IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

I TE KŌTI MATUA O AOTEAROA
WHANGĀREI-TERENGA-PARĀOA ROHE

CIV-2015-488-000109
[2018] NZHC 2211

BETWEEN	MALCOLM JAMES DAISLEY Plaintiff
AND	WHANGAREI DISTRICT COUNCIL First Defendant
	WAYNE WESLEY PETERS Second Defendant

Hearing: 16 July 2018

Appearances: E L Smith for the Plaintiff
F Divich and A Harpur for the First Defendant
N Batts for the Second Defendant

Judgment: 27 August 2018

JUDGMENT OF HINTON J
[re Application for leave and summary judgment on the issue of liability against the First and Second Defendants]

This judgment was delivered by me on 27 August 2018 at 12.30 pm pursuant to Rule 11.5 of the High Court Rules

.....
Registrar/Deputy Registrar

Solicitors:
Tailored Legal Solutions Ltd
Heaney & Partners, Auckland
Rice Speir, Auckland

[1] The plaintiff seeks summary judgment against the first defendant (the Council) in respect of two causes of action and as to liability only.

[2] The plaintiff also seeks summary judgment against the second defendant (Mr Peters) in respect of one cause of action and as to liability only.

[3] As the plaintiff did not make an application for summary judgment at the time of filing the statement of claim, he first applies for leave of the Court in each instance, as required by r 12.4(2) of the High Court Rules 2016.

Background

[4] From 24 December 2004 until 30 January 2010, the plaintiff was the owner of a property at Knights Road, where a quarry was located which was operating at the time of the plaintiff's purchase.

[5] Before settlement of the purchase, the plaintiff obtained a LIM from the Council which made no reference to any land use consent for the quarry operation.

[6] The plaintiff continued to operate the quarry through a company controlled by him, but was issued a series of abatement notices, infringement notices and an application for an enforcement order by the Council, during the period from 5 February 2005 through to August 2009.

[7] During this period of time, the Council made positive assertions that the operation of the quarry on the Knights Road property was an unconsented and unlawful use of the land.

[8] The plaintiff objected to the notices contending, inter alia, that he and his predecessor had paid rates consequent upon Council mineral extraction rate notices and that the quarry had been long operational. The plaintiff did not respond to the notices by saying that there was a land use consent, as presumably the plaintiff had no reason to consider such a consent existed.

[9] Ultimately, the plaintiff ceased the quarrying operation, as a result of the enforcement actions taken against him.

[10] On 21 September 2009, following the cessation of quarrying, a land use consent dated 1988, issued under the provisions of the Town and Country Planning Act 1977, was located at the offices of the Council by an employee of the second defendant.

[11] The above facts are not disputed.

The claim against the Council

[12] This proceeding was commenced in 2015.

[13] As Ms Smith submits, the essence of the plaintiff's claim against the Council is that the Council unlawfully issued the abatement notices and related proceedings, and that, as a consequence of those steps, the plaintiff had to close down the quarrying operation, and lost profits. Prior to the Council's infringement actions, the plaintiff had no cause for complaint as, although it had received an incorrect LIM, it had made its purchase unaware of any land use consent, and had quarried the land. The quarrying operation only ceased as a result of the enforcement actions brought by the Council.

[14] The causes of action pleaded against the Council are:

(a) Breach of statutory duty under the Resource Management Act 1991;

(b) Negligence when issuing abatement, infringement and enforcement notices under the Resource Management Act 1991; and

(c) Misfeasance in public office.

[15] The plaintiff is seeking summary judgment against the Council only in respect of the first two causes of action, and only in respect of liability.

[16] The Council raises defences, including affirmative defences, as follows:

(a) Limitation;

(b) The plaintiff does not have standing to bring a claim for loss, due to the quarrying at all times being conducted by a limited liability company;

(c) The Council caused no loss; and

(d) Contributory negligence.

The claim against Mr Peters

[17] The essence of the claim against Mr Peters is that he was instructed to consider and provide advice to the plaintiff as to whether the Council was responsible for the 2005 to 2009 infringement actions and to advise the plaintiff as to the options he had against the Council in respect of those past matters. The claim against the second defendant is not in respect of advice regarding the operation going forward from 2009.

[18] The causes of action pleaded against Mr Peters are:

(a) Breach of contract/negligence;

(b) Misfeasance;

(c) Breach of fiduciary duty.

[19] The plaintiff is seeking summary judgment only in respect of the first cause of action, and only in respect of liability.

[20] The defences relating to liability as pleaded by Mr Peters are:

(a) Limitation;

(b) Mr Peters caused no loss;

(c) The plaintiff suffered no loss; and

(d) Contributory negligence.

Application for leave

[21] Under r 12.4(2) of the High Court Rules 2016, a plaintiff is required to obtain leave to bring a summary judgment application if it has not been filed at the time that the statement of claim was served on the defendant.

[22] A statement of claim was served on 21 August 2015 and the application for summary judgment and leave was filed on 6 June 2018.

[23] The key facts relevant to the causes of action on which summary judgment is being sought were known at the time the proceeding was issued, or at least by the time the first statements of defence were filed by the Council and Mr Peters, being on 4 May 2016 and 25 September 2015 respectively.

Summary judgment

[24] In order to succeed in an application for summary judgment, a plaintiff must satisfy the Court that the defendant has no arguable defence to the plaintiff's cause of action.

[25] Summary judgment for liability is granted only where the Court is satisfied that the only issue to be tried is one about the amount claimed.[1]

[26] Summary judgment will be reasonably rare in negligence cases because frequently there will be differences over matters of primary fact with decisions required on credibility and there will be disputed factual questions relevant to foreseeability, standard of care and remoteness.[2]

---

1 High Court Rules 2016, r 12.3.

2 *Economy Services Ltd v Smith* (1989) 2 PRNZ 657 (HC).

[27] The power to grant summary judgment ties in with the overall aim of the High Court Rules, being to ensure a speedy and fair resolution of disputes.[3]

Summary judgment not suitable against Council

[28] I decline to grant leave to the plaintiff to make an application for summary judgment against the Council for the following reasons:

(a) I am not satisfied that the Council has no arguable defence to the two causes of action for which the application is brought.

(b) The application for summary judgment was brought two-and-a-half years after the key factual matters became known to the plaintiff.

(c) The application is only as to a subset of the claims against each of the defendants, both in terms of causes of action and liability/quantum and I am not satisfied it is going to make a material difference at this stage in terms of a speedy and fair resolution of the dispute. Extensive time and effort has already been put into the proceedings.

[29] I say no more about the second and third reasons above, but discuss below the question of the Council's arguable defences.

[30] The claim for breach of statutory duty against the Council requires the plaintiff to show that a statutory provision has been breached which is actionable by way of a claim for damages.

[31] The plaintiff relies on s 35(5)(gb) of the Resource Management Act 1991 which stipulates that every local authority has to keep adequate records of all resource consents. The plaintiff also relies on s 322(4) of that Act, which stipulates that an abatement notice shall not be issued unless the enforcement officer has reasonable grounds for believing that a circumstance exists which warrants its issue.

---

3 High Court Rules 2016, r 1.2.

[32] The breach of s 35(5)(gb) did not cause any loss because the plaintiff purchased on the basis of no land use consent. The loss was caused by the breach of s 322(4) because the abatement actions ultimately brought the quarrying to an end. But it is questionable whether there is any action for breach of statutory duty, in addition to other remedies that are available under the Resource Management Act 1991. Ms Divich, for the first defendant, refers to *Mawhinney v Auckland Council*, where Duffy J, relying on a decision of Fogarty J, held that there is no action for damages for breach of statutory duty under the Resource Management Act 1991, and that an affected party is limited to its remedies under the statute.[4] Duffy J also helpfully discussed the difference between breach of statutory duty and a claim for negligence simpliciter.[5]

[33] While arguably it may be a slight over-reach to say that there can never be an action for breach of statutory duty under the Resource Management Act 1991, it is clearly not appropriate to enter judgment for summary liability on that cause of action, in the face of the two judgments to which I have referred.

[34] In terms of the cause of action in negligence, the plaintiff has to establish that there is a duty of care owed by the Council when it is prosecuting a landowner. Both counsel submit that there is no authority one way or the other in that regard. Local authorities making decisions on resource management issues do not owe landowners a duty of care.[6] Local authorities issuing building consents do owe a duty of care.[7] There does not appear to be a case where the Court has considered whether a local authority, taking regulatory action by way of prosecution or otherwise, owes a duty of care to a landowner.

[35] The alleged duty of care would therefore be a novel one. I accept the case may be a little closer to the building consent scenario than to authorities making decisions about whether to grant a non-notified application, as in *Bella Vista*, where the authority

---

4 *Mawhinney v Auckland Council* [2013] NZHC 159 at [9]-[11].
5 At [6].
6 *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] NZCA 33, [2007] 3 NZLR 429.
7 For example, *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

is acting more in a quasi-judicial capacity.[8] However, whether there is a duty of care or not, can only be established by considering all of the circumstances to see whether there is a proximate relationship and what are the applicable policy and other considerations. It may be that a Council is only liable for wrongful prosecution where the prosecution amounts to a misfeasance, or alternatively, is malicious.

[36] Whatever the answer, summary judgment is clearly not appropriate based on negligence under the Resource Management Act 1991.

[37] In addition, there are the affirmative defences raised by the Council. I do not need to consider these, but I do note that, at least in respect of the limitation defence, it cannot be ruled out. There has already been a strike-out application based on that defence by the Council, which was unsuccessful for the apparent reason that the plaintiff might be able to establish concealment by fraud in terms of s 28 of the Limitation Act 1950, thereby extending what might otherwise be a limitation period that expired six years after the point at which the loss was caused, which arguably would have been on the cessation of quarrying operations in July 2009. The plaintiff has already accepted that the causes of action that relate to misfeasance, or similar, are not appropriate for summary judgment. The same must apply to the question of whether there was fraud by the Council in terms of the Limitation Act. As the plaintiff says, it may not be necessary for him to prove fraud, but for the same reason that Associate Judge Christiansen was not prepared to strike out the limitation defence without evidence, I would not be prepared to do the opposite and enter summary judgment, ignoring that defence.

[38] For all of the above reasons, I decline to grant leave to bring the application for summary judgment against the Council.

---

8 *Bella Vista Resort Ltd v Western Bay of Plenty District Council* [2007] NZCA 33, [2007] 3 NZLR 429.

Summary judgment not suitable against Mr Peters

[39] As Mr Batts submits, if summary judgment for liability is not available against the Council, it cannot be available against Mr Peters. The summary judgment claim against Mr Peters depends on Mr Peters having failed to prosecute a good claim against the Council, but until such time as that claim is established, any cause of action against Mr Peters is incomplete.

[40] In any event, I am far from satisfied by the plaintiff's arguments for summary judgment against Mr Peters. There is a contest as to what instructions Mr Peters received. There does not appear even to be any clear evidence at present of the plaintiff's having given Mr Peters instructions to advise on the actions that could be taken against the Council with regard to the 2005-2009 period. In fact, the documentary evidence suggests otherwise. I refer to Mr Daisley's email to Mr Peters on 29 September 2009. This is the last correspondence between Mr Peters and Mr Daisley.[9] I do not read this correspondence as indicating, or more importantly instructing, Mr Peters to advise as to options and take action against the Council, or similar. To the contrary, Mr Daisley says, "If that current consent is still enforced today I will be taking this further..." I have not been pointed to any correspondence after that time, including for example any letter from Mr Daisley to Mr Peters pointing out Mr Peters' failure to provide advice or to take actions. The allegations made against Mr Peters were apparently not raised until quite some time later, when other counsel became involved.

[41] While it may be that the plaintiff has a claim as alleged against Mr Peters, that is going to require a full airing of the evidence, including evidence as to oral discussions. Therefore, I am in no position to enter summary judgment for liability against Mr Peters at this point.

[42] The additional grounds for declining leave that applied to the application against the Council, equally apply to Mr Peters.

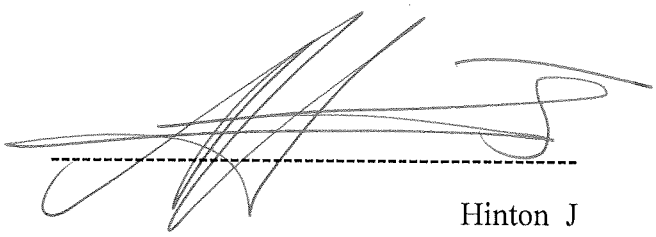
---

[9] Ms Smith makes the point that it is not the last attendance by Mr Peters because there is a bill dated 7 October 2009 which suggests there were attendances between 29 September 2009 and 7 October 2009, but she does not point to any further correspondence post 29 September 2009.

Conclusion

[43] The application for leave to bring a summary judgment application against the first and second defendants is dismissed.

[44] The defendants are entitled to costs against the plaintiff. They have asked to be heard as to quantum. The parties should do everything they can to resolve the costs issues before filing any submissions. Failing resolution, each of the defendants should file not more than five pages of submissions within 14 days and the plaintiff can reply, subject to the same page limit, within a further 14 days.



Hinton J