

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

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**IN THE FAMILY COURT
AT CHRISTCHURCH**

**I TE KŌTI WHĀNAU
KI ŌTAUTAHI**

**FAM-2021-009-001385
[2022] NZFC 12505**

IN THE MATTER OF	THE PROPERTY (RELATIONSHIPS) ACT 1976
BETWEEN	ZIDAN (DANIEL) ZHAO Applicant
AND	DAPHNE (DAN) ZHANG Respondent

Hearing: 24 November 2022

Appearances: P Tucker for the Applicant
N Burley for the Respondent

Judgment: 5 December 2022

**RESERVED JUDGMENT OF JUDGE P W SHEARER
[As to Interlocutory Applications]**

Introduction

[1] This reserved decision follows a submissions-only hearing on 24 November, to determine the parties competing interlocutory applications for further discovery.

[2] This is a relationship property proceeding that I am case managing. The background is set out in my previous minutes dated 8 March, 1 August, 11 August, 29 August and 23 November 2022.

[3] The parties separated on 27 January 2020 after a qualifying relationship of approximately 8½ years. The substantive relationship property proceedings were filed by Mr Zhao on 4 October 2021. Ms Zhang was served on 14 October 2021 and filed a notice of defence and affidavits in reply on 19 November 2021.

[4] Mr Zhao is represented by Ms Tucker and Ms Zhang (and her sister) are represented by Mr Burley.

[5] Each party has already filed a number of affidavits and documents. By my count, Mr Zhao has filed seven separate affidavits¹ and two affidavits from his parents/mother. Ms Zhang has filed five affidavits and two affidavits from her sister Xin (“Jane”) Zhang.

The interlocutory applications

[6] On 7 December 2021 Mr Zhao filed an interlocutory application for non-party discovery against, Jane Zhang, and a separate application pursuant to r 400 of the Family Court Rules to examine Ms Daphne Zhang, due to an allegedly inadequate affidavit of assets and liabilities. Ms Zhang and her sister, Jane, separately filed notices of opposition to those applications on 22 December 2021.

[7] On 25 February 2022, Ms Zhang then filed her own interlocutory applications seeking further discovery from Mr Zhao, and seeking to examine him on his affidavit of assets and liabilities. Mr Zhao filed a notice of opposition to those applications on 7 March 2022.

[8] At the submissions-only hearing neither side pursued the r 400 applications for examination. I had made it clear in my minute of 11 August that I was not minded to direct examinations and hear evidence about allegedly inadequate affidavits of assets

¹ Including as an affidavit his sworn list of documents dated 28 September 2021.

and liabilities. Each party has already provided significant further disclosure since those initial affidavits were filed more than 12 months ago now, and it is clear that significant further disclosure is sought by each party and will be filed prior to the substantive hearing.

[9] I am conscious of, and counsel themselves referred to, the principle that questions arising under the Act should be resolved as inexpensively, simply and speedily as is consistent with justice.² Directing and waiting for examinations to be scheduled would do the exact opposite in my view. I, therefore, dismiss the competing r 400 applications dated 7 December 2021 and 25 February 2022 respectively.

[10] That leaves the two interlocutory applications for further discovery, noting that Mr Zhao's application dated 7 December 2021 was technically an application for non-party discovery only.

[11] Ms Tucker made the point during the hearing that Ms Zhang has not filed an application for non-party discovery against Mr Zhao's parents, from whom further discovery is being sought. That is correct, but as I have observed, there is no formal interlocutory application for further discovery against Ms Daphne Zhang. I am not concerned about those technicalities. It is clear that further disclosure is required from each party, and from Mr Zhao's parents and from Ms Zhang's sister, if we are going to get to the bottom of the issues that have been raised in these proceedings. In my view a pragmatic and common sense approach is required.

[12] Neither party can have it both ways. By that I mean that they cannot seek and expect wide-ranging discovery from the other party and from the non-party on the other side, if they are not willing to provide such discovery themselves and/or are going to argue relevance with respect to the information sought from them.

[13] Post-hearing I have received and considered Ms Tucker's further memorandum dated 25 November, and Mr Burley's memorandum in reply dated 1 December. I do not want or need any further submissions.

² Section 1N, Property (Relationships) Act 1976.

The Law

[14] Rules 141 and 143 of the Family Court Rules 2002 provide the jurisdiction for the Court to make orders for discovery against parties and non-parties respectively, once proceedings have commenced.

[15] Ms Tucker, in her initial written submissions, referred me to the text *Fisher on Relationship Property*, which summarises disclosure principles. They include:

- Discovery is not to be used as a fishing expedition, but it is not a fishing expedition if it is directed to obtaining information as to a fact relevant to an issue raised by the proceedings;
- Discovery sought must be relevant to the issues in the proceeding, reasonably necessary at the time it is sought and not unduly onerous;
- Relevance will be approached robustly and with a greater degree of generality than in civil proceedings where pleadings allow for greater precision;
- Sometimes there will need to be wide-ranging discovery;
- The need for complete transparency in relationship property proceedings has been highlighted.
- More substantial discovery may be required if it appears that a party has concealed information or sought to mislead as to the scope of relationship property but in any application the scope of discovery should be scaled to the just and efficient disposition of relationship property issues.

[16] Ms Tucker also referred me to the High Court decision *Dixon v Kingsley*³ which is regarded as a leading authority, if not the leading authority on discovery principles. I note that Kos J said there:

The privacy interests of the three shareholders/employees is not a matter which justifies limiting discovery. If there are concerns about privacy or confidentiality, that is a matter calling for controlled production and inspection. It does not mean the documents are not relevant and should not be discovered.

[17] What I take from the case law and the academic texts is that I have a significant discretion to order discovery that is relevant to the issues in dispute. Evidence is

³ *Dixon v Kingsley* [2015] NZHC 2044 at [32].

relevant in a proceeding if it has a tendency to prove or disprove anything that is of consequence to the determination of the proceeding.⁴

Substantive Issues

[18] What is already clear is that there are a number of different issues in the substantive proceeding. They include, but are not limited to, the following:

(a) *House at [Carbine Place]*

This was the family home when the parties were first married and until about 2015, but it was not the family home when the parties separated in January 2020. It is a house that Mr Zhao had first purchased or acquired an interest in, in April 2008. He owned the property outright as from 19 February 2009, subject to a mortgage to ANZ Bank,⁵ and it was therefore his “separate property” when the parties married in August 2011. Ms Zhang’s claim, as I understand it, is that relationship property (income) was applied to the property and, in particular, to the outgoings on the property during the relationship and after the date of marriage.

(b) *House at [Fovant Street]*

This is a rental property that Mr Zhao acquired in his sole name during the marriage on or about 1 June 2017.⁶ Prior to that the house was owned by Mr Zhao’s parents. Prima facie the house is relationship property pursuant to s 8(1)(e) or (ee), having been acquired during the relationship, unless one of the s 9 exceptions apply. How the purchase was funded, and how the outgoings were paid during the relationship appears to be the real issues.

⁴ Section 7(3) Evidence Act 2006.

⁵ Document 1, Applicant’s sworn list of documents, 28 September 2021.

⁶ Document 29.

(c) *House at [Matipo Street]*

There is no dispute that this is Mr Zhao's parents' house, purchased by them on or about 22 May 2017.⁷ The query that Ms Zhang has raised is whether relationship property was applied to the purchase price. How Mr Zhao's parents funded the purchase is therefore the relevant issue.

(d) *Property at [Wilkes Road]*

This house has been referred to as the Wigram property in the pleadings. Mr Zhao purchased this property as a bare section in 2015, built a house there, and then sold it in September 2016.⁸ That was more than three years before the parties separated in January 2020, so that property has limited relevance now, in my view. It is a similar situation to the pizza business that the parties purchased in February 2012 and sold in October 2014.⁹ The relevant issue is how and where the net sale proceeds were applied. Tracing evidence is required.

(e) *Yumme Limited*

The parties incorporated this company in February 2012. (It was the company that bought and sold the pizza business.) Mr Zhao was initially the sole director of the company and each party was an equal shareholder. There were changes in the shareholding during the relationship and after the parties separated. It appears that Mr Zhao's share was transferred to Ms Zhang on 4 March 2014, that one of Ms Zhang's shares (50%) was then transferred to her sister, Jane, on 21 July 2015, and that Jane's share has then been transferred back to Ms Zhang on 23 November 2017. After the parties separated in January 2020 Ms Zhang's shares were transferred to Jane on 27 April 2020.¹⁰

⁷ Document 29.

⁸ Document 21.

⁹ Document 22.

¹⁰ Exhibit "B" to Mr Zhao's affidavit dated 7 March 2022.

The relevance of the company shareholding is that it was the company which purchased a motel, the Coachman Motel, on or about 21 September 2015 for \$350,000, and which owned and operated the motel until it was sold on 13 September 2021. Ms Zhang's evidence, in summary, is that it was her sister, Jane, who provided all of the funding for the motel purchase, and that the motel was owned and operated beneficially for her. Mr Zhao disputes that, as do his parents who have filed affidavits.

(f) *[Westpark Drive]*

This is a house that Ms Zhang purchased in her sole name post-separation, on or about 16 December 2020. Prima facie it is consequently her separate property, but Mr Zhao has queried whether relationship property was applied to the purchase price. As with the other properties already mentioned, the source of the funding is the issue.

[19] I am not determining any of these issues now. They are all issues for the substantive hearing. Further evidence is required, and obviously the evidence will need to be tested. Both sides have indicated an intention to engage forensic accountants once the further discovery required has been provided.

Decision regarding discovery

[20] I indicated to the parties and counsel during the hearing that I view each party as seeking similarly wide-ranging discovery from the other party. Within reason, and subject to appropriate relevance, my preliminary view was that each party (and their respective non-party) should provide the discovery that the other party is seeking. The sooner discovery can be provided and analysed, the sooner we can get on with timetabling a hearing of the substantive issues.

[21] It is only when the substantive issues are finally resolved, whether by way of a Court hearing and decision, or alternatively by agreement/settlement out of Court,

that the parties will finally be able to move on with their lives. That is important for each party and for their two dependent children who are still [both under 10].

[22] Having considered matters further, and counsel's written and oral submissions, I hold to my initial preliminary view that fulsome disclosure is required from each party to get to the bottom of the issues that have been raised.

[23] Mr Zhao is entitled to see and examine the business and personal bank statements for Ms Zhang and her sister, and financial accounts for the company, given his view and experience that the parties jointly owned and operated the motel where they lived from 2015 onwards. Jane Zhang needs to prove that she supplied all of the funds for the initial purchase. The source of those funds will also be relevant.

[24] Ms Zhang, equally, is entitled to see and examine Mr Zhao's personal bank statements during the course of the relationship. Evidence is required to prove Mr Zhao's contention that he did not apply any relationship property (income) to the properties he claims are his separate property. How the Fovant Street and Matipo Street properties were funded is relevant, as is how Ms Zhang funded the purchase of her new home at [Westpark Drive].

Orders

[25] I, therefore, direct the applicant, Mr Zhao, to provide further discovery as follows, by way of affidavit:

- (a) Unredacted bank statements for the bank accounts listed at para [10] of his narrative affidavit dated 28 September 2021.
- (b) Bank statements for all bank accounts in his name from 1 January 2011 to 1 February 2020.
- (c) Unredacted proof of superannuation as at 20 August 2011 and 27 January 2020.

- (d) Trust account ledgers and reporting statements from the solicitors who acted on the purchase of the properties at [Fovant Street] and [Wilkes Road], and as regards the sale of [Fovant Street].
- (e) Copies of all bank loan agreements entered into by Mr Zhao during the course of the parties' marriage (August 2011 to January 2020).
- (f) The amounts outstanding on mortgages on the Carbine Place and Fovant Street properties as at 27 January 2020 and currently.

[26] I direct that Mr Zhao's parents, Li Wang and Kuan Zhao, who are obviously non-parties but who have already sworn two affidavits and who will be witnesses at the substantive hearing, are to file a further affidavit providing the following disclosure:

- (a) Personal bank statements for the 9 month period 1 January 2017 to 30 September 2017, which covers the period that [Fovant Street] was sold and that [Matipo Street] was purchased;
- (b) Their solicitors' trust account ledger and reporting statements in respect of the sale of [Fovant Street] and the purchase of [Matipo Street].

[27] I direct that the respondent, Ms Daphne Zhang, is to provide further disclosure by way of affidavit, as follows:

- (a) The solicitors' motel purchase file and renewal of lease file (if not already provided);
- (b) Bank statements for Yumme limited and the motel business for 12 months from the date the motel was purchased, and again from 1 January 2020 to the date the motel was sold;
- (c) The 2021 finalised financial statements for the company;
- (d) Her personal bank statements from 1 June 2015 to 1 February 2020;

- (e) Her solicitors' trust ledger and reporting statements showing receipt and payment of funds for the purchase of [Westpark Drive].

[28] Finally, I direct that Ms Zhang's sister, Jane Zhang, is to provide by way of affidavit the following discovery:

- (a) The solicitors' motel sale file and including the settlement statement and solicitor's trust ledger showing the receipt and payment of funds.
- (b) Her personal bank statements for the period 1 January 2015 to the date three months after the motel was sold.

[29] For completeness, and in response to counsel's submissions, I do not consider it relevant or necessary for Yumme Limited to provide employment contracts and/or time records for all staff members, nor for Jane Zhang to provide immigration or travel records. Nor is there any basis to require Ms Zhang's parents to provide their personal bank statements. Orders are to issue as per [25] to [28] inclusive. All discovery is to be filed and served by Monday 13 February 2023.

[30] I make no order as to costs on the interlocutory applications filed by the parties and the non-party, Jane Zhang. In my assessment each party has filed similar applications and made very similar discovery requests, and each party has contributed to the costs incurred. I acknowledge that Jane Zhang has become involved in the proceedings as a non-party and that she is incurring legal fees as a result, but there is an asset that she says is hers (notwithstanding the legal ownership during the parties' relationship) and which she wishes to protect. She did not help herself, or the Court, by supplying a Chinese bank statement that was not legitimate. Costs are to lie where they fall.

[31] I adjourn the proceedings to case management review on 27 February 2023 to monitor compliance with these directions, and for counsel to advise the further directions required, noting the indication that each side intends to engage an expert accountant once disclosure is complete. It would obviously be preferable for discovery to be provided simultaneously sooner than 13 February if that is possible,

and the instructions to experts can then be provided sooner, but I am conscious of the pressure on counsel at this time of year, the impending holiday period and the volume of information (particularly bank statements) that is being required.

[32] I reserve leave for counsel to seek further directions with respect to the implementation of these discovery orders, on 48 hours' notice to the other party.

Application under the Trusts Act 2019

[33] Although this is a separate issue and wasn't part of the submissions-only hearing, I want to comment briefly on the separate on notice application dated 7 March 2022 filed by Mr Zhao seeking constructive trust orders under the Trusts Act in respect of the company Yumme Limited. That application has not yet been pursued, and as I understand it the application has not been served on all of the named respondents, but I am conscious that it is a live application that could potentially affect and/or delay the determination of the substantive relationship property proceeding.

[34] The application has been pleaded under s 141 of the Trusts Act. That section gives the Family Court very limited powers in a relationship property proceeding to make orders that are available under the Trusts Act. Particularly in the absence of consent.¹¹ Unless I am mistaken, there is no power under the Trusts Act to make constructive trust orders and consequently, there is no power to make such orders under s 141. Such a claim (for constructive trust orders) is within the High Court's equitable jurisdiction, although I am not sure such a claim can be taken against a company.

[35] I suggest that Mr Zhao and Ms Tucker will need to give further consideration to, and provide authority for the ability to pursue in the Family Court, the application that has been filed. The focus now, I suggest, should be on the substantive relationship property issues.

Judge P W Shearer
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 05/12/2022

¹¹ Section 141(2) Trusts Act 2019.