submissions filed.

Signed at Auckland this 12th day of July 2023 at 11.00 am

Kevin Muir
Family Court Judge