~~Commerce Commission~~ ~~House~~
NZLR

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP No. 230/99

UNDER	The Judicature Act 1908 and its Amendments and Rules
BETWEEN	**GREGORY ALEXANDER HUTT** Plaintiff
AND	**GREGORY ALEXANDER HUTT** and **WARREN THOMAS HUTT** as trustees of the G.A. Hutt Family Trust (No. 1) and The G.A. Hutt Family Trust (No. 2) Second Plaintiffs
AND	**THE FAMILY COURT** First Defendant
AND	**KAREN FRANCES NEELE** Second Defendant

In Chambers:

Date of Hearing: 29 November 1999

Date of Judgment: 30 NOV 1999

Counsel: M.G. Gazley for First and Second Plaintiffs
No appearance for First Defendant (to abide decision of the Court)
V. Ullrich for Second Defendant

JUDGMENT OF DURIE J

Solicitors:
M.G. Gazley, Wellington for First and Second Plaintiffs
Crown Law Office, Wellington for First Defendant
M.C. Jeffcoat, Wellington for Second Defendant

[1] The second defendant seeks a judicial conference, foreshadowing only one matter to be considered thereat, namely, a direction for discovery of documents.

[2] On 30 May 1995 the first plaintiff, Mr Gregory Hutt, and the second defendant Ms Karen Neele, then husband and wife, settled various matrimonial property interests in four family trusts, two in Mr Hutt's name and two in the name of Ms Neale. On 8 December 1995, shortly after separating, they agreed to a division of the matrimonial property then remaining in their names. In a separate agreement at the same time, the family trusts were reconstructed, reallocating assets in the trusts under their respective names.

[3] On 30 May 1997 Ms Neele filed an application to set aside the matrimonial property agreement. That proceeding remains extant in the Family Court. On 12 October 1998 she applied under s 182 of the Family Proceedings Act for orders so that the ownership or control of the property in the family trusts is apportioned equally between her and Mr Hutt. In addition, specific discovery was sought to assess the value of certain shares in Mr Hutt's business which had passed on the reconstruction of the trusts into one of the trusts in Mr Hutt's name. Ms Neele does not know the value of those shares. If they are somewhat inconsequential in value, then she may not wish to pursue her application.

[4] With regard to the application under s 182 of the Family Proceedings Act, the Family Court dealt first with the jurisdictional issue. It found that the Court did have jurisdiction to make an enquiry in respect of trust property and it allowed that proceeding to continue. Mr Hutt and the trustees of the trusts in his name, have sought review of that decision in this Court.

[5] Having reached a decision on jurisdiction, the learned Judge of the Family Court went on to give directions for discovery in respect of the shares that had passed to the trust in Mr Hutt's name. He did so for the obvious reason that this would enable Ms Neele to make an informed decision on whether or not to proceed. He noted:

> "... it is in my view important that there be disclosure, so that unnecessary litigation is not brought before the Courts. If at the end, even if the claim is successful, it was

> simply not worth the costs of pursuing it, it seems to me as a matter of policy that assistance of such solution by the supply of information is to be encouraged. I favour avoiding futile litigation being pursued through the Courts."

[6] And:

> "In my view it is very sensible, and to be applauded, that a party before continuing on litigation which in this case has been foreshadowed to go higher than this Court, should have available to her and to her advisers information relevant to whether it should be pursued or not."

[7] These are all sensible and pragmatic reasons for ordering discovery in respect of proceedings that the Family Court had, in the learned Judge's view, jurisdiction to determine.

[8] In light of the application for review, the Family Court direction for discovery has not been complied with.

[9] In this Court, Ms Ullrich for Ms Neele seeks a conference under s 10 of the Judicature Amendment Act 1972 and an order for specific discovery on the same terms as before and upon the grounds as before, that this would enable to her to make an informed decision on whether to continue her claim. She adds that it will also enable her to make an informed decision on whether to proceed with her defence of the current application for judicial review. She argued that s 10 of the Judicature Amendment Act 1972 enabled directions for discovery of material that might expeditiously dispose of the case, thereby ensuring that Court time is not wasted by unnecessary litigation should the shares have little value. She also contended that Mr Hutt was pursuing every avenue available to exhaust Ms Neele's slender resources in order to defeat her proceedings.

[10] Mr Gazley for Mr Hutt and the trustees opposed discovery on the grounds that such is not necessary and is irrelevant to the determination of the proceeding before this Court. He did not rely on a further ground stated in his notice of opposition that discovery was also oppressive. He argued that the rules prevented discovery except where discovery was necessary to dispose of the issues in the case or was otherwise relevant to those issues. In this case the only issue was a question of law relating to jurisdiction. Discovery was not necessary to dispose of the matter.

[11] No reasons for refusing the voluntary disclosure of the necessary information were proffered. It was not argued that discovery might be oppressive. It appeared to me that discovery would be appropriate, for the reasons given by the learned Judge of the Family Court, and might relieve this Court from unnecessary litigation. For that reason, while at first blush the rules appear to prevent an order for discovery in this case, I advised counsel that I would look at the matter more closely.

[12] I note first that the learned Judge of the Family Court, having determined that the Court had jurisdiction, had then some basis from which to determine whether specific discovery should be ordered. On this application for review the jurisdictional question is again at large and is the only matter before this Court. The question is whether specific discovery can be directed when the discovery so sought will not inform the issues before this Court, but may still dispose of the matter, expeditiously, through the withdrawal of the defence.

[13] I am referred to rr 297, 300 and 312 relating to general and particular discovery. Rule 312 provides that the Court shall not make an order under any of the provisions of rr 297 to 310 unless the same is "necessary" at the time when the order is made. Reading r 310 with r 297, an order would be appear to be necessary if voluntary discovery is not given and if an order is required to properly dispose of the matter before the Court. In this case it cannot be said that the matter is relevant to an issue currently before this Court, and accordingly, in terms of the rules, it cannot be said that an order is necessary, no matter how desirable it may be for the further disposal of Ms Neele's claim if jurisdiction exists, or to assist Ms Neele in determining whether the application should proceed at all. The position would be otherwise if the rule was that discovery might be ordered where the Court considered this desirable.

[14] Reliance is also placed on s 10 of the Judicature Amendment Act 1972. By sub-section 1 of that section a conference may be called for the purpose, inter alia, of ensuring that an application or intended application for review may be determined in a convenient and expeditious manner. At any such conference a Judge may give certain directions including a direction requiring any party to make discovery of documents.

[15] The question is whether this expands on the rules and enables discovery to be directed in a situation like this, where discovery may avoid the necessity for continued litigation. Section 10 may be read as directed to the efficient and adequate dispatch of the case by hearing, but I do not think that the power to direct discovery, enables a departure from the general principles of discovery in the rules.

[16] Accordingly the direction sought is refused. Costs are reserved. However, unless it can be shown that the production of accounts is oppressive, which would seem unlikely, this is not a case where I would allow costs against Ms Neele were this matter considered in isolation.

[17] I note however that, presumably, the Family Court order for discovery has not been stayed. The mere fact of an appeal does not operate as a stay and Ms Neale may seek enforcement in the Family Court, this appeal notwithstanding.

[18] Ms Ullrich sought a timetabling order to bring this matter to an early hearing. The intention to raise that matter had not been indicated in the application. Counsel should confer to settle upon a timetable. There seems no reason why this should not go to an early hearing.

Duri J