EDITORIAL NOTE: NAMES AND/OR DETAILS IN THIS JUDGMENT HAVE BEEN ANONYMISED.

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IN THE FAMILY COURT
AT NEW PLYMOUTH

FAM 2015-043-000073
[2016] NZFC 1884

IN THE MATTER OF	THE CARE OF CHILDREN ACT 2004
BETWEEN	DANIELA SEWARD Applicant
AND	OLIVER GOOSEN Respondent

Hearing:	8 March 2016
Appearances:	A Mihailoff for the Applicant No appearance by or for the Respondent P Shearer as Lawyer for the Children P Jensen as Counsel to Assist
Judgment:	24 March 2016

RESERVED JUDGMENT OF JUDGE G P BARKLE

Introduction

[1] The parties are the parents of two young boys namely:

- Stephen Goosen ("Stephen") born [date deleted] 2010; and
- Brian Goosen ("Brian") born [date deleted] 2011.

[2] The family immigrated from [name of country deleted] in February 2014 and includes an older daughter of Ms Seward's, Manuela Hart ("Manuela") born [date deleted] 2000.

[3] The couple separated on 2 March 2015 and the following day Ms Seward filed without notice applications for an interim parenting order, temporary protection order, tenancy order and ancillary furniture order. Those were granted. Mr Goosen was granted supervised contact by an approved provider. On 12 March 2015 an order preventing removal of the three children from New Zealand was made.

[4] On 8 January 2016 Mr Goosen made application to discharge the order for non-removal pursuant to s 77(5) of the Care of Children Act 2004 and to relocate the boys from New Zealand to [name of country deleted].

[5] Ms Seward has filed an interlocutory application pursuant to Rules 193 and 194 Family Courts Rules 2002 seeking that the Court strike out the application or stay or dismiss the proceedings. At the hearing on 8 March 2016 the issue of the Court's jurisdiction to dismiss the proceedings pursuant to s 140 of the Care of Children Act 2004 ("the Act") was also considered.

Procedural Matters

[6] From March 2015 until 18 September 2015 Mr Goosen was represented by Quin Law, primarily Ms S Dodunski and at times Mr G Wilson. A notice of response and affidavit were filed to the Care of Children Act proceedings and notice of defence to the domestic violence proceedings. At a hearing on 3 July 2015 His Honour Judge Courtney discharged the temporary protection order and declined

to make a final protection order. His Honour found that psychological abuse was proven but in the circumstances he was not of the view that it was necessary for a final order to be made.

[7] On 23 October 2015 Quin Law filed application for leave to withdraw as solicitor on the record for Mr Goosen pursuant to Rule 88 of the Family Courts Rules and that application was granted by the Court on 30 October 2015. Since that time Mr Goosen has represented himself.

[8] The substantive proceedings were the subject of a directions conference on 3 December 2015. Due to issues that had arisen concerning Mr Goosen's contact with Stephen and Brian a further directions conference was scheduled for 24 February 2016. In the intervening period Mr Goosen filed the applications the subject of this judgment.

[9] Mr Shearer, lawyer for Stephen and Brian, filed a report for the directions conference on 24 February 2016 in which he made observations concerning Mr Goosen's applications and raised the potential for those applications to be struck out or dismissed. At the directions conference counsel for Ms Seward, Ms Mihailoff, advised that her instructions were to pursue such applications. Mr Goosen attended the directions conference on 24 February 2016.

[10] At that conference the Court made directions requiring Ms Mihailoff to file a formal application and affidavit from her client and submissions were timetabled to allow the hearing of Ms Seward's application on the afternoon of 8 March 2016. Counsel to assist the Court was appointed to ensure that all issues would be before the Court, particularly as Mr Goosen was self represented.

[11] Ms Pamela Jensen was appointed by the Court as counsel to assist. In her submissions Ms Jensen advised that she made contact with Mr Goosen on 25 February 2016 inviting him to meet with her but he declined to take advantage of that opportunity.

[12] Mr Goosen filed submissions for the hearing dated 4 March 2016 in which he advised he was not going to attend the hearing on 8 March 2016 as he was intending to go to the [name of country deleted] Embassy in Wellington to make enquiries about the immigration status of the family.

[13] Mr Goosen was not present on 8 March 2016. As recorded he had filed submissions and counsel to assist the Court had been appointed. Accordingly I determined that the hearing should proceed despite Mr Goosen not being present.

Background

[14] The parties together with the three children of their family immigrated to New Zealand on 22 February 2014. The couple had been in a relationship since 2009. They had separated for approximately seven months in 2013 at which time Ms Seward obtained a protection order.

[15] Mr Goosen had obtained employment with [employment details deleted] in New Plymouth as a [employment details deleted]. He obtained a work visa which allowed the entire family to come to New Zealand. The parties separated on 2 March 2015 and the following day Ms Seward filed the without notice applications set out at paragraph [3]. A temporary protection order and interim parenting order were granted with Mr Goosen being reserved supervised contact by an approved provider. On 12 March 2015 an order preventing removal of the two boys and Manuela from New Zealand was made.

[16] Mr Goosen filed defences to both sets of proceedings on 16 March 2015. At paragraph 1 of his affidavit in support of the notice of response to the Care of Children Act proceedings he stated:

> "I agree that Daniela has [sic] day-to-day care of the children."

[17] In his affidavit in response to the domestic violence proceedings he said at paragraph [49]:

> "I agree that Daniela should have the day-to-day care of our boys. However I would want to have regular contact with them. "

[18] His Honour Judge Courtney determined Ms Seward's application for a protection order on 3 July 2015. By that time Ms Seward and the children had moved from where the family had been living to first the Women's Refuge and then other rental accommodation. It was apparent that there would be no reconciliation between the parties.

[19] Judge Courtney found both parties credible witnesses. His Honour was not satisfied to the requisite standard that the allegations of physical violence were made out. In making his finding His Honour stated that he was not saying no physical violence had occurred.

[20] However, Judge Courtney recorded that there were behaviours of Mr Goosen that in his view could be described as obsessive/compulsive although no medical diagnosis of that nature was provided to the Court. The Judge recorded that Mr Goosen had acknowledged his requirements of Ms Seward and behaviours had been "over the top". At paragraph [48] of his decision Judge Courtney said[1]:

> As I have said Mr Goosen has acknowledged in the course of his evidence that his behaviour has been over the top and also angry. I believe that his behaviour is in this regard demanding to such a degree that it does amount to control and psychological abuse …

[21] However at paragraph [65] Judge Courtney recorded that the aspects of psychological abuse had occurred in the context of the parties living together and in his view they were behaviours which would not occur while the parties were living apart. As a result His Honour found that there was no ongoing necessity for an order to prevent a repeat of such behaviour. Accordingly the application for a final protection order was declined and the temporary protection order discharged. Some of the behaviours identified by Judge Courtney related to issues of cleanliness, cooking, demands regarding medical treatment for the children that resulted from controlling behaviour and anger.

[22] Judge Courtney further determined that supervised contact should continue. That contact had been taking place at [details of supervision provider 1 deleted] but His Honour decided it could progress to being supervised by [details of supervision

[1] *Seward v Goosen* [2015] NZFC 5848

provider 2 deleted]. That allowed for the contact of Mr Goosen with the boys to take place at venues such as [locations deleted].

[23] [Details of supervision provider 2 deleted] is a private company owned and operated by Ms Annabel Wembley. She also runs the supervised contact programme at [details of supervision provider 1 deleted]. In his report for the Court dated 16 September 2015 Mr Shearer advised that Ms Wembley had been running the supervised access programme at [details of supervision provider 1 deleted] for approximately 25 years. He said that Ms Wembley has a reputation for being "straight up" and "telling it like it is" and is extremely experienced in assessing children's development, interaction and attachment with parents. [Details deleted].

[24] Ms Wembley has provided two reports to the Court in respect of Mr Goosen's contact with the children. Her first report dated 29 June 2015 recorded that between separation and 17 June 2015 Mr Goosen had supervised contact at [details of supervision provider 1 deleted] on six occasions for a period of one and half hours each time. Ms Wembley noted that [details of supervision provider 1 deleted] is set up for children's play and so it was difficult to ascertain Mr Goosen's ability to provide a child focussed environment for the boys of his own accord. It was noted that Mr Goosen's desire was to have the contact structured thereby limiting the boys' spontaneity in play. She noted that it would be beneficial to Mr Goosen to attend a parenting programme to learn more about the ages and stages of children's development.

[25] Ms Wembley's second report was dated 15 September 2015. That report recorded that there had been five supervised contact periods at venues in the community of two hours duration between 2 August 2015 and 12 September 2015. Ms Wembley's report concluded that she was unable to recommend unsupervised contact prior to Mr Goosen completing a programme such as the Incredible Years Programme. In her view the contact needed to remain supported until Mr Goosen had completed a comprehensive parenting programme, secured some accommodation and developed some understanding of the milestones of children which may assist in his relationships with his boys. In Ms Wembley's view his need for accommodation, securing a work environment he was comfortable with and

definitive plans for the future would help eliminate some of his anxieties that were impacting negatively on his parenting potential. Ms Wembley had offered Mr Goosen free counselling to provide some support but he had chosen not to take up the offer. Ms Wembley made those recommendations while advising her empathy for Mr Goosen's position in being alone in an alien country, his current living situation and his isolation.

[26] In the second report Ms Wembley had reported that at the contact visit on 12 September 2015 Mr Goosen and the boys had spent time at [location deleted]. The visit prior had also included time at [location deleted] which the boys had enjoyed. During the visit on 12 September 2015 there were considerably more persons present and Mr Goosen had struggled to maintain control of the boys. In a somewhat chaotic environment the boys' behaviour deteriorated and so did Mr Goosen's demeanour. Ms Wembley recorded that the supervisor reported Mr Goosen had become quite distressed at what he perceived was a racial slur against one of his children by an adult male at [location deleted]. The supervisor had interpreted the situation differently saying the man concerned had exhibited the same gruff approach throughout the time he was there with a number of people and had not regarded the situation as race related.

[27] Mr Goosen discussed the incident at [location deleted] with Mr Shearer prior to a scheduled directions conference on 18 September 2015. Mr Shearer was aware from Ms Wembley of what had been reported concerning the incident. As well as being upset about the incident Mr Goosen was very unhappy that Ms Wembley was not supporting a move to unsupervised contact. Mr Shearer supported Ms Wembley's position and proposed that before unsupervised contact could start it would be helpful for Ms Goosen to:

(a) Undertake a parenting programme such as the Incredible Years one;

(b) Take advantage of the counselling offered at no cost;

(c) Demonstrate some insight about the matters identified by Ms Wembley in her report concerning his interaction with the boys; and

(d) Secure accommodation as Mr Goosen was continuing to live in his car as he had done since separation in early March 2015.

[28] At the directions conference on 18 September 2015 Mr Goosen advised the Court that he had withdrawn his application for residency as a skilled immigrant and was very reluctant to continue supervised contact or undertake the parenting programme. The Court explained to him that for the sake of Stephen and Brian, ongoing contact albeit supervised was important and encouraged him to continue with that in the meantime.

[29] Despite the advice of Ms Wembley and Mr Shearer and the encouragement of the Court not only has Mr Goosen failed to take advantage of the parenting programmes and proposed counselling he has ceased all contact with Stephen and Brian. His last contact with the boys was on 12 September 2015. There was some suggestion from Ms Mihailoff during her submissions at the hearing on 8 March 2016 that Mr Goosen had attended at the boys pre-school and school to see them.

[30] A further directions conference was held on 3 December 2015. Mr Goosen attended representing himself. Again Mr Goosen was encouraged to take up the contact available with his sons and was advised that Court funding of that contact would continue. A further adjournment to a conference in late February was made. Mr Goosen then filed his application dated 8 January 2016.

Mr Goosen's Applications

[31] In his handwritten application Mr Goosen seeks:

(a) to discharge the order preventing removal of Stephen and Brian from New Zealand; and

(b) relocation of the children from New Zealand to their "born country" [name of country deleted].

[32] Mr Goosen records that he had stopped seeing the children after the verbal abuse towards his four year boy Brian from a worker at [location deleted] in New

Plymouth. He complains that this was ignored by Ms Wembley and Mr Shearer. Mr Goosen states that the boys are not safe here in New Zealand. That it will be better for the boys' welfare to get the best education, medical assistance and development in their own country and culture. Back home Mr Goosen states he will find a job within two weeks to support his children. Stephen's asthma that he has developed living in New Zealand because of the cold weather will be improved and Stephen will get specialist care for his eyes. Mr Goosen exhibited to his application a complaint to the New Zealand Law Society in respect of Mr Shearer dated 5 January 2016. The complaints service of the New Zealand Law Society has advised Mr Goosen that there was a protocol requiring a complaint about a lawyer for child to be lodged first with the Family Court.

Ms Seward's application and affidavit

[33] In her application dated 1 March 2016, Ms Seward applied to strike out Mr Goosen's applications on the grounds that they disclose no reasonable basis for being made, they are likely to cause prejudice, embarrassment or delay in the proceedings and are otherwise an abuse of the Court process.

[34] Ms Seward advises in her affidavit that she now has a work visa that will expire in August 2016. Currently she is looking to extend that visa or applying for a visa on other grounds. As she is lawfully in New Zealand then the children are also. Ms Seward's position in that it is in the children's welfare and best interests to continue to reside in New Zealand which she observes is now their country of habitual residence. In her view both she and the children would be at a significant disadvantage if required to relocate to [name of country deleted].

[35] Ms Seward further deposes that she believes Mr Goosen is seeking something that cannot realistically be granted. Mr Goosen is seeking to remove Stephen and Brian from New Zealand when not exercising contact nor at anytime having pursued day-to-day care. Ms Seward also annexed to her affidavit an email from Mr Goosen dated 6 December 2015 in which he threatened to cease child support payments for the children unless Ms Seward allowed him unsupervised contact.

The Law

[36] The statutory framework under which the application to strike out or dismiss Mr Goosen's applications are considered as follows:

Striking out pleading

[37] Jurisdiction for striking out a pleading is contained in r 193 Family Courts Rules 2002:

> **193 Striking out pleading**
>
> (1) The Court may order that all or part of an application or defence or other pleading be struck out if the pleading or part of it—
>
> (a) discloses no reasonable basis for the application or defence or other pleading; or
>
> (b) is likely to cause prejudice, embarrassment, or delay in the proceedings; or
>
> (c) is otherwise an abuse of the Court's process.
>
> (2) An order under subclause (1) may be made by the Court—
>
> (a) on its own initiative or on an interlocutory application for the purpose:
>
> (b) at any stage of the proceedings:
>
> (c) on any terms it thinks fit.

Stay or dismissal

[38] Jurisdiction for stay or dismissal of a proceeding is in r 194 Family Courts Rules 2002:

> **194 Stay or dismissal**
>
> The court may order that proceedings be stayed or dismissed, either generally or in relation to a particular application by which an order or declaration is sought, if the court considers, in relation to the proceedings or to the application, that—
>
> (a) there is no reasonable basis for the proceedings or application; or
>
> (b) the proceedings are frivolous or vexatious; or

(c) the proceedings are an abuse of the court's process.

Dismissal

[39] Jurisdiction to dismiss proceedings is also found in s 140 Care of Children Act 2004 ("the Act"):

> **140 Power to dismiss proceedings**
>
> The court may dismiss proceedings before it under this Act if it is satisfied—
>
> (a) that the proceedings relate to a specified child, and that the continuation of the proceedings is, in the particular circumstances, clearly contrary to the welfare and best interests of the child; or
>
> (b) that the proceedings are frivolous or vexatious or an abuse of the procedure of the court.

[40] Unlike the jurisdictional prerequisites for any other orders available under Family Law statutes, neither r 193 of the Family Court Rules nor s 140 of the Act requires an application be filed in order to invoke exercise of the discretion. The Court may entertain such an order of its own motion or initiative. In this matter Ms Seward's application relied on rr 193 and 194 but the issue of an application s 140 of the Act was squarely before the Court particularly as a result of the submissions filed by Ms Jensen, Counsel to Assist.

[41] Whether the Court exercises its powers available under s 140 of the Act or rr 193 and 194 the authorities make it clear that a decision to strike out or dismiss an application must not be made lightly and it is a discretion to be exercised sparingly and only when a very clear case is made out.

[42] In the High Court decision of *D v K*[2] Morris J at paragraph [4] considered an application under the then r 186 of the High Court Rules to strike out all three causes of action pleaded by the plaintiff. The Court outlined the legal principles required when considering a strike out application. Morris J stated these principles were "well known and required little elaboration":

> … the striking-out Jurisdiction must be exercised sparingly and only in cases when a Court is satisfied it can make a clear determination that the plaintiffs'

[2] (1994) 13 FRNZ 1

> case is so untenable and doomed to failure, even if all the allegations in the statement of claim were proven.
>
> To this summary I would add that although a striking out application may raise difficult questions of law which entail extensive argument, this does not, of itself, exclude the jurisdiction to strike out.

[43] In *RGPY v AL* [3] at 369 His Honour Judge von Dadelszen was considering an application under rr 193 and 194 of the FCR. His Honour stated as follows:

> [18] The principles to be applied where the application discloses no cause of action, must, in reliance on dicta applying to the equivalent rules in the District and High Courts, be the same under both rules. They are:
>
> 18.1 The powers under the rules are to be exercised sparingly;
>
> 18.2 The cause of action must be clearly untenable;
>
> 18.3 The Court must assume the pleaded facts are true;
>
> 18.4 The jurisdiction is not excluded where there are difficult questions of law requiring extensive argument; and
>
> 18.5 The Court must consider whether amendment will disclose a reasonable cause of action.
>
> [19] For present purposes, there are two differences between these two rules, which are otherwise almost identical. First, and importantly, an application which is struck out under r 193 is not precluded from returning as a viable action on amendment; a stay or dismissal under r 194 can have a more permanent effect. Secondly, only r 193 specifically says (in (2)(a)) that an order may be made on the Court's own initiative.

[44] In *Nelson v Bourke*[4] His Honour Judge Callinicos stated at [14]:

> Given s 140 derives from statute, it dominates any regulation or rule. Any conflict between Rule 193 and s 140 will fall to be determined according to the statutory provision. It is noted that r 193 does not contain, as s 140 does, specific reference to the application or defence being frivolous or vexatious.

[45] In *BAM v AJG*[5] Judge Ryan considered s 140. He confirmed at [12] an earlier view expressed by Judge Bisphan in *JJF v AJH*[6] where His Honour stated that the Court may act under s 140 of its own motion and that the test is essentially one whereby the Court must be satisfied as to the terms set out in that section. Judge Ryan agreed with the observations of Judge Bisphan that s 140(b) was

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[3] (2005) 24 FRNZ 369
[4] [2014] NZFC 5336
[5] [2011] NZFLR 352
[6] FAM-2008-009-5326, 14 April 2012

essentially a codification of the Court's inherent power to regulate its own processes to prevent abuse of process.

[46] Judge Ryan confirmed the approach taken in all other cases in this area, namely the question as to whether or not to dismiss proceedings under s 140 is a serious step and that unjustified dismissal could very well amount to a miscarriage of justice.

[47] Her Honour Judge Moss in *NZCYPS v B*[7] discussed what was meant by the words "frivolous, vexatious or an abuse of process." Her Honour defined frivolous and vexatious as follows:

> Frivolous means paltry or trifling or not serious. Whilst it could never be said that the subject of a custody application is not serious, the substance or presentation of such an application could come into this category. In a legal context the word vexatious has come to mean "not having sufficient grounds".

[48] Her Honour also made the following observation:

> To define the elements of a custody case is difficult. But one can readily recognise a deficient case or one which does not reach that "basic element" standard.

[49] In *RAW v CR*[8] Duffy J considered the provisions of s 140. At paragraph [58] Her Honour said:

> A decision to stay or dismiss a proceeding under s 140 necessarily involves considerations of the best interests of a child, and it carries serious consequences for the parties. In this regard, it is comparable to a decision on a parenting order.

[50] Her Honour further stated that when considering such an application a review of the merits of the parties' application was required as well as a consideration of the position of the child.

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[7] [1996] NZFLR 385
[8] [2012] NZHC 1470

Submissions

Mr Goosen

[51] Mr Goosen referred to the abuse he believed that was suffered by Brian at [location deleted] in September 2015. He stated that this was clearly racism and the bad part is that the Court assigns experts to his case who do not do anything about the matter. The Court understands that as a reference to Mr Shearer and Ms Wembley. As I have set out earlier both of them are aware of the incident referred to and that the supervisor of the contact did not regard what took place in the same light as Mr Goosen and further that Mr Goosen had advised Mr Shearer within a day or two of the incident that he had not heard what was said by the [location deleted] employee.

[52] Mr Jensen then goes on to state that he has been a victim of abuse and racism and it happens on a daily basis towards him at the company that he works. He advises that he is "depressed and sick and his health is going down" because of this abuse and racism. He states "that is why I want to go back to [name of country deleted]." Going back he says will be in the best interests and welfare of the children and he himself away from abuse, suffering and pain and racism. Mr Goosen concludes his submissions by advising the Court that he will not attend the hearing because he is going to the [name of country deleted] Embassy to solve this matter because he wants to go back to [name of country deleted].

Ms Mihailoff on behalf of Ms Seward

[53] Ms Mihailoff stated that there was no evidence before the Court that the children will even be safe in the respondent's unsupervised care, let alone in his sole day-to-day care in another country at a considerable distance from New Zealand. She reminded the Court that Mr Goosen had failed to fulfil any of the recommendations made to him by the Court or professionals despite being afforded several opportunities to do so. It has been Mr Goosen's choice not to pursue contact with his children thereby undermining his own psychological relationship with them.

[54] Ms Mihailoff noted that s 5(a) of the Act required that a child's safety must be protected and particularly from all forms of violence as defined in s 3(2) of the Domestic Violence Act 1995. The definition includes psychological violence. His Honour Judge Courtney in his decision of 3 July 2015[9] made a finding that psychological abuse had occurred. Ms Mihailoff submitted that the Court must first be required to address all potential safety risks for the children being in the respondent's unsupervised care, let alone day-to-day care, before it can even entertain the prospect of discharging a non-removal order or of Stephen and Brian relocating to [name of country deleted].

[55] Ms Mihailoff stated that Ms Seward did not wish to relocate to [name of country deleted] herself and considered New Zealand as the home country of the family. In her submission the application by Mr Goosen was not child focussed and he appeared to blame other people in the Court for his current predicament. Ms Mihailoff was concerned about the delay in finalising her client's application for a parenting order which had been filed in March 2014 and observed that s 4 of the Act required that decisions be made expediently with regard to the boys' sense of time.

Mr Shearer – Lawyer for Stephen and Brian

[56] Mr Shearer submitted that he did not doubt that Mr Goosen genuinely believed that his clients would be better off in [name of country deleted] and in his care and so from his subjective point of view his application was entirely reasonable. However, in his submission the Court needed to apply a dispassionate and objective analysis to the relevant facts and circumstances when considering what is in the welfare and bests interests of Stephen and Brian. Mr Shearer submitted that those included:

(i) that Ms Seward had been the primary caregiver of the children literally 24 hours a day, seven days a week for the 12 months that the parties had been separated;

[9] *Seward v Goosen* [2015] NZFC 5848

(ii) this was not a situation where there was already an established shared care arrangement and Mr Goosen was simply seeking a greater share of the care;

(iii) Mr Goosen proposes a complete reversal of the current care arrangement and to relocate Stephen and Brian to another country away from both their mother and older half-sister. In making that proposal Mr Goosen has provided no evidence of how the boys would cope psychologically with such a radical change;

(iv) nowhere in Mr Goosen's pleadings does he make any criticism of Ms Seward's parenting ability, her care of the boys or the boys education in New Plymouth. Mr Shearer had contacted the principal at [name of school deleted] where Stephen had commenced primary school and the advice received was that Stephen was happy and settled and progressing well;

(v) Mr Goosen had not addressed the reasons why he was only permitted supervised contact; and

(vi) Mr Shearer submitted that Mr Goosen's behaviour over the last six months gave serious concern for his mental state and the safety of the boys in his unsupervised care.

[57] Mr Shearer's submission was that the application by Mr Goosen was untenable and "vexatious" as legally defined in that it did not have sufficient grounds that should allow the application to continue.

Ms Jensen – counsel to assist

[58] Unlike other counsel Ms Jensen drew the Court's attention to the jurisdiction to dismiss the proceedings pursuant to s 140 of the Act. Ms Jensen noted that the Family Courts Rules are subordinate legislation and trumped by the provisions of the statute which has an express focus on the welfare and best interests of the children.

[59] Ms Jensen reminded the Court that Mr Goosen's right to natural justice was enshrined in s 27 New Zealand Bill of Rights Act 1990 and any discretion permitted in law that restricts that right must be founded in principle and used sparingly. Ms Jensen quoted the remark from Westlaw[10]:

> The power to dismiss proceedings without determining the merits of the application effectively denies the party who has initiated the proceedings access to the Court. This is a serious abridgment of the individual's right to natural justice and unless it can be shown to be reasonable limitation which is justified in a free and democratic society, is a breach of the right to justice conferred by s 27 of the New Zealand Bill of Rights Act 1980.

[60] Ms Jensen reminded the Court that it must consider the welfare and best interests of the children as specifically referred to in s 140. That must be undertaken having regard to s 4 and 5 of the Act. She submitted that s 140 anticipates that ongoing and unmeritorious litigation can be damaging to children's wellbeing. The principle in s 4(2)(a)(i) of the Act that decisions affecting children should be made within a timeframe that is appropriate to a child's sense of time is consistent with Article 3, United Nations Convention of the Rights of the Child which prescribes that[11]:

> The best interests of children must be the primary concern in making decisions that may affect them. All adults should do what is best for children. When adults make decisions, they should think about how their decisions will affect children.

[61] Ms Jensen concluded by deferring to the greater knowledge of Ms Mihailoff and Mr Shearer of the particular circumstances of Stephen and Brian and the factual matrix relating to these proceedings but submitted that the fact that the children have lived for a year in their mother's exclusive day-to-day care without any contact, direct or indirect, with their father for six months was in her view compelling.

Discussion

[62] I observed to counsel during submissions that the feature of the authorities was that strike out or dismissal applications followed either:

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[10] Brookers Family Law – Child law (online looseleaf ed. Thompson Reuters) at CC140.02

[11] United Nations Convention on the Rights of the Child 1577 UNTS 3 (offered for signature 20 November 1980 entered into force 2 September 1990)

(a) lengthy and protracted litigation with numerous applications being a feature of the litigation and/or

(b) A substantive hearing in which many, if not all, of the issues that were involved in the fresh application had been considered by the Court.

[63] I noted that this case was somewhat different. While there had been a hearing to determine the application for a final protection order in July 2015, no substantive hearing had been held concerning care and contact arrangements for the boys.

[64] No counsel was of the view that this precluded the applications of Ms Seward being considered by the Court. That must, of course, be right but I remind myself in exercising my discretion that to bring Mr Goosen's applications to a conclusion I must be satisfied that the grounds for dismissal or strike out are satisfied to the high standard referred to earlier in this judgment.

[65] In determining the application pursuant to s 140 of the Act and Rules 193 and 194 of the FCR the following factors are relevant:

(a) When Mr Goosen filed his affidavit in response to the proceedings filed by Ms Seward in March 2015 he conceded that Stephen and Brian should be in the day-to-day care of their mother (see paragraphs [16] and [17]);

(b) The finding of Judge Courtney of Mr Goosen's obsessive/compulsive character and particularly his own acknowledgement of his behaviour being "over the top" meant that the Court found psychological abuse made out. The behaviours that were referred to in the decision of Judge Courtney included having Manuela clean the couch that visitors had sat on in the family home after they left, Ms Seward having to cook chicken a minimum of three times, the children if away from home and wanting to use the toilet being expected to wait until they got home or if they desperately needed to go they would have to be

supervised. It is apparent that the psychological abuse referred to by Judge Courtney extended to the children as well as Ms Seward;

(c) The uncontested evidence that Ms Seward has been the main care giver for the boys since birth and effectively their sole carer since 3 March 2015;

(d) Mr Goosen's ill-advised and unjustified decision to have no contact with Stephen and Brian since 12 September 2015;

(e) Mr Goosen despite the advice of Ms Wembley supported by Mr Shearer has not been prepared to undertake a parenting programme or take advantage of counselling available at no cost;

(f) Mr Goosen's decision to live out of a car since early March 2015 and thereby not be in any position to have suitable accommodation which would allow him to have the day-to-day care of the boys. This was despite being in employment;

(g) Mr Goosen's belief that Brian was subject to a racial slur at [location deleted] in September 2015 when he conceded to Mr Shearer that he had not heard what was said;

(h) Mr Goosen's advice in his submissions dated 4 March 2016 that he is "depressed, sick and my health is going down";

(i) Ms Wembley's assessment that Mr Goosen has a lack of understanding of the all round development of Stephen and Brian, an inability to be consistent in his communication with the boys and that consequently they withdraw from him;

(j) Mr Goosen's failure to address the fundamental issue that this Court has seen fit to only allow him to exercise supervised contact with Stephen and Brian. How, from that position, he could expect the

Court to determine he should be allowed to relocate the boys to [name of country deleted] is not addressed; and

(k) The lack of cogent evidence to support the application of Mr Goosen for relocation of the boys to [name of country deleted]. There is a lack of substance in the application that reflects an insufficiency of grounds on the part of Mr Goosen.

[66] Section 140 of the Act requires for dismissal of the proceedings to be ordered that continuation of the proceedings be "clearly contrary" to the welfare and best interests of Stephen and Brian. Ms Jensen helpfully advised that the Oxford Dictionary defines clearly as "distinct, without doubt and obviously". That definition along with the authorities referred to earlier underline that the Court must be satisfied to a high threshold before dismissing Mr Goosen's application. Section 140 requires that this standard must be referenced with regard to the welfare and best interests of Stephen and Brian. In my view the s 5 principles that are of particular relevance in this case include:

(i) Section 5(a) – there are findings by Judge Courtney in his decision of 3 July 2015 that Stephen and Brian have suffered from and being exposed to psychological abuse by Mr Goosen;

(ii) Section 5(c) - there has been an ongoing lack of consultation in respect of the boys on the part of Mr Goosen since separation. In addition the application to relocate the children to [name of country deleted] has effectively come out of the blue and without any notice to Ms Seward and Mr Shearer as lawyer for Stephen and Brian;

(iii) Section 5(d) - any relocation of Stephen and Brian to [name of country deleted] would rupture their current stability and security and continuity of care. If living in [name of country deleted] they would be a considerable distance from their main

caregiver, Ms Seward and their half sister. Their current living situation in New Zealand would be disestablished; and

(iv) Section 5(e) - the application has no regard to Stephen and Brian's entitlement to have their relationships with their mother and half-sister strengthened and preserved.

[67] An assessment of the available evidence provided by Mr Goosen in support of his application reveals that there is a paucity of material which could support a finding that it is in the welfare and best interests of the children to be relocated to [name of country deleted]. The corollary of a decision to relocate would be that Stephen and Brian would have to go into Mr Goosen's day-to-day care. For the reasons already set out there is no likelihood of the boys prevailing care arrangements being changed. Having regard to the history of these proceedings since they were filed in March 2015 and particularly those matters I have set out at paragraphs [65] and [66] it is my view that Mr Goosen's application to relocate the boys to [name of country deleted] has no prospect of success.

[68] In terms of the authorities that I have referred to, in my determination Mr Goosen's applications are "doomed to failure." The applications are so clearly untenable that they cannot possibly succeed. In those circumstances I determine pursuant to s 140(a) of the Act that continuation of Mr Goosen's proceedings in these particular circumstances would clearly be contrary to the welfare and best interests of Stephen and Brian. In addition Mr Goosen's applications disclose no reasonable basis on why they should be allowed to continue and further, in my view, are an abuse of the procedure of the Court pursuant to s 140(b).

[69] Many of the decisions that deal with applications pursuant to s 140 of COCA and rr 194 and 194 FCR's refer to the limited resources available to the Courts also being a consideration. As Judge von Dadelszen said in *RGPY v AL*[12] at [20]:

> The judgments in the Court of Appeal in *A-G* v *M* [1995] 1 NZLR 558, [1995] NZFLR 104 make it plain that there is no principle of law that allows

[12] Above at n 3

> a person a day in Court irrespective of how hopeless their case may be. Hardie Boys J (as he then was) stated that-
>
> > The striking-out jurisdiction is founded on the realisation that resources are finite and are not to be wasted. [P 564; P 110]

[70] In my view those comments are most appropriate in this case. In the years since those remarks were made resources have become even more limited and the applications of Mr Goosen which I have determined have no prospect of success should not be allowed to diminish the limited resources of the Court further at the expense of more meritorious matters.

Outcome

[71] Mr Goosen's applications to:

(a) discharge the non-removal order of Stephen and Brian dated 12 March 2015; and

(b) relocate Stephen and Brian to [name of country deleted]

are both dismissed pursuant to s 140 of the Act. In my view it is not necessary to make similar rulings pursuant to Rules 193 and 194 of the FCR but if that was required then I would have made such orders.

[72] Mr Goosen is also advised that s 139A of the Act now takes effect and he is precluded from bringing substantially similar applications before the Family Court for a period of two years except by leave of the Court.

Directions

[73] Ms Mihailoff, on behalf of her client, sought that a final parenting order should be made at this time. I disagree. In my view it would be prudent for a further directions conference to be allocated before myself. In respect of that conference I direct:

(a) Mr Goosen is to advise on what basis, having regard to the concessions made in his affidavits of 16 March 2015 that the children should be in Ms Seward's day-to-day care, why such order should not be made; and

(b) He is further to advise the terms of any contact provision he seeks should be in a parenting order that provides for Ms Seward to have the day-to-day care of Stephen and Brian.

G P Barkle
Family Court Judge