IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2006-419-001066

BETWEEN	BRIAN PATRICK GARMONSWAY Plaintiff
AND	RAGLAN DEVELOPMENTS LIMITED First Defendant
AND	ALLAN JOHN CRAFAR, FRANK ROBERT CRAFAR AND ELIZABETH JEAN CRAFAR Second Defendants

Hearing: 18 November 2009

Counsel: IM Hutcheson for plaintiff
MJ Fisher and PM Hardie for second defendants

Judgment: 19 November 2009 at 9:00 am

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on application to strike out parts of amended statement of claim]

Solicitors: The Small Law Firm, PO Box 41 212, Auckland 1346 for plaintiff
Jones Howden, PO Box 1, Matamata for second defendants

[1] The second defendants apply to strike out parts of the document entitled *First amended statement of claim* filed on 7 November 2008.

[2] Mr Hutcheson advised that it was not intended as such that the document entitled *First amended statement of claim* be filed as a pleading. He intended it to be a draft and to be available when an application to join a proposed third and fourth defendants which was heard by Allan J on 16 February 2009.

[3] Mr Hutcheson's position, however, is not consistent with the history of this matter. The original strike out application that was filed by the second defendants was filed on 2 February 2009. It sought the striking out of the statement of claim originally filed on 7 August 2006. An amended application to strike out the amended statement of claim and, in particular, the fifth, sixth and seventh causes of action was filed on 11 February 2009. The fifth, sixth and seventh causes of action are all directed specifically to the second defendants. The amended statement of claim was before the Court when Allan J heard the joinder application on 16 February 2009 and, indeed, was the pleading analysed by him for the purpose of that application.

[4] Allan J dismissed the application to join a third and fourth defendant. He directed a conference to deal with the strike out application and the application for an order restoring the first defendant to the Register of Companies.

[5] A conference was held on 18 August 2009. I issued a minute as follows as a result of that conference.

> [1] This is an amended application. Mr Hutchison says that he may need some time to file a notice of opposition to the amended application. To cover this possibility I extend time for same to be filed and served to 28 August In addition, the plaintiff shall file and serve by 4 September an amended statement of claim. This should not alter the matters relied upon in the strike out application. If, however, counsel perceive a problem, leave is reserved to counsel to file a memorandum calling for an urgent telephone conference so that any appropriate directions can be given.
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> [2] The amended application is set down for a defended fixture at 10:00am on 18 November 2009. The second defendant shall file and serve, by 4 November, a case book of the relevant application, notice of opposition and affidavits and statement of claim and defence, which is indexed and

> paginated, together with submissions in support and copies of all authorities referred to in those submissions.
>
> [3] The plaintiff shall file and serve by 11 November, submissions in opposition, together with copies of all authorities referred to in those submissions.

[6] The current position is:

a) The Court file contains an amended statement of claim filed on 7 November 2008; and

b) The second defendants' application to strike out parts of that application is indeed the application that requires disposal of.

[7] There is no proper reason for delaying the disposal of the strike out application. Although no written submissions were filed by Mr Hutcheson on the plaintiff's behalf, he was given the opportunity to address. I am satisfied that the specific matters that need to be addressed in considering this strike out application have been fairly and squarely placed before the Court, either in the course of the hearing before Allan J or before myself on this strike out application.

[8] The background to this proceeding was comprehensively reviewed in the judgment of Allan J delivered on 5 May 2009. I adopt that summary and therefore do not repeat it.

[9] The application to strike out the pleading is now considered pursuant to r 15.1 of the High Court Rules. The general principles to be applied on a strike out application are well understood. They were confirmed by the Court of Appeal in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267 where the Court said:

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed. (*R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at pp 294-295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314 at pp 316-317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it

> has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at p 45; *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

[10] Applications are determined primarily on the pleadings. The Court may have consideration to affidavits if they disclose that despite what is contained in the pleadings a cause of action that may succeed. If that is so, the Court may instead of striking out the pleading give the plaintiff an opportunity to amend so as to plead a tenable cause of action properly. However,

> There may, of course, be circumstances where the pleading is so bad that the Court should not allow this opportunity and simply strike out the relevant pleading leaving it to the plaintiff to come again if within time and capable of putting his house in order.
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> *Marshall Futures v Marshall* [1992] 1 NZLR 316 at 323.

[11] Because part of the strike out application involves the consideration of limitation defences, it is appropriate that I refer to the approach which the Court adopts when that issue arises.

[12] In *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 at 531 Tipping J referred to the decision of the Court of Appeal in England in *Ronex Properties Ltd v John Laing Construction Ltd & Ors* [1982] 3 All ER 961. In summary he observed:

a) That a defendant could never apply to strike out a claim against him as disclosing no reasonable cause of action merely because he might have a good limitation defence;

b) A defendant who believes he has a good limitation defence may, however, either plead the defence and seek trial of the defence as a preliminary issue, or, in a clear case, apply to strike out the plaintiff's claim on the grounds that it is frivolous, vexatious and an abuse of process;

c) The onus is on the defendant to show that the plaintiff's claim is statute-barred;

d) Evidence can be tendered by affidavit;

e) The Court should be slow to strike out a claim, or cause of action altogether in limine but against that, if the position is quite clear, then the defendant should not be vexed by having to go to full trial when the answer is obvious and inevitable.

[13] I now deal with those parts of the amended statement of claim in respect of which an order striking out is sought.

[14] Paragraphs 36 to 42, which appear under the heading *Fifth cause of action*, is a pleading in tort. It alleges that the second defendants interfered with the contract which the plaintiff alleges that he entered into with the first defendant. That interference was in the form of the execution of the second sale and purchase contract which, it is pleaded, was entered on 23 March 2001.

[15] In his judgment of 5 May 2009 Allan J records that the plaintiff discovered the existence of the second sale and purchase agreement in 2001. Time, for limitation purposes, would clearly run from that time. The cause of action, however, was not pleaded until the filing of the amended statement of claim on 7 November 2008. As a cause of action it was therefore raised outside the limitation period prescribed by s 4 of the Limitation Act 1950.

[16] This, then, is one of those cases where I can conclude that this cause of action can be struck out on the grounds that it is frivolous, vexatious and an abuse of process.

[17] It is appropriate, however, that I record that in Allan J's judgment of 5 May 2009 dealing with the joinder, consideration was given to limitation matters and whether s 28 of the Limitation Act 1950 might have some application in this case. The reasons that His Honour gives, in relation to the third and fourth defendants and which are analysed in [34] to [39] of the judgment apply equally to the second defendant. Therefore, I conclude that the cause of action contained in paragraphs 36 to 42 must be struck out.

[18] The next cause of action which is sought to be struck out is contained in paragraphs 43 to 49 under the general heading *Knowing assistance*. It can be dealt with at the same time as the seventh cause of action which is dealt with in paragraphs 50 to 54, in respect of which a knowing receipt allegation is made.

[19] Both are sought to be struck out relying on the equitable bar by analogy principle. I need not review the authorities because they are comprehensively set out in the judgment of Allan J. I adopt his conclusions. What is plain is that both causes of action fail when the principle of equitable bar by analogy is applied because they are within the category of claims that must be struck out and which are described as frivolous, vexatious and an abuse of process.

[20] The plaintiff had the opportunity to address on these matters fully before Allan J.

[21] The plaintiff is bound by the rulings of Allan J based on the principle contained in *Henderson v Henderson* [1843-60] All ER Rep 378; (1843) 67 ER 313; (1843) 3 Hare 100.

[22] The remaining cause of action in the amended statement of claim relates to the parties who were sought to be joined and are contained in paragraphs 55 through to 68. Counsel were agreed in view of the order declining the application to join, they have no place in the proceeding and should accordingly be struck out.

[23] I took the opportunity in the course of this hearing to discuss with counsel what further matters were required to have this long-standing matter progressed to trial. Mr Fisher indicated that a further application for security for costs would be made. Although that will require leave there seems to me to be no reason why the leave application and the application for security for costs should not be made in the one application. Counsel were agreed on an acceptable timetable for that matter to be filed which I have set out in the orders that are made later in this judgment.

[24] I invited submissions from counsel on the question of costs. There was general agreement that Category 2 Band B was appropriate. Mr Hutcheson invited

me to consider whether it was appropriate, in the circumstances, for the full allowance for preparation for the hearing today to be given to the second defendants. I have reviewed the background and the steps leading up to this fixture and I see no reason to depart from the position that costs should be awarded on a 2B basis both for the hearing of the application as a ½-day hearing and for the preparation on the same basis.

Orders

[25] I order as follows:

a) Paragraphs 36 through to 68 of the amended statement of claim filed on 7 November 2008 are struck out;

b) Any application for leave and for security for costs by the second defendants shall be filed and served by 25 November 2009. Notice of opposition and affidavits in opposition shall be filed and served by 4 December 2009. Any replies shall be filed and served by 10 December 2009. The application shall be listed in the chambers list at 2:15 pm on 14 December 2009. In all other respects Counsel are reminded of the obligation to comply with rr7.19, 7.20, 7.24, 7.25 and 7.26 of the High Court Rules in respect of such application;

c) The plaintiff shall pay the second defendant's costs in relation to this strike out application based on 2B together with disbursements as fixed by the Registrar;

d) Irrespective of the filing of an application for leave and for security for costs this proceeding shall be listed in the chambers list at 2:15 pm on 14 December 2009. If appropriate, the Court will give directions for trial and will explore with counsel what forum is appropriate to

discuss settlement.

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JA Faire
Associate Judge