IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2019-404-1191
[2020] NZHC 1091

BETWEEN	EVEREST SERVICED APARTMENTS LIMITED Plaintiff
AND	BODY CORPORATE 511909 First Defendant
	STRATA TITLE ADMINISTRATION LIMITED Second Defendant

Hearing:	20 May 2020
Appearances:	MJF Taylor and L H Mau for the Plaintiff C Baker for the First Defendant (observing via AVL) T Wood for the Second Defendant
Judgment:	22 May 2020

JUDGMENT OF GAULT J

This judgment was delivered by me on 22 May 2020 at 3:30 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors / Counsel:
Mr MJF Taylor and Ms L H Mau, Russell McVeagh, Auckland
Mr E St John (counsel for the first defendant), Barrister, Auckland
Mr C Baker, Price Baker Berridge, Auckland
Mr D McGill and Ms T Wood, Duncan Cotterill, Auckland

[1] The second defendant, Strata Title Administration Ltd (Strata), applies to strike out the amended statement of claim filed by the plaintiff, Everest Serviced Apartments Ltd (Everest), on the grounds that the pleading discloses no reasonably arguable cause of action against Strata and is prolix.

[2] Everest's claim relates to alleged interference with its accommodation business involving serviced apartments in a unit title development called Park Residences, a relatively new block of apartments containing over 200 residential units at the corner of Albert and Swanson Streets in the Auckland CBD. Everest's business operation involved its entry into lease agreements with approximately 50 unit owners at Park Residences, subletting those apartment units via various online and other channels, and related management duties. Everest describes its business as a hotel operation, with a reception, and undertaking room cleaning and repairs.

[3] The first defendant is the Body Corporate for Park Residences. It has filed a statement of defence, and Mr Baker attended the hearing for the first defendant merely to observe.

[4] Strata is the Body Corporate secretary, engaged by the Body Corporate to undertake various management duties for the Body Corporate.

Approach on strike out applications

[5] Rule 15.1 of the High Court Rules 2016 governs applications for strike out. Rule 15.1(1) provides:

> **15.1 Dismissing or staying all or part of proceeding**
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> (1) The court may strike out all or part of a pleading if it—
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
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> (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.

[6] The approach on strike out applications on the ground of no reasonably arguable cause of action is well established.[1] The Court proceeds on the assumption that the facts pleaded in the statement of claim are true. Before the Court may strike out proceedings, the causes of action must be so clearly untenable that they cannot possibly succeed. The jurisdiction is to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material.

[7] The other grounds for strike out are somewhat inter-related. The Court of Appeal has said:[2]

(a) The "likely to cause prejudice or delay" ground requires an element of impropriety and abuse of the Court's processes. The categories of pleading that improperly "prejudice or delay" are potentially very wide and defy definition. Pleadings which can cause delay include those that are prolix, scandalous and irrelevant, plead purely evidential matters, or are unintelligible.

(b) A "frivolous" pleading is one which trifles with the Court's processes. A vexatious one contains an element of impropriety.

(c) The "otherwise an abuse of the process of the Court" ground extends beyond the other grounds and captures all other instances of misuse of the Court's processes, such as a proceeding that has been brought with improper motive or is an attempt to obtain a collateral benefit.

[8] Although the application relied on each of the grounds in r 15.1, Ms Wood, for Strata, acknowledged that the focus of the application was on the no reasonably arguable cause of action ground in r 15.1(a).

[9] Where a defect in a pleading challenged as disclosing no reasonably arguable cause of action can be cured by amendment, which the party is willing to make, the

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1 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267, approved in *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [10]; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

2 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].

Court will almost always permit amendment rather than striking out the pleading, particularly at a relatively early stage of the proceeding. As Tipping J put it in *Marshall Futures Ltd (in liq) v Marshall*, the difference "is between a pleading which is a total right off and one which is deficient but is capable of effective repair".[3]

[10] In terms of the level of detail required in a statement of claim, the courts require sufficient detail in the circumstances of the case to state the issues and inform the opposite party of the case to be met, sufficient to enable a reasonable degree of pre-trial briefing and preparation.[4]

[11] Ms Wood also relied on r 5.17, which provides:

> **5.17 Distinct matters to be stated separately**
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> (1) Distinct causes of action and distinct grounds of defence, founded on separate and distinct facts, must if possible be stated separately and clearly.
>
> (2) If a party alleges a state of mind of a person, that party must give particulars of the facts relied on in alleging that state of mind.
>
> (3) A state of mind includes a mental disorder or disability, malice, or fraudulent intention but does not include mere knowledge.

First cause of action – Fair Trading Act 1986

[12] Strata's complaint is that the first cause of action merely alleges that Strata's conduct was misleading and/or deceptive without specifying which statutory provision in the Fair Trading Act is relied on. It says Everest has been given the opportunity to replead but has refused.

[13] I note that Strata's complaint about the pleading was in general terms rather than specifically requesting this amendment or other particulars. I accept that the amended statement of claim should specify the relevant provision(s) of the Fair Trading Act relied on. But that is easily capable of repair. Everest's submissions confirmed that the claim is brought under s 9 and submitted that is evident from a

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3 *Marshall Futures Ltd (in liq) v Marshall* [1992] 1 NZLR 316 (HC) at 324.
4 *Price Waterhouse v Fortex Group Ltd* CA 179/98, 30 November 1998 at 19.

subsequent reference to s 9 in the amended statement of claim. In any event, the pleading of this cause of action should explicitly refer to s 9 (in paragraph 28).

[14] Ms Wood also submitted that the pleading of the Fair Trading Act cause of action failed to address the "in trade" requirement. I consider the earlier pleading (at paragraph 4(d)) that at all material times the defendants were in trade suffices.

[15] Strike out of this cause of action is clearly not appropriate.

Second cause of action – causing loss by unlawful means

[16] Strata claims that in this cause of action the reference back in paragraph 31 to multiple paragraphs of the narrative section of the amended statement of claim, some of which do not refer to elements of the tort, makes it prolix.

[17] Reference back to earlier paragraphs is a legitimate way to avoid repetition provided the paragraphs referred to clearly contain the relevant allegations, here that is the allegations of interference. I accept that some of the earlier paragraphs are merely introductory (13 and 16), some articulate the unlawfulness of the interference rather than the interference itself (15 and 20) and the operative paragraphs contain multiple allegations of interference, but I do not consider this cause of action is susceptible to strike out on the ground the pleading is prolix. I also note the reference back to paragraph 21 seems unnecessary in this context. The reference back could be tightened by amendment but strike out is not called for.

[18] Strata separately submits that Everest has failed to plead intention to cause loss to it, which is an essential element of the tort of causing loss by unlawful means, citing *Diver v Loktronic Industries Ltd*.[5] Ms Wood acknowledged that the pleading of malicious purpose in the amended statement of claim is presumably intended to amount to intention to cause loss. She relied by analogy on *Commerce Commission v Fletcher Challenge Ltd*, where Robertson J struck out the Commission's statement of claim which lacked pleaded inferences to be drawn from the factual matrix to support the Commission's case.[6] Robertson J characterised the pleading as containing

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5 *Diver v Loktronic Industries Ltd* [2012] NZCA 131 at [100]-[101].

6 *Commerce Commission v Fletcher Challenge Ltd* (1999) 6 NZBLC 102,752 (HC) at 102,763.

"some generalised allegation in the hope and anticipation that after they have obtained discovery they will be able to particularise inferences which they allege may then be drawn".[7] I do not consider the analogy is apposite. Here, intention to cause loss is specifically pleaded (in paragraph 33). At the hearing, Ms Wood acknowledged the distinction between failing to plead an essential element and a pleading that is untenable. She submitted that the facts alleged in support of the pleaded intention to cause loss fall well short of providing a tenable cause of action.

[19] In that regard, the starting point is that intention to cause loss is a factual allegation and I need to assume the facts pleaded in the statement of claim are true. There is therefore little room in the strike out context to explore whether the particulars substantiate that factual allegation. The approach for strike out is that the cause of action must be so clearly untenable that it cannot possibly succeed. Whether Strata has a defence of lack of intention to cause loss based on an innocent explanation for its actions is not for determination at the strike out stage – that is a matter for trial.

[20] Here, the facts relied on in support of the pleaded intention to cause loss are:

(a) The defendants actively encouraged owners leasing to the plaintiff to move to long-term leasing arrangements instead of the short-term leasing arrangements that comprised the plaintiff's business model. By an email of 19 October 2018 (8.26 am) from the second defendant to owners, the defendants stated:

> The committee would like to encourage owners to change to long-term tenancy, if possible, by the end of February 2019 (insurance renewal in March 2019), to avoid all the owners paying a massive insurance premium.

(b) Further, at the annual general meeting on 18 March 2019, the Building Manager and Committee Report published on behalf of the defendants, stated on five separate occasions:

> Dear owners, please consider to let your units to long term tenants, your help would be highly appreciated.

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7 *Commerce Commission v Fletcher Challenge Ltd* (1999) 6 NZBLC 102,752 (HC) at 102,767.

[21] I am in no position to conclude that these facts cannot support the pleaded intention to cause loss such that the cause of action is so clearly untenable that it cannot possibly succeed. Indeed, the email and report were not in evidence at this stage.

[22] Finally, I accept that a statement of claim must adequately plead and particularise the requisite elements of any cause of action. In general terms, a plaintiff cannot defer a proper pleading until after discovery. Ms Mau, for Everest, acknowledged that Everest should omit the various references in the particulars throughout the amended statement of claim to relying on specified facts "among others" or "for example", which allude to further unspecified particulars on which it will rely. That is not to rule out – in appropriate cases – a pleading that refers to further particulars to be provided after discovery.

Third cause of action – conspiracy by unlawful means

[23] Here, Strata's complaint is that Everest is asking the Court to make inferences as to a conspiracy, and also as to intention to injure, in reliance on a historical narrative while awaiting discovery which it hopes will improve its claim, citing by analogy *Commerce Commission v Fletcher Challenge Ltd*.[8] Again, I do not consider the analogy is apposite. Here, Everest alleges the defendants agreed between themselves to pursue the unlawful means against the plaintiff set out in the pleading. Its reference to the best particulars it is able to provide prior to discovery does not mean it is asking the Court to make unpleaded inferences as to conspiracy or intention to injure.

[24] Ms Mau acknowledged, however, that Everest's pleading of the agreement element of this conspiracy cause of action could be improved. Currently, the particulars of the agreement between the defendants (paragraph 40) refers only to unspecified minutes recording the committee meetings of the first defendant and the agency relationship between the defendants. It appears Everest's case is not so much that the minutes record unspecified agreements but rather that agreement to take (unlawful) action can be inferred from the discussions recorded in the minutes. In any

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8 *Commerce Commission v Fletcher Challenge Ltd* (1999) 6 NZBLC 102,752 (HC) at 102,763 and 102,767.

event, some specificity is required as to the particular minutes relied on in relation to the pleaded actions of interference.

[25] The unlawful means and intention to injure elements of this cause of action give rise to the same issues already considered in the second cause of action in relation to interference and intention to cause loss respectively.

Fourth cause of action – conspiracy to injure

[26] This cause of action has similar elements to the third cause of action and the same particulars are relied on. Strata's complaints are thus the same complaints regarding the pleading of conspiracy and intention to injure as in the third cause of action, which I have already addressed.

Fifth cause of action – injurious falsehood

[27] Strata complains that the pleading fails to plead the requisite false statements about the plaintiff, its business or property and malice on the part of the defendant. The statements are pleaded. Ms Mau confirmed that the statements relied on for this cause of action are the assertions and demands particularised in paragraphs 10 and 11. As to malice, again, Strata acknowledges the pleaded malicious purpose but describes this as a bare assertion without a pleaded basis for malice. But malice is pleaded, by reference back to the same facts relied on in support of the pleaded intention to cause loss, which I have already addressed. The position in relation to malice is the same. This is not a strike out issue.

Park Residences Management Ltd agency

[28] In reply, Ms Wood raised the need for the pleading to particularise the basis of the allegation that Park Residences Management Ltd acted as the agent of the defendants (paragraph 4(c)). Ms Mau did not accept this was necessary as a matter of pleading. It is certainly not core and I do not consider it warrants an order.

Result

[29] The second defendant's strike out application is dismissed.

[30] I make timetable orders as follows:

(a) The plaintiff is to file and serve a further amended statement of claim within five working days.

(b) The second defendant is to file and serve its statement of defence within ten working days thereafter.

[31] The plaintiff is entitled to 2B costs.

Gault J