IN THE COURT OF APPEAL OF NEW ZEALAND

CA804/2012
[2014] NZCA 82

BETWEEN	GRAEME TREVOR STEPHENS AND MARY STEPHENS Appellants
AND	SUSAN PATRICIA BARRON Respondent

Hearing: 17 February 2014

Court: O'Regan P, Stevens and Asher JJ

Counsel: R O Parmenter for Appellants
D M Law and S J K Thomas for Respondent

Judgment: 21 March 2014 at 11 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by O'Regan P)

Background

[1] The respondent, Susan Barron, has made a claim in the High Court for damages in excess of $1 million against a number of parties, including the appellants, Graham Stephens and Mary Stephens. Mrs Barron's husband was

initially also a plaintiff but he is now bankrupt, and the Official Assignee has discontinued the action from his point of view.

[2] Mrs Barron had contracted a company associated with the Stephens, Auckland Carpet Steam 'N' Dry Cleaning Limited (ACSD), to undertake carpet cleaning and prophylactic insect spraying in the house she owned with her husband. An employee of ACSD, Mr Hutton, undertook the spraying, but, it is alleged, used the wrong spray substance. The allegation is that the substance used was highly toxic and had a catastrophic effect on the home, causing extensive damage and making it an unhealthy environment for its occupants. ACSD has now been liquidated.

[3] A number of defendants, including Mr and Mrs Stephens, applied in the High Court for summary judgment or for orders striking out the claims against them. Some of the other defendants were partially successful in the High Court. However, Associate Judge Doogue refused to grant summary judgment to the Stephens.[1] They appeal against this decision. They argue that there is a complete answer to all of Mrs Barron's pleaded claims against them. None of the other defendants is involved in the present appeal. Mr Hutton is the first defendant but has taken no steps in the proceeding and ACSD has not been sued, due to its liquidation. The other defendants are the insurers of both Mr and Mrs Stephens and Mrs Barron, and parties involved in conducting tests aimed at establishing what substance was sprayed in the home by Mr Hutton.

Issues

[4] The application for summary judgment by Mr and Mrs Stephens was made after the filing of the statement of defence. Leave to file the application was therefore required under r 12.4(3) of the High Court Rules. An application for leave was made but, having found the application for summary judgment itself failed, the Associate Judge did not consider the leave application. Mr and Mrs Stephens did not appeal against the failure to grant leave, but after hearing argument, we gave them

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[1] *Barron v Hutton* [2012] NZHC 2183. Although the judgment says the Judge also refused to strike out the claim, counsel were agreed that this was an error: only summary judgment had been sought.

leave to extend the scope of the appeal by oral application during the hearing to cover the leave issue. This meant we could deal with the substance of the matters before us. The first issue is, therefore, whether leave should have been given.

[5] The principal cause of action against the Stephens is based on an alleged duty of care "to use such reasonable care and skill that in the circumstances a prudent pest controller would in the supervision, instruction and training of Mr Hutton". Mr and Mrs Stephens argue that the Associate Judge should have found that this cause of action could not succeed because no duty of care was established. Their case is that the claimed losses from the spraying undertaken by Mr Hutton were not foreseeable to Mr Stephens when undertaking the training and instructing of Mr Hutton or making the decision not to supervise him. They also say there was insufficient proximity between Mrs Barron and Mr Stephens. In addition, Mr and Mrs Stephens say there are compelling policy considerations counting against the imposition of a duty. The second issue, therefore, is whether it is so clear the pleaded duty of care cannot be established that summary judgment should have been granted.

[6] As a backup position, counsel for Mr and Mrs Stephens, Mr Parmenter, argues there is insufficient evidence as to the nature of the substance sprayed in Mrs Barron's house to provide a basis for proof that the spray caused the pleaded damage. He argues the Associate Judge should have been satisfied that he could confidently conclude that Mrs Barron could not prove the necessary link between the spray and the pleaded damage and should have granted summary judgment on that ground. The third issue, therefore, is whether the inability of Mrs Barron to prove what was sprayed in her home is fatal to her claim.

[7] The other pleaded duties of care on the part of Mr and Mrs Stephens are:

(a) a duty, as concurrent tortfeasors with Mr Hutton, to keep the property safe from any harm arising directly or indirectly from the spray;

(b) non-delegable duties under the Hazardous Substances and New Organisms Act 1996 (HSNOA) and the regulations made under

the HSNOA to comply with specific regulatory requirements relating to hazardous sprays; and

(c) a duty to take such steps as a reasonable and prudent operator would to mitigate any loss or damage caused to the respondent as soon as reasonably practicable after receiving advice from Mr Hutton as to the consequences of the spraying operation.

[8] The Associate Judge did not find it necessary to deal with the pleaded causes of action based on those alleged duties because he found that summary judgment could not be granted in relation to the claim based on the first pleaded duty of care. If we determine he was incorrect in that regard, then we will need to address another issue: can the Court confidently conclude that none of the causes of action based on the remaining three pleaded duties can succeed?

Test for summary judgment

[9] The application for summary judgment was made under r 12.2(2) of the High Court Rules. Summary judgment may be given under that rule if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed. This Court's decision in *Westpac Banking Corp v M M Kembla New Zealand Ltd* makes it clear that a defendant seeking summary judgment has a considerable burden to discharge.[2] Elias CJ delivering the judgment of the Court, made the following points:

(a) The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually this will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim.[3]

(b) An 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

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2 *Westpac Banking Corp v MM Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA).
3 At [61].

from affidavits. It may also be inappropriate where ultimate determination turns on a judgment able to be properly arrived at only after a full hearing of the evidence.[4]

(c) The Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment is not to be arrived at on a fine balance of the available evidence as would be appropriate at a trial.[5]

(d) The residual discretion of the Court to refuse summary judgment would be properly invoked to avoid the oppression which would otherwise result if an application by a defendant for summary judgment would pre-empt a plaintiff exercising the right to amend the pleadings.[6]

(e) Summary judgment should not be applied for unless the substantive merits of the case are clear and capable of summary disposal.[7]

Should leave have been granted?

[10] Because the notice of appeal did not refer to the fact that the Associate Judge did not decide the application for leave to bring the application for summary judgment, we heard only minimal argument on the point. The reason the Associate Judge did not deal with the point was because he addressed the substance of the summary judgment application and, having decided it would fail, determined that he did not need to address the leave question.

[11] The application for leave was based on an argument that the availability of defendant summary judgment became apparent only after Mrs Barron filed answers to interrogatories in the High Court which indicated that she was unable to prove what substance was sprayed by Mr Hutton in the home. Mr Parmenter also argued

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4 At [62].
5 At [64].
6 At [66].
7 At [68].

that the decision by the Official Assignee to discontinue Mr Barron's claim was a relevant factor.

[12] We have to say that we do not find either of these particularly compelling reasons for the granting of leave. The principal argument advanced in the High Court was that Mrs Barron could not make out a duty of care of the kind pleaded in her statement of claim. The nature of the substance sprayed in the home was not a significant factor in that argument. If Associate Judge Doogue had refused leave, we would not have been minded to allow an appeal against that decision on the information before us. However, we have only sketchy information about the reasons for which leave was sought but have heard full argument on the substantive issues. In those circumstances, we will deal with the substantive issues rather than resolving the appeal at the leave stage.

[13] We add that it is important that leave be dealt with as a prior step to the merits of an application for which leave is required. The criteria for granting leave need to be addressed, even if the merits of the substantive application are, themselves, an important aspect of the leave decision.

Duty relating to supervision, instruction and training of Mr Hutton

[14] The pleaded duty to use such reasonable care and skill that in the circumstances a prudent pest controller would use in the supervision, instruction and training of Mr Hutton is founded on the allegation that Mr and Mrs Stephens were both directors of ACSD at the relevant time. It appears that this is incorrect, and only Mrs Stephens was a director, while Mr Stephens was the principal manager. However, there is also an allegation that Mr and Mrs Stephens controlled, managed and operated the carpet cleaning and pest control business of ACSD. While there are factual disputes about the degree of involvement Mrs Stephens had in the business, we proceed on the basis that it can be established that each had a role in the management and operation of the business.

[15] The pleading also includes an allegation that Mr and Mrs Stephens were the "controlling mind and will" of ACSD, that they managed, supervised and operated its business, were charged with the statutory obligation owed by the operators of

ACSD (presumably under HSNOA) and that Mr Stephens had advertised that he personally guaranteed the cleaning undertaken by ACSD.

[16] The last of these is a reference to the fact that the Yellow Pages advertisement for ACSD included a personal guarantee of satisfaction with ACSD's service by Mr Stephens, with a promise of a refund if the customer was not satisfied.

[17] Mr Parmenter argued that this duty could not be made out because it did not meet the tests of foreseeability and proximity and, in any event, the policy reasons against imposing such a duty were so compelling as to be a complete block to the imposing of the duty.

High Court decision

[18] In the High Court, the Associate Judge accepted there was a lack of connection between Mr and Mrs Stephens and the events that occurred at Mrs Barron's home. Neither Mr Stephens nor Mrs Stephens was present and neither took part in the spraying operation, nor did they advise Mr Hutton how to undertake the operation. In relation to the obligation to train employees, the Associate Judge said it was clear that ACSD had a duty to ensure that its employees were properly trained. However, it was much more problematic as to whether Mr and Mrs Stephens exhibited sufficient control over Mr Hutton's actions that they should be personally liable.

[19] The Associate Judge said he thought the claim could not be described as a strong one, but he did not consider Mr and Mrs Stephens had a complete answer to the plaintiff's claim. He noted that the law was not entirely settled, so there was not the degree of certainty which would justify the Court in bringing the claim made by Mrs Barron to an end on a summary application.

Appellants' submissions

[20] In argument before us, Mr Parmenter interpreted the Associate Judge's comments to the effect that there was a lack of connection between Mr and Mrs Stephens and the events that actually occurred in the home as indicating that the

Associate Judge had rejected the alleged duties concerning instruction and supervision, and thus left only the allegation of a duty to train Mr Hutton properly.

[21] We do not read the Associate Judge's comments as segmenting the claim in that way, and in any event, on appeal we are required to address the claim as it is pleaded. We do not think it is helpful to segment the pleaded duty, which is a composite duty to use reasonable care and skill in the supervision, instruction and training of an employee, rather than separate duties to do each of those things.

[22] In effect, the allegation is that Mr and Mrs Stephens, as directors and/or controlling employees of ACSD, had a duty to ensure that its business, involving the spraying of chemicals, was conducted in a proper and safe manner by making sure that an employee actually undertaking the spraying was trained appropriately and given the supervision required. Of course, the need for supervision would depend on the degree of instruction and training given to the relevant employee and also his or her previous experience.

[23] Mr Parmenter accepted in argument before us that his case in the High Court had centred on this Court's decision in *Trevor Ivory Limited v Anderson* (*Trevor Ivory*).[8] He accepted before us that *Trevor Ivory* must now be read in light of subsequent decisions of this Court, particularly *Body Corporate 202254 v Taylor* (*Taylor*).[9] In *Taylor*, this Court reinstated a claim of negligence against the director of a building company in a leaky home case that had been struck out in the High Court. The Court noted the trenchant criticism of the decision in *Trevor Ivory* and William Young P, giving judgment for the plurality, said the Court should not assume too readily that *Trevor Ivory* represented the last word on the topic of director's liability in tort in New Zealand. He also noted that in both *Trevor Ivory* and *Williams v Natural Life Health Foods Limited*[10] the cases had gone to trial. He concluded the Court did not have a good feel for the facts in *Taylor*. Strike out was not therefore appropriate.

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8 *Trevor Ivory Limited v Anderson* [1992] 2 NZLR 517 (CA) ["*Trevor Ivory*"].
9 *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17.
10 *Williams v Natural Life Health Foods Limited* [1998] 1 WLR 830 (HL).

Factual issues

[24] We see the present case as in the same category as *Taylor*. The factual issues in relation to the involvement of Mr and Mrs Stephens in the business, the degree of control each of them exercised, their direct role in the spraying at Mrs Barron's home, the extent of the instruction and supervision needed in relation to Mr Hutton (in particular, his previous experience of working in an organisation undertaking the spraying of chemicals) and the training actually given to him are all matters which need to be established before the question of the imposition of a duty can fairly be resolved.

[25] *Taylor* was a strike-out case, whereas the present case is a summary judgment case, based on the apparent argument that Mr and Mrs Stephens have a complete defence. But the argument before us focused on the existence or otherwise of a duty of care so similar considerations apply.

Foreseeability and proximity

[26] Mr Parmenter argued that the loss suffered by Mrs Barron was not a foreseeable loss from the point of view of Mr and Mrs Stephens, and that even if it was, there was insufficient proximity between the Stephens and Mrs Barron. We see those issues turning on questions of fact of the kind described above, and we do not consider it can be determined with absolute confidence that Mrs Barron could not establish both foreseeability and proximity. In saying that, however, we emphasise this is an area where the law is not settled and what Mrs Barron seeks to establish is novel.

Policy considerations

[27] We now turn to consider whether the policy considerations raised by Mr Parmenter are so strongly against the imposition of a duty of care that summary judgment ought to be entered at this stage of the proceeding. We deal with the three policy matters he raised in the order in which he addressed them.

(i) Trainers would be liable for errors of trainees

[28] The first policy argument raised by Mr Parmenter is that the imposition of a duty on the Stephens in this case would amount to an acceptance that any person providing training or instruction would become liable for the errors made by his or her pupil in the future. He asked whether a tutor at a technical institute would be liable because one of his or her gas fitting apprentices made a mistake on the job. We do not see this as particularly helpful: the nature of the alleged duty of care in this case depends on Mr and Mrs Stephens' role as the guiding hands of a business conducting potentially hazardous spraying. The scope of the duty would be considerably more limited than Mr Parmenter's example. In any event, the gas fitting apprentice example would itself depend on the material facts.

(ii) Attack on limited liability

[29] The second policy consideration raised by Mr Parmenter is that the imposition of a duty would be an attack on limited liability. In that respect he relied on the reference in *Taylor* to the concern that allowing a claim against an employee would erode the concept of limited liability.[11] However, as Mr Parmenter rightly acknowledged, the Court later said that it did not see this point as being decisive because limited liability was not intended to provide company directors or senior employees with a general immunity from tortious liability.[12]

[30] We do not see the question of limited liability as of great moment in the present case. If any duty is established, it would be a duty arising from the personal actions of Mr and Mrs Stephens, not from their position as directors of ACSD. It would not make any difference whether the business they were directing, or for which they were working, was conducted through a limited liability entity or otherwise: what would matter would be their role in the business and the personal actions said to give rise to the duty.

[31] We see limited liability as principally about protecting investors (shareholders), rather than protecting employees or directors. Hardie Boys J said in

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[11] At [29](b).
[12] At [31].

Morton v Douglas Homes Limited, "The principle of limited liability protects shareholders and not directors, and a director is as responsible for his own torts as any other servant or agent".[13] We acknowledge that the comments of Cooke P in *Trevor Ivory* could be taken as supporting the notion that limited liability protects officers of a company from tortious liability.[14] However, we agree with the observation of William Young P in *Taylor* that limited liability relates to the financial risk of shareholders to the capital introduced to the company, and is not intended to provide directors and senior employers with a general immunity from tortious liability.[15]

(iii) Inconsistency with contractual framework

[32] The third policy consideration is the inconsistency with the contractual framework. This was a factor noted by William Young P in *Taylor*.[16] We agree with his comments.[17] Again, this is a matter on which an evaluation of the arguments will be assisted by a proper factual basis, which can be obtained only after a trial. There are, for example, particular factual disputes about the extent to which Mrs Barron chose to deal with a limited liability company and not Mr Stephens personally, the importance of the guarantee given by Mr Stephens in the Yellow Pages advertisement and the question as to whether Mrs Barron relied on Mr Stephens' skill and knowledge in engaging ACSD to undertake the spraying operation.

Conclusion

[33] While we agree with the Associate Judge that the claim cannot be described as a strong one (given the formidable obstacles to imposing a duty of this kind on a director or employee, as opposed to the company itself) we do not consider that this is an appropriate case for summary resolution of the existence or otherwise of a duty.

[34] Again, we do not wish to be misinterpreted as dismissing these policy considerations entirely. At this stage of the proceeding all we need to say is that we

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13 *Morton v Douglas Homes Limited* [1984] 2 NZLR 548 (HC) at 593. See also *Trevor Ivory*, above n 8, at 527 per Hardie Boys J.
14 At 523–524.
15 At [31]. See also the judgment of Chambers J at [125].
16 At [29](c).
17 At [32].

do not see them as being a killer blow to the imposition of a duty of care. That is not to say that they will not be significant factors in the trial Judge's evaluation of the appropriateness or otherwise of the imposition of the pleaded duty of care on the facts of the present case.

Proof of the sprayed substance or substances

[35] We now turn to what Mr Parmenter characterised as his backup position, namely that Mrs Barron's inability to prove what substance was sprayed in her home and at what concentration was fatal to the pleaded claim.

[36] In the statement of claim, it is alleged that Mr Hutton applied "a substance or combination of substances (the 'contaminants') at concentrations and in a manner that damaged the house and contents". In their interrogatories, Mr and Mrs Stephens asked for particulars of the contaminants, and the response given was that they were unknown. There is, in fact, considerable dispute among the various expert witnesses engaged by the Stephens, Mrs Barron and other parties as to the nature of the contaminants concerned.

[37] Associate Judge Doogue expressed a view that the failure to prove exactly what was sprayed in the house was not fatal to the claim, if it could be established that the pleaded damage was caused by the spraying. That would, of necessity, mean the products that were sprayed were not appropriate products for carpet cleaning and prophylactic insect repelling. We agree with that observation. We do not agree with Mr Parmenter that it can confidently be concluded that there is no connection whatsoever between what ACSD did and the alleged damage. Mrs Barron will have to establish on the balance of probabilities that the spray was the cause of the damage. This assessment will depend on a number of factual determinations and the assessment of the expert witnesses' evidence, which can be done only after trial.

Other pleaded duties

[38] As we have concluded that summary judgment should not be entered in relation to the first pleaded duty, it is not strictly necessary for us to deal with the

other three pleaded duties described at [7] above. We merely observe that we do not see these duties as adding much to the first pleaded duty:

(a) The duty to keep the property safe from harm will arise only if the first pleaded duty is established;

(b) The duties under the HSNOA and the regulations made under it will be relevant only if it can be proved that the substance used was a hazardous substance in terms of that legislation and those regulations;

(c) A duty to mitigate loss or damage is an oddity, because the duty to mitigate is the duty of a plaintiff, not of a defendant. If it is intended to argue that a new and different duty of care arose after the initial damage was caused, that duty needs to be pleaded clearly. However, we doubt that any liability arising from such a duty, if it could be established, would be anything other than a duplication of the damage arising from the breach of the first pleaded duty.

Conclusion

[39] We conclude that this case is not suitable for the entry of defendant summary judgment. We therefore dismiss the appeal.

Costs

[40] Costs should follow the event. We order Mr and Mrs Stephens to pay Mrs Barron costs for a standard appeal on a band A basis plus usual disbursements.

Solicitors:
Daniel Overton & Goulding for Appellants
Law & Associates, Auckland, for Respondent