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**NOT
RECOMMENDED**

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CP 419/97

BETWEEN	ROBERT ARTHUR FELTON AND NORAH ISOBEL FELTON First Plaintiff
AND	JAMES GERRARD FLYNN AND MARION EDITH MAE FLYNN Second Plaintiff
AND	DAVID RONALD LEESE Third Plaintiff
AND	COLIN GRAEME SMITH AND CHRISTINA DOROTHY SMITH Fourth Plaintiff
AND	ALAN RAYMOND TUCKER AND MARION JUNE TUCKER Fifth Plaintiff
AND	CLEAR-SHIELD CHRISTCHURCH LIMITED Sixth Plaintiff
AND	THE OFFICIAL ASSIGNEE Seventh Plaintiff
AND	NOEL RICHARD JOHNSON First Defendant
AND	ANNETTE FRANCES JOHNSON Second Defendant

Hearing: 14 April 2003

Appearances: D Smith for plaintiffs - including seventh plaintiff
AF Johnson, second defendant (in person)

Judgment: 16 April 2003

JUDGMENT OF MASTER FAIRE

[1] This hearing was scheduled to conclude the matters raised in my interim judgment of 28 November 2002. This judgment must accordingly be read with my judgment of 28 November 2002. Mrs Johnson appeared for herself. I had previously granted her solicitor, Mr Kemp, leave to withdraw.

[2] There are four general areas that require orders or directions on.

[3] The first relates to the documents which are identified in paragraphs 13(a) and 35 of my interim judgment. As this issue was discussed, it was apparent that an appropriate course might well be that the plaintiffs make application for non-party discovery. That course eventually had some appeal to both Mr Smith and Mrs Johnson. I therefore am not required to make a ruling on these documents at this time. I simply record that Mr Smith will provide Mrs Johnson with a draft application for discovery by non-parties by 17 April 2003. Mrs Johnson is to provide Mr Smith with advice as to whether she opposes all or part of the applications by 8 May 2003. This matter will be dealt with at the conclusion of this judgment. In the event that some further direction in relation to the matter is required, my final direction at the end of this judgment will reserve leave so that can take place.

[4] The second general area involves documents which were conveniently summarised in Mr Smith's letter to Mrs Johnson of 7 April 2003. For convenience sake, they are referred to both by reference to the paragraph in which some comment on them is made in Mrs Johnson's affidavit of 28 March 2003 and as to the bracketed part as to the document number in the privileged section of Mrs Johnson's verified lists of documents.

[5] My ruling on this section then relates to the following documents:

7(P2), 8(P3), 9(P4), 10(P5), 11(P6), 17(P12), 18(P13), 19(P14), 28(P23), 30(P25), 32(P27), 33(P28), 34(P29), 37(P32), 38(P33), 43(P38), 62(P5), 63(P6), 68(P11), 70(P13).

All of these documents are addressed to both the first and second defendant. When I apply *Kupe Group Limited v Auckland City Council* 2 PRNZ 60, 63 and the judgment referred to by Barker J which I have referred to in paragraph 27 of my interim judgment of 6 December 2002, it is clear that no privilege can attach to these documents having regard to the joint interest exception. This is because the documents are, in each case, addressed to both the first and second defendant. The Official Assignee, as seventh plaintiff, is the trustee of the first defendant and is therefore entitled to obtain the privileged information. The order that will be made at the conclusion of this judgment will direct production of the documents to Mr Smith on behalf of the seventh plaintiff only and on the understanding that the documents are not to be made available to other plaintiffs.

[6] Before leaving this topic, there were several further documents upon which comment must be made. The first is the document referred to in paragraph 25 of Mrs Johson's affidavit, which is document P20. This letter is in fact addressed to the first defendant. The joint interest exception therefore applies to it. Similarly, there will be a direction that this document be disclosed to the seventh plaintiff only.

[7] The document referred to in paragraph 29 of Mrs Johnson's affidavit and which is covered by P24 in her list is a letter written by Mr Johnson to the family solicitors. That letter, likewise, is covered by the joint interest exception and must be disclosed to the seventh plaintiff. Accordingly, an order to that effect will occur at the end of this judgment.

[8] The document referred to in paragraph 34 of Mrs Johnson's affidavit as document P29 is a copy of the document which is referred to in paragraph 5 of this judgment as 10(P5). Accordingly, for the same reason, there will be an order for its production to the seventh plaintiff.

[9] Mr Smith did not pursue the request in respect of a document referred to in paragraph 46 of Mrs Johnson's affidavit, that being document P41. For that reason, no order is required.

[10] The next document relates to the document referred to in paragraph 72 of Mrs Johnson's affidavit. That document is described as P15. I have viewed this document. It does not contain legal advice to Mrs Johnson. As that was the ground advanced for privilege, there will be a direction that it be discovered.

[11] The next document is that covered by paragraph 73 of Mrs Johnson's affidavit and is the document described as P16. That document is like P15. It does not contain legal advice to Mrs Johnson and, accordingly, I direct that there is no grounds for claiming legal professional privilege. There will be an order that it be produced.

[12] The third general area where production was sought relates to documents which Mrs Johnson has described as not in the folder. She explained that certain documents were uplifted from her solicitors. She has been unable to locate these documents in any of the files that have been provided to her. Based on that position it would be pointless of me to order that she produce something which, clearly on her sworn testimony, she is unable to do. For that reason, no order will be made in respect of the documents described in

paragraph 12(P7), paragraph 23(P18), paragraph 28(P23), paragraph 31(P26),
paragraph 64(P7)

of Mrs Johnson's affidavit of 28 March 2003. I record that Mrs Johnson has been informed, however, that should she locate any of these documents she should notify Mr Smith that they have been located so that Mr Smith can take whatever action he deems appropriate. Because I have had to conclude this part of the application in this way, the orders made at the end of the judgment reserve leave to make further application in respect of the documents just identified.

[13] The next group of documents relate to correspondence between solicitors. The first relates to the document described in Mrs Johnson's affidavit at paragraph 14 and is document P9. This document was made available to me. On my sighting it I noted that it provided information to Mr Paterson of Rudd Watts who had been instructed to give Mrs Johnson advice. On my reading of the document I could not

see how Mr Johnson could demand to see the document. The document therefore was prepared for the purposes of giving legal advice. It is not caught by the joint interest exception. For that reason there will be no order for its production.

[14] The next document relates to the document referred to in paragraph 15 of Mrs Johnson's affidavit and as document P10. This document was one that seemed to me to convey advice to the family solicitor by the solicitor instructed by Mrs Johnson. When I considered its contents I reached the conclusion that Mr Johnson could not demand to see the letter from the family solicitors because it was clearly written for the benefit of his wife. It does contain advice. The conclusion I reach is that it is subject to legal professional privilege and is not covered by the joint interest exception. Accordingly, there will be no order for its disclosure.

[15] The next document relates to the document referred to in paragraph 16 of Mrs Johnson's affidavit as P11. This fits within the same description as that which I have set out for P10 and for the same reason should not be produced. Accordingly there will be no order for its production.

[16] The next letter is that which is covered by paragraph 21 of Mrs Johnson's affidavit and is document P16. It is a letter written by the family solicitors to the solicitor now acting for Mrs Johnson. The conclusion I reached on reading the letter was that it was written on behalf of Mr Johnson as well as Mrs Johnson and, for that reason, even if there is an element of advice in it, it is a letter which is subject to the joint interest exception and therefore should be produced. For that reason there will be an order for its production.

[17] The next document relates to the document referred to in paragraph 24 of Mrs Johnson's affidavit as P19. This document fits within the same general description as the last document and, for the same reason, there will be an order for its production.

[18] Although I shall set out the orders made in this judgment, I require a draft order to be filed by the plaintiffs' counsel so that I can have the benefit of counsel's

full description of the documents to be produced. In that way there should be no doubt as to precisely what document is required to be produced.

[19] It is appropriate that I also record that I discussed the implementation of the orders. Mrs Johnson saw no difficulty with production of the documents which I order to be produced within 7 days of service of the order on her. When time is allowed for the approval of the draft order, the service of it on Mrs Johnson and the production for inspection of the documents by Mr Smith, it is apparent that this file can again be reviewed by the Court shortly after 16 May 2003.

Orders and directions

[20] I order that:

- a) the second defendant produce for inspection on behalf of the seventh plaintiff within 7 days of the service of a sealed copy of this order on her the following documents:

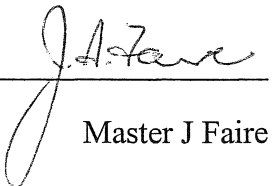
7(P2), 8(P3), 9(P4), 10(P5), 11(P6), 17(P12), 18(P13), 19(P14), 28(P23), 30(P25), 32(P27), 33(P28), 34(P29), 37(P32), 38(P33), 43(P38), 62(P5), 63(P6), 68(P11), 70(P13), 25(P20), 29(P24), 34(P29), 72(P15), 73(P16), 24(P19), 21(16).

- b) Counsel for the plaintiff shall serve on the second defendant by 17 April 2003 a draft application for non-party discovery. The second defendant shall advise plaintiffs' counsel by 8 May 2003 if the application is opposed. In the event that the application is opposed, I reserve leave to the plaintiffs to have the issues raised concerning the documents referred to in paragraphs 13(a) and 35 of my interim judgment reconsidered;
- c) Leave is reserved to the plaintiffs to relist this application in respect of documents P7, P18, P23 and P26 should circumstances change;

- d) A 40 minute evaluation conference shall be held at 10.50am on 28 May 2003. Its purpose shall be to ensure that there are no loose ends relating to production, to give appropriate directions in relation to the non-party discovery matters if they are required or, alternatively, if there are no outstanding interlocutory matters, to give setting down directions. Counsel for the plaintiffs and Mrs Johnson are required to file memoranda covering these specific matters three working days before the conference.

Costs

[21] Mr Smith invited me to reserve costs. Having regard to the exercise that has had to be carried out in this case it does seem to me that that approach at this stage is the correct one. For that reason costs are reserved.


Master J Faire

Delivered at ~~4.30~~ am/pm on 16.4.2003

Solicitors: Cairns Slane, PO Box 6849, Auckland for plaintiffs – including seventh plaintiff
A Johnson, PO Box 81 096, Whenuapai, second defendant