

IN THE DISTRICT COURT  
AT WELLINGTON

CIV 2005-085-596

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BETWEEN JOHNSTON LAWRENCE  
Plaintiff/Counterclaim Second Defendant

AND KIMBERLY BIRKENFELD  
Defendant/Counterclaim Plaintiff

AND ROGER CHAPMAN  
Counterclaim First Defendant

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Interlocutory Application Without Notice under DCR 2009 r 3.52.5  
*for an Order for Modification of Directions for Compliance  
with the United Nations Convention on the Rights of Persons with Disabilities*

April 17, 2010

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Judicial Officer: Judge Thomas

DISTRICT COURT
21 APR 2010
WELLINGTON

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**Kimberly Birkenfeld**  
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To Registrar of the District Court, Wellington Registry

**This document notifies you that -**

- 1 The applicant, Kimberly Birkenfeld, urgently moves the Court for orders (a) and (b) for reasonable modification of directions to comply with the United Nations Convention on the Rights of Persons with Disabilities:
  - (a) An order for immediate suspension of the 21 April deadline, the 5 May deadline, and the 21 May hearing timetables given in the April order of the Honourable Judge Thomas pending determination of order (b) below, and
  - (b) An order for immediate stay of District Court CIV 2005 085 596 proceedings pending final disposal of High Court CIV 2004 485 1657 proceedings.
- 1.1 This application is made without notice for the reason that a person suffering from brain injury expects reasonable privacy about their deficits. They should not be ordered to share information about medical vulnerabilities with others.
- 2 The grounds on which the orders are sought are as follows:

**The United Nations Convention on the Rights of Persons with Disabilities and the Human Rights Act 1993**

- 2.1 The United Nations Convention on the Rights of Persons with Disabilities, Article 13(1) provides: *State Parties shall ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and preliminary stages.*
- 2.2 This UN Convention, meant to highlight the needs of persons with disabilities, is already in effect through New Zealand domestic law through the Human Rights Act 1993 s 21(1)(h) and s 44(1)(b).
- 2.3 Disabled persons have right not to suffer substantial disadvantage based on disability during participation in hearing matters under the *United Nations Convention on the Rights of*

*Persons with Disabilities* Articles 13(1) and 17, and the Human Rights Act 1993 s 21(1)(h), s 44(1)(b) taking into reasonable expectations under s 52.

- 2.4 Article 5 of the *United Nations Convention on the Rights of Persons with Disabilities* Equality and non-discrimination: (2) *State Parties shall prohibit all discrimination on the basis of disability and guarantee to persons with disabilities equal and effective legal protection against discrimination on all grounds.*

#### **Circumstances of this proceeding**

- 2.5 Based on the circumstances of this proceeding and on the disabilities of a person suffering from traumatic brain injury, modification of the timetable order of Thomas J is necessary to ensure effective access to justice to a person with disabilities.

#### **Birkenfeld is a Person with Disabilities**

- 2.6 On August 8, 2002, Applicant Birkenfeld suffered severe brain injury as result of a catastrophic power v sailboat accident, cause of the original action complained of.
- 2.7 She continues to suffer from disabilities associated with brain injury, including narcolepsy and deficits.

#### **Birkenfeld is not a New Zealand Citizen**

- 2.8 A citizen of the United States, Birkenfeld is resident of Miami, Florida.

#### **To Ensure Effective Access to Justice for Persons with Disabilities on an Equal Basis with Others, Orders (a) and (b) are Necessary: It is not Reasonable that a Person Suffering the Disabilities of Brain Injury Including Narcolepsy be Ordered to Conduct two Complex International Proceedings Simultaneously**

- 2.9 Bates 1: Kimberly Birkenfeld suffered an open depressed skull fracture on August 8, 2002. Trauma to the head resulted in contra-coup brain injury.

- 2.10 Bates 2: High Court CIV 2004 485 1657 (“High Court 2004”) commenced in August 2004.
- 2.11 District Court CIV 2005 085 596 (“District Court 2005”) commenced in May 2005.
- 2.12 Bates 18-23 and Bates 24-33 District Court: 2 (Summary judgment) claim and counterclaim judgments given in 2006 and 2007 establish that District Court 2005 sprang from the primary High Court 2004 proceeding.
- 2.13 Bates 22: At [20] in the judgment of 3 March 2006 of Tuohy J:  
I consider it requires the full context of an oral hearing and consideration of all the written communications between those three parties on those issues at the relevant time. In other words, to use the words of Elias CJ, *“The ultimate determination turns on a judgment only able to properly arrived at after a full hearing of the evidence.”*
- 2.14 For more than 5 years of international litigation, Birkenfeld has simultaneously been Plaintiff and Defendant/Counterclaim Plaintiff in two pending proceedings in the Courts of New Zealand for matters growing in complexity and volume.

#### **Growing Complexity and Volume of Two Pending Proceedings: HC 2004 and DC 2005**

- 2.15 Bates 42: In October 2008, Birkenfeld was handling over 3,000 pages of discovery in District Court 2005.
- 2.16 Bates 34-40: On 5 November 2008, Birkenfeld appeared in the Court of Appeal of New Zealand on issues including human rights, while handling a 3-volume Case on Appeal of nearly 500 pages. Since that time, amount of documents has continued to grow.
- 2.17 Bates 49-56: Throughout the first half of 2009, she was fully engaged in the Supreme Court on the question of law of whether there is required to be a right to reasons for judicial decisions in New Zealand, based on New Zealand’s international obligations under Article 14(1) of the *International Covenant on Civil and Political Rights*.

- 2.18 On 1 July 2009, Supreme Court judgment was delivered and Birkenfeld began researching post-hearing procedures in the Supreme Court Act 2003 and Supreme Court Rules 2004.
- 2.19 For the second half of 2009, she was fully engaged in High Court 2004 matters.
- 2.20 Bates 47-61: After filing *Notice of Appeal* in the Court of Appeal on 16 December 2009, an Amended Grounds of Appeal was filed on December 21, 2009. An interlocutory matter arose in the Supreme Court.
- 2.21 Birkenfeld's *Application for Leave to Bring Appeal in the Supreme Court of New Zealand* was received in Wellington in February 2010. She later learned her Application for Leave to Bring Appeal to the Supreme Court was not accepted for filing until more than a month later than expected.
- 2.22 Bates 64-75: Three days ago on April 14, Birkenfeld filed written submissions in the Supreme Court on the question of law on proposed appeal:

*Whether the regulations made in High Court (Access to Court Documents) Amendment Rules 2009 and Court of Appeal (Access to Court Documents) Rules 2009 (both which provide no right to general public access to documents on a court file in a pending proceeding even upon payment of a prescribed fee) are in violation of the right to a fair and public hearing provision of the ICCPR given effect in New Zealand by the New Zealand Bill of Rights Act 1990.*

- 2.23 As Birkenfeld's *Notice of Appeal* in the Court of Appeal was filed 16 December 2009, she has until 16 June to file case on appeal in a document intensive matter.
- 2.24 Birkenfeld states in her April 17, 2010 affidavit:

*One of my deficits from traumatic brain injury is that I do not have the ability to manage two complex projects at the same time. I find that due to brain injury, I do not have the ability to progress matters in District Court 2005 085 596*

*before final disposal of High Court 2004 485 1657 matters in the Court of Appeal or Supreme Court. In order that I may have equal access to justice in the two pending proceedings, it is necessary that the secondary District Court proceedings be stayed forthwith.*

2.25 From the April 17, 2010 Affidavit of Dorothy Bobbitt at [8]:

*From late 2008, Ms. Birkenfeld has informed me that working on two proceedings at the same time has become overwhelming for her for reason of the brain injury she suffered in 2002. It is apparent she has limitations in ability to focus on more than one proceeding at a time, in addition to her observable physical disabilities.*

### **Reasonable Modification of Directions Requested for Equal Access to Justice**

2.26 To reasonably compensate for her disability of severe brain injury in these circumstances - on basis of the right of equal access to justice, Birkenfeld seeks reasonable modification of directions stated in (a) and (b) above. Else,

- District Court Wellington will deny US Citizen Birkenfeld a disabled persons' fundamental right of equal access to justice guaranteed by the UN Convention on the Rights of Persons with Disabilities.

3 This Application is made in reliance on the District Courts Rules 2009 r 3.52.5; the Human Rights Act 1993 s 21(1)(h) and s 44(1)(b); the United Nations Convention on the Rights of Persons with Disabilities Article 12(3), Article 13(1), and Article 17; the April 17, 2010 Affidavit of Kimberly Birkenfeld; the April 17, 2010 Affidavit of Dorothy Bobbitt, and the principle of equity.

Date: April 17, 2010

Signature: \_\_\_\_\_

Kimberly Birkenfeld, Defendant/Counterclaim Plaintiff

\* The reason for absence of a lawyer's certificate is that I am not legally represented.