IN THE HIGH COURT OF NEW ZEALAND
GISBORNE REGISTRY

CIV 2012-416-82
[2012] NZHC 2088

UNDER	the Judicature Amendment Act 1972
BETWEEN	MARTA HAYES Applicant
AND	FAMILY COURT First Respondent
AND	JUDITH GUERIN Second Respondent

Hearing: 10 August 2012

Counsel: Applicant in person
J C Bunbury and N Witters for second respondent

Judgment: 16 August 2012

RESERVED JUDGMENT OF DOBSON J
(Application for strike out)

Immediate issue, and test for strike out

[1] This judgment deals with an application brought on behalf of the second respondent (Mrs Guerin) to strike out the claim brought by the applicant (Ms Hayes) as an application for judicial review. The essential point on which the application for judicial review depends is Ms Hayes' contention that the Family Court wrongly declined her request to transfer to the High Court a claim against their mother's estate by Mrs Guerin under the Family Protection Act 1955 (the FPA). The Family Court proceeded to find in favour of Mrs Guerin's claim against their mother's estate, such orders operating to the detriment of Ms Hayes as the beneficiary in their mother's estate.

[2] Ms Hayes now claims that the Family Court did not have jurisdiction to hear the FPA claim because other requisite proceedings had already been commenced in the High Court. The concurrent jurisdiction of the High Court and the Family Court in respect of proceedings under the FPA was introduced in s 3A in 1992 on the following terms:

> **3A Courts to have concurrent jurisdiction**
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> (1) Subject to the succeeding provisions of this section, the High Court and a Family Court shall each have jurisdiction in respect of proceedings under this Act.
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> (2) A Family Court shall not have jurisdiction in respect of any application under this Act if, at the date of the filing of the application, proceedings relating to the same matter have already been commenced in the High Court.
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> …

[3] Ms Hayes did not cite s 3A(2) to the Family Court, when her application was made to transfer the proceedings to the High Court. Nor was the alleged lack of jurisdiction raised on subsequent opportunities in the protracted litigation between the step-sisters. Mrs Guerin contends that an application for judicial review on this basis is not a reasonably arguable cause of action under r 15.1(a) of the High Court Rules, and alternatively is an abuse of process under r 15.1(d). She therefore seeks to have it struck out.

[4] The onus on a party seeking to have proceedings struck out is a relatively high one. If strike out is sought on the basis of the untenability of the causes of action, then the Court must be persuaded that they are untenable in the sense that the causes of action could not possibly succeed.[1]

[5] Generally, such applications are to be considered on the assumption that facts pleaded in the statement of claim will be made out by the plaintiff. That approach must be subject to certain exceptions if allegations are entirely speculative and without foundation. So, too, where allegations in a statement of claim are mixed

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1 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267, *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314 (CA), *Couch v Attorney-General* [2008] NZSC 45 at [33].

propositions of fact and law, for example, as to the effect or characterisation of steps in Court proceedings.[2]

[6] The jurisdiction to strike out is only to be exercised sparingly, and in a clear case where the Court is satisfied it has all the requisite material.[3]

Litigation background

[7] The proceedings Ms Hayes relies on as having been commenced in the High Court before Mrs Guerin's claim was filed in the Family Court comprised disputed proceedings as to which of two wills made by their mother should be admitted to probate.

[8] During the latter stages of their mother's life, Ms Hayes and Mrs Guerin had both asserted primary responsibility for the care of their mother, at various times. The matter caused tension and each was critical of the other. After their mother died, Ms Hayes sought probate in respect of a 2005 will that appointed her as executrix of the estate, and excluded Mrs Guerin as a beneficiary. A statement by the testatrix accompanying that will confirmed the following:

> The Family Protection Act has been explained to me. I have not included [Mrs Guerin] in my will as she has adequate resources for her support and it leaves me free to help the other members of the family.

[9] Mrs Guerin sought probate of a later will, completed in 2006, that treated both daughters equally. Ms Hayes disputed the circumstances in which the 2006 will was completed, contending lack of capacity and undue influence.

[10] On or about 11 December 2007, Ms Hayes filed an ex parte application in the contested probate proceedings, seeking an order as to the liability of Mrs Guerin as a person fraudulently obtaining or retaining assets of the deceased. Although filed in the existing proceedings, the application purported to invoke the provisions of s 52 of the Administration Act 1969 (the AA).

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2 *Couch v Attorney-General* at [33].
3 *Attorney-General v Prince and Gardner* at 267.

[11] The contested probate proceedings were resolved at a settlement conference in December 2007, at which it was agreed that the 2005 will would be admitted to probate. It was a condition of the settlement that the assets of the estate would not be distributed until Mrs Guerin could bring an application under the FPA. Thereafter, Mrs Guerin commenced a claim under the FPA in the Family Court, which was opposed by Ms Hayes.

[12] Having granted probate in respect of the 2005 will in February 2008, the matter came back before Potter J on 21 May 2008. Her Honour issued a minute dealing with numerous aspects in relation to the administration of the estate. So far as the ex parte application under s 52 of the AA was concerned, the minute noted:

> ... Marta Hayes' application was made by her in her capacity as a daughter of the deceased. She is now the executrix. The application needs to be brought into an appropriate form and re-filed by her as executrix of the estate, it being her legal obligation as executrix to realise the assets of the estate, to meet the debts of the estate, and to distribute the assets in accordance with the will, subject of course to the outcome of the Family Protection Act proceedings filed by Judith Hayes to which I shall shortly refer. The application must be on notice.

The minute also recorded that the Judge had strongly urged Ms Hayes to take legal advice in respect of the AA application and to present it in a form that would "enable it to be properly advanced". The minute further recorded that Mr Bunbury had invited Ms Hayes to write to his firm setting out the claims in a single document to which he could respond, in the hope of avoiding further court proceedings.

[13] Nothing further had been filed in the High Court when Mrs Guerin's FPA application was heard by Judge O'Donovan in the Family Court at Gisborne on 12 December 2008. In an oral judgment delivered in the course of the hearing, the Family Court Judge declined Ms Hayes' application to transfer those proceedings to the High Court. That judgment included the following:[4]

> The respondent says that another reason for transfer is that there are unresolved proceedings in the High Court relating to the same issues, which arise in this case, in the sense that there are proceedings in that Court relating to the property in this Estate. Mr Bunbury assures me that that is not so. I have no knowledge of any such proceedings. In any case, it seems to me

[4] *JH v MH* FC Gisborne FAM 2008-016-000088, 12 December 2008 at [4].

> that the existence of same, would not prevent this Court dealing with the current application.

[14] Having dismissed Ms Hayes' application to transfer the FPA proceedings to the High Court, Judge O'Donovan went on and determined Mrs Guerin's claim. He held that she had made out an entitlement to an award from the estate and awarded her $80,000.

[15] After the Family Court hearing, on 22 December 2008 Ms Hayes filed what she described as an amended interlocutory on notice application for orders under s 52 of the AA, requiring Mrs Guerin to return assets or pay $260,000 as the value of such assets to the estate. Ms Hayes has subsequently criticised Mr Bunbury in trenchant terms for fraud and deceit in lying to the Family Court Judge when, on her view, Judge O'Donovan was misled by Mr Bunbury's assurance that there were, as at 12 December 2008, no proceedings in the High Court relating to the property in the relevant estate. Mr Bunbury was initially added as a respondent in his own right to these proceedings, but Ms Hayes has discontinued against him.

[16] The rationale for Mr Bunbury's assurance to Judge O'Donovan was that the disputed probate proceedings had been resolved, and that there were no other extant proceedings, given that the inappropriately formulated attempt to make application under s 52 of the AA had been rejected by the terms of Potter J's minute on 21 May 2008, and no further steps in relation to that initiative had been taken by or on behalf of Ms Hayes between 21 May 2008 and the hearing on 12 December 2008.

[17] Ms Hayes appealed the Family Court's substantive decision to the High Court, which directed that the appeal ought to be heard together with Ms Hayes' application under s 52 of the AA. Both matters were heard on 18 May 2009, and Miller J delivered a reserved judgment on 19 June 2009.[5] He dismissed the appeal from the Family Court, and made orders in respect of some assets on the AA application. Thereafter, Ms Hayes sought leave to further appeal the decision in respect of the FPA claim. The parties agreed to Miller J dealing with that application together with an application Ms Hayes pursued for a stay of execution of the High Court judgment, on the papers. Miller J issued a judgment on 5 March 2010 in

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5 *Hayes v Guerin* HC Gisborne CIV 2009-410-10, 19 June 2009.

which he declined Ms Hayes' application for leave to further appeal the FPA claim.[6] That judgment also declined Ms Hayes' application for a stay of execution of the terms of his substantive judgment.

[18] On 20 April 2010, the Court of Appeal heard an application on Ms Hayes' behalf for leave to appeal the High Court decision that dismissed her appeal from the Family Court FPA decision, together with a further application for stay of the effect of the substantive High Court decision. On 27 April 2010, the Court of Appeal dismissed the application for leave to appeal and for a stay. In the course of the Court of Appeal's judgment, the President observed:[7]

> Associated with Ms Hayes' challenge to this aspect of the judgment is her complaint that the Family Protection Act proceedings were determined in the Family Court before Administration Act proceedings (ultimately heard by Miller J at the same time as the appeal) were concluded. But those proceedings could only have served to augment the estate. In any event, because he heard both cases together, Miller J was well-placed to form a view as to whether Judge O'Donovan's assessment of the value of the estate was wrong. Plainly he did not form that view.

[19] In November 2010, Ms Hayes sought leave from the Court of Appeal to appeal out of time Miller J's decision on her application under s 52 of the AA. That application was declined. As I understood Ms Hayes' review of matters in her submissions before me, she was referring to the hearing on this application for leave when she cited Hammond J as having commented to her that it had been illegal for the Family Court to assume jurisdiction to deal with Mrs Guerin's application under the FPA. There is no reference to any such consideration in the Court of Appeal's judgment of 6 December 2010, declining the application for an extension of time. In reviewing the difficulties the Court of Appeal saw in the way of granting the extension of time Ms Hayes sought, the judgment recorded:[8]

> In terms of the relevant authorities, Dr Hayes faces five significant difficulties in relation to the present application:
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> …
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> (b) Second, Dr Hayes sought leave to appeal from Miller J's decision on her Family Protection Act appeal on 31 March 2010 when she filed

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6 *Hayes v Guerin* HC Gisborne CIV 2009-410-10, 5 March 2010.
7 *Hayes v Guerin* [2010] NZCA 148 at [7].
8 *Hayes v Guerin* [2010] NZCA 592 at [5].

> an application in this Court. She could have sought leave to appeal out of time against his decision on her Administration Act claim at the same time. Clearly the value of the estate was critical to the resolution of the proposed Family Protection Act appeal. If Dr Hayes considered that the value was less than it should have been because assets had been improperly dissipated by Ms Guerin, that might have impacted on the amount of funds available for distribution under the Family Protection Act. So the Administration Act issues had an immediate relevance to her proposed Family Protection Act appeal. Dr Hayes was represented by counsel when the application was made and has offered no explanation as to why this step was not taken at that time.

[20] The concern suggested in that paragraph that the two proceedings were connected because the funds available for distribution from the estate might be less than those represented by the claimant has to be read in light of the following observation in that judgment. That was to the effect that the Family Court and High Court had made concurrent findings of fact as to the value of the assets in the relevant estate, so that the Court of Appeal in its first judgment had treated that issue as one not appropriately re-opened on any further appeal.

[21] In 2011, Ms Hayes pursued an application for leave to appeal to the Supreme Court in respect of the Court of Appeal decision refusing to extend time for her appeal from the judgment on her application under s 52 of the AA. The Supreme Court declined leave.[9]

First ground for strike out: no tenable claim of lack of jurisdiction

[22] Mr Bunbury's first argument was that it is untenable for Ms Hayes to allege that s 3A(2) of the FPA applies to Mrs Guerin's proceedings in the Family Court. At the point when her application under the FPA was filed, the only matter extant in the High Court had been resolved by the compromise concluded in December 2007. That compromise occurred on terms contemplating an application under the FPA, which then ensued. Mr Bunbury discounted the initiative Ms Hayes had commenced on an ex parte basis seeking orders under s 52 of the AA, because it had not been served, and had been rejected by Potter J because it was not in a proper form. Mr Bunbury also argued that Ms Hayes' attempt to pursue that initiative within the

[9] *Hayes v Guerin* [2011] NZSC 80.

context of disputed probate proceedings was inappropriate and that any proper application had to have been pursued by means of a separate proceeding.

[23] In essence, Mr Bunbury's argument required the concept of proceedings "commenced" in the High Court for the purposes of s 3A(2) of the FPA to be read as proceedings properly commenced, and still being pursued. There would be no rationale for excluding the Family Court's jurisdiction because of the existence of High Court proceedings that had been concluded by a settlement, or on account of a purported application that had been rejected by the Court. In both circumstances, there was nothing extant in the High Court that might possibly alter the status quo in respect of the estate.

[24] However it is analysed, Mr Bunbury submitted that the rejected application under s 52 of the AA did not constitute a proceeding "relating to the same matter" in the sense of that expression in s 3A(2) of the FPA.

[25] Ms Hayes urged a broader interpretation of the scope of the constraint on the Family Court's jurisdiction. She argued that any proceeding already commenced in the High Court, which had a bearing on the administration of the estate in respect of which a claim was being pursued under the FPA, was likely to have an impact on the application under the FPA, and therefore operated to exclude the jurisdiction of the Family Court. She argued that Judge O'Donovan's reference to proceedings in the High Court "... relating to the property in this Estate"[10] was a knowing and implicit recognition by the Judge of the scope of constraint intended by s 3A(2), given the use in subs (2) of the phrase "proceedings relating to the same matter...".

[26] Reliance on that point is inconsistent with Ms Hayes' characterisation of Judge O'Donovan's "mistake" in assuming jurisdiction, which she argued had occurred because the Judge had not brought to mind the terms of s 3A(2). I took it from her submissions that she did not raise the constraint in s 3A(2) with Judge O'Donovan when requesting that the proceedings be transferred to the High Court.

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[10] *JH v MH* FC Gisborne FAM 2008-016-000088, 12 December 2008 at [4], cited in [13] above.

[27] Ms Hayes inferred a legislative purpose of excluding the Family Court from considering any application under the FPA where anything in relation to the estate was already before the High Court, because the High Court would be better informed by virtue of the matters addressed in documents filed in those other High Court proceedings. Ms Hayes was convinced that, if Mrs Guerin's application under the FPA had been heard by the High Court, then a High Court Judge would have regard to the matters alleged by Ms Hayes in the documents on the contested probate applications, and her (rejected) application under s 52 of the AA. On her analysis, a High Court Judge informed of the content of those documents would have come to the contrary conclusion, and rejected Mrs Guerin's application for provision out of their mother's estate.

[28] That misconstrues the relevance of allegations pleaded in proceedings yet to be determined by the Court. Such allegations in other proceedings in relation to an estate would ordinarily not have evidentiary status in determining an application under the FPA. If proceedings having any bearing on an estate, but unrelated to claims under the FPA, remain outstanding, then they may or may not be relevant to a determination of claims under the FPA. Certainly, the onus would be on those bringing and defending claims under the FPA to present all the evidence perceived as potentially relevant in the conventional way, within that FPA proceeding.

[29] Allegations that Ms Hayes made in respect of Mrs Guerin in any documents filed with the High Court would not have any different status in the course of determination of the FPA application, irrespective of whether that was heard in the Family Court or the High Court. In both jurisdictions, the onus would be on Ms Hayes to adduce evidence in support of those allegations, in accordance with the evidentiary rules of whichever Court was hearing the matter.

[30] The narrowest interpretation of "… proceedings relating to the same matter" in s 3A(2) is that which would arise from considering the terms of the section itself. Subsection (1) indicates that the section is dealing with proceedings brought under that Act ("… in respect of proceedings *under this Act*"). Consistently, subss (3) and (4) also deal with proceedings under the FPA. Consistency might suggest that the

remaining reference to "proceedings", as used in subs (2), was intended to have the same scope, namely proceedings under the FPA.

[31] However, I am not persuaded that confining the scope of "proceedings" as referred to in subs (2) as narrowly as that would meet what I infer to be the legislative purpose of a constraint on concurrent jurisdiction in both the Family and High Courts.

[32] I consider a more limited legislative purpose than Ms Hayes inferred is more likely when Parliament created concurrent jurisdiction as it did in s 3A, subject to the limitation in subs (2). That limitation is justified to prevent different claimants having competing or overlapping claims considered in different jurisdictions. Where more than one claim is advanced against an estate seeking distributions inconsistent with the terms of the will, or the usual succession on an intestacy, a single Court ought to be seized of all such claims against the estate. On this approach, the expression "proceedings relating to the same matter …" would include all claims seeking distributions inconsistent with the terms of the will, but not other proceedings.

[33] Generally, such proceedings would be confined to claims under the FPA, the Law Reform (Testamentary Promises) Act 1949 and the Property (Relationships) Act 1976. In each case, resolution of the merits of such claims need to have regard to the existence and merits of all others that seek to disturb the testator's wishes. This would arise whether they represent, for example, more than one claim under the FPA, or claims under two or more of these acts. Consistent with this analysis is the inclusion of a similar legislative bar to Family Court jurisdiction, where proceedings have been commenced in the same matter in the High Court, in s 5(2) of the Law Reform (Testamentary Promises) Act. Such claims are distinguishable from claims brought against the estate, for example for breach by the deceased of a contract, where the outcome would affect the size of the estate, but the merits of the claim would not otherwise influence any claims under these acts, which depend on various

grounds for the Court to order dispositions inconsistent with the wishes of the testator.[11]

[34] If I am correct in this interpretation of the scope of the limitation on Family Court jurisdiction, then clearly there were no applications under the FPA or other statutes that provide for claims against the estate of a deceased person that had been commenced in the High Court, so as to operate as a bar to the Family Court exercising jurisdiction. The result would be that the fundamental premise on which Ms Hayes' application for judicial review depends is untenable, and the second respondent is entitled to have it struck out.

[35] If I am wrong in the approach I prefer to the scope of the limitation in s 3A(2), then the tenability of the claims of illegality would need to be measured against a wider scope of proceedings in the High Court, the existence of which would preclude the Family Court exercising jurisdiction. That would raise a question of the scope to be attributed to the phrase in subs (2), "… proceedings relating to the same matter …". Arguably, it would not extend to all proceedings in relation to the same estate, because it would have been elementary for the draftsperson to use the word "estate" instead of "matter". What then is the most likely scope of proceedings between those brought against the same estate under the FPA or the other statutes I have referred to (all of which seek Court orders to vary the dispositions provided for in the will), and all proceedings of any type brought against or by the same estate? Generally, disputes as to the validity of a will, or entitlement to appointment as administrator, will be resolved before claims against the estate are brought. That certainly was the sequence here, and time limits for bringing claims run from the date of the grant of administration in the estate.[12]

[36] I am not persuaded that the scope of requisite proceedings for the purposes of s 3A(2) should extend to proceedings brought on behalf of, rather than against, the relevant estate. This point was alluded to by the Court of Appeal in its first judgment.[13] I respectfully agree with the observation there that if an initiative taken

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11 Or, the usual statutory rules of entitlement on an intestacy.

12 FPA, s 9(2), Law Reform (Testamentary Promises) Act, s 6 and Property (Relationships) Act, s 62.

13 *Hayes v Guerin* [2010] NZCA 148 at [7].

in the name of the estate might increase the extent of its assets (which would be the only practical purpose for pursuit of proceedings), then that does not provide the same justification for preventing the Family Court from entertaining an application under the FPA, if it has been pursued in that Court. The outcome of any proceedings on behalf of the estate could only increase the assets available to meet claims, and not decrease them. If a claimant under the FPA was confident the estate would be enlarged, then it would be for the claimant to decide whether, tactically, the claim should be pursued on the basis of the presently known scope of the estate, or deferred until the prospect of its enlargement was determined.

[37] Ms Hayes urged that a literal interpretation of the status of relevant proceedings would extend to all those that had been "commenced", irrespective of whether such proceedings had subsequently been resolved. On this basis, she argued that the original disputed probate proceedings constituted a High Court proceeding that had been commenced, and related to the same matter. However, those proceedings had been compromised as a result of the settlement conference in December 2007, and it is entirely artificial to treat them as relevant for the purposes of excluding Family Court jurisdiction when the parties to those proceedings had agreed that they be brought to an end.

[38] Accordingly, on this wider interpretation of the scope of the limitation on the Family Court's jurisdiction, I would still find that the claim of illegality depending on the Family Court not having jurisdiction is untenable.

[39] Ms Hayes' statement of claim pleads nine purported causes of action, but it is not entirely clear whether any of them could arise independently of the primary allegation that the Family Court acted unlawfully in exercising jurisdiction under the FPA when such jurisdiction did not exist. I invited Mr Bunbury to apply the grounds of his argument to the remaining causes of action. On his analysis, they all either depended on the primary allegation of absence of jurisdiction for the Family Court to determine the FPA application, or were not causes of action but rather pleadings of the propositions on which Ms Hayes would rely to pursue a variety of forms of relief. On his analysis, the claims to relief were all dependent on a finding that the Family Court had acted illegally because it went beyond its jurisdiction.

[40] Although Ms Hayes prevaricated somewhat, she did acknowledge that a number of her pleadings formatted as additional causes of action were indeed pleadings of the propositions she would rely on to seek relief, and that those propositions depended on the Court accepting her primary argument that the Family Court did not have jurisdiction to determine the FPA proceeding.

[41] To the extent that any of her allegations go beyond this primary proposition, then they are a restatement of criticisms of the merits of the substantive Family Court decision, which were argued in the course of the appeal from the Family Court decision. For instance, Ms Hayes' eighth cause of action is headed "Irrationality; contrary to public policy". It concludes with the allegation that the substantive decision of the Family Court was "... contrary to the express intent of Parliament and therefore wholly irrational and contrary to public policy". The ninth cause of action is headed "Testamentary freedom" and cites the recognition of that principle from s 8 of the Wills Act 2007. It includes the assertion that "testamentary freedom cannot be abridged by judicial activism ..." and, although not explicitly pleaded, implicitly criticises the substantive Family Court decision for producing a result in apparent contradiction of the principle of testamentary freedom. Such additional claims are vulnerable to strike out on the basis that their subsequent pursuit in an application for judicial review would constitute an abuse of process. I consider that ground for strike out below.

[42] The submissions Ms Hayes filed in opposition to the present strike out application included wide ranging criticisms of the substantive Family Court decision, including propositions that the Family Court owes a duty of care to other courts, to the public and to the litigants to write judgments properly, and that it breached that duty of care, and that "… only the eight people in the courtroom at the time (ie of the Family Court hearing) know that the outrageous award was made intentionally to harm, deprive and punish [Ms Hayes]". The voluminous materials filed in the present proceedings, and her discursive oral submissions, certainly left the impression that she still seeks redress for what she considers to have been an injustice committed by the Family Court in its substantive decision.

[43] Ms Hayes was insistent that she sought no relief against Mrs Guerin, did not wish to punish her, and had attempted to remove Mrs Guerin as a respondent from the proceedings. Given that approach, and because an address for service has been filed on behalf of the Family Court acknowledging that it would abide the Court's decision, Ms Hayes cited that stance as an acknowledgement that the proceedings were at least viable, if not bound to succeed, provided on behalf of the only respondent against whom she now sought relief.

[44] A notice of the type filed on behalf of the Family Court does not have any such consequence. I would not be prepared to treat it as an acknowledgement of the tenability of causes of action, and its presence on the file cannot avail Ms Hayes in the way she argued.

[45] Therefore, I am satisfied that the primary cause of action based on the lack of the Family Court's jurisdiction is untenable, as are other causes of action dependent on that finding, and should be struck out.

Second ground for strike out: abuse of process

[46] The strike out application was also pursued on the basis that, even if Ms Hayes could identify an existing High Court proceeding at the date of filing of the application under the FPA in the Family Court that deprived the Family Court of jurisdiction, pursuit of that complaint by judicial review now would constitute an abuse of process given the history of the proceedings between the parties in relation to the estate. Abuse of process is also relied upon, to the extent that any of the causes of action do indeed arise independently of the allegation that the Family Court did not have jurisdiction, as discussed at [41]-[42].

[47] Proceedings will be vulnerable to strike out where they constitute an attempt to re-litigate matters previously determined. In the area of judicial review, where any relief would be discretionary, the Court may adopt a relatively broad view to the concept of what constitutes *res judicata*. For instance, in *Fraser v Robertson*, the Court of Appeal recognised a wider sense in which the doctrine of *res judicata* may

apply.[14] If issues are sought to be raised in a judicial review proceeding where they were clearly part of the subject matter of earlier litigation in which they could and ought to have been raised, then it is a form of abuse to raise such issues for the first time in a new judicial review proceeding.[15]

[48] I am not satisfied that there is any satisfactory explanation as to why the claimed lack of jurisdiction was not raised in the course of the appeal before Miller J. Ms Hayes claimed that she was afraid of Judge O'Donovan apparently because, in the course of the hearing before him, that Judge threatened to hold her in contempt because of the manner in which she was attempting to argue her case. At one point, Ms Hayes suggested that her fear of Judge O'Donovan persisted when she launched what was otherwise a thorough attack on his substantive decision, in the course of arguing the appeal. In terms of other explanations, she cited first, and tended to come back to, her conviction that the merits of her appeal against the substantive Family Court decision were so compelling that she did not need to rely on the point that there was a lack of jurisdiction.

[49] Ms Hayes has largely acted on her own behalf,[16] but I do not see that fact or the other matters she raised as an adequate justification for holding back the argument about a lack of jurisdiction, until she could have a "second bite of the cherry".[17] In the Court of Appeal's first judgment on Ms Hayes' initiatives, the Court reflected on her self-represented status:[18]

> We consider it possible that Ms Hayes was prejudiced by her self-representation. … So if Ms Hayes was prejudiced by the litigation strategy she adopted, that is something which she will simply have to live with.

[50] If it was going to be pursued, the absence of jurisdiction point could and should have been argued in the course of the appeal before Miller J.

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[14] *Fraser v Robertson* [1991] 3 NZLR 256 (CA).

[15] At 260/18-23.

[16] She did have counsel in the first hearing in the Court of Appeal. Self-represented litigants are not ordinarily granted additional latitude because the interests of justice also encompass the interests of opposing parties: for example *Haden v Wells* HC Auckland CIV 2010-404-2050, 25 November 2010 at [83].

[17] An apt characterisation adopted by Rodney Hansen J in *Haden v Wells* HC Auckland CIV 2004-404-5500, 20 November 2009 at [27].

[18] *Hayes v Guerin* [2010] NZCA 148 at [5].

[51] An assessment of whether issues now sought to be raised in a subsequent application for judicial review constitute an abuse of process because they are of a type that could have been raised earlier will depend on the nature of the new objection, and the circumstances in which it is raised for the first time in subsequent judicial review proceedings. In *Morris v Templeton*, the Court of Appeal was confronted with a somewhat similar issue in the context of considering leave for a second appeal.[19] There, proceedings in the District Court were brought by beneficiaries against the trustees of a trust, for breach of trust. The beneficiaries' claim was made out but the District Court then purported to excuse the trustees from liability under s 73 of the Trustee Act 1956. The beneficiaries' appeal to the High Court against that finding was dismissed. It was only in the course of seeking leave from the Court of Appeal to further appeal the High Court decision (leave to appeal having been declined by the High Court Judge) that counsel for the applicants (who had not appeared in the earlier stage of the proceedings) argued that the District Court had lacked jurisdiction to hear applications under s 73 of the Trustee Act.

[52] The Court of Appeal was satisfied that the District Court could not exercise jurisdiction under s 73 of the Trustee Act, that being a power reserved solely to the High Court. It was therefore confronted with an original decision of the District Court for which there had been no jurisdiction. It was treated as a form of error of law of sufficient general importance to warrant leave to appeal being granted. It was argued in opposing leave that the point had been raised too late, but the Court of Appeal decided that it could not be too late to raise a point of jurisdiction in a case where the original decision was a nullity.[20]

[53] The beneficiaries opposing the appeal in *Morris* also argued that the High Court's review of the District Court's purported exercise of discretion could be treated as curing the absence of jurisdiction for the original order. Because the High Court's consideration involved an appeal against the exercise of a discretion, the argument in the High Court had not constituted an effective re-argument of the issue. The outcome was that the High Court was not persuaded of any basis for disturbing the District Court's decision. The Court of Appeal took the view that it would not

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19 *Morris v Templeton* (2000) 14 PRNZ 397 (CA).
20 At [15].

necessarily follow that the High Court Judge would have exercised an original jurisdiction in the same way.[21]

[54] That reservation about the scope of consideration of the issues by the High Court is not appropriate here. The appeal argued before Miller J was heard together with Ms Hayes' application under s 52 of the AA, and the Judge reviewed all of the factual and legal issues afresh. The Judge expressly observed:[22]

> Because there was no oral evidence in the Family Court, I am as well placed to assess the witnesses as the Judge was.

[55] He evaluated the protagonist's evidence in the following terms:[23]

> I find that [Ms Hayes] appears genuinely to believe her claims, but they are frequently implausible and extreme, sometimes inconsistent, and often unsupported by independent evidence. In short, her evidence can only be accepted with caution.

[56] As for Mrs Guerin:[24]

> I do not accept Judith's account uncritically, but the verifiable or undisputed evidence tends to support it.

[57] Later, in the context of the reasoning for his decision on the application under s 52 of the AA, the Judge also commented:[25]

> … the factual allegations were fully argued, and my factual findings bear on my reasons for dismissing the appeal, as noted earlier.

[58] The joint hearing of the application under s 52 of the AA is also significant in light of Ms Hayes' argument that the Family Court would have come to the opposite conclusion, had it been exposed to the detail of the matters being pursued in the High Court. Miller J was exposed to that other aspect of the dispute between the step-sisters, in circumstances where the contest over the 2005 and 2006 wills, propounded for probate respectively by Ms Hayes and Mrs Guerin, was a matter of factual background. It is therefore much more difficult in this case to dismiss the

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21 At [16].
22 *Hayes v Guerin* HC Gisborne CIV 2009-410-10, 19 June 2009 at [47].
23 At [47].
24 At [48].
25 At [67].

proposition that any lack of jurisdiction in the Family Court was cured by the re-hearing, on a fully informed basis, in the High Court.

[59] Nonetheless, I would not be satisfied to the standard required for a strike out that the adequacy of the re-hearing before the High Court would be sufficient to "cure" the illegality that would arise, if indeed s 3A(2) of the FPA applied to exclude the jurisdiction of the Family Court. Attributing that status to it would, in practical terms, preclude a right of appeal because the Family Court's decision was treated as being within its jurisdiction when the prospects for a second appeal were considered.

[60] I do not have the same reservation in relation to any components of Ms Hayes' statement of claim that are to be treated as alleging error in the substantive judgment, independently of the primary allegation of an assumption of jurisdiction when the Family Court did not have it. All criticisms of the substantive correctness of the Family Court decision were fully aired in the appeal determined by Miller J. Any attempt to re-litigate them under the guise of judicial review would clearly constitute an abuse of process. Accordingly, any purported causes of action that do not depend on the alleged illegality by virtue of absence of jurisdiction must be criticisms of the substantive correctness of the Family Court decision. To that extent, they constitute an abuse of process being raised in judicial review after the appeal process had been exhausted.

[61] There are additional grounds on which the proceedings might be struck out as constituting an abuse of process. Although alluded to by Mr Bunbury, they were not thoroughly argued. A legitimate concern is the improbability of any meaningful relief. Ms Hayes sought restitution of her "original loss" of $135,885, consequential losses of $42,000, and damages of $50,000. Originally she sought that sum on a joint and several basis from Mrs Guerin, the Family Court and Mr Bunbury personally. At an earlier stage in the proceedings she discontinued against Mr Bunbury and has subsequently attempted to discontinue against Mrs Guerin. Understandably, given the inevitability that any measure of relief granted in Ms Hayes' favour would adversely affect her step-sister's interests, Mrs Guerin opposed any initiative that would deprive her of standing to present contrary argument. By the time of the hearing, Ms Hayes wanted to confine her proceedings

to the prospect of a declaration of illegality in relation to the Family Court decisions, and a right to pursue restitution from the Family Court.

[62] At one point in her discursive submissions, Ms Hayes pleaded to be allowed to go on just for the sake of a declaration that the Family Court had decided the FPA application without jurisdiction. She promised that if she got that relief, she would "not do anything with it". Mr Bunbury opposed the Court relying on any such assurances, implicitly reflecting on what has been a protracted and apparently somewhat bitter experience of dealings with Ms Hayes.

[63] The point was not argued, but it seems most unlikely that the pleaded circumstances would extend to those in which administrative law damages might become appropriate. If the proceedings went on with the only relief sought being a declaration of illegality, further issues would arise as to the utility of proceedings on such a basis.

[64] Subsequent to the hearing, and without leave being reserved, Ms Hayes filed a further memorandum acknowledging the terms of s 6(5) of the Crown Proceedings Act 1950, which provides:

> **6 Liability of the Crown in tort**
>
> …
>
> (5) No proceedings shall lie against the Crown by virtue of this section in respect of anything done or omitted to be done by any person while discharging or purporting to discharge any responsibilities of a judicial nature vested in him, or any responsibilities which he has in connection with the execution of judicial process.

[65] Ms Hayes' point in citing s 6(5) is not entirely clear. However, it does represent one of numerous reasons why a claim for damages against the Family Court would be untenable, and I treat her reference to it as an implicit acknowledgement that it would be untenable to seek damages from the Family Court.

[66] Mr Bunbury questioned the utility of any declaration, if that was sought, as an end in itself. Given the extent to which the disputes over their mother's estate

have been litigated, it is predictable that, in its discretion, the Court at the conclusion of a substantive hearing might decline relief, even if persuaded that the Family Court decision had been made without jurisdiction. Again, however, I am not satisfied that that could be made out at the present stage of the proceedings to the requisite high standard to justify a striking out of the proceedings on that ground alone.

Summary

[67] Accordingly, I grant the second respondent's application to strike out the judicial review proceedings. The proposition that the Family Court did not have jurisdiction to determine Mrs Guerin's FPA application is untenable, as are the causes of action relying on it. To the extent that some of the causes of action sought to advance criticisms of the substantive Family Court judgment independently of this challenge to the Family Court's jurisdiction, then they constitute an abuse of process.

[68] Mrs Guerin's application sought, in the alternative, an order for security for costs. In the circumstances it is unnecessary to consider it.

[69] Mrs Guerin is entitled to costs.

Dobson J

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