

Introduction

[1] The defendants apply to strike out the plaintiff's statement of claim in this proceeding on the grounds that it does not disclose any reasonably arguable cause of action appropriate to the nature of the pleading; the claim is vexatious; and the proceeding is an abuse of the process of the Court. For the reasons that follow, the application must be granted.

Background

[2] Martin Honey was a shareholder in a company that operated a RE/MAX real estate agency franchise in Royal Oak, Auckland. This company re-branded as a Ray White franchisee in February 2009. Despite that change, RE/MAX branding continued to appear on Mr Honey's website pages from February 2009 until April 2010. For example, an Internet search of "RE/MAX Onehunga" linked to his company's website.

[3] Mr Nottingham claims to have been affected because he was a shareholder in a company that purchased a RE/MAX franchise in Onehunga during this period, in October 2009. He claims that his company suffered loss as a result of market enquiries on the Internet being diverted to Mr Honey's business. Mr Nottingham claims that Mr Honey, his wife, Stephanie Honey, who was employed in the business at the relevant time, and Hemi Taka, who was engaged by Mr Honey to make changes to the website, all knowingly participated in this allegedly fraudulent activity.

[4] Mr Nottingham lodged a complaint with the Real Estate Agents Authority against Mr Honey. Mr Honey complained to the Real Estate Agents Authority about Mr Nottingham's conduct in pursuing his complaint. Mr Nottingham responded with a further complaint that Mr Honey's allegations were knowingly false. Following an investigation, the Complaints Assessment Committee decided to take no action against Mr Honey.

[5] Mr Nottingham appealed to the Real Estate Agents Disciplinary Tribunal against the Committee's decision. This appeal was dismissed in a decision delivered

on 13 October 2014.¹ However, Mr Nottingham's appeal to this Court against the Tribunal's decision was allowed by Thomas J in a judgment delivered on 10 July 2015.²

[6] In the meantime, in 2014, Mr Nottingham took steps to commence a private prosecution against Mr and Mrs Honey and Mr Taka in the Auckland District Court. Following a protracted procedural history, the substantive hearing of these charges finally commenced on 4 April 2016 and concluded on 17 May 2016. The charges brought by Mr Nottingham against all defendants were dismissed by Judge E P Paul in a reserved judgment delivered on 20 June 2016.³ The Judge awarded costs to the second defendants in a decision delivered on 13 July 2016.

[7] Mr Nottingham's appeal against these decisions is set to be heard in this Court on 15 May 2017.

Present proceeding

[8] Mr Nottingham commenced the present proceeding on 12 September 2016. The proceeding is styled as an application for judicial review. However, it alleges a criminal conspiracy to pervert the course of justice and seeks relief that cannot possibly be given in the context of an application for judicial review.

[9] In particular, Mr Nottingham alleges that Judge Paul and Judge Collins (who made procedural directions and rulings in the criminal case) conspired with District Court staff, the second defendants, the second defendants' counsel and unnamed others, including members of the judiciary, the executive and the legislature, to "defeat, prevent, pervert, interfere, and obstruct justice in order to wrongfully acquit the second defendants" and to award costs in favour of the second defendants.

[10] The asserted "overt criminal actions" are baldly stated in 43 subparagraphs. These comprise outrageous and scandalous conclusory allegations which are wholly

¹ *Nottingham v The Real Estate Agents Authority (CAC10057)* [2014] NZREADT 80.

² *Nottingham v The Real Estate Agents Authority* [2015] NZHC 1616.

³ *Nottingham v Honey* [2016] NZDC 9272.

unsupported by any factual particulars. This can be illustrated by reciting the first ten alleged overt criminal actions on the list: “committing perjury”; “suborning perjury”; “promoting perjury”; “maladministering judicial office by protecting perjurers”; “maladministering judicial office by ignoring perjury”; “maladministering judicial office by encouraging perjury”; “making formal and informal applications that were based on, and supported by perjury, which perjury also contained false accusation against the plaintiff, [and others, involved]”; “maladministering judicial office by encouraging, and/or ignoring such applications, as cited immediately above”; “making [knowingly] false written, and/or oral, submissions, and/or rulings, as to facts, and law, in order to defeat, prevent, pervert, interfere, and obstruct justice”; and “ordering and/or carrying out the destruction of evidence”.

[11] No one is entitled to make allegations of serious misconduct, such as fraud or bad faith, let alone the extremely serious allegations of criminal conspiracy, corruption and dishonesty that have been advanced in this case, without being in possession of sufficient evidence to establish a *prima facie* case to prove it. Detailed particulars of the specific facts relied on must be pleaded to support the allegation. The statement of claim filed in this case fails miserably when judged against that standard.

[12] While fraud is an exception to the finality of a judgment, it is the Court’s duty to exercise appropriate pre-trial scrutiny of such claims to guard against the risk of abuse of process. Where an application is made to strike out a claim alleging that a judgment has been obtained by fraud, as in this case, the plaintiff has the onus of showing that it has evidence sufficient to establish a *prima facie* case of fraud. The facts relied on, and supported by that evidence, must be pleaded specifically and with appropriate particularity to support a clear and cogent case.

[13] These basic principles were recently affirmed and emphasised by the Supreme Court in *Commissioner of Inland Revenue v Redcliff Forestry Venture Ltd*.⁴ McGrath J, who gave the reasons of the Court, explained the position in these terms:

⁴ *Commissioner of Inland Revenue v Redcliff Forestry Venture Ltd* [2012] NZSC 94, [2013] 1 NZLR 804.

[32] The rationale for allowing a fraud exception to finality is that it is right that a party who can show that his or her ability to mount an effective case was compromised by the fraudulent conduct of the other party, should not be bound by a judgment which was thereby obtained.

[33] While this rationale exceptionally warrants permitting an unsuccessful litigant to bring a proceeding seeking to reopen a judgment in concluded litigation on the ground it was procured by fraud, it also provides for pre-trial scrutiny of such claims to protect against abuse of that process. So where a defendant in a proceeding involving the fraud exception applies to strike it out the plaintiff is required to discharge the onus of showing it has a case with an evidential foundation amounting to a prima facie case of fraud. The plaintiff's claim of fraud must be one that is fully and precisely pleaded and particularised and of sufficient apparent cogency that it should go to trial.

[14] The hopelessness of the present claim becomes even clearer when one examines the relief sought, almost all of which could not possibly be entertained in the context of an application for judicial review. The relief sought includes:

- (a) an order setting aside the judgment of the District Court acquitting the second defendants and replacing it with a judgment of this Court entering convictions against the second defendants on all charges brought against them by the plaintiff, including convictions on charges that were not accepted for filing or heard;
- (b) an order setting aside the judgment awarding costs to the second defendants and replacing it with an award of indemnity costs against the second defendants and their counsel in favour of the plaintiff;
- (c) an order holding the second defendants and their counsel "in contempt for perjury, suborning perjury and conspiring to falsely accuse, and conspiring to defeat the course of justice";
- (d) a declaration that the perjury committed by the second defendants and suborned by their counsel was of a most serious nature and that the police should be notified of the specificity and impact of that perjury;
- (e) an order directing that the behaviour of the defendants' counsel be reported to police and the Law Society;

- (f) a declaration that the District Court judges have criminally mis-conducted themselves in public office and should be subject to removal procedures as a result;
- (g) a declaration that the judges should be investigated for contempt of court;
- (h) an order giving access to the plaintiff of all communications between judges and staff and the second defendants, any anyone else [who] communicated with the District Court and the judges;
- (i) a substantial award of damages in favour of the plaintiff against the judges and unnamed District Court staff; and
- (j) an order stopping the defendants from harassing the plaintiff and his family.

Strike out

[15] The jurisdiction to strike out a statement of claim is exercised sparingly and only in clear cases. If there is any prospect of the claim succeeding, it must not be struck out. On the other hand, if the claim does not disclose a reasonably arguable cause of action appropriate to the nature of the pleading or is vexatious or is otherwise an abuse of the process of the Court, then the Court has a duty to strike it out.

[16] I have no doubt that Mr Nottingham's claim must be struck out. It is replete with scandalous and outrageous allegations without any attempt having been made to provide supporting factual particulars. Further, almost all of the relief sought could not be granted in the context of an application for judicial review. I am satisfied that these flaws in the claim are of such a fundamental character that they could not be saved by amendment.

Result

[17] The proceeding is struck out.

[18] The first defendant and the first and second named second defendants are entitled to costs assessed on a Category 2 band B basis together with their reasonable disbursements.

[19] The third named second defendant, who is unrepresented, is entitled to his reasonable disbursements.

M A Gilbert J