

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2008-404-006757**

BETWEEN                      IVAN KALMAN NAGEL AND  
   GRAHAM JOHN DAVY AS TRUSTEES  
   OF THE NAGEL FAMILY TRUST  
   Intended Plaintiff

AND                              METROWATER LTD  
   Intended Defendant

Hearing:            2 March 2009

Appearances: G Simms for Intended Plaintiff  
                         M Harris for Intended Defendant

Judgment:        2 March 2009

Reasons:           3 March 2009

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**REASONS FOR JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN**

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*This judgment was delivered by me on 3 March 2009 at 3:30 pm  
pursuant to Rule 11.5 of the High Court Rules.*

*Registrar/Deputy Registrar*

*Date: .....*

**Solicitors:**

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[1] At the conclusion of this morning's hearing I informed counsel that the application was dismissed and that costs were to be paid to the intended defendant calculated on a category 2B basis. At that time I informed counsel that the matter in issue was a straightforward negligence claim. Clearly there was a basis to bring it but that the deficiency is in the detail, not in the ability to formulate a claim. I said that in the usual course matters of detail were for dealing with following the issue of proceedings, and not prior to that issue.

[2] I informed counsel that my further reasons would follow in writing. Those further reasons are these.

### **Introduction**

[3] The intended plaintiff (Nagel) applied for pre-commencement discovery. The application was opposed.

[4] Nagel is a family trust. It owns a commercial office building at 97 Manukau Road, Epsom, Auckland (the property).

### **Background**

[5] The intended defendant (Metrowater) provides water and waste water services in Auckland City. It provides water through its water main pipe located beneath Manukau Road, Epsom (the pipe).

[6] On or about 18 May 2007 the pipe burst and approximately 50 million litres of water escaped from the burst pipe. The escaped water sprayed 10 metres into the air cascading on to the property's roof.

[7] Nagel claims as a result the plaintiff suffered significant damage requiring repairs costing \$224,846.48, and incurring \$16,262.89 in rent loss (the loss).

[8] By its draft statement of claim, Nagel asserts Metrowater owed a duty of care to it, including a duty to exercise reasonable skill and care in respect of the pipe so as

to avoid or minimise the risk of the pipe causing damage to the property, in particular to:

- i) Have a competent programme of maintenance for the pipe;
- ii) Ensure that a competent programme of maintenance was in fact carried out;
- iii) Adequately monitor the pipe for defects, damage, and all other risks to the pipe;
- iv) Ensure that all defects, damage and other risks to the pipe were promptly and competently addressed;
- v) Ensure that all work done on the pipe or associated with or within the vicinity of the pipe was carried out competently and with reasonable care;
- vi) Otherwise to ensure that all reasonable care and skill was taken in respect of the pipe so as to avoid or minimise the risk of it causing damage to the property.

[9] Nagel says the defendant breached its duty of care in each of the respects above described.

#### **Application for pre-commencement discovery**

[10] Nagel seeks disclosure of:

- a) Service, maintenance and repair records with respect to the pipe and hydrant;

- b) Documentation of the pipe work installation, including date, inverts and details of the type, grade, pressure rating and size of the piping fittings and related materials;
- c) Records of work carried out by Metrowater or their contractors that may not be directly related to the pipe but was in its vicinity;
- d) Records of other service providers working in the pipe's vicinity;
- e) Reports obtained after the incident investigating causation, including reports obtained by Metrowater's insurers;
- f) Pressure result tests on the pipe;
- g) Records of service pressures and flow rates through the pipe;
- h) Service connection reports, i.e. whether and on whom Metrowater recently connected anyone to the water reticulation system in the near vicinity;
- i) Reports of hydrant maintenance, testing and removal;
- j) Reports of other failures of other pipes of similar age and materials.

[11] Nagel's grounds for application are:

- i) It may be entitled to claim relief against Metrowater for its losses;
- ii) It is impracticable for Nagel to formulate a claim without reference to the documents;
- iii) There are grounds for believing the documents sought may be or have been in Metrowater's control.

## **The evidence**

[12] Mr Peffers is a civil engineer. He joined Metrowater in November 2004 and has been its network manager since 2006. He is responsible for the day to day operation and maintenance of Auckland City's water supply and wastewater collection systems.

[13] Mr Peffers says the claim relates to the bursting of a six inch cast iron water main outside the property.

[14] Concerning the claim that Metrowater failed to "maintain" or "repair" the pipe or that it failed "to identify the pipe was susceptible to burst", he deposes:

- a) The pipe in question was laid in 1955 and had an expected life of between 120 and 240 years when it burst;
- b) He is not aware of any defect in the service, maintenance or repair of the pipe as the section of pipe in question had had no history of problems;
- c) It is not Metrowater's practice to dig up roads to inspect or "maintain" pipes and there is no other way to check whether or not a pipe may be "susceptible to burst";
- d) There could have been a defect in the casting of the pipe in 1955, or the incident could have been caused by someone else working in the area, e.g. upgrading footpaths or provision of power or gas;
- e) Heavy traffic passing overhead can also cause pipes to burst;
- f) He is not aware of any work being undertaken by anyone else in the vicinity of the pipe at around the time of the incident, but such information is available to Nagel from the Auckland City Council which issues road opening permits;

- g) Reports of other failures of other pipes of similar age and materials were not assessed because the surface and ground conditions will vary from place to place;
- h) Although Manukau Road is not an area where earth movement, temperature change or ground movement are likely to cause a water main to burst, such factors cannot be eliminated as potential causes in this instance.

[15] The engineering evidence for Nagel is provided by Mr S D Hogg, an hydraulic engineer. In his opinion the information sought by Nagel's pre-commencement discovery application is required to be assessed to enable determination of the cause of the pipe to burst.

[16] He deposes it is possible a water main can burst for unexplained reasons but this is very unusual. In his experience, pipes usually burst from a combination of factors, including:

- Deterioration from chemicals, corrosion, erosion or electrolytic action;
- Interference from nearby repair works;
- Earth movement;
- Extreme temperature variations;
- Extreme pressures;
- Water hammer;
- Creep;
- Manufacturing defects;
- Installation defects;

- Inappropriate materials;
- Repeated pressure fluctuations;
- Mechanical damage.

[17] Mr Hogg deposes it is impossible to determine the cause of the pipe to burst without the information Nagel seeks.

[18] Addressing Mr Peffers' affidavit evidence, Mr Hogg deposes:

- a) A cast iron pipe has a life of over 100 years but only if it is properly installed, operated, maintained, and not damaged;
- b) Although a pipe may be within its expected life, it still requires proper attention and it may become unreliable;
- c) Metrowater no longer approves cast iron pipes for water supply;
- d) There are many ways to check on and maintain pipes without having to dig up roads, e.g:
  - (i) cast iron pipes below ground ought to have cathodic protection by installation anodes to prevent corrosion. The anodes have a life expectancy of about 10 years and competent pipe maintenance would involve checking them and replacing as necessary;
  - (ii) It is common to undertake corrosional surveys by measuring soil resistivity to measure its corrosive effect;
  - (iii) Remote camera survey of the inside of pipes is a technology readily available and is cost effective.

- (e) A review of the Geographical Information System map of the site shows the presence of a fire hydrant on the pipeline but photographs from the scene of the incident do not show that it is in place. Therefore Metrowater may have removed it at some point and caused damage to the pipe in the process;
- (f) Reports of other failures may assist if surface loading and ground conditions were similar; and they may show bursts at other sites have probably taken place in similar conditions.

### **Considerations**

[19] Nagel's application is made pursuant to r 8.25. It submits there is a real possibility that it has a claim. The evidence, whilst falling short of all the ingredients of a *prima facie* case, may point sufficiently to the existence of a case for relief such as to make it proper to seek preliminary discovery (*Hetherington Ltd v Carpenter* [1997] 1 NZLR 699).

[20] Nagel accepts it needs to show "the real probability of the existence of a claim" (*Heatherington* p 704).

[21] Nagel asserts the evidence shows that every element of the cause of action is present, except that it cannot give exact particulars of the breach of duty of care. Undoubtedly Metrowater had a duty of care to the neighbours of its pipe; that Nagel suffered damage caused by the bursting of the pipe. However, Nagel is concerned it must establish there is a real probability of a cause of action by showing sufficient evidence that Metrowater may have been in breach of its duty of care.

[22] The evidence is that there are reports on the incident; that a request for copies of those has been refused; that Metrowater has not provided any explanation for the burst.

[23] The parties' respective experts are at odds regarding the extent, if any, of a duty of care owed by Metrowater. The experts have clearly different views about the



cause of the pipe bursting. It is not competent for this Court at this time to express any preference in those instances where conflict arises. However, it is inevitable the Court would wish, at some time, to consider the availability of the documents sought by this application.

[24] Applications such as the present one will fail if an applicant cannot show sufficient evidence of a breach of duty, causation or loss. In contrast, Nagel's claim appears to have merit at least in sufficient terms to found a proper basis for a claim. Also, it appears undisputed that the bursting of pipe has caused Nagel's loss.

[25] I accept Nagel has shown there is evidence which points sufficiently to the existence of a claim for relief. Nagel says its present difficulty relates to its inability to give exact particulars of its claim of a breach of duty of care.

[26] Metrowater's position is that Nagel having, albeit in draft, pleaded its claim, it evidently believes there is already sufficient evidence in support of it. Therefore Nagel has been able to formulate its negligence claim without pre-commencement discovery. Further, Metrowater accepts that in the form presented, the draft statement of claim could not be struck out for want of sufficient particulars. Therefore it says an order for pre-commencement discovery is not necessary because Nagel has not found it impossible or impracticable to formulate its claim without it.

[27] Metrowater submits that Nagel really seeks pre-commencement discovery in order to evaluate the strength of its proposed negligence claim in advance of issuing proceedings. This, counsel submits, is neither appropriate nor permissible under r 8.25.

[28] Nagel has sought to satisfy the jurisdictional basis by claiming it will have difficulty in pleading particulars of breaches. But if this was the basis justifying a claim of pre-commencement discovery, then applications like the present one would be a routine feature of civil litigation. The rule permits discovery where it is otherwise impossible or impracticable to formulate a claim. That means that pre-commencement discovery may be directed if an intended plaintiff is unable to plead a claim in accordance with the requirements of the rules.

[29] Sometimes the provision of pre-proceedings discovery will enable an intending plaintiff to consider whether a claim could be filed. I am doubtful if that objective would be achieved in this case. Clearly, discovery is going to be a lengthy and costly process in this claim. That much is clear from the extent of documents that Nagel has indicated it wishes access to. Likely there will be challenges to Nagel's claim regarding the extent of documents sought. These matters are best left until after the proceeding has issued.

[30] Pre-commencement discovery is limited to what is required to enable a claim to be commenced. In this case, documents sought by Nagel goes beyond that purpose.

[31] It is not uncommon for a claim to be filed in the expectation that further particulars of it will in due course be required. Pre-commencement discovery was not intended to enable a plaintiff to have the comfort of knowing what proof is available before a claim is initially pleaded.

[32] Whilst there might be much to commend full disclosure of relevant documents at the earliest possible stage in a dispute, at present r 8.25 limits pre-commencement discovery to situations of impossibility or impracticability. Considerations of reasonableness are required in interpreting those words which define the limits but it is clear that pre-commencement discovery is to be available only in exceptional cases.

[33] In the usual course, the difficulties that Nagel submits hinder its ability to formulate its claim properly, i.e. "giving exact particulars of breach" are matters which, after a statement of defence has been filed, are the subject of requests for particulars. I accept the submission that were it otherwise and if wide ranging discovery was available pre-commencement, therein lies a potential to put the parties to unnecessary inconvenience and expense while significantly delaying the commencement, and thus the resolution of the dispute.

[34] Although Nagel asserts deliberate silence following its investigation of the incident, there is, in the circumstances of this case, no basis for inferring that

Metrowater has something to hide. Metrowater's case is that the pipe had no history of problems and that it had no reason to suspect that it might burst.

[35] There is nothing in this case which is much out of the ordinary in a negligence claim, certainly nothing of an exceptional kind which would warrant the grant of the application sought.

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Associate Judge Christiansen