



Court of Appeal
Supreme Court

New South Wales

Case Name: Eliezer v The Owners – Strata Plan No 51682

Medium Neutral Citation: [2017] NSWCA 325

Hearing Date(s): 7 December 2017

Decision Date: 7 December 2017

Before: Basten JA at [15];
Meagher JA at [1]

Decision: 1. Amended summons seeking leave to appeal from the judgments delivered and from the orders made by N Adams J on 22 March 2017 and Garling J on 15 June 2017 be dismissed.

2. The applicant is to pay the first respondent's costs in this Court - that is, the costs incurred only by the owners corporation - as agreed or assessed.

Catchwords: PRACTICE AND PROCEDURE – leave to appeal from summary dismissal of tortious claims for malicious prosecution and abuse of process – where relevant proceedings have not terminated – where immediate purpose for bringing proceedings was proper – whether manifest error or question of principle warranting leave – no such error or principle

PRACTICE AND PROCEDURE – leave to appeal from interlocutory decision dismissing application to join husband of applicant as second plaintiff, and amend statement of claim – no utility granting leave where underlying proceedings dismissed

Legislation Cited: Uniform Civil Procedure Rules 2005 (NSW), rr 4.10, 13.4, 6.19, 14.28
Strata Schemes Management Act 1996 (NSW), s 80

Supreme Court Act 1970 (NSW), s 101(2)(e)

Cases Cited: A v New South Wales (2007) 230 CLR 500; [2007] HCA 10

PNJ v The Queen [2009] HCA 6; (2009) 83 ALJR 384

Williams v Spautz (1992) 174 CLR 509; [1992] HCA 34

Category: Procedural and other rulings

Parties: Supriya Eliezer (Applicant)

The Owners – Strata Plan 51682 (First respondent)

Australian Property Managers Pty Ltd (Second respondent)

Peter Woodbury (Third respondent)

Frances Li (Fourth respondent)

Wanqlang Yang (Fifth respondent)

Meimei Xie (Sixth respondent)

Zhisheng Duan (Seventh respondent)

Wei Li Yu (Eighth respondent)

Xin Wang (Ninth respondent)

Ping Kwan Lo (Tenth respondent)

Leng Lin Leong (Eleventh respondent)

Representation: Counsel:

Applicant in person

M Klooster (First respondent)

A McGeady (Second, third and fourth respondents)

F Krstic (Fifth and sixth respondents)

D Lamb (Seventh, eighth, tenth and eleventh respondents)

G Li (Ninth respondent)

Solicitors:

Gilbert M. Johnstone & Co (First, seventh, eighth, tenth and eleventh respondents)

Jemmeson & Fisher Solicitors & Accountants (Second, third and fourth respondents)

Colin Biggers & Paisley (Fifth and sixth respondents)

Sun Lawyers (Ninth respondent)

File Number(s): 2017/108095

Decision under appeal:

Court or Tribunal: Supreme Court of New South Wales
Jurisdiction: Common Law
Citation: [2017] NSWSC 278;
[2017] NSWSC 783
Date of Decision: 22 March 2017
Before: N Adams J;Garling J
File Number(s): 2015/123687

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

Decisions under appeal

JUDGMENT

- 1 **MEAGHER JA:** By her amended summons filed on 14 September 2017, the applicant seeks leave to appeal from two decisions in proceedings in the Common Law Division of the Court. The first in time is a decision of N Adams J: *Eliezer v The Owners – Strata Plan No 51682 & Ors* [2017] NSWSC 278 and the second, of Garling J: *Eliezer v The Owners Strata Plan No 51682* [2017] NSWSC 783. For convenience, by reference to their sequence in time, I refer to these as the First Judgment and the Second Judgment.
- 2 These judgments were given in proceedings brought by the applicant against the owners corporation, the appointed strata manager, two employees of the strata manager, and owners of various lots in a strata title villa block in West Ryde. Although the Statement of Claim, in its original form, pleaded five separate causes of action, by the time the issues dealt with in the First Judgment and the Second Judgment arose for determination, the applicant only pressed tortious claims of malicious prosecution and abuse of process.

- 3 Those claims were made in relation to Local Court proceedings commenced by the owners corporation on 18 July 2013 against the applicant as owner of Lot 2 in the relevant strata plan, for recovery of outstanding strata levies. On 6 February 2014, the applicant was ordered by an assessor in the Small Claims Division of the Local Court to pay the amount owed. She appealed to the District Court on the ground of denial of procedural fairness. On 18 December 2014, by consent, orders were made allowing that appeal, setting aside the order of the assessor and remitting the matter to the Local Court for determination of the claim and the applicant's cross-claim. As part of that agreement the applicant undertook to pay the outstanding strata levies. However, the owners corporation did not waive its claims to interest on the outstanding levies, and the expenses incurred in seeking to recover them.
- 4 The proceedings in the Common Law Division were commenced on 27 April 2015, at a time when the claim to interest and expenses (totalling approximately \$8,000) had not been heard. On 13 August 2015, Button J stayed the Local Court proceedings by consent, pending the determination of the proceedings in the Common Law Division.
- 5 In December 2016, the applicant filed a motion in those proceedings for leave to join her husband, Joseph Eliezer, as second plaintiff pursuant to *Uniform Civil Procedure Rules 2005* (NSW), r 6.19(1) ('UCPR'), and to amend the Statement of Claim to the form of an Amended Statement of Claim filed 25 August 2016 (which although filed, had been rejected by the Court pursuant to UCPR, r 4.10(4)), or to the form in identical terms which had been filed on 29 September 2016.
- 6 N Adams J dismissed each of these applications; the first on the basis that Joseph Eliezer was not a necessary or proper party to any of the pleaded causes of action: First Judgment [61]-[65]; and the second on the basis that the proposed amendments did not disclose arguable causes of action for malicious prosecution or abuse of process: First Judgment [76]-[77] and [81]-[82]. The applicant requires and seeks leave to appeal from those orders made on 22 March 2017 (*Supreme Court Act 1970* (NSW), s 101(2)(e)).

- 7 On 16 May 2017, the respondents filed a motion for an order that the proceedings be summarily dismissed, or alternatively that the Statement of Claim be struck out: UCPR r 13.4, 14.28. Garling J heard that application and made orders summarily dismissing the proceedings. His Honour noted that the only claims pressed were those for malicious prosecution and abuse of process, and concluded that the claim for malicious prosecution could not succeed even if one accepted such a claim were available in relation to the prosecution of civil proceedings: Second Judgment [10]. To establish the tort of malicious prosecution, the relevant proceedings must have terminated in favour of the person bringing the claim: *A v New South Wales* (2007) 230 CLR 500; [2007] HCA 10 at [1] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). That is and was not the case in relation to the Local Court proceedings, which remain on foot: Second Judgment [12], [21].
- 8 The claim for abuse of process was, in essence, that the owners corporation had invoked the processes of the Local Court for an illegitimate or collateral purpose: see *PNJ v The Queen* [2009] HCA 6; (2009) 83 ALJR 384 at [3]; and *Williams v Spautz* (1992) 174 CLR 509 at 526-527 (Mason CJ, Dawson, Toohey and McHugh JJ); [1992] HCA 34, where it was said that proceedings would be brought for an improper purpose if “the purpose of bringing the proceedings is not to prosecute them to a conclusion but to use them as a means of obtaining some advantage for which they are not designed or some collateral advantage beyond what the law offers”.
- 9 Garling J concluded that the pleadings did not reveal any such collateral purpose. In the absence of any pleaded or other basis for finding that there was such a predominant purpose for bringing the Local Court proceedings, his Honour concluded that the Statement of Claim did not disclose a reasonable cause of action for the tort of abuse of process: Second Judgment [34]-[35]. With respect to the defendants other than the owners corporation and strata manager, who were not directly involved in the Local Court proceedings, his Honour correctly held that the pleading did not raise any arguable cause of action against any of them, in circumstances where a claim of aiding and abetting was no longer pressed: Second Judgment [7], [37]. The applicant also

requires and seeks leave to appeal from Garling J's order summarily dismissing the statement of claim: *Supreme Court Act*, s 101(2)(l).

- 10 As the respondents submit, there is no utility in granting leave to appeal in relation to the First Judgment unless leave is granted in relation to the Second Judgment. Leave should only be granted in relation to the Second Judgment if there is a manifest error or some issue of principle or of general application arising. His Honour's reasons do not reveal any such error, and it is not shown that there is any relevant question of principle which arises in relation to either of the two remaining claims.
- 11 In argument before this Court the collateral purpose for which the Local Court proceedings were brought was said to be "to bankrupt the Plaintiff". For that end to be achieved it was necessary that the Local Court proceedings be prosecuted to completion so as to obtain a judgment. In this respect there is no abuse of process because the immediate purpose for bringing those proceedings is wholly within the scope of their proper purpose. In this respect the position is explained by the following example given in the reasons of the plurality in *Williams v Spautz* at 526:

Thus, to take an example mentioned in argument, an alderman prosecutes another alderman who is a political opponent for failure to disclose a relevant pecuniary interest when voting to approve a contract, intending to secure the opponent's conviction so that he or she will then be disqualified from office as an alderman by reason of that conviction, pursuant to local government legislation regulating the holding of such offices. The ultimate purpose of bringing about disqualification is not within the scope of the criminal process instituted by the prosecutor. But the immediate purpose of the prosecutor is within that scope. And the existence of the ultimate purpose cannot constitute an abuse of process when that purpose is to bring about a result for which the law provides in the event that the proceedings terminate in the prosecutor's favour.

- 12 As the matter was argued before his Honour, it was said that the past events described in the Second Judgment at [25] had dramatically increased the levies, and accordingly the moneys sought to be recovered from the applicant. It was also suggested that the owners corporation was not, or may not have been, authorised to raise those levies or to bring proceedings to recover them. However, as Garling J observed at Second Judgment at [33]-[35], none of these matters was relevant to the causes of action relied on.

- 13 Accordingly, leave to appeal, both from his Honour's judgment and from the judgment of N Adams J, should be refused. The latter judgment is clearly correct as Joseph Eliezer is not a party to the proceedings brought in the Local Court and, therefore, not a necessary and proper party in relation to the two claims which are pressed in the Common Law Division.
- 14 The orders I would propose, in general terms, are that the amended summons be dismissed with costs.
- 15 **BASTEN JA:** I agree with Meagher JA. I would only add that in the course of oral submissions in this Court, the applicant contended that there was an issue of principle as to the construction of s 80 of the *Strata Schemes Management Act 1996* (NSW), which provides a right for an owners corporation to recover unpaid contributions and interest. There is no suggestion that there is any particular issue which arises under that provision in relation to a contribution which has become due and payable. I am not persuaded that there is any matter of construction which would warrant the grant of leave for consideration by this Court.
- 16 The orders of the Court are:
- (1) Amended summons seeking leave to appeal from the judgments delivered and from the orders made by N Adams J on 22 March 2017 and Garling J on 15 June 2017 be dismissed;
 - (2) The applicant is to pay the first respondent's costs in this Court - that is, the costs incurred only by the owners corporation - as agreed or assessed.
- [Discussion with counsel as to costs order.]
- 17 On the basis that the submissions which were filed online on behalf of all the respondents were submissions filed on behalf of the owners corporation, the Court is not minded to vary the costs order.

Amendments

14 December 2017 - Coversheet: judgment paragraphs amended

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