IN THE DISTRICT COURT
AT NELSON

I TE KŌTI-Ā-ROHE
KI WHAKATŪ

CIV-2019-009-000026
[2019] NZDC 12329

BETWEEN	GERALDINE LOUISE HILLARY Plaintiff
AND	DAVID BRUCE HILLARY Defendant

Hearing: 28 June 2019

Appearances: Applicant appears in Person (via video link)
G J Praat for the Defendant

Judgment: 28 June 2019

RESERVED JUDGMENT OF JUDGE A A ZOHRAB

Introduction

[1] The plaintiff, Geraldine Hillary, and the defendant, David Hillary, are sister and brother. A consent order was made in the Lower Hutt Family Court between Geraldine and David, resolving Geraldine's claim on their father's estate.

[2] It was a term of the consent order that neither Geraldine or David contact each other, either directly or indirectly.

[3] It was agreed that the mutual no contact provisions were essential terms of the consent order, and that if the no contact provisions were breached, then the party in breach would pay the other the sum of $20,000 per breach, together with any legal expenses incurred in recovering the money owing as part of the alleged breach.

[4] Geraldine alleges that David breached the non-contact provision on 14 December on two occasions, 19 December 2017, 25 December 2017, 1 April 2018, 13 October 2018, and in December 2018.

[5] Geraldine accepts that she responded to the first text on 14 December 2017, and that that text, and subsequent texts from her, might have been seen as encouraging further contact. However, she maintains that the last two texts which were not responded to by her were unwanted breaches, each obligating David to pay her the sum of $20,000 per breach, together with her legal fees of $1800.

[6] Geraldine seeks judgment by way of summary judgment against the defendant in the sum of $40,000, plus her legal costs.

[7] David opposes the grant of summary judgment.

The law

[8] This Court may only give judgment in a summary judgment application where the Court is satisfied that the defendant has no defence to any cause of action in the statement of claim. The words "no defence" have been interpreted as "no bona fide defence, no reasonable ground of defence, no fairly arguable defence". The concept underlying all of these expressions is the absence of any real question to be tried: *Pemberton v Chappell.*[1]

Geraldine's position

[9] Geraldine's position was quite simple:

> I would like a legal document like this to be respected and for my brother to be held to account.

[10] Geraldine's position was that she had not asked for the non-contact provision, and it had been insisted upon by her brother, David. Not only had her brother David insisted that the no contact provision be in the document, as a result of his insistence

[1] *Pemberton v Chappell* [1987] 1 NZLR 1, (1986) 1 PRNZ 183 (CA) at 3.

this markedly increased the cost of her legal advice in settling the claim against her father's estate.

[11] Geraldine said that when she received the first text that she was not sure who was trying to contact her, and she thought at first that it might be a prank. She went along with the exchange, but she was simply trying to establish who it was, and she was hoping that as the contact developed, that they might offer to get rid of the non-contact provision. However, that was never suggested by David.

[12] She says that if her text messages gave the impression that she was being friendly and encouraging, it was simply because she was trying to find out who was sending the texts.

[13] Once she had established who it was, she was hoping that they would offer to get rid of the non-contact provision.

[14] However, as the contact went on, she said that she was worried that they would "entice her to talk negatively about her father", so that she would then be in breach of the agreement, and potentially owe them $20,000. She also said that she decided that it was too emotionally harmful to deal with.

[15] She said that she did not respond to the last two contacts.

[16] She said that she is "simply looking for closure", that this was a simple case involving breaches of a Court order, which involved a simple breach of contract, and indeed breaches of the provisions which her brother, David, had insisted be included, and which she was opposed to. She also confirmed she wanted no contact.

David's position

[17] From David's perspective many of the facts were largely undisputed. His wife, Fiona, made contact with Geraldine around 14 December 2017. The point made by David was that he did not make personal contact but, as discussed with Mr Praat, the reality of the situation was that it was his wife, Fiona, who made the contact, and that he knew she was making contact, and he clearly knew what was happening.

[18] Having said that, however, the argument on behalf of David is that rather than the contact with Geraldine being rebuffed by Geraldine and met with an expression of concern and reference to the no contact provisions, the impression that he and his wife Fiona got, was that Geraldine was receptive to the contact.

[19] What seems to have influenced David in particular, was that after the first exchange on 14 December 2017, his wife, Fiona, decided to telephone Geraldine and asked her if she wanted to speak to David.

[20] Geraldine agreed, and David and Geraldine spoke for about 11 minutes, and he interpreted Geraldine's response as positive and emotional. There were tears, and Geraldine thanked them for calling, and they exchanged contact details, and agreed to stay in touch.

[21] What followed then were the text exchanges which are contained in the affidavits. From David's perspective he believed that Geraldine welcomed his text messages, and was happy for him to continue the form of communication, despite the existence of the consent order. His position was that if Geraldine had given him any reason to think that contact was not welcome, he would have of course stopped.

[22] From David's perspective he thought that he and Geraldine were making good progress, and he was very surprised when he was served with the proceedings.

Defendant's legal submissions

[23] It was submitted on behalf of David that Geraldine was not entitled to summary judgment for the following reasons:

(a) By Geraldine's actions and words she had procured David's breach of the non-contact provisions.

(b) The appropriate method of enforcement of any Court order will depend upon whether the relevant part of the order was an order effectively being judgment a judgment sounding in money, or an order requiring personal action by the defendant. There is a discretion with respect to

the enforcement of an order for payment of money under s 133 District Court Act 2016, and it would be inappropriate to exercise the discretion in a case such as this.

(c) The defence of equitable estoppel is available because Geraldine contributed to, and participated in, the exchange of communications. The whole concept of the doctrine is based on preventing "unconscionability".

(d) It is clearly arguable on the facts that there has been "acquiescence" or "waiver" by the plaintiff as to her rights under the consent order.

[24] Given the circumstances, it cannot be argued by Geraldine that David has "no bona fide defence", "no reasonable ground for defence" or "no fairly arguable defence".

Discussion and decision

[25] In my view, Geraldine's application for summary judgment must fail for the following reasons:

(a) There is a clear defence available on the basis of equitable estoppel. Following the telephone discussion on 14 December, Geraldine knew exactly who she was corresponding with, and rather than saying she was upset, there is a clear foundation in the evidence that she was receptive to the contact, and encouraged that. It is also clear from the form of the texting between the parties that she appears to be receptive and encouraging.

(b) There is clearly a defence available on the evidence as to "acquiescence" or "waiver" by Geraldine, of her rights under the consent order.

(c) I also have concerns about the enforceability of such a penalty provision, more especially as it is for an unlimited period. I am

conscious that this is not a commercial contract where the parties should be left to the certainty of the bargains that they have made, including the remedies that they have elected in the case of breach of the agreement. These were ordinary people, having resolved some difficult family issues, and it is hard to comprehend and accept that the parties could have intended that there should be no contact at all for the remainder of their lives, and in making that observation I am conscious of the fact that the consent order was made on 6 June 2014, and the first contact made by Fiona with Geraldine was on 14 December 2017.

(d) It is also contemplated in the consent order, under the heading "Consequences of Non-compliance" that if there is non-compliance, one of the options is to vary the order. It may therefore be appropriate to send the matter back to the Family Court to vary the order.

[26] The application for summary judgment is dismissed, and costs are reserved.

A A Zohrab
District Court Judge