IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV 2013-488-000393
[2016] NZHC 330

BETWEEN	M YOVICH & SONS LIMITED First Plaintiff
	DIANNE FULLER Second Plaintiff
AND	WAYNE WESLEY PETERS and HAYLEY MACDONALD trading as WAYNE PETERS LAWYERS First Defendants
	WAYNE WESLEY PETERS Second Defendant
	MICHAEL JEREMY BADHAM, ARTHUR BROOKS FAIRLEY, GRAEME JOHN MATHIAS, VAUGHAN BEVAN SYERS and GRANT LINDSAY CURRIE trading as THOMSON WILSON, Barristers & Solicitors Third Defendants
	ASB BANK LIMITED Fourth Defendant

Hearing:	23 February 2016
Appearances:	D Grove for the Respondents/Plaintiffs P Fee/V Wethey for the Applicants/Third Defendants
Judgment:	2 March 2016

JUDGMENT OF ASSOCIATE JUDGE CHRISTIANSEN

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

Registrar/Deputy Registrar
Date……

The applications

[1] The plaintiffs' proceeding was filed on 16 August 2013. The third defendants (Thomson Wilson) seek an order rescinding any and all of the orders made by Associate Judge Bell on 9 July 2014, 19 December 2014, 26 March 2015 and 26 May 2015 extending the time for service of the proceeding. The proceeding was not served on the third defendants until 3 August 2015. Not until then were they aware of the proceeding.

[2] Those orders made by Associate Judge Bell were applied for on an ex parte basis. They sought to extend the time for service of the proceeding in accordance with HCR 5.73.

[3] Thomson Wilson has brought its application for rescission on the basis that the plaintiffs did not make full and complete disclosure to the Court when it applied for those orders on an ex parte basis. They say the orders were improperly obtained.

[4] As Mrs Fee for the third defendants submits the background to these proceedings is factually dense. She submits that rather than what was portrayed by those applications what was in fact happening, was in stark contrast to what was being reported. Mrs Fee suggests those applications were misleading and that deceptive conduct was involved.

Background

[5] The first plaintiff was a family company which owned a farm. The second plaintiff (Mrs Fuller) was the sole director of the first plaintiff in her capacity as a trustee of her late father's estate. She had no beneficial interest in the shares of the company which were held for the benefit of the estate which was to go to her son. She maintained a life interest meanwhile.

[6] The second defendant is a principal of the first defendant law firm. He was personally involved in business dealings with clients including Mr Barry Trass and Peter Fuller (the second plaintiff's husband).

[7] In August 2007 Mr Currie of Thomson Wilson, the third defendant, accepted instructions from the fourth defendant (ASB) in respect of a funding transaction to Newco 2007 Limited (Newco) which involved the provision of guarantees by Mr Trass, Mr Peters, Mr Fuller and others, and the plaintiff.

[8] In July and August 2007 the first and second defendants requested and Mrs Fuller agreed to provide security and a guarantee to enable Newco to settle the purchase of a property at Ruakaka (the property). The guarantee was unlimited and $4.185M was borrowed to purchase the property for the intention of a development and on-sale.

[9] The first and second defendants did not hold any shares in Newco. Mr Fuller was one of the shareholders.

[10] The first and second defendants undertook to provide the first and second plaintiffs with a full indemnity from Newco and all shareholders in the event that the guarantee was ever called upon.

[11] On 15 August 2007 the first and second defendants advised Mrs Fuller that the loan documents were being executed the following day and enquired whether she required independent advice from another solicitor other than Mr Currie of Thomson Wilson who was acting on the matter generally. The meeting was held in the second defendant's boardroom. Mr Currie attended and witnessed Mrs Fuller's guarantee. It is pleaded that no independent advice was provided.

[12] It is pleaded ASB's manager had dealt with the first and second plaintiffs accounts for some years and was aware that Mrs Fuller was a shareholder and director of the first plaintiff only by virtue of her trusteeship and not personally.

[13] It is pleaded the first, second and third defendants ought to have been aware that it was imprudent that the first plaintiff and Mrs Fuller enter into the unlimited guarantee; that no proper indemnity was provided by Newco, its related entities, and/or its shareholders. No security was provided. Causes of action included breach of fiduciary duty, lack of good faith, and facilitation of breach of trust.

[14] The plaintiffs' evidence is that due to the financial market crash in late 2007 Newco was unable to develop and on-sell the property as was anticipated. By 2013 Newco was in default of the ASB loan. ASB served letters of demand and Property Law Act notices. Those were served on Newco and all guarantors including Mr Trass, Mr Peters, Mr Fuller and the first plaintiff.

[15] The statement of claim was filed by Foy & Halse, the plaintiffs' solicitors at that time.

[16] The proceedings were filed on the last day before expiry of the limitation period for the causes of action in negligence. Those proceedings were not served "as soon as possible" or within 12 months in accordance with HCR 5.72.

[17] In late 2013 Grove Darlow was appointed as counsel for the plaintiffs. They wrote to Mr Trass and Mr Peters seeking an indemnity in the event that ASB should take action under its securities. In early 2014 discussions took place between Mr Peters, Mr Trass, Mr Fuller and Grove Darlow (on behalf of the first plaintiff) with regard to resolving issues arising out of ASB's demands.

[18] Thomson Wilson was not a party to those discussions but was at that time acting for Mr Trass and his related trusts.

The applications

[19] For a clearer understanding of the submissions of respective counsel the Court has outlined each of the applications for an extension of time to effect service from the evidence information provided in support of those.

Extension request application 7 July 2014 (the first application)

[20] The first application was filed about 11 months after the proceeding was filed.

[21] That application noted the proceeding was concerned with an allegation that a breach of fiduciary duty or common law duty caused or permitted trust property to

be used as security in circumstances where everyone concerned knew the property was trust property. The application then noted:

> (e) The plaintiffs chose not to serve the proceeding while endeavouring to obtain a resolution of the issues. While the proceeding, remains "not served", the parties have, through their respective advisors, nevertheless engaged in settlement discussions.
>
> (f) While issues which are the subject of this proceeding have not yet settled, that prospect is considered "close".
>
> (g) Service of the proceedings will now or will more likely than not unnecessarily inflame the parties' positions or cause them to become entrenched and thereby be counterproductive to a resolution of the present discussions.

[22] In her affidavit filed in support Mrs Fuller deposed:

> 6. A deliberate strategic decision was made to not serve the proceeding (and not advise the defendants of the existence of the proceeding) in order to facilitate an environment in which settlement discussions would occur without the threat of the parties entrenching themselves in 'positions'.
>
> 7. In the case of those defendants that are lawyers, service of the proceeding would have meant decision making without settlement and avenues for settlement would have been taken out of their hands. This was a material factor in the strategic decision not to serve the defendants or advise them of the existence of this proceeding.
>
> 8. That strategic decision has proved justified.
>
> 9. Since filing the statement of claim on 16 August 2013, the parties (excluding Thomson Wilson and ASB Bank Limited) have engaged extensively in discussion. The discussions have moved steadily forward, navigating some difficult issues, to the point that a settlement agreement in form has been written up but not signed and effected. The last step or stage has proved difficult for reasons outside of the control of the parties negotiating a settlement.
>
> 10. …I remain positive about settlement as does the parties with whom we are negotiating.

[23] In his memorandum filed in support Mr Allan as counsel referred to Rule 5.73 as to good reasons being required. He stated:

> 10. …the plaintiffs… made a deliberate decision not to serve the defendants because of an anticipated adverse reaction to settlement discussions.
>
> 11. 'Good reason' was discussed in *Hibbs v Toll*…

12. Good reason will be assessed by reference to all the circumstances of the case, and the Court may have regard to the balance of hardship between the parties as a result. In *Hibbs* the Court referred to the consideration given to the words "for good reason in this context by Lord Brandon in *Kleinwrot Benson Ltd v Barbrak Limited*…, particularly at pages 622 – 623:

> *The question then arises as to what kind of matters can properly be regarded as amounting to 'good reason'. The answer is, I think, that it is not good reason in any particular case must depend on all the circumstances of that case, and must therefore be left to the judgment of the Judge who deals either with an ex parte application by a plaintiff for grant of an extension, or with an inter parte's application by a defendant to set aside an extension previously granted ex parte.*
>
> *Good reason is necessary for an extension in both Category (2) cases and Category (3) cases. But in Category (3) cases the applicant for an extension has an extra difficulty to overcome, in that he must also give a satisfactory explanation for his failure to apply for an extension before validity of the writ expired.*
>
> *The decision whether an extension should be allowed or disallowed is a discretionary one for the judge who deals with the relevant application. Jones v Jones shows that in exercising the discretion, the judge is entitled to have regard to the balance of hardship. In doing so, he may well need to consider whether allowing an extension will cause prejudice to the defendant in all the circumstances of the case. Once a judge has exercised his discretion, it is only on very limited grounds, to well known for it to be necessary for me to set them out here, that an appellant court will be justified in interfering with his decision.*

[24] In his minute approving an extension of time Judge Bell noted:

> [1] They [the plaintiffs] have deliberately held off service so that they can explore settlement…
>
> [2] I accept the plaintiffs' explanation for holding off service…
>
> [3] I am satisfied that this is a proper case to allow an extension of time for service.

[25] The extension of time was granted for six months.

The second application for extension of time (the second application)

[26] This was filed on 12 December 2014. It noted:

> (c) The proceeding is concerned with an allegation that a breach of fiduciary duty or common law duty caused or permitted trust

property to be used as security in circumstances where everyone concerned knew the property was trust property.

(e) The plaintiffs chose not to serve the proceeding while endeavouring to obtain a resolution of the issues. While the proceeding, remains "not served", the parties have, through their respective advisors, nevertheless engaged in settlement discussions.

(f) The parties have in effect agreed to settlement. This is to the extent of a settlement agreement having been drafted and one set of the parties having executed the agreement. There are however some issues which will need to be ironed out before the agreement is finally executed…

(g) Service of the proceedings now will or will more likely than not unnecessarily inflame the parties' positions or cause them to become entrenched and thereby be counterproductive to resolution of the present discussions.

[27] In Mr Allan's affidavit in support he states:

3. …A Settlement Agreement has been signed by the first and second plaintiffs… I believe that the settlement agreement has been signed by one material defendant and party to the settlement agreement. The other defendants are not parties to the settlement agreement but it resolves all rights inter se, if concluded. There are issues still to be resolved and the settlement effected. Nevertheless, all parties to the settlement agreement appear to me to be intent on concluding the settlement agreement. I am unable to provide copies of the exchanges.

[28] In her memorandum filed in support Ms Lethbridge as counsel referred again to Rules 5.72 and 5.73. She reiterated the explanation of principles given by the memorandum filed in support of the first application for extension. She noted further:

17. …both parties have been involved in settlement discussions with only some issues left to be resolved.

…

19. The parties have chosen to continue to withhold service because they believe the parties would navigate their way towards a settlement. That belief has been justified. The parties appear very close to settling this matter.

…

23. Proximity of the settlement is a 'good reason' since it will ultimately obviate the need for the court's assistance at all if the present situation be permitted to run its full course.

> 24. Obviously it is difficult to say it is a certainty that allowing the present decisions to run their full course will definitely result in a settlement within the two month extension sought. However, the plaintiffs remain confident and a draft settlement agreement has been drafted and executed by one side as a result of the dialogue todate.

[29] The minute of Judge Bell granting a second extension records:

> [2] The plaintiffs say that there is good reason under r 5.73(2) because the parties have been actively pursuing settlement. They say that agreement in principal has been reached, although some modifications may still be made.
>
> [3] I grant the extension sought. I am satisfied that there is good reason. The situation in this case is commonly found in leaky schools litigation. The Ministry of Education will issue proceedings, to ensure that they are within the time under s 393 of the Building Act 2004 and will then enter into settlement negotiations with the defendants. Directions are commonly given for stay of the proceeding pending settlement negotiations. I apply a similar approach here.

[30] Judge Bell granted an extension of time to serve until the end of March 2015.

Third application for extension (the third application)

[31] The third application seeking an extension was filed on 24 March 2015.

[32] In Ms Lethbridge's memorandum filed in support counsel notes:

> 3. As advised when the application was filed settlement negotiations have been ongoing and are in their final stages. Service of the proceedings at this stage would seem to jettison in the prospects of settlement. The plaintiffs instruct that settlement is imminent although it is yet to be finally documented and fully implemented.
>
> 5. The plaintiffs of course will attend to filing discontinuances as soon as the settlement has been confirmed.

Fourth application for extension of time

[33] The fourth application seeking an extension was filed on 22 May 2015.

[34] The memorandum of Ms Lethbridge filed in support noted:

> Since… a Settlement Agreement was finally concluded and executed on or about 27 March 2015.

> 3. A last minute issue has arisen in effecting the settlement such that the second defendant who is also a party to the Settlement Agreement was unable to contribute the sum of $200,000 (the Shortfall Sum) in order to achieve an obligation required in the Settlement Agreement.
>
> …
>
> 5. It is also a term of the Settlement Agreement that if proceedings are issued the first and second defendants be removed. The plaintiffs are concerned that should they serve the proceedings before the Shortfall Sum is paid the Settlement Agreement may not be complied with.
>
> 6. For that reason a further extension of time is necessary but given a Settlement Agreement has been executed and part performed there is certainty that this will be the last request for an extension.

The evidence

Evidence on behalf of Thomson Wilson

[35] By his affidavit dated 16 November 2015 Mr Syers noted that in December 2013 letters of demand and Property Law Act notices had been served on Newco and upon the guarantors and that the Property Law Act notices were expiring and ASB was threatening to a mortgagee sale of the property.

[36] He deposed:

> [10] The issues to be resolved were extensive and took a lot of negotiation, but a settlement agreement was finally executed on or about 24 March 2015.
>
> [11] There were two main matters resolved in the settlement agreement. The first related to Newco, McCann, Yovich and the ASB loan. Under the settlement agreement, Wayne [Peters] and Barry [Trass] through their respective Benevolent trusts agreed to repay the ASB loan and costs of $4,368,225.53, in consideration for the ASB assigning the securities it held over Newco to the Peters Benevolent Trust and the Trass Benevolent Trust. The Peters Benevolent Trust and the Trass Benevolent Trust then unconditionally released Peter and Yovich from the securities they had acquired from ASB (including the guarantee of Peter and Yovich) in consideration of the Fuller Benevolent Trust paying $492,000 to Newco which equalised current account contributions already made by the other shareholders in McCann to Newco.

[37] Mr Syers deposed the second issue related to the Advance Developments group of companies, involving, inter alia, in essence very similar entities. Those also

had received Letters of Demand and Property Law Act notices from ASB. The amounts outstanding were approximately $2M and this had been secured by the personal guarantees of Mr Trass and Mr Peters. It is clear that the Trass and the Peters Trusts insisted on those liabilities being resolved in the context of Newco's loan issues.

[38] Mr Syers deposes further:

> [15] Following the signing and settlement of the settlement agreement [dated 24 March 2015], I believed all issues arising out of the ASB loan and the Advanced Development group of companies had been resolved. However, on 31 July 2015 Thomson Wilson received a letter from Foy & Halse, acting for Yovich advising us they had "had to issue proceedings [against Thomson Wilson] in the Whangarei District Court] a copy of the statement of claim was attached, which was dated 15 August 2013…

[39] Mr Syers said he was surprised to receive the proceeding having understood that all issues arising out of the first plaintiff's guarantee had been resolved in the settlement agreement. He said he was even more surprised to learn the proceedings had been issued back in August 2013 and before any settlement discussions had even taken place. He said at no time had there been any suggestion by the plaintiffs or the first and second defendants that there was any issues with Thomson Wilson; that in fact there were two particular instances where Thomson Wilson was led to believe in the opposite.

[40] The first of those related to a meeting with Mr Peters concerning the Newco settlement when Mr Peters mentioned that Mr Fuller had made that oblique comment concerning Thomson Wilson's involvement in acting for Trass. Mr Syers presumed there was a conflict due to the fact that Thomson Wilson was acting for both Newco (in respect of the sale of the development land), and the Trass interests. Therefore he sent an email to all the parties involved asking whether any party had concerns with them acting for those two parties. None responded except Mr Peters who advised he had no issues with it.

[41] Mr Syers said had Thomson Wilson been advised it was a party to the proceedings issued then clearly they would have a conflict of interest and would have had to immediately stop acting for both Newco and Trass and would have had

to notify their insurers, and that Newco and Trass would have had to instruct new lawyers.

[42] The second instance concerned the negotiations of the terms of a settlement agreement from mid-2014. Clause 3 of the draft agreement dated 17 June 2014 stated that all parties acknowledged that all issues between them and with respect to the law firms of Wayne Peters or Thomson Wilson were resolved in full.

[43] Later that day a further amended draft settlement was sent to Mr Syers by Mr Peters and following that they had a telephone conversation to discuss the changes. At that time Thomson Wilson was still included in clause 3.

[44] On 19 June 2014 Grove Darlow sent a letter to Mr Peters proposing further changes to the agreement. Again there were no changes in relation to clause 3.

[45] On 20 June 2014 Mr Peters forwarded a further amended settlement agreement which had a number of marked up amendments including that the deletion of Thomson Wilson from clause 3.

[46] Mr Syers says it is his recollection that he telephoned Mr Allan of Grove Darlow in relation to the deletion of that clause. His recollection is that Mr Allan informed him it was inappropriate for Thomson Wilson to be included in the clause because Thomson Wilson had acted for Mr and Mrs Fuller on other matters and essentially the clause would be removing their right to bring any claim in relation to those other matters if there are issues in the future.

[47] Mr Allan denies there was any such telephone conversation.

[48] Mr Syers says that after consulting with Mr Currie of Thomson Wilson and given it was June 2014 and the loan facility had been signed in August 2014 that Thomson Wilson felt comfortable that if Mrs Fuller or the first plaintiff wished to make a claim against the firm, they were time barred from doing so. Therefore no objection to the removal of Thomson Wilson from clause 3 was raised.

Evidence on behalf of the plaintiffs

[49] The plaintiffs' case is that an element of urgency was required in response to ASB's notices; that loan extensions were required to save the first plaintiff farm which provided the only satisfactory means to pay ASB. Therefore it was necessary to enter into settlement negotiations with co-guarantors, even though the security agreement did not contain any co-guarantor indemnity provisions.

[50] The plaintiffs engaged in settlement discussions with Mr Peters. With the help of Mr Allan of Grove Darlow, Mr Halse prepared the first draft of a settlement agreement on 24 January 2014. The focus of that was to extinguish the first plaintiff's guarantee of the company's debt at no cost to the first plaintiff.

[51] Mr Allan deposes preparing a new draft of the settlement agreement on 12 June 2014. He says he was not aware that Mr Peters was at that time liaising with Mr Syers of Thomson Wilson regarding the settlement agreement. It was a settlement agreement between Mr Peters, the first plaintiff and Mr Fuller. Its purpose was to extinguish the guarantee that had been provided by the first plaintiff and to discharge the mortgage over the farm regarding the company's borrowings.

[52] Clause 3 of that draft agreement provided that it would resolve all issues between the first and second plaintiffs and the second defendant. Mr Allan deposes at that stage Thomson Wilson was not a party and nor was any Trass interest. He said discussions were being undertaken on a without prejudice basis as one would expect.

[53] Mr Allan's evidence is that Mr Syers of Thomson Wilson did not become involved directly in negotiating the terms of a settlement agreement (on behalf of the Trass interests) until 29 September 2014; that before then the plaintiffs discussions regarding a settlement agreement were only with Mr Peters and that Mr Syers involvement at that time related only to the sale of the company property. It was in that regard, Mr Allan says that Mr Syers raised issues of a reference to Thomson Wilson's involvement as being a possible conflict of interest.

[54] Thomson Wilson's present position is that the plaintiffs' evidence throughout proves that its strategy was to settle issues with the first and second defendants (into which framework the Trass interests issues became entwined) but always to preserve rights of action against Thomson Wilson and that as much should have been the case but was not revealed to the Court when the ex parte extension applications were filed.

[55] In his submissions for the plaintiffs Mr Grove rejects this claim. He submits the core responsibility was to save the farm, that only asset which provided security for advances and in respect of which Mrs Fuller had provided a guarantee, she says, with the encouragement of her husband. That security was the property that her father had intended would in due course become the property of her son.

[56] In that regard Mr Grove refers to a letter Mr Syers wrote to the first defendants on 16 March 2010 noting advice that there had been no agreement entered into between the guarantors regulating their respective liabilities and providing indemnities in the event one guarantor was pursued. Mr Syers acknowledged it was correct that on the basis of the security documents signed each guarantor did not have the ability to seek indemnification from a co-guarantor. He noted the plaintiffs were left in a position whereby if they had refused to sign the facility agreement then ASB would likely "have pulled funding on [Newco]" and that if the bank did pull funding, then the guarantee would be called upon.

Legal principles

Relevant High Court Rules

[57] Regarding the requirement for prompt service, Rule 5.72 provides:

> …
>
> (2) Unless service is effected within 12 months after the day on which the statement of claim and notice of proceeding are filed within such further time as the court may allow, the proceeding must be treated as having been discontinued by the plaintiff against the defendant or other person directed to be served if it has not been served.

[58] Rule 5.73 provides:

Extension of time for service

(1) The plaintiff may, before or after the expiration of the period referred to in Rule 5.72, apply to the Court for an order extending that period in respect of any person (being a defendant or other person directed to be served) who has not been served.

(2) The Court, if satisfied that reasonable efforts have been made to effect service on that defendant or person, or for other good reason, may extend the period of service for six months from the date of the order and so on from time to time while the proceeding has not been disposed of.

[59] Rule 7.49 provides that an order [extending time] may be varied or rescinded if shown to be wrong:

(1) A party affected by an interlocutory order (whether made on a Judge's own initiative or on a interlocutory application) or by a decision given on an interlocutory application may… apply to the court to vary or rescind the order or decision, if that party considers that the order or decision is wrong.

…

(3) [Requiring the filing and service of an application].

…

(6) The Judge may,—

(a) If satisfied that the order or decision is wrong, vary or rescind the order or decisions;

(b) …

[60] Rule 7.51 provides that a judge may rescind any order that has been fraudulently or improperly obtained.

(1) A Judge may rescind any order that has been fraudulently or improperly obtained.

(2) The Judge may grant any further relief by way of costs that the interests of justice require.

(3) This rule does not limit any other remedies of a party who has been adversely affected by an order that has been fraudulently or improperly obtained.

Submissions on behalf of Thomson Wilson

[61] Mrs Fee submits that what in the background was actually happening regarding progress with the proceeding was in fact in stark contrast to that which was being stated in the applications for extension. Mrs Fee submits that misleading and deceptive conduct was involved in that regard. Mrs Fee refers to the affidavit of Mr Allan sworn on 17 February 2016. That affidavit attached a copy of an email he sent to Mr Halse and to Mr Goodall (counsel then for Mr Fuller) on 19 June 2014. Mr Allan deposed recording in that email that he had discussed with Mr Peters the issue of him including a covenant in the draft agreement of claims against Thomson Wilson noting it was a term Mr Peters had included in his draft of the settlement agreement. Mr Allan confirmed that he went on to discuss that Mr Peters had assured him that he had not included Thomson Wilson at the request of that firm. Mr Allan said that he recorded in an email that he advised Mr Peters that Thompson Wilson remained firmly within [the plaintiffs'] sights.

[62] Mrs Fee submits the affidavit confirms it was the plaintiffs' intention from 19 June 2014 to sue Thomson Wilson, indeed before any application for an extension of time had been made.

[63] Mrs Fee submits the amendment to the draft agreement which had included a clause releasing Mr Peters' own law firm and Thomson Wilson as being provided indemnity, adds cause to claims that the plaintiffs proposed targeting of Thomson Wilson notwithstanding, indeed, perhaps even for the purpose of specifically preserving rights of suit in the outcome of a settlement with Mr Peters and Mr Trass.

[64] The amendment to the settlement agreement preserved the right to sue Thomson Wilson.

[65] Regarding claims on behalf of the plaintiffs that there was no prejudice to Thomson Wilson in that outcome, Mrs Fee submits the clear evidence suggests otherwise; that had they known that proceedings against them had been filed they could not have continued to act for Mr Trass as they would be in a position of

conflict with the plaintiffs and as well would have to instruct lawyers and contact indemnifiers.

[66] Meanwhile Thomson Wilson were unwittingly acting for the Truss interests in the course of settlement negotiations. Mrs Fee submits that was the plaintiffs' strategy from the beginning. That is why the plaintiffs, on receiving advice from Grove Darlow took no issue with the deletion of the clause which had provided indemnity for Thomson Wilson in the outcome.

[67] Mrs Fee notes that within three weeks of Mr Allan's email recording that Thomson Wilson firmly remained in the plaintiffs' sights, the plaintiffs filed their first application for an extension of time for service. She notes the application recorded the purpose of resolution of the issues, and not just some of the issues as appeared to be the case.

[68] Regarding Mrs Fuller's affidavit in support, she notes that does not advise that all parties have been put on notice and it does not say that the negotiations would resolve all issues.

[69] Mrs Fee submits that at a time unknown to Thomson Wilson the plaintiffs appeared to have devised a strategy to obtain contributions from their fellow shareholders in the company on the basis that collectively such contributions would discharge their joint liability to the ASB, and then they would sue Thomson Wilson for their contribution to that settlement.

[70] Mrs Fee submits that all along it was the plaintiffs strategy that in the outcome of settlement negotiations with others they would get what they could out of Thomson Wilson by way of contributions.

[71] Regarding the extension applications to the Court Mrs Fee submits at least it ought to have been disclosed that Thomson Wilson was acting for one of the shareholders of the company with whom settlement discussions were being held.

[72] Mrs Fee accepts that in certain litigation types, particularly leaky home claims, those proceedings may be filed at "the last minute" i.e. before Limitation Act factors apply. Routinely in those cases extensive settlement negotiations follow but those Mrs Fee submits provide a genuine attempt to settle all issues. By contrast she submits where other parties are involved who are not part of those settlement negotiations, then the Court should be advised; that there was no clear indication to Judge Bell that the relevant settlement negotiations did not include parties against whom the plaintiffs intended to pursue claims whatever the outcome of the settlement negotiations. Therefore she submits this is not the usual kind of case of filing a claim and adjourning pending settlement. Rather she submits the plaintiffs' strategy was to keep Thomson Wilson in dark, solicitors who were advising a party to the settlement negotiations, for the purpose of suing those same solicitors for a contribution to whatever loss the plaintiffs experienced in the outcome.

Considerations

[73] In the present case Thomson Wilson have applied for a rescission on the grounds the orders for an extension of time for serving the proceeding were improperly obtained.

[74] The plaintiffs oppose and say they will lose their claims in damages and negligence against Thomson Wilson otherwise. The plaintiffs have filed a notice of discontinuance against the first, second and fourth defendants.

[75] The submissions of Mrs Fee indicate elements of misleading and deceptive conduct where involved by the plaintiffs' applications for extension of time.

[76] Mrs Fee's submissions indicate the Court's present focus should be upon improper conduct.

[77] Impropriety is to be considered in relation to claims of innocent misuse. Fraud suggests an intentional misuse. Regarding the former Mrs Fee submits the Court's enquiry should focus upon whether the party obtaining the orders knowingly

ignored a legal obligation to provide more information than was done, such that it would be contrary to the interests of justice to allow the orders to stand.

[78] The question then arises whether the order granted would have been made had the alleged impropriety [concerning alleged misstatements or understatements of sufficient facts] not occurred. In short what would Judge Bell have done had he had the advantage of knowing all of the relevant facts?

[79] In the case of *Elvidge v ASB Bank Limited*[1] Judge Bell rescinded an order pursuant to HCR 7.51. That case involved strong claims of fraud. In that case Judge Bell held that the Bank had misled the Court. He held that while it was permissive for a party to passively stand by and watch the Court being misled he considered the Bank had not been passively silent. In other words the Bank had told a half truth to the Court in an aspect which was an essential issue in the decision-making process.

[80] Citing *Martin v Ryan*[2] Mrs Fee noted Fisher J's comment that a failure to observe the upmost duty of good faith would normally result in the discharging of an order, whether or not the order would have been justified on other grounds.

[81] It is the position on behalf of Thomson Wilson that there were a number of non disclosures, misleading statements and half truths which led the Court to make the orders it did. Mrs Fee submits the party seeking an ex parte order had a duty to make full and frank disclosure of all matters which may be material and otherwise ensure the Court is not misled either by a half truth, untruth or by silence. She submits it was represented (implicitly and/or expressly) by the plaintiffs that settlement negotiations were intended to resolve the litigation and, if settled, the litigation would not proceed. Alternatively she submits the material put before the Court invited the Court to infer that the settlement negotiations were intended by the plaintiffs to resolve the litigation against all defendants. Either way, the representation was made that resolution of the settlement discussions would result in the proceedings not being pursued.

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[1] [2015] NZHC 44.
[2] [1990] 2 NZLR 209 at 233 – 234.

[82] In breach of that obligation Mrs Fee submits it was not clearly disclosed by the plaintiffs that:

(a) At no time was Thompson Wilson aware/on notice that the plaintiffs had any dispute with it or intended to bring a claim against it.

(b) Thomson Wilson was involved in the settlement discussion as solicitors for the Trass interests and not in its own capacity.

(c) The plaintiffs did not advise Thomson Wilson of a potential conflict of interest despite Thomson Wilson raising a query in that regard by an email on 8 May 2014.

(d) In June 2014 before the first application for extension, the plaintiffs requested Thomson Wilson's name be removed from clause 3 of the draft settlement agreement which included Thomson Wilson as a party in respect of whom no party to the agreement could have any further claim. Thereby, the amendment preserved the plaintiffs' ability to sue Thomson Wilson notwithstanding the settlement agreement.

(e) At a time unknown to Thompson Wilson the plaintiffs devised a strategy to obtain contributions from further shareholders in the company on the basis that such contributions would discharge their joint liability to the ASB, and for the purpose then of suing Thomson Wilson for their contribution to that settlement.

(f) At some time during the year within which the plaintiffs obtained the orders extending time the plaintiffs knew that the settlement agreement would not resolve all issues between the parties to litigation; that in spite of this it was represented to the Court that settlement would result in discontinuance of the proceedings, or permit the Court to continue to be under the misapprehension that it would.

(g) Contrary to counsel's representations to the Court the underlying claim would turn on the recollection of witnesses as to the advice given by Thomson Wilson, so that the passage of time is prejudicial to Thomson Wilson.

(h) The settlement negotiation was not undertaken to put an end to the litigation but to crystallise a loss for which the plaintiffs, at some later time, intended to seek to recover from Thomson Wilson.

Conclusions

[83] This proceeding is about a guarantee Mrs Fuller provided on behalf of the first plaintiff. It is about claims that Thomson Wilson did not offer Mrs Fuller the opportunity of obtaining independent legal advice regarding her guarantee of a loan pursuant to security arrangements that did not provide for joint and several guarantees.

[84] Mrs Fuller claims she made her late father's estate farm property available as security at the suggestion of her husband. She had no interest in that property except as a trustee. It was to become the inheritance of her son.

[85] Mrs Fuller's signature was witnessed by Mr Currie of Thomson Wilson.

[86] The day before the plaintiffs signed the guarantee they received a facsimile from Mr Currie enquiring whether they wished independent advice to be obtained. She said she signed the documents the following day not having been told by Thomson Wilson what the guarantee was all about.

[87] Thomson Wilson had been instructed by ASB. That letter of instruction noted in the first paragraph that if there were any circumstances where Thomson Wilson considered it could not act, or it would be inappropriate for Thomson Wilson to act as solicitors for ASB, then the Bank was to be advised immediately by Thomson Wilson.

[88] The letter also required Thomson Wilson to make proper financial disclosure of all details of the facility agreements guarantees and security documents to the borrowers and to any guarantor.

[89] It was clear Mr Grove submits that following receipt of ASB's demands and Property Law Act notice, the plaintiffs' strategy at that time was not to crystallise loss but that urgency was required in order to satisfy ASB. That is, he submits, the primary reason why the extensions of time were sought, in order to serve the proceeding to save the farm; that there was no other way of saving the farm without getting the settlement with co-guarantors. In that regard Mr Grove submits it was clear Mr Peters would also be a primary target for the bank. He was an investor and had a personal involvement; and that negotiations with Mr Peters would be necessary to get a release of the first plaintiff's guarantee.

[90] Even before Grove Darlow was engaged there had been settlement discussions with Mr Peters. Then, urgency attached when the ASB issued its Property Law Act notice on 17 January 2013.

[91] As the evidence of Mr Syers confirms negotiations were extensive.

[92] It is clear from the beginning that the primary focus of the plaintiffs' intention was a debt of more than $4M. The initial settlement agreement draft referred only to the guarantors. Its purpose was to get the first plaintiff out of its guarantee obligations.

[93] Clearly the initial discussions occurred before Mr Allan was instructed. Indeed it seems Mr Allan was instructed after the ASB issued its Property Law Act notices.

[94] Regarding the disclosure made on the first application the Court considers that an inference may be drawn from the information supplied in support of the applications, that not all relevant details affecting requests of an extension were disclosed. However it seems to the Court essential elements were. Settlement

discussions were under way but issues were not settled; that service of the proceeding would likely be counterproductive to a resolution.

[95] Had there been disclosure about the claim against Thomson Wilson then that would have threatened the settlement negotiations. The positions of the parties would be entrenched. Indemnifiers would have become involved. That may have affected Mr Peters' ability continue in the negotiation process. As Mr Grove submits that might have caused the loss of the farm.

[96] It is open for consideration that through the application process a settlement may have been achieved without the need to consider pursuit of a claim against Thomson Wilson. It was not immediately obvious that through the settlement negotiation process the plaintiffs would not be required to contribute towards payment of ASB's debt. It was only when the plaintiffs could not avoid that consequence that there was reason to pursue its separate and distinct claims against Thomson Wilson.

[97] It is in that frame of matters the Court might consider was the purpose of Mr Allan's statement in his email of 19 June 2014 (before any application for an extension was filed) to Mr Halse that Thomson Wilson remained firmly in Yovich's sights.

[98] In the second application it was stated the parties had in effect agreed to settlement but there were some issues that needed to be ironed out before execution. Mr Allan said he believed the settlement had been signed by one material defendant and that there were other defendants who were not parties to the settlement agreement but that all rights inter se would be resolved if settlement was concluded.

[99] The third application referred to settlement being imminent and if reached a notice of discontinuance would be filed. The scope of settlement discussions had enlarged: further parties were involved, further issues required resolution.

[100] The evidence is Mrs Fuller's focus was upon retaining the farm.

[101] Likely, as the period of time involved indicates, settlement negotiations were long hard and stressful. It is acceptable in that perspective of matters that no good purpose would have been served by revealing the potential of a claim against Thomson Wilson. At the end of the day the Court was and still is able to rescind the extension orders if significant prejudice as by this process affected Thomson Wilson's ability to defend the proceeding.

[102] Mr Grove's submission was that only in the outcome of a settlement between co-guarantors was the decision made to continue with the intended claim against Thomson Wilson.

[103] In this Court's view and even if it did consider the plaintiff's had misrepresented the position by their applications for extension, based on the full explanation now available this Court believes the decision to grant the extensions of time was not influenced by alleged misrepresentations.

[104] Even if the Court did consider there was a material misrepresentation the Court believes the merits of the case dictate that the orders should stand.

[105] The Court has often accepted that pursuing settlement negotiations was a good reason for extending time for service of proceedings. In this case the negotiations focussed on saving a farm from a mortgagee sale. Almost certainly service of the proceedings on any of the defendants would have brought in the indemnifiers. This may have placed the farm at substantial risk of loss.

[106] Upon their applications for an extension of time the plaintiffs had to satisfy the Court there was good reason for the making of those orders. This judgment has already reviewed the submissions of Mrs Fee in that regard.

[107] The Court accepts a strategic decision was made not to serve the proceeding as focussed around avoiding a mortgagee sale of the farm.

[108] Mrs Fee submitted that when applications for extension were made there was a requirement to observe the upmost duty of good faith otherwise the Court will normally discharge the order if satisfied that good faith did not exist.

[109] The Court does not accept that is the case. Rather recent case law appears to accept that rescission of an order is not automatic if there has been some misleading conduct. Save in clear cases where the Court has been misled, the Court will review the matter and if it considers necessary will conduct a *de novo* hearing on an inter parte application.

[110] In *Love v Wensley Developments The Mariner Limited*[3] French J agreed that whilst there was no deliberate intention to deceive or mislead the Court that most of the additional information not provided was relevant and material and should have been disclosed. Her Honour noted that according to some authorities that conclusion in itself should result in the interim order being automatically set aside. Her Honour concluded that given hers was a hearing *de novo* her preference is to follow a more liberal approach which holds the Court has a discretion and should review the merits of the plaintiff's application in light of all the evidence it now has before it.

[111] In *Wagner v Gill*[4] Toogood J said at paragraph [26]:

> Mr Gilchrist quite properly and fairly acknowledged that while the defendants are justified in complaining strongly about these omissions, it is open to the Court, having now heard fully from the parties, to approach *de novo* the question of whether it is appropriate to continue the existing freezing orders to make fresh orders in light of full argument.

[112] It is submitted for Thomson Wilson that they have been prejudiced by the two year delay that has occurred until they were served with the proceeding. In that regard they say considerations of balance of hardship clearly adversely affect them more.

[113] Thomson Wilson assert they have lost an opportunity to participate in the settlement negotiations to its potential benefit or to seek a right of contribution.

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[3] CIV 2009-425-100, 29 June 2009, French J, High Court Invercargill.
[4] CIV 2011-404-3509, 21 August 2011, Toogood J, High Court Auckland.

These claims are questionable. It has not been indicated what rights of contribution they may have been able to assert against other defendants.

[114] The delay in time is unlikely to impact on the memories of those likely to give evidence. The pleading relates to a single meeting on 16 August 2007 when Mr Currie was present and acted for the plaintiff.

Summary

[115] The current practice of Court is to adopt a liberal approach in determining reviews of ex parte applications.

[116] The merits of the proceeding and the applications for extensions of time are relevant not only to the application to rescind those orders but also in considering those applications on a *de novo* basis. Perceptions of misinformation appear adequately addressed by an understanding of the complex commercial underlay of the negotiations that took place over a longer period of time.

[117] The Court does not agree it was misled by the extension applications; that whilst it would have been preferable if further information was provided at the time of the applications, the Court accepts the plaintiffs had proper reason not to do so because that disclosure would lead to a disclosure of confidential and privileged information and would prejudice the position of the plaintiffs. At the same time the Court does not accept a significant degree of prejudice occurred to the applicant.

Judgment

[118] The applications for rescission are dismissed.

[119] Costs are payable to the respondents on a 2B basis.

Associate Judge Christiansen