

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

CIV 2009-404-3620

BETWEEN	XUE YING ZHU Plaintiff
AND	HUA CHEN First Defendant
AND	ALI MOHAMMED PARKAR Second Defendant
AND	CHERIE LOUISE PARKAR Third Defendant
AND	THE HAT FACTORY 2006 LIMITED (IN LIQUIDATION) Fourth Defendant
AND	CLASSIC LIVING LIMITED (IN LIQUIDATION) Fifth Defendant
AND	JIAN HUA LIAO Sixth Defendant

Hearing: 16 December 2009

Appearances: F C Deliu for Plaintiff
B Cunningham for Defendants

Judgment: 17 December 2009

RESERVED JUDGMENT OF ELLIS J

This judgment was delivered by me on 17 December 2009
At 4 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors: H Hylan, PO Box 5660, Auckland 1141
Counsel: F C Deliu, PO Box 68559, Auckland 1145
B M Cunningham, PO Box 3599, Auckland 1140

[1] In the course of the Duty Judge list on 16 December 2009, counsel for the plaintiff Mr Deliu applied to strike out the defendants' applications

- a) dated 6 July 2009 for security for costs; and
- b) dated 20 August 2009 for the discharge of the freezing orders made by Williams J on 14 August 2009.

[2] The application is said to be made under HCR 15.1, s 88B of the Judicature Act 1908 and the Court's inherent jurisdiction. Mr Deliu also asks that any order striking out the applications be made on terms that they may not be refiled without leave of the Court.

[3] Mr Cunningham, who has formerly represented the six defendants, advised the Court that:

- a) The fourth and fifth defendants have been placed in liquidation
- b) The first defendant is applying to be voluntarily adjudicated bankrupt;
- c) The second and third defendants have been served with bankruptcy notices and the orders sought have been listed for hearing in mid January and early February 2010;
- d) The sixth defendant had no active involvement in the businesses operated by the other defendants (and has indeed sought to have her name struck out as a party).

[4] As well, Mr Cunningham advised that although the Legal Services Agency had previously refused to grant legal aid to those defendants who are natural persons, the Agency was in the process of reconsidering that decision, although any grant of legal aid would only relate to work done by Mr Cunningham up until the receipt of the freezing order judgment on 14 August 2009. He gave notice of his intention to withdraw accordingly.

[5] Essentially the grounds advanced in support of the plaintiff's application to strike out were:

- a) Failure by the defendants to take steps to pursue the applications, including the adjournment at their behest of a hearing of the applications that was scheduled to take place on 6 October 2009;
- b) Prejudice principally in the form of the unnecessary stress to the plaintiff occasioned by the continued existence of two applications that might materially and detrimentally affect her position;
- c) The prospective and contingent basis upon which both the applications have been made;
- d) The applications have (for a variety of reasons) no legal merit.

[6] Although I am not wholly persuaded that there would be significant prejudice to the plaintiff if the two applications were simply permitted to remain pending on the court file, in the other somewhat unusual circumstances of this case I am satisfied that both the application for security for costs and for discharge of the freezing order should be dismissed (rather than "struck out", which appears to be a term that is confined to pleadings). In particular, it Mr Cunningham appeared to accept that:

- a) The application for security was made to protect the interests of the Legal Services Agency at a point in time when no legal aid has in fact been granted;
- b) The application for discharge did not itself disclose any material change of circumstance since the making of the freezing order but rather was being kept alive so that it could (possibly) be amended on behalf of the H Chen Family Trust (not itself presently a party to the proceedings) in the event that a Property Law Act notice is issued by the National Bank in relation to the mortgage over the property at 70A Wheturangi Rd, Greenlane.

[7] I agree with Mr Deliu that it is, in general terms, unsatisfactory for applications to be made and maintained on the basis of facts that do not yet, and may never, exist. It is reasonably plain that (no doubt for this reason) the defendants do not wish to pursue the applications at this time. And of course the absence of the relevant supporting facts necessarily undermines the legal merits of the applications.

[8] As to Mr Deliu's request that the striking out be made on terms that would require leave before the applications could be refiled I agree with Mr Cunningham that this is the effect of HCR 7.52 in any event, and no such additional order is therefore required.

[9] The plaintiff is entitled to costs on a 2B basis.

[10] Mr Cunningham is granted leave to withdraw.

[11] Due to the pending bankrupt status of some of the defendants and other contingencies there is presently some uncertainty as to how the substantive claim will progress. For the same reason there would appear to be little point having this matter mentioned again early in 2010. Accordingly I direct that it be listed for mention in the first Duty Judge's list in March 2010, with leave reserved to all parties to seek from the Registrar an earlier date in the event there are matters requiring the Court's attention.

Rebecca Ellis J