

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

CIV 2008-419-000876

IN THE MATTER OF the Judicature Amendment Act 1972

AND

IN THE MATTER OF an Application for review of the statutory
powers and decisions of the New Zealand
Qualifications Authority and the Funeral
Services Trust of New Zealand

BETWEEN BEREAVEMENT TRUST INC
Plaintiff

AND THE NEW ZEALAND
QUALIFICATIONS AUTHORITY
First Defendant

AND THE FUNERAL SERVICES TRAINING
TRUST OF NEW ZEALAND
Second Defendant

Hearing: 30 March 2009

Counsel: RH Warren, in person for plaintiff together with JL Witehira by
telephone
LJ Taylor and Ms Verbiesen for first defendant, by telephone
JM Morrison for second defendant by telephone

Judgment: 31 March 2009 at 4:45pm

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on applications for (a) extension of time; and (b) joinder additional parties]

Solicitors: Far North Law, PO Box 462, Kaitaia for plaintiff
New Zealand Qualifications Authority, PO Box 160 Wellington for first defendant
Rainey Collins, PO Box 689, Wellington for second defendant

[1] Two applications were listed before me on 30 March 2009. Both were filed by Mr Murray. The first is an application for an extension of time. The second seeks orders joining Mr Murray personally as a plaintiff in the proceeding and joining the “Crown” as a defendant together with a number of consequential orders.

[2] At the request of counsel I permitted appearances by a number of counsel to be entered by telephone. Counsel’s, and indeed my, concern was to ensure that an efficient and cost-effective approach could be adopted to the resolution of the two applications. In the course of the hearing, an opportunity was given to counsel for the plaintiff to take instructions in private, following my setting out a number of proposals for disposal of the applications. That opportunity was taken.

[3] On 18 December 2008, I gave oral judgment in which I ordered that :

unless an amended statement of claim which complies with the High Court Rules is filed by 12 February 2009, this proceeding shall be struck out.

[4] Without going into the steps that were taken subsequent to that time, it is sufficient to note that no amended statement of claim was filed. The two applications which were listed before me have, as their purpose, the obtaining of orders which permit an appeal from my judgment or a review by myself of the discretion which is vested in me when unless orders are made and, further, a discretion to extend time once an unless order has been made.

[5] The reference in the application to seeking leave to appeal to the Court of Appeal is misconceived. The decision of 18 December 2008 was a decision given in chambers: see *Talyancich v Index Developments Ltd* [1992] 3 NZLR 28. As such, it is a decision which is reviewable only: s 26P Judicature Act 1908. There is no direct right of appeal from my judgment given in chambers to the Court of Appeal: *Nottingham v Registered Securities Ltd (in liq)* 12 PRNZ 625. The above position justifies the dismissal of those parts of the application which seek an extension of time for leave to appeal to the Court of Appeal.

[6] There is, however, a second and important aspect to these applications. That is the request in effect that I extend time for compliance with the unless order. It is

apparent to me that the only real issue between the parties here came down to one of costs. That is because of the following factors:

- a) The current statement of claim is hopelessly inadequate and requires, even if there is an appropriate cause of action, a complete redraft. The drafter will have to start from scratch;
- b) Both counsel for the defendants confirmed to me that there could be raised no estoppel or other bar to a second properly pleaded proceeding being issued by the named plaintiff. That indicates to me that non-compliance with the unless order, in this case, can have no specific prejudice by way of a bar to the issue of any further proceeding if I refuse to extend time;
- c) An instructing solicitor and counsel have been appointed by the plaintiff. The problems which I drew attention to in my judgment of 18 December 2008 arising from representation will not apply in respect of any new proceeding; and
- d) The costs differences between the parties are more imaginary than real. That is because, in terms of r 7.7(8), a party who files an amended pleading must bare all the costs of and occasioned by the original pleading and any application for amendment unless the Court otherwise orders. There is, in this case, no justification for my not applying r 7.7(8). In addition, however, both defendants advised me that if an order dismissing the two applications was made, no application for additional costs covering the filing the notices of opposition to these two applications and the attendance at this mention would be made. That, in itself, is a significant concession and which, when Items 4.11 and 4.13 of the Third Schedule are applied in respect of the two applications, a concession by each defendant in the sum of \$2,400 has been made.

[7] Both defendants, in addition to opposing the two applications, invite me to make an order for costs and disbursements in relation to the proceedings. What is sought is the sum of \$6,690 made up of costs which apply Category 2 Band B based on Items 2, 4.10 and 4.11 of the Third Schedule, and disbursements of \$130. Counsel's calculation is correct in its application of Category 2 Band B to this proceeding and, as I have mentioned, makes no specific claim in respect of the notices of opposition in respect of these two applications or for the appearance. The striking out of the proceeding justifies the making of an order for costs on the proceeding itself.

Conclusions

[8] I conclude an order is justified refusing both applications. In addition, an order for costs in the quantum that I have indicated is justified. The orders are made against the background that it is acknowledged that the strike out order does not, by way of estoppel or any other bar, prevent the filing of a further and properly pleaded statement of claim in a new proceeding should the plaintiff desire to take that action.

Orders

[9] I order:

- a) The application for extension of time is refused;
- b) The application of Tom Bowling Murray to be joined as a plaintiff and for the Crown to be joined as a defendant and various other consequential orders is refused;
- c) The plaintiff shall pay the first defendant's costs in relation to this proceeding, including disbursements in the sum of \$6,690; and
- d) The plaintiff shall pay the second defendant's costs in relation to this

proceeding, including disbursements in the sum of \$6,690.

JA Faire
Associate Judge