

Report on meeting with Legal Profession on 30 September 2013 concerning the leaky building list

The list

1. New arrangements for the leaky building list have now been in place for 12 months. This is the second meeting with the profession. The first was held on 4 February 2013. There are 135 files on the list. One hundred and twenty-seven are active. Eight are files which have settled and are awaiting completion of settlement. Twenty-nine files are not yet ready for the allocation of a conference, principally due to the fact that the time for statements of defence to be filed has not expired. Twenty-five files are awaiting trial and are under the supervision of the Case Officer, Anne Mitchell. Seventy-three files are at the second or subsequent conference stage and are under the supervision of the Case Officer, Sunema Tuigamala. All have fixed review dates for conferences or other attendance before Judge Faire.

First conference agenda

2. There was general support for a court directed site meeting of experts, followed by an exchange of expert reports. The current formula for the exchange of expert reports was generally accepted. Judge Faire will add to the agenda for the first conference as a separate topic “site meeting and exchange of expert reports”.

3. Representatives from Bell Gully, Simpson Grierson and Meredith Connell have agreed to confer with a view to producing an access to the building site protocol.

Experts

4. As mentioned above, an early site meeting of experts and an exchange of expert reports was seen as an essential step in promoting early settlement. Tim Rainey’s proposals were discussed. The Chief High Court Judge will write to Tim Rainey with a view to circulating his comments and arranging a follow-up meeting.

5. The possibility of expert conferences being chaired by a panel appointed by the New Zealand Institute of Building Surveyors was discussed and no doubt will be considered when the Rainey proposals are further investigated.

6. Venning J saw no difficulty in the trial directions given in respect of experts. Hot-tubbing was being used. He did emphasise the fact that experts must not act as advocates. Counsel must remind experts of the matters set out in Schedule 4 of the High Court Rules.

7. The privilege position relating to briefs of evidence as set out in s 56 of the Evidence Act 2006 and confirmed in r 9.14 was noted.

Particulars

8. The meeting was referred to the judgment of Kós J in *Platt v Porirua City Council* [2012] NZHC 2445 for its analysis of the law relating to particulars of claim in these cases. It was emphasised that it was for the plaintiffs to get their case into a properly particularised

position as soon as possible. This involves identifying the building defects and the damage that results from them. Broken down, that requires:

- a) Specification of precisely what the defect is;
- b) Are the defects universal or isolated and, if so, where are they;
- c) Which defects relate to which defendants; and
- d) What damage has resulted from a defect.

The meeting was advised that generally the court will not allow an open pleading which commences “the defects include but are not limited to”. That simply gives notice of a later amendment being required and the need to ascertain whether the amendment is permissible in terms of r 7.77. It was noted that there is a tension between a plaintiff having to issue a proceeding before the expiry of the limitation period and a defendant who receives a proceeding at a late stage being able to join within the limitation period appropriate third parties.

Timing of mediations

9. Counsel representing defendants emphasised the need to have quantum determined before mediation is attempted. All present accepted that, subject to that matter, an early mediation is desirable, particularly because of the cost of the litigation process leading up to and including trial.

10. The exchange of material ordered for a judicial settlement conference is rarely ordered in a mediation. The parties are therefore left to their own devices to ensure that appropriate material is advanced ahead of the mediation meeting.

Trial

11. Certainty of fixture time was confirmed. Cases must be ready to proceed on the allocated date. Consideration will be given to a delayed start where counsel are double or triple booked in respect of leaky building cases allocated for the same period. It was noted, however, that to date no trials have been lost on account of a loading issue in relation to trial dates. It was also noted that the cases are not to be treated as back-ups. Reference to back-ups will be removed from the court notice advising of the date of hearing.

Further meeting

12. Practitioners were in favour of future meetings at six-monthly intervals to review issues in relation to the leaky building list.