



Supreme Court
New South Wales

Case Name: Qasim v Mitchell

Medium Neutral Citation: [2022] NSWSC 698

Hearing Date(s): 27 May 2022

Decision Date: 30 May 2022

Jurisdiction: Common Law

Before: Adamson J

Decision:

- (1) In respect of the first defendant's notice of motion filed on 11 November 2021:
 - (a) dismiss the proceedings against the first defendant; and
 - (b) subject to order (6) below, order the plaintiffs to pay the first defendant's costs of the proceedings.
- (2) In respect of the second defendant's notice of motion filed on 10 December 2021:
 - (a) dismiss the proceedings against the second defendant; and
 - (b) subject to order (6) below, order the plaintiffs to pay the second defendant's costs of the proceedings.
- (3) In respect of the third defendant's notice of motion filed on 11 November 2021:
 - (a) dismiss the proceedings against the third defendant; and
 - (b) subject to order (6) below, order the plaintiffs to pay the third defendant's costs of the proceedings.
- (4) In respect of the fourth defendant's notice of motion filed on 10 December 2021:
 - (a) remove the fourth defendant as a party to the proceedings; and
 - (b) subject to order (6) below, order the plaintiffs to pay the fourth defendant's costs of the proceedings.
- (5) In respect of the fifth defendant's notice of motion filed on 9 December 2021:

- (a) dismiss the proceedings against the fifth defendant; and
- (b) subject to order (6) below, order the plaintiffs to pay the fifth defendant's costs of the proceedings.
- (6) Any defendant who seeks a costs order other than that the plaintiffs pay her, its or his (as the case may be) costs on the ordinary basis, may apply within seven days for a different order by written application to my Associate together with submissions and evidence in support.
- (7) If an application is made under order (6) above, further directions will be made for the determination of costs issues.
- (8) Grant liberty to any defendant to apply for an order that costs be paid in a gross sum.

Catchwords:

CIVIL PROCEDURE — Summary disposal — Dismissal of proceedings — No reasonable cause of action disclosed — where plaintiff described grievances without reference to cause of action known to law — where proceedings dismissed

CIVIL PROCEDURE — Parties — Removal of parties — where potential claim against company — where defendant joined was director of company — separate legal personalities — where defendant removed from proceedings

Legislation Cited:

Civil Procedure Act 2005 (NSW), s 98
District Court Act 1973 (NSW), s 127
Legal Profession Act 2004 (NSW), s 350
Strata Schemes Management Act 2015 (NSW), ss 85, 86
Uniform Civil Procedure Rules 2005 (NSW), rr 6.29, 13.4, 14.28, 42.1

Cases Cited:

Cabassi v Vila (1940) 64 CLR 130; [1940] HCA 41
General Steel Industries Inc v Commissioner for Railways (NSW) (1964) 112 CLR 125; [1964] HCA 69
McGuirk v University of New South Wales [2009] NSWSC 1424
Young v Hones [2014] NSWCA 337

Category:

Procedural rulings

Parties: Shaheen Qasim (First Plaintiff)
Fred Klein (Second Plaintiff)
Heather Mitchell (First Defendant)
Rachel Deegan (Second Defendant)
ILP Strathfield Pty Ltd trading as Strathfield Law (Third Defendant)
Yennie Chen (Fourth Defendant)
Anthony Fowler (Fifth Defendant)
Andrew Noble (Sixth Defendant)

Representation: Counsel:
S Qasim (Plaintiffs)
H Mitchell (First Defendant)
B Shaw (Second Defendant)
J Dooley (Third Defendant)
S Maybury (Fourth Defendant)
L Cooper-Hackman (Fifth Defendant)

Solicitors:
Not applicable (Plaintiffs)
Not applicable (First Defendant)
Bridges Lawyers (Second Defendant)
Sparke Helmore Lawyers (Third Defendant)
DLA Piper Australia (Fourth Defendant)
Barry Nilsson Lawyers (Fifth Defendant)

File Number(s): 2021/279779

JUDGMENT

Introduction

1 On 30 September 2021, Shaheen Qasim and Fred Klein (the plaintiffs) commenced these proceedings by filing a summons in which they specify the following “type of claim”:

“Prerogative Writ *other

Orders sought

- 1) Claim allowed with dismissal of case 2021 / 00070005.
- 2) Urgent structural engineering report be obtained for public safety.
- 3) Mr Anthony Fowler, to meet with Jones Nicholson engineers to confirm & explain the discrepancy of his reports with tampering of evidence in 2012.
- 4) Reinstatement of Supreme Court proceedings to ensure compliance & public safety”

2 The plaintiffs also claim the following relief:

“1. [1.250,000]

2. [\$ 32,000 discovery accountants fees & other fees]”

3 Each defendant, other than the sixth defendant, has applied, by notice of motion, to have the claim dismissed or, in the case of the fourth defendant, to be removed as a party. In order to appreciate the context in which these applications have been made, it is necessary to set out the factual background which establishes the connections between each defendant and Ms Qasim, the first plaintiff.

4 The connection between Mr Klein, the second plaintiff, and the defendants does not appear from the evidence. Ms Qasim identified Mr Klein as an accountant and proposed that he be substituted as a plaintiff in due course. However, as Mr Klein is currently a plaintiff, he is a respondent to the defendants’ notices of motion.

The facts

Background

5 The property known as 5 William Street Randwick, in which there are four units, is subject to Strata Plan (SP) 11245 (the property). Ms Qasim, at all material times, owned and continues to own units 3 and 4.

6 Issues relating to the condition and maintenance of the property arose at least from 2006. So far as the evidence revealed, these issues concerned the habitability of unit 3 because of structural defects in its ceilings.

7 Anthony Fowler, the fifth defendant, was then a director of Acumen Australia Consulting Engineers Pty Ltd (Acumen). He prepared reports concerning the property dated 18 September 2006, 2 December 2006 and 9 November 2007. Ms Qasim retained Owen O’Brien, a structural project engineer with Jones Nicholson, consulting engineers, who prepared a report dated 29 June 2007.

8 The first defendant, Heather Mitchell, purchased unit 1 in 2010. The second defendant, Rachel Deegan, purchased unit 2 in August 2020 from Y Ren and J Tu (no further details were revealed by the evidence).

The appointment of Strathfield Partners as strata managers

- 9 In June 2010, Strathfield Partners were appointed as strata managers for the property. As such, they handled the finances of the Owners Corporation of the property (the OC). Solid Strata Management (Solid Strata) was the managing agent for the property.

The 2010 proceedings in this Court

- 10 On 20 October 2010, Ms Qasim commenced proceedings 2010/348354 in this Court against the OC and Solid Strata (the 2010 proceedings). Although the file for the 2010 proceedings appears to have been archived, I have had regard to the JusticeLink record for the purposes of determining orders and directions made in those proceedings which may bear on the present applications.
- 11 Makinson d'Apice, solicitors, acted on behalf of the OC and were paid by Solid Strata from levies raised from the owners of the units in the property.
- 12 Strathfield Partners' cash management statement for the month to 31 October 2011 recorded that a payment was made on 21 October 2011 to ILP Strathfield Pty Ltd trading as Strathfield Law (Strathfield Law), the third defendant, in the sum of \$7,254.30. The evidence does not reveal the basis for this payment.
- 13 Makinson d'Apice retained Acumen to prepare an expert engineering report for the 2010 proceedings. Mr Fowler prepared a report dated 21 March 2012.
- 14 On 22 March 2012, the 2010 proceedings were listed for a five day hearing, commencing on 12 September 2012. At that same directions hearing, leave was granted to Ms Qasim to rely on expert evidence in response to the affidavit of Mr Fowler. Ms Qasim retained Jones Nicholson to prepare an expert engineering report on her behalf for the 2010 proceedings.
- 15 At a subsequent case management hearing before Nicholas J, his Honour urged the parties to resolve their disputes in advance of the hearing.
- 16 On 2 August 2012, Rockliffs, the solicitors on the record for Ms Qasim in the 2010 proceedings, applied for leave, which was granted by Nicholas J, to file a notice of ceasing to act in the proceedings. A notice of ceasing to act was filed on 17 August 2012.

- 17 On 10 September 2012, Nicholas J made the following orders by consent, which resolved the whole of the 2010 proceedings:
- “1. The Second Amended Statement of Claim is dismissed with no order as to costs.
 2. The First Cross-Claim is dismissed with no order as to costs.
 3. The Second Cross-Claim is dismissed with no order as to costs.
 4. The hearing dates of 12 -18 September 2012 are vacated.”
- 18 In so far as the plaintiffs claim, in prayer 4 of the summons, that the 2010 proceedings be reinstated “to ensure compliance and public safety”, this claim cannot succeed as the 2010 proceedings were resolved by the making of consent orders.
- 19 Although the 2010 proceedings were resolved, Mr O’Brien, who had been retained by Ms Qasim for the purposes of the 2010 proceedings, prepared a further report for Ms Qasim dated 8 October 2012 relating to the condition of units 3 and 4, which referred to Mr Fowler’s reports. The purpose of this report is not clear.
- 20 Acumen was deregistered in 2013.

The appointment of Supreme Strata as strata managers

- 21 On 22 May 2019, the OC entered into a strata management agency agreement with Brilliant Property Group Pty Ltd, which traded as Supreme Strata (Supreme Strata). Yennie Chen, the fourth defendant, is a director of Supreme Strata. A subsequent agreement between these parties was entered into on 5 March 2020 for a further term of 24 months.

The District Court proceedings

- 22 On 11 March 2021, the OC commenced proceedings 2021/70005 in the District Court of New South Wales at Sydney against Ms Qasim (the District Court Proceedings). In the District Court Proceedings, the OC claimed outstanding strata contributions in a total amount of \$135,582.06 plus interest at 10% per annum pursuant to s 85 of the *Strata Schemes Management Act 2015* (NSW) and other expenses under s 86(2A) of the *Strata Schemes Management Act*. Strathfield Law are the solicitors on the record for the OC in the District Court

Proceedings. Ms Chen, as the principal of Supreme Strata, affirmed the affidavit verifying the statement of claim.

- 23 I understand prayer 1 of the summons, which seeks an order, “Claim allowed with dismissal of case 2021 / 00070005”, to be an application for this Court to dismiss the District Court proceedings. A single judge of this Court has no power to dismiss District Court proceedings. A party to proceedings in the District Court has a right of appeal to the Court of Appeal but only from judgments or orders made: s 127 of the *District Court Act 1973* (NSW). To date, there do not appear to have been any orders in the District Court proceedings which could be the subject of an appeal to the Court of Appeal.
- 24 As referred to above, Ms Qasim commenced the present proceedings by filing a summons on 30 September 2021.

Consideration

- 25 The principles can be shortly stated. A claim will not be summarily dismissed unless it is so obviously untenable that it cannot possibly succeed: *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125; [1964] HCA 69. A claim is to be assessed against this standard assuming the truth of all the allegations in the plaintiff’s pleading or originating process. If a claim is untenable in this sense, then it may be summarily dismissed (under Uniform Civil Procedure Rules 2005 (NSW) (UCPR), r 13.4), or alternatively struck out if no reasonable cause of action might be pleaded (under UCPR r 14.28). A claim may also be struck out if allegations are made at such a level of generality that the defendant does not know in advance the case it has to meet: *McGuirk v University of New South Wales* [2009] NSWSC 1424.
- 26 Ms Chen moves under UCPR, r 6.29 to be removed as a defendant, on the basis that she had been improperly or unnecessarily joined.
- 27 It is convenient to address the applications by each defendant separately, although there are some common issues.

Application by Ms Mitchell for summary dismissal

- 28 Ms Mitchell submitted that the plaintiffs had alleged no cause of action known to the law against her and that, accordingly, the plaintiffs' claim against her ought be summarily dismissed.
- 29 Ms Qasim contended that Ms Mitchell had instructed Makinson d'Apice to act on behalf of the OC in the 2010 proceedings even though she held only 25% of the shares in the OC. Ms Qasim submitted that Makinson d'Apice were, in effect, acting for Ms Mitchell rather than in the interests of the OC. When pressed to identify a cause of action against Ms Mitchell, Ms Qasim alleged that Ms Mitchell had tampered with evidence in the 2010 proceedings and was guilty of white collar crime. The allegations of criminal conduct (for which no evidentiary basis was revealed in the evidence), even if made out, do not confer a private right on Ms Qasim against Ms Mitchell.
- 30 Ms Qasim has failed to identify a cause of action against Ms Mitchell. Although she has a number of grievances against Ms Mitchell, none corresponds with a cause of action known to the law. In so far as monies have been levied by the OC against the unit holders, it is the OC which is responsible for having levied those monies and not Ms Mitchell. Mr Klein has failed to articulate any claim against Ms Mitchell.
- 31 For these reasons, I am satisfied that the plaintiffs' claim against Ms Mitchell ought be dismissed.

Application by Ms Deegan for summary dismissal

- 32 Ms Qasim confirmed in her submissions that she did not seek any remedy against Ms Deegan as long as she could maintain a claim against Y Ren and J Tu for their conduct prior to Ms Deegan's purchase of the unit in August 2020. Mr Shaw, who appeared on behalf of Ms Deegan, submitted that, as there was no claim against Ms Deegan, the proceedings ought be summarily dismissed against her.
- 33 As Ms Qasim was unable to articulate a claim against Ms Deegan, either in her summons, her evidence or her submissions (and Mr Klein did not attempt to do so), I am satisfied that the claim against Ms Deegan must be dismissed.

Application by Strathfield Law for summary dismissal

34 Mr Dooley, who appeared on behalf of Strathfield Law, submitted that Ms Qasim's grievances, in so far as they could be discerned from the summons or her evidence, would appear to arise from physical defects in the common property, which had nothing to do with Strathfield Law.

35 Mr Dooley identified one document in the evidence (referred to above) which showed that a payment was made on 21 October 2011 to Strathfield Law in the sum of \$7,254.30. He referred to the following statement in Ms Qasim's affidavit of 17 September 2021 which was filed in support of the summons:

"The other abuse is that of the bank statement dated 31.10.2011. Strathfield Law helped themselves with respect to \$7254. This needs to be refunded with interest."

36 Mr Dooley submitted that, even if there was a basis for a claim for restitution or any other identifiable claim at law, the claim would be time-barred since over ten years have passed since it was paid. He also referred to s 350 of the *Legal Profession Act 2004* (NSW) (which was in force at the time of the payment) which provided that a client must seek an assessment of costs within 12 months, unless the time was extended. In so far as Ms Qasim seeks to challenge any fees paid by the OC to Strathfield Law, only the OC, as the client, has standing to challenge these.

37 Ms Qasim submitted that Strathfield Law had acted without instructions from the OC. She contended that, as Ms Mitchell and Ms Deegan only had a total of 50% of the units in the OC, they had no authority to retain Strathfield Law to act on behalf of the OC in the District Court proceedings. This would appear to be the basis of her claim for relief in prayer 1 of the summons:

"Claim allowed with dismissal of case 2021/00070005 [the District Court proceedings]."

38 As referred to above, this Court has no power, except on an appeal from the District Court, to dismiss proceedings in the District Court. Accordingly, the claim for dismissal of the District Court proceedings is not maintainable.

39 Ms Qasim's real grievance against Strathfield Law (which has not been pleaded) would appear to be that they purport to act on behalf of the OC, notwithstanding that Ms Qasim does not want them to act on its behalf. This is

a question which would appear to arise, if Ms Qasim chooses to raise it, in the District Court proceedings, since she is challenging Strathfield Law's right to represent the OC as plaintiff in proceedings brought against her.

- 40 Ms Qasim has neither alleged nor identified any claim known to the law which is separately justiciable in these proceedings as distinct from by way of notice of motion in the District Court proceedings. Mr Klein has not asserted any claim although he is named as a plaintiff. In these circumstances, I am satisfied that the plaintiffs' claim against Strathfield Law must be dismissed.

Application by Ms Chen for removal as a party

- 41 As referred to above, Ms Chen's application is that she be removed as a party from the proceedings since her only relevant role is as a director of Supreme Strata. Mr Maybury, who appeared for Ms Chen, submitted that the parties to the agency agreements for the property were the OC and Supreme Strata and that, accordingly, Ms Chen was not a proper party to the proceedings.
- 42 Ms Qasim contended that Supreme Strata and Ms Chen were, in effect, one and the same, and that she was entitled to sue Ms Chen for her grievances against Supreme Strata.
- 43 Supreme Strata (as defined above) is a corporate entity. As such, it has a legal personality which is separate and distinct from that of its directors. Ms Qasim has not identified any claim which she could conceivably have against Ms Chen. Ms Chen's connection as director of Supreme Strata is insufficient to make her a proper party to the proceedings. Accordingly, Ms Chen ought be removed as a party to the proceedings.

Application by Mr Fowler for summary dismissal

- 44 Ms Cooper-Hackman, who appeared on behalf of Mr Fowler, contended that there was no cause of action known to the law alleged against Mr Fowler.
- 45 Ms Qasim's claim against Mr Fowler would appear to be related to her claims in prayers 2 and 3 of the summons as follows:

"2) Urgent structural engineering report be obtained for public safety.

3) Mr Anthony Fowler, to meet with Jones Nicholson engineers to confirm & explain the discrepancy of his reports with tampering of evidence in 2012."

- 46 In oral submissions, Ms Qasim alleged that Mr Fowler was in breach of the Expert Witness Code of Conduct. She alleged that he had acted for the holders of units 1 and 2 and had not been retained by the OC. She also alleged that he had changed his opinion between 2006, when he prepared his first report, and 2012, when he prepared a report for the purposes of the proceedings.
- 47 Mr Fowler was, as referred to above, an expert retained by the OC in the 2010 proceedings, which were settled prior to hearing. He had prepared at least one expert report for the purposes of the hearing. Mr O'Brien, Ms Qasim's expert, disagreed with Mr Fowler's report.
- 48 Had Mr Fowler given evidence in the 2010 proceedings (which would have occurred had they not been resolved), he would have been entitled to an immunity from suit. In *Cabassi v Vila* (1940) 64 CLR 130; [1940] HCA 41, Rich ACJ said at 139:

"An action by the defeated party cannot ... be maintained against a witness or witnesses for giving false testimony in favour of his opponent. Public policy and the safe administration of justice require that witnesses, who are a necessary part of the judicial machinery, be privileged against any restraint, excepting that imposed by the penalty for perjury. Though not a party to the former suit and judgment, the merits of that judgment cannot be re-examined by a trial of the witness' testimony in a suit against him. The procedure, if permitted, would encourage and multiply vexatious suits, and lead to interminable litigation."

[Footnotes omitted]

- 49 Starke J said at 140-141:

"No action lies in respect of evidence given by witnesses in the course of judicial proceedings, however false and malicious it may be ... the rule of law is that no action lies against witnesses in respect of evidence prepared, given, adduced or procured by them in the course of legal proceedings. The law protects witnesses and others, not for their benefit, but for a higher interest, namely, the advancement of public justice. The remedy against a witness who has given or procured false evidence is by means of the criminal law or by the punitive process of contempt of court."

[Footnotes omitted]

- 50 In *Young v Hones* [2014] NSWCA 337, the Court of Appeal reviewed the authorities on advocate's immunity and witness's immunity. Bathurst CJ (Ward and Emmett JJA agreeing) said, at [35]:

"This review of the authorities reveals a somewhat divergent approach to the application of the immunity to out of court work done by an expert. However, once it is appreciated that the rationale for the immunity is the same as that for

advocate's immunity, there is no reason for the test for the application of the immunity to be different in either case. Thus the immunity will apply where the work in question is work done in court or work done out of court which leads to a decision affecting the conduct of the case in court or putting it another way, is work intimately connected with the work in court.”

[Citations omitted.]

- 51 Mr Fowler’s report for the 2010 proceedings was “intimately connected with the work of the court”. Thus, Ms Qasim has no action against Mr Fowler with respect to anything he did as a witness in connection with the 2010 proceedings, including preparing reports for the proceedings because he is protected by the immunity referred to above.
- 52 As to the relief claimed, there is no privity of contract between him and Ms Qasim whereby he promised to provide such a report. Thus, this Court has no power to order, by way of specific performance of any agreement, that Mr Fowler prepare a report. I discern no other basis on which the Court could order Mr Fowler to prepare a report. I accept Ms Cooper-Hackman’s submissions that Ms Qasim has no arguable claim against Mr Fowler. For these reasons, the plaintiffs’ claim against Mr Fowler ought be summarily dismissed.

Costs

- 53 The parties agreed that costs ought follow the event in accordance with the general rule: UCPR, r 42.1. In any event, I am not persuaded that there is any reason to depart from the general rule.
- 54 Mr Maybury sought leave to apply for costs in a gross sum pursuant to s 98(4) of the *Civil Procedure Act 2005* (NSW), if an order for costs was made in Ms Chen’s favour. Ms Cooper-Hackman foreshadowed an application for indemnity costs, if a costs order was made in favour of Mr Fowler. I will make provision in the orders for liberty to make these applications.

Orders

- 55 For the reasons given above, I make the following orders:
- (1) In respect of the first defendant’s notice of motion filed on 11 November 2021:
 - (a) dismiss the proceedings against the first defendant; and

- (b) subject to order (6) below, order the plaintiffs to pay the first defendant's costs of the proceedings.
- (2) In respect of the second defendant's notice of motion filed on 10 December 2021:
 - (a) dismiss the proceedings against the second defendant; and
 - (b) subject to order (6) below, order the plaintiffs to pay the second defendant's costs of the proceedings.
- (3) In respect of the third defendant's notice of motion filed on 11 November 2021:
 - (a) dismiss the proceedings against the third defendant; and
 - (b) subject to order (6) below, order the plaintiffs to pay the third defendant's costs of the proceedings.
- (4) In respect of the fourth defendant's notice of motion filed on 10 December 2021:
 - (a) remove the fourth defendant as a party to the proceedings; and
 - (b) subject to order (6) below, order the plaintiffs to pay the fourth defendant's costs of the proceedings.
- (5) In respect of the fifth defendant's notice of motion filed on 9 December 2021:
 - (a) dismiss the proceedings against the fifth defendant; and
 - (b) subject to order (6) below, order the plaintiffs to pay the fifth defendant's costs of the proceedings.
- (6) Any defendant who seeks a costs order other than that the plaintiffs pay her, its or his (as the case may be) costs on the ordinary basis, may apply within seven days for a different order by written application to my Associate together with submissions and evidence in support.
- (7) If an application is made under order (6) above, further directions will be made for the determination of costs issues.
- (8) Grant liberty to any defendant to apply for an order that costs be paid in a gross sum.

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