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[SQUARE BRACKETS]

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**IN THE FAMILY COURT
AT WAITAKERE**

**I TE KŌTI WHĀNAU
KI WAITĀKERE**

**FAM-2020-090-000453
[2021] NZFC 7942**

IN THE MATTER OF THE PROTECTION OF PERSONAL AND
PROPERTY RIGHTS ACT 1988

AND IN THE MATTER OF [JR]
OF Person in respect of whom the application is
made

BETWEEN [NP]
Applicant

AND [DP]
 [MP]
Other Parties/Persons

Hearing: 30 July 2021

Appearances: P Lavus for the Applicant
 J Surgenor for [JR]
 J Wain for [DP]
 S Wakefield on behalf of J Cundy for [MP]
 T Kelly for [KS]

Judgment: 12 August 2021

**RESERVED JUDGMENT OF JUDGE B R PIDWELL
(Discovery / Unless orders / Personal order)**

[1] The Court is being asked to review the decisions made by [DP] under the enduring power of attorney (EPOA) granted in his favour by his elderly aunt, [JR].¹

[2] The Court has a wide discretion to make any order it thinks fit,² and any such order has the effect “according to its tenor”.³

[3] To complete the inquisitorial process and ensure the Court has all the relevant documents necessary for the review, the Court has made discovery orders against [DP].

[4] The questions for the Court at this juncture are:

- (a) Is [DP] in default of the discovery orders?
- (b) If so, should the Court make an “unless” order and debar him from participating in the proceedings if he continues to default?
- (c) Should the interim personal order become final?
- (d) Is [NP] in default of the timetabling orders?
- (e) Professional conduct.
- (f) Costs.

History

[5] I refer to my decision of 18 June 2021 which sets out the procedural history and role of the Court in these proceedings.⁴

[6] In that decision, I stated:

¹ Protection of Personal and Property Rights Act 1988 [PPPR Act], s 103.

² Section 103(4).

³ Section 103(5).

⁴ *[NP] v [DP]* [2021] NZFC 5661.

[22] It is unfortunate that the Court is now being asked to make a further determination in order to fulfil its inquisitorial role in reviewing the attorney's decisions. There is a clear obligation imposed both by statute, common law and equity for an attorney to make all documents available which are relevant to his stewardship of [JR]'s property. Relevantly, the higher Courts have determined that [DP] has previously not acted with complete bona fide intent when exercising similar fiduciary obligations.

[23] The Court's role is to ensure that [DP] has not benefited himself to the expense of [JR]. His reluctance to make available legal files to the Court for which he claims personal professional legal privilege must be seen within this context.

(footnotes omitted)

[7] Discovery was confirmed later in the decision:

[29] Requests have been made by Ms Surgenor, lawyer for the subject person who was appointed under s 65 of the PPPR Act, for information that Mr Atmore holds to be made available to her and to the Court.⁵ [NP]'s application for review of [DP]'s decisions under the attorney are the subject of these Court proceedings. Therefore, any legal file, documents, invoices, and time records which relate to the exercise of [DP]'s powers under the EPOA for [JR] since 15 May 2014 held by Mr Atmore (and instructed counsel) must be disclosed.

[30] I direct that disclosure to be provided to the property manager and counsel on record within 14 days.

[8] On 7 July 2021, [DP] filed a supplementary affidavit of documents listing 470 documents in his possession or power "relating to the work performed by Mr Atmore in relation to [JR]".⁶

[9] On 8 July 2021, he swore a further affidavit. He was not directed to file the affidavit nor was leave sought or granted. He filed it "to clarify my position in relation to payment of legal fees incurred by me at various stages in respect of certain legal work involving [JR]".⁷

[10] In that affidavit, he states that he was advised by his legal counsel that as long as the legal work being done was for the "benefit of [JR] or undertaken on [JR]'s behalf", then he could seek reimbursement from her for the fees.⁸ He said that in 2020, he paid all of Mr Atmore's invoices himself and reimbursed himself only twice from

⁵ Sections 99B and 102(2)(e).

⁶ Supplementary affidavit of documents of [DP], 7 July 2021 at [1], sched 1.

⁷ Affidavit of [DP], dated 8 July 2021, at [2].

⁸ At [5].

[JR]’s own account.⁹ He confirms he also paid two of Mr Wain’s invoices (counsel instructed by Mr Atmore and appearing in these proceedings) directly from [JR]’s account.¹⁰

[11] The relevance of these statements is that they confirm [DP] has commissioned legal work in order to benefit [JR]. The inference is available that he was acting under the EPOA at these times.

Is [DP] in default of the discovery orders?

[12] Ms Kelly, on behalf of the property manager, submits that [DP] remains in default of the Court’s discovery orders. She reminds the Court that discovery orders were initially made in October 2020. The first affidavit of documents filed by [DP] was on 17 December 2020 and claimed blanket privilege for all legal files held in the discharge of his duties as attorney for [JR]. The Court confirmed in February 2021 that any legal file relating to [DP] discharging his obligations as attorney should be included in the list of documents.

[13] When the matter came back before the Court on 18 May 2021, [DP] had still not filed an updated affidavit of documents. The Court confirmed again the discovery order and directed [DP] to provide “any legal file documents, invoices and time records which relate to the exercise of [DP]’s powers under the EPOA for [JR] since 15 May 2014 held by Mr Atmore (and instructed counsel)” to be disclosed to the manager and counsel on record within 14 days.¹¹

[14] [DP] filed a further affidavit of documents on the evening of 7 July 2021, albeit five days late, and the documents were disclosed the following day by way of Dropbox.

[15] Upon reviewing the list of documents and the documents actually disclosed, Ms Kelly submits that [DP] remains in default of the order. The time records and invoices of Mr Wain (counsel on record) and Mr Atmore (instructing solicitor) include

⁹ At [15].

¹⁰ At [18].

¹¹ *[NP] v [DP]*, above n 4, at [17], [18] and [29].

narrations of other documents, emails, meetings and conversations where no documents have been included in the list.¹² Her submission is supported in full by Ms Lavus, counsel for [NP], Ms Wakefield, counsel for [MP], and Mr Tolich, agent for counsel for [JR].

[16] Mr Wain, on behalf of [DP], submits that all relevant documents directed under the discovery order have been disclosed. He submits that much of the content of the files listed in his client's affidavit of 7 July 2021 is "arguably completely irrelevant" to the issues in the current Court proceedings. He asks the Court to provide Mr Atmore with leave to file a further affidavit in relation to the defects in his disclosure. Additionally, Mr Atmore has retained separate legal representation in light of the property manager's allegations that [DP]'s legal team have compromised their obligations to the Court in failing to comply with the discovery orders of legal files in their possession.

[17] He submits that all invoices relating to matters of [JR]'s property have been disclosed in full, sufficient to inform the property manager as to how [JR]'s money has been spent.

[18] He further submits that [DP] has repaid [JR] any money that he "borrowed" from her or had been paid to him by [JR] since activation of the EPOA on 25 May 2020. He confirmed that [DP] had repaid to [JR] the sum of \$138,000. He submits that [DP] has been responsible for all his personal legal fees but acknowledges that there has been a "complication" as [DP] arranged payment of a number of counsel's (namely Mr Wain's) invoices from [JR]'s bank account.¹³ He confirmed that [DP] instructed him that he is "prepared" to repay to [JR] within 20 working days an amount equivalent to the sum paid from [JR]'s account from counsel's invoices in the sum of \$31,761.25.¹⁴

[19] As can be seen from the above commentary, the issue of payment of both Mr Atmore's and Mr Wain's legal fees by [DP] is at issue. That is because some of

¹² Examples contained in Memorandum of Counsel for the Property Manager Seeking Unless Orders, dated 22 July 2021 at [11]–[14].

¹³ Submissions of counsel for the respondent, dated 29 July 2021, at [25].

¹⁴ At [27] and [28].

their invoices have been paid by [DP] using his aunt's money. The Court acknowledges that Mr Atmore and Mr Wain have provided legal services to [DP] in his personal capacity. However, this Court is tasked with reviewing the decisions which [DP] has made that involve [JR]'s property since May 2014.

[20] The discovery order that the Court issued required not only the invoices and time records of the legal files relating to the work done for [DP] in his capacity as attorney for [JR], but also the relevant underlying legal documents, correspondence, emails and file notes. The other documents are required because it is the *decisions* of [DP] when acting in that role which must be scrutinised by this Court. It is not for Mr Atmore or Mr Wain to decide whether those documents are relevant or not. It is for the property manager and the Court to determine whether the actions of [DP] during those transactions when he was working as attorney for [JR] were appropriate or not.

[21] I am satisfied, having considered the affidavit of [DP] and the supplementary list of documents filed by him, that there remain documents, letters, emails and file notes which have not been disclosed to this Court. These documents relate to the work conducted by Mr Atmore and all counsel instructed by him, including Mr Wain. I therefore find that [DP] has not complied with the discovery order.

If [DP] is in default, should the Court make an unless order, and debar him from participating in the proceedings if he continues to default?

[22] Ms Kelly (for the property manager) submits that as [DP] continues to be in default of the discovery orders which have been before the Court on five occasions now, the Court should make an unless order. She relies on the principles enunciated by the Court of Appeal in *SM v LFDB*.¹⁵ She submits the Court has jurisdiction to make an unless order pursuant to r 237 of the Family Court Rules 2002 of its own initiative or upon application.

[23] Rule 237 provides:

237 Enforcement of orders

(1) If a party to proceedings defaults in complying with an interlocutory order (that is, an order made on an application),—

¹⁵ *SM v LFDB* [2014] NZCA 326, [2014] 3 NZLR 494 at [31].

- (a) if the party in default is the applicant in the proceedings, the court may order that the proceedings be stayed or dismissed as to the whole or any part of the relief claimed by the applicant in the proceedings:
 - (b) if the party in default is a respondent in the proceedings, the court may order that the party's defence be struck out:
 - (c) subject to section 138 of the District Court Act 2016, the court may order that the party in default be committed.
- (2) The court may make an order under subclause (1) on its own initiative or on another application for the purpose.
- (3) This rule is subject to any express provision to the contrary in any of these rules.

[24] Rule 237 provides a remedy for a party defaulting in complying with an interlocutory order (such as a discovery order) by defining what could happen to their pleadings if they remain in default. If the party is an applicant, the Court may stay or dismiss the application filed by that party.¹⁶ If the party is the respondent, the Court may order the party's defence be struck out.¹⁷

[25] The rule does not specify what should happen to other parties to proceedings. In these proceedings under the Protection of Personal Property and Rights Act 1988 (the Act), the applicant is [NP]. Her aunt, [JR], is the subject person and her brothers [DP] and [MP] are "interested parties". Pursuant to s 63 of the Act, the proceedings must be served on those persons named in s 63(1), including "any other person specified by the court". They were served pursuant to that section. As such, they are entitled to appear and be heard as a party to the proceedings.¹⁸

[26] Although a strict interpretation of r 237 does not provide a remedy for other parties to proceedings when they fail to comply with an interlocutory order, [DP] is essentially a respondent in these proceedings, namely he is objecting to the orders sought by his sister, the applicant, and has been given standing to do so. Indeed, the submissions filed by his own counsel in respect of this hearing refer to him as "the respondent" and name him as such in the intituling. Therefore, I am satisfied that the wording of r 237 is wide enough when read with the service requirements in s 63 of the Act to encompass any party.

¹⁶ Rule 237(1)(a).

¹⁷ Rule 237(1)(b).

¹⁸ Section 63(3).

[27] In addition, Mr Wain submitted that the principles enunciated by the Court of Appeal in *SM v LFDB* are not relevant to this Court as it was reviewing an unless order made by the High Court in its inherent jurisdiction. However, the order that the Court was reviewing was a stay order under r 7.48 of the High Court Rules 2016, not inherent jurisdiction.

[28] In *Brown v Sinclair*, the High Court affirmed that the Family Court did have jurisdiction to make an “unless order”.¹⁹

[29] In addition, this Court has inherent powers to make orders and directions to regulate its own process.²⁰ Accordingly, I am wholly satisfied that the Court has the power to make unless orders when a party is in default of an interlocutory direction.

[30] I am also satisfied that, in this case, there has been a history of failure to comply with earlier orders. This Court has made and confirmed the discovery order on four previous occasions. The statute itself requires an attorney to promptly comply with any request for information by Counsel for the subject person.²¹ The first request was on 7 September 2020, 11 months ago. The court orders and directions which followed have simply confirmed the requirement. Where the subject person is 97 years old, there is a heightened need to comply.

[31] [DP] is required to make all documents available which relate to the decisions he or his advisors made when he was acting for [JR] under the EPOA or, to use his words, when those decisions were made to benefit her. The Court will then make the determination of whether he was acting under the EPOA or not. It cannot rely on his or his advisor’s determination of where the line was drawn in light of the complication in the payment of legal fees.

[32] The Court has directed the property manager to prepare a report to assist in the investigation of the decisions made by [DP] over the last six-and-a-half years. Full compliance with the discovery orders and obligations is required.

¹⁹ *Brown v Sinclair* [2016] NZHC 3196 at [136].

²⁰ *Wihongi v Broad* [2020] NZFC 7746, [2020] NZFLR 585.

²¹ Section 99B(b).

[33] If [DP] considers that compliance may compromise his position in respect of proceedings relating to [NP] or other parties, he can explain his position to the Court in an ex parte memorandum. The Court will consider directing that any compromised discovery be made available to the property manager only. If that occurs, the Court will call for submissions on that issue.

[34] I am satisfied that an unless order is justified due to the ongoing delays, particularly in light of the fiduciary duties owed by the attorney to the subject person.

[35] [DP] is directed to provide a further list of documents, listing all correspondence, emails, file notes and documents referred to in the narrations to his legal invoices (including instructed counsel) incurred since May 2014 which relate in any way to property decisions involving [JR]. The list of documents is to be filed by 2 September 2021. Inspection is to be made available by 16 September 2021.

[36] No other evidence is to be filed without the leave of the court.

[37] If [DP] fails to comply, he will be barred from further participation in the application filed under s 103 (review of attorney's decisions).

Should the interim personal order become final

[38] Mr Wain is thanked for his memorandum of 6 August 2021.

[39] All parties now consent to the interim personal order becoming final.

[40] I therefore make it a final order in the same terms.

Is [NP] in default of the timetabling orders

[41] On 21 October 2020, [NP] was directed to file and serve a reply affidavit to [DP]'s affidavit within 28 days of receipt. Mr Wain argues that she is in default of this direction.

[42] Ms Lavus submits that as [DP] has not fulfilled his discovery obligations, the time for filing a reply affidavit has not commenced. I agree. A reply must be to all the evidence and is strictly in reply. When the evidence is incomplete, the reply cannot be prepared.

Professional conduct and independence

[43] Ms Kelly, on behalf of the property manager, raises the concern about the ethics of counsel for [DP] in light of the lack of compliance with the discovery order of documents in their possession or control. She submits that both Mr Atmore and Mr Wain are potential witnesses in these proceedings and in a position of conflict.

[44] Mr Atmore has filed two affidavits in these proceedings. The court has been advised that he now has instructed his own counsel.²²

[45] There is evidence before the court that both Mr Atmore and Mr Wain's legal fees, at times, have been paid by [DP] using his aunt's money. The appropriateness of those transactions is being scrutinised by the court.

[46] The Court notes r.13.5.3 and r.13.5.1 in Part 6 of the Lawyers and Conveyancers Act 2006, and the dicta of Moore J in *Cutting v Liu* [2014] 3 NZLR 224.

[47] Mr Atmore and Mr Wain are requested to reflect on the appropriateness of their continued involvement in the proceedings.

Directions

[48] The proceedings are to be reviewed in a case management list on 17 September 2021 to monitor compliance with the discovery, inspection and unless orders. Counsel are requested to file memoranda for that review, setting out any further directions required.

²² Mr Cummings appeared at the hearing, albeit late. As he was not counsel on record for any party, he was not granted the leave of the court to participate in the hearing. Family Court Act 1980, s 11A.

[49] Costs are reserved.

Signed at Auckland this 12th day of August 2021 at 10:15am.

Judge B R Pidwell
Family Court Judge

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