IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2011-494-4768
[2012] NZHC 1974

BETWEEN	DANNI MU Plaintiff
AND	BODY CORPORATE 312421 First Defendant
AND	ABOUT BODY CORPORATES LIMITED Second Defendant
AND	SHARRON WYNN O'SULLIVAN Third Defendant
AND	GRAHAM BELL Fourth Defendant

Hearing: 7 August 2012

Counsel: G M Illingworth QC for Plaintiff
T J Herbert for First Defendant
No appearances for Second to Fourth Defendants

Judgment: 7 August 2012

JUDGMENT OF ASSOCIATE JUDGE R M BELL

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*This judgment was delivered by me on ..**7 August 2012** at **5:00pm***
pursuant to Rule 11.5 of the High Court Rules.

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[1] In my minute of 20 July 2012 I directed a hearing on whether the first defendant's discretionary defence alleging wrongful conduct should be struck out. A decision on the triability of the defence is required so that the scope of discovery by the plaintiff can be determined. In considering the plaintiff's strike-out application, I apply the established approach for striking-out, established by authorities such as *Attorney-General v Prince*[1] and *Couch v Attorney-General*.[2]

i) In pleaded facts, whether or not admitted, are assumed to be true. However, this does not extend to pleaded allegations which are entirely speculative and without foundation.

ii) The cause of action or defence must be clearly untenable. In *Couch*, the Chief Justice said that it is inappropriate to strike-out a claim summarily unless the court can be certain that it cannot succeed.

iii) The jurisdiction is to be exercised sparingly and only in clear cases. This reflects the court's reluctance to terminate a claim or defence short of a trial.

iv) The jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument.

v) The court should be particularly slow to strike out a claim in any developing area of the law, particularly where a duty of care is alleged in a new situation.

[2] The plaintiff is the owner of a residential unit in Normanby Road, Mount Eden, Auckland. It is one in a block of 48 principal units. The first defendant is the body corporate established under the Unit Titles Act 1972 and now, as from 20 June

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1 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262.
2 *Couch v Attorney-General* [2008] 3 NZLR 725 at [33].

2012, governed by the Unit Titles Act 2010. The apartment building has weathertightness problems.

[3] According to the statement of claim, on 26 October 2010 there was a general meeting of the members of the body corporate. At the meeting a special resolution concerning the replacement of cladding was put to the vote. After the voting had taken place it was determined by the second and third defendants that the members had authorised the committee to use a panel system known as "Rockcote" to replace the cladding.

[4] The statement of claim seeks a declaration that the purported decision was invalid and that the defendants are not authorised to enter into a contract or contracts by or on behalf of the body corporate for the recladding of the complex unless the expenditure is approved by special resolution approved by 75 per cent of the eligible voters.

[5] The first defendant's statement of defence of 29 June 2012 admits that on 26 October 2010 at the extraordinary general meeting, a resolution was passed in the following terms:

> That it should continue with the Rockcote system as detailed by Brown Day (and approved by the Auckland City Council).

[6] It contends that the resolution did not at that time authorise it or its committee to use the "Rockcote" system to replace the existing cladding. It says that the effect of the resolution was that the committee was entitled to continue its planning and strategy for the replacement of the existing cladding on the basis that the "Rockcote" system will be used rather than any other alternative system. It pleads changes in the law and rules that have applied to its management and governance. It says that it has not decided yet what expenditure will be incurred by each proprietor and it has not levied any owner.

[7] It pleads three affirmative defences. The first is lack of jurisdiction. The second is that there is no justiciable or genuine dispute between the parties and no useful purpose would be served by the declaration sought by the plaintiff.

[8] It is the third defence that is in issue in the strike-out application. That defence is headed "*Wrongful conduct of the Plaintiff*". Paragraphs 27-41 of the amended statement of defence say:

> 27. On or around 25 October 2010, the Plaintiff, in an email circulated to all members of the First Defendant's Committee, accused the Third Defendant of having wasted the First Defendant's money and made "*secret deals*" with Rockcote Resene Limited.
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> 28. On or around 7 April 2011, the Plaintiff, in a letter circulated to all owners of principal units, accused the Fourth Defendant of making a "*false statement*" to those owners.
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> 29. On or around 11 April 2011, the Plaintiff, in a letter circulated to all owners of principal units, accused the Fourth Defendant of "*illegalities*", telling "*a bunch of lies*" at a general meeting, using the power of the First Defendant's committee "*illegally*", of lying in documents about plaster cladding, bullying the Plaintiff, making "*lots of threats*" (allegedly in conjunction with the Third Defendant), breaking into the Plaintiff's unit and conspiring for his benefit with the architects who had redesigned the cladding using the Rockcote System.
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> 30. On or around 13 May 2011, the Plaintiff accused the Defendants of making false statements and blocking appointments to the First Defendant's committee in an email to Rockcote Resene Limited.
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> 31. On or around 13 May 2011, the Plaintiff battered the Third Defendant, at the Second Defendant's premises.
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> 32. On or around 27 September 2011, the Plaintiff accused the Third Defendant of corruption and lying to the owners of principal units in an email published to the Fourth Defendant.
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> 33. On or around 29 September 2011, the Plaintiff accused the Third Defendant and the Fourth Defendant over "*overcharging*" and being corrupt in an email published to the Second Defendant, the Third Defendant and the Fourth Defendant.
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> 34. On or around 5 October 2011, the Plaintiff accused the Third Defendant and the Fourth Defendant of being corrupt in an email published to the Second Defendant, the Third Defendant and the Fourth Defendant.
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> 35. On 31 August 2011, 6 October 2011 and 10 October 2011, the Plaintiff, unbeknownst to the Fourth Defendant, attended the Fourth Defendant's unit and posted threatening messages, including asking him to "*get out*" and referring to him as "*a devil*".
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> 36. At various times in 2011, the Plaintiff has contacted real estate agents purportedly on behalf of the Fourth Defendant, stating that the fourth Defendant wished to sell his unit and providing the Fourth Defendant's contact details to them.

37. On 18 October 2011, the Plaintiff accused Murray Stirling (then a member of the First Defendant's committee) and the Fourth Defendant of being "*criminals*" and "*evils*" in an email to the Second Defendant, Third Defendant, Mr Stirling and the Fourth Defendant.

38. On 18 October 2011, the Plaintiff accused the Third Defendant and the Fourth Defendant of "*fraud*" by email to the Second Defendant, Third Defendant and Fourth Defendant.

39. On 9 April 2012 and 20 April 2012, in a letter circulated to all owners of principal units, the Plaintiff accused the Third and Fourth Defendant of "*fraud*", wasting money, abusing the rules of the First Defendant, corruption, conspiracy, illegally contacting owners of principal units, illegally charging penalties to owners of principal units, a "*rip off*" of the owners of principal units, using the Plaintiff's money "*to destroy her*", conspiracy to defraud, illegal abuse against the Plaintiff and of doing "*evils*".

40. On 24 May 2012, the Plaintiff accused William Yao, an owner of a principal unit, of being "*evil and criminal*" in an email to various other principal unit owners.

41. Further wrongdoing on the part of the Plaintiff will be pleaded after discovery.

[9] A declaration under the Judgments Act 1908 is a discretionary remedy. Even though a plaintiff may be able to make out a case, the court retains a discretion to decline to give a declaration. Equitable principles may be applied. This is recognised in Zamir & Woolf *The Declaratory Judgment*:[3]

> From a practical point of view, however, whether or not a declaratory judgment was originally an equitable remedy is no longer likely to be of any significance and a court's approach as to how it should exercise its discretion will be guided by the equitable principles governing all discretionary remedies.

[10] Similarly, in *Kung v Country Selection NZ Indian Association Inc.*,[4] Hammond J said:

> As to the exercise of that discretion, I doubt if there has been a more concise and (with respect) insightful statement than that of Viscount Radcliffe in *Ibeneweka v Egbuna*:[5]
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> > "[The] two primary considerations [are] that the power to make declarations is conferred, surely not by accident, in wide and general terms, and that what is conferred is a discretion to be exercised according to the facts of each individual case. ...

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3 Zamir & Woolf *The Declaratory Judgment* (4th ed, Sweet & Maxwell, London, 2011) at 4.31.

4 *Kung v Country Selection NZ Indian Association Inc.* [1996] 1 NZLR 663 at 665-666.

5 *Ibeneweka v Egbuna* [1964] 1 WLR 219 (PC) at pp 224-225.

> [It] is doubtful if there is more of principle involved than the undoubted truth that the power to grant a declaration should be exercised with a proper sense of responsibility and a full realisation that judicial pronouncements ought not to be issued unless there are circumstances that call for their making."
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> This kind of approach is very like the approach of a Court to equitable remedies, the broad question being whether justice requires a declaration. A wide range of factors will then be relevant: whether a plaintiff has a sufficient interest in the proceedings; whether an issue is now moot; and the practical utility of issuing a declaration. And I can see no reason why the so-called traditional equitable defences, or at least the ideas which underlie them, are not also apposite to declarations. To take a simple example, if a plaintiff's conduct has been itself questionable, why should (say) the clean hands doctrine not also apply to declaratory relief?

[11] The first defendant invokes the equitable principle: "He who comes into equity must come with clean hands." The first defendant says that by reason of her wrongful conduct pleaded in the statement of defence, the plaintiff is not entitled to a declaration, even if she can establish that the resolution at the meeting was invalid.

[12] The plaintiff says that the alleged misconduct comprises allegations that the plaintiff has made defamatory comments about others, but the requirements for pleading a cause of action in defamation have not been fulfilled. The plaintiff argues that it is a basic principle of New Zealand law that if a party wishes to allege defamatory conduct, that person must properly plead a valid cause of action in defamation in accordance with the Defamation Act 1992 and in accordance with the High Court Rules. The plaintiff refers to *The Law of Torts in New Zealand*[6] which says that following the decision of the Court of Appeal in *Bell-Booth Group Ltd v Attorney-General*,[7] claims directed at the publication of defamatory statements, "wrongful speech", must be pleaded in defamation and injurious falsehood rather than in alternative causes of action such as negligence.

[13] While I do not take issue with the principles stated in the text, they are not directly applicable to the present case. Not all of the allegations directed against the plaintiff in the statement of defence are that she has made defamatory statements about the defendants. For example, paragraph 31 alleges battery; paragraph 36 alleges misleading statements made to third parties, which are not necessarily

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6 Stephen Todd (ed) *The Law of Torts in New Zealand*(5th ed, Brookers, Wellington, 2009) at 16.19.

7 *Bell-Booth Group Ltd v Attorney-General* [1989] 3 NZLR 148 (CA).

defamatory. Moreover, the principle the plaintiff invokes goes only to the requirements for a valid cause of action for statements adversely affecting reputation. The matter in question here is the exercise of an equitable discretion. There seems no reason why conduct might not trigger the clean hands maxim, even if it does not give rise to a common law cause of action.

[14] The better approach is to consider whether the conduct alleged against the plaintiff comes within the equitable principle that "he who comes into equity must come with clean hands".

[15] The first defendant's pleadings allege that the plaintiff is strongly opposed to any cladding solution to the premises involving the use of a "Rockcote" product. In showing her opposition, the first defendant alleges that the plaintiff has made statements, particularly to other owners of principal units, attributing corrupt motives and dishonesty to the defendants. In its submission, she is said to use any means, fair or foul, to have her way.

[16] The question to be decided is whether these allegations, if proved, disentitle the plaintiff from seeking a declaration.

[17] The courts have made it clear that general allegations of misconduct are not enough to trigger the "clean hands" doctrine. Meagher Gummow & Lehane's *Equity Doctrines & Remedies* says:[8]

> For the defence of unclean hands to operate at all, the impropriety complained of "must have an immediate and necessary relation to the equity sued for". If the relationship to the cause of action relied on by the plaintiff is indirect, it is irrelevant. Mere general depravity is not enough.
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> (citations omitted)

[18] One of the authorities the text cites is *Attorney-General v Equiticorp Industries Group Ltd*.[9] That was a decision of the Court of Appeal on a strike-out application where the Crown ran a defence based on the maxim "he who seeks

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8 Meagher Gummow & Lehane's *Equity: Doctrines & Remedies* (4th ed, Butterworths LexisNexis, Chatswood (NSW), 2002) at 3-130.

9 *Attorney-General v Equiticorp Industries Group Ltd (In Statutory Management)* [1996] 1 NZLR 528 (CA).

equity must do equity". However, it appears from page 536 of the decision that the court also had in mind the "clean hands" principle.

[19] Another case, perhaps closer to the circumstances here, is *Kung v Country Section Indian Association Inc.*[10] In that case, Hammond J found that due notice of a general meeting had not been given. He went on to say that there was evidence to suggest that there was something of a packed meeting and that the court would have hesitated long, before granting the relief sought. There the alleged conduct went directly to the validity of the business transacted at the meeting.

[20] It is important to recognise why there should be an immediate and necessary connection between the alleged misconduct and the matter that is the subject of the declaration application. It cannot be correct that a plaintiff who may be a bad character or has engaged in wrongful conduct should be denied access to the courts to obtain declarations. To allow only good people or law-abiding people access to the courts would erode the principle that the courts will do justice to all. Meagher Gummow & Lehane say at 3-130:

> It is absolutely necessary for the courts to insist on this nexus, as otherwise almost no equitable relief could ever be granted as defendants excavate the remote misdeed of plaintiffs.

[21] The first defendant referred to a statement of Fisher J going the other way in *Eldamos Investments Ltd v Force Location Ltd*:[11]

> I do not think that in these matters of conscience one could be too dogmatic or technical about the question of a nexus. Perhaps in some circumstances the clean hands principle might preclude relief even without a nexus.

That statement was obiter. Fisher J rejected the defence for absence of nexus. It is not authority to allow a defendant to make allegations of discreditable conduct against a plaintiff which are not directly related to the matters in issue.

[22] If the defendants can prove their allegations, they will show that the plaintiff has campaigned against the proposals for the "Rockcote" system, and in that

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10 *Kung v Country Selection Indian Association Inc.*[1996] 1 NZLR 663.

11 *Eldamos Investments Ltd v Force Location Ltd* (1995) 17 NZTC 12,196 (HC) at 12,203.

campaign she has used less than honourable methods. In particular, she has descended to allegations of corruption and dishonesty.

[23] The first defendant accepts that if those allegations were sustained, the plaintiff would not be debarred from voting at a general meeting. Such misconduct does not deprive a unit holder of the right to vote at a general meeting.[12] Misconduct by an owner – even misconduct that descends to making seriously defamatory comments about the body corporate and its members and its secretary – does not disenfranchise the owner of a unit in the apartment complex. The member still retains the right to vote and to take part in the affairs of the body corporate. The rights to receive notice of general meetings, to attend general meetings and to vote at general meetings also carry the right to apply to the court for declarations as to the validity of business conducted at meetings.

[24] The first defendant's allegations do not allege any misconduct in relation to the actual meeting on 26 October 2010. Most of the allegations relate to conduct running from April 2011. The only allegation relating to conduct before the meeting is in paragraph 27, relating to an email alleging that the third defendant had wasted the first defendant's money and made secret deals with "Rockcote" and Resene Ltd. Mr Illingworth accepted that it was arguable that this met the nexus requirement and that paragraph 27 could remain. I did not understand him to concede that if the allegation were proved the plaintiff could not obtain a declaration. It is a matter to be left for the discretion of the judge who hears the case.

[25] Mr Illingworth contended that the remaining allegations of misconduct cannot be relevant because they are said to have occurred after the meeting in October 2010. Mr Herbert said that the second declaration sought by the plaintiff, which goes to the first defendant's powers in the future and therefore the plaintiff's conduct after the meeting, is arguably relevant to her entitlement to relief. I accept Mr Illingworth's submission that the second declaration flows from the first declaration and the alleged invalidity of the resolution at the October 2010 meeting. The matters pleaded in paragraphs 28-41 cannot affect the exercise of the discretion to grant a declaration and therefore should be struck out.

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[12] See now section 79(c) of the Unit Titles Act 2010.

[26] Because paragraph 27 of the statement of defence remains, the plaintiff is required to make discovery of any documents relevant to that allegation. The plaintiff is not required to disclose documents already in the control of the first defendant.

[27] I make these orders:

i) Paragraphs 28-41 of the statement of defence are struck out;

ii) The plaintiff is to file and serve an affidavit of documents disclosing all documents relevant to the allegations in paragraph 27 of the statement of defence within *15 working days* of this decision, but not including documents already in the control of the first defendant;

iii) Leave is reserved to the first defendant to file and serve any further affidavits within a further *15 working days*. Those affidavits are not to address matters pleaded in paragraphs 28-41 of the statement of defence;

iv) Leave is reserved to the plaintiff to file and serve any reply affidavits within a further *15 working days* of the first defendant's affidavits;

v) The case is given a new hearing date of ***4 March 2013*** for *one day*; and

vi) If the parties are not able to agree costs, memoranda may be filed for costs to be decided on the papers.

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R M Bell
Associate Judge