IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2008-404-000224

BETWEEN	MAVIS JILLIAN HIRSTICH Appellant
AND	SELWYN KUPA KAHOTEA Respondent
AND	NGAIRE DAWN BRITTAIN Non-Party Respondent

Hearing: 3 March 2008

Appearances: Ms Hirstich in person
Mr Kahotea in person
Ms Brittain in person

Judgment: 3 March 2008

(ORAL) JUDGMENT OF ANDREWS J

Parties: M J Hirstich, PO Box 75-930, Manurewa Auckland
S K Kahotea, 104A Great North Road, Whangarei
N B Brittain, 104A Great North Road, Whangarei

[1] The appellant, Ms Hirstich, has filed an application for a departure order under s 104 of the Child Support Act 1991. I understand that the substantive hearing of that application is set down for the Family Court next Monday, 10 March 2008.

[2] I am advised that the respondent, Mr Kahotea, has also made an application for a departure order but that application has been struck out.

[3] Ms Hirstich applied to Family Court for orders for discovery against Mr Kahotea. On 16 July 2007, Judge Adams made orders for discovery. Discovery was to be completed by 30 July 2007. On 24 July 2007 Mr Kahotea filed an affidavit in support of compliance with the discovery order. Ms Hirstich considered that he had not fully complied with the discovery orders and filed an application for an enforcement order against Mr Kahotea.

[4] On 21 September 2007 Ms Hirstich applied for an order that Mr Kahotea's partner, Ms Brittain, give discovery as a non-party.

[5] Judge Adams issued a reserved judgment on those applications on 10 December 2007 following a defended hearing held on 3 December 2007.

[6] Ms Hirstich now appeals against Judge Adams' judgment. In particular, she argued that:

a) Mr Kahotea had not fully complied with the discovery orders made on 16 July 2007;

b) In his judgment on 10 December 2007 the Judge in fact modified the original orders to the effect that she then received less, by way of discovery, than under the original order;

c) In dealing with her application for enforcement the Judge had not properly applied r 237 of the Family Courts Rules; and

d) The Judge was wrong not to award her costs.

The original discovery order

[7] The order made on 16 July 2007 against Mr Kahotea was as follows:

> (i) Within 14 days from today Mr Kahotea should file an affidavit or affidavits which provide the following information
>
> (a) The information relating to the entire tax years ending 31 March 2005, 2006 and 2007.
>
> (b) His tax returns for 2006 and 2007 should be provided.
>
> (c) His 2005 income position should be described with as much specificity as he can muster. I do not require the preparation of a notional tax return for that year but information that will satisfactorily explain to the Court what his financial fortunes were in that year.
>
> (d) An asset and liability statement to describe the position throughout those three tax years. A convenient approach would be to describe his assets and liabilities at the beginning of those three years and as at the end of each of those three years and to describe or note any significant changes.
>
> (e) To describe the creation of the Ngatai Trust, what its assets are, and have been, comprised of; what its current position is and Mr Kahotea's comments about the value of the items held (apparently family home and one-quarter shareholding in Grahamtown Holdings Limited).
>
> (f) The tax return for Grahamtown Holdings Limited and annual accounts for the years ending 31 March 2006 and 31 March 2007.
>
> (g) A general description of Breeze Bay Limited as indicated earlier in the decision.

[8] In response Mr Kahotea filed an affidavit dated 24 July 2007. He exhibited:

a) His personal tax returns for 2005, 2006 and 2007.

b) A document setting out the asset and liability for himself as at 1 April 2004, 31 March 2005, 1 April 2005, 31 March 2006, 1 April 2006, 31 March 2007 and 1 April 2007, the Ngatai Trust as at 31 March 2006,

1 April 2006, 31 March 2007 and 1 April 2007, and Breeze Bay Limited as at 1 April 2006, 31 March 2007 and 1 April 2007.

c) Financial statements for Grahamtown Holdings Limited for the year ended 31 March 2006 and draft financial statements for the company for the year ended 31 March 2007.

The 10 December 2007 judgment

[9] The Judge noted Ms Hirstich's argument that Mr Kahotea had not sufficiently complied with categories (a), (e), (f) and (g) of the discovery orders made on 16 July 2007. He found there was sufficient compliance with order (a) in the tax returns exhibited to Mr Kahotea's affidavit of 24 July 2007.

[10] Turning to order (e) the Judge noted that in his affidavit of 24 July 2007, Mr Kahotea had listed the assets of the Ngatai Trust as comprising the property at 104A Great North Road, Kamo and a bank account. Mr Kahotea had said that the Trust had no shares in Grahamtown. The Judge held that the affidavit was deficient in that Mr Kahotea had not "disclosed comprehensively the assets of Ngatai Trust". He ordered Mr Kahotea to file a further affidavit by 21 December 2007 stating precisely what the assets of the Ngatai Trust comprised, as at 1 July 2007 and at present. Shares in Grahamtown were to be specified.

[11] Order (f) had required the tax returns for Grahamtown and annual accounts for that company for the years ended 31 March 2006 and 31 March 2007. In the absence of tax returns the Judge was satisfied that the financial statements to 31 March 2006 and draft accounts to 31 March 2007 were sufficient but ordered that the finalised accounts to 31 March 2007, if completed, were to be provided prior to the substantive hearing.

[12] Order (g) related to Breeze Bay. The Judge had been told, in oral submissions, that Mr Kahotea had no right over that company's assets. The Judge required an affidavit to be filed confirming that.

[13] "Save for clarification" as to the Ngatai Trust and Breeze Bay, the Judge held that Mr Kahotea had provided "almost sufficient" compliance with the discovery order. The Judge was not persuaded that it would be a just response to grant an order sought by Ms Hirstich, striking out Mr Kahotea's defence to her application for discovery.

[14] Following that judgment Mr Kahotea swore an affidavit, dated 20 December 2007, in which he listed the assets and liabilities of the Ngatai Trust. He confirmed that the Trust owned 50% of the shares in Grahamtown, which he valued as worth nothing.

[15] On the same day Ms Brittain swore an affidavit confirming that Mr Kahotea was not a shareholder in Breeze Bay and did not, in her view, have any legal or beneficial in Breeze Bay or its assets.

Discovery orders against Mr Kahotea – discussion

[16] Although the Judge specified two particular matters to be clarified (the assets and liabilities of the Ngatai Trust and as to any interest Mr Kahotea had in Breeze Bay), he was satisfied that there was "almost sufficient compliance" with the discovery order.

[17] However, Ms Hirstich argued that in the 20 December 2007 judgment the Judge in fact modified the original discovery order. In particular, she said, the judgment dispensed with the requirement in the discovery order that Mr Kahotea describe the creation of the Ngatai Trust and set out its assets prior to 31 March 2006. Further, she argued that the Judge dispensed with the requirement that Mr Kahotea provide tax returns for Grahamtown for the years ending 31 March 2006 and 2007.

[18] With respect to the Ngatai Trust, the Judge gave no reason for not requiring Mr Kahotea to give discovery of documents relating to the creation of the Trust and its assets and liabilities prior to 31 March 2006. It is not clear to me whether this was inadvertent, or deliberate. Ms Hirstich submitted that the documents she sought

were relevant and necessary, at least in part because of what she referred to as a persistent history of non-disclosure by Mr Kahotea. Her accounting advice was, she said, that the documents were necessary in order for the Court to have a full picture of Mr Kahotea's financial position.

[19] For his part Mr Kahotea acknowledged that there is a Deed of Trust for the Ngatai Trust and various resolutions from the time of its creation, and that these could come under the description of documents as to the creation of the Trust. However, he was not prepared to disclose the deed, or any documents surrounding the creation of the Trust on the basis that they contain information as to beneficiaries not members of the family to which these proceedings relate, and were therefore not relevant.

[20] In my view documents as to the formation of the Trust may be relevant to the matters to be determined. However, I find myself unable to decide that. In the light of Ms Hirstich's insistence as to the relevance of the documents and Mr Kahotea's reluctance in any event to disclose them, I feel the only proper course is to refer the matter of documents relating to the creation of the Trust back to the Family Court Judge for further consideration. It may be that the Judge deliberately did not require production of such documents, or it may be it was inadvertent. Either way it is a matter that can only be clarified by the Judge.

[21] I turn then to the Grahamtown documents. It is clear from para [5] of the 10 December 2007 judgment that the Judge was aware that the tax returns had not been provided. However, in the absence of tax returns he regarded the financial statements as being sufficient.

[22] Again, on the basis of her Accountant's advice, Ms Hirstich submitted that it was necessary to have discovery of the tax returns. She submitted that these would give verification of what was in the financial statements.

[23] Mr Kahotea's submission on this point was that the financial statements to 31 March 2007 have still not been completed. The tax return for Grahamtown to 31 March 2006 had been completed and could be provided.

[24] In all the circumstances I am satisfied that it is appropriate that Mr Kahotea provide a copy of Grahamtown's tax return for the year ended 31 March 2006. That is to be provided to Ms Hirstich by facsimile (09) 267-0210 by 5pm on Wednesday, 5 March 2008. Further than that, Mr Kahotea cannot provide what does not exist.

Enforcement order

[25] Ms Hirstich also appealed against the Judge's decision in relation to her application for an enforcement order under r 237 of the Family Courts Rules 2002. She submitted that an enforcement order was appropriate, indeed necessary, in the light of Mr Kahotea's history of non-compliance with disclosure requirements. She referred me to the judgment of Giles J in *Butler v Li*[1], where the Judge made a strong statement to the effect that Court Orders must be complied with.

[26] One difficulty with Ms Hirstich's application is that what she sought was an order that Mr Kahotea's opposition to her application for orders for discovery be struck out. However, at the time she made that application the Judge had already (by his judgment of 16 July 2007) ruled on Mr Kahotea's discovery obligation, thus rendering his opposition to it effectively spent. Ms Hirstich submitted, before me today, that she did not seek an order that Mr Kahotea's opposition to her application for a departure order, should be struck out.

[27] Somewhat unsurprisingly, the Judge regarded Ms Hirstich's application as being one seeking an order striking out Mr Kahotea's defence to the departure order application. He was not prepared to make an order to that effect and I would not have been persuaded that that conclusion was not open to him.

Orders against Ms Brittain

[28] By an application dated 21 September 2007, Ms Hirstich applied for discovery orders against Ms Brittain, Mr Kahotea's partner. The orders related to the Ngatai Trust, Grahamtown, and Breeze Bay.

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[1] *Butler v Li* (1997) 12 PRNZ 23

[29] Judge Adams noted, at para [10] of the 10 December 2007 judgment, that orders were sought against Ms Brittain because Ms Hirstich considered that Mr Kahotea had not provided sufficient information. In the light of his conclusions as to Mr Kahotea's compliance, he declined to make any order against Ms Brittain.

[30] In any event, I note that Ms Brittain has filed an affidavit in relation to Breeze Bay, and the Ngatai Trust's shareholding in Grahamtown was covered in Mr Kahotea's affidavit of 20 December 2007.

[31] Ms Hirstich appealed against the Judge's refusal to make an order that Ms Brittain provide an affidavit with respect to the Ngatai Trust. I do not accept her submission that Ms Brittain should have been required to file an affidavit. I am satisfied, as was the Judge, that no useful purpose would be served in requiring Ms Brittain to provide identical information to that sought from Mr Kahotea.

Appeal as to costs

[32] The final aspect of Ms Hirstich's appeal related to the Judge's decision as to costs. At para [14] of his judgment of 10 December 0207 the Judge said that, provided Mr Kahotea provided the information required in the judgment by 21 December 2007 he would make no order for costs.

[33] Ms Hirstich submitted that she was entitled to an award of costs, but in submissions today made clear that the focus of her appeal was in fact on the question of discovery, not costs.

[34] The matter of costs is always one for the discretion of the trial Judge and it is, in any case, difficult for a Judge on appeal to assess the nature of the hearing and to decide whether or not a Judge's decision as to costs was appropriate. In the present case I am unable to see anything in the judgment that persuades me that the Judge was wrong in the exercise of his discretion as to costs, and in the circumstances that aspect of Ms Hirstich's appeal is dismissed.

Result

[35] In respect of Ms Hirstich's appeal in relation to Mr Kahotea's discovery as to the Ngatai Trust, the matter is referred back to Judge Adams for further consideration. I trust that that may be able to be dealt with at the hearing on 10 March 2008.

[36] With respect to Grahamtown, as noted earlier, Mr Kahotea is to provide, by facsimile, a copy of the company's tax returns to 31 March 2006.

[37] With respect to Ms Brittain, Ms Hirstich's appeal is dismissed.

[38] In relation to costs on this appeal, in a sense both sides have, to some extent, succeeded and failed and accordingly I do not consider an award of costs is appropriate.

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Andrews J