NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME OR IDENTIFYING PARTICULARS OF APPELLANT DFT IN [2021] NZHC 2080 REMAINS IN FORCE.

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA25/2023
[2023] NZCA 131

BETWEEN	DFT Appellant
AND	JDN Respondent

Court:	Courtney, Venning and Downs JJ
Counsel:	Appellant in person No appearance for respondent
Judgment: (On the papers)	28 April 2023 at 10.30 am

JUDGMENT OF THE COURT

The appeal is dismissed.

REASONS OF THE COURT

(Given by Courtney J)

[1] The appeal arises from longstanding litigation between DFT and her former partner, JDN, over the care of their children. Following a hearing in the Family Court in 2022 DFT made a number of applications, including an application seeking to transfer the proceedings from the Family Court at Manukau to the Family Court at Auckland. Judge Ryan declined these applications in a memorandum. DFT brought

an application for judicial review of the decision. Van Bohemen J struck out the judicial review application.[1] DFT appeals.

[2] The procedural background is lengthy. We draw from van Bohemen J's description of it.

[3] In October 2022 Judge Mahon delivered a decision declining DFT's application to transfer the Family Court proceedings to the High Court.[2] The Judge also set down for hearing JDN's application to stay or dismiss DFT's application for day-to-day care of the children. The hearing of JDN's application proceeded in December 2022. It was adjourned part-heard on 9 December 2022, awaiting final submissions. Judge Mahon indicated that he would seek to complete a written decision urgently in January 2023.

[4] DFT then applied to the Family Court for further orders, asserting that JDN had perjured himself at the hearing on 8 and 9 December and had denigrated her to their children, and that in his subsequent minute of 12 December 2022 Judge Mahon had drawn inappropriate inferences about her. There was a further hearing on 20 December 2022. Judge Mahon declined DFT's application for removal of the requirement for supervision of her contact with the children, and also declined to recuse himself.

[5] On 27 December DFT applied, without notice, to the Family Court at Auckland for:

(a) an order transferring the Family Court proceedings to the Family Court at Auckland;

(b) directions regarding the alleged perjury by JDN; and

(c) orders admonishing JDN for denigrating DFT, requiring him to pay a $5,000 bond into court and granting DFT six weeks with the children.

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1 *[DFT] v [JDN]* HC Auckland CIV-2023-404-34, 16 January 2023.
2 *[DFT] v [JDN]* [2022] NZFC 9600.

[6] On 30 December 2022 Judge L J Ryan declined these applications on the basis that "the evidence falls far short of establishing the need to proceed without giving the respondent the opportunity to be heard". The Judge directed that the applications proceed on notice.

[7] The following day, 31 December 2022, DFT applied, without notice, to the High Court seeking to review Judge Ryan's decision. She sought substantive orders transferring the Family Court proceedings to the Family Court at Auckland and directing a hearing to address the allegations of perjury made against JDN. In addition, she sought declarations regarding the way Judge Ryan had reached his decision, including assertions of failing to consider the evidence put before him.

[8] In his minute striking out the application, van Bohemen J said:

> [20] [DFT's] application is a thorough waste of the High Court's time. It is plainly vexatious and an abuse of process. Even leaving aside Toogood J's directions about filing, it should be struck out.
>
> [21] There is no reason for [JDN] not to be given notice of [DFT's] application to the Auckland Family Court. There is no urgency in any of the orders [DFT] is seeking in her application.
>
> [22] It was entirely appropriate for Judge Ryan to direct that [DFT's] application proceed on notice and be dealt with on the standard track.
>
> [23] It was entirely inappropriate for [DFT] to obtain a different result by attempting to review Judge Ryan's decision and to attempt to do so without notice to [JDN] or the Family Court.
>
> [24] In accordance with r 15.1(1)(c) and (d) of the High Court Rules 2016, I strike out [DFT's] application to this Court to review Judge Ryan's decision.
>
> (Footnote omitted.)

[9] The reference to Toogood J's direction relates to his decision in *DFT v New Zealand Law Society*.[3] There, Toogood J made an order that future applications that DFT sought to file for relief regarding her litigation before the Family Court under the Care of Children Act 2004 should not be accepted for filing. That order was set aside by this Court.[4] This Court also allowed appeals brought by DFT against decisions of the High Court declining her leave to file fresh proceedings. The effect

[3] *DFT v New Zealand Law Society* [2021] NZHC 2080.
[4] *DFT v JDN* [2023] NZCA 15.

of the decision is that new proceedings brought by DFT should not be refused for filing on the basis of Toogood J's order.

[10] If van Bohemen J's decision to strike out DFT's judicial review application was made pursuant to Toogood J's order, the appeal would be allowed. However, inquiries with the High Court confirm that DFT's application was accepted by the High Court Registry for filing on 4 January 2023. As a result, the basis for the Judge's decision was not Toogood J's direction but instead his conclusion that the application was vexatious and an abuse of process.

[11] The Judge struck out DFT's application under r 15.1(1)(c) and (d) of the High Court Rules, which confer on a Judge the power to strike out a pleading that is frivolous or vexatious or otherwise an abuse of the process of the Court. Having reviewed the papers DFT has filed, we agree that the pleadings did meet the criteria under both r 15.1(1)(c) and (d).

[12] Judge Ryan did not determine the applications that DFT made. He was acting in accordance with r 416J of the Family Court Rules 2002, which provides for how applications filed without notice are to be dealt with. The Judge's decision was that the applications should proceed, but on notice. JDN was unaware of not only the Family Court applications but also of the judicial review application, because none of those applications were served on him. DFT's applications are still on foot in the Family Court. The only possible inference to draw from DFT's filing of the judicial review proceeding in the High Court without notice, when there was no apparent urgency and against the background of Judge Ryan's direction that the applications proceed on notice, is that DFT was seeking to obtain an advantage over JDN by proceeding without serving him. In the circumstances, the proceeding was an abuse of process. Van Bohemen J made no error in his characterisation of the proceeding, nor in his decision to strike it out.

Result

[13] The appeal is dismissed.

[14] Since DFT is self-represented and JDN took no steps in this Court, no issue as to costs arises.