

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

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**IN THE FAMILY COURT
AT WAITAKERE**

**I TE KŌTI WHĀNAU
KI WAITĀKERE**

**FAM-2020-090-000453
[2022] NZFC 3662**

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: 18 March 2022 on the papers

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

Judgment: 28 April 2022

**RESERVED JUDGMENT OF JUDGE B R PIDWELL
(Activating Unless order)**

[1] On 12 August 2021, the Court directed [DP], [JR]’s former attorney under an enduring power of attorney, to provide a further list of documents describing 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 Court directed that [DP] would be barred from further participation in the application filed under s 103 of the Protection of Personal and Property Rights Act 1988 (PPPR Act) if he failed to comply (the Unless Order).

[2] [DP] filed a Supplementary Affidavit of Documents (unsigned) on 2 September 2021. It was accepted for filing on the basis an identical sworn version would be filed when the Covid-19 restrictions permitted.¹

[3] The supplementary affidavit was prepared under Covid-19 level 4 restrictions and is limited to electronic files. It specifically states that there are:²

... no file notes of any meeting or discussions between my solicitor, counsel and me, or any other meetings or discussions involving my solicitor and counsel concerning [JR] or me in my role as attorney for [JR].

Of itself, that is quite an extraordinary statement.

[4] The affidavit also states a USB stick has not been found, and lockdown restrictions have prevented a further search of Mr Atmore’s offices.³ The Court notes that lockdown restrictions have now eased.

[5] The list is sparse in its description of the documents, referencing only “email chains” on specific dates between 1 December 2016 and 23 September 2020, plus some additional court documents and invoices. Legal privilege is claimed for five

¹ [NP] v [DP] FC Waitakere FAM-2020-090-453, 4 October 2021 (Memorandum of Judge Pidwell). It was re-served on 16 September 2021 with the inclusion of an additional column. The Court has yet to receive the sworn document and notes counsel’s assurance that a sworn version would be filed once lockdown restrictions permit.

² Supplementary affidavit of documents of [DP] (unsworn), filed 2 September 2021 at [5].

³ At [6].

documents on the basis that the correspondence includes matters relating to a family trust dispute or [JR]’s will, and is unrelated to [DP]’s role as her attorney.

[6] It makes no reference to documents before 1 December 2016. The court must therefore presume they have all been disclosed in previous lists.

[7] The descriptions of the documents are not sufficient to inform the Court of their contents.

Is [DP] in default?

[8] Ms Lavus, for the applicant [NP], submits [DP] remains in default of the Court’s discovery orders in the following ways:

6.1 No documents for the period between May 2014 and December 2016 are included.

6.2 No ex parte memorandum was filed, as invited by the Court to address any documents which may be relevant but compromise his position in relation to other proceedings between [DP] and [NP] as per [33] of my judgment of 12 August 2021.

6.3 There are documents missing relating to an unidentified large sum of money [JR] gave to [DP], and correspondence/attendance concerning her will, which have not been addressed in any way (as invited by the Court in [33] of my judgment)

6.4 The 17 emails and “voluminous solicitor’s file re [JR]’s claim referred to in an invoice from Mr Wain to [DP] on 28 February 2020 re “[JR]’s claim” have not been disclosed (p0468 discovered documents)

6.5 The list fails to comply with Rule 8.15 (2) (e) of the DC Rules 2014

6.6 [DP] has failed to properly serve all parties/counsel, by providing an electronic link to the documents that did not work, and then required the applicant to provide (at her cost) a memory stick to be delivered to the home of his counsel, Mr Wain. (the sheer volume ie 620 pages made electronic disclosure impracticable and was difficult due to lockdown restrictions

6.7 [DP] has engaged in a pattern of obstructive behaviour designed to frustrate and delay the proceedings.

[9] Her submission is supported by Ms Kelly, on behalf of the property manager, and also Ms Surgenor, lawyer for [JR].

What does [DP] say?

[10] [DP] has provided a table to cross reference the documents contained in the third list, and those previously disclosed. He says 421 pages out of the 620 listed have been previously disclosed or were in the possession of the parties. He says the additional ones were considered by his solicitor, Mr Atmore, to have no particular importance and were therefore not retained on his paper files. They were only discovered when the archived electronic files (of emails) were searched. Further he says that there were no emails or documents which related to property decisions by [DP] involving [JR] within the terms of the discovery order.

[11] He has calculated that he has disclosed 2,863 documents and that discovery is complete.

Payment of lawyer's fees from [JR]'s accounts.

[12] [DP] acknowledges that he used his aunt's money to pay legal fees in 2020 in the amount of \$37,665.05. He says he has disclosed all of his counsel's relevant invoices, including those he paid personally. His counsel say he has repaid this money "without admission of liability on the part of [DP]".⁴ [DP] only "wished to remove the invoices from contention and so reduce further costs, including costs associated with further disclosure."⁵

[13] Repayment of the invoices does not, of itself, remove the obligation to provide disclosure, when the court's role is to scrutinise the actions of the attorney, and ensure he has upheld his fiduciary duties.

⁴ Memorandum of Counsel for the Respondent, dated 7 October 2021 at [9.4].

⁵ At [9.2].

Are documents missing?

[14] Mr Atmore's invoice to [DP] dated 1 March 2017 includes a narration "Email from [DP] with will, consider will, email to [DP] re will".⁶ Ms Lavus highlights that these emails have not been disclosed, nor the will. Privilege is claimed on the basis that Mr Atmore was advising [DP] in his role as executor of the will, not in relation to his actions as an attorney for [JR]. However, Mr Atmore's invoice blatantly contradicts this, as it is sent to [DP] "as attorney for [JR]". [DP] then paid this account using his aunt's money.

[15] It would be unusual for a lawyer to give advice to an executor of a will, before the testatrix died. If [DP] was receiving advice in his personal capacity, the invoice should have been addressed to him personally, and paid by him personally. It was not.

[16] [DP] claim privilege for these documents, accepting that the will is relevant but confidential to [JR]. However, the confidentiality and privilege surrounding her will has now passed to her property manager. It must be disclosed to her. [DP] no longer can maintain a claim of privilege on behalf of [JR], against her current property manager.

[17] As the will has not been disclosed, I find that there has been further noncompliance with the discovery order.

[18] The unredacted email portion of 9 February 2017 for which privilege was not sought refers to an unidentified sum of money [JR] gave to [DP]. [DP] says the documents have been disclosed in the third list and are exhibits "H" and "K" to his affidavit sworn on 23 December 2020. I accept this submission as the documents appear to relate to the transfer of money from [JR] to [DP] at this time.

[19] I accept Mr Wain's submission that the 17 emails referred to in Mr Wain's invoice dated 28 February 2020 are listed in the supplementary list at 053-069.⁷ The reference to reviewing a voluminous solicitor's file in the same invoice on 15

⁶ Affidavit of [DS], sworn 28 July 2021 at annex A.

⁷ Further Supplementary Affidavit of Documents of [DP], above n 7 at 5-6; and Affidavit of [DS], above n 6, at annex A(468).

February 2020 is answered by reference to Mr Atmore's 472 page file described in the second list.⁸

Ms Kelly's submission

[20] Ms Kelly submits that there are further examples of noncompliance, referring to specific narrations in invoices from Mr Wain to [DP]. It is possible that not all the underlying emails have been disclosed. The suspected emails are from September 2020, 14 October 2020, and 19 October 2020.⁹

[21] Mr Wain provides the context to these emails, namely the commencement of the current Family Court proceedings, against the backdrop of proposed High Court proceedings relating to the [P] Family Trust and [NP].

[22] Mr Wain, and Mr Atmore as his instructing solicitor, have represented [DP] both in his capacity as [JR]'s attorney and in his personal capacity in contemporaneous issues with the family trust and [NP] personally. The overlap of these proceedings, issues and representation has blurred the lines of obligation and privilege in the discovery context. Mr Wain's own submissions refer to matters "mistakenly overlooked" or "mistakenly identified" due to this overlap.¹⁰

[23] It is very difficult to identify these individual examples as clear breaches of his obligation to provide full discovery to this Court in that context. Some of the examples relied upon by the applicant have not been sustained. However, I am satisfied that there is a clear breach in relation to [DP]'s obligation to disclose the will and surrounding full email to the property manager, who now holds the privilege and confidentiality of that document on [JR]'s behalf. When considered in the context of [DP]'s previous non-compliance with court orders for discovery, I consider this breach to be egregious.

⁸ Affidavit of [DS], above n 6, at annex A(468). Supplementary affidavit of documents of [DP], 7 July 2021 at [1], Sched 1.

⁹ Documents 106 and 107.

¹⁰ Memorandum of Counsel for the Respondent, above n 4, at [6.15(c)]–[6.15(d)].

[24] The Court provided [DP] with an avenue to assert privilege in a confidential way which was not acted upon.¹¹

[25] I am satisfied that [DP] has not fully complied with the discovery orders, in not disclosing [JR]’s will and claiming privilege for it when that clearly no longer exists in his favour. I note the Judge Muir addressed this very issue when he made the second set of discovery orders on 30 November 2020 when he said:¹²

If some documents are claimed as privileged, they should be listed as such but nonetheless should be made available to the court for the purpose of determining the claim to privilege. For the sake of clarity documents including legal files which relate to the discharge of [DP]’s responsibilities as property manager/attorney ought not to be privileged against discovery by the temporary property manager.

[26] In those circumstances, the Unless Order is activated.

[27] [DP] is debarred from taking any further part in these proceedings, other than responding to summons to appear for cross examination.

[28] I need not comment on whether the inspection process was fair or appropriate. It occurred in a Covid-19 environment and has now been completed.

[29] Mr Wain submits that one effect of debarring [DP] from these proceedings would be to remove the party holding [NP] and the trustees of the [P] Trust to account. However, the purpose of these proceedings is not to hold them to account. It is to review the decisions made by [DP] as [JR]’s attorney. It is an inquisitorial process, and one where the attorney is required to account to the Court for their decisions. The relationship between [DP] and [JR] was a fiduciary one. He must account for the financial stewardship he held for her, act openly and fairly, keep all her property separate, and avoid any conflict in his duties.¹³

[30] I need not comment on the issue of a perceived conflict in Mr Wain and/or Mr Atmore acting in these proceedings, in light of the Unless Order being activated.¹⁴

¹¹ *[NP] v [DP]* [2021] NZFC 7942 at [33].

¹² *Re [JR]* FC Waitakere FAM-2020-090-453, 2 December 2020 (Memorandum of Judge Muir).

¹³ *Treanery v Treanery* [2009] NZFLR 208 (FC) at [55]

¹⁴ *Cutting v Liu* [2014] NZHC 1063, [2014] 3 NZLR 224 per Moore J.

[31] The fact that the discovery process has taken 18 months and three judgments to date is concerning, particularly in light of [JR]'s age. [DP]'s role as a party to the proceedings has been a significant cause of this delay. Now that he is a witness only, the Court should be in a position to determine the substantive application without undue delay.

[32] The property manager is requested to file a memorandum, advising the Court of an estimated time to complete her report requested in my minute of 18 May 2021.

[33] The Registrar is to allocate a 45-minute pre-hearing conference before me. Counsels are requested to provide their view on transferring the proceedings to the Auckland District Court, where I am now resident. If there is no consent, the proceedings will need to be case managed by a resident Waitakere judge from now on.

Signed at Waitakere District Court this 28th day of April 2022 at 10.00am.

Judge BR Pidwell
Family Court Judge | Kaiwhakawā o te Kōti Whānau
Date of authentication | Rā motuhēhēnga: 27/04/2022