

BETWEEN

ROSEMARY BARAGWANATH  
Plaintiff

AND

LINDSAY NEILSON  
RAEWYN NEILSON  
Defendants

Date: 3 July 2013

Appearances: M Keall for the Plaintiff  
N Speir for the Defendants

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**JUDGMENT OF JUDGE M-E SHARP ON STRIKE OUT APPLICATION**

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Introduction

[1] This is a strike-out application. The plaintiff sues the defendants in respect of what is said to be a breach of contract over an alleged agreement to grant an easement, and to require any purchasers in future of the land concerned to also grant an easement by virtue of a covenant on the title, or something of that nature.

[2] The defendants apply to strike out the pleading on the basis that there has been a misidentification of the defendants because Mr Speir argues that they were only trustees of the Neilson Family Trust in respect to at least one of the lots concerned and in respect to the other were never owners, whether as trustees or otherwise.

[3] The defendants seek that the Court deal with and make a determination of that particular issue and if in agreement with the defendants as to the capacity in which the Neilsons, who are the defendants, entered into any agreement with the plaintiff, it follows that the cause of action which is pleaded at present cannot succeed and the claim should be struck out.

### The Determination

[4] There is certainly an issue to be tried here, which is in what capacity the defendants entered into a contract, if there was a contract, with the plaintiff. However, that is not something that the Court should and will determine at present. That is because the law in respect to strikeout applications is very well known.

[5] It is accepted that the position in respect to strikeout applications is that the allegations in the claim are presumed able to be proved by the plaintiff. If that is the case it follows that unless there is a clear legal anomaly in the pleading upon which the plaintiff relies, or it discloses a lack of viable cause of action on its face, then the claim should be struck out; but it is a discretion on the part of the Court, which must be exercised sparingly.

[6] Mr Speir, who acts for the defendant applicants has not only proffered evidence from his clients in support of this application, but has also spent some time in his careful submissions talking the Court through the issues here, the chronology and how this claim came to be. But, everything relies on his assertion that this claim has been brought against the incorrect party.

[7] I have said that the Court is able to have reference to the pleadings, which in this case are the notice of claim, the notice of response, and to such evidence as is contained in the information capsule because of the presently fused procedure that has been adopted for the last year or two in civil proceedings, and shortly to be overhauled in favour of old-fashioned pleadings.

[8] I have said and I maintain that any additional evidence which has been filed in an attempt to persuade the Court that the allegations in the notice of claim cannot be proved, will not be read by me. I revert, as I say, to the position that the pleadings are assumed to be true for the purpose of a strikeout application.

[9] It is my no means certain that this claim cannot succeed on the face of the documentation that I have and accordingly, the application must fail. The claim will continue.



M-E Sharp  
District Court Judge