IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2008-404-006556

BETWEEN	OTEHA INVESTMENTS LIMITED Plaintiff
AND	SIMON YATES PLANNING LIMITED First Defendant
AND	NORTH SHORE CITY COUNCIL Second Defendant
AND	APEX SURVEYING LIMITED THIRD PARTY

Hearing: 29 June 2009

Counsel: P Chambers for Plaintiff
T Clark for First Defendant
W Loutit for Second Defendant
No appearance for Third Party

Judgment: 23 December 2009 at 11.30 am

RESERVED JUDGMENT OF ASSOCIATE JUDGE SARGISSON
(Strike Out Application)

This judgment was delivered by me on ***23 December 2009*** *at* ***11.30 am*** *pursuant to Rule 11.5 of the High Court Rules*

Registrar/Deputy Registrar

Date ....

Solicitors:
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[1] The plaintiff, Oteha Investments Ltd, has commenced this proceeding against two defendants, Simon Yates Planning Limited and North Shore City Council, seeking damages for losses it claims to have suffered totalling in excess of $4,000,000, because of the conduct of both defendants. In its statement of claim the plaintiff pleads three causes of action alleging breach of contract, mis-representation and negligence against the first defendant, and one cause of action against the second defendant alleging negligence.

[2] The second defendant has applied to strike out the claim against it under r 15.1 of the High Court Rules on the grounds that it discloses no reasonably arguable cause of action. The relevant part of the provision states:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The Court may strike all or part of a pleading if it –
>
> (a) Discloses no reasonably arguable cause of action…

[3] It is the second defendant's application that is before me for determination.

[4] The second defendant's contention is that even assuming that the facts the plaintiff has pleaded are capable of proof at trial, the claim against it falls foul of r 15.1(1)(a) because, on the basis of established New Zealand authority, it is untenable and should be struck out.

[5] The broad issue for determination is whether the second defendant is right. The plaintiff says its claim in negligence raises a duty of care that is novel and as such, it is inappropriate to strike it out.

Background and Pleading against the second defendant council

[6] The proceedings concern land the plaintiff owns at 97 Oteha Valley Road, Albany, North Shore City, and an application it made for resource consent to develop that land, which was ultimately withdrawn. A fresh application was submitted at a later date.

[7] The plaintiff alleges in its statement of claim that:

a) It is a property investment company and acquired the property with the intent of developing a comprehensive residential development that was to include 24 units for lease to Housing New Zealand;

b) Prior to 8 December 2008 when it formally lodged the application for resource consent, its professional advisers met twice with council officers to discuss the application at two pre-lodgement meetings;

c) The meetings were held in August and September 2006, the first of which was attended by its planning consultant, to assess the planned application against all of the provisions of the council's district plan. Council officers failed to identify two "fundamental matters" or requirements:

   i) the first, under both the council's district plan and the Resource Management Act 1991, for an esplanade reserve where sub-divisions adjoin a stream more than 3 metres in width,

   ii) and the second under the district plan, for the extension of Springvale Drive.

d) The result was that when it lodged its application for resource consent on 8 November 2006, it did not make provision for either requirement and:

> 17. In or around mid-January 2007, Paul Sousa, consultant planner for the [council], contacted the first defendant to arrange a site visit in order to discuss "two fundamental matters" requiring resolution before [the application] could be further progressed.

e) After much discussion and correspondence, by about 29 March 2007 the councils' concerns that the application did not provide for the

extension had been resolved. However the requirement for reserves remained in issue and placed it in the position where:

i) ultimately it had to withdraw its application for resource consent and had to instruct new consultants to lodge a fresh consent to comply with the council's reserve and other requirements, and

ii) its negotiations with Housing New Zealand for the lease of 24 apartments in the proposed development were terminated because of the delays in obtaining resource consent.

[8] The claim goes on to plead that the plaintiff's revised application for resource consent, which did take into account all of the matters raised in the council's correspondence, was not lodged until 10 August 2007, and was not granted by the council until 21 January 2008. It also alleges the delay had an impact on the plaintiff's contractual arrangements with Housing New Zealand, which caused it serious loss.

[9] At the heart of the claim is the plaintiff's contention that the council owed it a duty when discussing the planned application at the pre-lodgement meetings, to take reasonable care to:

a) Give accurate advice about the requirements arising under its district plan and the Act and specifically to ensure the applicant was told about the need to make provision in its resource consent application for an esplanade reserve and a road;

b) To identify any and all potential conflicts between plaintiff's proposed development and the requirements of the District Plan and the Act.

[10] The duty is pleaded in the following way:

> … to competently and fully inform and/or advise of the two Fundamental Matters, brought to the attention of the plaintiff by the second defendant by way of its 31 January 2007 and 29 March 2007 correspondence to the first

> defendant, prior to the plaintiff lodging its Application for resource consent and, in particular, at the two pre-lodgement meetings attended at the second defendant's offices by the plaintiff and charged for by the second defendant, to the plaintiff.

[11] The plaintiff further alleges that the council officers who attended the pre-lodgement meetings were negligent and did not identify the two requirements.

[12] The plaintiff claims damages for:

a) The reduction in profit between the original development under the first resource consent application and the revised development;

b) Interest on the cost of the purchase of land between the time the first application was filed and the revised application was granted;

c) The cost of preparing and lodging the revised application;

d) Lost income from a potential agreement to lease apartments to Housing New Zealand that it alleges it was unable to conclude due to the delay in obtaining resource consent.

[13] The plaintiff's proceeding is also brought against its planning adviser, Simon Yates Planning Ltd, who prepared and lodged the first resource consent application. The claim against Simon Yates is not the subject of the strike out application, but I mention it for completeness. The plaintiff alleges that this defendant represented in its contract, and while being instructed, that in preparing the resource consent application it would identify accurately all issues or requirements under the Act and the district plan. The plaintiff alleges that the plaintiff did not identify the requirements for the road extension through the site and the esplanade reserve prior to filing the first application for resource consent, and that this failure breached its duty of care.

[14] It is not in dispute that the council publishes information about the process of resource consent applications in which it recommends that a prospective applicant attend a pre-application meeting. It is also accepted that the council's website states

that such meetings provide an opportunity for the applicant to obtain information about its development concepts and to find out what information needs to be supplied when applying for consent. The website states, among other things, that:

> You can discuss general requirements with your planning, building or engineering information officers, but may be advised to engage the services of an independent consultant depending on the complexity of the proposal…
>
> When concepts have been developed into detailed plans, you have filled in the application form, and you have all the information required, you attend consent lodgement meeting at Environmental Services.

[15] The council's position is that pre-lodgement meetings, (as opposed, it seems, to consent lodgement meetings), are of a preliminary nature only, as any proposal being discussed at such a meeting is hypothetical and not formally the subject of an application for resource consent that has been lodged with the council. Further, that pre-lodgement meetings do not provide an opportunity for the council to conduct a site visit, which is often essential to a thorough understanding of a resource consent application once lodged. Nor do they provide an opportunity for the council to thoroughly assess an application in accordance with the relevant statutory criteria under the Act and the district plan, as this can only happen after the application is finalised and lodged.

Issues for determination

[16] It was common ground at the hearing that the key question in this strike out application is a narrow one. It is whether the council may owe a duty of care to potential applicants at pre-lodgement meetings to identify any and all potential conflicts between a proposed development or subdivision, and the requirements of the district plan and the Act.

[17] It was also common ground that I should take a cautious approach to the strike out application and should only entertain the possibility of an order to strike out if I am satisfied that the above question has been resolved by New Zealand authority, such that there is a clear and established impediment to recognising the duty the plaintiff contends for. This understanding is based on, and recognises, the intensely fact-specific exercise that the Court must undertake when considering

whether to recognise novel duties of care, most recently referred to in the Supreme Court's judgment in C*ouch v Attorney General* [2008] NZSC 45. There, Elias CJ described the exercise in the following way:

> 53. **Except in cases of clear impediment** (such as where tortious liability is inconsistent with statute), the judgment whether as a matter of proximity and policy it is right to recognise a duty of care in novel circumstances will usually be fact-specific. Lord Steyn in *Gorringe v Calderdale Metropolitan Borough Council* emphasised the especial need to focus closely on the facts and background social context when negligence arises in the exercise of statutory duties and powers, a subject he regarded as one of "great complexity and very much an evolving area of the law". Kirby J in *Pyrenees Shire Council v Day* thought it best to accept that liability in negligence in such hard cases is fixed by reference to a "spectrum" of factors of the kind examined in *Stovin v Wise* by Lord Nicholls and by the "candid evaluation of policy considerations" by Lord Hoffmann in the same case. We agree with that view. It is effectively the approach taken in *South Pacific Manufacturing*.
>
> [Emphasis added]

[18] It is trite that such an exercise cannot be conducted on a strike out application. Except in cases of clear impediment, as Elias C J said, the exercise is one for trial. Her Honour indicated a clear impediment arises where the question whether a particular duty of care is recognised has already been resolved by New Zealand authority and therefore can be confidently excluded: see *Couch* at [2].

[19] The same point was averted to in the majority judgment delivered by Tipping J in the following extract:

> 78 It is appropriate to refer briefly to the basis on which New Zealand Courts have hitherto decided whether a duty of care is owed in a situation not covered by previous authority. Neither side contended that the established approach should be revisited by this Court. In short, whether a duty of care is owed has been determined on the basis of whether it is fair, just and reasonable to impose it. Proximity and policy are the two headings under which the Courts have determined that ultimate question. The leading case is *South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd*. That case was followed in *Attorney General v Carter*, where the Court of Appeal said:
>
>> Whether it is fair, just and reasonable to hold that a duty of care is owed by defendant to plaintiff **in a situation not covered by authority is conventionally addressed in terms of proximity and policy: see for example** *Price Waterhouse v Kwan* (supra) at 41 para [6], and of course *South Pacific Manufacturing Co Ltd v New*

> *Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282. Generally speaking, proximity is concerned with the nature of the relationship between the parties whereas policy is concerned with the wider legal and other issues involved in deciding for or against a duty of care.
>
> 79 The most recent decision of the Court of Appeal on this subject is *Rolls-Royce New Zealand Ltd v Carter Hold Harvey Ltd* in which the Court adopted the same approach and listed a number of factors which it considered may be found helpful in considering the proximity and policy issues. If proximity is found to exist it is necessary to examine what influence wider policy considerations may have on whether it is appropriate to impose a duty of care. As the point was not argued we do not propose to discuss whether establishing proximity gives rise to any presumption of a duty of care.
>
> [Emphasis added]

[20] It follows that it will only be if there is established authority that a territorial local authority does not owe such a duty that the present claim should be struck out. Otherwise, it is common ground that the alleged duty of care cannot be confidently excluded and the claim at this stage must be allowed to proceed.

Discussion

[21] I agree with the council's contention that the present situation is covered by established authority, and in particular that the Court of Appeal's decisions in *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331 (CA) and *Bella Vista v WBPDC* [2007] 3 NZLR 422, which make it clear beyond argument that the kind of duty alleged in this case not recognised.

[22] Conversely, I am unable to agree with the submissions made by counsel for the plaintiff and for the first defendant that these decisions are not authority for the plaintiff's contention, and that the question whether local authorities owe a duty of care in relation to the advice its officers give at pre-lodgement meetings is a novel one that should, in accordance with *Couch*, be left for determination at trial.

[23] For reasons I will come to, I consider that the duty of care alleged in this case is not novel, that it is covered by the line of Court of Appeal authority in *Morrison* and *Bella Vista,* and that it is possible therefore to conclude at this stage that the

claim against the council discloses no reasonably arguable cause of action under r 15.1 of the High Court Rules.

[24] In *Morrison* the circumstances concerned an error in the council's interpretation of its district scheme and considering an application for planning consent. The council had interpreted the expression "neighbourhood" as meaning "street" when it initially gave the applicant, Mrs Morrison, and her surveyor oral advice on her proposed application for a dwelling house. The council told her that her proposed dwelling would satisfy the relevant plan requirements. However, the contrary was later found to be the case, and the council refused to grant consent to her application. Subsequently, she appealed and the application was granted by the Planning Tribunal as a specified departure.

[25] Mrs Morrison brought proceedings against the council for the increased costs of the development over and above those she would have incurred if her application had simply been granted in the first instance, and seeking general damages. One of the issues in the claim was whether a territorial local authority charged with the administration of a district plan owed a duty of care to those affected by it, to place a construction on the words used in the plan that was reasonable having regard to the object of the plan, and fair to those affected by it. In the District Court, Mrs Morrison was successful. On appeal to the High Court the finding of a duty of care was rejected essentially for reasons of policy. On further appeal, the Court of Appeal held that there was the necessary degree of proximity but that there were overwhelming policy reasons for denying a private law duty of care when having regard to the statutory scheme of the then Town and Country Planning Act 1977. These reasons are found at 337-338 and were in summary that:

a) Questions of interpretation of a district scheme depended on expertise and judgment and were hardly susceptible to the negligence standard;

b) There was a statutory remedy for review of the council's decisions by special purpose appellate tribunal; and

c) The proposed duty of care would be capable of expansion, carrying significant and unacceptably indeterminate consequences for the public interest.

[26] *Bella Vista* also involved an error by the council in considering an application for resource consent under the Resource Management Act, which equates with a planning consent under the former Town and Country Planning Act. The circumstances involved the grant of two resource consents. The first, on a non-notified basis to construct and operate a lodge and restaurant and the subsequent consent, on a application for variation to allow a separate conference facility. When the applicant, Mrs Hofmann, spoke with an officer of the council about the construction of the conference facility she was advised that she did not need to obtain new consents from neighbours. The officer informed her that approval could be obtained by way of variation of an existing condition attaching to the resource consent for the lodge and restaurant. The High Court revoked both the initial consent and the variation in judicial review proceedings brought by the neighbours who had signed the written consents. The neighbours argued successfully that the application for a variation could not be reconciled with their consents and that by approving the application on a non-notified basis, the council had effectively denied them standing to challenge the application. The council, as a result of the High Court decision, required the new owners of the entire facility to cease all activity.

[27] The new owners of the lodge brought a claim in negligence against the council. In their statement of claim they pleaded that the council owed them a duty of care, the duty being to ensure that the applications for consent and the variation were dealt with in accordance with and validly issued under the Act. They alleged that the duty was breached in various ways including "failing to consider the application for consent in comparison to, and in conjunction with, the affected persons' written consents", and issuing an invalid consent on a non-notified basis for activities beyond those that were consented to by the affected persons.

[28] It is apparent that in *Morrison*, pre-application advice was involved and that in *Bella Vista* both pre-application advice and the quasi-judicial function of granting and issuing the resource consent were involved. The distinction was not however

material to the outcome. In each case, the Court determined that the council did not owe the applicant for planning consent (or resource consent) a duty of care in advising on the meaning and application of district plan provisions with respect to the applicant's proposal.

[29] In *Bella Vista,* the Court said, per Chambers J at [90], that the policy factors in *Morrison* were unanswerable and equally applicable to the circumstances in *Bella Vista*. He observed that there were differences in the overall factual circumstances in *Bella Vista* and *Morrison.* In *Bella Vista* the applicants complained that the council granted consent only to be told later by the High Court it should not have granted the consent on a non-notified basis, whereas the converse was the case in *Morrison.* There the council did not grant consent, only to be told later by the Planning Tribunal it should have. His Honour considered the distinction to be irrelevant. He said:

> Each case involves an error by a council in considering an application for planning consent. In each case, a Court subsequently found the council had misinterpreted a legal document, in *Morrison* the district scheme, and *Bella Vista* s 94 of the Act. As a consequence of the interpretation error, the applicant for planning consent suffered economic loss.

[30] It is not necessary for present purposes to discuss the Court's decision at further length. Suffice it to note the Court found, per Robertson J at [56]-[62], that:

a) To impose the duty contended for in the initial dialogue between the applicants and council officers would make such informal dialogue, assistance and "rejigging," practically impossible. Inevitably staff of consenting authorities would be fearful of leaving themselves open to attack. Forcing them to operate in a defensive mode would not be in the public interest;

b) The absence of a duty on the council does not mean that people in the position of the appellants (if applicants) are denied any form of redress. Remedies are available to the applicants including:

    i) a right of appeal against the finding on judicial review,

ii) causes of action possibly against the professionals who they employed to assist them in their RMA applications, and

iii) the opportunity to reapply for resource consent on a notified basis.

c) Even had there been no other remedy available to the appellants, it would not alter the position. Applying for resource consent on a non-notified basis is an economic decision made in the hope that the consent would be obtained more cheaply and quickly. The fact that the decision turned out to have had adverse effects on the appellants' business did not mean that someone else (or some other entity) should be liable for the economic loss or the failure to make the anticipated financial gain.

d) Strong policy considerations negate the finding of a private law duty of care.

[31] I accept that the allegedly negligent omission complained of in this case is, in terms of the assumed facts, essentially on all fours with *Morrison* and *Bella Vista.* As in *Bella Vista*, this is so, notwithstanding some differences in the overall factual circumstances. The differences are immaterial.

[32] As was the Court in *Bella* Vista, so too am I satisfied here that there is no relevant distinction between the case under consideration and *Morrison*. Indeed, I agree with counsel for the council that, if anything, this case is an even clearer case for a refusal to recognise a duty of care. This case involved pre-lodgement meetings in respect of which the plaintiff asserts that the counsel has a duty not only to correctly interpret provisions of the plan that specifically arise in respect of a proposal, but to consider a draft proposal against the entire district plan and identify all areas of possible non-compliance. The policy reasons against the imposition of a duty of care identified in *Morrison* apply even more strongly in this case where what is complained of is an omission to spot certain issues and to give advice on them, and warrant an order striking out.

[33] There are further reasons that reinforce the appropriateness of that course. As was said in *Couch*:

> 80 The law has traditionally been cautious about imposing a duty of care in cases of omission as opposed to commission; in cases where a public authority is performing a role for the benefit of the community as a whole…
>
> [Emphasis added]

[34] In addition:

a) The applicant's own pleading discloses that the district plan and the Resource Management Act identified reserve requirements. The applicant was, in effect, on notice of what those legal instruments required;

b) The applicant is a commercial investor, and had its own professional advisers. The applicant cannot therefore be seen as a person at special risk who may meet the test of proximity. The applicant was one with the necessary background and resources to identify the issues its application would have to deal with;

c) The advice on the council's website about the nature of pre-application meetings reinforced the importance of applicants seeking their own advice.

[35] As Chambers J said in *Bella Vista* at [90] the policy factors in *Morrison* are unanswerable. The same applies here.

Result

[36] The second defendant's application to strike out the claim against is granted. The claim is struck out accordingly.

[37] Costs must follow the event. Accordingly, there will be an order for costs in favour of the second defendant against the plaintiff on a 2B basis together with

disbursements to be fixed by the Registrar. If there is any dispute as to the calculation of costs, leave is reserved to file memoranda within **10 working days**.

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Associate Judge Sargisson