

EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

NOTE: ANY REPORT OF THIS PROCEEDING MUST COMPLY WITH SS 11B TO 11D OF THE FAMILY COURTS ACT 1980, FOR FURTHER INFORMATION, PLEASE SEE [HTTP://WWW.JUSTICE.GOV.T.NZ/FAMILY-JUSTICE/ABOUT-US/ABOUT-THE-FAMILY-COURT/LEGISLATION/RESTRICTION-ON-PUBLISHING-JUDGMENTS](http://www.justice.govt.nz/family-justice/about-us/about-the-family-court/legislation/restriction-on-publishing-judgments).

**IN THE FAMILY COURT
AT WAITAKERE**

**FAM-2013-090-001465
[2017] NZFC 7791**

IN THE MATTER OF	THE FAMILY PROTECTION ACT 1955
IN THE MATTER OF	THE ESTATE OF [ELOISE WELLS]
BETWEEN	[ZOE CLEMENTS] Plaintiff
AND	[CAMERON CLEMENTS] Defendant

Hearing: 22 September 2017

Appearances: J Reuben for the Plaintiff
R Lawn for the Defendant

Judgment: 29 September 2017

**RESERVED JUDGMENT OF JUDGE B R PIDWELL
(Reasons for dismissal of Strike out application)**

[1] The executor (and beneficiary) of the estate of Ms [Eloise Wells] applies to strike out the application filed under the Family Protection Act 1955 for want of prosecution and delay.

[2] On 22 September 2017 I heard and declined the application and directed a settlement conference to be allocated. These are the reasons for my decision.

Background

[3] [Eloise Wells] died in [month deleted] 2013 at the age of 82 years. She is survived by two children. Her last Will is dated 20 February 2012. It provided for her estate to be divided equally into two parts, one part for her son [Riley Wells] and the remaining part to her son in law, [Cameron Clements]. She made no provision whatsoever for her daughter [Zoe Clements]. She appointed Mr [Clements] as her executor and trustee.

[4] [Zoe] and [Cameron Clements] were married. They separated in 2012 but remained living together in the family home. In November 2013 Mr [Clements] filed proceedings under the Property (Relationships) Act 1976. Mrs [Clements] left the family home in April 2015.

[5] In September 2014 Mrs [Clements] filed proceedings under the Family Protection Act 1955 in the High Court at Auckland seeking relief from her mother's estate. Mr [Clements], in his capacity as executor and beneficiary of the estate, filed a statement of defence, stating inter alia

4. The Defendant is married to the Plaintiff and is living in the same family home as the Plaintiff.

5. There are outstanding Relationship Property proceedings in the Waitakere District Court seeking to resolve property difference between the Plaintiff and the Defendant.

6. As of the date of filing this Statement of Defence, the proceedings in the Waitakere District Court remain to be finalised.

7. It is clear from the terms of the proceedings between the Plaintiff and the Defendant in the Waitakere District Court that the Plaintiff will not be "homeless" as a result of her inability to buy out her spouses interest in the former matrimonial home.

13. The Defendant says that the Testatrix had legitimate reasons for making her Will as she did and that the Testatrix was entitled to form her own opinion as to her moral obligations to her children and her grandchildren by way of the proxy representation of the Defendant of the grandchildren's interest. In particular events following 10 Christmas' or so proceeding the Christmas of 2012.

15. The Defendant says that the Will of the deceased [Eloise Wells] cannot be said to have been in breach of her moral duty or to be deficient in terms of the judgement in terms of a wise and just Testatrix.

[6] Two case management conferences were convened by Associate Judge Bell, on 3 February 2015 and 13 March 2015. He noted that the estate was a modest one and transferred the proceedings to the Family Court.

[7] On 7 April 2016 the Court heard the relationship property proceedings between the parties in their personal capacity and delivered a reserved judgment on the 12 May 2016 directing the sale of the family home amongst other things.

[8] On 28 July 2016 a judicial conference was convened before Her Honour Judge Manuel for these proceedings. She noted that the proceedings had "languished" since their transfer from the High Court, but was presented with a joint memorandum suggesting timetabling directions to advance the proceedings.

[9] Mr Lawn acts for Mr [Clements] in the relationship property proceedings and the family protection proceedings. It appears that he is acting for him in the family protection proceedings in his personal capacity as a beneficiary and as the executor, despite the statement of defence being filed on behalf of the executor by Cook Morris Quinn Solicitors in Auckland. No change of solicitor representation has been filed, but Mr Lawn appears to be acting for Mr [Clements] in both capacities.

[10] The remaining beneficiary of the estate is [Riley Wells] who is separately represented. He has indicated his position that as long as there is no challenge to his share of the estate, he will not take an active part in the proceedings.

[11] Mr Lawn did not appear at the conference before Judge Manuel. He conceded that his diary failed him on that day.

[12] The Court made timetabling directions as follows:

- (a) The children were to be served
- (b) Mr [Clements] in his capacity as beneficiary was to file an affidavit within 14 days
- (c) Mrs [Clements] was to reply within 14 days thereafter
- (d) The estate had a further seven days to address any matters arising from the evidence
- (e) The proceedings were to be reviewed by the registrar at the expiry of the timetable for counsel to advise how the matter was to be advanced. Judge Manuel then suggested that it would be best to consider an amicable resolution in light of the modest estate.

[13] The children were not served until 31 July and 1 August 2017. Mr [Clements] failed to file his affidavit as directed. No affidavits have been filed since the directions were made by the Court.

[14] On 9 November 2016 Mr [Clements] filed an interlocutory application seeking the proceedings be struck out for want of prosecution pursuant to rule 15.2 of the District Court Rules. He submits that the plaintiff has taken no steps since the proceedings have been filed and has failed to serve the proceedings on the children as directed. He relies on the civil case of *Watt v Sharma*¹ where Justice Asher held that a 15 month delay was inordinate and had seriously prejudiced the defendant in those proceedings. However he did grant the defendant one last indulgence and indicated that he would revoke the strike out order if a detailed proposal for future action was received by the Court within a seven day timeframe.²

¹ *Watt v Sharma* [2011] NZHC 1812

² Above at [25]

[15] Mr Lawn also relied on the case of *LHL Leasing Solutions Limited v Pinto Limited*³ where the civil court found there to be inordinate delay without explanation which was inexcusable and had caused prejudice.

[16] On behalf of the plaintiff, Ms Reuben highlights the fact that she was sole counsel to attend the judicial conference before Judge Manuel. She concedes that service of the children had not been effected until recently, but explained that within the context of delicate family relationships. In the meantime, the Court had ordered the sale of the family home where the adult children were residing and she wanted to resolve the family protection proceedings amicably. She was trying to avoid embroiling the children in the Court proceedings if at all possible. When it was clear that the defendant was pursuing the strike out application and not negotiating to a resolution, she served the children as directed.

[17] In addition, she indicated that discussions had been had between counsel regarding Mr Lawn's suggested representation of the children as she considered there to be a conflict of interest for him to take on that role.

[18] During this period of time, counsel were attempting to negotiate a resolution of the proceedings and email correspondence was submitted to the Court as evidence of those negotiations. Counsel met in November 2016 to further those negotiations.

Analysis

[19] The application for strike out was advanced in reliance on r 15.2 of the District Court Rules 2014. However r 5 of the Family Court Rules 2002 provides that all proceedings in a Family Court must be brought and dealt with in accordance with those rules. The District Court Rules will not apply unless specified by the Family Court Rule (r 5A). In my view, the applicable rule in this case is r 195 of the Family Court Rules, which governs the circumstances in which a strike out application can be made in respect of Family Court Proceedings.⁴

³ *LHL Leasing Solutions Limited v Pinto Limited* [2017] NZHC 1050 per Associate Judge Bell.

⁴ *Roulston v Roulston* HC Auckland CIV-2004-404-7120, 9 August 2005 at [9]

[20] Rule 195 provides:

Dismissal if proceedings or defence not prosecuted

(1) An opposite party may apply to have dismissed—

(a) all or part of an applicant’s proceedings, if the applicant has failed to prosecute the proceedings or part of them:

(b) all or part of a respondent’s defence, if the respondent has failed to prosecute the defence or part of it.

(2) On an application under subclause (1), the court may make any order it considers just.

[21] In *Roulston v Roulston* Heath J identified three predominant considerations which apply in this context:⁵

1. Has there been inordinate delay?
2. If so, is the inordinate delay inexcusable? and
3. Is the application likely to be seriously prejudiced by the delay?

[22] Those considerations are neither exclusive nor exhaustive. In the end, the Court must stand back and have regard to the interests of justice.⁶

[23] Applications under this rule are fairly uncommon these days as the modern rules of Court mean that the registry actively supervises the pre-trial stage of the proceedings.

[24] To justify a full dismissal of the proceedings for want of prosecution, some prejudice to the defendant must inevitably flow from the delay in progress.⁷

⁵ *Roulston v Roulston* at [11]

⁶ *Aarons-Spanier v Eynon* [2015] NZFC 3618 at [31]

⁷ LHL Leasing Solutions, *Birkett v James* [1978] AC-297 (HL) at 323.

[25] In addition, the overriding consideration is whether justice can be done, despite the delay.⁸

[26] These proceedings are aged, commencing in 2014. They were transferred from the High Court to the District Court, and then no progress occurred until a conference was held before Judge Manuel. The Court files were merged with the relationship property file, which was determined in 2016. There is a possibility that the registrar's administration of this file overlooked placing the matter in case review hearings to monitor its progression as it was merged with the property relationship file.

[27] There is no evidence to suggest that the defendant has been compromised by the delay. The property of the estate has been realised and is currently held in an interest bearing account. The evidence as to whether there has been a breach of moral duty will come from the parties themselves and there is no evidence of any diminishing memory in relation to those outstanding issues.

[28] In addition, the defendant has himself defaulted by not attending the judicial conference, and then not filing an affidavit in accordance with the directions made.

[29] The parties then engaged in appropriate settlement discussions and were in the throes of those when the application to strike out was filed.

[30] In those circumstances I cannot identify any prejudice to the defendant other than the frustration of delay. That has now been addressed by the Court directing a settlement conference with a back up date already being issued.

[31] Accordingly the application to strike out the proceedings is dismissed.

Signed at this day of , at am/pm.

B R Pidwell
Family Court Judge

⁸ *LHL Leasing Solutions* at [13]