

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

**CIV 2013-404-4646
[2017] NZHC 1163**

IN THE MATTER	OF IMPERIAL GARDENS APARTMENTS
BETWEEN	BODY CORPORATE 348047 Plaintiff
AND	CHRISTIAN WAN & ORS Second Plaintiff
	AUCKLAND COUNCIL First Defendant
	WHL LIMITED (FORMERLY WATTS & HUGHES LIMITED) (IN LIQUIDATION) Second Defendant
	DOWNER NEW ZEALAND LIMITED Third Defendant
	ALUMINIUM TECHNOLOGY LIMITED First Third Party
	ARCHITECTURAL WINDOW SOLUTIONS LIMITED Second Third Party
	ABBAS LIMITED Third Third party
	STEPHEN MITCHELL ENGINEERS LIMITED Fourth Third Party
	METROPOLITAN GLASS & GLAZING LIMITED Fifth Third Party
	RICHARD ORMAN BUILDERS LIMITED (IN LIQUIDATION) Sixth Third Party

RICHARD LEONARD ORMAN
Seventh Third Party

TAL LIMITED
Eighth Third Party

Hearing: 5 December 2016

Counsel: A K Hough & K M Lee for Plaintiffs
S C Price & J K Wilson for Auckland Council

Judgment: 31 May 2017

JUDGMENT OF DUFFY J

This judgment was delivered by me on 31 May 2017 at 11.30 am pursuant to
Rule 11.5 of the High Court Rules.

Registrar/ Deputy Registrar

Solicitors / Counsel:
Grimshaw & Co, Auckland
Minter Ellison Rudd Watts, Auckland

[1] This proceeding concerns the Imperial Gardens Apartments at 135 Hobson Street Auckland Council (Imperial Gardens apartments), which suffers from what has commonly come to be known as leaky building syndrome.

[2] The plaintiffs (the first plaintiff is the body corporate of the Imperial Gardens apartments and the second plaintiffs are the owners of the individual units) claim against a number of persons including the first defendant, Auckland Council, which is the successor territorial authority responsible for issuing the building consents for the Imperial Gardens apartments.¹

[3] The first step is to consider the allegations made in the pleadings.² The claim against Auckland Council alleges it or its predecessor was negligent insofar as building consents were issued for work that the plaintiffs contend is defective in terms of its compliance with the relevant requirements of the relevant building codes. The current statement of claim makes the following allegations in negligence against Auckland Council:³

- (a) As the territorial authority responsible for building controls Auckland Council owed the plaintiffs duties to exercise reasonable skill and care when issuing building consents; performing building inspections and issuing code compliance certificates, and duties to establish and enforce a system of inspections that would give effect to the building code.
- (b) In breach of its duties Auckland Council:
 - (i) failed to carry out the inspection of Imperial Gardens apartments with reasonable skill and care because it failed to identify defects which would have been apparent to a reasonably competent and careful building inspector performing the inspection;

¹ For ease of reference I propose to refer to the relevant territorial authority and its officers as Auckland Council as it is the territorial authority that now carries legal liability for negligence on the part of its predecessor.

² See *Re Securitibank (No 31)* (1984) 1 PRNZ 514 (HC) at 517.

³ See plaintiffs' fourth amended statement of claim dated 29 February 2016.

- (ii) failed to carry out sufficient inspections with reasonable skill and care because the defects would have been apparent to a reasonably competent and careful building inspector performing inspections of building work at Imperial Gardens apartments when critical building details were being installed such as the installation of the cladding, formation of junctions of dissimilar materials, flashing work to joinery openings and fire stoppings; and
- (iii) issued code compliance certificates when by reason of the aforementioned defects and the deficient building inspections and lack of sufficient inspections it did not have reasonable grounds upon which to be satisfied that the building work at Imperial Gardens apartments complied with the building code.

[4] The plaintiffs contend that the aforementioned breaches of duty have led to the Imperial Gardens apartments being built with defects, being non-compliant with the building code, suffering damage and requiring repairs. The plaintiffs' losses arising from the defects are alleged to have been a reasonably foreseeable consequence of the breaches of duty.

[5] Auckland Council is defending the claim and denies any negligence on its part. It admits it carried out certain inspections and then pleads that it relies on its records in full.

[6] The plaintiffs have applied for an order requiring Auckland Council to answer interrogatories.

[7] In its submissions Auckland Council makes a number of general statements regarding the requirements for interrogatories, which in principle are correct. Namely: (a) interrogatories must relate to matters in issue in the proceeding; (b) an order for interrogatories must be necessary; (c) interrogatories must be precise, unequivocal and amenable to a direct and meaningful answer from information within the knowledge of or reasonably available of the person required to answer; (d) interrogatories must not be unnecessary or burdensome; (e) interrogatories must not

be prolix; (f) interrogatories should not be comprised of mixed questions of fact and law; (g) interrogatories should not ask questions based on disputed assumptions of fact; and (h) interrogatories should not ask questions on the contents of an existing document.

[8] At the time Auckland Council first registered its opposition to the plaintiffs' interrogatories there were features that were objectionable. However, the form of those interrogatories has since been revised (the revised interrogatories). Nonetheless, Auckland Council maintains its opposition to answering them.

[9] There are 39 revised interrogatories. Thirty four of the revised interrogatories ask specific direct questions to which a yes or no answer can be given. Of the remaining interrogatories, two ask questions which hinge on a yes answer being given to the preceding question.⁴ These interrogatories also ask questions that are factual and discrete. The remaining three interrogatories ask Auckland Council to identify the information documentation on which the decision to issue a code compliance certificate was based. Those questions are also factual questions that are focussed on a specific event and which seek specific information related to that event.⁵

[10] My view is that the revised interrogatories meet the general requirements for interrogatories. In particular, 34 of the interrogatories ask a specific factual question which is capable of attracting a yes or no answer. The balance are sufficiently specific and focused to also satisfy the general requirements for interrogatories. Further, all interrogatories address primary facts, proof of which is directly relevant to the plaintiffs' negligence claim against Auckland Council. As to the other requirements to which Auckland Council has referred, having carefully thought about the matter I am satisfied the revised interrogatories conform to established requirements and do not offend against any of them.

[11] Auckland Council argues that the interrogatories are objectionable because they do not identify a particular inspection event, but instead question whether certain checks were made during any inspection of certain the building work by

⁴ These are revised interrogatories 34 and 36.

⁵ Interrogatories 37, 38 and 39.

Auckland Council staff. In this regard Auckland Council contends that in total up to 14 staff may have been involved in the checking process and that the omission to tie each interrogatory to a specific check makes the task of obtaining answers too onerous. Examples of this type of interrogatory feature are:

Interrogatory 1:

During any of your inspections of building work did you check whether the membrane laid under the tiles in the podium area of the Imperial Gardens apartments (as is described in Row 1 of Schedule 3 of the plaintiffs' amended statement of claim dated 29 February 2016 (Claim)) was lapped at least 80mm at sheet joints?

Interrogatory 2:

During any of your inspections of building work did you check whether the laps of the membrane laid under the tiles in the podium area of the Imperial Gardens apartments (as described in Row 1 of Schedule 3 of the Claim) had bonded?

[12] I do not consider the form of the interrogatory by asking if “on any inspection” a certain check was carried out is objectionable. The plaintiffs want to know whether or not a council officer ever made the relevant checks. Whether the allegedly defective work is non-compliant with the building code requirements of the day is a matter of proof for the plaintiffs. To maintain the negligence claim against Auckland Council the plaintiffs have to prove the defective work was non-compliant with the building code at the time and that either Auckland Council officers did not carry out checks that would have revealed such non-compliance at the relevant time or checks were made but no action taken by Auckland Council officers to require non-compliant work be made compliant. Whether checks were made and what action was taken, if any, in consequence of such checks is information that would be known to Auckland Council. Further Auckland Council has made the question of the checks central to its defence by admitting they were carried out and then by pleading that it “relies on its records in full”. Thus, Auckland Council acknowledges by the manner of its pleading in its statement of defence that whether there were checks and how they were done is a primary material fact in dispute and so highly relevant to the disposition of the claim. Accordingly, the interrogatories relate to matters in issue in the proceeding both in terms of proof of allegations made in the statement of claim and disproving the defence as pleaded. In addition, Auckland Council

seemingly knows what its records say and therefore is capable of providing answers to direct questions that ask specific information of it in relation to those checks.

[13] It is no answer to an interrogatory asked of a corporate body, such as a territorial authority like Auckland Council, for the corporate body to say (as Auckland Council does here) the persons with the necessary knowledge no longer work for it or there are a number of them each with his or her own particular knowledge. As was recognised in *Re Securitibank (No 31)* someone within the corporate body may have to assume responsibilities for answering the interrogatories through that person seeking information from those having a direct involvement in the particular event concerned.⁶ In this regard in *Re Securitibank (No 31)* Barker J drew on statements made by Megarry V-C in *Stanfield Properties Ltd v National Westminster Bank plc* concerning answering how a corporate entity might answer a discovery order, which Barker J implicitly considered was much the same as answering interrogatories:⁷

One particular officer of the company concerned should be able to accept the burden of making all the necessary enquires and then swearing an affidavit; ... discovery is not that of the individual but of the company or corporation. However there is a suggestion in *Cairns* that there can be more than one deponent if necessary. It will really be for the defendants to decide whether one person is able to answer the interrogatories or whether they feel that the proper discharge of their duties should rest on more than one person.

[14] Whether in any particular case the need for a corporate body to make enquires of persons, including former employees, before it can answer interrogatories is oppressive is a matter of reasonableness as to the enquires to be made before the answer is given.⁸ Here Auckland Council is alleged to have acted negligently by carrying out defective inspections. Whether inspections were done and checks made relevant to whether the Council was discharging its duties or not lies at the core of the plaintiffs' case against Auckland Council. The answer to the questions is directly relevant to proof of the plaintiffs' allegations. It is knowledge which Auckland Council should have. Auckland Council has itself said the knowledge lies with 14 persons. For an officer of Auckland Council now to make

⁶ *Re Security Bank (No 31)*, above n 2.

⁷ At 522 citing Megarry V-C in *Stanfield Properties Ltd v National Westminster Bank plc* [1983] 1 WLR 568 (Ch) at 570.

⁸ See *Security Bank (No 31)*, above n 2, at 522.

enquiry of approximately 14 persons does not seem to me to be unreasonable. Particularly as the answers to these interrogatories are likely to result in more efficient progress of this proceeding. The answers may well be pivotal to whether the plaintiffs should proceed with their claim against Auckland Council or not. The answers may be instrumental in bringing about a settlement, which in turn leads to efficient use of court resources and time. At least the answers should go some way to reduce the breadth of disputed factual issues, which will help narrow the scope of the proceeding.

[15] Claims for defective buildings involve claims for large sums of money, multiple parties and widespread issues. Procedural tools that allow for the scope of such claims to be narrowed are in my view to be encouraged. When orders for interrogatories are sought in such claims and the subject interrogatories are unobjectionable in terms of established principle I consider the aforementioned benefits they offer means they satisfy the requirement for the order to be necessary.

[16] Looked at overall I consider the revised interrogatories satisfy r 8.38 of the High Court Rules 2016. Further in terms of the grounds of objection set out in r 8.40 Auckland Council has failed to establish any proper basis for its objections.

Result

[17] Auckland Council is directed to answer each and every interrogatory listed in the revised interrogatories.

[18] The answers are to be provided by a senior officer of Auckland Council who has authority to take responsibility for answering the interrogatories and for ensuring the answers are truthful. That responsibility may be undertaken by more than one such officer if the task cannot be completed properly by one person.

[19] The parties have leave to file memoranda as to costs.

Duffy J