IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2007-404-003276

BETWEEN	ANTHONY STEVEN RADISICH Appellant
AND	DIANNE FAYE TAYLOR Respondent

Judgment: 23 March 2009 at 1:30 pm

RESERVED JUDGMENT OF COURTNEY J

This judgment was delivered by Justice Courtney
on 23 March 2009 at 1:30 pm
pursuant to R 11.5 of the High Court Rules

Registrar / Deputy Registrar
Date…….

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Introduction

[1] There are proceedings on foot in the Family Court between the appellant, Mr Radisich and the respondent, Ms Taylor, over the validity of a relationship property agreement signed by the parties in the context of a mediation convened to settle their relationship property issues. Mr Radisich accepts that the agreement is invalid and seeks to have the Court validate it. Ms Taylor opposes this, maintaining that the agreement was secured through misrepresentation by Mr Radisich. If the Court does not validate that agreement it will be required to determine relationship property issues under the Property (Relationships) Act 1976 (PRA).

[2] The parties have filed narrative affidavits in the proceeding. Both applied to the Family Court for orders that parts of their respective affidavits either not be read or be stricken from the Court record. At a hearing before Judge McHardy, Ms Taylor agreed that two relatively small portions of her affidavit should be removed. However, the Judge declined to direct the removal of parts of either affidavit. Mr Radisich appeals that decision.

[3] On an appeal from the Family Court against the exercise of a Judge's discretion, this Court will only interfere if the Judge has failed to take account of relevant considerations, taken account of irrelevant considerations, failed to applied correct legal principles or is plainly wrong[1]. The Judge, having directed himself as to the effect of s 36 PRA and referred to recent High Court decisions in this area[2], concluded that:

> [12] … it is difficult to categorically conclude that the statements are so irrelevant or otherwise offensive that they must be removed from the affidavits. I am therefore prepared to allow such passages to remain and to leave it to the trial Judge to assess their relevance or put such weight on them as necessary".

[1] *May v May* [1982] 1 NZFLR 165
[2] including *Walker v Walker* [2006] NZFLR 768 and *Redding v Redding* HIAK CP20-07 7 November 2002 Master Lang (as he then was)

[4] Mr Radisich asserts error by the Judge in failing to take account of relevant considerations (namely that the material sought to be removed was largely irrelevant) and failed to apply the correct test for determining the admissibility of evidence. These grounds are conveniently dealt with together by reference to the particular paragraphs. It is also asserted as a separate ground that the Judge took into account certain irrelevant considerations (how long the affidavits had been on the Court file, assuming that trial stage is the proper time to assess relevance and treating evidence that could potentially affect credibility as being relevant).

Admissibility of the evidence to which objection is taken

Admissibility of evidence generally in proceedings under Property (Relationships) Act 1976

[5] Under ss 7 and 8 Evidence Act 2006 the fundamental principles governing the admissibility of evidence is relevance and the exclusion of evidence where its probative value is outweighed by its prejudicial effect. However, questions of admissibility in the context of PRA proceedings must be viewed through s 36 PRA which provides that:

> In all proceedings under this Act, and whether by way of hearing in the first instance or by way of appeal or otherwise howsoever, the Court may receive any evidence that it thinks fit, whether it is otherwise admissible in a Court of law or not.

[6] Nonetheless, whilst the exercise of the discretion is, on its face, unfettered it is generally regarded as being constrained by what is in the interests of justice in the particular case, a point explained in *Barlow v Barlow*[3] where Judge Inglis QC made the following observations[4]:

> …it is provided by s 36 that the Court has a discretion to admit such evidence as it thinks fit, whether or not such evidence is technically admissible. That is in contrast to the strict rules of evidence applicable in the ordinary civil proceeding. However the width of the discretion conferred by s 36 (and other similar statutory provisions conferring a similar discretion in other areas of the Family Court's jurisdiction) should not be misunderstood.

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[3] Family Court at Christchurch FP009473/96 16 September 1998

[4] adopted by Miller J in *Lipinski v Weiss* HC NEL CIV-2005-442-000322 8 September 2005

> The discretion does not enable the Family Court to exclude admissible evidence. It operates only to enable the Court to treat as admissible evidence that would otherwise be inadmissible.
>
> While the discretion is unfettered in its terms, and while it was said in *Campbells v Pickles* (1982) 1 NZFLR 97, 99 (CA), that where Parliament has seen fit to put no limits on the grounds upon which a discretion should be exercised, no court shall attempt to do so, it was also said that the interests of justice provide a basic principle on which such an unfettered discretion ought to be exercised.
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> It will therefore ordinarily be in the interests of justice to apply the discretion conferred by s 36 and similar provisions by reference to the ordinary rules of evidence and to the extent to which a party seeks to depart from them in a particular instance. The interests of justice obviously cannot be served by a view that s 36 confers absolute license to ignore established rules of evidence…The discretion must take into account the reasons of policy why certain evidence (for instance, evidence of privileged communications) is ordinarily inadmissible. Because the interests of justice constitute a criterion in the exercise of the discretion, it is important to remember that the discretion should be exercised so as to protect the right of the opposing party to justice.
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> In general terms the interests of justice in exercising the discretion under s 36 and similar provisions will therefore best be furthered by bearing in mind the three basic and underlying principles by which the admissibility of most evidence is tested: is the evidence sought to be adduced relevant? Is it reliable? Is it a matter of necessity that evidence of a particular nature be admitted – necessary in the sense that evidence of the facts sought to be proved cannot be adduced in any other way? There are also the objectives of the 1976 Act, to secure a just division of matrimonial property and in limited circumstances to depart from equal sharing, objectives not to be unnecessarily obstructed because of technical issues of admissibility of evidence.

[7] I would add to these observations the point made by McGechan J in *Donovan v Graham*[5]:

> Where, however, pre-trial objection is indeed taken the Judge must act in a manner which will best promote the overall interests of justice given the facts of the particular case. The Judge must bear in mind risks involved in premature exclusion of evidence which on the more fully informed basis emerging at trial might be seen as admissible. He must keep in mind the desirability of the case being kept within bounds, and open to efficient disposal. It is important affidavits not be allowed to mushroom, with irrelevance piled upon irrelevance, accusation upon accusation, and with the parties becoming increasingly and unproductively inflamed. Having said that, it is also important that the Court not become buried in extensive interlocutory battles over evidential points of relatively trivial importance, without time to decide substantive disputes. There is room for pre-trial

[5] 4 PRNZ 311 at 313

> pragmatism, particularly over lesser matters. Each case must depend very much on its own facts.

[8] Mr Spring, for Mr Radisich, identified a number of paragraphs that he said were inadmissible, even in the context of the more relaxed framework of the PRA and which the Judge should have ordered removed. I consider these next.

Paragraphs 3.8 –3.10

[9] In these paragraphs Ms Taylor deposes to the discussions and intentions of both her and Mr Radisich in the very early stages of their relationship, conveying that it was the strong intention of both that they embark on a long-term relationship which would effectively produce a family unit for them and their respective children. She goes on to describe the formation of the *de facto* relationship and its early stages.

[10] Mr Radisich submits that these paragraphs are inadmissible for a number of reasons. The first is that they are irrelevant because there is no dispute that the parties had a *de facto* relationship that lasted for more than three years. As a result it cannot assist the Court in determining any issue to be apprised of what was intended at the outset of the relationship. He also submitted that some of it was aimed at denigrating Mr Radisich and other parts amounted to advocacy, submission or argumentative material.

[11] Ms Taylor agreed that the last two sentences of paragraph 3.8 should be removed so that it is only the remainder of 3.8 and 3.9-3.10 that are in issue. Mr Hikaka, for Ms Taylor, submitted that these passages (and others) should be viewed against the circumstances that existed when the affidavit was filed. At the outset of the proceeding it was necessary to establish the existence and nature of the relationship.

[12] I consider that merely because a particular issue ceases to be in dispute as the proceeding progresses does not justify removing portions of an affidavit. That approach would lead to a multiplicity of applications and take up valuable court time on something that is easily attended to by the trial Judge. The matters addressed by

Ms Taylor were relevant at the outset and should not be removed merely because they are not disputed now.

[13] Nor do I accept the complaint that some of these passages are aimed at denigrating Mr Radisich. I do not see anything especially adverse to him in this part of the affidavit.

Paragraphs 4.14 – 4.15

[14] These paragraphs refer to a single aspect of the living arrangements relating to Ms Taylor's son. They are directed towards showing that Mr Radisich makes promises that he does not keep. Mr Spring submitted that they were inadmissible because they were irrelevant to any issue arising in the proceeding, the evidence is aimed at denigrating Mr Radisich and the probative value is outweighed by the prejudicial effect.

[15] Mr Hikaka submitted that although this and other paragraphs did not have any apparently direct relevance to PRA issues, they were relevant to the misrepresentation issue. Ms Taylor asserts that the relationship property agreement that Mr Radisich seeks to have the Court ratify was obtained through misrepresentation and, in particular, that Mr Radisich misled her in the mediation as to the nature and viability of the business from which Ms Taylor agreed to accept revenue as part of the agreement. Ms Taylor essentially says that Mr Radisich misled her over financial matters during their relationship and that fact is relevant in assessing whether he did so in relation to the agreement. Mr Radisich denies misleading Ms Taylor. His (and her) credibility will inevitably be in issue at the trial.

[16] One of the reasons that the Judge gave for refusing to direct removal of some of the paragraphs was that he intended to leave it to the trial Judge to assess the relevance of those passages and put such weight on them as was necessary and in reaching that conclusion he accepted that some of the evidence might go to

credibility[6]. Mr Spring submitted that the relevance of the evidence should be assessed and, if necessary, evidence pruned at the pre-trial stage and that in deferring consideration of relevance the Judge allowed irrelevant material to remain on the file which would take up valuable time at the substantive hearing. In relation to the issue of credibility Mr Spring submitted that such evidence could not be relevant because it did not fall within the definition of relevant in s 7(3) Evidence Act 2006 as being evidence that has a tendency to prove or disprove anything that is of consequence to the determination in the proceeding.

[17] Whilst the assertions made in these paragraphs might ultimately be regarded as only marginally relevant, since making promises that one does not keep is not necessarily the same as deliberately misleading somebody, Ms Taylor has put Mr Radisich's honesty in issue by making the assertions of misrepresentation. Even though the instances deposed to may not attract much weight they should be regarded as relevant to the assessment of a significant issue in the case and I am not prepared to interfere with the Judge's decision.

Paragraph 4.32

[18] In this paragraph Ms Taylor comments on Mr Radisich's lavish tastes in cars, clothes, watches and so on. Mr Spring submitted that this paragraph was irrelevant and that its probative value was outweighed by its prejudicial effect. Mr Hikaka submitted that this evidence was relevant to the nature and classification of relationship property given that Mr Radisich has sworn an affidavit identifying as his only assets a bank account in the Cayman Islands containing an unknown amount of money whereas conduct of extravagant purchases relied on evidences substantial assets of his own.

[19] It is clear that if the agreement is not validated a significant issue in the case will be the nature and extent of Mr Radisich's assets. While evidence about extravagant personal expenditure might seem tangential it may nevertheless assist in

[6] [12] and [13]

assessing the extent of assets and I do not think the Judge erred in allowing it to remain.

Paragraphs 4.36 – 4.37

[20] In these paragraphs Ms Taylor again talks about suggestions or promises made by Mr Radisich that he did not follow through on. Mr Spring submitted that these pieces of evidence were not relevant and that their probative value was outweighed by their prejudicial effect. Mr Hikaka again characterised them as relevant the misrepresentation issue, essentially that the way Mr Radisich conducted himself in relation to business matters was important. Once again these various assertions of poor conduct are relevant given the allegation of misrepresentation. The weight to be put on the evidence is a matter for the trial judge and, whilst it may ultimately not be great, I do not consider that its probative value is outweighed by its prejudicial effect.

Paragraphs 4.38 – 4.42

[21] In this portion of her affidavit Ms Taylor describes plans (not followed through on) to purchase a house together, the development of the relationship between Ms Taylor and Mr Radisich's young son and issues in the relationship over Mr Radisich's contact with former girlfriends. Mr Spring once again submitted that these paragraphs were all irrelevant and that any probative value was outweighed by their prejudicial effect, that they amounted to advocacy or submission and were argumentative. Mr Hikaka characterised the passages as relevant to the misrepresentation issue, apart from the paragraph relating to the relationship with Mr Radisich's son.

[22] I am not prepared to interfere with the Judge's decision in relation to paragraphs 4.38-4.41. Any matters involving the acquisition of property including the indication by Mr Radisich as to how much money he had to put into property and

his conduct in relation to property I consider either is or may be regarded by the trial Judge as relevant. The general narrative regarding the ongoing relationship in the family unit can hardly be objectionable.

[23] I do, however, regard the content of paragraph 4.42 as irrelevant and unduly prejudicial. It certainly puts Mr Radisich in a poor light but is inconclusive as to any misconduct and, in any event, this type of misconduct is not relevant in the determination of the issues that arise in this case. Paragraph 4.4.2 is to be struck out.

Paragraphs 4.84 – 4.85

[24] In these paragraphs Ms Taylor discusses her understanding of the administration of Mr Radisich's business interests based in Jersey. Mr Spring opposes this evidence being admitted because he says it is not relevant, the prejudicial effect outweighs any probative value, it is secondary evidence and without any factual foundation. Clearly, however, the nature and value of Mr Radisich's business assets will (if the agreement is not validated) be integral to any determination of the property relationship issues. In addition, if there are questions over Mr Radisich's integrity in a business context that will likely to be relevant to any assessment of his credibility and to the determination of the allegations of misrepresentation. I will not interfere with the Judge's decision in relation to these paragraphs.

Paragraph 6.7

[25] This paragraph describes Ms Taylor's view about her relationship with Mr Radisich's son and her role in his life. Mr Spring submits that the paragraph is irrelevant. I agree that its relevance now may appear somewhat tangential given that there is no argument over the nature and duration of the relationship. However, this passage would have been unobjectionable when the affidavit was filed and I see no reason to interfere with it now.

Paragraph 7.1(g)

[26] Ms Taylor refers in this paragraph to an assertion made by Mr Radisich that he could not afford to fund a particular function at their home in 2005. This contrasted with his telling her how well his business had been doing. However, even in the context of the misrepresentation issue I consider that this evidence does not have relevance or, if it does, it is so slight as to be outweighed by its prejudicial effect. I order that this paragraph be excised.

Taking into account irrelevant considerations

[27] At [13] the Judge identified, as a reason for reaching his conclusion, that the affidavits had been on file for some time, unchallenged. Mr Spring submitted that merely because an affidavit has been on the Court file for a certain period of time does not mean that it might not contain irrelevant or argumentative material. That is true and, in this case, there have been a number of interlocutory applications which may have taken up the parties' time and attention. However, the fact that the Judge erroneously identified this as one reason for his decision does not justify interfering with his decision, given my earlier conclusions, since it would not have affected the outcome.

[28] Mr Spring also submitted that the Judge wrongly considered that the proper time to assess relevance was at trial stage rather than at the pre-trial stage. I have effectively dealt with this issue. If it is possible, then issues of admissibility, including relevance, raised by parties at the pre-trial stage should be determined then. But a Judge dealing with matters at the pre-trial stage is entitled to look ahead and recognise that matters may become more or less prominent at trial than they appear at the pre-trial stage and, in such cases, it would be proper to leave those matters for determination by the trial Judge. I therefore do not consider that the Judge erred in this respect.

Summary

[29] The appeal is allowed only to the very minor extent that paragraphs 4.42 and 7.1(g) are to be excised.

P Courtney J