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

IN THE DISTRICT COURT
AT CHRISTCHURCH

I TE KŌTI-Ā-ROHE
KI ŌTAUTAHI

CIV 2018-009-001205
[2019] NZDC 2472

BETWEEN	MR BURE Plaintiff
AND	CREDIT UNION SOUTH First Defendant
	FINANCIAL SERVICES COMPLAINTS LIMITED Second Defendant

Hearing: 21 January 2019

Appearances: Mr Bure in person
MOW King for the First Defendant
M Leggat for the Second Defendant

Judgment: 14 February 2019

JUDGMENT OF JUDGE A P CHRISTIANSEN

Background

[1] In January 2016 the Plaintiff, Mr Bure, purchased a Subaru motor vehicle granting a security interest to the First Defendant, Credit Union South, trading as NZCU South. During 2017 Mr Bure fell into arrears with his loan repayments. On Mr Bure's behalf, a financial hardship application was submitted under the Credit Contracts and Consumer Finance Act 2003 (CCCF Act), and he also requested NZCU South to restructure the loan. Both requests were declined.

[2] On 5 February 2018, the second defendant, Financial Services Complaints Limited (FSCL) received a complaint from Mr John Flavell on behalf of Mr Bure about NZCU South's conduct. Mr Flavell is Mr Bure's step-father.

[3] Mr Flavell asked FSCL to review NZCU South's decision to decline Mr Bure's financial hardship application and NZCU South's refusal to restructure Mr Bure's loan.

[4] FSCL is a government approved dispute resolution scheme under the Financial Service Providers (Registration and Dispute Resolution) Act 2008 (FSP Act). By that Act, all financial service providers in New Zealand have to, by law, belong to an approved dispute resolution scheme. A consumer complaining about a financial service provider may refer the complaint to FSCL for independent review, at no cost to the consumer.

[5] Ms Taylor, the Chief Executive Officer of FSCL deposes that it operates in the same way as an industry Ombudsman scheme, for example, the banking Ombudsman scheme. It is a not-for-profit scheme and is funded by scheme participants.

[6] Ms Taylor reports that once FSCL receives a complaint it reviews the evidence, talks to the parties by telephone and invites submissions to be sent. If the complaint cannot be settled, FSCL delivers a preliminary finding following which a complainant and the financial services provider (NZCU South) are given the opportunity to respond. Then FSCL delivers its formal recommendation.

[7] Ms Taylor advises that Mr Gates, FSCL's case manager, sought information from Mr Flavell on behalf of Mr Bure, and from NZCU South. Resolution could not be achieved through the negotiation process.

[8] During the week beginning 19 March 2018, while the complaint was still being investigated, NZCU South asked for permission to recommence recovery action by repossessing the vehicle. Ms Taylor gave permission for that to be done. She now accepts that this permission was not correct in terms of the CCCF Act.

[9] It was FSCL's preliminary view that NZCU South had complied with its CCCF Act lending act obligations and was therefore entitled to decline the hardship application and was justified in declining Mr Flavell's request to take over the loan. In short, it was considered NZCU South was entitled to repossess the vehicle because

there was no guarantee Mr Bure would be able to increase his income and it would be irresponsible for NZCU South to let the situation drift; and therefore, the best course was for the vehicle to be sold with the proceeds to be applied to reduce the loan debt.

[10] When Ms Taylor delivered that preliminary view on behalf of FSCL, she provided further submissions, allowing 20 working days for those to be delivered. She did not ask NZCU South to return the vehicle, she says, given the fact that the loan was in arrears, the vehicle was unwarranted and uninsured, and because no loan payments were being made.

[11] Mr Flavell provided 3 sets of submissions on the preliminary view of Ms Taylor. Ms Taylor responded and advised Mr Flavell that if he could satisfy NZCU South and FSCL that Mr Bure could afford to pay the weekly loan payments and to warrant, register and insure the car, that she would ask NZCU South to return the car to Mr Bure. She wrote and requested Mr Flavell to provide Mr Bure's budget, bank statements for the last three months and details of any other debts Mr Bure owed.

[12] No reply was received to the letter and on 23 April 2018, she issued her final decision on the complaint. In that, Ms Taylor apologized to both NZCU South and Mr Flavell for permitting the repossession of the vehicle. She acknowledged she had not considered s 83J(5) of the CCCF Act, by which repossession of a security is not permitted until a complaint to a dispute resolution scheme had been resolved or otherwise determined, unless the goods were "at risk". It was, and remains, her view however, that NZCU South should not have been required to return the vehicle because the evidence pointed to Mr Bure being unable to afford the loan repayments and to obtain a warrant, register and insure the vehicle.

The Plaintiff's Claims

[13] Those, against both defendants, are based on ss 93, 94 and 94A of the CCCF Act. It is FSCL's position that those provisions do not confer rights of action against a dispute resolution scheme. Accordingly, Counsel wrote to Mr Flavell inviting Mr Bure to discontinue his claim against FSCL. Mr Flavell's response was that if FSCL was a "paid advisor" under the CCCF Act it could therefore be liable under those sections of the Act. Later, Mr Flavell wrote and argued that FSCL was a "paid

advisor" because of the reference in 2 items of correspondence that Ms Taylor "advised" NZCU South that she did not object to it commencing recovery action in relation to the vehicle.

[14] It remains FSCL's position that it is an independent, external disputes resolution scheme, the role of which is to consider complaints and facilitate negotiation of settlements, and if that was not successful, then to make determinations – which are not binding on a complainant.

[15] Ms Taylor says FSCL does not give advice to either scheme participants or complainants and FSCL's case managers will always confirm that they cannot give legal advice.

[16] On 29 June 2018, FSCL filed an application to strike out Mr Bure's claim against it on the grounds that it disclosed no reasonably arguable cause of action and/or was vexatious and an abuse of the process of Court.

[17] An affidavit in opposition was filed by Mr Flavell, noting that he was the step-father of Mr Bure and was acting under a very limited power of attorney and he said he was not acting for himself but for his step-son. He deposed, inter alia, that a reasonably agreeable cause of action was available, including against FSCL and submits there is no provision contained in the FSP Act which prohibits an FSCL decision from being reviewed or appealed in any form or in any Court. Mr Flavell then details at some length his challenge to the factual position outlining relevant circumstances for consideration, when enabling NZCU South to repossess and to sell the vehicle.

The First Defendant's application for stay and security for costs

[18] On 10 August 2018, the First Defendant applied for orders staying the proceedings and requiring the Plaintiff to pay security for the First Defendant's costs, calculated on a 2B basis, on the grounds there was evidence that the Plaintiff would be unable to meet an order for costs if he did not succeed in his proceeding.

[19] Mr Flavell has filed an affidavit in opposition to the security for costs application. He claims that it ignores completely the allegations of illegalities committed by NZCU South. While acknowledging that he and Mr Bure had difficulty maintaining regular payments on the loan, he noted that the claim of arrears of $1,551.72 at the time of repossession included the costs of repossession of $55 and $368. It is his conclusion that the correct arrears figure was only $438.72. He notes that FSCL did not agree the vehicle was "at risk" and therefore the repossession was in breach of statutory provisions. Now he says Mr Bure's financial situation has improved markedly. It is considered there is strong evidence regarding breaches of the CCCF Act.

[20] By Mr Bure's notice of opposition to NZCU South's strike-out application, it is noted, inter alia:

(a) The Plaintiff is fighting for his rights as consumer under the CCCF Act;

(b) The application is "bullying, overbearing, and oppressive;

(c) It is an attempt to deny a hearing;

(d) It ignores the breaches of the CCCF Act provisions by NZCU South;

(e) It ignores ongoing breaches arising from the repossession of the vehicle;

(f) While acknowledging a wrong interest rate had been applied, no meaningful discount for overcharges interest was offered; and

(g) The loan agreement contained significant defects.

The Second Defendant's application to strike out the Plaintiff's claims

[21] By its application to strike-out the Plaintiff's claim, FSCU South asserts no reasonably arguable cause of action lies against it.

[22] It notes that when the Plaintiff fell into arrears with loan payments, he was served with default notices and in response made a financial hardship application

under the CCCF Act with a request that his loan be restructured. When Mr Flavell complained to FSCL it investigated the complaint before issuing a final decision. As against FSCL, it is noted the Plaintiff seeks "statutory", "exemplary" and what appears to be "general" damages under various heads, totaling approximately $61,000. It is a similar amount to that claimed as damages against NZCU South.

[23] FSCL says that it cannot be liable under the CCCF Act. Rather that Act is limited to "… any creditor, creditors agent, lessor, transferee, buyer-back promoter, paid advisor or broker …".

[24] Mr Flavell submits FSCL was a "paid advisor" under the provisions of the CCCF Act. FSCL says it was not a "paid advisor" under the meaning of the CCCF Act or at all. It says it is not one of the categories or persons specified by s 93 of the CCCF Act. Further, that it cannot be argued any loss was suffered by Mr Bure as a result of any "conduct" of FSCL. Finally, it is submitted the term "paid advisor" has a narrow application in the scheme of the Act; that where a "paid advisor" introduces one party to a credit contract to another, it can thereby become a "consumer credit contract". In that situation, it can be understood the "paid advisor" might potentially become liable to a party. By contrast, in this case, FSCL had absolutely no role in "introducing" the parties.

[25] Counsel for FSCL then refers to the relevant provisions of the CCCF Act and to relevant cases dealing with claims about a "paid advisor".

[26] The strike-out application then refers to relevant terms and conditions of the CCCF Act. It includes that while there may be issues between the Plaintiff and NZCU South, they do not provide a basis for action against FSCL, because what was significant in the present case concerns the communication of a decision as opposed to offering advice.

[27] A notice of opposition signed by Mr Flavell notes the request for the Court's approval to permit Mr Flavell to represent Mr Bure in the proceedings. It highlights two issues concerning the strike-out application with respect to the repossession of the vehicle, and the denial by FSCL that it was a "paid advisor" under the CCCF Act. It

notes that NZCU South had "requested permission" from FSCL to repossess the car and that permission was given, not as a "recommendation" but as "advice". Further, it is asserted, of Ms Taylor's evidence, that more verbal "advice" was given to NZCU South to delay the sale of the car until the complaint had been determined. It is claimed that the term "paid advisor" relates to the "aiding, abetting, or counselling" a party to breach provisions of the CCCF Act. Mr Flavell then refers in detail to aspects of Ms Taylor's evidence, including that she had specifically "advised" NZCU South to repossess the vehicle. Mr Flavell submits this confirms FSCL was a "paid advisor".

Application to represent Plaintiff

[28] On 20 August 2018 Mr Flavell filed a 'memorandum regarding representation' (MRR). Mr Flavell requested that he be permitted under s 107(3) of the District Courts Act 2016 to represent the Plaintiff in Court.

[29] The primary focus of the hearing dealt with by this judgment was to have been the application of Mr Flavell to represent the Plaintiff in this proceeding. It is now his request that the Court appoint an Amicus or standby counsel to represent Mr Bure.

[30] Previously the Court has deferred from dealing with the strike-out and security for costs applications pending determination of the application of Mr Flavell to represent the Plaintiff. His recently filed memorandum advises he is 78 years of age and has had several [serious health episodes] and he feels unable to "cope with the machinations" of dealing with the defendant's lawyers.

[31] Previously the Court has indicated the representation issue ought to assume priority. As counsel now note, Mr Flavell's application appears to be based on grounds including:

(a) The Plaintiff is a typical Fijian man and finds it easy to agree with most questions asked of him and this enables advantage to be taken of his friendly or cooperative nature;

(b) He and the plaintiff have been unable to find a lawyer who will agree to represent the plaintiff; and

(c) He does not understand the 'legal side of things at all.'

Considerations

[32] Mr King, by his submissions in support of NZCU South's opposition to the application, notes that s 107 of the District Court Act 2016 (DCA) confers a general right of audience only on Barristers and Solicitors of the High Court and therefore that a party must either represent him or herself, or be represented by a Barrister or Solicitor. As Counsel notes, the Rule extends beyond appearing in Court to instituting proceedings on behalf of a party.[1] While in some circumstances an agent may be appointed to represent a party, those persons are not entitled to fees. However, special circumstances are required.

[33] Sometimes lay persons have been permitted to appear on behalf of companies but as Cooke J. noted in *Re GJ Manaix,* the right of audience will rarely be granted to lay advocate.

[34] In this proceeding, clearly Mr Flavell has assumed total responsibility for representing the plaintiff, his step-son. Little information is available regarding the plaintiff's ability not to represent himself. Mr King submits a dangerous precedent would be set by permitting a person acting in support or on behalf of another person in that it would open the flood gates to lay litigants involved with respect to other parties endeavoring to represent them in Court proceedings.

[35] Mr Flavell has throughout represented the plaintiff. He has provided information to the Court regarding attempts made to retain the services of counsel. He has included the responses of a number of lawyers in that regard advising they would not be available to assist at that time.

[36] Evidence has been provided of an application for legal aid having been declined but Mr Flavell acknowledged that may have been due to the application being filed in his name.

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1 *Penrose Earth Works Limited v Robert Cunningham Construction Limited* (1993) 7 PRNZ 35.

[37] It is clear Mr Flavell has assumed total responsibility for the representation of the plaintiff, his step-son in this dispute. Issues arose out the plaintiff's inability to service a loan debt obtained with security provided over a motor vehicle. The debt amounted to about $16,000 when the car was repossessed, the matter having first been considered by the second defendant.

[38] The first defendant confirms it no longer seeks recovery of any debt due to it. The second defendant has provided its reasons justifying a dismissal of any claim for responsibility of any losses the plaintiff may have sustained.

[39] Clearly significant sums have been spent by the defendants with the engagement of counsel to assist. For the plaintiff, it is equally clear that Mr Flavell has actively pursued the claims for losses he says the plaintiff has sustained – although no clear evidence has been provided to identify the extent of these.

[40] This proceeding focuses on Mr Flavell's perception of justice.

[41] Mr Flavell may be acting under a limited power of attorney which authorizes him to act on behalf of his step-son but that does not provide him with the authority to represent his son-in-law in any Court hearing this dispute.

[42] Mr Flavell has been encouraged by the direction of another Judge indicating consideration would/could be given to appointment of an amicus.

[43] The role of an amicus is confined to the function of assisting the Court. More recently it seems and in particular with reference to criminal proceedings, the Court has been prepared to hear from standby counsel appointed to assist a self-represented defendant in criminal proceedings.

[44] By way of summary:

(a) The appointment of an amicus is made only in exceptional circumstances, which would seldom endorse the appointment for the civil proceedings process.

(b) An appointment should not be made for counsel to assist where, as in the case Mr Bure, legal aid has been declined.

[45] Other matters for consideration include:

1) The first defendant has written off the loan owed by Mr Bure and does not intend to pursue any amount owed by him.

2) Arguably the proposed purpose on behalf of the plaintiff for continuing these proceedings is to seek the appointment of an amicus to endeavor to receive a windfall from these Court proceedings.

3) It is not clear if Mr Bure is unable to obtain legal aid. He may qualify due to his financial situation.

[46] An amicus, if appointed does not act on instructions from a party to the proceedings or indeed from a client. Traditionally, an amicus discharges requests from the Court for an analysis of one or more matters. Any assistance provided is by way of independent assessment. There needs to be an element of public interest for an amicus to be engaged. Therefore if a person wishes the assistance of a lawyer, he should retain his own counsel or apply for legal aid, and if not entitled to legal aid, then there appears no justification for the Court to remedy any perceived deficiency in the legal aid regime by appointing counsel.[2]

[47] An amicus will only be appointed to assist if there is the probability of a difficult point of law needing determination. Therefore it is for the purpose of assisting the Court that consideration of appointment will be made. The role of counsel assisting does not become a parallel to the function of the legal aid system. An amicus does not act as the legal representative of and unrepresented party.

[48] Under r 10.27 of the District Court Rules 2014, the Solicitor-General must appoint counsel to assist the Court at the request of the Court. As Mr Leggat for FSCL submits, the rules provide no guidance as to the circumstances in which counsel

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2 *Erwood v Holmes* [2017] NZHC 1278 para [25].

assisting might be appointed, nor is there any guidance by the parallel rule 10.2 of the High Court Rules 2016. It is clear, however, that the purpose of any appointment is to assist the Court and not directly to assist a party.

[49] It appears to this Court there is only one area in this proceeding where a matter of legal principle emerges and that concerns whether in providing its services under the FSP Act the second defendant is a "paid advisor" within the meaning of the CCCF Act.

[50] Mr Leggat submits that while it might charitably be described as a novel argument, it is not a difficult point of law for a lawyer retained by Mr Bure or indeed Mr Bure personally could address this point and the Court will then be well able to make a decision without the need of an independent counsel to assist.

[51] An option to the appointment of an amicus may exist by the appointment of a standby counsel. Such appointments were discussed in length by the Court of Appeal in *Fahey v R.*[3]

[52] A standby counsel is appointed to assist a self-represented party to the extent it is required. It is clear by reference to the Court of Appeal's decision that such appointment was referred to in the context of representation in criminal proceedings.

[53] The Court should not consider any appointment in any circumstances where the primary purpose is to assist a party in the presentation of their case in the circumstances were legal aid may have been refused or for some other reason the party is unable or unwilling to access a lawyer for the purpose of representation.

[54] In this case, legal aid has been refused – albeit the application was made in the name of Mr Flavell and not Mr Bure.

[55] This Court's clear view is that the appointment of amicus or standby counsel should be refused.

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3 [2017] NZCA 596.

Judgment

[56] The application for appointment of counsel is dismissed.

[57] In the events costs are sought from Mr Bure, counsel should file and serve submissions for consideration in due course.

Judge A P Christiansen
District Court Judge