

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

**CIV 2007-011-52**

BETWEEN

BETTY VERA MAW  
Plaintiff

AND

JARVIS JAMES MAW  
First Defendant

AND

JARVIS JAMES MAW AND RUSSELL  
TURNER TRUSTEES LIMITED AS  
TRUSTEES OF THE MAW FAMILY  
TRUST AND CHARIS ANNE MAW  
AND RUSSELL TURNER TRUSTEES  
LIMITED AS TRUSTEES OF THE  
PENDELL FAMILY TRUST  
Second Defendants

Hearing: 4 June 2009

Appearances: R C Mark for Plaintiff  
A Malone for First Defendant

Judgment: 4 June 2009

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**ORAL JUDGMENT OF ASSOCIATE JUDGE ROBINSON**

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Solicitors: R C Mark, Barrister, PO Box 172, Kerikeri  
Webb Ross, Private Bag 9012, Whangarei  
M B Dodds, Barrister, PO Box 199, Kerikeri

[1] The first defendant brings this application for the following orders:

- a) Granting leave to bring the application.
- b) Ordering the plaintiff to make particular discovery of the diary belonging to the late Arthur James Maw for the year beginning 1 January 1995; and
- c) Ordering the plaintiff to produce for inspection document 105 listed in the plaintiff's list of documents sworn on 26 March 2008.

[2] The proceedings are brought by the plaintiff for recovery of the sum of \$140,000 she says she advanced by way of loan to the defendant in March 2004. The plaintiff's claim that the advance by way of loan is denied by the defendant who claims the advance was a gift. The plaintiff is the mother of the defendant. Because the proceedings have been set down for hearing it is necessary for the defendant to obtain leave to bring this application for discovery and disclosure.

[3] Counsel for the plaintiff acknowledged that if there were grounds for requiring discovery and disclosure of the diaries referred to in the application then leave should be granted but submitted that the diaries were not discoverable because there were no entries in those diaries that were relevant to these proceedings.

[4] In support of the application it is submitted by the first defendant that the plaintiff has referred to entries in her diaries in affidavits that she has filed to support her contention that the monies which the first defendant admits he received were advanced by way of loan and not gift. The first defendant is concerned that the plaintiff may have been selective in disclosing entries favourable to her case whilst refusing to disclose entries that favoured the defendant's case. So far as the diary of the late Arthur James Maw is concerned, the first defendant contends the diaries to be relevant because there may be entries referring to a desire by the late Arthur James Maw for the plaintiff to assist the first defendant by making gifts to him. It is therefore submitted that applying the very wide test referred to in *Compagnie*

*Financiere et Commercial de Pacific v Peruvian Guano Company* {1882} 11 QBD 55. The entries in the diaries are relevant because they could contain entries showing an intention by either the plaintiff or the late Arthur James Maw to gift money to the first defendant.

[5] In meeting the concern of the plaintiff that the first defendant may use the diary for his personal interest and not with regard to meeting the plaintiff's claim in these proceedings counsel for the first defendant would accept a condition that initially the two diaries be disclosed only to her and should not be released to the first defendant. In this respect, it must be borne in mind that the plaintiff and the late Arthur James Maw are the parents of the first defendant. Counsel advise that there are extensive entries in the diaries containing personal reflections of both the plaintiff and the late Arthur James Maw which include references to all members of their family. The diaries apparently were for the personal use of the party making entries therein and the parties obviously did not make those entries believing that the first defendant and other members of the family would have access to those entries.

[6] Consequently, there must be some concern that wider publication of personal entries in diaries kept by the parents could adversely effect the relationship between the plaintiff and the defendant and possibly the defendant and other members of the family referred to in the diaries. It is indeed unfortunate that the family relationship has deteriorated to such an extent that it is necessary for the Court to have to resolve this dispute. In resolving the dispute the Court must be sensitive to the ongoing needs of the family and to the hope that the unfortunate rift that has developed will somehow be resolved. At this stage however I must determine this application by applying the law and not be influenced by any desire to avoid worsening the obvious rift that has developed between the plaintiff and the first defendant.

[7] Clearly, if there is any reference in the diaries relating to an intention to benefit the first defendant by way of gift, then such entry must be relevant. On the other hand entries which as I understand it relate to estimation of the wealth of the plaintiff and her late husband, personal reflections on members of the family and recipes retained relating to preparation of food cannot have any relevance and must

not be discovered. I say must not be discovered because discovery of irrelevant information only adds to the costs with no benefit to the parties or the Court.

[8] Pursuant to the High Court Rules that now apply and did apply when these proceedings were commenced, a solicitor acting for a party must to the best of the solicitor's ability ensure that the party understands the party's obligations under an order for discovery and faithfully fulfils those obligations. Counsel for the plaintiff points out that the solicitor in this case has complied with that rule. Furthermore, counsel advises that on his personal inspection of the diaries there is no reference to any intention to make advances by way of gift to the first defendant.

[9] It is also emphasised on behalf of the plaintiff that discovery of the diary listed under number 105 of the plaintiff's lists of documents was by mistake and that the diary concerned has no material that is relevant to these proceedings. Counsel for the plaintiff did not contend that information in the diary that was not relevant to these proceedings had to be discovered. What counsel was seeking to do was to check counsel for the defendant's statement that the diaries contained no relevant information.

[10] In the circumstances, I can see no justification for going behind the statement made by counsel for the plaintiff to the effect that the diaries concerned contain no relevant information. It must be borne in mind that the advance in this case is alleged to have been made by way of gift by the plaintiff and not the late Arthur James Maw. The advance was made in March 2004. The diaries relate to the years 1995 and 1996.

[11] The plaintiff has been advised of her obligations . Counsel for the plaintiff has confirmed not only that he has given that advice but that he has checked the diaries to see that there is no information contained therein that is relevant. In those circumstances, I am satisfied that the plaintiff has provided full and proper disclosure and that there is no justification for the Court making further orders which in effect will enable counsel for the first defendant to check the correctness of counsel for the

plaintiff's submission that there is nothing in the diaries that is relevant to these proceedings. Consequently, I conclude that this application cannot succeed and must be dismissed. In the circumstances therefore the application will be dismissed. There will be an order that the first defendant pay the plaintiff's costs assessed on a 2B basis with disbursements as fixed by the registrar.

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**Associate Judge Robinson**