

IN THE DISTRICT COURT
AT NORTH SHORE

CIV. 2018-044-1629

BETWEEN

DENNIS ARHUR SMITH

Plaintiff

AND

IAN JAMES PLOWMAN

First Defendant

NIKAU GROVE NURSERY LIMITED

Second defendant

HELEN IRENE MITCHELL

Third Defendant

SEA CONTAINERS NZ LIMITED

Fourth Defendant

SYNOPSIS OF SUPPLEMENTARY SUBMISSIONS FOR THE APPLICANTS
DATED 5 OCTOBER 2020

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MAY IT PLEASE THE COURT

Counsel for the applicants, Ian Plowman, Nikau Grove Nursery Limited and Helen Mitchell submit:

1. This synopsis of supplementary submissions is in addition to the submissions filed by former counsel Ms Holdaway dated 13 March 2020. These supplementary submissions provide a summary of the evidence filed and the law relating to the strike out applications.

Strike out application

Legal principles

2. The legal principles for a strike out application are articulated by Blanchard J writing for the majority in the decision of *North Shore City Council v Attorney-General*¹:

The principles are well settled. The statement of then Richardson P in *Prince v Gardener* is authoritative:

A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may be not admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so untenable that they cannot possibly succeed...; the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has requisite material...; but the fact that applications to strike out raise a difficult question of law, and require extensive argument does not exclude jurisdiction...

...

The claim

3. For the purposes of this application Counsel is focused on the first amended statement of claim dated 29 March 2019 (SOC). This statement of claim has been served on the first three defendants only. There is no proof of service

¹ [2012] NZSC 49 at [146] (citations omitted)

on the Court file in respect of the named fourth defendant, Sea Containers NZ Limited. The plaintiff, Mr Smith, also seeks to join another defendant, Mr Bruce Corban. There is no interlocutory application to join the fourth defendant, or Mr Corban as additional defendant, before the Court. If one is to be filed, it will be opposed.

4. The plaintiff has alleged against the first defendant, Mr Plowman, has either in his personal capacity or as agent for Nikau Nurseries Ltd, entered into a lease agreement with him over land on which Nikau Nurseries operates a business, as a tenant, at 51B Smith Road Kumeu².
5. The plaintiff states that the lease agreement is recorded in his email dated 16 August 2018 to Mr Plowman and he has set out passages from that email at paragraphs 2 and 3 in the SOC. The plaintiff purports that Mr Plowman agreed to the alleged lease, and terms of the alleged lease, in an email later that day which is recorded at para 5 SOC.
6. Counsel submits that these email communications cannot be read as a lease agreement on the grounds that all or some of the essential requirements for a lease are absent and/or uncertain. Namely, certainty of term; certainty of premises, exclusive possession; and proper creation.
7. The email response from Mr Plowman³ is equivocal. It does not acknowledge or agree terms. It is informal, conversational and does deal with the terms proposed.
8. Mr Plowman has provided an affidavit setting out the entire email from Mr Smith and he has also provided evidence that the arrangement was a temporary arrangement of three weeks for Mr Smith to park his house truck and live there⁴. Mr Smith initially instigated proceedings in the Tenancy Tribunal⁵.
9. The email from the plaintiff also contemplates further discussion about the “subleasing issues” and acknowledgement that Mr Plowman is not the

² First amended statement of claim (SOC) at para’s 1-3.

³ SOC para 5

⁴ Affidavit of Ian Plowman sworn 23 August 2019

⁵ See exhibit I affidavit of Ian Plowman

owner. Mr Plowman is not a landlord. He does not have authority and cannot legally sublet premises nor can he authorise a joint tenancy.

10. There is no right of exclusive occupation and possession.
11. The email is in the nature of a personal record by one party to a conversation regarding a proposal or agreement to agree. At it highest it is a proposed and draft "Heads of Agreement".
12. In summary Mr Smith cannot unilaterally impose a lease agreement via email over land on a person who has no authority to enter into a lease over that land.
13. The declarations sought by Mr Smith are misconceived. The trespass notice was validly issued and enforced by Mr Plowman and the Police. It cannot be retrospectively "un-enforced" or set aside.
14. The application for a declaration that the Court enforce and impose a lease agreement of uncertain terms on the defendants is untenable.
15. The claim for damages for lost opportunity wages and interference has no basis in law and is speculative.
16. The claim for exemplary damages for loss of quite enjoyment is dependent on a legal right to quite enjoyment. This claim too must fail as there was no lease to begin with.
17. Finally, even if there was a short-term lease, which is denied, it was terminable at will and was validly terminated⁶ by email dated 9 October 2018⁷. Mr Smith has not suffered any loss.

Conclusion

18. The onus is on Mr Smith to establish that there was a lease. On the pleadings, and in particular the email exchange relied upon, it is submitted that for the reasons set out above he cannot possibly succeed.

⁶ S 210 Property Law Act 2007

⁷ Exhibit E Affidavit of Ian Plowman

Helen Mitchell : third defendant

19. Mr Smith has sought to join Helen Mitchell as a party on the basis that she assisted in the service of a trespass notice which led to his eviction⁸ as a squatter.
20. Mrs Mitchell has otherwise no connection to Mr Smith and his dispute with Mr Plowman and Nikau Nurseries.
21. Serving a trespass notice cannot lead to a legal claim for damages against an unrelated third party. She is not a party to the lease agreement and accordingly she cannot be liable for any loss suffered as a result of a breach of that alleged agreement.
22. Mr Smith has a history of failing to appear and issuing multiple proceedings against individuals and entities who are witnesses to events but against whom he does not have a legal claim⁹.
23. Counsel submit that Mrs Mitchell should be struck out as a defendant on the basis that the plaintiff has attempted to improperly join her to this proceeding¹⁰.

Dated: 5 October 2020.



W E Andrews

⁸ Paras 17-18 SOC

⁹ Ibid

¹⁰ Rule 4.56 District Court Rules.