IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV 2008-409-001071

BETWEEN	ANDREW ROSS LISTER AND 123 TRUSTEES LIMITED AS TRUSTEES OF THE LISTER TRUST Plaintiffs
AND	2 HARROGATE STREET LIMITED First Defendant
AND	PAUL MAURICE FOLEY Second Defendant
AND	FOLEY DESIGN LIMITED Third Defendant
AND	PAYNTER INVESTMENTS LIMITED Fourth Defendant

Hearing: 12 November 2009

Counsel: DG Smith for plaintiffs
OG Paulsen for first defendant
KM Dougherty for second and third defendants on a watching brief basis only

Judgment: 12 November 2009 at 4:30 pm

JUDGMENT OF ASSOCIATE JUDGE FAIRE
[on applications (1) striking out plaintiffs' statement of claim; and (2) for an order transferring the strike out application to the Court of Appeal]

Solicitors: Benton Law, PO Box 74 225, Auckland for plaintiffs
Cavell Leitch Pringle & Boyle, PO Box 799, Christchurch for first defendant
Cunningham Taylor, PO Box 1003, Christchurch for second and third defendants

[1] The first defendant makes two applications. The first seeks orders striking out the plaintiffs' statement of claim against the first defendant. The second seeks the transfer of the hearing of the strike out application to the Court of Appeal.

[2] Counsel have filed helpful and extensive submission which I have carefully considered. I suggested to counsel that there was no need for oral addresses unless they specifically requested it. That was because I had a clear view of the matter which, in one sense, was no surprise to Mr Paulsen. Counsel advised that they did not wish to further address in the circumstances.

[3] It is appropriate that I briefly refer to the Court's jurisdiction to strike out a statement of claim.

[4] Rule 15.1 provides:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.
>
> (2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.
>
> (3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.
>
> (4) This rule does not affect the court's inherent jurisdiction.

[5] The principles applicable to a strike out application were confirmed by the Court of Appeal in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 at 267 where the Court said:

> A striking-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the causes of action must be so clearly untenable that they cannot possibly succeed. (*R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR 289 at pp 294-295; *Takaro Properties Ltd (in receivership) v Rowling* [1978] 2 NZLR 314 at pp 316-317); the jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material (*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at p 45; *Electricity Corporation Ltd v Geotherm Energy Ltd* [1992] 2 NZLR 641); but the fact that applications to strike out raise difficult questions of law, and require extensive argument does not exclude jurisdiction (*Gartside v Sheffield, Young & Ellis*).

[6] The Supreme Court in *Couch v Attorney General* [2008] 3 NZLR 725 at [33] said:

> It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be "so certainly or clearly bad" that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing. And in both *X (Minors) v Bedfordshire County Council* and *Barrett v Enfield London Borough Council* liability in negligence for the exercise or non-exercise of a statutory duty or power was identified as just such a confused or developing area of law. Lord Browne-Wilkinson in *X* thought it of great importance that such cases be considered on the basis of actual facts found at trial, not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike-out. Lord Slynn in *Barrett* was of the same view:
>
> > ". . . the question whether it is just and reasonable to impose a liability of negligence is not to be decided in the abstract for all acts or omissions of a statutory authority, but is to be decided on the basis of what is proved."

[7] If a pleading is capable of correction by amendment the Court will generally provide plaintiffs with an opportunity to do so: *Marshall Futures v Marshall* [1992] 1 NZLR 316. In addition, I take cognisance of the rulings issued in relation to partial strike outs of statements of claim: see *Whitman v Airways Corporation of New Zealand Ltd* (1994) 8 PRNZ 155 and *Apple Fields v Apple and Pear Board Marketing Board* HC WN CP35-94 21 April 1994 Doogue J.

[8] The first defendant seeks to strike out the two causes of action pleaded against it.

[9] The first defendant admits to being the developer of a motel complex on the site known as “Drifters Inn” at 2 Harrogate Street, Hanmer Springs.

[10] The plaintiff is a trust. The trust was nominated by the named purchaser in a sale and purchase contract entered into with the first defendant as vendor.

[11] The motel complex is alleged to suffer defects as a result of water damage. In short, this is a leaky building case.

[12] In its first cause of action the plaintiffs plead breach by the first defendant of various warranties concerning building requirements which are contained in the sale and purchase contract.

[13] The first defendant’s position is that it did not enter into the contract with the plaintiffs and therefore is not contractually liable to the plaintiffs.

[14] The position of a nominee was considered by the High Court, Court of Appeal and Supreme Court recently. The Court of Appeal and Supreme Court references are respectively *Laidlaw v Parsonage* [2009] NZCA 291 and [2009] NZSC 98. Those decisions established the principle that a purchaser’s nominee under an agreement for sale and purchase will, due to s 4 of the Contracts (Privity) Act 1982 obtain the benefit of the contract and the right to sue on it.

[15] Mr Paulsen acknowledged that to succeed he must establish that *Laidlaw v Parsonage* was wrongly decided. Although there might be a small difference in the facts of the present case relating to the time of the advice of the nomination, I am of the view that that fact does not take this case outside the law as stated by the Court of Appeal and confirmed by the Supreme Court when leave to appeal was declined in *Laidlaw v Parsonage.*

[16] Accordingly, I am bound by the Court of Appeal decision. The law in New Zealand has been clearly pronounced on this subject. Accordingly, there is no justification for an order striking out the first cause of action.

[17] The plaintiffs plead, in the alternative, a cause of action in tort. They allege that the first defendant owed a duty of care to the plaintiffs as a later purchaser of the property by virtue of the fact that the first defendant was the developer. The duty claimed is a duty to ensure that the motel was built in a proper and workmanlike manner and in accordance with the Building Code and to ensure that its contractors/agents were properly supervised in the construction of the motel.

[18] I bear in mind the caution in approaching a strike out application where the Court is asked to consider whether a duty of care exists, as was expressed by the Supreme Court in *Couch v Attorney General.*

[19] Mr Smith drew attention to the Court of Appeal decision in *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234. In that case the Court held that a development company had a duty of care to see that proper care and skill was exercised in the building of a block of flats and that the duty could not be avoided by delegation to an independent contractor. Bearing in mind that the contract cause of action remains, as I have earlier ruled, together with the fact that I have considerable doubt as to whether, on a strike out application, the existence of the duty claimed can properly be determined, I conclude, that an order to strike out the second cause of action is not appropriate on this application.

[20] There remains the question, however, of whether this application should be transferred to the Court of Appeal pursuant to s 64 of the Judicature Act 1908. Section 64 provides:

> **64 Transfer of civil proceedings from High Court to Court of Appeal**
>
> (1) If the circumstances of a civil proceeding pending before the High Court are exceptional, the High Court may order that the proceeding be transferred to the Court of Appeal.
>
> (2) Without limiting the generality of subsection (1), the circumstances of a proceeding may be exceptional if—
>
> (a) A party to the proceeding intends to submit that a relevant decision of the

Court of Appeal should be overruled by the Court of Appeal:

(b) The proceeding raises 1 or more issues of considerable public importance that need to be determined urgently, and those issues are unlikely to be determined urgently if the proceeding is heard and determined by both the High Court and the Court of Appeal:

(c) The proceeding does not raise any question of fact or any significant question of fact, but does raise 1 or more questions of law that are the subject of conflicting decisions of the High Court.

(3) In deciding whether to transfer a proceeding under subsection (1), a Judge must have regard to the following matters:

(a) The primary purpose of the Court of Appeal as an appellate court:

(b) The desirability of obtaining a determination at first instance and a review of that determination on appeal:

(c) Whether a Full Court of the High Court could effectively determine the question in issue:

(d) Whether the proceeding raises any question of fact or any significant question of fact:

(e) Whether the parties have agreed to the transfer of the proceeding to the Court of Appeal:

(f) Any other matter that the Judge considers that he or she should have regard to in the public interest.

(4) The fact that the parties to a proceeding agree to the transfer of the proceeding to the Court of Appeal is not in itself a sufficient ground for an order transferring the proceeding.

(5) If the High Court transfers a proceeding under subsection (1), the Court of Appeal has the jurisdiction of the High Court to hear and determine the proceeding.

[21] In relation to the jurisdictional basis for the transfer, I acknowledge that Mr Paulsen intends to submit that the Court of Appeal decision in *Laidlaw v Parsonage* was wrongly decided. I note, however, that the Supreme Court has concluded there is no justification for leave to appeal to it.

[22] When I consider s 64(2)(b) I conclude, having regard to the review of the law that has already been undertaken, that this matter does not raise an issue of considerable public importance which needs to be determined urgently. I accept Mr Smith's submission that the law is perfectly workable as stated by the Court of Appeal and confirmed in the Supreme Court's leave decision. When I consider the

matters that are set out in s 64(3) I find no support for the application to transfer in this case.

[23] Whilst I appreciate that this case may be the subject of further reviews or appeals, I do not see that as a justification for delaying passage of this matter to a final conclusion either by a judgment of the Court or by the parties embarking on an appropriate settlement process. If my judgment is challenged, the review pursuant to s 26P(1) of the Judicature Act 1908 and in reliance on r 2.3 of the High Court Rules requires that a notice of application must be filed within five working days of this judgment. It is for that reason that I am allowing a short period after the delivery of this judgment for a case management conference. I have taken the opportunity, while counsel were before me, to establish matters which should be discussed at that conference and accordingly that is the reason for the agenda which has been set in the orders made later in this judgment.

Costs

[24] I discussed this matter also with counsel. Both were agreed that it is a Category 2 case and that Band B was appropriate. There was no agreement as to the timing of payment of costs. If no review of my decision is sought within the time specified in the High Court Rules, the Registrar will refer the file to me and I will enter costs in favour of the plaintiffs based on Category 2 Band B of the High Court Rules, together with disbursements as fixed by the Registrar. If a review is filed, the costs will be reserved but on the understanding that I have fixed quantum pursuant to Category 2 Band B.

Orders

[25] I order:

a) Both applications are dismissed;

b) A case management conference shall be held by telephone at 2:30pm on 1 December 2009. The following matters will be discussed:

i) Whether there should be joinder of any additional parties;

ii) settlement and whether a mediation or a Judicial settlement conference should be ordered;

iii) other outstanding interlocutory orders or directions sought;

iv) trial issues;

v) trial duration, the fixing of a trial date and the making of any special trial directions that are required.

Counsel shall file and serve memorandum dealing with those items two working days before the conference; and

c) quantum of costs are fixed based on Category 2 Band B. They are reserved having regard to the matters referred to in [24].

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JA Faire
Associate Judge