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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2021-404-944
[2022] NZHC 870

BETWEEN	MC Plaintiff
AND	FAMILY COURT AT MANUKAU (JUDGE MALOSI) First Defendant
	THE CHIEF EXECUTIVE OF ORANGA TAMARIKI – MINISTRY FOR CHILDREN Second Defendant

Hearing:	8 December 2021
Appearances:	Plaintiff in person and Erin Meehan as support person No appearance by or for the First Defendant (abiding the Court's decision) L Jackson for the Second Defendant
Judgment:	29 April 2022

JUDGMENT OF GAULT J

This judgment was delivered by me on 29 April 2022 at 4:30 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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[1] The second defendant, the Chief Executive of Oranga Tamariki – Ministry for Children (OT), applies to strike out MC's tort claims against the Manukau Family Court / Judge Malosi and OT.[1] The first defendant has filed an appearance abiding the Court's decision and reserving rights.

Factual background

[2] MC is the mother of five children who were removed from her care and that of her partner (who is the father of the youngest child).

[3] On 24 May 2016, the Family Court made an order (on a without notice basis) placing the five children in the custody of OT pursuant to s 78 of the Oranga Tamariki Act 1989 (the Act).

[4] On 30 August 2018, following a six day defended hearing in June 2018, the Family Court made several orders under the Act. These included placing four of MC's children in the custody of the Chief Executive of OT under s 101, making the Chief Executive their additional guardian under s 110(2)(b), and determining there was no realistic possibility of return of any of the children into MC's care under s 18B(2)(c) (the 2018 decision).[2]

[5] On 27 September 2018, MC filed a notice of appeal in the High Court appealing the 2018 decision.

[6] On 16 April 2019, following a preliminary hearing of interlocutory matters, Gordon J in the High Court determined that MC could proceed with her appeal on specified grounds.[3] There was no application for leave to appeal from that interlocutory judgment confining the grounds of appeal.

[7] MC's substantive appeal was heard on 5 December 2019. Justice Hinton reserved her decision.

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1 The plaintiff's name has been anonymised given the reference to earlier proceedings to which s 437A of the Oranga Tamariki Act 1989 applies.

2 *Chief Executive, Oranga Tamariki v MC* [2018] NZFC 4705 at [110]. One of the children had turned 18 years old and was therefore not the subject of this order.

3 *MC v Chief Executive, Oranga Tamariki* [2019] NZHC 833 at [11] and [42].

[8] While the appeal decision was pending, MC made two further separate Court applications. First, on 16 January 2020, she applied to the Family Court at Manukau to discharge the orders made in the 2018 decision. She required leave to do so under s 206A of the Act. Secondly, on 21 January 2020, she filed a statement of claim in the High Court seeking judicial review of the 2018 decision raising alleged procedural irregularities.

[9] On 31 January 2020, Hinton J dismissed MC's appeal.[4] There was no application for leave to appeal that judgment.

[10] On 27 February 2020, Palmer J struck out the statement of claim in the judicial review proceeding.[5]

[11] On 28 July 2020, in relation to MC's Family Court application to discharge the s 101 custody orders in the 2018 decision, Judge Rogers declined leave to re-instigate proceedings on the basis there had not been a material change in circumstances since MC litigated the issues determined by Judge Malosi in 2018 and on appeal in the High Court.[6]

This proceeding

[12] On 8 June 2021, MC commenced this proceeding. As well as her statement of claim, MC filed an application for summary judgment and an unsworn affidavit.

[13] On 22 July 2021, MC filed an amended statement of claim.

[14] On 24 August 2021, OT applied to strike out the 8 June 2021 statement of claim, together with an unsworn affidavit in support (later sworn on 14 October 2021).

[15] MC filed an affidavit in response dated 14 September 2021 (which was also unsworn due to COVID-19 restrictions).

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4 *MC v Chief Executive, Oranga Tamariki* [2020] NZHC 50.
5 *MC v Chief Executive, Oranga Tamariki* [2020] NZHC 296.
6 *Chief Executive, Oranga Tamariki v MC* [2020] NZFC 6164.

[16] It emerged at the hearing that the amended statement of claim had not been served (at least not on OT). MC advised that there were no substantive changes in the amended statement of claim but agreed to send a copy to counsel for OT, Ms Jackson. I reserved leave for OT to file and serve a supplementary memorandum if required and for MC to respond.[7] In the event, no supplementary memoranda were filed. It is only necessary to refer to the amended statement of claim.

[17] MC's tort claims in the amended statement of claim may be briefly summarised as:

(a) a claim against the Manukau Family Court / Judge Malosi alleging the 2018 decision was "fundamentally unlawful" and involved "misbehaviour"; and

(b) a claim against OT for "abuse of Court process".

Approach on strike out applications

[18] Rule 15.1(1) of the High Court Rules 2016 provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.

[19] The approach on applications to strike out on the ground of no reasonably arguable cause of action is well established.[8] The Court proceeds on the assumption that the facts pleaded in the statement of claim are true. Before the Court may strike out proceedings, the causes of action must be so clearly untenable that they cannot

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7 Minute dated 8 December 2021.

8 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267, approved in *Carter Holt Harvey Ltd v Ministry of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [10].

possibly succeed. The jurisdiction is to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material, but the jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument.

[20] The other grounds for strike out are somewhat interrelated. In *Commissioner of Inland Revenue v Chesterfields Preschools Ltd*, the Court of Appeal said:[9]

> The grounds of strike out listed in r 15.1(1)(b)–(d) concern the misuse of the court's processes. Rule 15.1(1)(b), which deals with pleadings that are likely to cause prejudice or delay, requires an element of impropriety and abuse of the court's processes.[10] Pleadings which can cause delay include those that are prolix; are scandalous and irrelevant; plead purely evidential matters; or are unintelligible. In regards to r 15.1(1)(c), a "frivolous" pleading is one which trifles with the court's processes, while a vexatious one contains an element of impropriety.[11] Rule 15.1(1)(d) – "otherwise an abuse of process of the court" – extends beyond the other grounds and captures all other instances of misuse of the court's processes, such as a proceedings that has been brought with an improper motive or are an attempt to obtain a collateral benefit.[12] An important qualification to the grounds of strike out listed in r 15.1(1) is that the jurisdiction to dismiss the proceeding is only used sparingly. The powers of the court must be used properly and for bona fide purposes. If the defect in the pleadings can be cured, then the court would normally order an amendment of the statement of claim.

[21] As the Court of Appeal said in *Dotcom v District Court at North Shore*,[13] a case involving the abuse of process ground:

> The jurisdiction to strike out should be exercised sparingly.[14] In *Reid v New Zealand Trotting Conference* we observed that the purpose of the strike-out power is fundamentally to avoid the misuse of judicial processes which tend to undermine confidence in the administration of justice.[15] The re-litigation of matters already determined may constitute an abuse of process for precisely that reason.[16]

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9 *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].

10 *McGechan on Procedure* (online ed, Thomson Reuters) at [HR15.1.03].

11 At [HR15.1.04].

12 At [HR15.1.05(1)].

13 *Dotcom v District Court at North Shore* [2018] NZCA 442, [2018] NZAR 1859 at [16]. See also *Sutcliffe v Tarr* [2018] NZCA 135, [2018] NZAR 696 at [27]-[28].

14 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [31].

15 *Reid v New Zealand Trotting Conference* [1984] 1 NZLR 8 (CA) at 9.

16 *Hunter v Chief Constable of the West Midlands Police* [1982] AC 529 (HL) at 541; and *Moevao v Department of Labour* [1980] 1 NZLR 464 (CA) at 482.

[22] I emphasise that it is no part of my function on this application to assess whether the facts pleaded in MC's amended statement of claim are true. I proceed on the assumption that the facts she has pleaded are true.

Issues

[23] OT's strike out application relied on each limb of r 15.1(1), but the primary ground relied on is that MC's claim is an abuse of process as it attempts to relitigate issues determined in the earlier proceedings. Thus, the issues for determination are whether the claim:

(a) is an abuse of process;

(b) discloses no reasonably arguable cause of action;

(c) is frivolous or vexatious;

(d) is likely to cause prejudice or delay.

[24] Before addressing each of these issues, it is necessary to refer to the amended statement of claim in some more detail.

Amended statement of claim

[25] The amended statement of claim refers to a claim for tort against the Manukau Family Court / Judge Malosi and a claim for abuse of Court process against OT. MC is self-represented and the pleading is not in orthodox form. The purpose of a statement of claim is to inform the opposing parties and the Court of the essential basis of the claim and its necessary ingredients. Each cause of action should be clear and the essential facts making out the elements of the cause of action should be pleaded. A pleading is not a legal submission. The legal principles referred to in MC's amended statement of claim are not appropriate for a pleading and their relevance is difficult to follow.

[26] As indicated, the claim against the Family Court alleges that the 2018 decision was "fundamentally unlawful" and involved "misbehaviour", but the nature of tort

alleged is unclear. MC's notice of opposition to the strike out application describes the claim as being for negligence, but the essential requirement of a duty of care in a negligence claim is not addressed in the amended statement of claim. MC's affidavit in response also alleges unconscious bias on the part of the Family Court Judge.

[27] The nature of the claim against OT for abuse of Court process is also unclear. The required malice or ulterior motive for such a tort is not pleaded. MC's notice of opposition to the strike out application does allege that OT attempted to coerce the High Court to award costs to impose additional stress and financial strain, but without indicating the basis for any improper motive. The notice of opposition also alleges that OT has made baseless and defamatory statements, but these are not specified.

[28] Ms Jackson helpfully summarised the grievances evident in MC's pleading as follows:

(a) there was insufficient evidence for the Family Court to issue a declaration that her children were in need of care and protection;

(b) in declaring there was no realistic possibility of return of the children into her care, the Family Court acted without jurisdiction;

(c) Judge Malosi was negligent (and/or prejudiced and biased);

(d) OT was wrong to file an application (for an order under s 18B of the Act) one working day prior to the hearing;

(e) the Family Court was wrong to decline leave for MC to admit an affidavit as evidence on the first day of the hearing; and

(f) the basis for the tort claim against the Chief Executive of OT was OT's unlawful reliance on s 18B of the Act to remove MC as the children's guardian.

Abuse of process

[29] Based on this summary of the grievances evident in MC's pleading, Ms Jackson submitted that the substance of MC's claim in this proceeding is the lawfulness and procedural fairness of the 2018 decision and that this proceeding is an abuse of process as it seeks to relitigate those issues.

[30] MC submitted that the strike out application is an abuse and that she is not trying to do another appeal. She did not accept Ms Jackson's characterisation of her proceeding. She submitted it was really a complaint against the Judge who owed a duty of care to her as a party, but it was a claim for misfeasance more than negligence. She submitted her case against OT was essentially about the way OT misled the Judge.

[31] MC submitted it was very difficult for her, and she had no faith in the justice system given the conduct of the Judge. She submitted that she did not want to be self-represented, but the Judge effectively forced that. She submitted that she did not know what she was doing and was very ill. She acknowledged that the applications she filed in January 2020 were procedurally wrong.

[32] MC's self-represented status was an issue in the Family Court and on appeal. Her first point on appeal was that the Judge wrongly refused her an adjournment before the hearing commenced so she could instruct new counsel (and respond to revised proposed plans for the children). Hinton J noted that MC had discharged four counsel and had been cautioned by the Family Court on 2 May 2018 to expect the hearing to proceed on 11 June 2018. On 11 June 2018, Judge Malosi declined MC's application for an adjournment. On appeal, Hinton J concluded that no error was identified in the Judge's refusal to grant the request for an adjournment so that MC could obtain new counsel.[17]

[33] I accept that MC had a cancer diagnosis in August/September 2019. That and surgery in September 2019 may well have affected her preparation for the appeal. But it did not stop her pursuing her appeal at the hearing on 5 December 2019, nor from filing in January 2020 the other Court applications referred to above.

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[17] *MC v Chief Executive, Oranga Tamariki* [2020] NZHC 50 at [17]-[25].

[34] MC also submitted that she has post-traumatic stress disorder and found it difficult to speak. Her oral submissions at the hearing before me were sufficiently clear.

[35] Finally, MC sought to rely on a letter from the Office of Human Rights Proceedings to OT dated 1 September 2021 in relation to an interference with privacy complaint. That letter is marked without prejudice and refers to facilitating without prejudice discussions. It is inadmissible in this proceeding.

[36] Returning to the amended statement of claim, the substance of MC's claim in this proceeding is the lawfulness and procedural fairness of the 2018 decision. This conclusion is supported by the allegations in the amended statement of claim that the 2018 decision is "fundamentally unlawful" and by the relief sought, including that the custody order be "immediately voided". The references to the legal doctrine of nullity and to void or voidable orders reinforce that conclusion.

[37] Further, I am satisfied that, in substance, each of MC's identified grievances has already been addressed in the earlier proceedings. First, the threshold for the s 101 order (need of care and protection) was addressed by Judge Malosi,[18] and by Hinton J on appeal.[19]

[38] Secondly, the argument that there was no jurisdiction for the determination under s 18B of the Act that there was no realistic possibility of the children's return into MC's care was also addressed by Hinton J on appeal.[20] I mention this further in relation to OT below.

[39] Thirdly, while the allegation that Judge Malosi was negligent and/or prejudiced and biased were not points of appeal, the underlying allegation is that the 2018 decision was incorrect. The only ground of negligence is that the 2018 decision was wrong, which was addressed on appeal. The prejudice/bias claim is also grounded on

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18 *Chief Executive, Oranga Tamariki v MC* [2018] NZFC 4705 at [103].
19 *MC v Chief Executive, Oranga Tamariki* [2020] NZHC 50 at [56]-[61].
20 At [63]-[74].

the allegation that Judge Malosi did not sufficiently weight MC's evidence. The weighting of evidence was one of the points on appeal addressed by Hinton J.[21]

[40] Fourthly, the argument that OT was wrong to file its s 18B application one working day prior to the hearing was addressed in substance in the appeal. MC contended that the Family Court should not have accepted the application for filing, and that the circumstances of her case are not ones in which s 18B should be employed since the criteria for making the determination required by s 18B were not fulfilled at the time the order was made. Hinton J acknowledged that this submission arose from an understandable misunderstanding of the highly technical language of ss 18A and 18B and the relationship between those provisions and the rest of the statutory scheme.[22] Having addressed the issues, Hinton J concluded that Judge Malosi was correct to find that the statutory criteria for the making of the determination referred to in s 18B(2)(c) were established, and to make that determination.[23]

[41] Fifthly, the argument that the Family Court was wrong to decline MC leave to admit further evidence on the first day of the hearing was addressed by Hinton J on appeal.[24]

[42] Lastly, in relation to the basis of the claim against the Chief Executive of OT, I have already addressed the allegedly unlawful reliance on s 18B. I add that the 2018 decision did not remove MC as a guardian. Also, MC's allegations in the notice of appeal that certain OT witnesses fabricated evidence to mislead, or lied to, the Family Court were excluded from the specified points of appeal by Gordon J on the basis they were without any proper evidential foundation.[25]

[43] For these reasons, I consider that MC's claim is a further attempt to relitigate issues that have been determined in the earlier proceedings. As Ms Jackson submitted, this proceeding is really challenging the 2018 decision, which has already been appealed unsuccessfully. The correct process if MC wished to challenge the decision

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21 *MC v Chief Executive, Oranga Tamariki* [2020] NZHC 50 at [92]-[96].
22 At [64].
23 At [74].
24 At [43]-[54].
25 *MC v Chief Executive, Oranga Tamariki* [2019] NZHC 833 at [12]-[13].

of the High Court on appeal was to seek leave to bring a second appeal to the Court of Appeal. That would have required MC to identify that the proposed appeal raised some question of law or fact capable of bona fide and serious argument in a case involving some interest, public or private, of sufficient importance to outweigh the cost and delay of the further appeal.[26] I conclude that this proceeding is a collateral attack and an abuse of process.

Reasonably arguable cause of action

[44] Given my conclusion in relation to abuse of process, it is unnecessary to address this alternative ground for strike out in any detail. As indicated, I assume the facts MC has pleaded are true. Even so, insofar as the claim is against Judge Malosi, it is statute barred by s 23 of the District Court Act 2016, which provides that Judges of the District Court have the same immunities as a High Court Judge. Therefore, the amended statement of claim does not disclose a reasonably arguable cause of action against the Judge.

[45] I also note that MC's reliance on the decision of Clifford J in this Court in *Hager v Attorney-General* is misconceived.[27] The amended statement of claim includes a purported quote that cannot be found in that judgment, and this Court's conclusions relating to a decision of the same Judge in a different case are irrelevant to whether there is a reasonably arguable cause of action in tort in this case. For the same reason (among others), it is also misconceived to suggest that this proceeding should be transferred to Clifford J in the Court of Appeal on the basis that he has dealt with the Judge's allegedly "lawless conduct" previously.

[46] In relation to the claim against OT, the facts pleaded do not give rise to a reasonably arguable cause of action for abuse of Court process. As indicated, the required malice or ulterior motive for such a tort is not alleged. Even if OT made defamatory statements about MC in the earlier proceedings, these would be protected by privilege.[28]

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[26] *Waller v Hider* [1998] 1 NZLR 412 (CA) at 413; *Snee v Snee* (1999) 13 PRNZ 609 (CA) at [22]; and *Downer Construction (New Zealand) Ltd v Silverfield Developments Ltd* [2007] NZCA 355, [2008] 2 NZLR 591 at [30]-[31].

[27] *Hager v Attorney-General* [2015] NZHC 3268, [2016] 2 NZLR 523.

[28] Defamation Act 1992, s 14.

[47] Insofar as a negligence claim against OT has also been suggested, Ms Jackson acknowledged that such a claim would raise a novel duty of care issue. While a claim in negligence has not been properly pleaded, if the claim were not an abuse of process for the reasons already given, I would have given MC an opportunity to amend her pleading to properly plead the elements of a claim in negligence.

Frivolous or vexatious

[48] Ms Jackson also submitted that MC's claim is vexatious. She relied on MC's earlier threat, referred to by Judge Rogers, "to bombard the Court with continuous proceedings and criminal charges against every person involved in the Family Court proceedings if the orders are not discharged".[29] While that threat was most inappropriate, and MC acknowledged at the hearing before me that she had been emotional, I do not consider that this proceeding is part of a vexatious campaign to bombard the Court. As Ms Jackson acknowledged, the sincerity of MC's belief that she has been wronged is not doubted. I do not consider this limb of r 15.1(1) adds anything material in this case.

Prejudice or delay

[49] Ms Jackson also relied on this limb of r 15.1(1) but I consider this limb too does not add anything to the abuse of process ground already addressed.

Conclusion

[50] While I accept the sincerity of MC's belief that she has been wronged, the fundamental difficulty is that she cannot relitigate the correctness of the 2018 decision by bringing a tort claim against the Judge or OT. MC's amended statement of claim should be struck out as an abuse of process.

Result

[51] The amended statement of claim is struck out.

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[29] *Chief Executive, Oranga Tamariki v MC* [2020] NZFC 6164 at [8].

[52] Scale costs normally follow the result. The second defendant is entitled to costs on a 2B basis.

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Gault J

Parties / Solicitors:
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Ms L Jackson, Rachael Dewar Law, Auckland