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IN THE HIGH COURT OF NEW ZEALAND  
NEW PLYMOUTH REGISTRY

1384  
1363

BETWEEN AVALON HOMES LIMITED  
a duly incorporated  
company having its  
registered office at  
New Plymouth

Plaintiff

A N D THE WAITARA BOROUGH COUNCIL  
a body corporate

Defendant

Hearing: 1 November 1984 in Chambers

Counsel: J.E. Macdonald for Plaintiff  
R.C. Laurenson for Defendant

Judgment: 2 November 1984

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JUDGMENT OF GALLEN J.

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In December 1982 the plaintiff commenced proceedings by way of writ of summons and statement of claim against the defendant. The statement of claim indicates the dispute between the parties arises out of sub-divisional developments in Waitara. The cause of action disclosed by the statement of claim is not wholly clear, but appears to involve allegations of breach of contract. The defendant moved to strike out the statement of claim in May 1984 on the basis that the statement of claim does not disclose a cause of action.

In October 1983, the defendant filed a statement of defence which is a simple denial of the contentions contained in the statement of claim. The plaintiff therefore filed a notice of motion seeking relief against the defendant on the basis that the statement of defence was evasive. Before either of these motions were finally disposed of, the plaintiff purporting to act under the provisions of R.144 of the Code of Civil Procedure, filed an amended statement of claim which is based on the same allegations of fact and claims the same damages but seeks an order compelling the defendant to upgrade the facilities about which complaint is made as distinct from the previous proceedings where the equivalent relief sought was specified performance of an alleged agreement.

The amended statement of claim is clearly based on allegations of negligence. There is no repetition of the allegations of breach of contract which appear to have been contained in the original statement of claim. The defendant now moves to strike out the amended statement of claim on the basis that it introduces an additional cause of action.

The interpretation to be placed on R.144 is now clear. The Court of Appeal in Rowley v. Wilkinson 1968 N.Z.L.R. 334, surveyed the practise which had evolved and concluded in effect that the Rule authorised the filing of an amended statement of claim which added an alternative cause of action, but not one which added an additional cause of action. This conclusion was followed in the subsequent cases of

Smith v. Wilkins and Davies Construction Company Limited  
1958 N.Z.L.R. 958 and Pukekohe Joinery Limited v. Sargent  
(1974) 2 N.Z.L.R. 506. In this case, what the plaintiff seeks  
to do is not to add an additional cause of action, but to  
substitute a different cause of action arising out of the  
same circumstances.

In my view, such a course is authorised by the Rule.  
I can see no reason why an alternative cause of action  
should be acceptable and a substituted cause of action, not.  
I was informed by counsel that any questions of limitation  
will be argued as a part of the substantive hearing.

I am therefore satisfied that the plaintiff is  
entitled to file the amended statement of claim and the motion  
will be dismissed.

*R. J. Baker*

Solicitors for Plaintiff;

Messrs Billing and Company,  
New Plymouth

Solicitors for Defendant;

Messrs Govett, Quilliam and Company,  
New Plymouth

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