

Supreme Court
New South Wales

Case Name: Eliezer v The Owners Strata Plan No 51682

Medium Neutral Citation: [2017] NSWSC 783

Hearing Date(s): 15 June 2017

Date of Orders: 15 June 2017

Decision Date: 15 June 2017

Jurisdiction: Common Law

Before: Garling J

Decision: 1. The proceedings commenced by Statement of Claim dated 27/4/2015 be summarily dismissed.

2. Order the plaintiff to pay the defendants' costs of the proceedings.

Catchwords: CIVIL PROCEDURE – order for summary dismissal – alternative order that statement of claim be struck out

CIVIL PROCEDURE – summary dismissal – proceedings are vexatious or oppressive – no reasonable cause of action is disclosed – claim for malicious prosecution disclosed no reasonable cause of action – claim of abuse of process vexatious and oppressive

Legislation Cited: Uniform Civil Procedure Rules
Strata Schemes Management Act 1996,

Cases Cited: Dey v Victorian Railways Commissioners (1949) HCA 1; (1949) 78 CLR 62
Eliezer v The Owners – Strata Plan No 51682 & Ors [2017] NSWSC 278
Eliezer v The Owners – Strata Plan No 51682 and Ors [2017] NSWSC 581
Eliezer v The Owners of Strata Plan No 51682 [2015] NSWSC 1172
Spencer v Commonwealth of Australia (2010) HCA 28; (2010) 241 CLR 118
Willers v Joyce [2016] UKSC 43
Williams v Spautz [1992] HCA 34; (1992) 174 CLR 509

Texts Cited: Not Applicable

Category: Principal judgment

Parties: Supriya Eliezer (P)
The Owners Strata Plan No. 51682 (D1)
Australian Property Managers Pty Ltd (D2)

Peter Woodbury (D3)
Frances Li (D4)
Wanqlang Yang (D5)
Meimei Xie (D6)
Zhisheng Duan (D7)
Wei Li Yu (D8)
Xin Wang (D9)
Ping Kwan Lo (D10)
Leng Lin Leong (D11)

Representation:

Counsel:
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M Klooster (D1)
D Lamb (D7, 8, 10, 11)
Mr Krstic (D5, 6)
G Li (D9)
S Jadhav (D2, 3, 4)

Solicitors:
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File Number(s): 2015/123687

Publication Restriction: Not Applicable

EX TEMPORE JUDGMENT

- 1 This is an application by a Notice of Motion filed on 16 May 2017 for an order that proceedings be summarily dismissed pursuant to r 13.4 of the Uniform Civil Procedure Rules ("the UCPR"), or alternatively, pursuant to r 14.28 of the UCPR, that the Statement of Claim filed on 27 April 2015 be struck out.
- 2 The Notice of Motion which was filed on 16 May 2017 was amended today so as to include the correct designation of the rule under which the defendants were moving.
- 3 It is necessary to refer briefly to the nature of the proceedings and the general background. However, I note that the facts and background can be adequately found in three judgments of this Court. The first of Button J on 13 August 2015, *Eliezer v The Owners of Strata Plan No 51682* [2015] NSWSC 1172, in which his Honour made an order staying proceedings 2013/00219204 in the Local Court until the conclusion of these present proceedings or further order of the Court. The second decision of relevance in terms of describing the background is that of N Adams J delivered on 22 March 2017. That judgment is to be found at *Eliezer v the Owners – Strata Plan No 51682 & Ors* [2017] NSWSC 278. Finally, a brief judgment of Johnson J delivered on 9 May 2017. His Honour's reasons can be found at *Eliezer v The Owners – Strata Plan No 51682 and Ors* [2017] NSWSC 581.
- 4 The defendants move to have the proceedings summarily dismissed on the basis that the proceedings are vexatious and oppressive, or alternatively, that no reasonable cause of action is disclosed.

- 5 It is necessary to say something about the proceedings and the Statement of Claim. The Statement of Claim is brought by Supriya Eliezer whose husband has appeared on her behalf and argued the matter before the Court. She is the owner of lot 2 in Strata Plan No 51682, a block of six villas located in West Ryde. The first defendant is the owner's corporation for Strata Plan No 51682. It will be convenient to refer to the first defendant as the Strata Corporation. The second defendant, Australian Property Managers Pty Ltd, is the appointed strata manager. The third and fourth defendants are employees of the strata manager, and according to the pleadings, at all relevant times, were acting as the strata manager on behalf of the second defendant. The fifth to eleventh defendants are owners of various lots in the villa block.
- 6 The Statement of Claim propounds, in its original form, five separate causes of action. The first is the civil tort of malicious prosecution, the second is the civil tort of abuse of process, the third is an allegation of fraud, the fourth is an allegation of fraud on the minority and civil conspiracy and the fifth is an allegation of aiding and abetting the tortious conduct.
- 7 It became apparent in the course of submissions that the plaintiff does not seek to propound all five of the causes of action that are pleaded. Rather, the only causes of action which the plaintiff seeks to further propound are the actions for the tort of malicious prosecution and for abuse of process. The plaintiff made it plain that the torts of fraud which are contained in paragraphs 34 to 36 of the Statement of Claim, fraud on the minority and civil conspiracy contained in paragraphs 37 to 49 of the Statement of Claim, and the tort of aiding and abetting contained in paragraphs 50 to 55 of the Statement of Claim, are no longer pressed and the Court ought not regard them as being any part of any claim by the plaintiff. Accordingly, it is unnecessary for the Court to further consider those pleaded causes of action.
- 8 Before coming to the pleaded causes of action, I note that the relief claimed in the Statement of Claims is as follows:
- (1) Declaration that Local Court proceeding 2013/00219204 is an abuse of process;
 - (2) Order that Local Court proceeding 2013/00219204 be permanently stayed;
 - (3) Damages;
 - (4) Interest pursuant to s 94 of the *Supreme Court Act 1970*;
 - (5) Costs.
- 9 The relief framed in that way is unsurprising since what gives rise to the relief claimed are two alleged tortious causes of action. The first alleged tortious cause of action is malicious prosecution. Traditionally, a claim for malicious prosecution refers to, and arises from, criminal proceedings which have been terminated in favour of an accused person and in circumstances where the accused person brings a claim for damages alleging that the prosecution was commenced or maintained maliciously.
- 10 It is not firmly established in the law of Australia that a civil claim for damages by way of malicious prosecution can arise from civil proceedings. However, I note that in 2016 the Supreme Court of the United Kingdom delivered a judgment which indicates that such a tort may exist: *Willers v Joyce* [2016] UKSC 43. Accordingly, I would not be prepared to hold in the

course of this interlocutory application that the common law of Australia does not include a tort of malicious prosecution arising out of civil proceedings. Before I could hold or make such a finding, I would need to have full and complete submissions about it and I would need to be persuaded that resolution of that issue was a necessary component of this Motion.

- 11 However, it seems to me that in order for the tort of malicious prosecution to succeed in relation to a civil claim, as a minimum the claimant, here the plaintiff, would need to plead and be in a position to demonstrate by evidence that the proceeding about which complaint is made, here the proceeding in the Local Court, was terminated or else came to an end favourably to the plaintiff claiming damages, for the tort.
- 12 The facts in this case, unarguably and overwhelmingly, demonstrate that the proceedings in the Local Court are still on foot. Those proceedings were commenced in 2013. It is apparent that after a hearing, a judgment was entered in favour of the only plaintiff in those proceedings, being the Strata Corporation. Against that judgment, the plaintiff in these proceedings appealed to the District Court.
- 13 Prior to the District Court hearing and disposing of that appeal, the parties entered into settlement terms. Those settlement terms provided, relevantly, that the appeal to the District Court be allowed; that the Assessor's order of 6 February 2014 to strike out the Defence and Cross-Claim and the judgment be set aside. There were other terms. It is unnecessary to deal with them. But, the effect of those terms was that if the parties were unable to clearly resolve all of their disputes, the proceedings would be returned to the Local Court. If, in the steps which were contemplated, the parties resolved their disputes, then the proceedings in the Local Court were to be discontinued.
- 14 The parties were unable to resolve their disputes, clearly, as they had hoped in the District Court. Accordingly, the current status of the Local Court proceedings is that they are still on foot. That is why it was necessary for the plaintiff to apply to Button J, when he was the Duty Judge, for an order that those Local Court proceedings be stayed until the determination of the current proceedings in this Court. His Honour made those orders by consent.
- 15 It follows that the Local Court proceedings, which are at the heart of the complaint of the plaintiff, are still on foot and are unresolved. It seems to me that, at the very least, an essential element of any tort of malicious prosecution in relation to a civil claim, namely that the proceedings be terminated in favour of the claimant in this court, simply does not exist and cannot be found.
- 16 It follows that insofar as the proceedings presently in this Court include a claim for malicious prosecution, the claim cannot succeed and it does not disclose any reasonable cause of action.
- 17 Maintaining a claim which cannot succeed can also be regarded as vexatious or oppressive. However, there is no need for me to make that finding.
- 18 There is a second reason why the tort of malicious prosecution cannot succeed, and that is even without considering whether the claim is still on foot. The whole circumstances of the claim in the Local Court for outstanding levies, interest and expenses, pursuant to s 80 of the

Strata Schemes Management Act 1996 substantially succeeded. By that I mean that the claim before the Local Court resulted in a judgment in favour of the owners, the Strata Corporation.

- 19 The resolution in the District Court, which was reached without any party stating that they were not making admissions as to causes of action, resulted in the judgment being set aside, and with agreement being reached that the plaintiff would pay the outstanding levies, which I am informed, without objection and apparently by agreement, she has in fact done.
- 20 What remains outstanding between the parties is interest on those unpaid levy payments and such amount of s 80 expenses as are sought to be recovered.
- 21 It is simply clear that from all of the facts and circumstances put before me, that the proceedings in the Local Court are continuing and, to the extent of any issue within them, they have not been resolved favourably to the plaintiff, but rather they have been partially resolved with an acceptance by the plaintiff that moneys were owed and were paid.
- 22 That brings me to the remaining cause of action, which is a tort of abuse of process. Mr Eliezer has put before this Court, on behalf of his wife, that the tort of abuse of process exists arising out of a background where there has been a period of about eight years of unhappiness, to put it at its least, between the plaintiff and her husband and other lot owners in the strata plan with respect to the way in which the lot owners themselves and the Strata Corporation has behaved towards the plaintiff and his wife.
- 23 He submitted that the core issue is whether the Local Court proceedings, brought pursuant to s 80 of the *Strata Schemes Management Act* were properly commenced by the Strata Corporation and continued properly and whether it was fair for those proceedings to be maintained against the plaintiff in these proceedings.
- 24 In short, it seemed to me that the plaintiff was seeking to assert that, although there may have been outstanding debts in respect to which the Strata Corporation was entitled to commence proceedings, its decision to commence the Local Court proceedings, which involved an exercise of discretion, was improperly taken and ought to be viewed against a history of previous events as constituting conduct analogous to an oppression of a minority shareholder.
- 25 Apparently the history of past events included, so I was informed, an unequal use, to the disadvantage of the plaintiff, of the parking by-laws of the unit; hostile behaviour by one or more of the property owners at the time towards the plaintiff; a failure by the strata manager to adequately attend to the maintenance and repair of various issues in the property, including a driveway light, or lights, in respect of which there is exposed wiring creating a hazard which was not properly addressed; the maintenance and repair of a retaining wall which was not properly addressed and in respect of which the strata manager did not act transparently by providing appropriate answers to the plaintiff when questioned; and whether the strata manager has acted in a way which has caused an increase in the expenses in running the owners corporation, with the consequence that levies have been dramatically increased in circumstances where they were not necessary.
- 26 It was submitted that this core issue gave rise to questions as to whether there is oppression by the body corporate of the lot owner, being the plaintiff; whether or not that oppression is on-

going; and whether the plaintiff is entitled to any relief, or remedy, in respect of such circumstances, either in general or specifically related to the Local Court action. Ultimately the plaintiff seemed to submit that the Strata Corporation was acting in breach of a statutory provision by commencing the Local Court proceedings.

27 The pleading filed in this Court by the plaintiff asserts that there are six collateral purposes in the Local Court proceedings, which are as follows:

“24.1: From early 2009 onwards, then owners with assistance and support from the strata manager commenced to use strata processes in a manner that was oppressive, discriminatory and prejudicial towards the plaintiff; as pleaded in paragraphs 13.1 to 13.8.

24.2: The fourth defendant, the current strata manager, in initiating the legal action in para 18, [this refers to the Local Court proceedings] continued the oppressive, discriminatory and prejudicial conduct towards the plaintiff.

24.3: The action was brought against the plaintiff in retaliation and retribution for the plaintiff's complaints in relation to lapses of the first, second, third and fourth defendants.

24.4: The action was brought to inflict pecuniary loss and detriment on the plaintiff in the form of s80 expenses under the Strata Schemes Management Act 1996.

24.5: The action was brought to damage the plaintiff's standing in the owner's community, thereby silencing the plaintiff and reinforcing the control of the second, third and fourth defendants over the management of the strata plan.

24.6: The defendants persisted with this vexatious litigation to harass and subdue the plaintiff.”

28 The High Court of Australia in *Williams v Spautz* [1992] HCA 34; (1992) 174 CLR 509, dealt with the issue of what constitutes an abuse of process in the course of litigation. From the joint judgment of Mason CJ, Dawson, Toohey and McHugh JJ, at 526-527, it can be concluded that proceedings are brought for an improper purpose and so constitute an abuse of process, where 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 for some collateral advantage beyond what the law offers.

29 Their Honours also held that the improper purpose need not be the sole purpose of the moving party, so long as it is the predominant purpose.

30 Often questions of whether proceedings constitute an abuse of process fall, if at all, to be determined at an interlocutory stage. Here the Court has the benefit, with respect to the Local Court proceedings, of a history of the conduct of those proceedings, rather than their mere commencement in order to judge whether there is any basis for propounding that those Local Court proceedings are an abuse of process.

31 What is known about them is that, first, there was a statutory power which permitted their commencement; secondly, that all that was sought in those proceedings was a monetary judgment and an order for costs; thirdly, there was a proper factual basis for the commencement of the proceeding, namely that there were outstanding levies which had been raised by the Strata Corporation, having been fixed by the lot owners at an annual general meeting and which had not been paid by the plaintiff; fourth, that at a hearing before an assessor in the Small Claims Court Division of the Local Court, that was the only claim that was pursued and it resulted in a judgment for the sums outstanding; fifthly, that when confronted with a District Court appeal, the Strata Corporation resolved those proceedings in a

way which compromised, in part the claim by giving the plaintiff in these proceedings a period of time in which to pay the outstanding moneys and reserved to the Strata Corporation the right, if it, upon further consideration, thought fit, to pursue interest and s 80 expenses.

32 It was agreed that each party should pay their own costs of the District Court proceedings. The compromise there effected by consent of the parties, does nothing to indicate any form of collateral purpose whatsoever. On the contrary, it demonstrates, as it seems to me, that the Local Court proceedings were brought for the relief which was claimed and that the further litigation, which was brought about by the plaintiff's Notice of Appeal to the District Court, was resolved in a sensible and rational way.

33 Putting it differently, there is nothing at all about the fact of the Local Court proceedings, their commencement and maintenance and, in part, their resolution and their on-going maintenance that indicates the existence of any collateral purpose whatsoever.

34 The pleadings to which I have made reference are not capable, on their face, of demonstrating any form of collateral purpose for the commencement of the Local Court proceedings.

35 Hence, neither as a matter of pleading, or as a matter of the evidence available to the Court on this Motion, is there any basis for a conclusion that the Local Court proceedings were brought for a collateral purpose, let alone a conclusion that the collateral purpose was the predominant purpose of the moving party. It is clear that the only relief sought in those proceedings was relief which the law permitted and that the claim was limited to that relief.

36 Accordingly, I conclude that the Statement of Claim in these proceedings does not disclose any reasonable cause of action insofar as it alleges an abuse of process, and therefore that the maintenance of it is vexatious and oppressive.

37 Of course, this is not the end of the matter. I should add that the pleading of malicious prosecution and abuse of process, concentrating as it does on the Local Court proceedings and particularly in light of the abandonment by the plaintiff of the tort of aiding and abetting, simply does not raise any cause of action at all against the third to eleventh defendants. Quite how it is said that they have been involved in the tort of malicious prosecution when those defendants have not been involved directly in the bringing of the proceedings is simply not revealed by the pleading.

38 In order to consider the orders sought in the Notice of Motion, I must turn my mind to a consideration of the legal principles which underlie the exercise of the Court's power to summarily dismiss proceedings pursuant to r 13.4 of the UCPR. That rule permits the Court to summarily dismiss proceedings if the proceedings are frivolous or vexatious, if no reasonable cause of action is disclosed on the pleadings, or if the pleadings are an abuse of the process of this Court. As I have said, the applicants on the Motion, who are the defendants here, seek to rely on the first of those two grounds.

39 In *Dey v Victorian Railways Commissioner* (1949) HCA 1; (1949) 78 CLR 62 at 91, Dixon J said:

"A case must be very clear indeed to justify the summary intervention of the Court to prevent a plaintiff submitting his case for determination in the appointed manner by the Court with or

without a jury. The fact that a transaction is intricate may not disentitle the Court to examine a cause of action alleged to grow out of it for the purchase of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the Court to dismiss the action as frivolous and vexatious and an abuse of process."

40 A number of other authorities have since then applied that principle in the context of summary disposal of cases. In 2010, the High Court of Australia emphasised the importance of that authority in *Spencer v Commonwealth of Australia* (2010) HCA 28; (2010) 241 CLR 118. In their joint judgment, French CJ and Gummow J, said at [24]:

"The exercise of powers to summarily terminate proceedings must always be attended with caution. That is so whether such disposition is sought on the basis that the pleadings fail to disclose a reasonable cause of action or on the basis that the action is frivolous or vexatious or an abuse of process. The same applies where such disposition is sought in a summary judgment application supported by evidence."

41 I am conscious of the limited circumstances in which this Court ought exercise its power under r 13.4 of the UCPR. The circumstances must be very clear and in exercising the power, I must proceed cautiously.

42 I have listened carefully to the submissions of the plaintiff provided by her husband. In particular, I have listened carefully to the plaintiff's complaints about underlying facts and circumstances which have given rise to the concerns expressed by the plaintiff in the pleadings and, in particular, I have given careful attention to the concern of the plaintiff that unless they proceed in the way in which they have in this Court, there is, in effect, no remedy available to them from the law to address the situation in which they find themselves.

43 I am well satisfied, having regard to the requisite authorities, that the claim for damages based upon the tort of malicious prosecution and abuse of process cannot possibly succeed.

44 I come to that conclusion against the background of necessary care and caution, but the simple fact of the matter is that the proceeding which is brought is wide-ranging in the numbers of parties which are nominated, and it fails to demonstrate any cause of action against the third to eleventh defendants at all. In respect of the causes of action it pleads in respect of the existing Local Court proceedings, the cause of action is either premature, if it exists at all, and in my view, on the material available to me, it does not exist at all, or is wholly misconceived.

45 In those circumstances I am satisfied that I should grant the relief sought by the Notice of Motion and I should summarily dismiss the proceedings commenced by Statement of Claim dated 27 April 2015.

46 I order the plaintiff to pay the defendants' costs of the proceedings.
