IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV-2007-443-000289

BETWEEN	NEIL STUART JOHNSTON Plaintiff
AND	CHRISTOPHER FREDERICK SCHURR First Defendant
	DEEM & SHEARER Second Defendant

Hearing: 27-30 October and 2-5 November 2009

Appearances: E J Hudson and D G Chesterman for the Plaintiff
P J Mooney for the First Defendant
J M Morrison for the Second Defendant

Judgment: 5 November 2009

(ORAL) JUDGMENT OF DUFFY J
[Re an Application by the Plaintiff to File an Amended Statement of Claim]

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[1] The trial has reached the stage where all parties have closed their cases and all that remains is for the Court to hear closing submissions. In these circumstances, the plaintiff has applied to amend his statement of claim by adding additional allegations against the first defendant.

[2] The proposed amendments are set out in the draft second amended statement of claim. They comprise two groups of additional allegations. The first is additions to the subparagraphs of paragraph 23 of the amended statement of claim. The additions run from paragraph 23.3 through to paragraph 23.7. The second additions are in the form of an additional subparagraph to paragraph 26 of the amended statement of claim.

[3] In support of the proposed amendments, the plaintiff argues that they do no more than provide more detail in relation to the allegations pleaded in the substantive paragraphs to which the proposed additional subparagraphs relate. It is said that the proposed amendments do not raise a new cause of action, and they do not cause the first defendant any significant prejudice.

[4] The amendments are opposed. Before dealing with the arguments for and against permitting the amendments, it is necessary to outline, in general terms, what is in issue in this proceeding.

[5] This proceeding is the result of an unfortunate accident the plaintiff suffered on the eve of signing a matrimonial property agreement with his former wife. The result of the accident meant that, for some years, the plaintiff was unable to manage his own affairs, and so they were managed by a property manager appointed under the Protection of Personal and Property Rights Act 1988. The first defendant is that manager. The terms of the first defendant's appointment as property manager excluded him from having certain powers relating to resolution of the plaintiff's matrimonial property. The precise scope of the powers excluded is a matter for argument in the substantive proceeding. One of the outcomes of the plaintiff's property being managed under the Protection of Personal and Property Rights Act is that his matrimonial property issues with his former wife were not resolved until

some five years after the accident when the plaintiff had regained responsibility for managing his affairs.

[6] The plaintiff now claims against the first defendant that there was a failure on his part as property manager to use the plaintiff's property in the plaintiff's best interests. It is a negligence action based upon the omission of the first defendant to act in a reasonable and competent way. The crucial omission, in general terms, is alleged to be a failure to take steps to resolve the matrimonial property division with the plaintiff's former wife.

[7] The allegations currently pleaded against the first defendant in paragraph 23 of the amended statement of claim are that the first defendant failed to use the property of the plaintiff in the promotion and protection of the best interests of the plaintiff. These failures are currently particularised as being:

a) Failing to take all appropriate or any steps to appoint either a co-manager under the Act, or solicitor to effect settlement of outstanding relationship property issues of the plaintiff and the plaintiff's then wife (paragraph 23.1); and

b) Failing to take all appropriate or any steps to appoint either a co-manager or solicitor to take proceedings under the Property (Relationships) Act 1976 (paragraph 23.2).

[8] These are general allegations of a failure to take all, or any appropriate steps. What those steps should have been would need to be established through evidence or argument.

[9] The proposed amendments to paragraph 23 are a series of subparagraphs, 23.3 to 23.7, which provide specific examples of the acts that the first defendant is alleged to have failed to perform.

[10] The first defendant opposes the amendments on the grounds of prejudice. He also argues that proposed additions of subparagraphs 23.3 to 23.7 raise issues which

were either not properly covered in evidence, or could have been better covered in evidence both by the plaintiff and the first defendant. Insofar as the plaintiff may not have led evidence to establish the allegations in the proposed additions, this is more relevant to arguments to be made in closing submissions. In relation to the amendments in the new subparagraphs 23.3 to 23.7, my impression of the first defendant's submissions was that the first defendant accepted that the bulk of the particulars in those subparagraphs would fit within the current general particulars as pleaded in subparagraphs 23.1 and 23.1 of the current amended statement of claim.

[11] My reading of the proposed additions of subparagraphs 23.3 through to 23.7 is that in a more specific way, they set out alleged failures on the part of the first defendant. Those failures have been covered in evidence of both the plaintiff and the first defendant, both in terms of witness testimony, and documentary evidence in the agreed bundles of documents.

[12] When I consider the general approach taken to amendment of pleadings, which is now governed by r 1.9 of the High Court Rules, I consider the two most helpful cases are *Elders Pastoral Ltd v Pemberton* (1990) 2 PRNZ 188 and *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383. Those two cases make it clear that the focus for a Court in dealing with applications such as these is to consider the interests of justice, whether or not there is significant prejudice to the opposing party, and whether or not the amendment will cause significant delay.

[13] In terms of the interests of justice, it is obvious that the plaintiff should be able to pursue its case in a way that best fits with the evidence that has been produced to the Court. An alternative for a plaintiff who seeks to adjust his or her pleadings to reflect better the evidence that is before the Court is to discontinue and start again. That option may not be available here, due to the passage of time. No one has dealt with the effect of the Limitation Act 1950, which must be affected here by the impediment the plaintiff would have been under during the time he was subject to the Protection of Personal and Property Rights Act.

[14] I consider that it is in the interests of justice for the statement of claim to provide greater specificity about the alleged failures the first defendant is said to

have committed. I propose, therefore, to allow the amendments in relation to paragraph 23.3 to paragraph 23.7, for the reason that I see those amendments as simply providing greater detail to the existing paragraph 23. In my view, even if I did not allow the amendment, I consider that the plaintiff would be free in its closing to raise the matters identified as the new particulars, simply as evidence to support the general failings that are currently pleaded.

[15] I then turn to the proposed amendment in subparagraph 26.2. The first defendant contends that this proposed amendment introduces a new cause of action. The first defendant argues that this proposed amendment refers to a loss of opportunity to settle property issues in or about October 1999, is either a new cause of action, or, if not a new cause of action, then it is a new material allegation against the first defendant.

[16] The plaintiff's argument in response is that he must prove a loss of chance of arriving at an outcome. He contends that, as currently pleaded, the loss of chance is that of an opportunity to settle the matrimonial property issues as agreed in December 1998. But the plaintiff argues that this is but one aspect of loss. The new particular in subparagraph 26.2 alleges a loss of opportunity to settle matrimonial property issues in or about October 1999. This is said to be an allegation which goes to the measure of loss, rather than to introduce a new cause of action based on an entirely separate loss.

[17] It is important to consider what the plaintiff's case is about. The plaintiff's case is based on an alleged failure by the first defendant to use the plaintiff's property in the plaintiff's best interests. Most loss of chance cases involving professional advisors focus on the loss of chance for the plaintiff, due to the professional advisor not providing the plaintiff with competent advice. In those cases, the plaintiff has always been competent to act on and receive the advice. In this particular case, at the time the alleged failures occurred, the plaintiff was not competent to act on any advice. The first defendant was, in essence, standing in for the plaintiff, due to the plaintiff's inability to be able to look after his own property.

[18] It is, therefore, important to look at what the first defendant in this role is alleged to have failed to have done. He is alleged to have failed to use the property of the plaintiff in the promotion and protection of the best interests of the plaintiff. In essence, it is being said that the first defendant has acted negligently by omitting to resolve the plaintiff's matrimonial property issues. The loss the plaintiff is alleged to have suffered is the loss of the chance to have his matrimonial property resolved earlier than it was. This, in turn, is alleged to have led to a lost opportunity to enjoy the capital gain in property that would have been in his sole ownership if the matrimonial property issues had been resolved earlier than they were.

[19] The decision in *Benton v Miller and Poulgrain (A Firm)* [2005] 1 NZLR 66 is one of the leading decisions on loss of chance. It is relevant to this proceeding. The Court of Appeal's decision makes it clear that when it comes to looking at how a plaintiff would have acted in the absence of a breach of duty, the Court takes an all or nothing approach; so the plaintiff must show that it is more likely than not that he or she would have acted in a particular way. The Court acts on the assumption that this is the way the plaintiff would have acted. If this is not established as being more likely than not, then the Court acts on the basis that the plaintiff would not have acted in that particular way (at [47]). With the present case, given the alleged negligent omission to act sooner, the focus must be on what would a competent property manager acting in the first defendant's role be more likely than not to do in those circumstances. The key question, therefore, is whether a competent property manager in the circumstances of the first defendant would, for the duration of his appointment in this role, omit to take any steps to resolve the plaintiff's matrimonial property issues.

[20] In *Benton*, the Court of Appeal makes it clear that when it comes to assessing what someone would have done had proper advice been given, the Court looks at that on an all or nothing basis. But then, when it comes to determining how third parties would have reacted had the correct steps been taken, the test for that determination is based on loss of chance principles. Hence, when it comes to determining what might have been the reactions of the plaintiff's wife, Christine Johnston, to the overtures of a property manager, attempting to resolve matrimonial property issues, this must be done on loss of chance principles: see

Benton at [49]-[50]. It follows that if I were to conclude that a competent property manager would have taken steps to resolve the matrimonial property issues, I would then be using loss of chance principles to determine what were the chances of Mrs Johnston agreeing to participate in any such resolution. When it comes to assessing those chances, broad judgments are called for. In *Benton*, the Court of Appeal said at [50]:

> … broad judgments are called for. At one end of the spectrum, very low probabilities are unlikely to be reflected in an award of damages. So if the chance of avoiding an adverse event is as low as say one in ten, a Court will probably reject the claim rather than fix damages at 10 percent of the cost to the plaintiff associated with those adverse events. At the other end of the spectrum that approach is sometimes, but not always, adopted. So a 90 percent chance of avoiding an adverse event may result either in complete recovery of all losses associated with that adverse event …

The Court of Appeal also refers to discount of contingencies.

[21] It seems to me, therefore, that the issues I have to decide are: whether or not a competent property manager would have acted to resolve the matrimonial property; and, if so, I then have to assess what was the likelihood of him being able to resolve those issues, given that the outcome depended on how Mrs Johnston might react. If I were to find that there was no evidence from which I could draw an inference as to how Mrs Johnston might have reacted, it would be speculative to make any assessment on what she might have done. Hence, there would be little, if any, chance of the matrimonial property being resolved. But if I were to find there was evidence from which I could conclude that Mrs Johnston might have been open to resolving matrimonial property issues, then it would also be open to me to conclude that this chance was lost, as a result of the first defendant's omission to act in this regard.

[22] When I look at the matter in this way, it seems to me that the new particular in paragraph 26.2 is not so much introducing a new cause of action, as pointing to another example of evidence which would show that there was a real chance to resolve matrimonial property issues. I do not, therefore, see the introduction of particular 26.2 as a new cause of action. It seems to me to be something that gives greater specificity to assessing the loss of opportunity, as well as providing a

measure of that loss. Furthermore, if the loss of opportunity were to be limited to the end of 1998 and early 1999, it is difficult to see why there was so much documentary evidence included in the agreed bundle of documents that recorded matters referring to the plaintiff's matrimonial property issues and which could be referenced to the first defendant. This material goes from mid 2000 and beyond. The inferences to be drawn from this material are in dispute. However, if the loss as currently pleaded was always to have been confined to the early period immediately following the plaintiff's accident on 6 January 1999, it is difficult to see the relevance of much of the documentary evidence that all parties have agreed to being included in the agreed bundle. The presence of much of this material reveals that the parties' evidence has already anticipated the issue that is now expressly covered in the proposed subparagraph 26.2.

[23] I accept the plaintiff's argument that subparagraph 26.2 does little more than to provide an alternative measure of loss. Furthermore, this measure of loss is less than the measure that is already pleaded. Hence, the result of the amendment is not to increase the measure of loss the first defendant currently faces. I consider that it is in the interests of justice for the two alternative measures of loss to be pleaded. I do not consider that the addition of a lesser measure of loss will significantly prejudice the first defendant. I propose, therefore, to allow the amendments.

[24] I am conscious that the first defendant is facing to have to deliver his closing address immediately after the delivery of this judgment. His closing address will have already been prepared and, therefore, he may not have addressed the issues in the way that he may now need to do. Accordingly, I propose to give the first defendant time to prepare arguments on the proposed amendments. I invite submissions from the parties on this point.

Duffy J