Bd/WORKS

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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.No.1099/79

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BETWEEN FRANK BORIC, ZORKA BORIC, MILENKO BORIC, BARRY BORIC, BARBARA BORIC, and ROSITA FRANICEVIC all of Henderson, Orchardists

Plaintiffs

AND FRANKIPILE NEW ZEALAND LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as foundation and piling contractors

First Defendant

AND FLORA INVESTMENTS LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as an investment and building company

Second Defendant

AND H. JENKIN & SON LIMITED a duly incorporated company having its registered office at Auckland and carrying on business as timber merchants

Third Defendant

AND ONEHUNGA BOROUGH COUNCIL a body corporate under the provisions of the Local Government Act 1974 having its office at Onehunga

Fourth Defendant

Hearing: 6 April, 1984.

Counsel: P.M. Salmon, Q.C. for Plaintiffs.
A.D. Davies for First Defendant.
S.P. Bryers for Second Defendant.
R.J. Katz for Third Defendant.
D.M. Carden for Fourth Defendant.

Judgment: 6 April, 1984.

(ORAL) JUDGMENT OF VAUTIER, J.

This is a notice of motion by the plaintiffs seeking an order granting leave to the plaintiffs to file an amended statement of claim. Such an order is necessary by reason of the proviso to R.144, this action having been set down for trial. The position in that regard is that a fixture has now been allocated for this case for 25 June next. The action is one in which the plaintiffs are seeking relief by way of damages against the various defendants in respect of the damage which resulted to a building by reason of a subsidence in the foundations. The relief is claimed against the different defendants on the different bases which are pleaded in the original statement of claim. This, it should be mentioned, was filed with the writ on 16 August, 1979. The plaintiffs now seek to amend their statement of claim, first, by including in it a claim for damages additional to those already pleaded upon the basis that the building, notwithstanding the carrying out of repairs, has suffered a diminution in value as a result of the subsidence. A new paragraph is accordingly sought to be added in the claim reading:

> "As a further result of the damage to the building the value of the property has been reduced by an amount of $145,000."

The original claim advanced, it should be mentioned, is for the sum of $75,971.00.

Secondly, it is sought to amend the claim by including a claim for $70,000 by way of general damages and to include a pleading in respect of this, reading as follows:

> "That as a further result of the damage to the building the Plaintiffs have been put to considerable inconvenience and loss of time and claim general damages in respect of these matters."

There is a third matter of amendment which it is sought to introduce in the new pleading, that is a claim for the sum of $2,000 in respect of alleged loss of time incurred by one of the plaintiffs in relation to the matters the subject of the claim. This is specified as being 100 hours in respect of which $20 per hour is claimed.

It should be mentioned that the defendants have had notice of the plaintiffs' desire to amend the pleadings in these respects since early in December when the notice of motion now under consideration was filed and served accompanied by an affidavit setting out the proposed amendments.

The defendants all object to leave being granted at this stage to make these amendments. On behalf of the first defendant, it is said that the plaintiffs have delayed too long before bringing forward this amendment. It is pointed out on their behalf that it is now nearly five years since the proceedings were commenced and it is said that the first defendant suffers some prejudice by the introduction of a substantially increased claim at this stage because it has now scaled down its operation in New Zealand. It should be noted, however, that there is no affidavit filed in opposition to the present motion.

The substantial basis upon which all the defendants oppose the granting of leave is that it is claimed that the introduction of the major new claim in particular at this stage is equivalent to the introduction of a new cause of action or at least the introduction of a new case on the facts or a new and different basis of claim which should not be permitted at such a late stage as this. These submissions were advanced in detail by Mr Davies on behalf of the first defendant and his submissions were adopted on behalf of the other defendants.

Reference was made in support of the contention that the amendment sought amounted to a pleading of a new cause of action and accordingly an amendment which, on authority, should not be permitted, to the case of Smith v. Wilkins and Davies Construction Company Limited [1958] NZLR 958 and in particular the statement in the judgment of McCarthy, J. at p.961 where he says this in relation to the question of what is meant by the term "cause of action":

> "In other words, is it something essentially different from that which was pleaded earlier? Such a change in character may be brought about, in my view, by alterations in matters of law or of fact, or both. Alterations of fact could possibly be so vital and important as by themselves to set up a new head of claim."

I think that it is convenient that I deal with the submissions made in this case individually in the interests of brevity. With regard to the decision to which I have just referred and the passage relied upon I think it is clearly necessary to read that in the context of the whole paragraph and to note that the Judge continues to say this:

> "On the other hand, more often alterations of fact do not affect the essence of the case brought against the defendant. Lord Wright said of a certain alteration 'in my view, therefore, the proposed amendment would, if allowed, have set up a new cause of action, involving quite new considerations, quite new sets of facts, and quite new causes of damage and injury, and the only point of similarity would be that the plaintiff had suffered certain injuries' (ibid.,88). I do not read that passage as implying a prohibition against any alteration on the facts. In each case it must, I consider, be a question of degree."

I do not, therefore, find anything in what was said in that case as clearly showing disentitlement of the plaintiff here to an amendment of the nature which it is seeking. As regards the major matter to which objection is taken,the pleading of the diminution in value, that is simply pleaded in my view as an additional head of damage arising out of exactly the same facts as those already pleaded.

In relation to this matter of the diminution in value, it is said that the pleading is insufficient in that it does not indicate when the loss of value alleged arose and what are the various factors affecting the loss of value and so on. These, however, are in my view matters going to the nature of the evidence and are not matters which would ordinarily be pleaded. If, however, because of the special circumstances of this case the defendants consider that they are entitled to further particulars of the pleading they have, of course, ample time before the fixture to seek those additional particulars and to approach the Court in respect of the matter, if required.

The next point raised is an objection on the basis that the introduction of the claims referred to at this stage could result in the defendants being deprived of the benefit of the statute of limitations and of their accordingly suffering a detriment which they would not sustain if the Court refused to grant leave at this stage. Reliance is placed in this regard on the recent decision of the House of Lords in Pirelli General Cable Works Ltd. v. Oscar Faber & Partners (a firm) [1983] 1 All ER 65, where the House of Lords has laid it down that in cases of this kind time commenced to run when the damage complained of is discoverable, not when it was actually discovered. I would not think that this in itself was a ground upon which the plaintiffs could be denied the right to the amendment which they seek unless there was here shown to be an attempt to introduce a new cause of action. In any event, there does not seem to me to be sufficient before me simply on the pleadings whereunder I could reach any conclusion as to whether or not this point has validity. There is no indication, moreover, so far as I am concerned, as to whether the Courts in this country and in particular the Court of Appeal will adopt the view that is taken in the Pirelli case which, of course, is contrary to the basis upon which many cases of this kind have already been decided in New Zealand.

Mr Davies made further reference in support of his wider claim that this was a major change which should not be permitted, even if it did not amount to the pleading of a new cause of action, to the case of Gabites v. Australasian T. & G. Mutual Life Assurance Society Limited [1968] NZLR 1145 and in particular the passage in the judgment of the President, Sir Alfred

North, at p.1151. I think it is useful, again dealing with the point immediately, to note all that was said in that case in the passage referred to. Reference was made by the Judge to a statement of Davies, L.J. in the case Dornan v. J.W. Ellis & Co. Ltd. [1962] 1 QB 583, [1962] 1 All ER 303, and when that is examined it will be found that there are references to the type of case which the Judge had in mind and which no doubt the President in our Court of Appeal had in mind in what was said by him. The cases are referred to earlier in the judgment, being two cases involving the London Transport Board. In these the original cause of action set up by the plaintiff was that he was injured through the negligent driving of the person in charge of a bus. The amendment sought was an allegation that the accident may have occurred through the state of the roadway and tram tracks. As the learned President proceeds to point out those are clearly the sort of cases where, although the plaintiff is still advancing his case upon exactly the same cause of action, that is to say the fact that he has sustained personal injury and claims damages against the defendant in that respect, he is altering the whole basis of his case and wherever that is found to be the situation I would agree that the authorities are against the amendment being granted.

I cannot see, however, that the present case falls into that category at all. These amendments are simply additional damages sought as a result of precisely the same cause of action as was originally pleaded in each case against the defendants concerned. An increase in damages or the addition of a new head of damage has, of course, been a commonplace type of amendment in litigation over the years. When an

amendment of this kind is sought the general rule as to amendment must, of course, be borne in mind, that is to say that an amendment, however late, will be permitted if such amendment is necessary in order that justice should be achieved between the parties and injustice will not be caused to the other side. It may be necessary that the defendants in a case where a plaintiff seeks to amend should be compensated in costs because of the lateness of the amendment or, if they are taken by surprise, they should of course have further time to prepare. I cannot see, however, that either of these factors has any real application in the present case. The amendment may indeed be sought at a somewhat late stage but the action has been proceeding, it appears from the record, with fairly reasonable diligence displayed and such delays as have occurred appear to me to be fairly typical of litigation of this particular kind where a number of parties are involved and where there are issues of magnitude and some difficulty as regards the facts involved for those advising the parties.

I do not for a moment wish to be thought to be suggesting that there is to be countenanced any laxity in the matter of pleadings. Mr Katz referred me to the statement of Lord Edmund-Davies in Farrell v. Secretary of State for Defence [1980] 1 All ER 166 at p.173 where the Judge, at the outset of his judgment, was stressing the importance of pleadings and the necessity at times to insist on complete compliance in their technicalities. That, however, is not the sort of issue at all that is involved in this case. The Judge there, it should be mentioned, was dealing with a question of whether or not a particular issue should have been allowed to go to the jury,

there being a question as to whether or not the matter had been properly and fully pleaded. If the defendants here face difficulties over the ambit of the new damages claims put forward then, of course, as I have already indicated, their remedy in my view lies in seeking further particulars in the ordinary way and I cannot see that there is justification as was suggested if leave is granted that the plaintiffs should be put on some terms. The defendants, I think, can readily protect themselves in respect of any of the kind of difficulties to which they have referred.

The leave to amend is granted on terms that the amended pleading in the form annexed to the affidavit in support of the motion is filed and served on all defendants within seven days and the defendants are required to file their statement of defence to the amended pleading within 14 days and leave is granted, if such be necessary, for such amended statements of defence to be filed notwithstanding the setting down of the case for trial. That is to say, no further application is necessary so far as the defendants are concerned.

There will accordingly be leave granted to amend the pleading in the respects sought.

I reserve costs with liberty to apply.

SOLICITORS:

M.N. Kostanich, Henderson, for Plaintiffs.
Jordan Smith & Davies Auckland, for First Defendant.
Martelli McKegg Wells & Cormack Auckland, for Second Defendant.
Butler White & Hanna Auckland, for Third Defendant.
Wynyard Wilson & Co. Auckland, for Fourth Defendant.