

Reference No. HRRT 029/2017

UNDER THE HUMAN RIGHTS ACT 1993

BETWEEN KATHY APOSTOLAKIS

PLAINTIFF

AND ATTORNEY-GENERAL

FIRST DEFENDANT

AND ROB GARLICK

SECOND DEFENDANT

AND SIMON NICOLAS MEIKLE

THIRD DEFENDANT

AT WELLINGTON

BEFORE:

Mr RPG Haines ONZM QC, Chairperson

Ms GJ Goodwin, Member

Mr BK Neeson JP, Member

REPRESENTATION:

Mrs K Apostolakis in person

Mr RS May and Ms R Kós for first defendant

Mr C Matsis for second defendant

Mr SN Meikle in person

DATE OF HEARING: Heard on the papers

DATE OF DECISION: 17 January 2019

DECISION OF TRIBUNAL STRIKING OUT STATEMENT OF CLAIM¹

¹ [This decision is to be cited as: *Apostolakis v Attorney-General No. 3 (Strike-Out Application)* [2019] NZHRRT 2.]

INTRODUCTION

[1] On 15 July 2010 a property situated at 12 Colville Street, Newtown, Wellington was sold at public auction on behalf of the Registrar of the District Court at Wellington pursuant to an order of the Family Court made in matrimonial property proceedings between Mrs Apostolakis and a Mr Damir De Polo who had been in an acknowledged de facto relationship with Mrs Apostolakis in the nature of a marriage.

[2] The successful bidder at the auction was Kosta Apostolakis (Kosta), the son of Mrs Apostolakis.

[3] In these proceedings under Part 2 of the Human Rights Act 1993 Mrs Apostolakis alleges that in the circumstances the Attorney-General (on behalf of the Ministry of Justice) as well as the second and third defendants discriminated against her on the grounds of her family status, namely her membership of a class of persons who are related to “notorious criminals”.

[4] All three defendants have applied to have the proceedings struck out on the grounds the claim is an abuse of process because:

[4.1] No reasonably arguable discrimination case arises. There is no foundation in the statement of claim to support the allegation by Mrs Apostolakis she has suffered discrimination on the grounds of family status or otherwise.

[4.2] The claim attempts to inappropriately use the Tribunal as a forum to dispute matters which have resulted from Family Court orders in *DDP v KA FC Wellington* FAM-2006-085-498, 13 October 2009 as well as matters determined in *Apostolakis v Kolich* [2012] NZHC 212.

[5] Related claims against the Attorney-General have already been struck out by the Tribunal in *Apostolakis v Attorney-General No. 1 (Strike-Out Application)* [2017] NZHRRT 52 and in *Apostolakis v Attorney-General No. 2 (Strike-Out Application)* [2017] NZHRRT 53.

Explanation of “notorious criminals”

[6] The “notorious criminals” referred to by Mrs Apostolakis are Nick Apostolakis who was at one point her husband and Kosta, one of their sons. In the circumstances more fully described in *R v Apostolakis* (1997) 14 CRNZ 492 (CA) Mr Apostolakis pleaded guilty to a charge of attempting to procure a Police officer to murder Mrs Apostolakis. He was sentenced in the High Court to 18 months imprisonment suspended for a period of one year and was fined \$7,500. An appeal by the Solicitor-General against sentence was unsuccessful, although the Court of Appeal observed that it had not been appropriate for the sentence to be suspended.

[7] Kosta was charged with unlawful possession of the firearm which was to have been supplied to the undercover Police officer who had been asked to carry out the murder. For that he (Kosta) was sentenced to 15 months imprisonment, a sentence subsequently reduced by the High Court on appeal to nine months imprisonment. At the time of the events Mrs Apostolakis was living in a de facto relationship with Mr De Polo.

The second and third defendants

[8] Mr Garlick is described in the statement of claim as a company director of Leaders Real Estate Ltd, the firm of real estate agents engaged to conduct the auction.

[9] Mr Meikle is a lawyer who represented Mr De Polo.

Jurisdiction to strike out

[10] Because the Tribunal's jurisdiction to strike out proceedings is fully addressed in *Apostolakis v Attorney-General No. 2 (Strike-Out Application)* [2017] NZHRRT 53 we do not intend repeating that discussion here and it is adopted in full.

The background circumstances

[11] It is difficult to discern from the incoherent statement of claim the background circumstances to this matter but the submissions for the defendants make reference to the judgment of Associate Judge Gendall in *Apostolakis v Kolich* [2012] NZHC 212. Because the background facts set out in that decision will assist the Tribunal to deal effectively with the strike out application, we have decided to admit them in evidence pursuant to the Human Rights Act, s 106(1)(d). The relevant paragraphs follow:

[4] The plaintiff and a Mr Damir De Polo (Mr De Polo) were in an acknowledged defacto relationship being a relationship in the nature of a marriage from July 1996 to July 2004.

[5] Following their separation in 2004, difficulties arose concerning division of their property. This culminated in a judgment being given on 13 October 2009 by Judge PR Grace in the Family Court in matrimonial property proceedings between the couple brought in that Court.

[6] Amongst other things, that Family Court judgment dealt with an issue concerning the parties' previous relationship home at 12 Colville Street, Wellington (the property). That property throughout was in the name of the plaintiff alone but Judge Grace at [22] of his decision found clearly that the property was the relationship home of the plaintiff and Mr De Polo at separation.

[7] According to Judge Grace's judgment, the property had a rating valuation at September 2007 of \$540,000.00 and, at the time of his judgment in October 2009, it was subject to charges securing a \$24,000.00 debt to Johnson Lawrence Nominee Company Limited, a further \$170,000.00 debt to Hayman Lawyers Nominee Company Limited and a further debt in favour of Pioneer Limited of \$8,897.50.

[8] In his judgment Judge Grace dealt with the property in two ways. First, he allowed the plaintiff Ms Apostolakis a period of time to give notice that she wished to acquire Mr De Polo's interest based on a market valuation figure to be obtained. From that fair market valuation figure were to be deducted the amounts owing on the property as at the date of separation referred to in para [7] above, and the interest of Mr De Polo was to represent one-half of the remaining net equity in the property.

[9] Secondly, the judgment in the Family Court went on at para [28] to provide that, if the plaintiff Ms Apostolakis did not wish to acquire Mr De Polo's interest in the property, then the Registrar of the Wellington District Court was appointed to conduct a public auction to sell the property and:

After payment of estate agents and costs incurred in respect of sale, the balance, subject to deduction of the amounts owing on the mortgages as at the date of separation, is to be divided equally between the parties.

[10] As it transpired, the plaintiff Ms Apostolakis did not acquire Mr De Polo's interest in the property. Instead, in about August 2010 the property was sold by way of public auction under the conduct of the Registrar of the Wellington District Court.

[11] The plaintiff Ms Apostolakis says she attended that auction with her son Kosta Apostolakis (Kosta) in an endeavour to purchase back what she describes as "her" property. She claims that through her son Kosta she bid for its purchase, and ultimately was successful.

[12] At the conclusion of the auction however, the property was clearly acquired by Kosta as the successful bidder at a price I understand of around \$554,000.00. A deposit of \$54,000.00 was paid to the agents (according to the plaintiff from money she had provided) and a contract was signed for the purchase of the property by Kosta and his wife Ms Kolich as named purchasers.

[13] Subsequently, according to the plaintiff, Kosta and Ms Kolich arranged from the BNZ the necessary mortgage for the total balance purchase price of the property to enable them to complete settlement with the Registrar of the High Court. Title to the property was then transferred into their names on 20 August 2010.

[14] After a short while, however, it seems that Kosta and Ms Kolich were unable to meet the substantial mortgage payments on the property despite them having arranged a tenant and applied the rental received towards these payments. Accordingly, the property was again placed on the market for sale.

[15] It was then sold by Kosta and Ms Kolich to third parties Sarah Jenny Wilson (Ms Wilson) and Herman Steven De Groot (Mr De Groot), I understand at a significant reduction in price from the amount they had previously paid at auction. Title to the property was transferred to the purchasers on 27 July 2011.

[12] The second defendant has filed an affidavit by Mr Peter Scott, a director of Leaders Real Estate (1987) Ltd who was the auctioneer on the day of the sale. He deposes:

[12.1] At the time he did not know Mrs Apostolakis was related to “notorious criminals” and was not aware that Mr Garlick or anyone else within Leaders was aware of any such relationship and no one treated Mrs Apostolakis differently because of that relationship.

[12.2] Mrs Apostolakis is wrong in asserting she was the highest bidder for the property at the auction and that Leaders and the Crown “cancelled” her purchase. The highest bidder was in fact Kosta and this is evidenced by the sale agreement annexed to Mr Scott’s affidavit. The purchaser is listed as “Kosta Apostolakis or nominee”.

[12.3] As to the claim by Mrs Apostolakis that Leaders forced her and Kosta into “an absurd, ridiculous, unreasonable and inappropriate contract”, Mr Scott has no idea what she means by that. She was not a party to the contract and Mr Scott does not recall anything absurd, ridiculous, unreasonable and inappropriate about the sale agreement signed by Kosta.

[12.4] Prior to the auction Mr Scott had not met Mrs Apostolakis, had no knowledge of any of her family relationships (whether criminal or otherwise) and no reason to discriminate against her.

Discussion

[13] The statement of claim filed by Mrs Apostolakis is characteristically discursive, unfocused and unhelpful in terms of understanding what her case is against each of the three defendants. Apart from alleging the defendants treated her less favourably because she was perceived as belonging to a class of people related to notorious criminals, the statement of claim is bereft of any meaningful information as to the grounds and circumstances on which Mrs Apostolakis relies to support her ephemeral allegations.

[14] The same is true of the memoranda filed by Mrs Apostolakis and of her affidavit sworn on 28 September 2017.

The claim against the Attorney-General

[15] The statement of claim alleges the Attorney-General treated Mrs Apostolakis less favourably because of her belonging to a class of people related to “notorious criminals”. No foundation for the claims is provided.

The claim against Mr Garlick

[16] In relation to Mr Garlick it is alleged he and his staff “made a false statement and treated the plaintiff less favourably because she belongs to a class of people who are related to ‘notorious criminals’”.

[17] The basis for this contention is not given but in any event the claim is untenable in the face of the explicit terms of the sale agreement. The statement of claim provides no plausible basis for a claim that Mrs Apostolakis was discriminated against by Mr Garlick on the basis of her family status.

The claim against Mr Meikle

[18] In the case of the third defendant (Mr Meikle) it is alleged he wrote a letter to a Mr Ian McCulloch of Max Tait Legal. Of this letter Mrs Apostolakis claims in her pleadings:

The content of the letter refers to the plaintiff and unlawfully discriminates against her because she is in a class of people related to past and/or present notorious criminals.

[19] Again, no plausible basis for this unintelligible claim is made in the statement of claim and the only conclusion that can be reached is that there is no case at all against Mr Meikle.

General

[20] The conspicuous absence from the statement of claim of any plausible case against any of the defendants was a feature also of the allegations made by Mrs Apostolakis in the proceedings brought by her in the High Court in *Apostolakis v Kolich*. In those proceedings she unsuccessfully challenged the transfer of the property from the Registrar of the District Court (as vendor) to Kosta. The Associate Judge at [32] to [34] found no proper basis for any suggestion that the sale to Kosta and his subsequent on-selling of the property to a third party were illegal due to fraud. There was no proper basis for any suggestion that either of the contracts could be considered to be an illegal contract.

[21] In the present proceedings neither the statement of claim nor the affidavit sworn on 28 September 2017 nor any of the various memoranda filed by Mrs Apostolakis establish the basis for a tenable claim against any of the defendants of discrimination based on family status. Her pleadings are bereft of particularisation in relation to the alleged discrimination. In reality the present proceedings are an attempt to re-litigate matters which have already been determined by the Family Court and by the High Court. It is well-recognised this is an abuse of process. See *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 at 541 (HL) and *Apostolakis v Kolich* at [51].

CONCLUSION

[22] We conclude the statement of claim is an abuse of process because:

[22.1] There is no foundation in the facts pleaded in the claim to support the allegation Mrs Apostolakis, through the actions of the first, second and third defendants, has suffered discrimination on the grounds of family status or on any other ground.

[22.2] The claim is a collateral attack on the decisions of the Family Court and the High Court and seeks to re-litigate matters already determined by those courts.

[23] The statement of claim is accordingly struck out in its entirety.

Costs

[24] Costs are reserved. Unless the parties are able to reach agreement on the question of costs, the following procedure is to apply:

[24.1] The defendants are to file their submissions within 14 days after the date of this decision. The submissions by Mrs Apostolakis are to be filed within a further 14 days with a right of reply by the defendants within 7 days after that.

[24.2] The Tribunal will then determine the issue of costs on the basis of the written submissions without an oral hearing.

[24.3] In case it should prove necessary we leave it to the Chairperson of the Tribunal to vary the foregoing timetable.

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Mr RPG Haines ONZM QC
Chairperson

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Ms GJ Goodwin
Member

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Mr BK Neeson JP
Member