

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE**

**CIV 2017-404-2678
[2017] NZHC 3018**

BETWEEN

DERMOT GREGORY NOTTINGHAM
AND PHILIP RAYMOND
NOTTINGHAM AND ROBERT EARLE
MCKINNEY
Appellants & Whistle Blowers

AND

REAL ESTATE AGENTS
DISCIPLINARY TRIBUNAL
First Respondent

MARTIN HONEY
Second Respondent

Hearing: On the papers

Judgment: 7 December 2017

JUDGMENT OF DUFFY J

[1] Pursuant to r 5.35A(3) of the High Court Rules 2016 the Registry has forwarded a proceeding to me to determine whether it is an abuse of process.

[2] The proceeding is an appeal brought by three litigants in person from a decision of the Real Estate Agents Disciplinary Tribunal (the Tribunal),¹ which is a statutory body that hears appeals from the Real Estate Agents Authority. The other respondent, Martin Honey, is a real estate agent who also appeared before the Tribunal.

¹ *Nottingham v Real Estate Agents Authority* [2017] NZREADT 61.

[3] The proceeding is the latest step in what appears to be protracted litigation which the appellants are bringing against Mr Honey. This litigation is presently at the stage where a substantive appeal has been remitted back to the Tribunal for re-hearing, following decisions of this Court and the Court of Appeal.²

[4] To assist with the disposition of the appeal the Tribunal issued a ruling on 11 October 2017 on an application by the appellants to admit further evidence. The appellants now seek to appeal against this ruling.

Relevant portions of the High Court Rules 2016

[5] Rules 5.35A, 5.35B and 5.35C were inserted into the High Court Rules on 1 September 2017:

5.35A Registrar may refer plainly abusive proceeding to Judge before service

- (1) This rule applies if a Registrar believes that, on the face of a proceeding tendered for filing, the proceeding is plainly an abuse of the process of the court.
- (2) The Registrar must accept the proceeding for filing if it meets the formal requirements for documents set out in rules 5.3 to 5.16.
- (3) However, the Registrar may,—
 - (a) as soon as practicable after accepting the proceeding for filing, refer it to a Judge for consideration under rule 5.35B; and
 - (b) until a Judge has considered the proceeding under that rule, decline to sign and release the notice of proceeding and attached memorandum for the plaintiff or the applicant (as appropriate) to serve the proceeding.

5.35B Judge's powers to make orders and give directions before service

- (1) This rule applies if a Judge to whom a Registrar refers a proceeding under rule 5.35A is satisfied that the proceeding is plainly an abuse of the process of the court.
- (2) The Judge may, on his or her own initiative, make an order or give directions to ensure that the proceeding is disposed of or, as the case may be, proceeds in a way that complies with these rules, including (without limitation) an order under rule 15.1 that—

² *Nottingham v Real Estate Agents Authority* [2015] NZHC 1616; *Nottingham v Real Estate Agents Authority* [2015] NZHC 1998; and *Nottingham v Real Estate Agents Authority* [2017] NZCA 1.

- (a) the proceeding be struck out:
 - (b) the proceeding be stayed until further order:
 - (c) documents for service be kept by the court and not be served until the stay is lifted:
 - (d) no application to lift the stay be heard until the person who filed the proceeding files further documents as specified in the order (for example, an amended statement of claim or particulars of claim).
- (3) Rule 7.43(3) does not apply. However, if a Judge makes an order on the Judge's own initiative without giving the person who filed the proceeding an opportunity to be heard, the order must contain a statement of that person's right to appeal against the decision.
- (4) A copy of a Judge's decision to strike out a proceeding must, if practicable, also be served on the person named as a party or, if more than 1 person is named, those persons named as parties to the proceeding.
- (5) *See* rule 2.1(3)(b) concerning the exclusion of the jurisdiction and powers of a Judge under this rule from the jurisdiction and powers of an Associate Judge.

5.35C Requirement for signature and release of proceeding in certain circumstances

The Registrar must, after a Judge has considered a proceeding under rule 5.35B, release the notice of proceeding and attached memorandum for service if—

- (a) the Judge decides not to exercise the discretion in rule 5.35B; or
- (b) the Judge makes an order or gives directions under which the proceeding must be released for service.

[6] These rules provide for a three-step process, as summarised in *McGechan on Procedure*:³

- (a) Stage 1 (r 5.35A) provides that a Registrar who believes that a proceeding accepted for filing is, on the face of it, plainly an abuse of the process of the court, may refer the proceeding to a judge for consideration before releasing the documents that would enable the proceeding to be served.

³ *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at [HR5.35A.01].

- (b) Stage 2 (r 5.35B) provides that if the judge to whom the proceeding is referred is satisfied that the proceeding is plainly an abuse of the process of the court, the judge may make an order striking out the proceeding before it is served, or may make orders or directions aimed at ensuring the proceeding is conducted according to the rules.
- (c) Stage 3 (r 5.35C) provides for the Registrar to release the documents for service if the judge decides not to exercise the discretion to strike out the proceeding, or if the judge gives directions under which the documents must be released for service.

Do these provisions apply to appeals under Part 20 of the High Court Rules?

[7] The wording of r 5.35A indicates that it applies to “a proceeding tendered for filing”. “Proceeding” is defined in r 1.3(1) as follows:

proceeding means any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application

[8] On its face this would appear to include an appeal under Part 20.

[9] It appears that the decision to use the word “proceeding” rather than “claim” was deliberate, although not specifically to encompass appeals. The minutes of the Rules Committee meeting on 28 November 2016, where these new rules were discussed, record that:⁴

Although “claim” is used throughout the Rules the Committee noted that “proceeding” was wider than “claim” and the rule was going to cover originating applications. Accordingly, the Committee decided that it would be appropriate to use “proceeding”.

[10] There have been few cases decided under these new rules, given that they have been inserted only recently. However, in *Brown v Wellington Court of Appeal* Churchman J found that a “notice of appeal” and “notice of judicial review” filed by the applicant were an abuse of process.⁵ I too am satisfied that the purpose of these rules was to also include civil appeals.

⁴ Rules Committee Minutes of Meeting held on 28 November 2016 (05/16).

⁵ *Brown v Wellington Court of Appeal* [2017] NZHC 2430.

Is the present appeal an abuse of process?

[11] In *Mathieson v Fildes*, Osborne AJ commented on the general scope of and intention behind the new rules:⁶

The inherent power which this Court possesses and the express powers contained in rr 15.1(1) and 5.35B High Court Rules enable the Court to prevent misuse of its process when the procedure being adopted would be manifestly unfair to another party or would otherwise bring the administration of justice into disrepute. There are no fixed categories of abuse of process.

[12] The Associate Judge concluded on the facts that the proceeding should be struck out:⁷

... it would be manifestly unfair to the named respondents that they be constrained to respond to the applicants' document. ... right-thinking people would regard this Court as exercising very poor control of its processes if it were to allow the applicants' document to be regarded as a proper document for filing let alone one to which intended respondents should have to respond whether in pleading or other form ... When this point is reached, this Court has a duty, not a discretion, to strike out.

[13] In the present case before the Tribunal the appellants sought to admit as fresh evidence: (a) unsigned briefs of evidence of Martin Honey and his wife; and (b) an affidavit sworn by Mrs Honey. The Tribunal allowed the admission of the unsworn briefs of evidence of Mr and Mrs Honey. However, the Tribunal refused to admit the sworn affidavit of Mrs Honey. In this regard, the Tribunal accepted the submission of Mr Honey's counsel that the affidavit related to an application for name suppression and was irrelevant to the appeal. This is the only issue on which the appellants were unsuccessful in their application for the admission of fresh evidence.

[14] A challenge to a refusal to admit an affidavit as fresh evidence requires the appellants to identify where the Tribunal has erred in its refusal to admit the evidence. Such challenge requires a clear focus on the legal grounds for admission of fresh evidence and some explanation for why the subject evidence is relevant to the appeal.

[15] The notice of appeal and accompanying documents identify nothing that is relevant to the question in issue. Instead, the appellants go on at length to personally

⁶ *Mathieson v Fildes* [2017] NZHC 2258 at [4].

⁷ At [7]–[8].

attack the Tribunal, the Real Estate Agents Authority and others, including persons responsible for the appointment of the members of the Tribunal and the Authority. The notice of appeal is prolix and full of irrelevant, vexatious and scandalous material, which includes personal attacks and defamatory statements against the Tribunal and other persons, including some who have no connection to the appeal. The notice of appeal also seeks to traverse issues that have earlier been addressed at earlier stages of the litigation.

[16] If there is a kernel of merit in the appeal it is so deeply buried that it is not apparent to me. It would be manifestly unfair for the respondent Mr Honey to have to respond to the appeal in its present form, which is plainly of the type for which r 5.35A(3) is intended. Accordingly, I am satisfied that in its present form the notice of appeal and accompanying documents created by the appellants are plainly an abuse of the process of the court.

Orders

[17] I direct pursuant to r 5.35B(2)(a) that the proceeding be struck out.

[18] Pursuant to r 5.35B(4), a copy of this decision is to be served upon the respondents as soon as practicable.

[19] The appellants are informed that they have a right of appeal against this decision.

Duffy J