IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2022-409-462
[2024] NZHC 550

UNDER	the Building Act 2004, the Contract and Commercial Law Act 2017 and in tort
BETWEEN	EMMA-LOUISE HOBDAY and JASON LYNDON ZACHARY HOBDAY Plaintiffs
AND	SELWYN DISTRICT COUNCIL First Defendant
	KYE DAVID JOHNSON, JUSTINE MARGARET JOHNSON and RICHARD CROCKFORD GRAY, as trustees of the Cornelius Johnson Family Trust Second Defendants

Hearing:	4 March 2024
Appearances:	E J Walton and T S Burtenshaw for Plaintiffs C Harpur and N Ravaji for First Defendant A D Marsh for Second Defendants (watching brief)
Judgment:	14 March 2024

JUDGMENT OF ASSOCIATE JUDGE LESTER

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[1] Emma-Louise Hobday (**Emma**) and Jason Hobday (**Jason**) instructed their then solicitors to issue proceedings against the Selwyn District Council (**the Council**) and the Cornelius Johnson Family Trust (**the Trust**) (the second defendants), arising from poor workmanship in respect of a property Emma and Jason purchased from the Trust in 2014.

[2] Kye and Justine Johnson, who are trustees of the Trust, are also directors of Kye Johnson Builders Ltd. The Trust was originally the owner of the land purchased by Emma and Jason and the house which they purchased was built by Kye and Justine's building company, or at least that is the understanding of Emma and Jason.

[3] The Council issued a building consent for the property on 20 September 2011. The Trust applied for a Code Compliance Certificate on 15 October 2012 that was issued on 18 October 2012.

[4] Emma and Jason say that in September 2022, they learnt their house was not watertight. They were not sure how to proceed but had heard about the Leaky Homes Tribunal and approached the Council for help. How that contact was made is not in evidence but given the Council cannot locate any emails from Emma and Jason in 2022, it may have been oral contact. On 16 September 2022, a Council employee sent Emma and Jason an email advising he had discovered the Weathertight Homes Resolution Service were not receiving new claims after 31 December 2021. He referred to the possibility that Emma and Jason may have the ability to claim against the builder of the property. His email concluded:

> As you are rapidly approaching the 10 year warranty period limitation, the owner should seek legal advice sooner rather than later.

[5] Emma and Jason acted on that suggestion and their then solicitors filed a statement of claim in this Court on 17 October 2022 —one day within the 10 year long stop limitation period.

[6] Unfortunately, it appears due to an oversight by Emma and Jason's then solicitors, the statement of claim was not served within one year of being filed.

[7] Rules 5.72 and 5.73 of the High Court Rules 2016 (**the Rules**) provide:

> **5.72 Prompt service required**
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> (1) The statement of claim and notice of proceeding must be served—
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> (a) as soon as practicable after they are filed; or
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> (b) when directions as to service are sought, as soon as practicable after the directions have been given.
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> (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. An application to extend time under r 5.73 of the Rules was filed on 27 October 2023. The application was initially made without notice but was served.
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> **5.73 Extension of time for service**
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> (1) The plaintiff may, before or after the expiration of the period referred to in rule 5.72, apply to the court for an order extending that period in respect of any person (being a defendant or other person directed to be served) who has not been served.
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> (2) The court, if satisfied that reasonable efforts have been made to effect service on that defendant or person, or for other good reason, may extend the period of service for 6 months from the date of the order and so on from time to time while the proceeding has not been disposed of.

[8] Counsel for the Trust advise Emma and Jason's application for leave to serve their proceedings more than six months after filing is not opposed, however, the Council opposes the application essentially on the basis it has the benefit of the 10 year long stop provision under s 393 of the Building Act 2004 (**the Act**). It is common ground the longstop period has come into effect and that, unless an extension is granted, Emma and Jason's claim against the Council is statute barred.

[9] The statement of claim was served on 25 October 2023. Accordingly, Emma and Jason seek an extension of time for serving their statement of claim to the date it was served. If granted, that extension would prevent the Council relying on the longstop provision.

Which rule applies to the extension of time?

[10] Ms Walton, counsel for Emma and Jason, submits the application can be considered under r 1.19 of the Rules as opposed to r 5.73(2). That submission was made essentially on the ground that Ms Walton considers the jurisdiction under r 1.19 may be easier to satisfy than r 5.73.

[11] Ms Walton relied on the Court of Appeal decision of *Hemmes v Young,* where the Court applied the then equivalent of r 1.19 to the then equivalent of r 5.72.[1] I am satisfied the *Hemmes* decision is not applicable in the present case as it concerned a claim for which there is no limitation period, being an application under the Status of Children Act 1969. The proceedings had been brought after some 46 years had lapsed and sought an order that the appellant was the father of the respondent and his deceased twin sister. The appellant argued where there was no limitation period, the plaintiff had to proceed without inordinate delay or risk the proceedings being struck out for want of prosecution. The case was primarily concerned with pre-commencement delay. Proceedings concerning the Status of Children Act were not based on a "cause of action" under which it could be said that a litigant has time running.[2]

[12] As I have said, here it is common ground the effect of late service of the claim means the proceeding is statute barred against the Council unless an extension of time is granted. In *Russell v Attorney General*, the Court declined to apply the equivalent of r 1.19 where to do so would have the effect of enlarging a limitation period.[3] There, the Court referred to the submissions of senior counsel on this issue where senior counsel said:[4]

> It is acknowledged that the power to extend time is not unlimited and does not ordinarily extend to revive a right that has expired. See *Johnsonville Licensing Trust v Johnsonville Gospell Hall Trust Board* 1972 NZLR 655.

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1 *Hemmes v Young* [2003] 1 NZLR 193.
2 At [31]. See also the discussion in *BNZ v Savril Contractors Ltd* [2005] 2 NZLR 475 at 499.
3 *Russell v Attorney General* [1995] 1 NZLR 749 at 760.
4 At 760.

[13] The Court went on to refer to the headnote of *Johnsonville*, a decision of Wilde CJ which records, "[t]he Court will not exercise a general procedural power to extend time where the effect would be to revive a right which has expired".[5]

> The Court will not exercise a general procedural power to extend time where the effect would be to revive a right which has expired.

[14] The Court in *Russell* concluded there was not jurisdiction to enlarge time for service in that case "… because that would effectively revive the causes of action in respect of which time commenced to run…".[6]

[15] In my view, extensions of time in relation to a deemed discontinuance pursuant r 5.72 of the Rules are to be dealt with under r 5.73(2). This was the view of Master Hansen (as he then was) who considered it was wrong as a matter of principle to apply the equivalent of r 1.19 where there was a specific provision relating to extensions of time in this context.[7]

[16] Accordingly, I am satisfied the present application falls to be considered under r 5.73(2) of the Rules.

Extensions of time under r 5.73

[17] The relevant principles were recently considered by Associate Judge Sussock in *Stewart v JR Legal Ltd*.[8] I adopt her Honour's summary of the principles where her Honour discusses the meaning of "for other good reason" from r 5.73(2) of the Rules:

> [9] In *Hibbs v Towle*,[9] Richardson J considered the meaning of "good reason" and referred to the three separate categories of case identified by Lord Brandon in the House of Lords decision, *Kleinwort Benson Ltd v Barbrak Ltd*:[10]
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> (a) first, where the application for extension is made when the statement of claim is still valid and before the relevant limitation period has expired;

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5 At 760.
6 *Russell v Attorney-General*, above n 3, at 760.
7 Robert Osborne and others *McGechan on* Procedure (online ed, Thomson Reuters) at [HR5.73.02].
8 *Stewart v JR Legal Ltd* [2024] NZHC 38.
9 *Hibbs v Towle* CA 60/87, 21 July 1988.
10 *Kleinwort Benson Ltd v Barbrak Ltd* [1987] 1 AC 597 (HL) as cited in *Hibbs v Towle*, above n 9, at 10.

(b) second, where the application for extension is made when the statement of claim is still valid but the relevant limitation period has expired; and

(c) third, where the application for extension is made when the statement of claim has ceased to be valid and relevant limitation period had expired.

[10] Lord Brandon explained that it was not possible to define or circumscribe the scope of the expression "good reason", holding that it will depend on all the circumstances of any particular case. In category three cases, however, Lord Brandon held that an applicant had an extra difficulty to overcome in that the plaintiff must also give a satisfactory explanation for the failure to apply for the extension before the validity of the claim expired.[11]

[11] Lord Brandon further commented that whether an extension should be granted is a discretionary decision,[12] with the judge entitled to have regard to the balance of hardship between the plaintiff and the defendant.

[12] In *Zaremba v The Guardian Trust and Executors Co of New Zealand*, Henry J went so far as to hold that the jurisdiction to extend time for service should "only be exercised in exceptional circumstances where the claim has become statute-barred and the defendant has a clear right to plead the statute."[13]

[13] But in *Melgren v Public Trustee*, Moller J held that the use of phrases such as "exceptional case" or "exceptional circumstances" may well be misleading and concentrate attention too much upon individual aspects of any given case to the exclusion of an overall view of every aspect of the matter in the search to discover whether the plaintiff had "good reason" for seeking an order.[14]

[14] Moller J went on to say however:[15]

> It is of course necessary to remember even then that, in cases in which an order to review would deprive a defendant of a defence under the Limitation Act, the reason, to be "good", "must be strong".

The significance of the discontinuance and limitation

[18] Emma and Jason's proceeding "must be treated as having been discontinued". The discontinuance is in effect, subject to a reservation of leave created by r 5.73 to apply for an extension of time to serve the proceedings. Emma and Jason's proceeding is, in my view, in the third category of cases identified in *Kleinwort Benson Ltd.*[16] Ms Walton did not suggest otherwise. That is, where the application for

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11 *Kleinwort Benson Ltd v Barbrak Ltd*, above n 10, at 623.
12 At 623.
13 *Zaremba v The Guardian Trust and Executors Co of New Zealand* [1968] NZLR 476 (SC) at 478.
14 *Melgren v Public Trustee* [1971] NZLR 681 (SC) at 688.
15 At 688.
16 *Kleinwort Benson Ltd v Barbrak Ltd*, above n 10.

extension of time is made at a time when the writ has ceased to be valid and the relevant period of limitation has expired.

[19] A proceeding that must be treated as having been discontinued is not a valid proceeding for the purposes of the categorisation called for in *Kleinwort*.

[20] In *Archer v Hibbs* Lord Brandon observed:[17]

> In category 3 cases, Lord Brandon observed, that it could properly be said that at the time when the application for extension is made, a defendant on whom the writ has not been served has an accrued right of limitation.

[21] The authorities confirm that to justify an extension in respect of a category 3 case, good reason as opposed to exceptional circumstances must be shown, however:[18]

> …in category 3 cases the applicant for an extension has an extra difficulty to overcome, in that he must also give a satisfactory explanation for his failure to apply for extension before the validity of the writ expired.

[22] In *Stace v Miller*, O'Regan J, adopted the "good reason" rather than "exceptional circumstances" approach.[19] His Honour referred to *Melgren v Public Trustee*, where Moller J took the view that in cases where the order extending time would deprive a defendant of a defence under a limitation statue, the reason to be "good" must be strong.[20]

[23] *Hibbs* was a case where an extension of time, despite a limitation period having passed, was granted.[21] There the Court of Appeal carried out the balance of hardship exercise called for in *Kleinwort*. The claim in *Hibbs* was under the Law Reform (Testamentary Promises) Act 1949. There had been, with the consent of all parties, a sizeable interim distribution from the estate to the beneficiaries in the Will. The Court noted that distribution was not at risk while, on the other hand, the appellants who were of limited means stood to lose any benefit from what was a distinctly arguable case.

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17 *Hibbs v Towle*, above n 9 at 10.
18 *Kleinwort Benson Ltd v Barbrak Ltd*, above n 10, at 622-623.
19 *Stace v Miller* [1975] 1 NZLR 89 at [90].
20 *Melgren v Public Trustee*, above n 14.
21 *Hibbs v Towle*, above n 9.

[24] *Stace v Miller* was also a Testamentary Promises claim where the statement of claim had not been filed within one year as required by s 6 of the Law Reform (Testamentary Promises) 1949 Act.[22] A claim under the Family Protection Act 1955 had also been brought which was still on foot precluding the estate from being distributed. Notwithstanding that factor, leave was declined in part because there is a separate jurisdiction under s 6 of the Law Reform (Testamentary Promises) Act 1949 to apply for leave to bring a proceeding out of time.

[25] In this proceeding, no alternative means of avoiding the long stop exists in respect of the cause of action against the Council.

[26] Here, the Council has an accrued right of limitation. Emma and Jason are forced to ask the Court to deprive the Council of that right. It cannot and was not suggested that the Council has any responsibility in the proceedings being served out of time. On what I am told by Ms Walton, the responsibility of the papers not being served lies with Emma and Jason's former solicitors who it seems overlooked the need to serve within one year of filing.

[27] It was the Council when first approached, who told Emma and Jason of the 10 year limitation period.

[28] Part of the reasoning for the long stop is that conducting litigation 10 years after the events in issue involves self-evident difficulties in respect of inter alia the availability of witnesses, the dimming of memories and the availability of records. In practical terms, Emma and Jason are asking for the long stop to become 11 years plus.

[29] There is nothing to mitigate the prejudice to the Council. The Council bears no responsibility for the circumstances that have arisen regarding service of the proceedings nor was it on notice that it may be subject to a claim — there is no suggestion by Emma and Jason that when they contacted the Council in September 2022, they raised a possibility about a claim against the Council.

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22 *Stace v Miller*, above n 19.

[30] It is necessary to consider whether there is a satisfactory explanation for the failure to serve the proceedings within a year of filing and the hardship Emma and Jason will suffer if an extension is not granted. Relating to this is whether Emma and Jason have alternatives open to them if their application is declined.

[31] Ms Walton identified factors favouring the application as follows:

(a) the delay in service was only five working days beyond the one year limit in r 5.72;

(b) Emma and Jason's claim concerns their family home, repair of which may cost hundreds of thousands of dollars;

(c) the claim is supported by expert evidence which shows it has merit; and

(d) Emma and Jason stand to lose the benefit of a distinctly arguable case if an extension is not granted.

[32] The last three points are effectively the same, that is, Emma and Jason will not be able to pursue their claim against the Council concerning their home if their application is not granted. In one sense, the more Emma and Jason emphasise the strength of their claim against the Council, the greater the hardship to the Council in being deprived of its limitation defence.

[33] To the final point that the delay in service was only five working days, the fact is the obligation under r 3.72 was to serve the claim "… as soon as practicable…". That was not done. There was nothing preventing the claim being served and it is not uncommon for proceedings filed for limitation purposes to be served and it being agreed the defendant need not take any steps upon being given notice to do so.

[34] Ms Walton submitted that from the Council's point of view, while it presently has a defence, if the application is granted it may have the ability to seek contribution from other parties including a building inspector who assisted Emma and Jason at the time of their purchase. Ms Walton also raised the point, which I address below, that it is possible if the application is not granted, the Council may be brought back in by

another party, in particular, the firm of solicitors whose apparent negligence has put Emma and Jason in their present situation.

[35] In her initial affidavit in support, Emma explained that she and Jason did not want to serve the claim without understanding the causes for the state of their home and responsibility of the parties, because if the information did not support the claim, it could be withdrawn or amended. Emma says they went on to obtain expert reports and a legal opinion but obtaining those took time. Emma explains that on 9 October 2023 they received a draft report specifically addressing the lack of weathertightness albeit a final report had not been issued. At the time of her affidavit (8 December 2023) the final report was expected within the next week. Emma says: "We understand now that we were to serve our claim by 17 October 2023. That date was overlooked."

[36] In submissions in support of the application it is also said the solicitors then instructed by Emma and Jason overlooked serving the proceedings.

[37] Ms Harpur, counsel for the Council, submitted the preliminary building report commissioned by Emma and Jason received by them on 9 October 2023 would have permitted the proceedings to have been served before the deemed discontinuance. Ms Harpur submits that "seeking confirmation" of the merits of the claim when that claim had already been prepared and filed is not a good reason for delaying service, particularly when limitation is an issue and the time for service under r 5.72 is running.

[38] The situation amounts to this. The effect of the application, if granted, would be to relieve the solicitors responsible of their apparent negligence in not serving the claim in time at the cost of a valuable advantage that undoubtedly is presently enjoyed by the Council.

[39] Declining leave may well mean that Emma and Jason must bring a claim against their former solicitors, but they were always going to be involved in litigation concerning the building defects - only now those proceedings may be against their former solicitors alone. Ms Walton said I could not make any assumptions about Emma and Jason's ability to sue their former solicitors, however, the evidence is that

service was overlooked by those solicitors. While I do not know all the circumstances, given there has been no explanation as to why the papers were not served other than an affidavit prepared by the former solicitors that the date was "overlooked", it is hard to see how the solicitors concerned could have any defence to any negligence claim.

[40] Emma and Jason's claim will be for a loss of opportunity to pursue the claim against the Council. In the affidavit prepared by Emma and Jason's former solicitors, the claim against the Council was described as "strong".

[41] Accordingly, Emma and Jason are not left without a remedy. They also retain their rights against the Trust.

[42] The primary hardship asserted by Emma and Jason is that they have lost their cause of action against the Council. So much is inherent in the limitation period having expired. That is the context in which every application to extend time for service in a category 3 case, using the *Kleinwort* categories, falls to be considered. In other words, hardship is a given in category 3 cases.

[43] Megaw J in *Heaven v Road and Rail Wagons Ltd*, when discussing a category 3 case, albeit discussing what would amount to exceptional circumstances as opposed to good reason, said:[23]

> Clearly, the fact that the plaintiff will be deprived of the possibility of successfully pursuing his claim against the defendants, since the latter can plead the statute of limitation to any fresh writ, cannot be a ground. It is not an exceptional circumstances it is the necessary consequence of applying the general rule; it is, indeed, the very fact which gives rise to the existence of the rule. Nor can the fact that the defendants knew of the existence of a claim, or knew that a writ had been issued, be a ground. These are in no way exceptional circumstances. Nor can it be a ground that the defendants are unable to show that, if the validity of the writ were to be extended, there would be any specific prejudice or detriment to them in conducting their defence, compared with what their position would have been if the writ had been duly served on them within the twelve months' period …
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> Exceptional cases, justifying a departure from the general rule, might well arise where there has been an agreement between the parties, express or implied, to defer service of the writ; or where the delay in the application to extend the validity of the writ has been induced, or contributed to, by the words or conduct of the defendant or his representatives; or perhaps where the defendant has evaded service or, for other reasons without the plaintiff's

[23] *Heaven v Road and Rail Wagons Ltd* [1965] 2 All ER 409, [1965] 2 QB 355 at 365.

> fault, could not have been served earlier even if the application had been made and granted earlier.'

[44] Megaw J's reasoning applies equally whether the standard is exceptional circumstances or good reason. That Emma and Jason will not be able to re-issue their claim is a "necessary consequence of applying …." r 5.72 and of the long stop provision under the Act.

[45] The short point is that Emma and Jason took no steps to serve their proceeding for more than a year after it was filed. They appear to have been let down by their former solicitors which may explain why service did not take place, but the fact Emma and Jason cannot pursue a claim they consider has merit cannot of itself be a good reason to extend the time for filing their claim because if it is a good reason it will exist in each and every category 3 case - at least those with arguable merit.

Will the Council get dragged in after all?

[46] Ms Walton submits if an extension of time is not granted, Emma and Jason would be able to bring a proceeding in negligence against their former solicitors. Ms Walton submits it is almost certain the former solicitors will seek a contribution from the Council and the Trust as third parties. She submitted they would not be time barred from doing so.

[47] Ms Walton submits the practicalities and increased costs of Emma and Jason having to proceed against their former solicitors outweighs the suggestion that continuation of the current proceeding should be halted. (I note it is not a case of the present proceeding being halted, but whether it should be "resurrected" against the Council.) Ms Walton submits there is no "severe prejudice" to the Council as its limitation defence is only vis-a-vis Emma and Jason and the Council will face a valid third party claim from the former solicitors.

[48] I am satisfied the present application falls to be determined on the circumstances as they presently stand. Those circumstances are that on the material I have, Emma and Jason have a good claim against their former solicitors. How that claim will be dealt with, whether it will result in proceedings and whether there will be an attempt to join other parties, involves speculation.

[49] Ms Harpur submits it would be unusual for a solicitor who has failed to serve a claim in time to seek contribution under s 17 of the Law Reform Act 1936 from the party it has failed to serve.

Decision

[50] Having balanced the factors and taken into account the unenviable position Emma and Jason have been put in, I am unable to conclude there is good reason to extend the time for service under r 5.73(2) of the Rules.

[51] In terms of the circumstances that have led to this application, the Council is the "innocent" party. Nothing it did was a contributing factor. Emma and Jason are not left without their remedies. That remedy will, to a large extent, be based on the merits of the claim Emma and Jason had against the Council. The possibility that the Council may be involved in that process is not sufficient reason to deprive its accrued immunity from the present claim.

[52] The application to extend time is ***declined***.

Costs

[53] There is no reason why costs should not follow the event. Emma and Jason are to pay the Council costs on a 2B basis plus disbursements as fixed by the Registrar. If either party wishes to file costs memoranda, such are to be filed ***within five working days —*** if no costs memoranda are filed, the above costs order will come into effect.

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Associate Judge Lester

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