

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

CIV 2008-404-005910

BETWEEN NEIL CLARENCE JACK
First Plaintiff

AND NEIL CLARENCE JACK AND ALAN
ROBERT JACK AS TRUSTEES OF THE
JACK FAMILY TRUST
Second Plaintiffs

AND SHIRLEY-ANNE CARVER
First Defendant

AND GARRY DESMOND STEWART
Second Defendant

AND SHIRLEY-ANNE CARVER, GARRY
DESMOND STEWART AND HAYDN
ASH AS TRUSTEES OF THE
WHITIORA TRUST
Third Defendants

Hearing: 25 June 2009

Counsel: S P Bryers for plaintiffs
P D Sills for defendants

Judgment: 25 June 2009

ORAL JUDGMENT OF ASSOCIATE JUDGE ABBOTT

Solicitors:
Richard S Wood, PO Box 6422, Auckland for plaintiffs
Hornabrook Macdonald, PO Box 91 845 Auckland for defendants

[1] This matter is before the Court today for the defendants to be examined as to their means (the defendant Haydn Ash as to the assets of The Whitiora Trust only) pursuant to an order made by Woodhouse J on 14 April 2009.

[2] The order was made on the basis of non-compliance with an order made on 26 November 2008 that the defendants provide an affidavit as to their assets (again, in respect of Mr Ash, I take that to be limited to his interest as trustee). They were required to provide that affidavit within seven working days.

[3] At the commencement of the hearing I dealt with a change of representation for the defendants. I made an order that Ed Johnston & Co had ceased to be solicitors on the record, and granted leave to withdraw to their former counsel, Mr Perese. Notice of change of representation for the defendants was filed yesterday. Hornabrook Macdonald are now acting and Mr P D Sills has been retained as counsel.

[4] Mr Sills appears today to seek an adjournment of this hearing. He was instructed only yesterday. He seeks an opportunity to become fully briefed on the matter, and particularly to get an understanding as to how today's examination impacts on other aspects of the case.

[5] Mr Bryers, who has been acting for the plaintiffs throughout, opposes the application. He says that there has been an absence of any satisfactory explanation of the failure to comply with the original order, that there is no particular prejudice to the defendants if the examination proceeds, but that there is prejudice to the plaintiffs if the examination does not proceed.

[6] It is necessary to traverse the history of this matter briefly to put this application in to context.

Background

[7] This proceeding was commenced by the plaintiffs in September 2008. It included an application for summary judgment in respect of four causes of action. The total sum claimed was in excess of \$3,500,000.

[8] After the proceeding was commenced, the plaintiffs learnt of matters that caused them to believe that the defendants might be dissipating or dealing with their assets in such a way as to protect them from the plaintiffs' claim. They applied ex parte on 25 November 2008 for Mareva injunctions. Orders were made, as sought, on 26 November 2008. As well as orders restraining removal of assets from the jurisdiction or disposing of them beyond the sum sought in the plaintiffs' claim (identified as \$3,781,190.40), the defendants were ordered to disclose, by way of affidavit to be provided within seven working days of service, of the existence, nature, value and whereabouts of assets including (but not limited to):

- (a) Details of all bank accounts and other accounts held in the Defendants' names or on their behalf, including the balances of those accounts;
- (b) All shares held or traded by any share registries in the Defendants' names; and
- (c) All other assets either real or personal, in which the Defendants have a beneficial or legal interest, and all assets over which the Defendants have power of disposition or control.

[9] On 18 December 2008, the defendants applied to discharge the Mareva injunctions. The essential ground appears to be that the defendants had failed to discharge their obligation of material disclosure, although a number of grounds were advanced. The memorandum filed in support of that application is of some relevance for today's purposes. In paragraph 4 of that memorandum, counsel advised the Court:

The defendants are currently taking reasonable steps to prepare their affidavits in respect to their assets and financial positions etc but require more time to complete their affidavits and seek a stay of the Court's order pending the hearing of their application to discharge and/or vary the Mareva Order.

[10] The application for discharge came before the Court on 22 December 2008. The first and second defendants appeared that day in person and advised that they wished to withdraw instructions from the solicitors and counsel then representing them. The application was adjourned for further call at the same time as the plaintiffs' application for summary judgment at the end of January 2009.

[11] Immediately after the call on 22 December 2008, the plaintiffs applied for an order enforcing the order made on 26 November 2008 that the defendants provide an affidavit as to their assets. In that application they sought an order that the defendants attend this Court and be orally examined as to their income and expenditure and assets and liabilities (with the proviso already mentioned as to Mr Ash's examination) and to produce documents relating to these matters.

[12] All three applications were eventually given a hearing date of 24 March 2009. By that time, the defendants had instructed Ed Johnston & Co. and were represented by Mr Perese. Woodhouse J gave a reserved judgment on all three applications on 14 April 2009. By that time the plaintiffs had limited their application for summary judgment to the 2nd, 3rd and 4th causes of action (accepting that there was a dispute of fact in respect of the first cause of action). Woodhouse J entered summary judgment for the plaintiffs against the defendants on these three causes of action, dismissed the application to vary or discharge the Mareva injunctions, and ordered the present examination.

[13] The defendants have appealed Woodhouse J's judgment. Although I do not have a copy of the appeal before me, I understand that it is in respect of all of the judgment. Again of particular relevance for today, the defendants have not applied for stay of the judgment pending appeal.

[14] I have already referred to the fact that the defendants in the last day or so have changed their representation. Their former solicitors have filed an affidavit in support of an order that they cease to be the solicitors on the record, stating that legal fees are outstanding (some in excess of three months) and they wish to take steps to recover those outstanding fees.

The application for adjournment

[15] One can have sympathy for Mr Sills, who is faced with a significant legal proceeding and expected to provide advice at very short notice. However, it is difficult to see how the defendants will be prejudiced by providing financial information that is likely to be required from them in this proceeding in any event in the course of discovery and to be explored further at trial. Proceeding with the examination today will not affect their rights of appeal, or their grounds for continuing the defence of the remaining cause of action. Mr Sills, understandably, says that he cannot be confident of this but has been unable to point me to any particular way in which provision of this financial information could be prejudicial to the defendants.

[16] I am also somewhat sceptical about the way in which the defendants appear to change their legal representation. Mr Bryers informs me that Hornabrook Macdonald will be the third set of solicitors since this proceeding was issued. I have already referred to the fact that a former counsel advised the Court in December that the affidavit as to assets would be provided. One cannot help but draw an inference that that was unpalatable to the defendants and led to the change of solicitor. However, perhaps even more significantly, the defendants have had their opportunity to challenge the order, and were successful only in part, in that the order for examination was only one aspect of the enforcement that the plaintiffs sought.

[17] I also have to have regard to the potential prejudice to the plaintiffs. Mr Bryers says that there are continuing concerns about the defendants' actions in respect of their assets. He says that the information is required promptly to assist the plaintiffs in deciding whether some variation is required to the Mareva orders. He refers to a number of dealings with the property subject to the Mareva injunction since it was obtained. These are matters he wished to explore in the examination today. He referred me to dealings on three properties. I accept Mr Sills' point that the dealing in respect of one of them appears to have preceded the Mareva injunction. The dealing on another one would appear to be related to the defendants' former solicitors' claim for outstanding costs. However, there does appear to have

been a dealing with respect to a third property with further security having been provided to financiers in respect of it.

[18] In the course of his submissions this morning, Mr Sills suggested that it might be possible for the defendants to deal with the matter before the Court today by now providing the affidavit that was ordered last November. He has taken instructions, and informs me that the defendants are prepared to provide the affidavits as ordered by the end of next week. That will also permit Mr Sills some opportunity to obtain an understanding of the case, and to advise the defendants on the nature and extent of the information that they should be providing. In effect, it allows them to make good their breach of the Court orders to date.

[19] Mr Bryers opposes that course. He makes the valid point that the parties are now here, and there is really nothing to prevent the examination. He is concerned that further issues could arise as to the completeness of the affidavits.

[20] Weighing the opposing interests, I think the fairest course is to allow the defendants the opportunity to provide the affidavit or affidavits by adjourning this examination and allowing for it to be resumed if the information provided in the affidavits is incomplete or unclear. In forming this view, I also take into account that the defendants have said that they will complete these affidavits by the end of next week, and that there is a case management conference scheduled for 9 July 2009 at which Mr Bryers can raise any issues that he has over the disclosure that has been made in the affidavits, and can seek a new date for the examination, if needed.

[21] Mr Bryers points out that the order for enforcement made by Woodhouse J on 14 April 2009 extended the original Mareva orders by allowing examination in respect of the defendants' income and expenditure, and assets and liabilities generally (again, limiting Mr Asher's disclosure to The Whitiora Trust), and requiring the defendants to produce books or other documents relating to all of these matters. The order read:

- (a) Each of the Defendants, namely Shirley Anne Carver of 112 Wisely Road, Hobsonville, Auckland, Businesswoman, Garry Desmond Stewart of 112 Wisely Road, Hobsonville, Auckland, Chiropractor and Haydn Ash of Auckland, Chartered Accountant, are ordered to

attend before the High Court at Auckland at 10.00am on Thursday the 25th day of June 2009 in order:

- (i) To be orally examined as to their income and expenditure, assets and liabilities, provided that the examination of Haydn Ash shall be limited to the income and expenditure, assets and liabilities of the Whitiara Trust; and
- (ii) To produce all books or other documents in the Defendants' power or possession relating to their income and expenditure, assets and liabilities as aforesaid.

[22] In addition, Mr Bryers asks that all three deponents provide an affidavit, and that the affidavits include an explanation as to any dealings since the issue of this proceeding and provide further explanation of the use of the proceeds of sale of a Paeroa property (identified in paragraph 3(a) of an affidavit of the first defendant sworn on 6 March 2009) by identifying the property acquired.

[23] Mr Sills accepts that the affidavits should cover these matters.

Decision

[24] I grant the defendants' application for adjournment on the following conditions:

- a) The defendants are to file and serve affidavits as to their assets (either jointly or severally) disclosing the matters set out in paragraph 2 of the order of 26 November 2008 (set out in paragraph [8] above) but also extending to their income and expenditure and assets and liabilities as contemplated by order 5(a) of the judgment of 14 April 2009 (set out in paragraph [21] above). By way of clarification, I would expect the affidavits to annex relevant documents as identified in paragraph 5(a)(ii) of the judgment of 14 April 2009. The affidavits are also to extend to explanations and details of any dealings in assets since the issue of this proceeding, and to identify and provide details of the funding of the property purchased with the proceeds of sale of the Paeroa property.

- b) The affidavit or affidavits are to be filed and served by 5:00pm on 3 July 2009, time being of the essence.
- c) This examination is adjourned to 11:45 am on 9 July 2009 for further directions.

Costs

[25] The plaintiffs seek costs. They are in receipt of legal aid. Mr Bryers makes the point that the adjournment is sought purely as a consequence of the delays by the defendants. He also notes that he wrote to former counsel for the defendants last week inviting the defendants to volunteer the information, but received no response. As a consequence the plaintiffs have incurred costs in preparing for and appearing at Court today.

[26] Mr Sills invites the Court to reserve costs. He suggests that it is evident from the withdrawal of the former solicitors that there have been issues of communication. He says that the hearing has been of some use in the making of orders and providing the path forward.

[27] I do not accept the submission that the defendants' position up to this point is simply a consequence of poor communication with their former solicitors and counsel. They have known of their obligations to provide this information since at least December of last year. There has clearly been a reluctance until now to provide the information. I am in no doubt that today's examination could have been avoided by the defendants making the proposal that Mr Sills has done on their behalf at this hearing.

[28] I make an order that the defendants pay the plaintiffs their costs of preparation for and attendance at this hearing on a scale 2B basis.

Associate Judge Abbott