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

NOTE: PURSUANT TO S 139 OF THE CARE OF CHILDREN ACT 2004, ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980. FOR FURTHER INFORMATION, PLEASE SEE HTTP://WWW.JUSTICE.GOVT.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS.

IN THE FAMILY COURT
AT INVERCARGILL

FAM-2016-025-059
[2017] NZFC 8624

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	[EWAN BRADY] Applicant
AND	[JULIE BOHM] First Respondent
AND	[SILKE THEISSEN] Second Respondent

Hearing:	13 September 2017
Appearances:	P B Redpath for the Applicant R M Adams for the First Respondent J B Walker for the Second Respondent T E McKenzie as Lawyer for the Children
Judgment:	30 October 2017

JUDGMENT OF JUDGE J J BRANDTS-GIESEN

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[1] The applicant seeks an order for production of documents for inspection.

[2] An interlocutory application on notice for order for discovery against each of the first and second respondents was made on the 23 February 2017. This was opposed by the first respondent and by the second respondent.

[3] I made directions with respect to discovery and other matters in a minute dated 16 June 2017.[1]

[4] An affidavit document by the first respondent was filed on 12 July 2017. I understand that the applicant did not pursue an application for discovery against the second respondent.

[5] The first respondent's affidavit opposed the requirement for discovery of the following broad categories:

(a) Records and correspondence relating to the first respondent's mental health and any treatment received by her;

(b) A job note by [the Detective Sergeant];

(c) A job note by [the Detective];

(d) A letter from [the doctor] who examined [the child] after the incident;

(e) The medical notes/file obtained by the police from [the child]'s general practitioner with the written consent of the applicant;

(f) An email from the first respondent to Mr [Harry Bates]; and

(g) An email from the first respondent to Mr [Archie Hancock].

[6] With respect to (b) and (c) above, I rule that those notes should be made available for inspection by the applicant because they are relevant to these

[1] See paragraphs [13] to [20] inclusive of my minute of 16 July 2017.

proceedings. Notwithstanding that the applicant already has in his possession the transcript of the notes of evidence, witness briefs from all trial witnesses, including [the detective], the photographs provided at trial, and the summary of facts, and the judgment and sentencing notes of [the Judge], I direct that the job sheets from both [the Detective Sereant and the Detective] be made available.

[7] Regarding (d) and (e), as the guardian of [the child], these notes are obtainable by the applicant and there is no reason why the respondents should have to supply what is already within reach of the applicant.

[8] Regarding (f) and (g), I do not understand the significance of the emails from the first respondent to Mr [Bates] and [Hancock]. I direct that those emails be made available to the Court to assess their relevance.

[9] Regarding (a), Rule 5A of the Family Court Rules 2002 (FCR) states that the District Court Rules 2014 do not apply to proceedings in a Family Court, unless that rule is specifically applied by the Family Court Rules.

[10] It follows that the rules relating to discovery and inspection of privileged and confidential information in the District Court Rules do not apply to the Family Court Rules. Rule 146 of the FCR is clear:

> … a person who claims privilege on a document must state the grounds for privilege.

[11] Rule 146 only allows privilege as an exception to production and does not address confidentiality. However, confidential documents may be the subject of orders for limited inspection and copying[2].

[12] Accordingly, reports or therapeutic documents relating to treatment received by Ms [Bohm] may be deemed confidential and may be subject to such order for limited inspection. However, this is a case where the respondent herself showed material to the psychologist who prepared the s 133 report. This can be compared to a situation where a claimant receives legal advice and asserts reliance on that

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[2] s 56 Evidence Act 2006.

privileged communication, and also seeks to inject the substance of the communication in her evidence, that a claimant cannot have the benefit of reliance on that communication as confidential and still seek not to disclose it to the other party.[3]

[13] In *Tau v Durie,* Justice McGechan described the principles underlying the doctrine of implied waiver as a "matter of fairness":[4]

> … it is all in the end a matter of fairness. A party cannot expect to put forward the existence of legal opinion, with inference invited as to favourable content, or part of a legal opinion which is favourable, and refuse to disclose the opinion document, or the remainder of it, so in enabling the position to be checked. If a party positively advances it, the party must disclose it.

[14] Furthermore, rr 150 and 151 of the FCR give the Court power to determine whether an objection to the production of a document will be upheld. To carry out that function, the Court will order the document to be produced.

[15] In *Marr v Arabco Traders Limited* Tompkins J stated:[5]

> This leads me to the basis upon which the Court should exercise its discretion to require production and to inspect. In the field of privilege it is now generally accepted that if in doubt the document in issue should be inspected by the Judge. I need go no further than refer to the recent comments of Cooke J in *Guardian Rural Exchange Assurance New Zealand Limited v Stewart* [1985] 1 NZLR 596, where he said with reference to the inspection of documents:
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> > Experience suggest that its advantage in being likely to lead to a more just decision, outweighs the disadvantage that only the Judge and not the other side, sees the documents, if the claimed privilege is upheld. Accordingly, in the field of legal professional privilege at least, I think in general a Judge who is any real doubt and is asked by one of the parties to inspect, should not hesitate to do so.

[16] I consider that what has happened in this instant case is sufficiently comparable for these cases to be regarded as a guide, even a precedent, to assist this Court. Inspection by the Court can act as a safety valve.

[17] Accordingly, I direct that those documents referred to in part 2 of the schedule of the affidavit of documents filed by the first respondent on 12 July 2017, which

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[3] *Astrazeneca Limited v Commerce Commission* (2008) 12 TCLR 116.
[4] *Tau v Durie* [1996] 2 NZLR 190; (1996) 9 PRNZ 7 at p 11.
[5] *Marr v Arabco Traders Limited* (1986) 2 PRNZ 72 at p 78.

relates to copies of any reports, being those reports and records referred to in part 2 of the affidavit, and which appear on page 7 and 8 of the affidavit, be made available for my inspection.

[18] I will then consider whether the document should be disclosed in its entirety to the applicant; whether it should be shown to the applicant's counsel only; and/or whether it should be redacted with respect to any matter which should be kept confidential because it is very sensitive, but not significantly relevant for confidentiality to be set aside. I consider that r 150(2) of the FCR allows me to take this approach.

[19] Costs are reserved.

J J Brandts-Giesen
Family Court Judge