

IN THE HIGH COURT OF NEW ZEALAND  
WELLINGTON REGISTRY

A No 581/85

**NOT  
RECOMMENDED**

IN THE MATTER of the Family Protection  
Act 1955

A N D

IN THE MATTER of the ESTATE OF B M  
DONALD

BETWEEN

G DONALD

First Plaintiff

A N D

H A DONALD

Second Plaintiff

A N D

N KEEDWELL

First Defendant

A N D

J J DONALD

Second Defendant

Date of Hearing: 21 March 1988

Counsel: C B Ruthe for Plaintiffs  
C F Finlayson for Second Defendant

Date of Decision: 22.3.88

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RESERVED DECISION OF McGECHAN J

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This is an application by the second defendant under R 432 for leave to file an affidavit by Glanville John Menneer and a further (fifth) affidavit by the second defendant. The second defendant no longer seeks to file a second affidavit by one Paul van Velthooven. The application was opposed. I called for drafts of the two affidavits remaining in issue at the end of argument so as to be able to make a realistic decision and have since read those drafts.

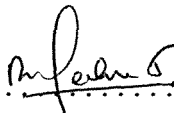
Put very briefly, the plaintiffs seek further provision from the estate of their late mother who by her will left everything to the second defendant. A major aspect of the second defendant's opposition to his brothers' claim is that they did very well by comparison with him in relation to assets ultimately derived from the estate of their late father. In particular, arrangements under which the second defendant was bought out in or about 1962 favoured the first and second plaintiffs. The matter has been dragging on since commencement on 18 December 1985. A fixture for March 1988 was given late in 1987. Notwithstanding that setting down and fixture, on 8 February 1988 leave was given to the plaintiffs to file five affidavits. There is some apparent difference in recollection between counsel then involved as to whether consent on the part of counsel for the second defendant to that course was subject to an understanding that the second defendant would be able to file further affidavits in response. I do not attempt to resolve that misunderstanding, if it be such, and put any questions of a possible agreement to that effect to one side. The second defendant does now seek to file the two affidavits mentioned in response.

Objection is taken to that of the second defendant on the basis that it contains matters of comment, and to that of Menneer on the basis of relevance. As to discretion, counsel pointed to increasing expenses in an estate of only some \$100,000.00, and the risks of a perceived need for yet further response on the part of the plaintiffs. Having read the affidavits and compared them with preceding materials I am satisfied that in the circumstances of this case both are relevant. While that of the second defendant contains some matters of comment these do not go beyond the bounds of that often tolerated by the Court these days. I consider the interests of the Court in being fully informed outweigh fears that to admit these affidavits will procure yet a further round of affidavits by way of response. Any attempt simply to keep on having the last

word can easily be dealt with. If there is some genuine basis for yet further affidavits that can be taken into account on any further application with leave.

Leave is granted to file the two affidavits concerned as submitted in draft form.

Questions of costs are reserved.



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R A McGechan J

Solicitors: Ruthe Denee & Co, Wellington for Plaintiffs  
Cooney Lees & Morgan, Tauranga by their agents  
Brandon Brookfield, Wellington for Second Defendant