IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

CIV 2012-419-000637
[2013] NZHC 1819

BETWEEN	J E McCONNEL and W K McCONNEL (as executors of the Estate of K H McConnel and J E McConnel) Plaintiffs
AND	L J MATTHEWS First Defendant
	AECOM NEW ZEALAND LIMITED Second Defendant
AND	PARTRIDGE CONSTRUCTION BOP LIMITED Third Defendant

Continued over/...

Hearing: 18 July 2013

Appearances: G Shand for the Plaintiffs
C J Booth and J M Hanning for the First Defendant
P J Crombie for the Sixth Defendant
M Singh for the Seventh Defendant
J A McKay and K R Toki for the Eighth Defendant

Judgment: 22 July 2013

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
22.07.13 at 4:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

P G LUIJKEN
Fourth Defendant

PARADISE COATINGS LIMITED
Fifth Defendant

P V McKINNON
Sixth Defendant

PLASTER SYSTEMS LIMITED
Seventh Defendant

JAMES HARDIE NEW ZEALAND LIMITED
Eight Defendant

M J BURGER
Ninth Defendant

Introduction

[1] This judgment rules upon the applications of four defendants (the first, sixth, seventh and eighth defendants) to dismiss the plaintiffs proceeding against them. They claim inordinate and inexcusable delay in service of that proceeding has caused serious prejudice to them and prevents them from defending the proceeding appropriately.

[2] The plaintiffs' proceeding was filed on 24 May 2012. The plaintiffs own a residential apartment property in Mount Maunganui. The proceeding claims the apartment was badly built and has serious weather tightness problems. They say it will cost in excess $1M to remedy those.

[3] There are nine defendants. The plaintiffs say the defendants were involved in the construction of the defective apartments to some extent. The first defendant (Mr Matthews) was the architect and project manager. The sixth defendant (Mr McKinnon) is the sole director of the fifth defendant who it is said applied the external cladding. The seventh defendant Plaster Systems Limited (PSL) was the manufacturer/supplier of cladding tape. The eighth defendant (James Hardie) was the manufacturer, supplier, inspector and warranty provider for the cladding system used.

Service of the proceedings

[4] On 10 December 2012 Associate Judge Faire expressed concern that none of the defendants had at that time been served with the plaintiffs' proceeding. He directed service be effected forthwith. The following day he issued a further minute scheduling a telephone conference on 21 February 2013 to discuss, among other matters, whether initial disclosure obligations had been complied with.

[5] On 21 December 2012 the plaintiffs wrote a letter to PSL enclosing a copy of the statement of claim, notice of proceeding and various Court memoranda.

[6] On 18 January 2013 the statement of claim and notice of proceeding was served on Mr Matthews.

[7] On 24 January 2013 the notice of proceeding and statement of claim were served on James Hardie.

[8] On 25 January 2013 the notice of proceeding and statement of claim was served on PSL. Service upon Mr McKinnon was effected on 4 February 2013.

The dismissal applications

[9] On 21 February 2013 Mr Matthews filed his application to dismiss the proceeding for want of prosecution. Mr McKinnon filed his application on 15 March 2013. PSL filed its dismissal application on 4 March 2013. James Hardie filed its application on 8 March 2013. Each complains that because of inordinate delay, and inexcusable delay, and because serious prejudice has ensued, that it is said the plaintiffs have failed to prosecute their proceeding appropriately. Each says that in the interests of overall justice that the claims against them be dismissed.

[10] The applicants complain that the statement of claim and the notice of proceeding were not served "as soon as practicable" after they were filed, contrary to Rule 5.72(1)(a). Also, that the plaintiffs defaulted in complying with Associate Judge Faire's directions of 11 December 2012 to serve those documents "forthwith". The defendants say the delay was inexcusable because the plaintiffs ought to have been aware of the potential limitation issues and that this has prejudiced the ability of those defendants to file cross claims against other defendants or to file third party claims within time limitation periods.

[11] Each of the applicants refers to persons or entities that they may have been entitled to join "but for the plaintiffs' want of prosecution".

[12] It is not claimed by any applicant that the proceeding served upon it/him was served outside of the ten year "long-stop" provisions. Therefore none of the affected defendants was served on a date which was outside of that date which was more than

10 years from the date when the cause of action, as pleaded, arose. The real issue for the applicants is their claim of insufficient time to file cross claims or to apply for joinder of third parties. The Court does not by that assessment preclude general considerations of delay or suggestions of dilatory action, but the primary focus here, as indeed it does affect many claims of a similar kind, is that the defendants ought to be in a sufficient position to ensure that all potential contributories can be brought to account.

[13] In this case the applicants complain there is no explainable or inexcusable reason for the delay of seven months or so that passed between the date the proceeding was filed and the date those were served.

[14] Each applicant is concerned that the ten year limitation period between the date of filing and the service of the claim has now already precluded third party or cross claims being filed.

Chronology

[15] Counsel for Mr Matthews and for James Hardie have helpfully provided chronologies. Relevant details include:

Date	Narrative
5 February 2002	Mr Matthews enters into a 'professional design services' agreement with the plaintiffs.
	Plaintiffs instruct second defendant to undertake structural design work at the property.
5 May 2002	Mr Bayley, Mr Matthews' subcontractor, renders an invoice to Mr Matthews for 'production of contract drawings'.
24 May 2002	Plaintiffs submit building consent application to Tauranga District Council.
	First defendant pays check to John Keoghan for drafting work performed on project.
28 June 2002	Plaintiffs appoint third defendant, Partridge Construction BOP Limited, as builder 'subject to the building consent being obtained for the project'.
Circa August 2002	The fourth defendant, Mr Luijken (a director

	of the third defendant), engages Paradise Coatings (1997) Limited (not the fifth defendant) to plaster the cladding on the property.
9 September 2002	Tauranga District Council issues building consent.
16 December 2002	Partridge Construction BOP Limited commences building construction.
30 January 2003	Block work 93 per cent complete.
	Aluminium joinery – 50% complete.
	Carpentry – 51% per cent complete.
	Roofing – 70% complete.
31 January 2003	The second defendant completes its design and observation roles.
28 February 2003	Aluminium joinery – 90% complete.
	Carpentry – 65% complete.
	Joinery fittings – 65% complete.
	Reinforcing and structural steel, and roof – 100% complete.
March 2003	Paradise Coatings (1997) Limited's subcontractor completes plastering work.
17 April 2003	Plaintiffs enter into a 'professional design services agreement with Matthews Scott McNally Limited with effect from 1 April 2003.
29 May 2003	Property fails building inspection.
30 May 2003	According to the builder building works were completed except for tiling which builder asserts was 85% complete whilst Mr Matthews asserted it was 50% complete.
20 November 2003	Matthews Scott McNally Limited issues final progress payment certificate to plaintiffs.
26 November 2003	Final inspection of property.
	Plaster Systems Limited provides plaintiffs with a producer statement.
17 December 2003	James Hardie provides the Monotek warranty over the property.
22 December 2003	Code compliance certificate issued by Bay Building Certifiers Limited.
2004	First, third and eighth defendants correspond about "cracks that appeared in the James Hardie Monotek 'cladding system'".
1 July 2005	Fifth defendant, Paradise Coatings Limited,

	is incorporated and listed on the Companies Register.
15 December 2006	Private certifier, Bay Building Certifiers Limited, struck off Companies Register.
2008	Mr Matthews suggests plaintiffs apply to Weathertight Homes Resolution Service for an assessor's report.
20 March 2009	Plaintiffs lodge complaint with Weathertight Homes Tribunal.
8 June 2009	Weathertight Homes assessor's report.
22 June 2010	Paradise Coatings (1997) Limited struck off Companies Register.
11 July2011	Builder placed in liquidation.
26 March 2012	Third defendant, Partridge Construction BOP Limited, removed from Companies Register.
24 May 2012	Proceedings commenced.
18/19 February 2012	Amended statement of claim served.

[16] It appears that it is unclear when the building work was practically complete. Arguably this was by 30 May 2003.

General overview of considerations in this case

[17] A court must take an overall view of the interests of justice in these cases. Inordinate delay involves a period of time which is materially longer than is usually regarded by courts as acceptable[1]. Clearly any perspective of delay requires a consideration of the particular facts involved. In this case the applicants say it involved default by the plaintiffs in ensuring that service was effected 'as soon as practicable' as Rule 5.72 requires, or 'forthwith' as Associate Judge Faire directed.

[18] Complaints of delay will be looked at more critically by the Court after a proceeding has been filed. The applicants say that with the issue of the Weathertight Homes assessor's report in June 2009 the plaintiffs had sufficient information to commence proceedings; that the defects of the required remedial work particularised in the statement of claim are taken directly from that report.

[1] *Tabatha v Heatherington* [1983] TLR 764.

[19] Counsel submit that in these kinds of cases there is an ever present potential for cross claims and third party joinder and these considerations should properly be taken into account in considering whether or not there has been inordinate delay.

The plaintiffs' evidence in opposition

[20] It is contained in the affidavit of Mr P D Barnett. Mr Barnett has 38 years of experience in the building industry. He deposes he frequently reports on weather-tight issues upon instructions from owners, developers, builders and architects. He says he has a thorough knowledge of building regulations and practices adopted by territorial authorities. He has for many years been investigating building failures and has assisted in the remedial work carried out on those.

[21] He says that in the third quarter of 2011 the plaintiffs engaged him "to undertake a deconstruction process to evaluate the weather-tight issues concerning the plaintiffs' property".

[22] Mr Barnett reports that he could not be "definitive as to the actual date of practical completion". He noted that between 30 May 2003 and 30 October 2003 contract payments were made in the sum of $88,220.18 plus GST. He said this appeared to be exceptionally high if it related only to negotiated variations. It supports his queries as to when practical completion took place. It is to be inferred that he considered the date of practical completion occurred not before 30 May 2003, but likely after that date.

[23] Mr Barnett referred to the plaintiffs engagement of Mr Hughes a structural engineer to advise the plaintiffs regarding the structural design of the property. He reports Mr Hughes was concerned about the original design. He said Mr Hughes required sections of the building "to be opened up" and that intrusive investigation was required. He reports that when the plaintiffs filed their statement of claim in May 2012 Mr Hughes' report was not available. It seems the plaintiffs did not wish to file until Mr Hughes' report was available.

[24] Mr Barnett says the issue then became whether or not the lack of structural integrity of the building affected the exterior cladding. He reports it was Mr Hughes view that further engineering advice was needed. In the outcome he has been advised by Mr Hughes that there was no linkage between weather-tightness issues and structural engineering issues.

[25] Mr Hughes says that the delay in service of the statement of claim occurred due to the difficulties in isolating the structural engineering issues from the weather-tightness issues. He said the plaintiffs have had to go to great lengths to ensure that the challenge against the original structure design was substantive and could be supported in court by expert evidence. All of this, he said, took time. He says that the amended statement of claim differentiates the structural engineering claim from the weather-tightness claim. He reports that there was no intention by the plaintiffs to affect the parties limitation claims.

The applicants' response to this evidence

[26] It is readily apparent from this abbreviated summary of Mr Barnett's evidence that some of his evidence comprises hearsay. The plaintiffs submit that there appears no reason why the original statement of claim could not have been served immediately and an amended statement of claim, if thought appropriate, served at a later date once the suggested complex structural engineering issues were clarified and resolved.

[27] The applicants say that the only amendments added by the amended statement of claim were of limited impact referring to 'structure' as opposed to 'building' issues.

[28] The applicants say that each of the other defendants is potentially a joint tort feasor against whom there would be a right of cross claim for contribution under s 17(1) (c) of the Law Reform Act 1936. In the case of some of those it is asserted that their duties were completed by a date which has prevented the defendants from filing contribution claims at all. Certainly this would be so regarding any wish to

join the Tauranga City Council which issued a building consent on 9 September 2012 some nine months at least prior to the practical completion of the construction.

[29] The applicants acknowledge that whilst a code compliance certificate was issued on 22 December 2003 no practical completion certificate has been produced by or on behalf of the plaintiffs at all.

[30] It seems that it may already be too late to pursue any contribution claims at all.

[31] Of particular concern to the applicants is the failure by the plaintiffs to provide any form of initial disclosure when the proceedings were served. Therefore, the defendants only had their own documents and otherwise those they claim were of limited availability, to assist in considering who might be potential tort feasors.

[32] It is rare for a court to consider dismissal claims such as these in instances where it is asserted by applicants that they have lost the right to claim contribution from third parties or indeed their insurers. Such contribution claims are a regular feature of weather-tightness claims litigation. Usually courts will permit applications for third party joinder to be filed within a certain date after discovery obligations or answers to interrogatories are completed. Seldom do Limitation Act considerations influence the process. It follows that when they do it may be appropriate to consider issues of prejudice in relation to delays by the plaintiff of service of proceedings, even though these delays may not be the responsibility of the plaintiffs. In this proceeding it is the applicants' case that the delays have been the responsibility of the plaintiffs. In this case it is asserted there are potentially six groups who are not named as defendants but who could have appropriately be joined as third parties but who cannot now be joined because, it is claimed, of the plaintiffs' want of prosecution.

[33] Potential parties include the persons to whom Mr Matthews sub-contracted part of the preparation of plans, specifications and drawings. There is, as previously mentioned, the Tauranga City Council which issued the initial building consent. There is Bay Building Certifiers Limited which issued the code compliance

certificate and who conducted pre issue inspections. Although they are in liquidation there is the availability of a claim against employees who carried out the inspections. Then there is the second defendant against whom the plaintiffs' proceeding has been discontinued because of an agreement that their issues be referred to arbitration. Finally there are the employees of the third defendant builder Partridge Construction who may be liable for joinder now that their employer has been liquidated.

[34] The applicants say:

(a) Mr Barnett's affidavit does not in any event justify pre-issue delay.

(b) Claims of structural engineering issues requiring further analysis are discounted in terms of adequately explaining the delay in filing an amended statement of claim.

(c) From the time of the assessor's report on 8 June 2009 the plaintiffs had sufficient information to commence their proceeding.

(d) The plaintiffs having chosen to delay their proceeding until the late stages of the limitation period they assume responsibility to achieve a proper degree of expedition in the subsequent prosecution of their case. [2]

(e) Notwithstanding Mr Barnett's claim that the plaintiffs did not intend to affect the parties' cross-claims or potential for third party claims, in the context of this kind of proceeding such claims are clearly foreseeable.

[35] Of concern to PSL is that the cladding tape that it manufactured was a small component of the greater cladding system manufactured in the main by James Hardie and installed by Mr McKinnon. PSL believes that the plastering work was completed by March 2003 and accordingly cross claims are now statute barred.

[2] *Sutton v the New Zealand Guardian Trust Co Limited* Auckland A835/84, 24/9/90, Wylie J.

[36] James Hardie believes that any right of claim against the Tauranga City Council expired on 9 September 2012 just ten years after the initial building consent issued. James Hardie believes that although practical completion was around 30 May 2003 that the bulk of construction of the property took place between mid-May 2002 and mid-January 2003, and therefore recourse to potential contributors disappeared at about the time it was served with the plaintiffs' proceeding.

Discussion

[37] The issues focus upon claims of inordinate delay since the commencement of the proceedings, that such was inexcusable, and that it has seriously prejudiced the ability of the defendants to respond to the plaintiffs claims.

[38] A court should be circumspect before considering dismissing a proceeding for want of prosecution. Rule 5.72 provides that a statement of claim and notice of proceeding must be served within 12 months of filing. The Rules also require the service of proceedings "as soon as practicable" after filing. Claims of proper considerations of practicability feature in the plaintiffs response to claims of inordinate delay. The plaintiffs' position is that they have complied with relevant specified timeframes.

[39] Various counsel for the applicants have referred to the decision in *Stewart v Gray River Gold Mining Limited* [3]. In that case a delay of eight months was considered inordinate but, also there had been a considerable history of delay before then in prosecuting the proceeding.

[40] In this case the plaintiffs chose to engage Mr Barnett to report in connection with the plaintiffs ongoing investigations into weather tightness issues by the experts. The plaintiffs say they wanted to be certain about whether structural design issues caused weather tightness damage before defendants incurred time and costs in responding to the claims.

[3] HC Christchurch 9/12/91 A517/78 – Master Hansen.

[41] The Court accepts that this primary reason was the focus of Mr Barnett's report albeit that Mr Barnett's affidavit was provided to explain the plaintiffs delay in service of its proceeding. The court accepts as reasonable the criticism of counsel for the applicants that parts of the affidavit contain hearsay. Importantly Mr Barnett has been able to confirm that the alleged structural defects do not relate to weather tightness issues but instead identify separate and unrelated problems that may have caused separate and distinct damage requiring separate and distinct remediation.

[42] The primary focus of the applications concerns claims that they may be out of time to file cross-claims or join additional parties.

[43] All of the applications for dismissal were filed relatively promptly after service of the plaintiffs' proceedings.

[44] Mr Matthews' application filed on 21 February 2013 refers only to issues of delay without identifying any concern regarding cross-claims or joinder. Likewise is the form of the application for dismissal filed by PSL. The applications of the James Hardie filed on 8 March and Mr McKinnon filed on 15 March 2013 raise for the first time claims of limitation issues in relation to cross-claims and joinder. Those applications referred to the inability of those applicants to consider taking action in relation to acts or omissions by other parties which occurred in the period between mid-May 2002 and mid-January 2003 by virtue of the 10 year "long stop" limitation provision.

[45] It appears that considerations of prejudice were not a feature of some original dismissal applications filed. Since however the prejudice issue is very much at the forefront of all applications.

[46] A significant focus of the applicants' submissions is that the plaintiffs did not provide initial disclosure of their discoverable documents as is required by Rule 8.4 of the High Court Rules, and as indeed was reinforced by the directions of Associate Judge Faire given on 11 December 2012. Initial disclosure has not been forthcoming at all. In part perhaps this is explained by the intercession of the Christmas holiday period shortly after Associate Judge Faire's directions were given. Also, and prior to

the telephone conference scheduled by the learned Judge for 21 February 2013, some of the dismissal applications had already been filed. However, the essence of the applicants' complaints concerning initial discovery is that such discovery ought to have been fully informative of details capable of identifying limitation dates, and as well regarding the identity of potential contributors.

Mr Matthews' application

[47] Upon Mr Booth's analysis for Mr Matthews, the cladding work was completed no later than March 2003. He suggests it might have been even earlier than that.

[48] Mr Booth queries claims of difficulties in preparing a statement of claim when a close analysis of those proceedings indicates they were substantially a copy of the weather-tight assessor's report prepared more than three years earlier in 2009.

[49] Concerning claims of delay being related to the report of Mr Hughes a structural engineer, Mr Booth's comments that while the amended statement of claim differentiated structural engineering claims from other weather-tightness claims, it is now the case that those structural engineering claims have been discontinued.

Mr McKinnon's application

[50] Mr Crombie for Mr McKinnon submitted that because the plastering work was completed by March 2003 there was a period of one to two months only available from the date of service in which to file a statement of defence and after that to lodge cross-claims and to file applications for joinder. Further, that such task was made more difficult because of the plaintiffs failure to provide initial disclosure.

[51] In one respect Mr McKinnon's application differs from those of the other applicants. Mr Crombie refers to the fact that the proceeding against the fifth defendant, the company in Mr McKinnon's control, has now been discontinued. The reason for discontinuance lies in the fact that the fifth defendant was wrongly named as Paradise Coatings Limited when it should have been named as Paradise Coatings

(1997) Limited. It was the latter company that had contracted to apply the external cladding and not Plaster Coatings Limited which was not incorporated until 2005.

[52] Mr Crombie submits that the pleading against Mr McKinnon has an inseparable connection with the pleading against the fifth defendant which is now in liquidation and against which the proceeding has been discontinued.

[53] Mr Crombie specifically refers to the fact that it is pleaded that Mr McKinnon "owed a duty of care to the plaintiffs to ensure that Paradise Coatings [Limited] discharged its duty of care" in completing the external cladding.

[54] Because the whole cause of action against the fifth defendant has now gone any claim against the cladding applicator would need to be filed anew but, Mr Crombie submits, the plaintiffs are now out of time to do that.

[55] Further Mr Crombie argues that because it is not pleaded that Mr McKinnon personally was liable except for this obligation to ensure the fifth defendant completed its obligations, therefore any further proceeding against Mr McKinnon would have to begin anew, and limitation constraints would prevent this.

[56] Therefore it is argued the proceeding against Mr McKinnon must be struck out. The Court deals with these submissions in paragraphs [93] and [94] of this judgment.

PSL's application

[57] Mr Singh for PSL submits that the Weather-tight Homes assessor's report of 2009 ought to have been part of the initial disclosure provided with service of the plaintiffs proceeding. That report contains significant information regarding timeframes and the connections of persons involved that have not been joined as a party to the plaintiffs' proceeding.

[58] Mr Singh also refers to the affidavit of Mr McKinnon who says he performed no building work on the dwelling and that his company have engaged a sub-contractor to perform the plastering work the fifth defendant had contracted to do.

Mr Singh submits because such persons were potential contributors but that it is too late now to join them.

[59] Mr Singh submitted that in the totality of delay considerations the Court should also have regard to the delay that occurred pre-issue of the proceedings. He noted that defects were first noticed in 2004. In 2009 the plaintiffs applied for and obtained a Weather-tight Homes assessor's report. As early as February 2011 the plaintiffs' solicitor wrote to the second defendant architect proposing a meeting to discuss contributions to the "remediation of the defects identified". Apparently nothing came of that suggestion. Indeed it appears little at all happened between the time of the assessor's 2009 report until the last quarter of 2011 when Mr Barnett was engaged to prepare his report.

[60] Mr Singh submitted that if a claim had been lodged by the plaintiffs with the Weather-tight Homes Tribunal in the interim then this would have "stopped the clock" on limitation claims even if a claim was later to be pursued through the High Court. Therefore, in the outcome of this opportunity lost the applicants are now faced with the reality that they no longer have any opportunity to pursue potential contributors.

James Hardie application

[61] Mr McKay for James Hardie submitted that the dismissal applications were in reality all about issues of prejudice. He submits the plaintiffs have been cavalier about the impact of their delays on the defendants' position. In his submission considerations of post-commencement delay can appropriately be adversely impacted by a significant period of pre-commencement delay. In this case he says James Hardie is particularly concerned that a claim for joinder against the Tauranga City Council is no longer available. The Council issued the building consent even though it may not have been involved in the subsequent inspection processes which were carried out by Bay Building Certifiers Limited, a private certifier. Nevertheless the plaintiffs pleading claims that the building plans were defective and it was just those plans which the Tauranga City Council approved for construction. As from 9 September 2012 claims against the Tauranga City Council are time-barred. James

Hardie claims it has been denied an opportunity of joinder because the plaintiffs proceeding was not served "as soon as practicable" after they were filed.

[62] Although it appears James Hardie had a copy of the Weather-Tight Homes assessor's report from about February 2011 it says it cannot be blamed for not taking any action in connection with it, at least until it has been served with a proceeding alleging negligent responsibility.

[63] Mr McKay also provided an analysis of the available evidence in an attempt to identify that date by which the 10 year long-stop limitation period began insofar as it affected James Hardie. By his analysis the exterior cladding work must have been considered to have been completed by March 2003. Therefore, no opportunity remains to James Hardie for joinder of potential contributors.

Considerations

[64] Not since the proceedings were served on the defendants has any of the applicant parties filed cross-claims or applications for joinder.

[65] Mr Shand for the plaintiffs has provided this overview regarding the connection of the applicant defendants to the development building:

(a) The first defendant architect/project manager performed his role from February 2002 until November/December 2003 and by 16 June 2003 he had not issued a practical completion certificate.

(b) The sixth defendant applied the plaster system in March 2003 based on evidence that as at 28 February 2003 the relevant progress claim document showed that the 'solid plaster' was zero per cent complete.

(c) The seventh defendant's product was used by the sixth defendant in its plaster application in March 2003.

(d) The eighth defendant issued a warranty on 17 December 2003 for its Monotek cladding system with a commencement date of that warranty

of 1 May 2003 which date may indicate that the cladding was completed as at 1 May 2003.

[66] It is the plaintiffs case that based on the Weather-tight Homes assessor's report the following appear to be the main weather tightness defects with the building:

(a) Inadequate clearance of base of cladding to ground.

(b) Inadequate floor to ground clearances.

(c) Lack of vertical control joints and cladding.

(d) Failure of taping to cladding joints.

(e) Inter-storey cladding joints failed.

(f) The erroneous location of cladding joints.

(g) Pergolas incorrectly attached through cladding.

(h) Cladding used on horizontal surfaces.

(i) Sealed sill and jamb flashings to windows.

[67] As Mr Shand submits it appears these defects are virtually all cladding issues. Indeed the submissions of Mr Booth concede as much.

[68] Mr Matthews complains he has lost the ability to cross-claim against the third and fourth defendants. The evidence appears to show that those defendants were involved in building work at the property until at least June 2003 and that by 16 June 2003 the first defendant had not by then certified practical completion.

[69] It appears that the cladding work involving the sixth, seventh and eighth defendants was not completed until May 2003.

[70] Mr Matthews complains about an inability to join two persons who were involved in preparing the plans in May 2002. Similarly he complains he has lost the ability to join the Tauranga District Council that issued the building consent on 2 September 2002.

[71] Mr Shand's response is that there is no reference in any evidence to errors with the plans that those other two persons were involved in the preparation of. Likewise there is no suggestion that the Tauranga District Council acted wrongly in issuing the building consent. Indeed, it appears there is a lack of case precedent confirming the liability of a territorial authority for the action only of issuing a building consent.

[72] Regarding Mr Matthews claims to have lost the ability to join as parties two persons who were apparently site foremen on the project, it appears undisputed the building work was ongoing until at least June 2003 and that the relevant defective building work was done post 1 March 2003.

[73] Mr Matthews complains also that he lost the ability to join the individuals who performed building inspections as employees of Bay Building Certifiers Limited. But, the evidence appears to show that all of the relevant building inspections took place between 10 March 2003 and 26 November 2003.

[74] The Court accepts Mr Shand's' analysis of documents regarding those periods when defendants and potential contributors alike were engaged in the project and regarding the extent of their participation.

[75] An analysis of payment claims indicates that the relevant cladding work, and it was cladding work which was the focus of the plaintiffs' claims, was not finalised until, at the earliest, after 30 May 2003. It is in that frame of things that the Court needs to consider the applicants complaints of an inability to acquire knowledge connecting potential contributors. Apparently two of the defendants, PSL and James Hardie in particular, are no strangers to claims involving weather-tightness issues. A third, Mr Matthews is likewise to have been involved in the provision of services to developments from which weather-tightness issues have evolved. Those defendants

could be expected to have been able to access information about the claims affecting them. In any event the Court is satisfied that all defendant applicants had sufficient time to file claims against potential contributors, even if the Court was to concede the plaintiffs assumed that responsibility to the defendants at all.

[76] The case of *Stewart* to which I earlier referred to is an authority supporting claims that a proceeding ought to be filed within time to permit the defendants an opportunity to join third parties before time limitations preclude such joinder. In that case an amended statement of claim was filed in March 1983. In May 1983 the first defendant issued a notice against the second defendant seeking indemnity. In 1991 the plaintiff applied for leave to amend its statement of claim and to amend the parties. Three months later the second defendant applied to strike out the proceeding. A month after that the first defendant applied for strike out. The Court held there was inordinate delay which was inexcusable. It said the period of delay of eight years from the date of the issue of the initial proceeding had prevented the second defendant from issuing a third party notice against its solicitor.

[77] The facts in this proceeding are different to *Stewart* but that case does provide an example of circumstances where considerations affecting an ability to join potential contributors were acknowledged.

[78] In *Lovie v Medical Assurance Society New Zealand Limited* [4] the learned Chief Justice summarised what he regarded as the principles applicable. The case concerned a proceeding issued six months before the limitation period expired. The Court noted the case had been pursued expeditiously initially then there was no action from the plaintiffs for 13 months in breach of a timetable order that applied. Matters for consideration included whether, having regard to the limitation period, the delay prior to the issue of the proceeding could be taken into account and if so to what extent. The Court also enquired whether the 13 month delay since the proceeding was issued had added in a more than minimal way to the prejudice caused by the earlier delay.

[79] Regarding the principles applicable the Chief Justice held:

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[4] NZLR (1992] p244 Eichelbaum C J.

1. By itself, delay prior to the issue of proceedings cannot constitute inordinate and inexcusable delay for purposes of a striking out application.

2. If such delay has occurred, further delay after issue of proceedings will be looked at more critically by the Court, and will be regarded more readily as inordinate and inexcusable than if the proceeding had been commenced earlier.

3. The defendant must show prejudice caused by the post-issue delay. If however the defendant has suffered prejudice as a result of pre-issue delay, he will need to show only something more than minimal additional prejudice to justify striking out the proceeding.

4. An overriding consideration is whether justice can be done despite the delay. As to that, all factors, including pre-issue prejudice and delay, have to be taken into account.

[80] In this case the applicants claim there has been significant pre-issue delay. It was more than three years from the date of the assessor's report which described the details of defects in a form that was largely replicated in the proceeding filed by the plaintiffs on 24 May 2012. In the interim there had been some correspondence involving the plaintiffs' solicitors with one or more parties (including James Hardie) suggesting meetings for discussion and possible resolution. As well the services of Mr Barnett and Mr Hogan were engaged because of concerns that weather-tightness issues may have involved structural services as well as building services in the development.

[81] The plaintiffs filed their proceeding when they did in circumstances where it can be inferred they were conscious of potential limitation issues. However those proceedings were not then served, the plaintiffs say because Mr Hughes enquiries were not complete and in the outcome of those they intended to file an amended statement of claim.

[82] There was no immediate compliance with the directions of Associate Judge Faire that the proceeding be served forthwith and that initial discovery be provided in accordance with r 8.4. In part the Christmas holiday period interceded to delay service. Even now no initial discovery has been provided. Also the defendants' dismissal applications were filed within a short time of the proceedings being served. The proceeding has remained on hold since. As was earlier noted no cross-claims or third party notices have been filed.

[83] In this type of case there is no duty on a party to start a proceeding at any particular time. There is no obligation in proceedings like these that compels a plaintiff to sue anyone other than he or she considers should be joined.

[84] There is no obligation on a plaintiff to file a proceeding any earlier than he or she does. Any requirement that in weather-tight home cases a plaintiff should file a proceeding within time to allow all potential contributors to be joined could result in a requirement that the proceeding be filed well within the limitation period. Some potential contributors may have performed functions many months and even up to a year or more before the defendants became involved in providing contract services.

[85] In our present case the Tauranga City Council was responsible for the singular act of issuing a building consent up to nine months before there was arguably practical completion of services involving some defendants.

[86] In this case although service was not effected upon the defendants until seven - eight months after filing, there is some explanation for that in the enquiries being made by Mr Barnett and due to the investigations being undertaken by Mr Hughes.

[87] This case is mostly about cladding issues. As well it is about the design plans of Mr Matthews. The proceeding has a fairly narrowly defined and discrete focus. It appears some of those involved have some experience of the litigation processes involved.

[88] The Court earlier referred to the fact that the initial dismissal claims were focussed on delay issues only until issues of prejudice were raised by the later dismissal applications. Usually complaints of slow service of proceedings or of initial disclosure would be dealt with by directions of the Court with a threat of consequences for failure to comply with those. This has not occurred in this case.

[89] In the background of all considerations there is a need for the Court to consider "whether justice can be done despite the delay" [5].

[5] *Lovie* [supra] at p.253.

[90] In *Commerce Commission v Giltrap City Ltd* [6] the Court of Appeal at p 579 held:

> In cases of delay and alleged want of prosecution, the right of all citizens and organisations to have access to the Courts for the determination of the issues they have raised should be denied only if that important right is outweighed by a stronger right vested in the defendant to have the case dismissed because justice can no longer be done in the light of the delay... Case management principles and practices are important, indeed vital, for controlling crowded calendars and promoting the expeditious despatch of Court business; but they should not be allowed to obscure or undermine the fundamental purpose of any system of justice which is to deliver justice at all concerned.

Conclusion

[91] It is this Court's judgment that delay has not been inordinate, that it is excusable, and that there has been no sufficient prejudice caused by any post-issue delay. Justice can be done despite any delay that has been caused.

[92] With regard to Mr Crombie's submission that the claim against Mr McKinnon ought to be struck out, it is the Court's view that application be declined. The essence of the pleading is that Mr McKinnon assumed a personal role of supervision to ensure that his company completed the contract works correctly. An error was made because the wrong company of Mr McKinnon was joined as the fifth defendant to the proceeding.

[93] The Court does not consider any new cause of action is required but that the matter can be adequately addressed by a refinement of the present proceeding.

Judgment

[94] The applications for dismissal are dismissed.

Associate Judge Christiansen

[6] CA 114/97 16 December 1997.