SUPREME COURT OF QUEENSLAND

CITATION:	*Woolnough & Anor v Isaac Regional Council* [2017] QCA 219
PARTIES:	**TIMOTHY EARL WOOLNOUGH** (first appellant) **CHRISTEEN WOOLNOUGH** (second appellant) **v** **ISAAC REGIONAL COUNCIL** (respondent)
FILE NO/S:	Appeal No 13425 of 2016 SC No 12 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Mackay – Unreported, 25 November 2016 (North J)
DELIVERED ON:	29 September 2017
DELIVERED AT:	Brisbane
HEARING DATE:	30 May 2017
JUDGES:	Morrison and McMurdo JJA and Boddice J
ORDERS:	**1. The appeal is dismissed.** **2. Set aside Orders No. 2 and No. 8 made on 25 November 2016.** **3. The costs of the application for summary judgment heard on 25 November 2016 be reserved to the judge hearing the trial in the proceedings.** **4. There be no order as to the costs of the appeal.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – ENDING PROCEEDINGS EARLY – SUMMARY DISPOSAL – SUMMARY JUDGMENT FOR PLAINTIFF OR APPLICANT – EVIDENCE IN SUPPORT OF APPLICATION – where the appellants seek damages and restitution of land from the respondents in a current Supreme Court claim in which they allege trespass, negligence and nuisance – where the appellants' applications for summary judgment and default judgment were refused and the appellants appeal against those orders – where the appellants' submissions surround claims that they were not heard by the primary judge and the respondent was yet to produce evidence to support their

defence – where the respondent submitted that the volume of evidence supporting and defending the claim is such that summary or default judgment would be inappropriate – whether the learned primary judge erred in refusing the applications for summary and default judgment

Uniform Civil Procedure Rules 1999 (Qld), r 288, r 292

Woolnough & Anor v Isaac Regional Council [2016] QSC 172, related

COUNSEL: The appellants appeared on their own behalf
P D Lane for the respondent

SOLICITORS: The appellants appeared on their own behalf
Barry Nilsson Lawyers for the respondent

[1] **MORRISON JA:** Mr and Mrs Woolnough[1] have been engaged in litigation against the Isaac Regional Council (the **Council**) since December 2015. They claim that over 10 years ago the Council installed a sewer main on their property without permission or authority to do so. They contend that the result is that subsidence has occurred, and raw sewage rises to the surface and escapes onto their land. They seek damages and restitution of the land.

[2] On 25 November 2016, they applied for summary judgment and for default judgment against the Council. Both applications were dismissed. They appeal against those orders.

[3] The grounds of the appeal were set out in a discursive way in various documents used by the Woolnoughs on the appeal, but can be synthesised as follows:

(a) the Council's legal representatives were acting on instructions from a third party insurer rather than the Council, and that was not revealed to the Woolnoughs until after the hearing on 25 November 2016;

(b) the Court did not hear the Woolnoughs, heard the Council first and ignored the documents relied upon by them; and

(c) the Council did not adduce evidence to support a defence or warrant a trial.

The litigation and applications

[4] Some background to the litigation is necessary to a consideration of the applications and the decision by the learned primary judge. The following has been taken from affidavit material and the reasons of the learned primary judge:

(a) 9 May 2016: the Woolnoughs filed an originating application against the Council, seeking more than $12 million damages for trespass and other causes of action;

(b) 30 May 2016: it was ordered that the proceedings continue as if started by a Claim, and that the Woolnoughs file a Statement of Claim;

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[1] For convenience only, and without intending any disrespect, I will refer to them as "the Woolnoughs", unless it is necessary to distinguish between them.

(c) 27 June 2016: the Statement of Claim was filed;

(d) 22 July 2016: the Defence was filed;

(e) 1 August 2016: hearing of the Council's applications for summary judgment, or alternatively striking out of parts of the Statement of Claim;

(f) 3 August 2016: summary judgment refused, but various parts of the Statement of Claim struck out, with leave to re-plead;

(g) 4 August 2016: Reply filed;

(h) 25 August 2016: the Woolnoughs filed a request for default judgment;

(i) 26 August 2016: an Amended Statement of Claim was served;

(j) 23 September 2016: Amended Defence filed;

(k) 3 October 2016: Amended Reply filed;

(l) 31 October 2016: application filed by the Woolnoughs seeking summary judgment;

(m) 21 November 2016: the Council applied to strike out paragraphs in the Statement of Claim, namely paragraphs 17(1), (2) and (6), 27-38, 42, 43 and the three paragraphs preceding the heading "CONCLUSION"; other orders were sought to progress the proceedings;

(n) 25 November 2016: various parts of the Statement of Claim were struck out; there was no leave granted to re-plead;

(o) notwithstanding the appeal, the proceedings progressed: the property was inspected in March 2017, and between March and May 2017 expert engineers have prepared reports; and

(p) in the course of preparing the case the Council discovered that it had admitted in its Defence that the sewer main was built in 2007 whereas there was evidence that it was done in mid-2005; as a consequence, in May 2017 the Council applied to withdraw that admission; that application had not been heard at the time of the appeal hearing.

The approach of the learned primary judge

[5] The learned primary judge made a number of findings and observations during the reasons given for dismissing the Woolnoughs' applications.

[6] His Honour referred to the general nature of the litigation, and the fact that a summary judgment application had been heard by McMeekin J on 1 August 2016. That was the unsuccessful application for judgment brought by the Council. His Honour said it was "pertinent to refer to the circumstances of the applications and hearing before Justice McMeekin that occurred on 1st of August 2016". His Honour continued:

> "It is pertinent for the purposes of the application before me to make brief allusion to paragraph 8 of his Honour's reasons published on the 3rd of August, to the decision in the Court of Appeal of the *Deputy Commissioner of Taxation v Salcido* and to the other authorities referred to in that paragraph concerning the principles that

> apply upon applications for summary judgment under rule 292 and the cognate rules relating to summary judgments in the UCPR."

[7] The reference to the reasons of McMeekin J was to the decision in *Woolnough & Anor v Isaac Regional Council*,[2] an earlier application for judgment but by the Council, where his Honour said:

> "In *Deputy Commissioner of Taxation v Salcedo* [2005] 2 Qd R 232, after a review of authorities, the Court of Appeal considered the approach that should be adopted to summary judgment applications brought pursuant to rules 292 and 293 UCPR. It was held that the more stringent test laid down by Barwick CJ in *General Steel Industries Inc v Commissioner for Railways (NSW)* (1964) 112 CLR 125 at 130 that "the case of the plaintiff is so clearly untenable that it cannot possibly succeed" is not to be applied. Rather "the court must consider whether there exists a real, as opposed to a fanciful, prospect of success. If there is no real prospect that a party will be successful in all or part of a claim, and there is no need for a trial, then ordinarily the other party is entitled to judgment": per Atkinson J at [47]. See also McMurdo P at [2] and Williams JA at [17]. I bear in mind the cautionary statement of McMurdo P in that case at [3]:
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> > "Nothing in the UCPR, however, detracts from the well established general principle that issues raised in proceedings will be determined summarily only in the clearest of cases. Gaudron, McHugh, Gummow and Hayne JJ. said in *Agar v. Hyde*, (2000) 201 C.L.R. 552, 575-576 [57] recently cited with approval by Gleeson CJ., McHugh and Gummow JJ. in *Rich v. CGU Insurance Ltd* (2005) 79 A.LJ.R. 856, 859 [18]-[19]:
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> > > "... Ordinarily, a party is not to be denied the opportunity to place his or her case before the court in the ordinary way, and after taking advantage of the usual interlocutory processes. The test to be applied has been expressed in various ways, but all of the verbal formulae which have been used are intended to describe a high degree of certainty about the ultimate outcome of the proceeding if it were allowed to go to trial in the ordinary way.""

[8] The learned primary judge then referred to the nature of the claim, and turned to the material filed on the application for summary judgment before him:

> "Placed before me by the parties at the hearing of the application is a vast bulk of documentation. Mr Sharman's affidavit to which I refer, exhibits a number of expert reports that had been commissioned by one or other of the parties or by loss adjustors appointed by an insurer, who has had the interests of the defendant in mind at different times. There are multiple expert reports. It's not necessarily clear from those reports what information or assumptions the reports have been based upon.

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2 [2016] QSC 172, at [8].

> The plaintiffs have filed and have read before me not only their own affidavits in support of the application, but a compendious bundle of documents styled Miscellaneous Documents in the index to the court file. The bundle is contained in a blue lever arch folder. I have not attempted to count the number of pages, the bundle of documents is not paginated. Much of it is reproduced in the affidavit filed by Mr Sharman that I've referred to and also reproduced in some of in the paginated bundle of documents the defendant handed up when the material before me was read. The history of the litigation and the claims, the number of expert reports and the size and breadth of the documents the plaintiffs seek to rely upon in support of their claim speak volumes that this is not an appropriate case for a summary judgment.
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> Plainly, there are, assuming causes of action have been adequately pleaded, issues between the parties that require consideration at a trial. There are, potentially, at least time consuming if not complex issues of admissibility of evidence and relevance to consider. The plaintiff's claims for relief include [indistinct] claims for damages for the trespass and other relief. There is, before me, a cross application by the defendant seeking to strike out some paragraphs of the latest statement of claim; that is, the amended statement of claim that was filed subsequent to the orders made by Justice McMeekin on 26 August 2016.
>
> A perusal of that document and of the amended defence is sufficient to demonstrate quite plainly why this is not an appropriate case for summary judgment. This holding by myself should not be interpreted as any indication by myself as to the [indistinct] merits of the litigation or the issues between the parties. There may well be a claim or claims that can be successfully pursued by the plaintiffs. That is a matter for determination at a trial. Short of any other resolution, either sanctioned by the rules of court or arising as a result of agreement between the parties, the view I take is that the ultimate determination of the rights between the parties should be determined at a trial. For the reasons I've given, therefore, I dismiss the plaintiff's application for summary judgment."

[9] The reasons apparent from that passage for the refusal of the summary judgment application are:

(a) there was substantial documentation which included a number of expert reports, and the information or assumptions upon which the reports were based was not necessarily clear;

(b) it was not an appropriate case for a summary judgment because of (i) the history of the litigation and the claims, (ii) the number of expert reports and (iii) the size and breadth of the documents the plaintiffs seek to rely upon in support of their claim;

(c) assuming that the causes of action had been adequately pleaded, there were issues between the parties that require consideration at a trial; the plaintiffs' claims for relief included claims for damages for the trespass and other relief;

in that respect there were time consuming, if not complex, issues of admissibility of evidence and relevance to consider; and

(d) that the ultimate determination of the rights between the parties should be determined at a trial.

[10] The learned primary judge gave another glimpse of the reason why the application for summary judgment was dismissed, when dealing with the costs. His Honour said: "The application was, really, hopeless in the context of the complexity and history of the matter".

[11] The learned primary judge then turned his attention to the application for a default judgment. Having noted the request his Honour identified that it proceeded on a misconception:

> "I apprehend that they filed it on the understanding that under the rules of court, the defendant is in default because as they put it, evidence had not been filed in support of the defendant's defence subsequent to the filing of the amended statement of claim that had occurred on 26 August 2016."

[12] His Honour then reviewed the sequence of steps and pleadings in the proceeding, which included the Amended Defence filed on 23 September 2016, and the Reply filed on 4 August. His Honour concluded:

> "There is no relevant default that I can identify under the UCPR by or on behalf of the defendant that entitles the plaintiffs to request of the court a default judgment. There is no circumstance such as the noncompliance with a court order of any sufficient seriousness that would warrant the court entertaining such an application for judgment as part of the enforcement of orders. In the circumstances, I dismiss the request for a default judgment."

The orders made on 25 November 2016

[13] The orders made on 25 November 2016 were as follows:[3]

> "lA. Pursuant to rules 171, 155, 157 and 158 Uniform Civil Procedure Rules (1999) the following parts of the Amended Statement of Claim be struck out:
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> a. Sub-paragraphs 1, 2 and 6 of paragraph 17 (commencing with the words "1. Acquisition of Land Act (Qld) 1967 and up to and including the words "Plaintiff's seek the penalty of $2,000.000.00 from 2007 to present day (9) years for continued trespass");
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> b. Paragraphs 27 to 38 inclusive;
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> c. Paragraphs 42, 43 and subparagraphs "A", "B" and "D" of paragraph 43 (where that paragraph appears for the second time under the heading "RELIEF");

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3 AB 951.

d. The three paragraphs which appear immediately under the heading "CONCLUSION".

2. That the plaintiffs be refused leave to file or serve a further amended statement of claim without the leave of the court or a judge first being attained.

3. The plaintiff grant any expert the defendant might appoint to prepare a report, either upon liability or quantum, upon the matters the subject of the plaintiff's claim (and such other person as they might reasonably require) access to the property as is reasonably necessary to carry out such investigations the may deem necessary to prepare any report.

4. At least 21 days before any that the parties are to inform the other who is to be called to give expert evidence at the trial.

5. At least 21 days before trial the parties, are to provide the opposed party with a copy of any report by an expert that:

   (i) The party intends to rely upon at trial; or

   (ii) That has previously reported on the matters the subject of the proceedings; or

   (iii) That might here after prepare a report upon instructions by that party.

6. Subject to these orders parties have leave to call expert evidence at any trial.

7. For the purposes of any property inspection under order 3 above:

   (a) The plaintiffs are to be given 48 hours notice of an inspection;

   (b) A representative, of the defendant is at liberty to be present at any investigation but neither representative nor any of the plaintiffs are to interfere with any expert carrying out the investigation.

8. The plaintiffs pay the defendant's costs of application for summary judgement.

9. The defendant's costs of its application be its costs in the cause.

10. A transcript of proceedings is to be prepared and placed on file."

Submissions by the Woolnoughs

[14] The Woolnoughs represented themselves in the proceedings below and on the appeal. Apart from raising the point about the insurer running the Council's case, they contended that they had been consistently prevented from presenting "our case and documents" in the hearings since the proceedings commenced.

[15] During oral submissions, Mrs Woolnough strenuously asserted that the transcript of the hearing below incorrectly recorded her as saying the things in the transcript. It was put a number of ways, commencing with "I have no recollection of most of what is in that transcript",[4] but ending up with "I did not say the majority of what's in that document. And I'm not going to stand here and lie and say I did".[5] When taken to the transcript of the learned primary judge's reasons, Mrs Woolnough flatly denied that it was said by his Honour.[6]

[16] Mr Woolnough did not take the same line, conceding that "Some of this was said. I've read it. Some of it has been – I believe was said".[7] But he submitted it was a revised transcript and "there's things in here that I know wasn't said".[8]

[17] Mrs Woolnough submitted that the learned primary judge did not hear them on the applications on 25 November 2016. She said "within minutes, the judge … dismissed our summary judgment and default before we had a chance to stand before him … and state … the application that we'd put in. It was just dismissed straight away" and "he gave us no reason for dismissing it".[9] She said that "We introduced ourselves. We sat. The next thing we heard was, "Default judgment and – and summary judgment dismissed."[10]

[18] The error she identified in the learned primary judge's reasons was that "he didn't hear us in court".[11] That was a complaint levelled by Mrs Woolnough at the appeal proceeding, that is "from the very beginning, we have not been heard in court … We have never been heard orally speaking, our claim, our application, a submission. We have never ever been heard."[12]

[19] Mrs Woolnough had a more broad complaint, that they had been the subject of discrimination based on their age, and that they were not legally trained.

[20] Mr Woolnough contended that the error on the learned primary judge was that his Honour assumed wrongly that what was produced on the hearing of the application was the Council's evidence that could entitle them to defend at the trial.[13] As it transpired, his submission was that there was no evidence upon which a successful defence could be made.[14] His contention was that there was simply no evidence of any notification of entry for the purpose of survey, notification of the construction authority's intent, no easement registered, and no authority from them as owners allowing them to be on the land.[15]

[21] Mr Woolnough also submitted that they expected that the hearing of the application was the opportunity for the Council to present their evidence:[16]

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4 Appeal transcript 1-6 line 37.
5 Appeal transcript 1-7 line 41.
6 Appeal transcript 1-13 lines 22, 36.
7 Appeal transcript 1-10 line 36.
8 Appeal transcript 1-11 line 1.
9 Appeal transcript 1-8 lines 36-46.
10 Appeal transcript 1-24 line 32.
11 Appeal transcript 1-9 line 35; 1-12 line 2.
12 Appeal transcript 1-21 lines 19-46.
13 Appeal transcript 1-14 lines 31-41.
14 Appeal transcript 1-15 line 25.
15 Appeal transcript 1-16 lines 17-25.
16 Appeal transcript 1-27 lines 15-19.

> "But I was under the impression, from what happened was, that the application filed on the 17th by the defence, a month after they should have had the information to us, right, that Judge North was giving them the opportunity to present their evidence, you know, that they could defend themselves against us or against the claim at trial."

The Council's submissions

[22] On behalf of the Council, it was submitted that the volume of documents before the learned primary judge contained evidence going to defences against parts of the claim, and which made the application an inappropriate one in which to give judgment. For example: there were said to be reports from six different engineers, each with different views, in relation to the subsidence issue which was an important part of the Woolnoughs' claim; and the expert reports suggested that the sewer main had not been compromised.

[23] The Court was told that the Council had brought an application in the trial division, to be heard the day after this Court's hearing, seeking to amend the defence in a way which would have a significant impact on the trespass claim. As explained, this was because the Council sought to withdraw the admission that the work had occurred in July 2007, because it intended to plead that the work was in fact done in 2005. It was explained that the significance of that amendment was that 2005 was prior to the Woolnoughs' ownership of the land. It was contended that as the case might be substantially re-pleaded, even if this Court were of the view that the learned primary judge was wrong not to have given some sort of summary judgment, this Court would come to the conclusion that no judgment at all ought to be given until the pleadings are closed.

Discussion

[24] The first point of the appeal can be easily dismissed. That the Council's insurer was involved in conducting the litigation is hardly surprising, nor objectionable. In an affidavit in support of the appeal, Mr Woolnough said that fact was "never disclosed to Woolnoughs by the [Council] nor Mr John Sharman solicitor between approx July 2011 and the 25th Nov 2016".[17] In fact the material before the learned primary judge suggested that the Woolnoughs had known that the Council's insurer was involved as early as September 2011.[18]

[25] Much of the difficulty confronting the Woolnoughs' appeal derives from a fundamental misunderstanding on their part as to the court processes leading to a trial. It was evident that they believed that interlocutory hearings were the time and place where the Council would put all their evidence forward. Plainly that is wrong. Whilst it may be that applications require some evidence to be adduced, the trial is where all the relevant evidence on both sides is brought forward.

[26] The second misapprehension was that it was not enough for the Council to file a defence. It had to produce evidence in support of the pleading.[19] That proposition only has to be stated to be seen to be wrong.

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17 AB 955.

18 AB 844; email dated 19 September 2011 from Ms Keogh to the Woolnoughs which noted an entry, at AB 846, that "correspondence has been forwarded to Council s legal representatives and insurance company for advice".

19 Appeal transcript 1-16 lines 35-41, 1-20 lines 5-9.

[27] Those misapprehensions were the cause of the Woolnoughs applying for default judgment. That was an application doomed to failure, and rightly dismissed.

[28] The main complaints by Mrs Woolnough, that they were not heard by the learned primary judge, and that the transcript does not reflect what was said, must be rejected. I have listened to the audio recording of the entire hearing concerning the applications for summary judgment and default judgment, and the reasons for dismissing the applications. Save for some asides when the learned primary judge spoke to his associate,[20] and some inconsequential typographical errors,[21] it accords with the transcript.[22] There is no question that the Woolnoughs were heard. For example, the transcript reveals:

(a) Mrs Woolnough's contentions that: the Council had not put forward its evidence,[23] there were caveats on the property,[24] the damage suffered;[25]

(b) Mr Woolnough's contentions that: the Council had not put forward evidence of the authority it relied on, and had no defence to the trespass claim;[26] the sewer line was negligently constructed, and the damages;[27] and

(c) the learned primary judge telling them that they would be heard first on the application for summary judgment;[28]

(d) having dealt with the application for summary judgment, the learned primary judge then telling the Woolnoughs that the next application to be dealt with was that for default judgment;[29]

(e) the Woolnoughs then responding with the contention that the Council had not adduced any evidence in breach of the orders made by McMeekin J.[30]

[29] It is true to say that the learned primary judge did not call upon Counsel appearing for the Council, but that does not support Mrs Woolnoughs' contention that they were not heard.

[30] Mr Woolnough's contention, that the Council failed to adduce evidence at the hearing below that would suggest it could succeed at trial, is another matter.

The trespass claim

[31] The Amended Statement of Claim pleaded a case in trespass.[31] It specifically pleaded that what the Council did was without the consent or knowledge of the Woolnoughs as owners.[32] The Amended Defence admitted that the Woolnoughs

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20 AB 3 lines 15, 44; AB 5 line 36; AB 7 line 38; AB 11 lines 16, 42.

21 AB 6 line 36 ("three hundred and eighty-eight"); AB 7 line 39 ("on the court file"); AB 11 line 45 ("to have those"); AB 15 lines 15 and 17 ("pacific", not "specific"); AB 17 line 10 ("10 or"); AB 19 line 2 ("a man in Townsville"); AB 19 line 6 ("Taylor Solicitors"); AB 21 line 1 ("well, all he said").

22 AB 2-25.

23 AB 9, 14-15.

24 AB 14.

25 AB 21-22.

26 AB 16-19.

27 AB 18, 19-20.

28 AB 15.

29 AB 23.

30 AB 24-25.

31 Paragraphs 1(b), 6, 12, 14, 15 and 17; AB 921-923.

32 Paragraph 15(b), AB 923.

had purchased the land on about 15 November 2006, but denied the lack of consent, in these terms:[33]

> "As to paragraph 15 of the Statement of Claim, the defendant denies that the sewer main trench was unlawfully installed by the defendant, its servants and / or agents, and / or without the consent and / or knowledge of the plaintiffs as said allegations are untrue and states that the plaintiffs consented, agreed and / or acquiesced to the defendant, its servants and / or agents, entering the property in and around July 2007 for the purposes of constructing / installing the sewer main trench."

[32] As can be seen the Council mounted a positive case that it had the Woolnoughs' consent or acquiescence to the entry on the land. The Woolnoughs' Reply put that in issue:[34]

> "15. Defendant denying is not facts or evidence.
>
> Provide all evidence to verify agree entry and consent and Plaintiffs signatures to enter the property in July 2007."

[33] The Council conceded before this Court that it had not adduced any evidence at the hearing below that it had consent to be on the Woolnoughs' land, and could not point to any evidence of acquiescence.[35] The onus of proving consent or acquiescence was on the Council.[36] When pressed to explain how it could discharge its onus of showing a defence to the trespass claim, Counsel referred to the pleaded statutory defence. That defence was in these terms:[37]

> " … if this Honourable Court was to find that the installation of the sewer main trench constituted a trespass to the plaintiffs' property (which is denied), any such trespass ended / ceased with the commencement of s 144 of the *Local Government Act 2009 (Qld) ("2009 Act")*, which allows for the installation of such infrastructure without a property owner's consent."

[34] As was conceded by the Council before this Court, that relates to the position from 2009, and not from 2007 when it was alleged the trespass commenced.[38] And in the earlier judgment, on the application by the Council, McMeekin J had suggested that the statute may not give authority prior to the Act's commencement in 2009.[39]

[35] No consideration seems to have been given by the learned primary judge to either of these aspects of the case.

The claims in nuisance and negligence

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33 Paragraph 15, AB 933.
34 Paragraph 15, AB 940.
35 Appeal transcript 1-39 lines 28-30, 1-41 lines 3-8.
36 *Plenty v Dillon* (1991) 171 CLR 635; [1991] HCA 5; at 647 per Gaudron and McHugh JJ; *Department of Health and Community Services v JWB and SMB (Marion's case*) (1992) 175 CLR 218, [1992] HCA 15, per McHugh J at p 311; *White v Johnston* [2015] NSWCA 19, at [95].
37 Paragraph 17(d), AB 934.
38 Appeal transcript 1-41 lines 10-21.
39 *Woolnough & Anor v Isaac Regional Council* [2016] QSC 172 at [24]-[30]; AB -912.

[36] The Amended Statement of Claim pleaded an adequate claim in nuisance and negligence. The contrary was not suggested below or before this Court. The relevant breach of duty alleged that when the Council designed and installed the sewer main and other works in July 2007, it did so in breach of proper engineering standards.[40] As a consequence it caused ground instability, structural damage and sewage escape.[41]

[37] The Amended Defence, whilst admitting that the Council installed the sewer works in July 2007, denied any breach of duty because competent engineers were engaged to design and install the works, and the Council relied upon them.[42] As well the defence put in issue the dimensions and location of the works,[43] and the extent and cause of any alleged damage.[44]

[38] The nuisance claim was put in issue, the Council pleading that when inspections were done in February 2008 there was no evidence of the pleaded nuisance (escape of sewage and sewage odour)[45] and the only damage seen was some erosion of topsoil which was caused by the Woolnoughs' construction of a shed which then concentrated the discharge of water.[46]

[39] The material tendered before the learned primary judge was such that no firm view could have been formed as to the success of the claim or the defence. Quite apart from the date of installation, about which I will say more shortly, the material contained expert reports from six engineers[47] which came to differing conclusions, summarised in paragraph 18 of Mr Sharman's affidavit relied upon before his Honour below.[48] The differences were as to whether the works had caused the subsidence of which complaint was made. That subsidence was the alleged cause of the escaping sewage. In addition, Mr Sharman deposed that it was unclear what information was provided to the engineers and what assumptions they made.[49] Finally, Mr Sharman deposed that CCTV footage did not suggest that the sewer main's integrity had been compromised.[50]

[40] In addition Mr Sharman deposed that there were difficulties with the proof of the damages as the proffered invoices were not accompanied by any evidence of the qualifications of the authors to assess the figures.[51]

[41] Given that state of conflict, there was no reasonable prospect of summary judgment being given on the claims in nuisance or negligence.

Judgment on the claim in trespass?

[42] Whatever may be said about the difficulty of resolving, on a summary basis, the pleaded causes of action in nuisance and negligence, on the face of it there was

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40 Amended Statement of Claim, paragraphs 31, 33; AB 926.
41 Amended Statement of Claim, paragraph 29, 33-35; AB 925-927.
42 Amended Defence, paragraphs 29-35; AB 936.
43 Amended Defence, paragraph 14; AB 933.
44 Amended Defence, paragraph 18; AB 934.
45 Amended Statement of Claim, paragraphs 18-21; AB 924.
46 Amended Defence, paragraph 18; AB 934.
47 Referred to in Mr Sharman's affidavit at AB 120, and exhibited in the material.
48 AB 120-121.
49 Affidavit paragraph 19.
50 Affidavit paragraph 20.
51 Affidavit paragraphs 21-26.

reason to conclude that the defence to the trespass claim had not been established because the Council adduced no evidence of the licence it contended it had to enter the land. Since the onus was on the Council to establish that licence, it had not demonstrated a viable defence to the trespass claim. On that basis it was an error to dismiss the application for summary judgment in so far as the trespass claim is concerned.

[43] It must be noted, however, that judgment against the Council would have been merely for damages to be assessed. On no basis could it be suggested that the question of damages could be resolved summarily.

[44] Had this been the only basis for considering the judgment below the Woolnoughs would have been entitled to succeed on the appeal, at least on a limited basis. However, the fact that the Council were to seek to withdraw the admission that the work was done in 2007, and advance a positive case that it was done in 2005, as referred to in paragraph [23] above, alters the way in which this Court should treat the appeal.

[45] At the hearing before this Court the Council relied on an affidavit by its solicitor, setting out the basis for the application to withdraw the admission and the proposed amended defence.[52] Part of the material included in the affidavit consisted of information and contemporaneous documents from Council employees and engineers who were involved in the sewer project at the time, showing that the work was done on mid-2005.[53] That affidavit was evidently the basis for the application to amend the defence. Given the lack of prejudice to the Woolnoughs, and the importance of the point to the Council's defence of the claims, it was, in my view, likely that the application to amend would succeed.

[46] If the Council were given leave to amend to plead that the work was done in 2005, prior to the Woolnoughs becoming the owners of the land, there would be an inevitable re-pleading of the case, including the reply to such an allegation. And it would introduce a new dimension in terms of proof of the authority which the Council had, or lacked, to go on the land and conduct the works. The fact that the Woolnoughs gave no consent would become only part of the factual matrix surrounding that issue.

[47] In my view, the circumstance that the case was likely to be substantially re-pleaded in such an important way would compel this Court to refuse to allow the appeal, even though error has been demonstrated.

[48] After the hearing of the appeal the Court requested the parties to say if they agreed that it could be informed of the outcome of the Council's application and the form of the Further Amended Defence. The Council agreed but the Woolnoughs did not. Notwithstanding the Woolnoughs' response it is appropriate that the Court know the outcome of the application, given its significance as described above.

[49] On 31 May 2017 the Council was successful in obtaining an order permitting the withdrawal of the admission and amending to allege that the works were done in 2005. Consequently a Further Amended defence was filed on 28 June 2017, and a new Reply was filed on 17 July 2017. The Further Amended Defence alleged that the

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52 Affidavit of Mr Sharman, sworn 18 May 2017.

53 Paragraphs 21-23 and Exhibits B-Ito the affidavit of Mr Sharman.

Council carried out the works in July/August 2005,[54] before the Woolnoughs became owners.[55]

[50] For the reasons above the appeal should be dismissed.

[51] However, because the Council has decided to amend, and in particular withdraw the admission that it built the works on the Woolnoughs' property in July 2007, the Woolnoughs should not be disadvantaged if they choose to bring a second application for summary judgment. Given what has been said above I do not consider such an application could extend beyond the trespass claim, and even in respect of that claim much would depend on the amended pleadings. That should not be taken to suggest that such an application should be made, nor that I express any view as to its success. It is simply that the Council has fundamentally altered the pleaded case in trespass, and the Woolnoughs should not suffer by the fact of having brought one application for summary judgment already.

Costs

[52] Even though the appeal has failed, that was due to the Council's application to amend the defence in a way not foreshadowed below. In those circumstances the Woolnoughs should not have to pay the Council's costs of the appeal.

Impact on the orders made 25 November 2016

[53] As for the orders made on 25 November 2016, plainly some of them cannot survive notwithstanding that the appeal has been dismissed. As the reason for the appeal's dismissal was the amendment of the defence, by now asserting that the work was done in 2005, the Woolnoughs should not have their ability to further amend the Statement of Claim unduly fettered. Consequently Order No. 2 should be set aside.

[54] Further, even though the appeal has been dismissed the result should have been different in the proceedings below, at least as to the trespass claim, even if that was limited to a judgment for damages to be assessed. That has an impact on the costs of the proceedings below. Order No. 8 should be set aside and those costs reserved to the judge hearing the trial.

Disposition of the appeal

[55] For the reasons above I propose the following orders:

1. The appeal is dismissed.
2. Set aside Orders No. 2 and No. 8 made on 25 November 2016.
3. The costs of the application for summary judgment heard on 25 November 2016 be reserved to the judge hearing the trial in the proceedings.
4. There be no order as to the costs of the appeal.

[56] **McMURDO JA:** I agree with Morrison JA.

[57] **BODDICE J:** I have read the reasons of Morrison JA. I agree with those reasons and the proposed orders.

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54 Paragraphs 9, 12 and 15.

55 Paragraph 1(c) alleges that they became registered owners on 28 November 2006.