

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

CIV-2008-404-6556

BETWEEN OTEHA INVESTMENTS LIMITED
 Applicant

AND SIMON YATES PLANNING LIMITED
 First Defendant

AND NORTH SHORE CITY COUNCIL
 Second Defendants

AND APEX SURVEYING LIMITED
 Third Party

Hearing: 24 August 2010

Appearances: A R Galbraith QC and C Chambers for the Plaintiff
 No appearance on behalf of the First Defendant
 P McNamara and W Bangma for the Second Defendant
 No appearance by the Third Party

Judgment: 30 August 2010

RESERVED JUDGMENT OF ELLIS J

This judgment was delivered by me on 30 August 2010
At 4 pm, pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

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[1] This is an application for review of the 23 December 2009 decision by Associate Judge Sargisson striking out a negligence claim made by Oteha Investments Ltd against the second defendant, the North Shore City Council. The claim was struck out because the judge concluded that no duty of care could be owed in the pleaded circumstances.

[2] Oteha Investments Limited is a property investment company. In 2006 it acquired land in Albany with the intention of building a residential development that was to include 24 units that it planned to lease to Housing New Zealand Limited.

[3] Prior to lodging an application for resource consent the applicant's representatives twice met (in August and September 2006) with officers of the North Shore City Council to discuss what was proposed. Such meetings are termed "pre-lodgement meetings" and are encouraged by the Council. At the first meeting Oteha's representatives were accompanied by a planning consultant (the first defendant).

[4] Put broadly, the purpose of pre-lodgement meetings is to facilitate any subsequent resource consent application and the statutory consent process that follows. There can be little doubt that such meetings are essentially advisory in nature, and a charge for the expert services provided by the Council representatives at such meetings is made, regardless of whether an application for resource consent is eventually forthcoming. The statement of claim says:

It was always understood by the plaintiff and the first defendant that the purpose of these pre-lodgement meetings, offered by the second defendant was for the second defendant to identify any and all potential conflicts between the Proposed Development and the second defendant's Resource Consent requirements, so as to avoid added and unnecessary delay and expense (in an already time consuming and expensive process) by requiring an amendment to an Application after lodgement, due to conflicts having arisen.

[5] Following the meetings, Oteha lodged its application for resource consent on 8 November 2006, taking into account the advice it had received

from the Council. However in mid-January 2007 a consultant planner for the Council contacted Oteha's planning consultant concerning two relevant matters that were impediments to the application and which had not previously been raised by the Council. These were:

- a) The fact that under both the Council's District Plan and the Resource Management Act there was an esplanade reserve requirement where subdivisions adjoin a stream that is more than three metres in width; and
- b) Under the District Plan there was a proposed extension of Springvale Drive which would impinge upon the proposal.

[6] A site visit was proposed and Oteha was told that each of these two matters required resolution before its resource consent application could be further progressed.

[7] The issue concerning the extension of Springvale Drive was resolved by the end of March 2007. However the reserve requirement remained both live and problematic and ultimately led to Oteha withdrawing its original application and instructing new consultants to lodge a fresh application in order to comply with it. As a result of this, and the associated delay, it is alleged that Oteha's negotiations with Housing New Zealand for the lease of the 24 proposed apartments were terminated. These proceedings were filed.

[8] The statement of claim alleges that the Council owed Oteha a duty of care in the following terms:

At all material times the second defendant, when advertising the availability of pre-lodgement meetings for prospective resource consent applicants and/or their agents to discuss with specialists of and from the second defendant potentially complex applications and their compliance with the RMA and District Plan, including the cost of such meetings in the base fee for resource consent applications, for the arrangement and attendance at pre-lodgement meetings, held itself out to be providing specialist advice and services in relation to the preparation of resource consent applications prior to their lodgement.

...

As such, the second defendant owes to prospective resource consent applicants who book and attend pre-lodgement meetings with the second defendant and its specialists, a duty of care to competently and fully inform and/or advise those entities of any and all matters that may affect the successful outcome of a resource consent application, once lodged.

In the present case, the second defendant owed a duty of care to the plaintiff to competently and fully inform and/or advise of the two Fundamental Matters, brought to the attention of the plaintiff by the second defendant by way of its 31 January 2007 and 29 March 2007 correspondence to the first defendant, prior to the plaintiff lodging its Application for resource consent and, in particular, at the two pre-lodgement meetings attended at the second defendant's offices by the plaintiff and charged for by the second defendant, to the plaintiff.

[9] The Council applied to strike out the claim against it under Rule 15.1. The application was heard before Associate Judge Sargisson on 29 June 2009. As I have said, she later granted the application.

[10] The principal basis for Judge Sargisson's decision was that the Court of Appeal had held in *Morrison v Upper Hutt City Council*¹ and *Bella Vista Resort Ltd v WBPDC*² that local authorities do not owe a duty of care in circumstances which, in her view, were indistinguishable from the present. She was further fortified in her conclusion by the proposition that the courts are less willing to impose a duty of care in relation to "omissions", which was how she characterised the Council's failure to identify the two "fundamental matters" referred to above.

Approach to Review

[11] The basis upon which applications for review of decisions made by Associate Judges are to be conducted is well established: *Wilson v Neva Holdings Ltd* [1994] 1 NZLR 481.

[12] While there was some debate before me as to the precise application of the *Wilson* analysis to the present case it was in the end quite fairly accepted by Mr McNamara for the Council that a decision to strike out was not the exercise

¹ *Morrison v Upper Hutt City Council* [1998] 2 NZLR 331 (CA).

² *Bella Vista Resort Ltd v WBPDC* [2007] 3 NZLR 429.

of a discretion. That is because it turns (almost entirely) upon the correctness or otherwise of the legal propositions upon which the conclusion that the claim disclosed no reasonably arguable cause of action was based. Once that point is reached (based on the approach articulated in *Wilson*) general appellate principles apply and no particular or special weight or deference is to be given to the decision under review. Accordingly I proceed on that basis.

Submissions

[13] Notwithstanding the rather lengthy application for review and statement of issues filed on Oteha's behalf, Mr Galbraith QC readily accepted that there was in reality only one central issue presently for determination, namely whether Associate Judge Sargisson was correct to hold that the circumstances of the present case were materially indistinguishable from those at issue in *Morrison* and *Bella Vista* and thus in her conclusion that no duty of care could be owed to Oteha by the Council.

[14] Mr Galbraith submitted that the learned Associate Judge had failed to appreciate that the signal point of difference between those cases and the present was that *Morrison* and *Bella Vista* were each concerned with whether a duty could arise in the context of the statutory consent process itself. He accepted that those decisions hold that, once a Council is exercising its statutory consent powers and functions, its actions are "barely justiciable" and powerful policy considerations militated against the imposition of a duty of care in respect of those actions.

[15] By contrast (Mr Galbraith said), in the present instance the statutory consent process had not been engaged. Rather, the Council had simply held itself out as an expert advisor, had charged for its advice and had known that Oteha would rely upon it. Thus there was an ordinary *Hedley Byrne* duty to take reasonable care when giving that advice. The policy matters which had militated against a duty of care in the *Morrison* and *Bella Vista* cases were entirely absent. Furthermore, any distinction between acts of omission and

commission was inapt in a *Hedley Byrne* context because the point was that the advice that was given was deficient, and therefore wrong.

[16] Mr Galbraith referred me to a number of decided cases in which local authorities or other similar bodies have been found to owe a duty of care in similar circumstances, in particular *Carll Ltd v Berry*³, *Brown v Heathcote County Council*⁴, *Dancorp v ACC*⁵, *Court v Dunedin City Council*⁶ and *Smaill v Buller District Council*.⁷ It does not appear that these cases were referred to the learned Associate Judge.

[17] Mr McNamara for the Council submitted that both *Morrison* and *Bella Vista* should be read more widely. He said they are properly to be regarded as determining that where a local authority is engaged in what he termed an “interpretative” exercise involving the evaluation or assessment of a particular proposal against the terms of a District Plan or the provisions of the Resource Management Act, no duty of care could be owed. He said this exercise was materially the same regardless of whether a resource consent application had been filed and that even at the pre-lodgement stage the Council was acting under a broad statutory penumbra. While he accepted that, as in *Morrison* and *Bella Vista*, the necessary proximity existed in the present case he said that the policy considerations that militated against the imposition of a duty in those decisions applied with equal, if not greater force, in the present case.

Discussion

[18] The two Court of Appeal decisions in *Morrison* and *Bella Vista* are plainly of central importance here. It is accordingly necessary to consider them in further detail at the outset.

³ *Carll Ltd v Berry* [1981] 2 NZLR 76 (HC).

⁴ *Brown v Heathcote County Council* [1986] 1 NZLR 76 (CA).

⁵ *Dancorp v ACC* [1991] 3 NZLR 337 (HC).

⁶ *Court v Dunedin City Council* [1999] NZRMA 312 (HC).

⁷ *Smaill v Buller District Council* [1998] 1 NZLR 190 (HC).

Morrison and Bella Vista

[19] The facts and key aspects of the Court of Appeal's earlier decision in *Morrison* were summarised by Robertson J in *Bella Vista* in this way (at [35] – [39]):

... Ms Morrison wanted to build two units on a site she owned. The provisions of the District Scheme precluded more than 12.5% of the sites in a given neighbourhood being used for two townhouses. The Council had treated "neighbourhood" as meaning "street". Using that approach the Council provided oral advice to Ms Morrison and her surveyor that her application would satisfy the requirement. This was found to be incorrect and the application was subsequently refused. The Planning Tribunal allowed a specified departure but Ms Morrison sued for the additional costs which had been incurred in the delay that this had occasioned.

In the District Court there was a finding that there was a duty of care and no good reason in public policy to limit or dissolve the duty. In the High Court, and in this Court, there was agreement that there was the necessary degree of proximity or relationship between the parties, but at both appellate levels it was held that, as a matter of policy, there should not be a duty of care.

Richardson P, writing for the Court, noted that, whether or not it was just or reasonable to recognise a duty of care was an intensely practical question which requires consideration of all the material facts in combination.

Richardson P found that the statutory scheme raised three policy considerations tending to negate a private law duty of care. First, the Council, as the statutory body administering the District Scheme, was constantly exercising judgment and there was a heavy overlay of policy considerations which required evaluation and determination. Secondly, there was an appellate structure in place which provided a statutory remedy for the review of initial decisions and various ameliorating remedies were available in that.

Finally, Richardson P said at 338:

The third and final policy consideration tending to negate the existence of any common law duty of care is the floodgates problem. Recognition of a duty of care would allow claims to be advanced whenever a claimant asserted an incorrect interpretation, negligently made, causing loss. And the recognition of a duty of care of this kind could not reasonably be confined to planning responsibilities of local authorities. It would be difficult to justify not extending the duty category to decisions on the construction of other legislation or private law documents likely to affect other persons. In short, the proposed duty category would potentially be hugely

expansive, carrying significant and unacceptably indeterminate consequences for the public interest.

[20] In *Bella Vista* itself the appellant had successfully applied for resource consent on non-notified basis under s 94 of the Resource Management Act 1991 to erect a lodge and restaurant. It later obtained approval to vary the consent and to erect an additional separate conference facility. The neighbours of the facility successfully challenged both consents on the basis that they had consented only to erection of an exclusive homestay and restaurant. The High Court subsequently set aside the consents and remitted the matter back to the Council for reconsideration.

[21] The appellant then sought damages for the Council's alleged negligence in granting the initial consents. In the High Court, Simon France J struck out the negligence claim against the Council because he considered there could be no duty of care owed, although he did not refer to the *Morrison* decision in his judgment.

[22] One of the principal issues in the *Bella Vista* appeal was whether *Morrison* necessarily led to the same conclusion as that reached by Simon France J and in particular whether it could be said that the *Morrison* decision had impliedly overruled an earlier Court of Appeal decision, *Craig v East Coast Bays City Council*.⁸

[23] In the *Craig* case the Council had permitted a deviation from a requirement in a proposed District Scheme without either receiving the required written application or giving affected neighbours the opportunity to object. The Court of Appeal held that the Council did owe a duty of care to the neighbours, with damages quantifiable by reference to the value of the right to object. The decision in *Craig* was not referred to by the Court of Appeal in *Morrison*, notwithstanding that Richardson J had sat on both appeals.

⁸ *Craig v East Coast Bays City Council* [1986] 1 NZLR 99 (CA).

[24] Chambers J held that *Craig* had necessarily been impliedly overruled by *Morrison*. Robertson J, however, preferred not to determine the issue, and said:

[44] Without deciding whether *Morrison* necessarily overrules *Craig*, at the very least it confirms that local authorities cannot owe a duty of care for granting permission to applicants.

[25] On its face this statement invites the argument that the ratio of *Morrison* is (as Mr Galbraith submitted) limited to the post-application stage of the consent process.

[26] Such an argument - that there is a material distinction between the consideration of an application for consent and any preliminary (pre-application) advice that may have been given - garners further support from the judgment of William Young P in the same case. Significantly, he said:

[72] Obviously the more closely the pleading focuses on the precise statutory functions of the Council as a consent authority, the more it engages policy considerations which point away from the imposition of a duty. The statement of claim unhelpfully focuses on the Council's quasi-judicial responsibilities rather than on the broader context in which the relevant decisions were made. In *Morrison* the District Court judgment against the Council in favour of Ms Morrison in relation to a negligent advice claim - which seems to have been closely associated with her ultimately unsuccessful claims - was not challenged on appeal. There is other authority which supports the view that negligent planning advice given by a local authority can sound in damages, see for instance my own judgment in *Court v Dunedin City Council* [citation omitted]. Given *Craig* and the willingness of the Courts to award damages against local authorities for negligent planning advice, I was, until persuaded otherwise by the judgments of Robertson and Chambers JJ, inclined to the view that it was not appropriate on a strike out application to rule out the possibility of a claim in the present circumstances.

...

[74] I have, however, concluded that the case must be addressed as pleaded. This is particularly as the appellants have not sought to reformulate their claims to base them on negligent advice. Indeed, on the basis of what we know of the facts, such a claim would itself face difficulties. So the case must be addressed as founded on the proposition that the Council owed a duty of care associated with the way in which it exercised its quasi-judicial functions.

[27] While expressing reservations about holding against a duty of care in the context of a strike out application and the validity of the third of the policy considerations articulated by Richardson J in *Morrison* (the “floodgates” argument), William Young P ultimately concluded that *Craig* and *Morrison* could not be distinguished and that *Morrison* was to be regarded as the “controlling authority”. It followed that in the *Bella Vista* case the Council could not be said to have owed a duty of care to the appellants.

[28] In my view the above dicta in *Bella Vista* strongly suggests that there is a material difference in terms of the existence of a duty of care between cases of negligent advice and interpretative decisions made by local authorities during the “quasi-judicial” consent process. The existence of such a distinction is further borne out by the cases referred to me by Mr Galbraith and noted at [16] above.

[29] While I accept that (as cogently submitted by Mr McNamara) the Council’s decision and advice functions both involve the interpretation and application of statutory provisions of the District Plan, it is the specific context in which that interpretation and application occurs that is all-important. This is not because the context determines the existence of the necessary proximity (which exists in either case) but rather because it dictates what policy considerations are at play.

[30] At a general level the policy considerations found to militate against a duty of care in *Morrison* were echoed by the three judges in *Bella Vista*, subject to the reservations expressed by the President about the persuasiveness of the “floodgates” factor, particularly in the context of a strike out. As well, however, it seems that in *Bella Vista* Chambers J and Robertson J considered that the fact that the plaintiffs were responsible for their own predicament (because they had asked the council to deal with their application and the variation on a non-notified basis and explained the reasons why, in their view, the council was justified in so proceeding) was a further policy matter that weighed against the existence of a duty in that case. William Young P

preferred to view that factor in contributory negligence, rather than duty, terms.

[31] Ultimately it seems to me that whether or not the present case is materially on all fours with *Morrison* and *Bella Vista* is something that can most usefully be tested by asking whether the policy concerns identified by the Court of Appeal as militating against the existence of a duty in those decisions apply here.

[32] First, volunteering (and charging for) expert advice to assist in the identification of likely impediments to, or requirements for, a particular proposed development seems to me to be very far from a “quasi-judicial” statutory consent function of the sort at issue in *Morrison* and *Bella Vista*. The giving of such advice does not necessitate the making of a decision or the reconciliation and weighing of potentially competing objectives.

[33] While I have already acknowledged that such advice may be predicated on a reading and consideration (or even interpretation) of the relevant parts of the District Plan and/or the statute, there is no final judgment made as to those matters and no-one’s rights or interests are affected. Accordingly I do not consider that the first *Morrison* policy consideration has any application here.

[34] As regards the question of appeal rights (Richardson J’s second policy concern) Mr McNamara’s submission was that it is sufficient that such rights exist and come into play once the formal application for resource consent is made. I do not accept that submission. The advice received may result in no such application ever being made. If it later transpires that that advice was careless and wrong there is no remedy. While I accept that the existence (or not) of appeal rights was not regarded as decisive by Robertson J in *Bella Vista* their absence here certainly does not support the decision to strike out the claim.

[35] Thirdly, I tend to share the concerns expressed by the President in *Bella Vista* about the persuasiveness of an ad terrorem floodgates argument. It may

be that potential liability in negligence does have a chilling effect on the concept of pre-lodgement meetings and advice. Alternatively it may simply mean that more care is taken when giving such advice. More importantly, however, it needs to be remembered that this is a strike out application. Necessarily I am not required to determine whether a duty was in fact owed to Oteha, let alone whether there has been a breach of that duty that was causative of loss to the company. The most that this judgment can do is to find that it cannot be said at this preliminary stage that no duty could be owed. Equally, it could not then be said that Oteha's claim discloses no reasonably arguable cause of action.

[36] Lastly, and in terms of any issue about the part played by Oteha in causing its own loss, my own view (to the extent it is open to me) is that it is a question going to questions of contributory negligence rather than the existence of a duty. And in any event the facts of *Bella Vista* were quite different in this respect. Here there is no suggestion that Oteha misinformed the Council or otherwise sought the outcome that has now been visited upon it. I am unable to see that any policy concern militating against a duty being owed by the Council arises simply because Oteha had also engaged the expert services of the first defendant.

[37] It follows that in my view none of the policy considerations that led the Court of Appeal to find against the existence of a duty of care in *Morrison* and *Bella Vista* exist in the present case. Nor do I consider that it was correct to class this as a case involving an "omission" of the sort that militates against a duty being owed. I think the better view is, as Mr Galbraith submitted, that Oteha's claim involves a standard *Hedley Byrne* pleading which is not readily amendable to a strike out application.

[38] Accordingly I have formed the view that the statement of claim filed by Oteha did disclose a reasonably arguable cause of action against the Council. The decision to strike out the claim on the grounds that no duty could exist was wrong.

[39] The judgment of 23 December 2009 is quashed and the claim against the Council is reinstated accordingly. The appellant is entitled to costs on a 2B basis.

Rebecca Ellis J