IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV-2009-419-001053

BETWEEN	ALBERT MCQUEEN Plaintiff
AND	HAMILTON CITY COUNCIL Defendant

Hearing: 10 December 2009

Counsel: Plaintiff in person
P Morgan QC for the defendant

Judgment: 10 December 2009

(ORAL) JUDGMENT OF STEVENS J

Solicitors/Counsel:
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Introduction

[1] This is an application by Albert McQueen (the plaintiff) for an injunction to prevent a mortgagee sale of 17 Lorenzen Bay Road (the property) owned by the plaintiff and his wife. The Hamilton City Council (the defendant) has a charging order over this property to secure the total indebtedness of the plaintiff and his wife to the defendant arising from three earlier proceedings.

[2] The plaintiff has filed a statement of claim (the proceeding) seeking five separate forms of relief, the details of which will be set out later in this judgment. The defendant has applied to have the proceeding struck out or stayed. Counsel for the defendant submitted that the proceeding and the plaintiff's application for an injunction are both misconceived and are merely an attempt by the plaintiff to prevent the defendant from recovering the amounts already determined by previous judgments or orders.

[3] The plaintiff has filed two affidavits dated 7 August and 13 November 2009 respectively. These affidavits refer to much extraneous material purporting to advance various grounds to justify the application for an interim injunction. Much of the material that has been placed before the Court by the plaintiff is extremely difficult to follow and irrelevant.

[4] In summary, the plaintiff seems to be asserting that the judgments and orders that the defendant obtained against the plaintiff in various courts, and the judgment against his former wife, Mrs McQueen (who is not a party to the proceeding) were irregularly obtained and that a charging order registered against the property was also irregularly obtained.

Factual background

[5] The plaintiff and Mrs McQueen are shown as joint owners on the certificate of title of the property at 17 Lorenzen Bay Road, Raglan, the certificate of title to which is SA41D/637.

[6] In 2007, the plaintiff and Mrs McQueen filed an application for a writ of habeas corpus in relation to their dog, Waru, as the Hamilton City Council had uplifted Waru because he was unregistered. The defendant was successful in having the proceedings struck out and was awarded costs on a category 2B basis: *Providers of Natural Order Charitable Trust v Hamilton City Council* HC AK CIV 2007-419-533 7 June 2007. On 17 March 2008, the High Court sealed an order for costs against Mr McQueen in the sum of $6,919.

[7] The plaintiff and Mrs McQueen applied for special leave to appeal out of time. This application was declined and costs were awarded against the plaintiff and Mrs McQueen: *Providers of Natural Order Charitable Trust v McQueen* [2007] NZCA 515. On 4 September 2008, the Court of Appeal sealed an order for costs and disbursements totaling $1,808.85.

[8] In the District Court case in *Hamilton City Council v McQueen* DC HAM CIV 2007-019-1668 14 February 2008, the plaintiff obtained summary judgment against Mrs McQueen for outstanding rates in respect of a property at 101 Massey Street, Hamilton for the rating year ending 31 July 2006. On 19 February 2008, the District Court sealed judgment in the sum of $4,530.88 against Mrs McQueen. This amount included the total amount of the debt owed to the defendant by Mrs McQueen, rates, interest and costs together with an additional $30 filing fee.

[9] On 13 May 2009, the defendant applied to the High Court for a charging order over the property. This was to secure the total indebtedness of the plaintiff and Mrs McQueen in the sum of $13,288.73 arising from the judgments and orders already referred to. On 20 May 2009, the High Court sealed the final charging order, it being registered by the defendant on 25 May 2009. The plaintiff has filed a statement of claim and an application for a quia timet injunction to prevent a mortgagee sale of the property. The specific relief sought in the proceeding is as follows:

> (a) Judgment against the Defendants for an amount that reflects the costs, stress, injuries, damages and for the possible loss of the Homestead (Govt Valuation $190,000), which has been in the Plaintiffs family for 3 generations and for breaches of the Te Tiriti o Waitangi 1840, and the Kingitanga Movement by the intention to denigrate a Wahitapu site.

(b) Costs for the degree of deception and fraud associated with the intention and act by misrepresentation of the facts.

(c) An order for a Quia Timet Interim Injunction.

(d) Cancel all applications, orders and seals of the District/High Court Hamilton Registry that relied upon the Defendants Affidavit NIKAYLA RENEE GOODWRIGHT sworn on the 13th May 2009 and authorised by Rosemary J.T.Robertson Solicitor in the High Court of New Zealand.

(e) Judicial Review of the District/High Court in Hamilton in regards to Deputy Registrars, Registrars and Decisions associated with the Defendants Affidavit NIKAYLA RENEE GOODWRIGHT sworn on the 13th May 2009 and authorised by J.T.Robertson Solicitor in the High Court of New Zealand.

[10] The reference in the relief sought to an affidavit of Nikayla Renee Goodwright is to an affidavit filed on behalf of the defendant in support of the application for the charging order in CIV-2009-419-621 in the Hamilton Registry of the High Court.

[11] As noted, this application is supported by two affidavits, the first of which is described as "affidavit in support of quia timet interim injunction and review of deputy registrars and registrars decision". The second affidavit was filed in response to the defendant's application for stay and strike out.

[12] There was a preliminary issue raised by Mr McQueen this morning regarding the fact that he had only recently received the written submissions filed by Mr Morgan QC on behalf of the defendant in the proceeding, and applicant in the strike out matter.

[13] There followed a discussion regarding the requirement in the High Court Rules at r 7.39 regarding the provision of synopsis of argument in a defended interlocutory application. Mr McQueen accepts that he did not file a written synopsis of argument pursuant to that rule. He says that he was unaware of the requirement to do so. Despite the fact that no written synopsis was filed by Mr McQueen as required by law, Mr Morgan did not insist on compliance and the Court is, on this occasion, prepared to waive the requirement for him to do so.

[14] Mr McQueen accepted that he had received notice that Mr Morgan wished to respond on behalf of the defendant to the matters to be discussed in court today. Mr McQueen received by post the copy of the submissions having requested Mr Morgan's office to put the documents in the post rather than he having to pick them up as was originally offered.

[15] There was no reason to delay the hearing this morning. Potter J had made quite clear in her Minute dated 21 October 2009 that the hearing was to be a firm fixture that would proceed in accordance with the timetable orders made.

Applicable principles

Principles relating to injunctions

[16] An interim injunction may be granted by the High Court exercising its discretion to protect the position of a plaintiff or to secure the status quo if proper grounds can be made out for such an order. As a full hearing may take some time to be heard, the Court may grant temporary relief in appropriate situations to protect the position pending the final hearing of a proceeding. But there must be some right of the plaintiff which is being, or is about to be, infringed. The House of Lords in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 laid down a twofold test. The applicant must first establish that there is a serious question to be tried in respect of its claim. The Court will then decide whether the balance of convenience lies in favour of granting the injunction.

[17] In *Klissers Farmhouse Bakeries Ltd v Harvest Bakeries Ltd* [1985] 2 NZLR 129, the Court of Appeal stated at 133:

> The principles applicable to the grant of an interim injunction are well known. The Courts in this country have generally followed the decisions in *American Cyanamid Co v Ethicon Ltd* [1975] AC 396 and *Fellowes v Fisher* [1975] 2 All ER 829. The threshold question in each case must be whether the plaintiff has established that there is a serious question to be tried. In order to determine that question the Court must consider - first, what each of the parties claims the facts to be; second, what are the issues between the parties on these facts; third, what is the law applicable to those issues, and, fourth, is there a tenable resolution of the issues of fact and law on which the plaintiff may be able to succeed at the trial…

[18] In McGechan *McGechan on Procedure* (online looseleaf ed, Brookers) at HR7.53.04, the applicable principles are summarised as follows:

> The relative strengths of each party's case are to be considered in the body of the decision. The question of relative strengths will be weighed, within the ultimate search, at a point and with an intensity that will vary according to circumstances.

Principles relating to striking out or staying the proceeding

[19] Rule 15.1 of the High Court Rules provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
>
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (4) This rule does not affect the court's inherent jurisdiction.

[20] In *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262, the Court of Appeal summarised the criteria striking out a proceeding. The Court of Appeal stated at 267:

> 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*).

[21] In *Couch v Attorney-General (on appeal from Hobson v Attorney-General)* [2008] 3 NZLR 725, the Supreme Court endorsed the criteria established in the *Prince* case. Ellis CJ and Anderson J stated at [33]:

> It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing. And in both *X (Minors) v Bedfordshire County Council* and *Barrett v Enfield London Borough Council* liability in negligence for the exercise or non-exercise of a statutory duty or power was identified as just such a confused or developing area of law. Lord Browne-Wilkinson in *X* thought it of great importance that such cases be considered on the basis of actual facts found at trial, not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike-out. Lord Slynn in *Barrett* was of the same view:
>
> > ". . . the question whether it is just and reasonable to impose a liability of negligence is not to be decided in the abstract for all acts or omissions of a statutory authority, but is to be decided on the basis of what is proved."

Submissions for the plaintiff

[22] Although the plaintiff did not file a written synopsis of submissions, the thrust of his main contention may be gleaned from parts of the affidavit material filed in support of his application for the injunction. In the affidavit dated 13 November 2009, the plaintiff stated his belief that the defendant is not entitled to charge the property for the full amount of $13,288.73. It is not easy to ascertain the grounds the plaintiff was advancing to support his application for an injunction. However, the gist of the argument seemed to focus on disputing that he personally owed the full amount of the sum of $13,288.73 when part of the debt in respect of rates due by Mrs McQueen in respect of the property at 101 Massey Street, Hamilton were solely owed by her.

[23] The grounds set out in the application for injunction do not assist the plaintiff. There is no evidence before the Court to establish that the affidavit of Ms Goodwright contains material errors or that the defendant had misrepresented the facts in the course of the enforcement process. I accept that the fact of the

enforcement action by the defendant will be causing stress and pressure to the plaintiff. That is its very purpose. Further, the fact that the property the subject of the charging order is "wahitapu and has been in the McQueen family for three generations" is of no legal consequence. If anything, that fact might provide an incentive to the plaintiff (and I add Mrs McQueen) to do what the defendant seeks, namely, settle their outstanding obligations in respect of the outstanding costs orders and the rates judgment.

[24] The plaintiff cited in his application the case of *PTY Homes Ltd v Shand* [1968] NZLR 105. The specific quotation relied upon at 112 was one where Haslam J referred to the purpose of a quia timet injunction as aimed at preventing loss by restraining the defendants from embarking on a certain course of conduct. But the difficulty for the plaintiff is that the injunctive relief was sought in that case in an entirely different context to the present. That was a case involving conspiracy to wrongfully interfere with the trade of another. Here, there is no conspiracy alleged and the defendant, far from seeking wrongfully to interfere in the trade of Mr McQueen, is merely endeavouring lawfully to enforce orders and judgments of the Courts obtained against Mr and Mrs McQueen by the means prescribed in the High Court Rules.

[25] In his oral submissions in support of the application for an injunction, and opposing the application to strike out the proceeding, the plaintiff acknowledged that the two amounts for costs ordered by the High Court and Court of Appeal were due and owing. He also acknowledged that these two amounts had not been paid. Further, there is no arrangement to pay the defendant. It seems that the plaintiff has no intention to pay those amounts. However, he is a legal owner of the property the subject of the charging order. He claims that the charging order should have separated out the amounts which he admittedly owes and the money which Mrs McQueen owes in respect of the rates judgment in the District Court.

Submissions for the defendant

[26] Mr Morgan emphasised that the defendant has no interest in forcing the sale of the property. Rather, it seeks to obtain the money that is owed by the plaintiff and

Mrs McQueen by the lawful processes of the Court. The charging order obtained is but the first step in the enforcement process. Hence, Mr Morgan submitted that, in relation to the application for an injunction, there is no serious question to be tried and that the defendant had regularly obtained the orders in respect of costs against Mr McQueen and the rates judgment in respect of Mrs McQueen and subsequently the charging order relating to all three amounts. On this basis, Mr Morgan submitted that the plaintiff had no right to prevent the defendant from attempting to recover the fruits of these orders and judgments.

[27] Mr Morgan further submitted that the statement of claim disclosed no reasonably arguable cause of action, that the pleading is flawed, makes no sense and does not support the relief sought. Mr Morgan submitted that it is difficult to ascertain just what the real cause of action is. It appeared that the plaintiff was seeking to prevent the defendant from using the charging order procedure to recover the fruits of its entitlements under the law against the plaintiff and Mrs McQueen. For this reason, the defendant submitted that the proceeding is frivolous, vexatious and an abuse of the Court process.

[28] In summary, Mr Morgan submitted that the proceeding in the application for injunction represents the plaintiff attempting to challenge the enforcement process by a collateral process which was not permissible. As such, the proceeding should be struck out and the application for the injunction dismissed.

Discussion

[29] The starting point for discussion is that where a party to a proceeding in the High Court or District Court has been awarded a judgment or order in respect of which the time for appeal has passed, the party may take enforcement action. The party entitled to relief (the entitled party) may enforce the judgment or order against a liable party of judgment debtor.

[30] The methods by which the entitled party may enforce the judgment or order are set out in r 17.3 of the High Court Rules as follows:

17.3 Method of enforcing judgments

(1) A judgment may be enforced by 1 or more of the following enforcement processes:

(a) an attachment order:

(b) a charging order:

(c) a sale order:

(d) a possession order:

(e) an arrest order:

(f) a sequestration order.

(2) Subclause (1) is subject to the rules in this Part.

(3) No enforcement process may be issued until any period specified in the judgment for payment or performance has expired.

Application for injunction

[31] The application for an interim injunction seeks to prevent the defendant from exercising its right to obtain a mortgagee sale in respect of the property. The first issue is whether there is a serious question to be tried. The difficulty here is that the plaintiff has not advanced any proper basis upon which the interim injunction could be granted. The sole basis mentioned in the plaintiff's oral submissions appears to be that the defendant is not entitled to the charging order over the property in respect of the total sum of $13,288.73 for the reasons already discussed. However, the defendant's entitlement to the amounts comprising this total sum and to the charging order itself, have already been determined by the Courts. Neither the costs orders nor the rates judgment have been challenged or appealed. In respect of the application for the charging order, that was determined by the High Court at the time when the charging order was applied for and granted.

[32] Further, I am satisfied that the defendant was lawfully entitled to obtain a charging order covering the total amount, even though it was comprised of amounts said to be due and owing by the plaintiff on the costs orders and Mrs McQueen on the rates judgment. That is because both the plaintiff and Mrs McQueen are

registered proprietors on the certificate of title to the property. The charging order has not been the subject of any appeal.

[33] I have carefully considered the written material filed by the plaintiff and his oral submissions this morning. I am satisfied that the plaintiff has not raised any plausible legal or factual basis for suggesting that there is a serious question to be tried.

[34] The second question is whether the balance of convenience lies in favour of granting the injunction. Given my previous conclusion, I do not need to consider this aspect. But even if I were wrong on the issue of the serious question, the balance of convenience raises discretionary factors which need to be considered against the background of the unchallenged costs orders of the High Court and Court of Appeal, as well as the decision of the District Court against Mrs McQueen in respect of the overdue rates.

[35] Had it been necessary to exercise the Court's discretion as part of the balance of convenience question, I consider that there are compelling reasons in favour of exercising such discretion against the plaintiff. In my view, the time has come where the plaintiff and Mrs McQueen need to face reality and settle the overdue debts totalling $13,288.73 without further delay.

Application to strike out proceeding

[36] The defendant has also applied to strike out the proceeding, or alternatively stay such proceeding. The plaintiff's statement of claim does not disclose a reasonably arguable cause of action. It is extremely difficult from the mass of material referred to, to say just what the plaintiff was seeking to plead. The statement of claim is prolix, unclear and full of uncertainties. It does not properly set out the material facts sought to be relied upon in any coherent fashion.

[37] Rather, the statement of claim seems to seek to dispute the judgments obtained in the High Court and Court of Appeal for costs and the judgment in the District Court against Mrs McQueen in respect of overdue rates. I accept the

submission of Mr Morgan on behalf of the defendant that the plaintiff's pleading is frivolous and vexatious and an abuse of the process of the Court.

[38] Although I appreciate that an application for strike out normally proceeds on the assumption that the facts pleaded in the statement are true, it is still open to a party to apply to strike out a proceeding if the cause of action is so clearly untenable that it cannot possibly succeed. Against the background of the unchallenged costs orders and the unappealed rates judgment, and the unchallenged charging order, the cause of action pleaded by the plaintiff is clearly untenable and cannot possibly succeed. This is an appropriate case therefore to strike out the plaintiff's statement of claim.

Result

[39] The application for quia timet injunction is declined. The proceeding is struck out.

Costs

[40] The defendant is entitled to costs. I offered the plaintiff the opportunity to make submissions as to why costs should not follow the event. His main submission was that the proceeding and the application for injunction had been brought in good faith.

[41] Nevertheless, the plaintiff has failed legally and factually to support the application for the injunction and the proceeding has been struck out. I am satisfied that the defendant is entitled to costs. There will be an order for costs in favour of the defendant on a category 2B basis.

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Stevens J