

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

**CIV-2013-404-4646
[2014] NZHC 2971**

IN THE MATTER of "Imperial Gardens Apartments"

BETWEEN BODY CORPORATE 348047
First Plaintiff [Second plaintiffs continued over]

AND AUCKLAND COUNCIL
First Defendant

WATTS & HUGHES
Second Defendant

DOWNER NEW ZEALAND LIMITED
Third Defendant

AND ALUMINIUM TECHNOLOGY
LIMITED
First Third Party [Third parties continued over]

Hearing: 21 November 2014

Counsel: PR Grimshaw and RF Harvey for plaintiffs
SC Price and JK Wilson for first defendant
SJP Ladd for third defendant

Judgment: 26 November 2014

JUDGMENT OF FAIRE J

Solicitors: Grimshaw & Company, Auckland
MinterEllisonRuddWatts, Auckland
Bell Gully, Auckland

Second plaintiffs, continued

AND

CHRISTIAN WAN, ZHENG WANG,
LINE LINE FAILLOUX (1/2 share) and
THIERRY SILLOUX (1/2 share); LI-WEI
SUN; JAMES ERNEST STEWART and
ELIZABETH MARY BAYNE;
HORTENSE FAILLOUX; MEI MEI
LUO; FLORA WANG; LEON
FAILLOUX and SOLANGE CHENGUE
FAILLOUX; AGATHE FAILLOUX;
RALPH MATAPO and BLANCHE NIVA
MATAPO; EMMANUEL RAUNUI
ROLAND PAIN (1/3 share), MYRIAM
HAIMANU DANNIELLE PAIN (1/3
share) and ANGELIQUE HITIATUA
MARIE PAIN (1/3 share); YUAN-
CHUNG WANG and SHENG-PAO
CHANG WANG; SHANE LAVELLE
MCDUFFIE; HOUSING NEW
ZEALAND LIMITED; PL AND SONS
INVESTMENTS LIMITED; FANG XIA;
ROSE JOANNA LIM; HENRI MOU and
THERESE TERIRIATUA MOU;
DEALEX LIMITED; PHYLLIS LAI;
CHANG MEI-YU CHIU and ABNER
YU-RAY CHIU; TSAI-YU LO and TONY
YU CHUAN WANG; ALAN MICHAEL
BIRD and DIANE MAREE BIRD;
XUFENG LI; ROTA ANDREE; FINMEI
FAN; ALAN ROLAND; LIQIAN TONG;
YUEHUA HE; JUNLING QI and QI
SUN; MIAOSHAN LIU; XIANGHONG
CAO; MIKI GIORDANI; IRENE
MARDIONO; MINGZHU YANG and
PINGQI WEI; HUIJIE XIN; ZHENG HE;
HLY LIMITED; MASANOBU ESUMI;
HENG LI; DEQIANG SHI and JIA
ZHOU; XUELAN PANG; PEIYAN MA,
QIANG WANG and WILLIAM WANG
MA; DONALD HARTLEY KAYES;
CHOONG HUAT LAI and LUAN JOO
TAN; KANG XU; MING LI; LIANG
ZHU and XIAOSHU CHEN; TREVOR
DENIS ALLISON; GEN BAO IN;
SYLVIAN LIAO; LI MA; JUNYU
QIANG; XUI XU PRODUCTIONS
PARADISE NZ LIMITED; KIM HA
TRAN; GANG XU; FEN GU; JIANHAO
XU; NIEVES RUBIO CAMBERO;
SCATS INVESTMENTS LIMITED; EN-

CHIN TENG and MAN-JUNG HSIEH;
AZANO PROPERTIES LIMITED;
ROGER DESPOIR and GHISLANE
WONG KIN HING; JOHN WILLIAM
BLUNDEN and FOOTES TRUSTEES
LIMITED, BETTERKIWI LIMITED;
PAUL ERNEST WHITE; JOHN
PATTERSON; PAUL JOHN FOLWELL
and PAULINE ANN FOLWELL;
JIANHUI HUANG; TAG JEONG HAM
and EUN JEONG JANG; HUI GU and QI
YANG; GORDON LEONARD WIGG
and HEATHER ANNE WIGG; YUET WO
FUNG and BOSTON TRUSTEES 6303
LIMITED; GRIGG-CRAIG
INVESTMENTS LIMITED; ACADACA
INVESTMENTS LIMITED; XIANJUN
SUN; QIJUN XIE; MANAKO
NAKAKIMA; LITTLE ENTERPRISES
(2003) LIMITED; COLIN MCKENZIE
DOUGLAS and LYNN HEATHER
DOUGLAS (1/2 share) and KIRSTY
LORNA TSOI (1/2 share); GUIYEN REN
and MINGXIANG GU; OSCAR LOO and
PHUI YEE WONG; OSCAR LOO, PHUI
YEE WONG and EDDY LOO; NIKHITA
& NIKHL INVESTMENTS LIMITED;
JIAJUA LU; ROHIT KUMAR;
FREDERICK MCSKIMMING
HACKETT; HOCK SENG HARRY LOH
and SIEW GEOK ANNETTE CHONG; ;
ANTHONY JOHN PATTERSON; SEON
JANG; DANEIL LECOMTE and ALICE
LECOMTE; PETER TIMOTHY MOORE
and ANDREW MARIE MOORE; HUI
XUE; PUSHPALI JAYANTHI DE
ZOYSA YAYATILLAKA and
AGAMPODI JALIYA DE ZOYSA
JAYATILLAKA; PHILIP HAROLD
TYLER; VILAS KANITKAR; JACK
ARIEL and ADRIANNA GLORIA
MARCHETTO DE ARIEL; RENXIANG
WANG, LIYA REN and ZHIFANG
WANG; BIN-FA CHING and LING LO
CHING; MASSIS OVANESSOFF;
KEITH ALEXANDER MILNE (1/2
share) and JAN MARGARET MILNE
(1/2 share); LOUIS KWUN HO YEUNG
and WING MAN SANDY LAU; TSENG
SAO LEON (1/2 share) and YONG VVE

LOPIN SIOU HANE EDWIGE (1/2 share); SIU YIN CHOU and LAU KIU CHOU; STEPHEN CHANG HUNGLIU and WINNIE SHUK KUEN SIU; JIANMIN ZHAO; SORAYA SABETIAN and PETER CARL NEUMEGEN; JIAN SUN and YAN ZHAO; DEEPIKA HIMMAT LODHIA and CHRISHANT LODHIA; COUTTS INVESTMENTS LIMITED; OLGA BUCAN and PERICA BUCAN; MICHAEL WALKER and ELIZABETH WALKER; QIN ZHANG; HOCK SENG HARRY LOH and SIEW GEOK ANNETTE CHONG; TSENG LI LAN TSAI; MIKI GIORDANI; BOKSOON BAE and MICHELLE EUNJOO SEOK; JULIE ANNE PEPPER and HELEN MAREE STANAWAY; YITIAN LUO; MICHAEL DUPIEUX and MARTHE MO WONG; TAHOMIN LAUZUN and TIIHIVA TURERE; REALTYCORP LIMITED DONNY HENRI TCHONG-WONG and DELHIA ASAMI LI CHIN FOC TCHONG-WONG; FENG GAO (1/2 share) and XIAOQI TONG (1/2 share); RICARDO IVAN DORAN; NORTHERN PROPERTY TRUST LIMITED; YAN LU (1/2 share) and YINI YE (1/2 share); GUANCUI WANG and GUIYAN ZOU; LINDA CATHERINE HILL and JONATHAN AUBREY HILL; ALBERT CHONON and CHRISTINE CHONON; HUIZHEN CHEN; LIQIANG GUAN; LIXIAN LIANG; PO-MIN YANG; LI-WEI SUN; TERII WONG, AMELIE CHANSAY WONG and JOEL WONG; QUANG KIEM TRAN and INH HA TRAN; SUZANNE JISSANG; LI-LING CHOU; PRADIP BAISYET and JINA BAISYET; MIAOSHAN LIU; MING PO HUANG and CHEN AH-MEI HUANG; YING CHEN; YING YING HUNG; WEI LUN WU; MARK LOUISE WALSDORF; WEI YUAN; WEIJIA ZHANG, HUIFANG FU and ZHONGMIN ZHANG; LUCIEN FRANCIS CHING and MARTINE CHING; ERNEST MOUX, HOWEVER, WAH CHAN EP. MOUX and YANNICK TEVA MOUX;

WEI LIU; MENGYI SUN and
YONGWEI ZUO; LITTLE BOXES
LIMITED, WEI WEI; HUAJUN WANG;
SAROACH JONGJITT; CHOONG HUAT
LAI and LUAN JOO TAN; SUCHART
TANYATANABOON; WAI-HING CHEN;
HOOI CHIN CHAN; HUNG DUNG
NGO BONNIE FONG PAN; SESH
PROPERTY LIMITED; RUI LING
ZHOU; CHIH-SHAN LAI; YUEN
KWONG CHUNG and YUEN PAT
FONG; KERRIN BIANCA MELINDA
LEONI; TERRY CHRISTOPHER
PARKIN, MAUREEN PARKIN and
G.D.A. TRUSTEES LIMITED;
MASAHIKO OSHINO; MONIQUE
LAUSIN; ROGER STANLEY HICKSON
(1/2 share) and ANNA BRIGID
HICKSON (1/2 share); TARA ANNE
HICKSON (1/2 share) and GERARD
ANTHONY O'SULLIVAN (1/2 share);
EUGENIE WONG; SIU WING CHAN
(1/2 share) and SIU FONG CHAN also
known as SIU FONG PANG (1/2 share);
SOHAIL SABETIAN; DARREN MAN
CUONG PANG and YING CHEN;
DIANA DIEM QUYEN PHU;
HORTENSE LAUX and ROSELINE
LAURENT; WARAPORN
ONGTHANASUK; JING WANG; PHAN
TUYET VAN; GOLD HARBOUR
LIMITED; RAYMOND KHAU; DEMIN
GE; HONG ZHANG YAN; JOANNA
FRANCES PARKIN and G.D.A.
TRUSTEES LIMITED; ANGELA JAYNE
HACKETT and KM BUCHANAN
TRUSTEE COMPANY (2008) LIMITED;
KATHLEEN MARY BUCHANAN and
ROBERT LOUIS BUCHANAN;; LOUIS
CHALONS, PUI HAN CHAN EP.
CHALONS and LAURENT VETEA
CHALONS; LOUIS CHALONS, PUI
HAN CHAN EP. CHALONS and KEVIN
TEVA CHALONS; GEOFFREY
JOHNSTON PEARSON, SHAMIMUN
NISHA PEARSON and MAQ TRUSTEE
2011 LIMITED; JIANHUI HUANG;
YUAN GUO; HONGMEI
MATUSCHKA; YUXIA WANG and
WEIMIAO ZHENG; SHERRY WANG

FITCHETT; BELINDA PHU; KEVIN CHARLES EWANS and LYNNETTE ALISON EWANS; KEVIN BARRY JUDD, LEANNE RUTH JUDD and COOMBE SMITH TRUSTEE COMPANY LIMITED; JING JING TONG; MICHAEL TERRENCE BUTLER; CHI MIA; JOHN DEARSLEY ROBINSON, PAMELA JOAN ROBINSON and NORMAN JOHN COMERFORD; MEW RESIDENTIAL LIMITED; ARTHUR CHUNG and SOU LAN CHUNG; JAEKEUN LIM and HEEJA KIM; YAN TIAN; ZHONMIN ZHANG; AND LING KAN
Second Plaintiffs

Third parties continued

AND

ARCHITECTURAL WINDOW SOLUTIONS LIMITED
Second Third Party

ABBAS LIMITED
Third Third Party

STEPHEN MITCHELL ENGINEERS LIMITED
Fourth Third Party

METROPOLITAN GLASS & GLAZING LIMITED
Fifth Third Party

Application

[1] The first defendant applies for an order that a proceeding commenced by a notice and statement of claim, dated 23 October 2013, be dismissed or struck out in its entirety.

Background

[2] The first plaintiff is a body corporate constituted under the Unit Titles Act 1972 for the unit title development at 135 Hobson Street, Auckland, known as “Imperial Gardens Apartments”.

[3] The second plaintiffs are those members of the body corporate and proprietors of units at Imperial Gardens Apartments who are listed in a schedule to the statement of claim.

[4] The plaintiffs sue the Auckland Council, who is the successor of the Auckland City Council, and who is and was at all material times responsible for the district in which Imperial Gardens Apartments is located.

[5] The plaintiffs also sue the second defendant, and allege that that company was the builder that undertook and/or was responsible for the construction of Imperial Gardens Apartments. In addition, the plaintiffs sue the third defendant and allege that the third defendant was the contractor responsible for the application of waterproofing membranes at Imperial Gardens Apartments.

[6] The second and third defendants are not involved in this strike out application.

[7] This proceeding has been issued because the plaintiffs allege that Imperial Gardens Apartments were constructed with building defects.

[8] The plaintiffs allege that an application was made to the Council for a building consent for piling and excavation for an apartment building, on 19 September 2003. It is alleged that the Council issued a consent for stage 1 of a new 15-level apartment building piling and retaining structure only on 15 October 2003.

[9] The plaintiffs further allege that an application was made to the Council for a building consent to construct a new apartment building. It is alleged that on 22 December 2003 the Council issued a building consent for a new 15-level apartment building, including two levels of parking. Further applications were made to the Council for building consents for exterior glazing and cladding systems for the apartment building on 14 July 2004. These were the subject of a building consent granted by the Council on 22 October 2004.

[10] It is alleged that the second defendant constructed the apartments between December 2003 and May 2005. It is further alleged that the Council inspected the building work between 19 November 2003 and 9 May 2005. On 18 May 2005, the Council issued a code compliance certificate under s 95 of the Building Act 2004 in respect of all building work.

[11] The body corporate instructed Cove Kinloch, who in turn instructed a façade engineer, to investigate the building and provide a report. The report was received. The body corporate secretary's account manager instructed the plaintiffs' solicitors to review the Council file and to check any upcoming limitation dates that the body corporate should be aware of. He says that instructions were then given to the plaintiffs' solicitors to issue proceedings.

[12] A notice of proceeding and statement of claim was filed on 24 October 2013. As explained below the statement of claim is deficient and does not comply with the High Court Rules for pleadings.¹ It pleads in paragraph 19 that "the Imperial Gardens Apartments was constructed with building defects". These are not identified. It next pleads that "the Defects have resulted in damage to the Imperial Gardens Apartments" but does not specify what the damage is. It gives no indication as to what might be involved in the repairs to the damage.

[13] The first plaintiff was advised that their expert was unable to provide evidence or expert witness support in December 2013. It was not until May 2014, that the plaintiffs were able to find a qualified façade engineer to report. A draft report was received in July 2014.

[14] At this stage, the notice of proceeding and statement of claim had not been served on any other party. The plaintiffs by its committee then instructed the plaintiffs' solicitors to prepare an amended statement of claim. An amended statement of claim was filed on 20 August 2014 and served shortly thereafter. Service included the original statement of claim. The first defendant filed a statement of defence on 30 September 2014. It responds specifically to the allegations made in the amended statement of claim, which is dated 20 August 2014.

¹ High Court Rules, rr 5.26 and 5.27.

[15] The file was referred to Associate Judge Bell who issued a minute of 7 October 2014. In his minute he established a face-to-face case management conference to be held at 3:50 pm on 24 October 2014. He identified a number of matters that required discussion, including issues relating to the pleadings themselves. He set a time for the filing and service of memoranda on a sequential basis.

[16] The first defendant filed this strike out application which is the subject of consideration in this judgment on 20 October 2014.

[17] At the case management conference held on 24 October 2014, Fogarty J ordered that:

- (a) The plaintiffs' notice of opposition to this application be filed and served by 31 October 2014;
- (b) The parties were to agree a timetable for the exchange of submissions; and
- (c) Certain material was to be disclosed by the plaintiffs, which included the preliminary expert reports, documents pertaining to the plaintiffs' authority to commence this proceeding and that the plaintiffs were to file a second amended statement of claim by 10 December 2014.

[18] In addition, Fogarty J extended the time for the filing and service of third party notices until 6 March 2015. He also settled a time for the next case management conference for 6 March 2015.

[19] The plaintiffs' counsel in their memorandum for the conference before Fogarty J recorded the following:

The plaintiffs submit that as this proceeding relates to alleged design and/or construction defects, and the statement of claim currently lacks particulars in relation to the defects it is not yet possible to articulate the issues for trial.

The pleadings

[20] I recorded that the statement of claim, dated 23 October 2013 and filed on 24 October 2014, simply alleged that “the Imperial Gardens Apartments was constructed with building defects”. Those defects were not particularised or identified at all. That statement of claim, in paragraph 20, pleaded that the defects resulted in damage. It did not identify what the damage was, where it was, or any other particular concerning the damage. In short, the document simply alleged a bare statement that the building was constructed with building defects and with no specific particulars beyond that.

[21] The statement of claim further alleged that the first defendant owed a duty of care to exercise reasonable skill and care in performing the functions under the Building Act. It then made an allegation as to breach as follows:

26. In breach of its duties, the Council:
 - (a) Issued building consents even though the building work if carried out in accordance with the plans/specifications would not have complied with the Building Code;
 - (b) Failed to competently carry out inspections of the building work because in its inspections it failed to identify the Defects;
 - (c) Failed to ensure a sufficient number of inspections were carried out and/or that the inspections were undertaken with sufficient thoroughness so as to ensure that the building work complied with the requirements of the building consents and/or the provisions of the Building Code;
 - (d) Issued code compliance certificate when it did not have reasonable grounds to believe that the building work complied with the Building Code.

It will be immediately apparent, when considering the matters that I have referred to, that there is simply no particularisation of the precise allegations to support a breach of duty against the first defendant.

[22] The amended statement of claim followed the same form as the statement of claim filed in October 2013 but contained a number of schedules. For the purpose of this application, Schedule 4, which sets out defects alleged, did not provide any

particularisation of the damage said to have resulted from the defects. It did not provide any information concerning the cost of remedial work in respect of the repair of the so-called damage.

Pleading requirements

[23] The High Court Rules set out the requirements for a statement of claim. The relevant rules are set out below.

[24] Rule 5.26 provides:

5.26 Statement of claim to show nature of claim

The statement of claim—

- (a) must show the general nature of the plaintiff's claim to the relief sought; and
- (b) must give sufficient particulars of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiff's cause of action; and
- (c) must state specifically the basis of any claim for interest and the rate at which interest is claimed; and
- (d) in a proceeding against the Crown that is instituted against the Attorney-General, must give particulars of the government department or officer or employee of the Crown concerned.

[25] Rule 5.27 provides:

5.27 Statement of claim to specify relief sought

- (1) The statement of claim must conclude by specifying the relief or remedy sought.
- (2) If the statement of claim includes 2 or more causes of action, it must specify separately the relief or remedy sought on each cause of action immediately after the pleading of that cause of action.

[26] Rule 5.31 provides:

5.31 Specifying relief sought

- (1) The relief claimed must be stated specifically, either by itself or in the alternative.

- (2) Despite subclause (1), it is not necessary to ask for general or other relief but the court may, if it thinks just, grant any other relief to which the plaintiff is entitled, even though that relief has not been specifically claimed and there is no claim for general or other relief.

[27] Rule 5.32 provides:

5.32 Amount of money claim

A statement of claim seeking the recovery of a sum of money must state the amount as precisely as possible.

[28] A thorough review of the pleading requirements, including these rules, for leaky building cases was undertaken by Kós J.² His Honour’s judgment is well-known and understood by counsel who are briefed in this area.

[29] His Honour noted the importance of particulars where negligent omission is pleaded.³ His Honour emphasised the purpose of particularisation, namely to:⁴

- (a) inform defendants as to the case they have to meet;
- (b) limit the scope of matters the plaintiff may put in issue at trial (or in pre-trial settlement discussion);
- (c) enable the defendants to know what witnesses it will need to retain and enable them to start preparing evidence ahead of the formal exchange of evidence; and
- (d) provide an opportunity for a defendant to seek summary determination on the basis that the claim as pleaded is untenable.

[30] To that summary, there must be added a further purpose to:

Provide an opportunity for a defendant to determine whether a third party should be required to make contribution or provide indemnity to the defendant in respect of the relief sought.

[31] The statement of claim must plead facts “upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is

² *Platt v Porirua City Council* [2012] NZHC 2445.

³ At [20].

⁴ At [19].

charged”.⁵

[32] Where, as in this case, the allegation is based on the defendant’s failure to identify defective construction, design or performance by third parties, the plaintiff needs to adequately particularise the following:⁶

- (a) what, *physically* the *defects* are that caused loss (i.e. the “where”);
- (b) the particular *standards* that the *third parties* failed to meet in the case of each defect, either individually or collectively (i.e. “how” they were “defects”);
- (c) the circumstances in which the *defendant* came to have an inspectoral or supervisory role (including, normally, when);
- (d) the *standard(s)* required of the *defendant* in undertaking that role;
- (e) particulars of the *breach* of duty by the defendant; and
- (f) the *loss* thereby caused (that is – the loss caused by the third parties’ defective performance which would have been avoided by the defendant performing its duty to the required standard).

[33] His Honour concluded, after a review of the conventional approach to particularisation of negligent omission cases that, in the case of leaky building litigation, a detailed Scott schedule need not be submitted as part of the statement of claim. However, the plaintiffs’ pleading must show the general nature of the plaintiffs’ case and give sufficient particulars of the matters in High Court Rule 5.26(b) to enable the issues between the parties to be defined, and enable the defendant to start briefing its evidence. In addition, the statement of claim must particularise any objective standards, expressed either in specific acceptable solutions deemed compliant with the Building Code or in alternative solutions (e.g. manufacturers installation standards), that the plaintiff says forms part of the standards the builder and contractors were required to meet, and which, in a case against a council, are indirectly impressed upon the Council when exercising its own duties.⁷

[34] The above summary explains the plaintiffs’ obligations in terms of the High Court Rules.

⁵ At [22].

⁶ At [24].

⁷ At [34].

[35] It is immediately apparent that the original statement of claim did not comply with the High Court Rules. The defects were not particularised and the damage was not identified. The amended statement of claim provides partial compliance, but is also substantially deficient.

[36] The state of the pleading is such that a defendant cannot analyse this case as to whether the pleading should be challenged using one of the three options referred to by Tipping J in *Matai Industries Ltd v Jensen*.⁸

[37] In addition to the defects in the pleadings, the plaintiffs also did not serve the original statement of claim promptly as required by s 5.72. In this case, there was nothing stopping service within a few days of filing. The first defendant is a public authority. It belies belief that it could ever be suggested that service could not have been effected on the Council within a few days.

[38] Some comment must be made about r 5.72(2). The provides:

5.72 Prompt service required

...

- (2) Unless service is effected within 12 months after the day on which the statement of claim and notice of proceeding are filed or within such further time as the court may allow, the proceeding must be treated as having been discontinued by the plaintiff against any defendant or other person directed to be served who has not been served.

[39] What is apparent is that r 5.72(2) does not modify the mandatory requirement imposed by r 5.72(1). All it does is provide a consequence if the proceeding is not served within 12 months. It certainly does not endorse or approve of an ability to serve within 12 months without consequence.

Analysis

[40] The application raises the question of what is the appropriate response to two pleadings which do not comply with the High Court Rules and the failure to serve

⁸ *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC) approved in *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [33] and [34].

the first statement of claim on the defendants. The application made by the first defendant refers to:

- (a) Rule 1.5, which deals with non-compliance with the Rules;
- (b) Rule 5.72, which requires prompt service of proceedings;
- (c) Rule 15.1, which identifies the Court's jurisdiction to strike out, dismiss or stay proceedings on grounds that the pleading:
 - (i) Discloses no reasonably cause of action;
 - (ii) Is likely to cause prejudice or delay;
 - (iii) Is frivolous or vexatious; or
 - (iv) Is otherwise an abuse of the process of the Court;
- (d) Rule 15.2, which deals with issues that arise post-filing and empowers the Court to dismiss for want of prosecution; and
- (e) The Court's inherent jurisdiction.

The effect of non-compliance with r 5.72

[41] The first issue is what consequence non-compliance with r 5.72 should have. Rule 5.72 provides no sanction for non-compliance. As a consequence, one must consider the position either in terms of rr 1.5, 15.1 or the Court's inherent jurisdiction.

[42] Counsel referred to a number of cases when discussing the service rule, dealing with the effect of delay. The cases, however, involve a consideration of r 15.2, which deals with a failure to prosecute. They can, also, have some bearing on the exercise of discretion provided to the Court under r 15.1, which I will refer to later in this judgment. They do not have any specific application as to the mandatory requirement of r 5.72, which I find has been breached in this case.

[43] I deal with the claim that there has been a want of prosecution, which would justify the Court invoking the jurisdiction reserved to it under r 15.2. Rule 15.2 provides:

15.2 Dismissal for want of prosecution

Any opposite party may apply to have all or part of a proceeding or counterclaim dismissed or stayed, and the court may make such order as it thinks just, if—

- (a) the plaintiff fails to prosecute all or part of the plaintiff's proceeding to trial and judgment; or
- (b) the defendant fails to prosecute all or part of the defendant's counterclaim to trial and judgment.

[44] It will be immediately apparent from the reading of the rule that it has no application to the statement of claim which was first filed. This rule deals with matters after the commencement of the proceeding. The leading authority on the obligations imposed and what sanction is appropriate is *Lovie v Medical Assurance Society of New Zealand Ltd*.⁹ For a proceeding to be dismissed for want of prosecution there needs to be:¹⁰

- (a) An inordinate delay;
- (b) The delay is inexcusable; and
- (c) The delay caused serious prejudice to the defendants.

[45] In *Commerce Commission v Giltrap City Ltd* the Court of Appeal emphasised the need to stand back when considering the overall interests of justice and whether a proceeding, where there has been a delay, should be allowed to proceed.¹¹

[46] I am not satisfied that there is sufficient evidence before me to reach a conclusion that the defendant has established that the plaintiffs have failed to prosecute since issue and the filing of the statement of claim. The plaintiffs' counsel were clearly placed in a difficult situation with no identification of the real problems

⁹ *Lovie v Medical Assurance Society of New Zealand Ltd* [1992] 2 NZLR 244 (HC) at 248.

¹⁰ At 248.

¹¹ *Commerce Commission v Giltrap City Ltd* (1997) 11 PRNZ 573 (CA).

with the building that would enable a pleading which complies with the High Court Rules to be completed. They took the steps that were available to them by instructing experts. It took time. I am not satisfied that it has been established that what time it took in this case would justify the exercise of discretion under r 15.2. While there was a delay of 10 months this was not inordinate and reasons were given for the delay. Accordingly, I conclude that the proceeding should not be dismissed under r 15.2. In reaching that conclusion I record that it has not been established that any potential third party has a limitation defence available to it, and has raised it in circumstances where that has arisen by virtue of the fact that there was a delay between the original filing and the final service of the proceeding.

The non-compliant statements of claim

[47] The next issue raised by this application relates to the position of each statement of claim. If the matter was confined simply to an argument about particulars, the position is as stated by the Court of Appeal in *Price Waterhouse v Fortex Group Ltd*.¹² The Court referred to a second amended statement of claim which had been replaced by a third amended statement of claim and made the observation in relation to the second amended statement of claim that: “In the eye of the law, it no longer exists.”¹³ The Court, however, was discussing the issue in light of an amendment to the pleadings. If the statement was taken literally, there would be no need for r 7.77, which deals with amendments to pleadings which introduce fresh causes of action. The statement of claim in this case purportedly notifies the cause of action, which is then the subject of an amended document giving particulars but relates to the same cause of action. To that extent, the statement of claim originally filed does signal the first step taken in court in respect of that cause of action. It is therefore necessary to determine whether it is a statement of claim which appropriately announces a cause of action.

[48] In my view, there are two potential ways of approaching the original statement of claim. On its face, it is hopelessly inadequate for the reasons that I have already set out. It simply fails to identify any potential particular that would justify the cause of action that it purports to notify. I accept, as Mr Grimshaw submitted,

¹² *Price Waterhouse v Fortex Group Ltd* CA197/98, 30 November 1998.

¹³ At 17.

that it is in a different category from the statement of claim which was considered by the Chief Justice in *Te Toki v Pratt*.¹⁴ I accept also, given time, the deficiencies in the statement of claim may well be able to be remedied. That, however, is not the point. If a document, such as the statement of claim that was filed in this case, is sanctioned by the court it could have the effect of significantly watering down the purpose and effect of limitation statutes. It certainly seriously undermines the position of a defendant who might wish to seek contribution in reliance on r 4.4 from other parties involved in the case.

[49] Initially, I was attracted to the position that the problem in relation to the statement of claim could have been dealt with pursuant to r 1.5, by the Court declaring that the document was a nullity. There is, potentially, a bar in this case to that order being made by the operation of r 1.5(4) because the first defendant has filed a statement of defence and taken other steps in the proceeding.

[50] That, however, does not answer the position in terms of r 15.1. With respect to that rule, the first point to note is that although there might be some support for the argument that the document discloses no reasonably arguable cause of action, I discount that because it signalled a negligence claim. What the document amounts to, however, is an abuse of process. The proceeding was clearly brought to save a claim from the consequences of a limitation defence. When I look at what was in that document and what it notified, I reach the conclusion that it was clearly an abuse of the rules of court which was highly prejudicial and was issued for an improper motive, namely to bring a case inside a limitation period where the case is known to the party pleading to have no notified, particularised foundation for the allegations made.

[51] I therefore conclude that the statement of claim filed on 24 October 2013 and notice of proceeding must be treated as a nullity and of no effect. This will clarify the position for limitation defence purposes. I make this order by analogy with the powers contained in r 15.1 to strike out a pleading as an abuse of process, but pursuant to the inherent jurisdiction of the court. I do that because the special circumstances of this case are not precisely addressed in the High Court Rules.

¹⁴ *Te Toki v Pratt* (2002) 16 PRNZ 160 (HC).

[52] The next question that arises is what to do with the amended statement of claim. My conclusion is that there is sufficient in it to identify a potential cause of action and therefore it should not be struck out, but that time should be allowed for an amendment which complies with the High Court Rules. That is a position which the plaintiffs have accepted they have an obligation to carry out and, indeed, have undertaken to file such a document.

[53] The result of my conclusion is that, for limitation purposes, this case commenced with the filing of the amended statement of claim on 20 August 2014. It follows, on the grounds so far discussed, therefore that on the material placed before me at this time, and having regard to the principles which have been recited in many cases which were approved by the Court of Appeal in *Attorney-General v Prince and Gardner*, I am not justified in striking out the amended statement of claim.¹⁵

[54] Before leaving this topic there is one further matter that was raised by the first defendant. It concerned the possibility that this case had been issued without the authority of the second plaintiffs. Although there is mention of the matter in the case management conference minute of Fogarty J on 24 October 2014, no application to amend the application to strike out was made, so that it could allege as an alternative ground that the proceeding was issued without authority. I discussed this with counsel because it seemed self-evident to me that it would be wrong to consider this as a separate ground when it had not been formally signalled and therefore had not been given to the plaintiffs in a way that the plaintiffs could respond to all aspects of the argument.

[55] Accordingly, I proceed on the basis that the application before me did not specifically raise a ground for the exercise of discretion to dismiss or strike out based on the issue of proceedings without authority.

[56] This application is an interlocutory application. The rulings I have made will not prevent a defendant from pleading a limitation defence should, on an examination of further facts, there be a justification for such a pleading. I find it necessary to record that point in this judgment because, understandably, the first

¹⁵ *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA).

defendant was put in a difficult position when it was served with a statement of claim and an amended statement of claim where the first was so hopelessly deficient in terms of its compliance with the High Court Rules. Although it does not need saying separately, for the avoidance of doubt, I make it clear that my ruling pertains precisely to the application that was brought to the court for determination.

[57] Accordingly I order:

- (a) The statement of claim filed on 24 October 2013 together with the notice of proceeding is a nullity and of no effect;
- (b) In other respects, the first defendant's application is refused; and
- (c) The orders made by Fogarty J on 24 October 2014 which require a second amended statement of claim to be filed by 10 December 2014 and dealing with other matters pertaining to the proceeding covering site inspection, discovery and joinder of third parties and convening a case management conference on 6 March 2015 at 9:50am are confirmed.

[58] I reserve costs. Counsel will discuss same. If a party seeks costs, a memorandum shall be filed and served by that party. The party opposing costs must file and serve a memorandum in answer within 10 working days. A reply memorandum may be filed and served within a further five working days.

JA Faire J