IN THE HIGH COURT OF NEW ZEALAND
ROTORUA REGISTRY

CIV 2014-463-000170
[2016] NZHC 413

BETWEEN	DAVID HORWOOD AND WENDY HORWOOD Plaintiffs
AND	OPOTIKI DISTRICT COUNCIL Defendant
	STUART WALLACE GALLOWAY Third Party

Hearing:	9 March 2016
Appearances:	K J Patterson for the Plaintiffs F Divich/C Harper for the Defendant
Judgment:	9 March 2016

ORAL JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

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[1] The plaintiffs apply for particular discovery from the defendant (the Council).

[2] In November 2007 the plaintiffs applied to the Council for a building consent to renovate the house on a rural property. On 11 December 2007 the Council issued a building consent.

[3] The third party was employed to construct the renovation. Work commenced in March 2008.

[4] A dispute arose between the plaintiffs and the third party. The third party's contract was terminated on 1 September 2008.

[5] The plaintiffs plead that at that time the works were externally "closed in", the kitchen was partly installed but not functioning, and that wall linings in the laundry, kitchen and downstairs bedroom had been installed. Some of the linings in the garage had been installed and some of the ceilings had been completed. However nothing (except behind the kitchen bench) had been plastered and part of the veranda areas had not been installed.

[6] The plaintiffs have since settled payment claims with the third party.

[7] The plaintiffs say the building contains building defects and that these have arisen due to the Council's breaches of a duty of care owed to the plaintiffs to ensure that the building consent drawings and specifications were satisfactory, and to properly carryout inspections and supervise the building works and specifically to ensure those building works were completed in accordance with the building consent and the building code generally.

[8] The plaintiffs are advised the Council's inspection services were provided by Mr Chapman, a building inspector, Mr Whilmhurst a senior building inspector (now deceased), Mr Schlotjes a department head, and Mr Morris an independent building inspector.

[9] The plaintiffs report that house damage includes moisture ingress through the exterior envelope and into the structure of the house. It is estimated repair costs will

be about $250,000. As well they consider an estimated loss of property value of $350,000.

[10] Claims of breach of duty of care include:

(a) A failure to determine that the drawings and specifications were inadequate;

(b) Failed to institute an inspection regime designed to ensure compliance with the building consent;

(c) Failed sufficiently or competently to carryout inspections.

[11] The plaintiffs also plead claims of negligent misstatement or negligent misstatement by omission in connection with building inspectors' reports of inspections. It is pleaded that the Council admits in respect of inspections carried out on 1 March 2010 and 1 November 2010 that it failed to competently inspect the building works and that it should have noted the cladding defects at those inspections.

[12] The plaintiffs say that at the time of those inspections the person inspecting made false statements and also provided false reports.

[13] On 1 March 2010 the plaintiffs arranged a site visit for the purpose of bringing to the attention of Mr Chapman, various defects in the third party's workmanship done in 2008. At that time the plaintiffs say Mr Chapman failed to advise them that he had written up this aspect of the site visit (on 1 March 2010) as a 'failed inspection'; that on that date Mr Chapman ticked the cladding as weather tight thereby making a misstatement; that on 2 March 2010 Mr Chapman sent by email and by post an instruction book page detailing remedial work to be undertaken yet he did not include the 'failed inspection' sheet. Also it is claimed that Mr Chapman wrote the 'failed inspection' up on a pre-line inspection sheet even though the garage had been mostly lined in 2008. Regarding the 1 November 2010 site visit the plaintiffs plead that Mr Chapman failed to advise them that he had written up the

site visit as a 'failed inspection' whilst on that same date he had ticked the cladding as weather tight. Thereby it is claimed Mr Chapman made a misstatement.

[14] On 1 December 2010 the plaintiffs emailed Mr Chapman saying they understood:

(a) It was acceptable to continue interior work providing the plaintiffs kept a comprehensive photographic record;

(b) Both the kitchen and garage had been inspected in parts;

(c) To let the plaintiffs know if the Council was required to be onsite again for further inspections.

[15] While Mr Chapman acknowledged receipt of that email he provided no comment regarding matters raised.

[16] On 12 April 2011 Mr Schlotjes and Mr Morris made a site visit to discuss the shadow clad installation/bracing and in that outcome advised nothing more needed to be done other than to add more nails.

[17] The plaintiffs say Mr Chapman by letter dated 30 April 2011 stated:

> We acknowledge that there were issues raised with Council by Mr and Mrs Horwood which have been rectified. We are not aware of any other unresolved defects and areas of non-compliance with manufacturers specifications mentioned in your letter.

[18] The plaintiffs claim that as a result of these negligent misstatements or negligent misstatement by omission and before discovering the statements were false or that the omissions had been made the plaintiff put a lot of time and money to prove that their house was noncompliant with the building code and the building consent.

The application for particular discovery

[19] The plaintiffs wish the Council to provide the diaries of the four inspectors concerned from the time of the resource consent in 2008 until their employment ceased.

[20] They also seek:

(a) Copies of all inspection sheets completed in 2008 when the cladding was inspected.

(b) Training records and peer reviews of the inspectors named.

(c) Details of Mr Morris' qualifications and terms of contract for services or employment with the Council.

(d) The list of properties which name the third party on the building consent as the builder.

(e) A copy of all building department meeting minutes in March 2008.

(f) The Councils building insurance policy.

[21] The application is opposed on the following grounds:

(a) The documents sought do not fall within the test for standard discovery pursuant to HCR 8.7.

(b) The documents sought are not relevant to the issues in the proceeding.

(c) The documents sought are not linked to any of the pleaded causes of action or defences.

[22] At 3:00pm on 8 March 2016 the Council's counsel emailed to the High Court and copied to the plaintiffs' counsel an affidavit of Ms Dempsey on behalf of the

Council to which was attached a number of those documents which the Council had offered to provide previously. The affidavit confirmed advice previously given that the Council did not have certain documents sought. The affidavit also confirmed that the Council had previously supplied copies of all inspection sheets used in 2008 under cover of a letter dated 20 August 2014 [albeit that some of the attachments referred to in the letter had not been provided].

The hearing

[23] During the course of the Court's discussions with counsel for the plaintiffs there was a focus upon issues of relevance and whether or not any remaining documents indeed existed at all.

[24] At the conclusion of each discussion regarding the items sought [detailed in paragraph 21 herein] a decision was made upon the plaintiffs' application.

[25] Regarding the request for the diaries of named inspectors the Court held that no such diaries existed and that all relevant records of inspection had been discovered.

[26] The Court accepted that the plaintiffs request for inspection sheets used in 2008 had been complied with.

[27] The Court did not accept that copies of all peer reviews and training records of named Council officers would provide relevant evidence but in any case considerations of right to privacy and confidentiality would outweigh any grounds for discovery.

[28] Likewise regarding the request for details of Mr Morris' qualifications the Court considered the application for that material should be refused upon grounds of irrelevance.

[29] Concerning the Council's records of all the properties having been built by the third party, the Court ruled that this information was irrelevant because the inspection records of other properties had no bearing on this case.

[30] The plaintiffs' recent request for all monthly minuted building department meetings since March 2008 was not part of the plaintiffs' original application for additional discovery. Nevertheless the Council did agree to provide that information and has recently done this. It is questionable in any event whether there was any obligation to provide that material.

[31] The plaintiffs want a copy of the Council's building insurance policy. Quite clearly that document has no relevance at all to the current proceeding.

Conclusion

[32] The Council's position adopted by its opposition to the current application has been vindicated in the outcome. The Council has provided more material than it was obliged to. Its grounds for opposing the presentation of other material have been sustained in the outcome.

Costs

[33] The Council has been successful and is entitled to an award of costs. In that regard the Court has received a memorandum from plaintiff's counsel following the hearing.

[34] Counsel recalls the Court having indicated costs on a 2B basis would be payable to the Council.

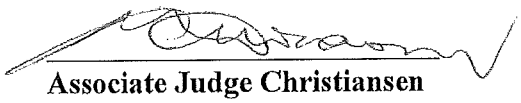
[35] It is correct that those costs were ordered by the Court and at that time it was indicated the Court would not certify any costs payable on behalf of second counsel.

[36] That ruling remains in place.

[37] The Council supplied that which it said it would and should have. It has succeeded in its reasons for opposing discovery of that material it considered it should not.

[38] The plaintiffs' expectations of discovery went well beyond that for which any application could have been successful. That is why the hearing was necessary – indeed as the Court's discussions with counsel clearly indicated.

[39] The order for costs on a 2B basis together with disbursements including counsels travel costs is confirmed. In the circumstances those shall not be required to be paid until the proceeding is scheduled for a trial.



Associate Judge Christiansen