IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2023-409-42
[2024] NZHC 389

BETWEEN	ROSS ARTHUR GRAINGER and VIRGINA KATE LANGMUIR First Plaintiffs
	SHANE CUNNINGHAM COAKLEY and JOANNE ELIZABETH BLAKE Second Plaintiffs
	CHRISTOPHER JOHN ROYDS, as trustee of the MP FAMILY TRUST Third Plaintiff
	IAN HARTLEY DUFF and GLENYS GRACE DUFF Fourth Plaintiffs
	EARLY VALLEY FARM LIMITED Fifth Plaintiff

continued….

Hearing: 19 February 2024

Appearances: F W Rose for Plaintiffs
T C Weston KC and R J H Scott for First Defendant

Judgment: 29 February 2024

JUDGMENT OF ASSOCIATE JUDGE LESTER

AND	ANN LOUISE VAN ASCH, DANIEL GERRIT VAN ASCH and PAUL HENRY DRURY VAN ASCH, as trustees of the ESTATE OF GD VAN ASCH Sixth Plaintiffs
AND	CORYSTON FARM LIMITED Seventh Plaintiff
AND	PETER CHRISTOPHER EASTGATE and ROBYN MARGARET JAMIESON, as trustees of the ESTATE OF HELEN MARY GRAHAM Eighth Plaintiffs
AND	IAN TERENCE FORRESTER Ninth Plaintiff [Discontinued]
AND	LANSDOWNE VALLEY LIMITED Tenth Plaintiff
AND	MCVICAR HOLDINGS LIMITED Eleventh Plaintiff [Discontinued]
AND	AF SCOTT FORESTRY LIMITED Twelfth Plaintiff (struck out)
AND	ORION NEW ZEALAND LIMITED First Defendant
AND	LEISURE INVESTMENTS NZ LIMITED PARTNERSHIP Second Defendant

[1] The first defendant applies for further particulars and to strike out part of the third amended statement of claim.[1]

[2] The plaintiffs allege that Orion New Zealand Limited (**Orion**) in February 2017 caused a fire on Early Valley Road in the Port Hills of Christchurch, that caused extensive damage. The plaintiffs allege the fire started near Pole reference number AX 728 in Early Valley Road on 13 February 2017. The plaintiffs claim two

[1] At the time the application was filed, it concerned the second amended statement of claim. In response, plaintiffs prepared a proposed third amended statement of claim which while not yet filed, counsel agreed would be the subject of the present application. I refer to that draft pleading as the third amended statement of claim.

conductors, that is two power lines, came into contact (clashed) creating an overcurrent event. The fuse located at Pole AX 728 (an explosion drop out (EDO) fuse) operated as a result of the overcurrent event causing (the plaintiffs say) molten metal articles to be ejected. Orion disputes this occurred.

[3] An EDO fuse is designed to operate when there is an overcurrent event. Power lines coming into contact can cause an overcurrent event.

[4] That the fuse failed at Pole AX 728 does not necessarily mean the overcurrent event occurred at that Pole. The overcurrent event could have happened anywhere downstream of Pole AX 728 for a length of three kilometres which involves some 29 spans on the main line. Accordingly, the clash of power lines could have happened at any one of those 29 spans downstream of Pole AX 728.

[5] The plaintiffs position is that although they cannot say at which of those spans the power lines clashed, this does not need to be specified in respect of their cause of action under s 43 of the Forest and Rural Fires Act 1977 (**the Act**).

[6] Orion seeks that the plaintiffs plead the location at which the power lines clashed. In addition to the cause of action under the Act there is a cause of action in negligence. The plaintiffs plead that Orion caused the overcurrent event by failing to take adequate or any precautions to mitigate or stop the power lines clashing in the wind downstream of Pole AX 728 during what the plaintiffs say were high winds on the day in question.

[7] Orion seeks particulars of what precautions the plaintiffs say it was required to take to mitigate against or stop power lines clashing during the winds and the ways in which Orion failed to take those required precautions.

[8] There is a separate application for strike out that I deal with at the end of this judgment.

Principles applying to the application for further particulars

[9] The principles outlined by Mr Weston KC, counsel for Orion, were not disputed by Mr Rose, counsel for the plaintiffs. Given I agree with Mr Weston's summary, I adopt it.

[10] Rule 5.26(b) of the High Court Rules 2016 (**the Rules**), requires such particulars "… of time, place, amounts, names of persons, nature and dates of instruments, and other circumstances to inform the court and the party or parties against whom relief is sought of the plaintiffs cause of action".

[11] The Court of Appeal's decision in *Price Waterhouse v Fortex Group limited*, at pages 17-19, is the usual starting point.[2] The Court outlined that a party's pleading is not simply the minimum which the opposing party needs so as to be able to lead, rather it is intended to:[3]

> … supply an outline of the case advanced, sufficient to enable a reasonable degree of pre-trial briefing and preparation.
>
> [12] In *Platt v Porirua City Council*, Kós J noted at [19] that particulars of pleadings are important to:[4]
>
> (a) inform defendants as to the case they have to meet;
>
> (b) limit the scope of matters the plaintiff may put in issue at trial (or in pre-trial settlement discussion);
>
> (c) enable the defendants to know what witnesses it will need to retain and enable them to start preparing evidence ahead of the formal exchange of evidence; and
>
> (d) provide an opportunity for a defendant to seek summary determination on the basis that the claim as pleaded is untenable.

[12] In *Body Corporate 74246 v QBE Insurance (International) Ltd*, Associate Judge Osborne (as he then was) set out three questions that a court could usefully ask to determine whether further particulars are required:[5]

> (a) Has sufficient information been provided to inform the other party of the case they have to meet and to enable them to take steps to respond?

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2 *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998.
3 At 19.
4 *Platt v Porirua City Council* [2012] NZHC 2445 at [19].
5 *Body Corporate 74246 v QBE Insurance (International) Ltd* [2015] NZHC 1360 at [18(h)].

(b) Is there a real risk that the other party may face a trial by ambush if further particulars are not provided?

(c) Is the request oppressive or an unreasonable burden upon the party concerned?

[13] As to the particulars required in a negligence claim, Mr Weston relied on the following factors listed by the Court in *Platt*:[6]

(a) what, *physically* the *defects* are that caused loss (i.e. the "where");

(b) the particular *standards* that the *third parties* failed to meet in the case of each defect, either individually or collectively (i.e. "how" they were "defects");

(c) …

(d) the *standard(s)* required of the *defendant* in undertaking that role;

(e) particulars of the *breach* of duty by the defendant; and

(f) the *loss* thereby caused (that is – the loss caused by the third parties; defective performance which would have been avoided by the defendant performing its duty to the required standard).

[14] Accordingly, it is necessary to consider what the plaintiffs must plead to properly inform Orion of the case it has to meet in respect of the claim under the Act and in negligence.[7]

The claim under the Act

[15] The plaintiffs founding proposition is that Orion "factually caused" the fire as they say the clash of the power lines was the cause of the fire. This claim is disputed. Orion says there is evidence that points to the fire having started before the overcurrent event and that it may have been the fire itself that caused the overcurrent event.

Tucker v New Zealand Fire Service Commission[8]

[16] Mr Weston's submission, at its most basic, was that the Act draws a distinction between fires deliberately lit and fires caused by accident.

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6 *Platt v Porirua City Council*, above n 4, at [24].

7 There is a cause of action in nuisance which Mr Weston submitted did not in substance add anything to the negligence claim and so he did not pursue separate particulars in respect of that claim.

8 *Tucker v New Zealand Fire Service Commission* [2003] NZAR 270.

[17] Mr Weston submitted:

> 42. The facts of [Tucker] concerned a truck driver pulling two trailers on a state highway. Two of the tyres burst and the rims came into contact with the road causing sparks, and a fire resulted. Obviously, the truck driver factually caused the fire. That, however, did not satisfy the causation requirements in s 43. A more nuanced interpretation was required. The entirety of the decision, including the Judge's response to the District Court decision from which the appeal sprang, needs to be assessed. The five reasons given by the Judge at [42] need to be understood in the wider context of the decision.[9] Proving causation in fact is necessary but not sufficient to establish breach of s 43. The High Court found that Mr Tucker, the driver of the truck, could not be regarded as having *caused* the outbreak of the fire for the purposes of s 43

[18] The Fire Service acknowledged in *Tucker* that Mr Tucker had not in any way been negligent or otherwise in breach of any legal obligation when he, as a matter of fact, caused the fire.

[19] *Tucker* confirms that in the case of an accidental fire it still must be shown that the party who factually caused the fire was nonetheless responsible for the outbreak of fire in issue.

[20] If having factually caused the fire, albeit accidentally, the fire was an ordinary consequence of that person's, actions then the person causing the fire was likely to be liable under the Act. Justice William Young gave the example of a farmer who mows a paddock known to be stoney and whose mower strikes a stone which in turn produces the fire.[10] His Honour considered the farmer would be held (indeed without difficulty) to have caused the fire. Such a farmer could fairly be regarded as being "responsible for" the fire. Imposing liability under s 43 of the Act on such a person was consistent with underlying policy of the legislation.

[21] However, as a fire occurring from driving a properly maintained and inspected vehicle down a highway was an *extraordinary* event, his Honour found it difficult to see how the truck driver could be regarded as being responsible for the outbreak of the fire.

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[9] *Tucker v New Zealand Fire Service Commission*, above n 8 at [42].
[10] At [59].

[22] The Court of Appeal in *Leisure Investments NZ Ltd v Grey*, with reference to what it called "the superadded *Tucker* requirement of ordinary event", while considering such was arguably over generous to the defendants, nonetheless acknowledged that the requirement was settled law.[11] The Court of Appeal said, "Whether that is more accurately viewed under the rubric of responsibility or causation is immaterial".[12]

[23] Justice William Young's concluding words in *Tucker* were:[13]

> On the approach which I have adopted s 43(1) is likely to apply so as to impose liability upon any person who deliberately starts a fire or who causes a fire through negligence or other breach of legal obligation. In cases where a person causes fire accidentally but without negligence (or other breach of legal obligation) causation is likely to be difficult to establish. This seems to me to be consistent with likely intentions of Parliament when s 43 was enacted.

How have the plaintiffs pleaded liability under the Act?

[24] The plaintiffs plead liability under s 43(1)(b) of the Act as follows:

> 25. Orion factually caused the outbreak of the Fire when the following happened:
>
> a) An Overcurrent Event occurred on the Orion Network at 5.39 pm on 13 February 2017, and
>
> b) The Overcurrent Event led to either or both of the following events occurring at Pole AX 728:
>
> i. The EDO Fuse operated resulting in hot molten metal particulars from inside the fuse carrier of the fuse being ejected from it onto the grass and vegetation below, igniting it, and/or
>
> ii. The Gunmetal Clamp Connection overheated and/or arced because of the presence of galvanic oxidation at it, sending a shower of incandescent aluminium from the aluminium conductor (jumper) onto the grass and vegetation below, igniting it, and
>
> 26. The chain of events referred to in paragraph 25 above are: a normal or ordinary occurrence in all the circumstances; and are not unusual or extraordinary.

[11] *Leisure Investments NZ Ltd v Grey* [2023] NZCA 89.
[12] At [128].
[13] *Tucker* above n 8 at [66].

> 27. As a result, the above Plaintiffs suffered the losses set out in Schedule A from Orion.

[25] Paragraph 25 of the above pleading is intended to address the issue of what caused the fire as a matter of fact.

[26] It is para 26 that, in my view, creates difficulty. The language at para 26 appears to be designed to address Justice William Young's distinction between a normal or ordinary event (the farmer mowing the stoney field causing sparks) and an unusual or extraordinary event such as occurred in *Tucker*.

[27] The difficulty is in the words "in all the circumstances". Just what that is intended to capture must be pleaded. For example, earlier in the pleading para [19] says:

> The Overcurrent Event was caused by the yellow and blue phase electricity lines in the Orion Network clashing together in the wind at some presently unknown point along Early Valley Road, Lansdowne, but downstream of Pole AX 728.

[28] There is a pleading that at the same time as the overcurrent event there were specified wind gusts. Under the negligence cause of action, which follows the cause of action under the Act, there is the assertion that the power lines were not tensioned correctly, resulting in excessive sag that allowed excessive lateral movement in the wind that caused them to clash.

[29] The plaintiffs must re-plead para [26] of their statement of claim. They must set out in full detail the circumstances which they say meant the fire was a normal or ordinary occurrence of Orion operating its power lines. However, if they are going to say those circumstances include the power lines not being properly tensioned then that is going to require them to plead the type of detail that will have to be provided in the negligence claim.

[30] Orion's evidence is there are nearly 23,500 EDO fuses on the Orion Network. The fuses are commonly operated and intended to be a protection system. There is no evidence or pleading that the operation of an EDO fuse is routinely associated with fire and, as Mr Weston submits, common sense dictates that it must be the case. Why

there would be 23,500 EDO fuses that, in the normal or ordinary occurrence of them being activated, would cause a fire, does not make any sense. However, if that is the pleading the plaintiffs wish to advance then they must be quite clear about that.

[31] The plaintiffs must plead what the other circumstances are which mean the pleaded events in para [25] of the third amended statement of claim were a normal or ordinary occurrence.

[32] Mr Rose's submissions were very brief on this point, essentially to the effect that the pleading as it stands contains the necessary material facts. I do not accept that submission. In terms of the test for particulars, it is not possible to identify what is meant by "in all the circumstances". The plaintiffs are to re-plead the cause of action under the Act. If they maintain the fire was a normal or ordinary occurrence "in all the circumstances", as I have said, the circumstances must be specifically pleaded. If it is going to be asserted some aspect of the use or maintenance of the EDO fuse is relevant to the ordinary occurrence claim, that must be detailed as well. If, in the course of re-pleading, the plaintiffs find themselves having to rely on the power lines not being properly tensioned, then they will need to deal with the matters that I address in respect of the negligence cause of action.

The negligence cause of action

[33] Paragraphs [28] and [29] of the third amended statement of claim are as follows:

> 28. Orion, as the owner and operator of the Orion Network, including Pole AX 728, owed a duty of care to property owners in the surrounding area, including the above Plaintiffs.

[34] Orion breached that duty of care as follows:

> *Particulars*:
>
> 29.1 By causing the Overcurrent Event referred to in paragraph 16 above, by failing to take adequate, or any, precautions to mitigate against, or stop, the yellow and blue phase electricity lines clashing together in the wind in the Orion Network downstream of Pole AX 728 during high winds on 13 February 2017.

Particulars:

> The yellow and blue phase electricity lines were not tensioned correctly, resulting in excessive sag that allowed excessive lateral movement in the wind, and/or

[35] While it is said that particulars are sought of pleadings, not of particulars given the generality of para [28] and the bare pleading at para [29] that the duty was breached, I am satisfied the plaintiffs must provide further particulars. This issue is connected to the plaintiffs not being able to specify at which of the 29 spans downstream from Pole AX 728 the clashing of wires occurred.

[36] The plaintiffs have in correspondence referred to the overcurrent event being a foreseeable event that caused a fire when it should not have.

[37] The plaintiffs must re-plead their cause of action in negligence. They need to be specific as to the content of duty of care alleged. Presumably, it is to take reasonable care to prevent electricity lines clashing or, perhaps more broadly, to take reasonable care to prevent overcurrent events — it is a matter for the plaintiffs to determine.

[38] The plaintiffs must then plead how the duty of care they identify was breached. It is not sufficient to simply say that Orion failed to prevent the lines clashing, as that is a pleading of strict liability.

[39] If the allegation of a failure to properly tension the power lines is to be maintained then what the requisite tensioning is will need to be specified and how Orion was negligent in not reaching or maintaining that standard also specified.

[40] While the plaintiffs do not know at what of the 29 spans downstream from Pole AX 728 the overcurrent event occurred, the onus is not on Orion to prove the power lines were properly tensioned at each relevant point along the three kilometre stretch. It has no onus either in negligence or under the Act.

[41] The plaintiffs say it is not possible for them to be more specific in respect of the tensioning issues. The pleading at [19] of the third amended statement of claim being the clash took place at some "… *presently* unknown point…" (emphasis added).

It is not explained how the plaintiffs may in the future ascertain where the clash occurred.

[42] Mr Rose submits the plaintiffs: "… are relying on circumstantial evidence to prove on the balance of probabilities, that [the lines] clashed in the high winds present at the time because of too much sag between the poles." If that is the case, then the factors said to be the circumstantial evidence must be specifically pleaded albeit this appears close to a pleading of res ipsa loquitur — if that is what is intended again, that should be made express.

[43] Orion's evidence is there are Australian and New Zealand Standards for overhead line design which could be relevant to the duty of care asserted.

[44] The evidence is that if two conductors, that is two power lines, clash as alleged thereby causing an overcurrent event, the arcing (flashover) between the two power lines would damage the exterior coating of the lines which would have been visible after the event. No such damage has been identified by the experts or Fire Emergency New Zealand representatives who were involved in investigating the Port Hills fire in 2017. Orion's evidence is that if the allegation of the clash of power lines is correct, then inevitably there would have been some damage to the conductors at the location of the clashing. There is no evidence in reply on this point.

[45] During oral submissions, Mr Rose submitted the plaintiffs may need discovery to properly plead this point. That claim has not previously been raised and may have been prompted by a comment from the Court.

[46] It is not uncommon for a party facing an application for particulars to say they require discovery to provide the particulars sought. Indeed, it is not uncommon for a pleading to specifically contemplate that particulars will be provided after discovery. That is not the case here.

[47] Mr Weston in his brief oral reply submissions was not in a position to address in detail the position with discovery.

[48] Whether the plaintiffs will have done enough in their new pleading to require Orion to provide discovery relating to the maintenance of its power lines downstream of Pole AX 728 will depend on how the plaintiffs finalise their third amended statement of claim. If the plaintiffs' request for discovery, assuming one is made, can be categorised as fishing, it will go no further.

[49] In *AMP Society v Architectural Windows Ltd*, Chilwell J said:[14]

> In my view, the description of "fishing" in the authorities cited by Barker J [in *Security Bank v Rutherford*] and in other authorities cited by counsel come to this: an applicant is fishing when he seeks to obtain information or documents by interrogatories or discovery in order to discover a cause of action different from that pleaded or an order to discover circumstances which may or may not support a baseless or speculative cause of action.

[50] Whether the next iteration of the plaintiffs' causes of action will be speculative will again depend on how they are framed.

[51] At this stage, all I can say is there is no rebuttal to Orion's evidence that there were no signs of clashing on the power lines found after the 2017 fire. The plaintiffs are unable to say where the clashing occurred and so far have not been able to plead what the relevant tensioning standards are for the power lines or specify a breach of the relevant standard/duty of care. An aspect of the plaintiffs claim is that Orion knew its network was vulnerable to overcurrent events without setting out the basis of the alleged "vulnerability" or how Orion knew of the alleged vulnerability. If it is to be maintained there was a systemic issue with these particular power lines so that they were "vulnerable" then that needs to be pleaded with proper particulars.

[52] In short, the amended statement of claim will require a careful review. If the plaintiffs are going to include in their claim an assertion they can only provide particulars following discovery then, subject to discussions between counsel, I anticipate that an appropriate application will be required. However, all of that is in the future. The application before me is by Orion for particulars. I am satisfied the particulars are required as I have set out.

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14 *AMP Society v Architectural Windows Ltd* [1986] 2 NZLR 195 at 196.

Strike out application

[53] Rule 9.14 of the Rules is headed "Privilege and admissibility not affected by briefs". Sub-rule (e) provides:

> Nothing in this sub-part —
>
> …
>
> (e) allows a brief, served under these rules, to be made available, before it is given in evidence, for use for another purpose or proceeding.

[54] The equivalent rule (r 441J of the Judicature Act 1908) was addressed in *Rea v Russell*, where Baragwanath J discussed the status of a brief of evidence prepared for a different proceeding but not given in evidence in that proceeding. His Honour said:[15]

> … I am satisfied that the briefs in question are protected. Either they fall within the "pending litigation" exception or, if they are not strictly privileged, they are protected under implied contract, or under the equitable doctrine of confidence, or indeed under the privacy jurisdiction.

[55] Mr Weston notes *Rea v Russell* was not referred to in *Affordable Housing Ltd v Body Corporate 396511*, where an application for particular discovery was made seeking expert reports and advice relating to a building where the Body Corporate had sued a local authority.[16] The plaintiff applicant was not a party to that earlier proceeding. Discovery was opposed on the basis it would be disproportionate. That a party is required to list such reports does not make them open documents for the purpose of discovery. The existence of an expert report from an earlier proceeding where that expert did not give evidence producing that report is relevant material and should be discovered but will be subject to a privilege claim. I do not consider *Affordable Housing Ltd* to be on point.

[56] In the second amended statement of claim, for the first time a new pleading emerged. The same allegation is made in each of the negligence and nuisance causes of action and carried over to the third amended statement of claim being paras [29.2.3] and [33.2.3] (the allegation).

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15 *Rea v Russell* HC Auckland CIV-2004-404-7138, 24 April 2007 at [16].
16 *Affordable Housing Ltd v Body Corporate 396511* [2023] NZHC 776.

[57] The plaintiffs were able to include the allegations as the solicitor for the plaintiffs, Mr Gates, spoke to one of the expert witnesses retained by other plaintiffs in an earlier proceeding against Orion arising from the 2017 fire, which claim settled. It is common ground the allegations were sourced from a brief of evidence of a witness for Orion provided in the earlier proceeding but that witness never gave evidence. It is not in dispute the plaintiffs in this proceeding have a copy of that brief of evidence because they disclosed it in their initial disclosure accompanying the amended claim.

[58] Mr Rose, in addressing this application, frankly acknowledged the brief of evidence in question is privileged and accepts it was the springboard for the allegations that are objected to and that such amounted to a breach of that privilege.

[59] I am satisfied the paragraphs referred to should be struck out. The prohibition on using briefs of evidence in other proceedings is made clear by r 9.14(e) of the Rules. That is exactly what has happened here, albeit apparently without Mr Gates appreciating the background that leads to what Mr Rose accepts is a breach of privilege.

[60] Mr Rose accepted that as the brief is privileged it could not be produced in evidence, but the implication from his written submissions was that such did not prohibit the plaintiffs from using the information contained in it or proving those allegations by other means.

[61] I cannot accept this submission and as indicated I did not understand Mr Rose to maintain that submission in his oral submissions. The plaintiffs have gained a springboard from the breach of privilege. They cannot on the one hand acknowledge privilege attaches to the brief and the effect of r 9.14(e) and at the same time say that nonetheless they can use information contained in the brief. That approach would render r 9.14(e) all but useless.

[62] Mr Rose submitted Orion's application does not state it is relying on r 15.1 of the Rules (the strike out rules). Mr Rose did not suggest any prejudice from that omission. Rule 15.1(1) permits the Court to strike out part of a pleading if it is an abuse of process of the Court. I am satisfied it is an abuse of process of the Court to

found a pleading on information contained in breach of r 9.14(e). For r 9.14(e) to be effective, there must be a sanction that meets the substance of the breach.

[63] Accordingly, paras [29.2.3] and [33.2.3] are struck out of the third amended statement of claim.

Costs

[64] Orion has been successful in its application. Counsel were not heard on costs. The order of the Court is that Orion is entitled to costs on a 2B basis plus disbursements as fixed by the Registrar.

[65] If Orion wishes to seek costs on another basis, it must do so by memorandum of not more than three pages in length, ***within five working days*** and the plaintiffs may reply within a further ***five working days*** and costs will then be fixed on the papers. If no such memorandum is filed then the above costs order will become final.

Associate Judge Lester

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