

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY CP31/SDC00

BETWEEN EILEEN MULLEN
Plaintiff

AND RODNEY DISTRICT COUNCIL
First Defendant

AND JAMES D THOMPSON
Second Defendant

AND THE NATIONAL BANK OF NEW ZEALAND
Third Defendant

Hearing: 25 February 2002

Counsel: SJR Neville for plaintiff
S A Bambury for First Defendant
G Everard for Second Defendant
L A Ogorman for proposed third defendant

Judgment: 25 February 2002

ORAL JUDGMENT OF NICHOLSON J

Solicitors:

Ellis Gould, DX CP22003, Auckland, for plaintiff
Heaney & Co, DX CP 24052, Auckland, for first defendant
KPMG Legal, DX CP22001, Auckland, for second defendant
(Counsel G C Everard, PO Box 2269, Shortland Street, Auckland)
Buddle Findlay, DX SP20201, Wellington, for proposed third defendant

[1] The Plaintiff applies to have the National Bank joined as a third defendant in these proceedings. The application is opposed by the National Bank. The first defendant and the second defendant do not oppose the application but Ms Bambury, counsel for the first defendant, the Rodney District Council, advises that this is upon the basis that the joinder issue should not jeopardise the priority fixture which has been made for the hearing of the proceedings on 8 April 2002. The Rodney District Council is anxious that the matter be resolved then.

[2] The application is made under Rule 97 which gives the Court a discretion as to the joinder of further parties. The primary criteria is whether presence of the proposed party may be necessary to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the proceeding. The current approach in New Zealand to joinder is liberal, particularly in the case of a plaintiff seeking to join a further defendant: *Westfield Freezing Co Ltd v Sayer & Co (NZ) Ltd* [1970] NZLR 137 (CA).

[3] As stated by Barker J in *NZI Insurance Ltd v Hinton Hill & Coles Ltd* (1996) 9 PRNZ 615 the general rule is that it is for the plaintiff to decide whom to sue and defendants may apply to be struck out of the proceeding if there is no arguable case against them. In *Mainzeal Corporation Ltd v Contractors Bonding Ltd* (1989) 2 PRNZ 47 Barker J said that the test for joinder is: in respect of the party sought to be joined, will its rights against or liabilities to any party to the proceedings in relation to the subject matter of the proceedings be directly affected by any order which may be made in the proceeding?

[4] However, application of these principles must be considered in light of the circumstances of the particular case. Ms O’Gorman for the National Bank submits that it is not in the interests of justice that the National Bank be joined and then go through the procedure of seeking to be struck out, but rather that the issue of whether the claim against National Bank is likely to succeed should be determined by a separate hearing at an earlier stage without the National Bank having to incur further time and cost in going through the processes of discovery and the like.

[5] The basic circumstances are that Ms Mullen and her former husband owned a 10 acre property in Duff Creek Road, Stillwater. They had borrowed substantial money from the National Bank which was secured by a first mortgage against that property. In 1997 they were in the process of completing a sub-division of the property into two five acre lots. Late in that year the Council advised in principle an intention to put a major road through the area, this requiring the acquisition of private land, including that of the plaintiff and her husband.

[6] About the same time the National Bank served a Property Law Act notice in respect of mortgage debt which was then of the order of \$353,000. When payment was not made the bank took steps to sell the property. It was sold by mortgagee sale in May 1998 for \$540,000. This was apparently sufficient to meet the debt owed to the National Bank. There was a charge on the property which also was satisfied by the sale.

[7] However, Ms Mullen claims that the property was worth some \$780,000 and that she thereby lost approximately \$260,000 by reason of the forced sale. It is this which she seeks to recover in the proceedings. In February 2000 she commenced the present proceedings, naming the Council as first defendant, Mr Thompson as second defendant and the National Bank as third defendant. The claim against the Council is based upon alleged obligation arising from its notices in respect of the proposed designation of part of the land for a road.

[8] The claim against Mr Thompson is on the basis that he was the lawyer acting for Ms Mullen and failed to protect her interests. The claim against the bank is upon the basis that it failed to exercise its duty to obtain the best price.

[9] An amended statement of claim was filed in March 2000. In May 2000 the plaintiff filed notice of discontinuance in respect of the National Bank. It therefore dropped out of the proceeding at an early stage.

[10] The first defendant applied to strike out the claim against it but for a number of reasons this was not pursued. In mid 2001 the Grey Lynn Neighbourhood Law Office which had issued the proceedings as solicitor for the plaintiff and Ms Abdale who was counsel for the plaintiff were granted leave to withdraw. Shortly thereafter the plaintiff's present solicitors, Ellis Gould, started acting.

[11] In December last year counsel applied for a priority fixture. In the affidavit in support of that application it was pointed out that Ms Mullen had sought and obtained considerable publicity by way of a sit in with her children at the Council's offices, in effect claiming that she had been wrongly deprived of her home and that she and her children did not have a home.

[12] The application for a priority fixture was heard by Paterson J on 30 January 2002. It was not opposed. Paterson J, the civil liaison Judge for the Auckland Registry, gave a priority fixture for the week commencing 8 April. He made timetable orders included in which was "the plaintiff has indicated that she may wish to rejoin the National Bank. If application is to be made to this Court it is to be filed and served by 5 pm on 8 February 2002." The application was filed on 11 February, later than the time granted and being just a fortnight ago.

[13] In the affidavit in support of the application to join the National Bank as a third defendant a draft of a further amended statement of claim is exhibited, it being proposed to extend the alleged ground of liability to include a liability under s 185A of the Resource Management Act.

[14] In its notice of opposition to joinder the National Bank gives as a ground that the evidence offered by the plaintiff in support of the application "clearly does not, and could not at trial, support the cause of action." In explanation some very cogent points are made.

[15] It is very late in the day for the plaintiff to seek to rejoin the National Bank. I consider that in the circumstances the interests of justice require that the National Bank not be rushed to a full hearing but be given the opportunity to resist the application for joinder upon the ground that the evidence falls short of establishing liability. In *O'Sullivan v New Zealand Ostriches Ltd* (2000) 14 PRNZ 593 Potter J reviewed the pertinent legal principles and stated the principle that although joinder is common where jurisdiction is established, it could not be ordered in that case because the evidence did not support the cause of action against the party to be joined.

[16] Although mindful of the position of the Council and understanding its wish to have the matter resolved promptly, I consider that the overall interests of justice in allowing the National Bank to have the application for joinder heard on the basis it wishes requires that that be the way the matter proceed which will inevitably mean that the fixture in April is lost.

[17] Any reaction by Ms Mullen as to unfairness to her is answered by the fact that she has caused the situation and although she may well blame lawyers involved, nevertheless it is a situation of her making. Should she continue to criticise the

Council publicly then the appropriate course may be for application to be made to the Court for orders restraining such criticism.

[18] I accordingly adjourn the application to join the National Bank as a third party with a view to giving the National Bank the opportunity to satisfy the Court that the evidence does not support the cause of action against it. I make the following timetable orders -

(a) The National Bank is to file and serve affidavits in support of its notice of opposition by 5 pm 18 March 2002. Service is to be upon all parties.

(b) Any affidavits in reply are to be filed and served by 5 pm 8 April.

(c) Any affidavits in response limited to matters raised in the affidavits in reply are to be filed and served within seven days of the receipt of those affidavits in reply, this at the latest will be 15 April assuming that the affidavits in reply are not filed until just before the expiry of the deadline on 8 April.

(d) Counsel on leaving Court are to obtain a one day fixture for hearing of the application for joinder. The fixture will of necessity be adjourned, but the appropriate person to make the alternative fixture would be Paterson J the civil liaison Judge. When he considers that he will undoubtedly take into account the date when the contested application for joinder is to be heard.