IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2012-404-002490
[2014] NZHC 2864

BETWEEN	STUART GRAHAM JUDGE and C O P TRUSTEES LIMITED as Trustees of the Challenger Trust Plaintiffs
AND	PAUL JOHN DEMPSEY, MICHELLE AGANELL DEMPSEY, JONATHAN PAUL STEWART HISLOP and FINBAR NOMINEES LIMITED First Defendants
AND	MORRISSEY HOMES LIMITED Second Defendant
AND	THE DC CO. LTD (formerly Dominion Constructors (1973) Limited) (in liquidation) Third Defendant
AND	AUCKLAND COUNCIL Fourth Defendant
AND	ANDREW JAMES MORRISSEY Fifth Defendant
AND	MSC CONSULTING GROUP LIMITED Sixth Defendant
AND	GREGORY CLAYTON WATERHOUSE Second Third Party
AND	CLIVE BROOK PARKER Third Third Party

CIV-2014-404-000547

BETWEEN	PATRICK ANTHONY EDWARDS and COLLEEN EDWARDS Plaintiffs
AND	NELSON JOHN PATRICK CULL and ELIZABETH MEGAN CULL First Defendants
AND	DWELL HEALTHY HOMES LIMITED Second Defendant
AND	ANTHONY JOHN WINTER Third Defendant
AND	PAUL JOHN DEMPSEY Fourth Defendant
AND	PAUL JOHN DEMPSEY, MICHELE AVENELL DEMPSEY, JONATHAN PAUL STUART HESLOP and FINBAR NOMINEES LIMITED Fifth Defendants
AND	GS MASTERS BUILDERS LIMITED Sixth Defendant
AND	SCOTT AARON MASTERS Seventh Defendant
AND	GRANT ROSS MASTERS Eighth Defendant
AND	THE DC CO. LIMITED Ninth Defendant
AND	MSC CONSULTING GROUP LIMITED Tenth Defendant
AND	SOLID PLASTERERS LIMITED Eleventh Defendant
AND	STEPHEN ROY MOYLE Twelth Defendant
AND	AUCKLAND COUNCIL Thirteenth Defendant

Hearing:	12 August 2014
Relevant Counsel:	P M Fee and A R Tosh for Applicants (Sixth and Tenth Defendants) G B Lewis and L Cooney for Respondent/-2490 Plaintiff T J G Allan for Respondent/-547 Plaintiff P A Fuscic for Other Defendants (First -2490 Defendants and Fourth and Fifth -547 Defendants)
Judgment:	18 November 2014

JUDGMENT OF ASSOCIATE JUDGE OSBORNE
UPON DEFENDANT'S SUMMARY JUDGMENT APPLICATION

This judgment was delivered by me at 1.00 pm on 18 November 2014 pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar

Introduction

[1] A defendant seeks summary judgment against the plaintiffs in these two proceedings.

[2] The two proceedings have been filed by the owners of two neighbouring properties in Challenger Street, St Heliers, Auckland (No 14 and No 14A) which were constructed at the same time.

[3] I shall call the owners of No 14 "the Judges" and the owners of No 14A "the Edwards".

[4] The Judges and the Edwards (all subsequent purchasers) say that No 14 and No 14A are leaky buildings. They seek damages from parties involved in their construction, certification and previous sales.

[5] The applicant, MSC Consulting Group Ltd (MSC), is the sixth defendant in relation to the No 14 proceeding and the 10th defendant in relation to the No 14A proceeding.

MSC's grounds of application

[6] MSC asserts that the plaintiffs' claims against MSC cannot succeed because:

(a) MSC did not owe a duty of care to the plaintiffs (subsequent purchasers) in relation to the Producer Statement;

(b) the plaintiffs did not rely on the Producer Statement when purchasing No 14 and No 14A;

(c) the issue of the Producer Statement did not cause damage. There is no causative connection between the issue of the Producer Statement and the plaintiffs' claimed losses; and

(d) all of the work undertaken by MSC except for the issue of the Producer Statement was undertaken more than 10 years before the

proceeding against MSC was filed. All claims in relation to that work are therefore time-barred by the 10 year long-stop limitation period in s 393(2) Building Act 2004.

Chronology

[7] Events occurred as follows:

- January 2003 – Approved Building Certifiers Limited (ABC) apply to the Auckland City Council (ACC) for a building consent for the construction of two residential dwellings at No 14 and No 14A.

- January 2003 – ACC issues building consents.

- 8 August 2003 – final construction observation by MSC.

- 2 April 2004 – MSC Producer Statement issued to Auckland City Environments.

- 21 April 2004 – ABC issues Code Compliance Certificate to ACC in respect of No 14 and No 14A.

- 17 May 2004 – the title to No 14 transferred by the developer to the Judges.

- 29 July 2008 – title to No 14A transferred by the developer to Nelson and Elizabeth Cull.

- 15 April 2011 – title to No 14A transferred to the Edwards.

- 5 March 2014 – the Edwards issue a statement of claim including against MSC in respect of No 14A.

- 11 March 2014 – the Judges issue an amended statement of claim (including for the first time against MSC) in respect of No 14.

Defendant's summary judgment application – the principles

[8] The starting point for a defendant's summary judgment application is r 12.2(2) of the High Court Rules, which requires that the defendant satisfy the Court that none of the causes of action in the statement of claim can succeed.

[9] The general principles which apply to a defendant's summary judgment application include:

(a) The onus is on the defendant seeking summary judgment to show that none of the plaintiff's causes of action can succeed. The Court must be left without any real doubt or uncertainty on the matter.

(b) The Court will not hesitate to decide questions of law where appropriate.

(c) The Court will not attempt to resolve genuine conflicts of evidence or to assess the credibility of statements and affidavits.

(d) In determining whether there is a genuine and relevant conflict of facts, the Court is entitled to examine and reject spurious defences or plainly contrived factual conflicts. It is not required to accept uncritically every statement put before it, however equivocal, imprecise, inconsistent with undisputed contemporary documents or other statements, or inherently improbable.

(e) In weighing these matters, the Court will take a robust approach and enter judgment even where there may be differences on certain factual matters if the lack of a tenable defence is plain on the material before the Court.

[10] Limitations of the defendant's summary judgment procedure were illustrated in *Westpac Banking Corporation v M M Kembla New Zealand Ltd*.[1] In *Kembla*, the Court of Appeal had occasion to consider a Master's refusal to enter summary

[1] *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 299 (CA).

judgment for defendant banks in a case which raised novel points about the standard of care of a paying bank and knowledge to be imputed to a receiving bank in relation to electronic transfer of funds. The Court of Appeal found that summary judgment had been properly declined.

[11] Delivering the Court's judgment, Elias CJ identified features of the summary judgment procedure under the then r 136(2) (now 12.2(2)):

> [60] Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure because a defendant can apply to strike out the claim under Rule 186. Rather Rule 136(2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The difference between an application to strike out the claim and summary judgment is that strikeout is usually determined on the pleadings alone whereas summary judgment requires evidence. Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.
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> [61] The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim. Examples, cited in *McGechan on Procedure* at HR 136.09A, are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.
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> [62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.[2]

[12] In *Spencer on Byron* the Chief Justice returned to the appropriate approach on a defendant's summary judgment application (and on a strike out application):[3]

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2 The observations approved by the Privy Council in *Jones v Attorney-General* [2003] UKPC 48, [2004] 1 NZLR 433 at [5].

3 *Body Corporate No 207624 v North Shore City Council* [*Spencer on Byron*] [2012] NZSC 83, [2013] 2 NZLR 297.

> [3] This is the fifth case in which the Court has had occasion since 2008 to consider the principles on which liability in negligence arises against the background of statutory duties and following strike out or summary judgment for the defendant in the lower courts…
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> [4] Once again, it is necessary to point out that if the claim were indeed novel, as the Council maintains it is (on the basis that existing authority recognises liability in respect of residential buildings only), then application for strike out or summary judgment is appropriate only in cases where there is clear legal impediment to liability in negligence (in which case strike out is appropriate) or where there is a complete and incontrovertible answer on the facts (in which case summary judgment may be entered for the defendant).

[13] I adopt Associate Judge Faire's succinct summary of the summary judgment/strike out procedural distinction:[4]

> [28] Summary judgment applications are appropriate where there is a complete and incontrovertible answer on the facts. By contrast, a strike out application is appropriate when there is a clear legal impediment to liability.

[14] Where a defendant is able to establish either on the evidence or the plaintiff's own pleadings that the cause of action would be defeated on limitation grounds and cannot be cured, the preferable course for the defendant and the appropriate course for the Court is to have the summary judgment entered (rather than the pleading struck out).[5]

[15] Finally, a combination of complex issues of fact and law may justify the dismissal of a defendant's summary judgment application either because the Court cannot be satisfied that the defendant has no defence or because the Court exercises a discretion to dismiss the application as a matter of justice.[6]

[16] Ms Fee, who appeared for MSC in support of the present applications, recorded that MSC proceeds on the basis that the allegations made by the plaintiffs in their statements of claim (while not admitted) are taken to be true. The basis of MSC's application is that, notwithstanding the pleaded facts, the claims cannot

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4 *Warehouse Limited v Westgate No 1 Ltd* [2013] NZHC 2264.

5 Illustrated in the decision in *Vincent v Mindel* HC Auckland CIV-2010-404-6275, 19 August 2011 at [110].

6 Andrew Beck and others *McGechan on Procedure*, (online looseleaf ed, Brookers) at [HR12.2.11].

succeed. (Notwithstanding the apparent concession, Ms Fee challenged, as I will come to below,[7] at least the pleadings as to causation).

Relevant pleadings

No 14

[17] The Judges allege that:

(a) MSC acted as the engineers for the design and construction of the property and undertook services including periodic reviews of the construction of the property and the issue of Producer Statements.

(b) MSC owed the Judges a duty to exercise reasonable skill and care in undertaking its services.

(c) In breach of its duty of care:

(i) MSC allowed No 14 to be constructed with the following defects:

1. The blockwork was constructed without vertical control joints; and

2. There was a lack of grout under the windowsills caused by an air lock formed during the grouting process.

(ii) MSC, through its employee Gordan Brkic issued the Producer Statement notwithstanding the presence of the defects.

(d) As a result of MSC's negligence the Judges have suffered loss because No 14 has defects, leading to water ingress, damage to the building elements and consequential loss.

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[7] At [41].

[18] The first and fourth defendants have filed cross-claims. The first defendant seeks contribution pursuant to s 17(1)(c) of the Law Reform Act 1936 and/or in equity. The fourth defendant seeks contribution pursuant to s 17(1)(c) of the Law Reform Act 1936.

No 14A

[19] The Edwards allege that :

(a) MSC owed the Edwards a duty to exercise reasonable skill and care in undertaking its engineering services.

(b) In breach of its duty of care MSC:

(i) prepared structural plans for building consent and construction of No 14A with inadequacies that caused the weathertightness defects;

(ii) failed to ensure that the structural elements of No 14A were constructed in accordance with the applicable verification method to the Building Code;

(iii) issued a Producer Statement notwithstanding the weathertightness defects; and

(iv) failed to identify the weathertightness defects and take steps to rectify them.

(c) As a result of these breaches, the Edwards have suffered loss as No 14A has defects, leading to water ingress, damage to building elements and consequential loss.

[20] The fourth, fifth and thirteenth defendants have filed cross-claims. The fourth and fifth defendants seek contribution pursuant to s 17(1)(c) of the Law

Reform Act 1936 and/or in equity. The thirteenth defendant seeks contribution pursuant to s 17(1)(c) of the Law Reform Act 1936.

Analysis of the grounds of application

[21] MSC is able to succeed on its summary judgment application against each plaintiff if none of the particular plaintiffs' causes of action can succeed.

[22] In each case, the Judges' and the Edwards' claims for damages refer to different periods of MSC's services. First, there is reference to matters such as allowing the buildings to be constructed with defects (in relation to which MSC relies upon the 10 year long-stop limitation period). Secondly, the plaintiffs plead MSC's issuing of the Producer Statement notwithstanding weathertightness defects (in relation to which MSC asserts there was neither a duty of care nor reliance leading to damage).

[23] If the plaintiffs have an arguable case as to a duty of care in relation to the Producer Statement and breach causing loss, then the defendant's summary judgment application must fail. It becomes unnecessary to consider the limitation aspect of the defence. I therefore proceed first to examine the duty of care argument.

Duty of care

[24] The duty of care asserted by the plaintiffs was a duty to exercise care in relation to the issue of the Producer Statement.

[25] MSC's relevant Producer Statement stated:

> As an independent person approved by the Auckland City Council to carry out a construction review, I or persons under my control have obtained all necessary information and carried out such periodic reviews of the work as are in accordance with the Auckland City Council's published criteria as are appropriate to the conditions of the Building Consent. I have also conducted such additional reviews which were necessary in the circumstances. Based upon the information obtained and the reviews carried out I am satisfied on reasonable grounds that the building work specified above has been completed to the extent required by the above Building Consent and complies with the Building Code … I understand that if this Producer Statement is accepted, it will be relied on by Auckland City Council for the purposes of establishing compliance with the Building Code.

[26] Under the Building Act 1991, territorial authorities could, at their discretion, accept a Producer Statement establishing compliance with the Building Code in issuing a Building Consent[8] or a Code Compliance Certificate.[9] Private certifiers could similarly rely on Producer Statements.[10]

[27] "Producer Statement" was defined in the Act to mean:[11]

> Producer statement means any statement supplied by or on behalf of an applicant for a building consent or by or on behalf of a person who has been granted a building consent that certain work will be or has been carried out in accordance with certain technical specifications.

[28] The provision for a certifier to rely on the Producer Statement in establishing compliance with the Building Code means that the author of the Producer Statement makes an assessment that would otherwise be made by the certifier.[12]

***Pacific Independent Insurance Ltd v Webber*[13]**

[29] For MSC, Ms Fee relied upon *Pacific Independent Insurance Ltd v Webber* as "directly on point". In that case, Lang J awarded summary judgment to one of the defendants, a Mr Kathagen, and his company.

[30] Ms Fee correctly described *Webber's* case as one in which the plaintiff as a subsequent purchaser of a leaking building had pleaded that Mr Kathagen had carried out a negligent inspection which led to his company issuing a Producer Statement (signed by Mr Kathagen). The plaintiff alleged that Mr Kathagen owed it a duty to exercise reasonable skill and care in performing the inspection that led to the Producer Statement and in issuing the Producer Statement.

[31] Lang J held that the relationship between the plaintiff and Mr Kathagen was too remote for a duty of care to arise.

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8 Building Act 1991, s 33(5).
9 Section 43(8).
10 Section 56(3A).
11 Section 2.
12 Sections 43(3) and 56(3).
13 *Pacific Independent Insurance Ltd v Webber* HC Auckland CIV-2009-404-4168, 24 November 2010.

[32] Ms Fee correctly noted that Lang J took as relevant that:[14]

(a) the plaintiff (a subsequent purchaser) and Mr Kathagen and his company were never in a contractual relationship;

(b) neither Mr Kathagen nor his company physically created the defects in the building work;

(c) Mr Kathagen had not voluntarily assumed responsibility to the plaintiff, having never dealt with the plaintiff and having had no ongoing involvement with the property;

(d) the Producer Statement had been prepared for the developer of the property, who was the original owner, and there was no basis for concluding that Mr Kathagen had foreseen or ought to have foreseen that subsequent purchasers might rely on the Producer Statement;

(e) the issuer of a Producer Statement is in a different position to a territorial authority as there is a community expectation that territorial authorities will carry out their duties to a particular standard and thus should be considered to owe a duty of care to all houseowners, including subsequent purchasers; and

(f) the community does not rely in the same way on issuers of Producer Statements, even though a Council may rely on such statements when deciding to issue Code Compliance Certificates.

[33] Ms Fee relied also on the additional finding of Lang J that the defendants in *Webber's* case were entitled to summary judgment because, in the absence of general reliance or community expectation, the law requires actual reliance.[15] On the evidence Lang J found that the plaintiff had not relied on in any way upon Mr Kathagen's inspection or Producer Statement when it acquired the property.[16]

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14 At [44].
15 At [47], applying *Boyd Knight v Purdue* [1999] 2 NZLR 278 (CA) at [57].
16 At [51].

[34] For the plaintiffs, Messrs Allan and Lewis submitted that *Webber's* case is distinguishable from the present cases. Their submissions as to the distinctions may be gathered under three heads:

(a) **MSC's full engineering role**

In *Webber's* case, Lang J identified as an important factor:[17]

> … the fact that the inspection and Producer Statement did not create the damage to the dwelling.

In other words, Mr Kathagen as certifier had not in fact been involved in any way with the building work itself. In this case, the involvement of MSC with No 14 and No 14A in the engineering calculations and structural plans and in the monitoring of construction places MSC outside the category of a mere "inspector". As the more accurate description of MSC's role, Mr Lewis referred to the observation of Richmond P in *Bowen v Paramount Builders (Hamilton) Ltd* in which his Honour observed:[18]

> Quite clearly English law has now developed to the point where contractors, architects and engineers are all subject to a duty to use reasonable care to prevent damage to persons whom they should reasonably expect to be affected by their work.

(b) **MSC's expectation**

In *Webber's* case, Lang J found that there was no basis on which to conclude that Mr Kathagen foresaw, or ought to have foreseen, that subsequent purchasers might reasonably place reliance upon his Producer Statement, the statement having been prepared for the developer (the original owner of the dwelling).[19] There was thus, in *Webber's* case, no contractual or other expectation that a professional (such as an engineer) involved in the design and construction monitoring would also be the person providing the Producer

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17 At [41].

18 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 406.

19 *Pacific Independent Insurance Ltd v Webber*, above n 13, at [40].

Statement required by the territorial authority in order to issue a Code Compliance Certificate. Mr Allan emphasised the point that in this case, with properties being jointly designed and constructed by the developer, it must have been obvious to MSC that one or both of the properties would have been for on-sale.

(c) **Addressees/Community at large**

Lang J drew a distinction between persons to whom a Producer Statement is addressed (who may rely upon it for a particular purpose) and Councils (who may rely on it in deciding whether to issue a Code Compliance Certificate) on the one hand and "the community at large" (which does not rely upon the issuer of a Producer Statement in the same way).[20] Mr Lewis submitted that the generally applicable observation of Lang J does not necessarily follow in relation to an engineer who accepts the "start to finish" responsibility which MSC took on in this case. The reasonable reliance of particular members of the community (such as later purchasers who come to check on documentation produced in the course of the building's construction and completion) might arguably differ as between professionals who have a substantial involvement from start to finish, including in relation to Producer Statements and on the other hand a professional who comes in at the end for inspection and Producer Statement purposes.

Discussion

[35] I accept the thrust of Ms Fee's submission to the effect that the case law which imposes a duty of care upon territorial authorities in relation to matters such as code compliance relies substantially on policy considerations which do not apply in relation to other entities. But the history of the imposition of duties of care, as evidenced in recent decades, has been incremental – it would be unsafe (and unfair to a plaintiff in a summary judgment context) to assume that because a duty of care has not been imposed in a particular factual setting previously, then none can be.

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[20] At [43].

[36] I adopt in this regard the concluding sentence in the passage in the Chief Justice's judgment in *Kembla* which I have cited:[21]

> Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear … novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.

[37] Further, as Elias CJ later observed in *Spencer on Byron*:[22]

> [4] Once again, it is necessary to point out that if the claim were indeed novel, as the Council maintains it is … then application for strike out or summary judgment is approximate only in cases where there is a clear legal impediment to liability in negligence (in which case strike out is appropriate) or where there is a complete and incontrovertible answer on the facts (in which case summary judgment may be entered for the defendant).

[38] This is not a case for summary judgment on the basis of there incontrovertibly being no relevant duty of care.

[39] Stephen Todd observed in relation to the range of persons who may owe duties of care in relation to defective building construction:[23]

> Of course, there are many other potential defendants who may be held to owe a duty of care in respect of defective building construction. Fairly clearly they also are open to claims founded on *Spencer on Byron* to the extent that they negligently contribute to buildings being erected that do not comply with the building code. It could hardly be right that a council is potentially liable as regards the negligent exercise of its inspection and approval functions but that those responsible for the actual creation of any defects are not.

With particular reference to *Spencer on Byron*, Professor Todd footnoted:[24]

> In *Body Corporate No 207624 v North Shore City Council* [2012] NZSC 83 [*Spencer on Byron*] at [193], Chambers and McGrath JJ remarked that no one can be party to the construction of a building that does not comply with the building code, and spoke in particular of the obligations of the inspection authority or of any supervising architect or engineer.

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21 Above at [11].

22 *Spencer on Byron*, above n 3.

23 Stephen Todd *"Negligence: Particular Categories of Duty*" in Stephen Todd (ed) *The Law of Torts in New Zealand* (6th ed, Brookers, Wellington, 2013) 269 at 316.

24 At n 268.

Reliance and causation

[40] In its summary judgment application, MSC in its grounds relating to whether there had been actionable negligence, relied upon both the absence of a duty of care and a lack of causation. In relation to the latter ground, the notice of opposition stated:

> The plaintiffs did not rely upon the producer statement when they purchased the property and so there is no causal nexus between [MSC's] allegedly negligent issue and the producer statement in any loss that the plaintiffs may have suffered.

[41] In her submissions for MSC, Ms Fee focussed in this regard on the proposition that there was no actual reliance by either the Judges or the Edwards upon the Producer Statement. Ms Fee relied particularly on the findings of the Court of Appeal in *Sunset Terraces.*[25]

[42] In *Sunset Terraces*, one unit owner, (Mr Devlin) had received copies of the designer's practical completion certificates before he completed the purchase of his unit. Heath J, at first instance noted that Mr Devlin had not said "in explicit terms" that he had relied on the certificates in completing his purchase.[26] Heath J, upon the basis that there can be no community expectation on a designer to certify practical completion, found that it was necessary, if Mr Devlin were to succeed, that he prove actual reliance on the certificates to establish the causation of loss.[27] Mr Devlin's claim therefore failed.

[43] The judgments of the Court of Appeal proceeded equally on the basis that actual reliance had to be shown.[28] However, on their Honours' examinations of the evidence at trial (including the cross-examination) it was found there had been reliance by Mr Devlin.[29]

[44] Ms Fee characterised the plaintiffs' reliance in this case as "a much more abstract construct" than the reliance of Mr Devlin in *Sunset Terraces.* She

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25 *Sunset Terraces North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] 3 NZLR 486.
26 *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC).
27 At [553].
28 Per Baragwanath J at [124]–[127]; William Young P at [201]–[203], Arnold J at [205].
29 Per Baragwanath J at [127] and William Young P at [203].

characterised it as involving the proposition that the Producer Statement would have been relied on by the building certifier in issuing a Code Compliance Certificate on the basis that it would have been material to the plaintiffs' decision to settle their purchase of No 14 and No 14A respectively. She points out that there is no evidence that the plaintiffs knew of the role of Producer Statements either generally or in relation to Code Compliance Certificates. She describes the plaintiffs' argument in this case as even more remote than the plaintiffs' argument in *Webber's* case and as one which cannot succeed (as a matter of law).

[45] In her submissions, Ms Fee went on to deal particularly with the evidence of the Edwards to which I will return.

[46] I do not consider that the analysis of the potential success of a reliance argument, which MSC invites through the summary judgment application, can justly be undertaken by the Court in this summary judgment context. Both Mr Judge and Mr Edwards, in their brief affidavits expressly refer to reliance upon the Code Compliance Certificate. Mr Edwards additionally refers to having relied on the whole property file obtained from Auckland City Environments, including the Producer Statement, deposing that "nothing red-flagged any issue to me".

[47] The detail of Ms Fee's submissions, including her proposition that the plaintiffs' arguments may involve a "much more abstract construct" than what might be described as "pure reliance" on the Producer Statement, serves to highlight the significant difference between an interlocutory application for summary judgment (on affidavit evidence) and a trial where both factual and legal issues are resolved. The sophistication of Ms Fee's argument serves to indicate the detail which counsel might consider appropriate to explore as a proceeding moves towards trial and evidence is fully briefed. The very fact that the Judges of the Court of Appeal in *Sunset Terraces* reached a different conclusion as to reliance based on an analysis of Mr Devlin's evidence at trial, including cross-examination, highlights the way in which trial will usually be the correct context in which to assess whether a particular matter of the nature of reliance is made out.

[48] To adopt the Chief Justice's terminology in *Spencer on Byron,*[30] I am not satisfied that it is legally or factually correct, or indeed just, to conclude in this summary judgment context that it is an "incontrovertible fact" that there was not a reliance by either the Judges or the Edwards upon MSC's Producer Statement so as to establish causation of loss. There may be, as Ms Fee's logical analysis suggests, some real difficulties facing the plaintiffs in establishing reliance but that is not a basis for summary judgment.

[49] Had I not reached this conclusion in relation to both the Judges and the Edwards, I would have needed to consider the particular position of the Edwards separately, by reason of Mr Edwards' evidence in relation to the documents (including the Producer Statement) which he obtained from Auckland City Environments.

[50] Ms Fee's analysis of Mr Edwards' particular evidence in this regard was that it smacked of a "late and artificial attempt to construct actual reliance". Ms Fee submitted that unlike Mr Devlin, Mr Edwards did not give any specific consideration to the Producer Statement when deciding whether to purchase the property. She submitted that his evidence rather was to the effect that the Producer Statement was simply "there" when he obtained the Council file.

[51] I have considered Mr Edwards' evidence in the light of Ms Fee's criticism. Ms Fee's inference of a "late and artificial attempt to construct actual reliance" is only one possible inference, and I am not convinced it is even the most likely. Mr Edwards' evidence, including a comment that he is "unable to honestly now say whether he relied on any particular record in the Council's property file any more than any other" has the quality of a fair and balanced attempt at recall. In any event, the conclusions which Ms Fee invites are appropriate conclusions for a trial Judge who has assessed a witness, not a Judge dealing with the wording used in an affidavit. As matters stand, Ms Fee's submission that Mr Edwards did not give any specific consideration to the Producer Statement is difficult to line up with what he actually says in his affidavit. Mr Edwards says that he and his wife obtained the documents on the Council's property file; the documents included the Producer

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[30] Above at [13].

Statement; Mr Edwards looked through the documents on the file to see whether there was anything wrong with the building or the approvals obtained for its construction; and he concluded (on the basis of his inspection) that there was nothing. This is at least arguably evidence of actual reliance.

[52] Accordingly, on this further basis I would have found the Edwards' claim for damages for breach of a duty of care arguable.

The Limitation Act defence

[53] To this point of the judgment, I have focussed on the plaintiffs' claims in relation to the Producer Statement issued by MSC to Auckland City Environments on 2 April 2004. Such claim is unaffected by the 10 year long-stop limitation period.[31]

[54] I have found the plaintiffs' claims in relation to the Producer Statement to be at least arguable and therefore not capable of giving rise to summary judgment if they stood alone.

[55] By reason of that finding, MSC would not be entitled to summary judgment on the basis that any earlier negligent acts are outside the 10 year limitation period. Rule 12.2(2) precludes a defendant's summary judgment unless all the causes of action in the plaintiffs' statement of claim are incapable of succeeding. I therefore will not express a conclusion on the detailed submissions which I received from counsel in relation to matters arising from MSC's limitation pleading. Messrs Lewis and Allan presented detailed submissions to the effect that MSC's role from the outset was to be a continuing one culminating in the issue of a Producer Statement and that there was a continuing aspect to breaches of duty which in some way required MSC to identify and correct earlier breaches as MSC's role continued. Ms Fee presented forceful submissions to the contrary, while recognising that there may be fact-specific and unusual circumstances which may at some point justify a finding of a continuing duty (albeit not in the circumstances of the present cases).

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[31] Building Act 2004, s 393(2). The relevant claims in the Edwards' and Judges' proceedings were issued on 5 March 2014 and 11 March 2014 respectively.

The first and fourth defendants' cross-claims

[56] There are no applications before the Court in relation to the cross-claims which other defendants have against MSC. Those cross-claims are unaffected by this judgment.

Costs

[57] It is usually appropriate on an unsuccessful defendant's summary judgment application that costs follow the event. I will adopt that course. An award to the plaintiffs on a 2B basis is appropriate in both proceedings.

[58] Mr Fuscic appeared (before being excused) for first and fourth defendants/cross-claimants to notify the Court of the position of those parties. They informally opposed MSC's application. It is unlikely that the Court would award costs to those defendants but I will reserve costs in that regard lest there is any issue.

Orders

[59] I order:

(a) the application of MSC Consulting Group Limited for summary judgment in each of these proceedings is dismissed;

(b) MSC Consulting Group Limited is to pay to each set of plaintiffs the costs of the application on a 2B basis together with disbursements to be fixed by the Registrar;

(c) costs as between MSC Consulting Group Limited and any other defendants who appeared are reserved; and

(d) any defence yet to be filed by MSC Consulting Group Limited is to be

filed and served within 10 working days in accordance with r 12.13 High Court Rules.

Associate Judge Osborne

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