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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2002-404-003634 (FORMERLY M 847 SW01)

UNDER The Trustee Act 1956

IN THE MATTER OF the JOHN BISHOP FAMILY TRUST, the
JOSETTE BISHOP FAMILY TRUST and
the JOHN and JOSETTE BISHOP
FAMILY TRUST

BETWEEN M C BISHOP
Plaintiff

AND J M S BISHOP, G J ELLOTT AND V P
ELLOTT
First Defendant

AND J A ANDERSEN AND N A ANDERSEN
Second Defendant

Hearing: October 2003

Appearances: P Twist for plaintiff
R Smith for first named first defendants
P Cullinane for second defendants

Judgment: 4 December 2003

**JUDGMENT OF O'REGAN J
SECOND STRIKE OUT APPLICATION**

Solicitors

*Moody & Gulley, PO Box 33051, Takapuna for plaintiff
Brookfields, PO Box 240, Auckland for first defendant
D Cutting & Co, Epsom for second defendants*

Counsel

*P Twist, PO Box 2301, Auckland for plaintiff
P Cullinane, PO Box 55101, Mission Bay for second defendant*

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[1] This judgment deals with applications by the first and second defendants to strike out the plaintiff's claims against them, and an application by the second defendant for summary judgment. It is the second time I have dealt with strike out applications in relation to this case.

[2] I dealt with the earlier applications in a judgment dated 21 February 2003. In that judgment I declined the applications to strike out the plaintiff's claim, but noted considerable inadequacies in the statement of claim and directed the plaintiff to file an amended statement of claim. The plaintiff did so, which led to these renewed applications to strike out the claim, and to the second defendants' new application for summary judgment.

Facts

[3] In the following paragraphs I will summarise the factual background. This summary is a modified version of that which appeared in my 21 February 2003 judgment.

[4] The John Bishop Family Trust and the Josette Bishop Family Trust (the mirror trusts) were set up in June 1996. Although the assets of the Bishops appeared to be readily identifiable and simple to administer, the trust deeds were very complex documents, each running to some 25 pages of very close type.

[5] The settlor of the John Bishop Family Trust was John Bishop (now deceased), the husband of Josette Bishop and the father of Michèle Bishop. The trustees were John and Josette Bishop and there was a "protector", the solicitor involved with the preparation of the documentation, Mr Holmes. The primary beneficiaries were Josette Bishop, Michèle Bishop, Janet Andersen and Josephine Wilson, and any children, grandchildren or remoter issue of the named beneficiaries. There was provision for secondary beneficiaries to be appointed by the trustees. John Bishop was not a beneficiary of this trust.

[6] On the same day the trust was created, John Bishop signed a “memorandum of wishes” addressed to the trustees of the John Bishop Family Trust. This recorded John Bishop’s wish that the income and capital of the trust should be dealt with as he recommended from time to time, and in the absence of recommendation, should be added to capital – this was to apply during his lifetime. After his death, he wished for the capital to be dealt with as Josette Bishop recommended from time to time. After the lifetime of John and Josette Bishop he wished that, among other things, the half share of the property at 78 Felton Mathew Avenue, owned by the John Bishop Family Trust and the library situated at the family home, owned by the trust and occupied by John and Josette Bishop, be distributed to Janet Andersen, and if she was not living, to her husband Niels Andersen. He also wished that \$10,000 be distributed to Josephine Wilson, the balance of the trust fund be distributed to Michèle Bishop, and Michèle Bishop and Mr Holmes then be appointed as trustees of the trust.

[7] The Josette Bishop Family Trust is essentially identical, except that the settlor is Josette Bishop and John Bishop is a beneficiary but Josette Bishop is not. The memorandum of wishes signed by Josette Bishop was not in evidence, but I was led to understand it was in the same form as that signed by John Bishop (with the obvious exception that the references to John Bishop were to Josette Bishop and vice versa in the Josette Bishop memorandum of wishes).

[8] In August 1996, the 78 Felton Mathew Avenue property was transferred to the trustees of the mirror trusts as tenants in common in equal shares.

[9] The plaintiff pleads in the statement of claim that after the transfer of the Felton Mathew Avenue property to the trustees of the mirror trusts, John Bishop became so affected by Alzheimer’s disease that he became unfit and lacking in capacity to form his duties and exercise his powers as trustee of the John Bishop Family Trust and the Josette Bishop Family Trust. This is an important pleading which is denied by both defendants. It appears to be accepted that John Bishop suffered from Alzheimer’s, but there is a dispute about the timing and extent of it and its impact on his ability to act as trustee.

[10] In March 2000, John and Josette Bishop, as trustees of the John Bishop Family Trust removed Mr Holmes as protector and appointed an Auckland solicitor, Mr Lynch, as protector. The same thing happened in relation to the Josette Bishop Family Trust.

[11] In April 2000, John and Josette Bishop, as trustees of the John Bishop Family Trust and also as trustees of the Josette Bishop Family Trust, transferred the property at 78 Felton Mathew Avenue to Janet Andersen. This was a distribution to Janet Andersen as beneficiary of each of the John Bishop Family Trust and the Josette Bishop Family Trust. Janet Andersen thereupon waived any further claim or entitlement of any benefit from either mirror trust.

[12] On 30 March 2001, Mr Lynch as protector under the John Bishop Family Trust removed John Bishop as trustee of that trust and appointed Josette Bishop, Gerald Elliott and Valerie Elliott as trustees. He did the same thing in relation to the Josette Bishop Family Trust. The protector's power to remove John Bishop as trustee arose only if John Bishop had become "mentally incapable" – this is provided for in clause 13(1)(a) of the trust deed.

[13] Immediately after that step was taken, a new trust, the John and Josette Bishop Family Trust, was established. Josette Bishop is the settlor of this trust and Josette Bishop, Gerald Elliott and Valerie Elliott are the trustees. The definition of "beneficiaries" in the trust deed named Josette Bishop, John Bishop, Michèle Bishop, and Josephine Wilson as beneficiaries, and provided that Josette Bishop had power to appoint other beneficiaries.

[14] Clause 5.1 of the trust deed said that the trustees had a power to declare that a person defined as a beneficiary shall cease to be a beneficiary.

[15] Immediately after the creation of the John and Josette Bishop Family Trust, the trustees of the John Bishop Family Trust resolved to wind up that trust and to resettle the entire fund onto the John and Josette Bishop Family Trust. The trustees of the Josette Bishop Family Trust did the same thing. The deeds of resettlement were executed to give effect to that resolution. The effect of this was to change the

position that had applied under the mirror trust by making John Bishop a beneficiary in relation to the assets of the John Bishop Family Trust and Josette Bishop a beneficiary in relation to the assets of the Josette Bishop Family Trust.

[16] On 29 May 2001, the trustees of the John and Josette Bishop Family Trust executed a deed excluding Michèle Bishop from the class of beneficiaries and from any entitlement to any benefit under the John and Josette Bishop Family Trust, as well as the John Bishop Family Trust and the Josette Bishop Family Trust (although the latter two had already been wound up). The deed also excluded Josephine Wilson from the class of beneficiaries. The effect of this was that only Josette and John Bishop remained as named beneficiaries, so the changes brought about by the resettlement took on an additional importance. The trustees did not tell Michèle Bishop of this development so she was unaware she had been excluded as a beneficiary.

[17] In October 2001, John Bishop died.

[18] In May 2002, Michèle Bishop's solicitor sought information relating to the John and Josette Bishop Family Trust. After the third request for information, the solicitors for the trust wrote to Michèle Bishop's lawyer, refusing the request for information on the ground that Michèle Bishop was no longer a beneficiary of either the mirror trusts or the John and Josette Bishop Family Trust, as a result of the deed excluding her. This was the first time either Michèle Bishop or her solicitor had been told she had been excluded as a beneficiary over a year before.

[19] After the hearing of the first strike out application but before I issued my judgment, the plaintiff sought an injunction to prevent the sale of the property at 78 Felton Mathew Avenue by the second defendants. That issue was resolved by consent and the property was sold, subject to a requirement that the proceeds of sale of the property and a neighbouring property, be held until the disposal of these proceedings.

[20] The Ellots have now resigned as trustees. The application to strike out the causes of action against the first defendants has been brought by the first named first defendant, Josette Bishop.

Criteria for strike out

[21] There is no dispute as to the criteria for determining an application to strike out under R 186 of the High Court Rules. Those criteria are:

- a) The application proceeds on the assumption that the facts pleaded in the statement of claim are true, regardless of whether they are admitted or not;
- b) The discretion to strike out is to be exercised sparingly and only in clear cases where the Court is satisfied it has the requisite material before it;
- c) The Court will not exercise its discretion unless the case as pleaded is so clearly untenable the plaintiff cannot possibly succeed;
- d) If a claim depends on a question of law, capable of decision on the material before the Court, the Court should determine the question even though extensive argument may be necessary to resolve it.

[22] I repeat my finding from my earlier judgment, that I do not accept that there is any basis for not following the general rule that the Court assumes that the facts pleaded are true, and that the plaintiff will be able to prove them.

[23] I also state at the outset that I will consider this application on the basis of the statement of claim currently before the Court, which differs in many respects from the statement of claim under consideration in the first strike out application.

First cause of action: breach of fiduciary duty

[24] The first cause of action alleges that the first defendants as trustees of the John Bishop Family Trust, the Josette Bishop Family Trust and the John and Josette Bishop Family Trust, breached their fiduciary duties to the plaintiff in excluding her from the class of beneficiaries, and from any entitlement to any benefit under those trusts. It is alleged that they exercised their powers of exclusion in an arbitrary, capricious and unreasonable manner and for an improper purpose, failed to take into account relevant considerations, failed to consult with the plaintiff and failed to notify her of her exclusion. The plaintiff says this prejudiced her because she will no longer enjoy the rights of a beneficiary under those trusts. She seeks a declaration that the first defendants breached their duties, and an order that she be restored as a beneficiary, as well as an order that new trustees be appointed.

[25] In the alternative the plaintiff pleads that the trustees failed to turn their minds to the question of whether she should be excluded, failed to take into account that she was the only child of the settlors, and her need for support from the trust, failed to take into account the memorandum of wishes prepared by Mr Bishop, and the equivalent document prepared by Mrs Bishop, and failed to consult with her and inform her of the decision.

[26] Counsel for Josette Bishop, Mr Smith, argued that the first cause of action was flawed, and disclosed no reasonable cause of action.

[27] Mr Smith said the trustees had an express power to exclude a beneficiary, and the trust deed provides for the trustees to have a broad and uncontrolled discretion. He said Courts have been traditionally reluctant to interfere with the exercise by trustees of discretionary powers. I accept that is so, but trustees must act impartially and bone fide and must not act arbitrarily or capriciously (*Karl v Director General of Social Welfare* [1994] 3 NZLR 497 at 499, per Eichelbaum CJ, and *Re Londonderry's Settlement* [1965] 2 WLR 229 at 240 per Salmon LJ). In effect, the plaintiff was alleging that Mrs Bishop acted out of spite or corruptly, and the Ellotts, who had just been appointed as trustees, did not take into account relevant matters in relation to the plaintiff.

[28] While the plaintiff will have some evidential mountains to climb in support of her claim that the trustees acted capriciously or out of spite, I do not consider the pleading, as currently drafted, can be said to disclose no reasonable cause of action.

[29] Mr Smith argued that the pleading of failure to take into account the memoranda of wishes was flawed, because such memoranda are for guidance only and do not override the specific terms of the trust. He pointed out that the memoranda of wishes provided only for the situation that would apply after the death of both Mr and Mrs Bishop, a situation which has not yet arisen. I accept that is true, but it can also be said the memoranda of wishes make no sense unless the plaintiff remains as a beneficiary throughout the lives of both Mr and Mrs Bishop. Her removal as a beneficiary frustrates that being achieved. I accept Mr Smith's submission that the trustees are not bound to act in accordance with the memoranda of wishes, and I also accept that those memoranda do not specifically address the current situation. On the facts as disclosed to me, a cause of action based on a failure to comply with those memoranda is not tenable.

[30] Similar comments can be made about other matters which the trustees are said to have failed to consider: the plaintiff's position as only child of the Bishops, the fact that John Bishop left his estate to the John Bishop Family Trust, and the financial and health circumstances of the plaintiff. It is not credible to say the trustees did not consider the plaintiff's position as the Bishops' only child – given that Mrs Bishop was one of the trustees, this must have been well known to the trustees, and considered by them. Whether the trustees gave that factor (or the other two factors referred to above), appropriate weight is not for the Court to decide. A claim which requires the Court to do so is untenable.

[31] There is also a claim based on failure to consult the plaintiff or notify her of her exclusion. Neither failing can impugn the decision to exclude her, and claims based on those failings are also untenable.

[32] I therefore determine that sub paragraphs (c)-(k) of paragraph 31 of the statement of claim should be struck out.

[33] Mr Smith also argued that the plaintiff, as a discretionary beneficiary, had no right to an expectation of receiving anything under the trusts. For this reason, her exclusion meant she suffered no loss. I mentioned in my earlier judgment the need to plead loss, but on further consideration I am satisfied a failure to do so will not be fatal to a claim of this kind. In some circumstances, I accept that a discretionary beneficiary can seek the Court's assistance to ensure compliance with the terms of the trust deed: (*Gartside v Inland Revenue Commissioners* [1968] AC 553 at 617-618 per Lord Wilberforce). It is not necessary for me to make a finding on this point, but I am satisfied that the failure to plead loss does not render the plaintiff's claim untenable.

[34] Mr Smith did not take issue with a number of other aspects of the first cause of action, and I will say no more about them. I am satisfied that the pleading, based on the breach of the memoranda of wishes should be struck out, but in other respects I decline to strike out the first cause of action.

Second and third causes of action: appointment of new protector

[35] The second cause of action relates to the removal of Mr Holmes as protector under the John Bishop Family Trust, and the appointment of Mr Lynch. The plaintiff says the resolution to do this was void and of no effect, because John Bishop lacked capacity to understand the nature and effect of the resolution at the time it was passed.

[36] The third cause of action is in the same terms, except that it relates to the Josette Bishop Family Trust.

[37] I mentioned in my first judgment that this cause of action is reliant on the factual finding that John Bishop suffered incapacity at the relevant time. I noted there was a real dispute about this. I will proceed on the basis the plaintiff can prove this, but she needs to be aware that if she cannot, then there are potentially significant cost implications for her.

[38] Mr Smith first raised the issue of the plaintiff's standing to challenge this action. Even if the action were invalid it would be only voidable at the instance of Josette Bishop. That matter was dealt with at the first strike out application, when I indicated I was not prepared to strike out the claim for that reason. I have not altered my position in the meantime, although I note again there are some significant issues to be determined at trial. Of greater significance is the argument that there is no pleading that the power was exercised in an arbitrary, capricious, unreasonable or spiteful manner, and therefore no basis for a Court to intervene. I am not satisfied that a claim based solely on lack of capacity rather than arbitrary or capricious exercise of a power is untenable. If the plaintiff can prove John Bishop was incapable of understanding the nature and quality of the resolution removing Mr Holmes and appointing Mr Lynch, an argument based on invalidity resulting from lack of capacity, may be available to the plaintiff. I do not believe such an argument can be characterised as untenable.

[39] Mr Smith also argued there was no pleading as to why the appointment of the protector was so significant it should be deemed to be void. Nor was there any pleading of loss. The plaintiff seeks a declaration that the removal of Mr Holmes and the appointment of Mr Lynch is void, and also seeks an inquiry as to damages, and an order for the appointment of new trustees and costs. I accept Mr Smith's argument that the position of the protector seems to be remote from any actions which have affected any legitimate interest which the plaintiff may have. Her argument appears to be based on a desire to impugn subsequent decisions made by the trustees, which did affect her position, because of their dependence on the position of the protector. Again, I am not prepared to find that the plaintiff's claim for that remedy is untenable.

[40] I conclude therefore that Mrs Bishop has not succeeded in establishing that the second and third causes of action are untenable. I therefore decline to strike them out.

Fourth cause of action: undue influence

[41] The fourth cause of action is an allegation by the plaintiff that John Bishop's role in the removal of Mr Holmes and the appointment of Mr Lynch as protector of the John Bishop Family Trust and the Josette Bishop Family Trust and the transfer by way of distribution of the share of each of those trusts in the property at 78 Felton Mathew Avenue to Janet Andersen, were procured by the actual undue influence of Josette Bishop over John Bishop (partially said to have been caused by the Alzheimers disease which the plaintiff says John Bishop suffered from at the relevant time).

[42] Mr Smith argued that this cause of action could not be sustained on the facts. I am not prepared to make a finding to that effect at this stage of the proceeding. It is a matter which needs to be determined at trial.

[43] The difficulty which the plaintiff faces is that she is not the person against whom the undue influence is said to have been exercised. If Josette Bishop did exercise undue influence over John Bishop, that could give rise to a cause of action on the part of the plaintiff only if Josette Bishop breached a duty owed to the plaintiff, when she exercised that undue influence over John Bishop. The plaintiff does not plead any such breach of duty which could be the foundation of an action by the plaintiff as discretionary beneficiary.

[44] In the absence of such a pleading, I believe the claim as currently framed is untenable, and I would be disposed to strike it out. It is possible that the exercise of undue influence by one trustee over the other could amount to a breach of trust if it prevents the unduly influenced trustee from exercising independently his or her judgment in relation to decisions made by the trustee, and that such a breach of trust could form the basis of a claim by the plaintiff. But the plaintiff has already had the benefit of considerable latitude from the Court in the framing of these pleadings. I therefore intend to strike out the fourth cause of action and leave it to the plaintiff to frame a new claim based on breach of trust if, on further research, counsel is satisfied such a claim is tenable.

Fifth cause of action: failure to provide information and documents

[45] The plaintiff sought various documents relating to the financial position of the trusts involved in this litigation, but has not been successful in obtaining the information. In the fifth cause of action she alleges that the failure to provide this information deprives her of a proprietary right in the information.

[46] Mr Smith argued that this is essentially an application for discovery, and that Josette Bishop is happy to provide all relevant documents within her power and possession. I am at a loss to understand why she has not already done so. I repeat what I said in paragraph 34 of my earlier judgment:

However, in the interests of the expeditious conduct of this litigation, the more sensible course may be for the matter to be dealt with by way of discovery. It seems inevitable that information of this nature will require to be discovered and, in order to reduce the cost for everyone involved, the sensible course may be for the first defendant to provide the information by way of discovery before an amended statement of claim is filed, so that this issue can be put to one side.

[47] Once again, I urge Josette Bishop and her counsel to do this so that unnecessary and ultimately futile interlocutory applications about this issue, do not waste the time of the Court. In the meantime, I decline to strike out this cause of action for the same reasons as I declined to strike it out previously.

[48] The recent decision of the Privy Council in *Schmidt v Rosewood Trust Ltd* [2003] 3 All ER 76, makes it clear that a discretionary beneficiary may seek disclosure of trust documents under the Court's inherent jurisdiction to supervise and, if necessary, intervene in the administration of trust (see paragraph 51). However, even if the plaintiff is successful in establishing this information should be disclosed, it will not include information relating to the reasons for the exercise of the discretionary power to exclude her as a beneficiary: *Re Londonderry's Settlement* [1965] Ch 918.

Sixth cause of action: constructive trust

[49] The sixth cause of action is against the second defendants. It is said to be a derivative action brought by the plaintiff on behalf of the John Bishop Family Trust, the Josette Bishop Family Trust and the John and Josette Bishop Family Trust against the second defendants as constructive trustees of the 78 Felton Mathew Avenue property.

[50] The plaintiff says the trustees of these trusts are disabled from suing because of the conflicts of duty and interest, and because there are no other surviving primary beneficiaries apart from Josette Bishop. She submits that the Andersens received the Felton Mathew Avenue property, knowing (or constructively knowing) that John Bishop lacked capacity to understand the nature and effect of the documents making the distribution of the property to them and that Josette Bishop had unduly influenced John Bishop. The plaintiff therefore argues that the Andersens are liable, as if they were constructive trustees, because they received the Felton Mathew Avenue property, knowing the distribution of that property to them was in breach of trust.

[51] The plaintiff's claim to entitlement to bring a derivative action depends on her success in establishing her claims against the first defendant. Even if she does, she will still need to establish that any breach of trust by the first defendants disables them from suing, and will also need to establish that the illegality of which she complains is of sufficient moment to place in jeopardy the trust estate, or her beneficial interest in it (*Manukau City Council and Ors v Lawson and Ors* (High Court Auckland, CP210/SW99 20 December 1999, Paterson J).

[52] On behalf of the plaintiff, Mr Twist relied on an extract from *Lewin on Trusts*, paragraph 43-05, which states that a beneficiary may bring an action in his or her own name on behalf of a trust against a third party. Such action is derivative: the beneficiary stands in the place of the trustees and sues in right of the trust, enforcing duties owed to the trustees rather than to him or herself.

[53] While the plaintiff faces some substantial difficulties in establishing her right to bring a derivative action, I do not consider it appropriate to strike out this claim for that reason. Whether the plaintiff is entitled to bring such an action will need to be determined at trial, after the conduct of the trustees has been the subject of consideration by the Court in the context of the plaintiff's actions against the first defendants.

[54] The plaintiff says the Andersens received the Felton Mathew Avenue property, knowing that its distribution to them was in breach of the trust. The plaintiff pleads that the Andersens had either actual knowledge or constructive knowledge of Mr Bishop's Alzheimer's disease and incapacity, and the transfer of property was procured by undue influence by Josette on John Bishop. If that allegation is capable of proof, it is conceivable that a Court would find that the property was held by the Andersens as if they were constructive trustees. It could not be said the cause of action is untenable, and it would not be appropriate to strike it out.

[55] Mr Cullinane argued that the Court should not accept these allegations may be proved for the purpose of the strike out application, and that they were mere statements of opinion by the plaintiff which were at this stage unsubstantiated and lacking in any inherent credibility. I accept that the allegations appear difficult to prove and I repeat my earlier warning to the plaintiff that she would be unwise to proceed with causes of action which are not capable of proof, but I am not prepared to depart from the normal rule that I should assume allegations are capable of proof in the context of a strike out application. Accordingly, while I have some major misgivings about this cause of action, I do not consider it appropriate to strike it out. Rather, it is time for these matters to be brought to a substantive hearing so the issues between the parties can be resolved once and for all. No doubt the plaintiff will have been warned of the costs applications pursuing causes of action which ultimately fail, where there have been warnings about the potential difficulties of proof.

Seventh cause of action

[56] The seventh cause of action is also a derivative action, and the comments I made on that topic in relation to the sixth cause of action apply equally here.

[57] The plaintiff alleges that the Andersens procured the inclusion of key provisions in the memoranda of wishes by undue influence. Those key provisions record a wish that the share of the John Bishop Family Trust and of the Josette Bishop Family Trust in the Felton Mathew Avenue property be distributed to Mrs Andersen, or failing her, to her husband. This allegation is said to be based on the fact that Mrs Andersen was “the spiritual adviser and counsellor with respect to psychic phenomena, spiritualism, astrology and other ‘new age’ philosophies of both [John and Josette Bishop], who reposed trust and confidence in her”.

[58] It is alleged that Mrs Andersen hypnotised the Bishops in 1995, taking them back to past lives, and during this hypnotism, Josette Bishop regressed to a past life in which she was the mother of Mrs Andersen. It is said Mrs Andersen had complete dominion and control over Josette Bishop’s actions and could make her do anything she wished, and that Mrs Andersen also knew Josette Bishop had undue influence over John Bishop, and procured her to use that influence to induce him to join in transferring the Felton Mathew Avenue property to Mrs Andersen.

[59] It need hardly be said that these allegations will be difficult to prove. I have some misgivings about assuming that they will be capable of proof, given their nature. Mr Cullinane observed, fairly in my view, that as these events are said to have taken place in 1995, it is surprising that these allegations are made at this stage for the first time.

[60] Mr Twist argued that the status of spiritual adviser placed Mrs Andersen in a relationship with Josette Bishop, analogous to that of a religious adviser and disciple. There is some authority which lends support to the plaintiff’s contention: (*Chenelles v Bruce* [1939] 55 TLR 422 and *Lyon v Home* (1868) LR 6 EQ 655).

[61] If the plaintiff is successful in proving there was a relationship of spiritual adviser/disciple, and that this gave a capacity to influence (which as I have said will be difficult), she will also need to prove that this influence has been exercised unduly, and this has brought about the provisions in the memoranda of wishes favouring Mrs Andersen at the expense of the plaintiff. The circumstances leading to the creation of the John Bishop Family Trust and Josette Bishop Family Trust, involving an independent lawyer appointed as protector, does not on its face give any indication of any undue influence on the part of Mrs Andersen being exercised on either of the Bishops. It will be difficult to establish that this undue influence arose at the time of the memoranda of wishes and continued until the actual distribution of the property which occurred some years later. The claim appears to me to be one which has very significant difficulties of proof, but if the matters alleged by the plaintiff are proven, then it cannot be said to be untenable. Accordingly, I will not strike it out, but I repeat my warning about the potential cost implications of pursuing this claim if the plaintiff is unable to prove the fundamental requirements.

Summary judgment

[62] The second defendants also sought summary judgment but that application is made in advance of the filing of a statement of defence, and in any event I am not satisfied that “none of the causes of action in the plaintiff’s statement of claim can succeed”, which is the test which must be applied under R 136(2).

Conclusion

[63] I therefore grant the first named first defendant’s application to strike out the plaintiff’s claims to the following limited extent:

- a) I strike out that part of the first cause of action which is set out in paragraph 31(c)-31(k) (inclusive) of the statement of claim;
- b) I strike out the fourth cause of action.

[64] I decline to strike out the other claims against the first defendants. I also decline the second defendants' application to strike out the plaintiff's claims against the second defendants and their summary judgment application.

Costs

[65] I did not hear from the parties on costs. Memoranda may be filed if necessary. It may well be that reservation of costs at this stage is appropriate.

Next steps

[66] The second defendant has filed an application for security of costs. I will ask the Registrar to arrange a fixture for the hearing of that application. That hearing can be combined with a conference at which timetable orders can be made for the future conduct of the litigation. Counsel should file memoranda at least 48 hours before the conference (preferably a joint memorandum), outlining the steps which need to be taken and the proposed timetable for them. A fixture for the substantive hearing of the matter will be set at that conference. The time has now arrived when interlocutory applications should stop, and the matter proceed to a hearing.

[67] I discussed with counsel during the October hearing whether efforts had been made to settle this matter. I urge counsel to initiate discussions with that in mind, and to make proper efforts to settle, before further unnecessary costs are incurred. If settlement discussions have not progressed matters at the time of the next conference, it may be appropriate to order that a judicial settlement conference takes place.

Delivered at 12 noon on 4 December 2003


M A O'REGAN J

