

32/78

## FAMILY COURT OF AUSTRALIA at MELBOURNE

*In the Marriage of KITCHENER (AM and J)*

Asche SJ

6 April 1978 — [1978] 34 FLR 448

**FAMILY LAW – CONTEMPT – FAILURE TO COMPLY WITH UNDERTAKING – CONSENT ORDERS MADE IN COURT – ONE INVOLVED AN UNDERTAKING BY THE WIFE TO ENSURE THAT ANOTHER WOMAN BE MOVED OUT OF THE WIFE'S RESIDENCE WITHIN A CERTAIN TIME – UNDERTAKING NOT COMPLIED WITH – POWERS OF CONTEMPT – TEST TO BE APPLIED – WHETHER WIFE IN BREACH OF THE UNDERTAKING – APPROPRIATE PENALTY: FAMILY LAW ACT 1975, SS33, 35, 70, 108 and 114.**

**HELD:** Wife in breach of the undertaking.

1. Accepting that matters against the wife must be proved beyond reasonable doubt, the Court must find if it finds that there has been a breach of the undertakings, that that breach has been both wilful and contumacious.

2. For most of the period from November 1977 to March 1978, the wife was well aware that she was in breach of her undertaking and was contumacious in the sense that she preferred to be in breach of that undertaking than to evict Miss L.

3. Whilst the wife may not be a bright woman, she knew what she was doing in breaching her undertaking. She persisted in breaking her promise to the Court, knowing she was doing it and knowing that there was no real excuse for her to continue to have Miss L. on the premises and, in that sense, she was in breach of the undertaking.

4. Order that the wife has committed a contempt of Court in that she has broken her undertaking to the Court given on the 8th day of September 1977 and further order that, if the wife is willing to do so, she enter into a recognisance to be of good behaviour for one year and to obey all orders of the Court and carry out faithfully any undertakings entered into by her with the Court. If such recognisance is kept, the application to be discharged after the expiration of one year. Upon breach of this recognisance, the wife to be brought before this Court and dealt with for such breach.

**ASCHE J:** (*ex tempore*) In this case there have been applications by the parties relating to custody of the children of the marriage. It is not necessary on this application to recite the facts out of which those applications arose, or the stage at which those applications have reached.

This is an application that the wife be dealt with for contempt of court, arising out of an undertaking which she gave on the hearing of the application before Mr Justice Strauss on the 8th day of September 1977. On that day, certain orders were made by consent, including an order that the wife have custody of the two children. Those orders were made upon the undertaking of the wife and the relevant words are:

'And upon the undertaking of the wife to the Court that she will take all reasonable steps to ensure that Miss L. will move out of her present residence within two weeks of this date, and that she will not bring Miss L. in contact with the children of the marriage.'

There seems little conflict on the evidence that just over the two weeks period provided in that undertaking, Miss L. did move out of the premises which she had previously been sharing with the wife. The evidence established that she left on the 23rd day of September 1977. If all that was alleged against the wife, was that she was in breach of her undertaking by a period of one day, I do not think that these proceedings would be before the Court. However, the evidence is equally one way that on the 23rd day of November 1977, Miss L. returned to live with the wife and the children and remained until 5th day of March 1978, when by reason of events which then occurred, she was charged with an assault and although she seems to have returned to the property on the next day, the evidence would appear that after that she has not remained with the wife.

As a result of these events, the husband on the 22nd day of March 1978, filed two applications, the first being an application for custody of the children which is not relevant to the proceedings presently before me; but the other application was that the wife be punished for contempt in that she did breach her undertaking made to the Family Court at Melbourne on the 8th day of September 1977 'by' — and there follow three specific instances of oral allegations in which it is alleged that the wife was in breach of the undertaking. Those allegations are stated with sufficient particularity to allow the wife to appreciate the specific nature of the matters raised against her, and it is not sought by Mr Bonnici, who appears for the wife, and I consider he properly did not seek to suggest that they did not comply with the necessity to allow the respondent in a contempt case the opportunity of knowing specifically what is being alleged against her.

The three particulars can be summarised as follows:

Firstly, that the wife allowed Miss L. to remain in the same home as the one in which she and the children were living from the 22nd day of September 1977 until March 1978 or part of that period. Secondly, failing to take any reasonable steps, or any steps, to ensure that Miss L. moved out of 55 Albert Street, Windsor within two weeks of the 8th day of September 1977; and Thirdly, bringing Miss L. into contact with the children on diverse occasions between the 28th day of September 1977 and the 5th day of March 1978.

As I say, I do not consider that any complaint can be raised to the application which states with proper particularity the allegations against the wife.

The husband has filed certain affidavits and called evidence, to which I will in a moment refer, to support the allegations made in that application. I have ruled at the end of the husband's case that a *prima facie* case existed against the Respondent and it now remains for me to consider whether, on the whole, of the evidence, the case has been made out — and made out beyond reasonable doubt — because I accept that that is the test for matters of contempt of this nature, and I repeat what I have previously said in the case of *Davis & Davis* (1976) FLC 75,206 at page 75,207. I say there:

'... a person charged with contempt cannot forecast the decision. And since the proceedings are of a quasi-criminal nature, he is entitled to the classic protections of an accused in a criminal trial. One of those protections I have already noted; he must be heard on his own behalf if he so desires. There are others. He must be informed with reasonable particularity of the matters alleged against him. He must have the right to cross-examine witnesses called against him and to call witnesses in his own case. He is entitled to be legally represented. He commences with the presumption of innocence which he does not lose until the case against him is proved beyond reasonable doubt'.

I accept those tests. Some preliminary matter has arisen because I called Counsels' attention to the question as to how the Court acted in breaches of undertakings. In my view, the Court does not act in these cases under section 70 which relates to failing to comply with orders; section 108 which relates to contempt in the face of the Court when exercising that jurisdiction or for wilful disobedience of any decree made by the Court; or section 114 which relates to failure to comply with an injunction or order.

I am aware of the fact that it has been stated by authorities that breach of an undertaking has the same force as an injunction, and for that I cite *Halsbury* 4th edition volume 9 under the heading 'Contempt of Court' para 75 and the cases there cited. However, that is not the same as saying that a person has 'failed to comply with an injunction or order', as stated by section 114. In my view, the power must be found in other parts of the Act, and I am satisfied that it is found certainly in section 33, and it may be also in section 35.

Section 33 confers jurisdiction upon the Court in respect of matters not otherwise within the jurisdiction expressed by this Act that are associated with matters in which the jurisdiction of the Court is invoked or that arise in proceedings before the Court. In my view, when an undertaking is given, the Court has the power — and the power is conferred pursuant to section 33 — to act if an undertaking is broken, 'to the extent that the Constitution permits'. I read that qualification as meaning that if an undertaking is given which is outside the constitutional limits of this Court's jurisdiction, then the Court could not act to enforce compliance with that undertaking or punish for breach of it. In this case, I have no doubt that the undertaking given was within the

ambit of powers which are within the constitutional powers of this court; indeed they are plainly undertakings in relation to the welfare of children and arise out of proceedings clearly within the definition of matrimonial cause in section 4. Undertakings are given every day in this Court and they are a useful exercise of the powers of the Court in many cases where parties do not wish to be bound by decrees or orders. Indeed, the giving of undertakings is generally a matter *inter partes*, and undertakings are not usually imposed by the Court, save in the sense that the Court accepts the undertakings.

To that extent they prove a useful adjunct to the discussions between the parties and have been productive of many settlements where resentment might be felt if an order was imposed by the Court.

Undertakings, to my knowledge, and to the knowledge of any practitioner who practised in the matrimonial jurisdiction under the *Matrimonial Causes Act*, were equally frequently given under that Act, and to my knowledge, there has never been any suggestion that those undertakings were not within the jurisdiction of the Court to take. I refer also to *Shulsinger* 2 Fam Law Reports page 11,611 and page 11,617.

I am inclined to think that a similar or another source of power stems from section 35 which provides that subject to this and any other Act, the Family Court has the same power to punish contempts of its power and authority as is possessed by the High Court in respect of contempts of the High Court. I say this with some hesitation only because the Full Court in *Sahari* 2 Fam Law Reports at 11,126 and 11,138 seems to be of the opinion that those powers arise where jurisdiction is being exercised by the Family Court under a law other than the *Family Law Act*. If, however, the power relates to this sort of situation, then section 24 of the *Judiciary Act* provides that the High Court shall have the same power to punish for contempt of its powers and authority as is possessed at the commencement of this Act, by the Supreme Court of Judicature in England. There is no doubt that power to punish for breach of an undertaking is part of the powers given to the Supreme Court of Judicature and I refer merely to *Dent v Dent* (1962) Probate 187 as an instance of the exercise of that power; and by the operation of section 35 it therefore would appear that the Court has the power to punish for breaches of an undertaking. However, as I have said, it does seem to me that section 33 is sufficiently worded to give those powers.

Accepting that matters against the wife must be proved beyond reasonable doubt, I think I must also accept the test propounded by Mr Bonnici that I must find, if I find that there has been a breach of the undertakings, that that breach has been both wilful and contumacious. If that is a very strict test, and if it is said that the test should not be as strict as that, I am content to place my views on the basis that if I am wrong in considering that it is an appropriate test, it is at least erring on the side of the Respondent and if one is to be wrong, I think one should be wrong on that side rather than on the other, but my own view is that that is the proper test.

I am satisfied that for most of the period from November 1977 to March 1978, the wife was well aware that she was in breach of her undertaking and was contumacious in the sense that she preferred to be in breach of that undertaking than to evict Miss L.

My observation of Mrs Kitchener is that she is not a bright woman, but I am quite satisfied that she knew what she was doing in breaching her undertaking. I am quite satisfied that she persisted in breaking her promise to the Court, knowing she was doing it and knowing that there was no real excuse for her to continue to have Miss L on the premises and, in that sense, I am satisfied that she was in breach of the undertaking.

I can accept that if Miss L. had arrived for a short time that it may have been difficult for Mrs Kitchener to have arranged for her to leave immediately but I cannot accept that it was so difficult to get Miss L. to leave for the whole of the period between November 1977 and March 1978.

Finally, there is the fact that the parties were living in a lesbian relationship and that to neighbours they even appeared as husband and wife. That Mrs Kitchener made statements of relating to her love for Miss L. and was prepared to forgive Miss Longhurst for the various occasions in which assaults occurred upon her. I consider that it would be going beyond the bounds of common sense to accept in that case that the behaviour of Mrs Kitchener was not both wilful and contumacious and I find it to be so.

Insofar as the application itself is concerned, I am prepared to consider that there should be no finding adverse to the wife or no consideration adverse to her taken in relation to the second part of the application which complained that the wife did not within a fortnight arrange for Miss Longhurst's removal. She may have been one day out of time in that, but I do not think that anything turns on that. But I am satisfied that the other two parts of the application relate to the time Miss L. returned and have been made out.

Consequently, I find that there has been a breach of the undertaking, and I will consider the question of penalty. (Discussion ensued re penalty). The order I will make is that I find that the wife has committed a contempt of Court in that she has broken her undertaking to the Court given on the 8th day of September 1977. I order that, if the wife is willing to do so, she enter into a recognisance to be of good behaviour for one year and to obey all orders of the Court and carry out faithfully any undertakings entered into by her with the Court. If such recognisance is kept, the application to be discharged after the expiration of one year. Upon breach of this recognisance, the wife to be brought before this Court and dealt with for such breach.

---