

Supreme Court
New South Wales

Case Name: Ralph Lauren 57 v Byron Shire Council

Medium Neutral Citation: [2016] NSWSC 169

Hearing Date(s): 10 November 2015

Date of Orders: 3 March 2016

Decision Date: 3 March 2016

Jurisdiction: Common Law

Before: Hidden J

Decision: Motion to file further amended statement of claim granted. Motion to strike out certain paragraphs of existing statement of claim dismissed.

Catchwords: PRACTICE AND PROCEDURE – proceedings in negligence and nuisance by property owners against Shire Council – application by Council to strike out certain paragraphs in statement of claim – application by plaintiffs to file further amended statement of claim.

Legislation Cited: Civil Liability Act 2002
Coastal Protection Act 1979
Conveyancing Act 1919
Local Government Act 1993
Local Government Act 1919

Cases Cited: Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59, 200 CLR 1
Graham Barclay Oysters Pty Ltd v Ryan [2002] HCA 54, 211 CLR 540
Kirby v Sanderson Motors Pty Ltd [2002] NSWCA 44, 54 NSWLR 135
Southern Shire Council v Heyman (1984-85) 157 CLR 424

Category: Principal judgment

Parties: Ralph Lauren 57 Pty Ltd (1st plaintiff)
PJ George Investments Pty Ltd (2nd plaintiff)
Ralph Lauren Pty Ltd (3rd plaintiff)
Robert Watson (4th plaintiff)
Immer (No. 196) Pty Ltd (5th plaintiff)
John Vaughyan (6th plaintiff)
Anne Vaughan (7th plaintiff)
Paecal Pty Ltd (8th plaintiff)
Stewartville Pty Limited (9th plaintiff)
John Anthony Callanan (10th plaintiff)
Simon Clowes (11th plaintiff)
Lisa Clowes (12th plaintiff)
Jürgen Greiner (13th plaintiff)
Ingrid Greiner (14th plaintiff)
Byron Shire Council (1st defendant)
Reserve Number 82000 (2nd defendant)

Representation: Counsel:
AJL Bannon SC with A Bouris (plaintiffs)
S Donaldson SC with S Glascott (defendants)

Solicitors:
Karen Elizabeth Coleman - King & Wood Mallesons
(plaintiffs)
Samantha Kelly - DLA Piper Australia (1st & 2nd
defendants)

File Number(s): 426979

JUDGMENT

- 1 **HIS HONOUR:** The fourteen plaintiffs in these proceedings are the owners of properties on Belongil Beach in the Byron Bay area. The defendants are Byron Shire Council, the relevant local authority, and Reserve Number 82000, a Reserve Trust managed by the Council. The defendants will be referred to compendiously as “the Council.”
- 2 The proceedings were commenced in 2010. Before me is a motion by the plaintiffs seeking leave to file a further amended statement of claim. An order is also sought to join two further plaintiffs, but that matter was not addressed at

the hearing of the motion and may be able to be resolved by the parties. A significant number of the amendments in the proposed pleadings are not in issue, but some are opposed. Also before me is a motion by the Council for an order striking out some parts of the existing statement of claim. There is considerable overlap in the issues raised by the dispute in both motions.

- 3 The proposed pleading is lengthy and complex. The background, however, may be sketched briefly.
- 4 Between the 1960's and the 1970's, the Council constructed an artificial headland protected by a rock seawall adjacent to Jonson Street, Byron Bay, referred to in the pleadings as the "Jonson Street Structure." The plaintiffs allege that the structure has caused erosion of the beach to the northwest, in particular, at Belongil beach. Consequently, their properties have been exposed to seawater and wave action. It is also alleged that the Council failed to take reasonable steps to protect the plaintiffs' properties by, among other things, failing to modify or remove the Jonson Street Structure, and provide further seawalls to protect the beach. It is also alleged that the Council failed to allow the plaintiffs to take such protective measures.
- 5 The plaintiffs claim damages, in some cases for the cost of protective works to their properties, and in all cases for diminution of the value of their properties said to be due to their exposure to the effects of erosion.
- 6 The existing statement of claim alleges a duty of care of the Council to the plaintiffs "to take steps to protect each of their properties from the danger to those properties caused by the Jonson Street Structure": par 102. That duty is said to be "ongoing and continuing": par 103. In par 104 breaches of that duty are alleged in subpars (a) – (h). The allegations in the subpars (a) – (d) are uncontroversial. However, those in par (e) – (h) are the subject of the Council's strike out application, as amended.
- 7 In addition to the claim in negligence, there are alternative claims in nuisance and under s 177 of the *Conveyancing Act 1919*. Loss and damage to the effect of those to which I have referred to above are pleaded in par 160.

- 8 The area of dispute in the present motions relates to the pleading of various steps taken by the Council in more recent years. In some paragraphs of the existing pleading and of the proposed amended pleading there is reference to a policy known as “planned retreat”, adopted in a particular Development Control Plan of the Council. Broadly speaking, the policy requires dwellings to be able to be relocated should the seaward erosion escarpment approach within 20 metres of them. It also creates certain restrictions on development on the beach or properties adjacent to the beach.
- 9 These steps by the Council are the subject of pars 115 - 159 of the existing statement of claim, and it is those paragraphs which the Council seeks to have struck out. They relate to the breaches of duty alleged in par 104(e) - (h). While those subpars are not referred to in the strike out motion, they became the subject of it in submissions.
- 10 In pars 115 - 126, reference is made to a 2004 Coastline Management Study prepared by WBM Oceanics Australia and provided to the Council, which relevantly asserted that the preferred option for Belongil Beach was to “implement beach nourishment to retain the amenity of the beach.” The benefits of that approach were explained. However, should that option not be available, the next best option was “planned retreat under public and private ownership”, although the deficits of that option were also explained.
- 11 In 1990 the New South Wales government published the “New South Wales Coastline Management Manual.” That manual recommended the formation of Coastline Management Committees to assist in developing coastline management plans. The Council formed such a committee in 2006, but informed it that the Council had resolved that planned retreat was its “preferred hazard management option” for the Belongil area. The statement of claim alleges that the Coastline Management Committee was not permitted any opportunity to consider other options in the 2004 study, and in late 2008 it was disbanded.
- 12 The breach alleged in par 104(e) is that the Council “constrained and, ultimately, terminated the operation of the Coastline Management Committee”

- 13 Part 4A of the *Coastal Protection Act 1979* provides for Coastal Zone Management Plans (“CZMP”). As the provisions of that Part stood in 2010, s 55B of the Act provided that a Council in a relevant area may make a CZMP and, if directed to do so by the Minister, must do so. Such a plan was to be publicly exhibited, so that any person might make submissions about it, and it had to be submitted to the Minister for approval: s 55G.
- 14 Pars 127 - 139 record that from mid-2008 an existing CZMP was re-written by the Council and placed on public exhibition between October and December 2009. It is alleged that there was no Coastline Management Committee review of this plan, which is said to be a direction in the Coastline Management Manual. The plaintiffs’ solicitors provided a submission to the Council, asserting the adverse impacts on Belongil if it were adopted and reasons why it was invalid, including that it was contrary to the Council’s legal duty to protect the plaintiffs from the danger caused by the Jonson Street Structure.
- 15 In May 2010, the Council resolved to adopt the draft CZMP and refer it to the Minister for approval. Put shortly, it is pleaded in par 138 that the draft plan made provision for the maintenance and upgrade of the Jonson Street Structure, despite its consequential impact upon Belongil Beach, taking no measures to counteract that impact other than to investigate the potential to reduce it by modification of the Jonson Street Structure. Its effect also was to prevent residents, including the plaintiffs, from carrying out any protective works, such as a terminal wall, to protect their properties; and the Council was to develop “an enforcement policy for retreat of development in accordance with consent conditions, and develop an infrastructure and utility services retreat policy.” Finally, the Council would itself “fail and refuse to take any other steps, by way of beach nourishment, terminal wall or end control structure ... so as to provide protection to the properties of residents.”
- 16 Similar provisions were published for a revised version of the “Part B - Emergency Action Plan” section of the proposed CZMP: par 139.
- 17 Pars 140 - 149 refer to parts of the Coastline Management Manual which provide that the primary objectives of a CZMP include “to reduce the impact of hazards on individual owners and occupiers and to reduce private and public

losses from hazard damage”, and that such a plan should ensure that “all reasonable measures are taken to avoid hazard and potential damage to existing properties and recreational amenity at risk.” In a section of the manual dealing with “Protective Works” various options are expressed. Planned retreat is not one of them, although the manual states that it may avoid or limit risk to future coastal developments.

- 18 In par 147 it is pleaded that the draft CZMP was inconsistent with the mandatory requirements of the manual and was “ultra vires the *Coastal Protection Act*” and, in particular, s 55C of the Act:

“Matters to be dealt with in coastal zone management plans

A coastal zone management plan http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1979210/s4.html - coastal zone management plan must make provision for:

- (a) protecting and preserving beach http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1979210/s4.html - beach environments and beach amenity, and
- (b) emergency actions of the kind that may be carried out under the *State Emergency and Rescue Management Act 1989*, or otherwise during periods of beach http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1979210/s4.html - beach erosion, including the carrying out of related works, such as works for the protection of property affected or likely to be affected by beach erosion, where beach erosion occurs through storm activity or an extreme or irregular event, and
- (c) ensuring continuing and undiminished public access to beaches http://www.austlii.edu.au/au/legis/nsw/consol_act/cpa1979210/s4.html - beach, headlands and waterways, particularly where public access is threatened or affected by accretion.”

- 19 In pars 148 and 149 it is pleaded that in preparing and promulgating the draft CZMP, the Council failed to take into account as relevant considerations the large body of material by way of reports, correspondence and the like which was available to it, as well as the purposes of the *Coastal Protection Act* and its duties under the general law. In par 150 it is pleaded that the draft plan would inevitably cause further loss and damage of the kind referred to in par 160, that it constitutes a further breach of the duty pleaded in par 102, and would contribute further to the causes of action in nuisance and under the *Conveyancing Act*.

- 20 These paragraphs are said to be the source of the breaches alleged in par 104(f) and (g), the preparation and public exhibition in June 2009 of the draft CZMP, and the Council's adoption in May 2010 of that draft plan and its decision to seek the Minister's approval of it.
- 21 Pars 151 to 159 are concerned with a draft Local Environment Plan ("LEP") adopted by the Council at the end of 2008. It is pleaded that the effect of the draft LEP was to significantly inhibit the ability of the plaintiffs to undertake erosion protection works: par 158. In par 159 this is said to have had the same consequences as those referred to in par 150. In par 104(h) the preparation and promulgation of the draft LEP is pleaded as a breach of duty.
- 22 Given the overlap of the issues raised by the motions, it is convenient at this point to consider the amendments sought in the proposed further amended statement of claim.
- 23 Par 150A asserts that, in the light of the matters earlier pleaded, including par 150 and the breaches alleged in par 104(f) and (g), the draft CZMP was not subject of any statutory authority or power.
- 24 Pars 159A – 159Q deal with the withdrawal of the draft CZMP. It is recorded that the Minister returned the draft with a direction pursuant to s 55G of the *Coastal Protection Act* requiring certain amendments. Ultimately, in March 2011, the Council resolved to withdraw the draft and prepare a further draft, said to be in accordance with a new statutory regime. It is alleged that the decision to withdraw the draft was the result of the plaintiffs' claims in these proceedings (and in related proceedings in the Land and Environment Court), and concerns that it would "jeopardise" the Council's insurance policy in relation to the proceedings.
- 25 In par 159P, it is pleaded that the draft CZMP was ultra vires, and not a proper exercise of the Council's statutory functions. Further, it is pleaded that the Council owed a duty of care to the plaintiffs in the preparation of the draft CZMP to act consistently with the duty to protect pleaded in par 102 and, accordingly, to include appropriate provisions to protect the plaintiffs' properties from the effects of the Jonson Street Structure. It is further pleaded that the Council breached that duty by failing to do so. In par 159Q it is pleaded that the

withdrawal of the draft was done to “protect or enhance” the Council’s own legal position in respect of the plaintiffs’ claims, and was not an attempt to perform the duties referred to in pars 102 and 159P. Nor was it done in an attempt to abate the nuisance alleged, or to perform the duty or rectify a breach of the duty pleaded in the *Conveyancing Act* claim.

26 Par 159R pleads that following the withdrawal of the draft CZMP, the Council continued to contemplate planned retreat as a lawful option notwithstanding the legal duties pleaded in par 159Q, and neglected to adopt a valid CZMP discharging those duties. It is also pleaded that the Council neglected to take steps to act otherwise so as to avoid or ameliorate damage to the plaintiffs, already sustained and continuing. The effect of par 159S is to plead that the failure of the Council to bring into force a valid CZMP with provision for the protection of the plaintiffs’ properties amounted to a breach of the duty pleaded in par 159P.

27 Pars 159T – 159V plead that, following the withdrawal of the draft CZMP, the Council continued the preparation of a new LEP, “including proposals to enforce Council’s planned retreat proposal as contemplated in the draft CZMP.” In so doing, it is alleged, Council failed properly to exercise its statutory functions or duties with respect to the preparation of the LEP. Par 159V pleads that the proposed LEP dealing with coastal matters cannot be finalised until the Council has finalised a valid CZMP.

28 Related amendments are sought to be made by way of additions to par 104, pleading breaches of duty. Par 104A pleads generally that, since the commencement of these proceedings and the withdrawal of the draft CZMP, the Council has “continued to act in breach of the duty of care it owes to the plaintiffs pleaded in pars 102 and 103”

29 Pars 104B - 104G complain of the Council’s failure to prepare a new draft CZMP despite a direction from the Minister to do so within certain periods of time, and since its withdrawal of the draft which had been prepared. In particular, par 104D pleads that the Council has not prepared a valid CZMP “with provisions consistent with its powers under the *Coastal Protection Act* and the legal duties pleaded in the statement of claim.” Par 104E pleads the

lack of preparation of the CZMP “making provision for the management of the impacts of the Jonson Street Structure and the proposed changes to it.”

- 30 In addition, pars 104H – 104T1 complain of a lack of protection for the plaintiffs in an Emergency Action Sub-Plan, pursuant to s 55C(b) of the *Coastal Protection Act*, set out above, which was adopted by the Council in December 2011. It is pleaded that the sub-plan provided that the only protective steps to be included as intended emergency actions “would be to support the protection afforded by the Jonson Street Structure to the township of Byron Bay by monitoring and repairing” that structure as and when required: par 104L. No provision was made for the protection of private property: par 104K, despite an offer by the plaintiff to contribute to the funding of such protection: pars 104P – 104R.
- 31 Par 104T1 pleads a duty of care in the preparation of a draft sub-plan to act in accordance with s 55C(b), to act consistently with the duty to protect pleaded in par 102, and to discharge that duty by appropriate protective provisions, including provisions to protect the plaintiffs’ properties from the effects of the Jonson Street Structure. The Council is said to have breached that duty by failing to include such provisions in the sub-plan
- 32 Finally, pars 104MM – 104NS deal with the Council’s ongoing consideration of planned retreat. Par 104MM pleads that the Council has continued to consider planned retreat as a management option for Belongil Beach notwithstanding, among other things, its legal duty to protect pleaded in pars 102 and 103. Other paragraphs in this section, commencing with 104NN, refer to the Council having continued to make public “its ongoing consideration of planned retreat as an option for Byron Bay Embayment.”
- 33 Par 105 is sought to be amended to incorporate relevant paragraphs in the proposed series from 104B – 104NS as pleadings which constitute a “separate and independent breach” by the Council of the duty of care to the plaintiffs asserted in par 102.
- 34 At the hearing of the motions the plaintiffs were represented by Mr Bannon SC and Mr Bouris, and the defendants by Mr Donaldson SC and Ms Glascott. In submissions on the strike out application Mr Donaldson observed that, putting

aside the paragraphs the subject of the application, the statement of claim pleaded a conventional case in negligence and nuisance (and under the *Conveyancing Act*), noting that the duty pleaded in par 102 was to take steps to protect each of the plaintiffs' properties "from the danger to those properties caused by the Jonson Street Structure." The thrust of the argument was that subpars 104(e) – (h) and pars 115 – 159 plead facts which are extraneous and irrelevant to those claims and do not plead independently any arguable cause of action. As it was put in written submissions, they "do not plead any duty or obligation nor any breach of any duty or obligation."

35 As to the Coastline Management Committee, he noted that the New South Wales Coastline Manual did not create an obligation on the part of Councils to create such committees, nor to obtain advice from any committee which had been formed. No such obligation was pleaded, nor was it pleaded how the termination of the committee here caused the loss and damage alleged. He added that, in any event, the issue could have been relevant only to the closed period between the adoption of the draft CZMP in May 2010 and its withdrawal in April 2011. As to the draft CZMP itself, Mr Donaldson noted that it was a matter for the Council whether it prepared such a plan unless the Minister directed it to do so, which was not the case here. He argued that the adoption of the plan and the public exhibition of it were irrelevant to the pleaded causes of action, again noting that it was withdrawn.

36 As to the Manual itself, Mr Donaldson referred to par 147 and pointed out that the Manual does not impose mandatory requirements in a CZMP. Section 55D(2) of the *Coastal Protection Act* empowers the Minister to determine guidelines in relation to a draft CZMP, and may adopt a manual of the kind in question here as such guidelines. However, the Minister has not adopted the Coastline Management Manual for the purpose of that provision. As to pars 148 and 149, alleging a failure on the part of the Council to take into account relevant material in preparing and promulgating the draft CZMP, and par 150, alleging further loss and damage arising from the plan and the contribution of the plan to the pleaded causes of action, Mr Donaldson submitted that it was unclear how a draft CZMP which had never been implemented could have any bearing on those matters.

- 37 Mr Donaldson submitted that all these considerations apply to pars 151 – 159, dealing with the draft LEP. Generally, he argued that the parts of the claim sought to be struck out fail to meet the test enunciated by Hodgson JA in *Kirby v Sanderson Motors Pty Ltd* [2002] NSWCA 44, 54 NSWLR 135, at [20] (143) that plaintiffs must plead in such a way “that a defendant can understand the materiality of the facts, that is, how they are material to a cause of action.”
- 38 Mr Donaldson noted that in the proposed amended pleading an attempt has been made to allege relevant duties and breaches: pars 159P in relation to the draft CZMP, 159S in relation to the failure to prepare a further CZMP, and 104T1 in relation to the Emergency Action Sub-Plan. These paragraphs seek to incorporate these allegations under the umbrella of the duty pleaded in par 102 and, as noted, par 105 is sought to be amended to plead them as separate and independent breaches of that duty.
- 39 As to the draft CZMP, Mr Donaldson noted that the effect of the legislative scheme is that control of the terms of a CZMP rests with the Minister, not the Council. Generally, he submitted that what was sought to be done by these amendments was to raise a wholly new case alleging a duty to set policy, particularly through the failure to produce a further draft CZMP and the terms of the Emergency Action Sub-Plan, in such a manner as to protect the interests of the plaintiffs.
- 40 Such a case, he submitted, intrudes into matters of political judgement which are not open to scrutiny by the courts through proceedings of this kind. He referred to a body of authority dealing with the line between the exercise of statutory authority in that sense, on the one hand, and the exercise of statutory functions (or the failure to exercise them) giving rise to tortious liability, on the other. This included *Southern Shire Council v Heyman* (1984-85) 157 CLR 424, *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54, 211 CLR 540 and *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59, 200 CLR 1. In the last case McHugh J at [93] (39) considered the circumstances in which it might be open to a plaintiff to allege that a statutory authority owed him or her a common law duty of care and breached that duty by failing to exercise a statutory power.

- 41 On this question I accept the submission of Mr Bannon, for the plaintiffs, that this submission raises matters of substance which are not susceptible of being dealt with at this early stage in applications to strike out or amend pleadings.
- 42 Otherwise, Mr Donaldson argued that these proposed amendments are also superfluous to the case the plaintiffs seek to make, founded on the duty asserted in par 102. As it was put in written submissions, the plaintiffs' case is that the Council has been duty bound to act to protect their properties from the impact of erosion and that it failed to do so. It does not advance their position to identify a particular series of events in the course of which such action might have been taken, but was not.
- 43 As to pars 104B – 104G, relating to the Council's failure to prepare a new CZMP, he also noted that it is not pleaded that such a draft CZMP would necessarily have contained provisions protecting the plaintiffs' property or that the Minister would necessarily have approved it. Similarly, as to pars 104H – 104T1, dealing with the Emergency Action Sub-Plan, he argued that s 55C(1)(b) does not require the Council to produce a sub-plan which enabled the plaintiffs to install or maintain protective seawalls, or required the Council to prefer the interests of the plaintiffs to those of adjoining land owners or otherwise to impose measures which would serve to protect the plaintiffs' properties.
- 44 As to pars 104MM – 104NS, relating to the Council's ongoing consideration of planned retreat, Mr Donaldson argued that the pursuit of a policy by the Council could not be a relevant breach of the duty to protect the plaintiffs' properties relied upon, and the promulgation of the policy in the public arena is not material to the case in negligence or nuisance. Nor, he argued, is par 104NR, alleging that the Council had taken erosion protection steps at other locations.
- 45 For all these reasons, he submitted, par 150A, alleging a lack of statutory authority in respect of the draft CZMP, should also be struck out.
- 46 As to pars 159A – 159Q, dealing with the withdrawal of the draft CZMP, Mr Donaldson argued that the relevance of the circumstances surrounding that withdrawal is not apparent. He noted that par 159P alleges that the draft CZMP

was “ultra vires”, yet it was withdrawn from the Minister’s consideration and, as it was put in submissions, it is impossible to understand the relevance of the duty of care in preparing the plan pleaded in pars 159P and 159S.

47 As to pars 159T – 159V, concerning the draft LEP, Mr Donaldson noted that the relevant statutory powers or duties are not pleaded and, as to par 159V, argued that it is not clear how the proposed LEP could not be finalised until a further draft CZMP was also finalised. Mr Donaldson also relied upon evidence that the draft LEP did not receive the necessary ministerial approval.

48 In response to the strike out application, Mr Bannon pointed out that the current amended statement of claim was filed in January 2011, while the strike out motion was not filed until September 2015. In the meantime, in June 2011, an amended defence had been filed in which all the paragraphs sought to be struck out were pleaded to, together with a pleading (par 60) in answer to the whole statement of claim that the Council had at all times acted in good faith within the meaning of s 733(1) of the *Local Government Act 1993* (and its predecessor, s 582A of the *Local Government Act 1919*). Moreover, discovery categories had been agreed on the terms of the current pleadings, and discovery had been provided and inspected. These included categories relating to the draft CZMP and the draft LEP. Mr Bannon added that no explanation for the delay in bringing the strike out application, and for the change in position from pleading to these claims, has been forthcoming.

49 Generally, Mr Bannon’s submission was that pars 115 – 159 pleaded material facts and circumstances giving rise to the breaches of duty asserted in par 104(e) – (h). This material is directed to the continuing duty pleaded in par 103, and embraces not only an enduring failure by the Council to take steps to protect the plaintiffs’ properties but also positive steps to inhibit them from doing so. They are included in par 105 as separate and independent breaches of the duty under par 102, and the matters pleaded in pars 115 – 149 are specified as further breaches of that duty and as factors contributing to the causes of action in nuisance and under the *Conveyancing Act*.

50 Further, Mr Bannon argued, the matters raised in pars 115 – 149 are relied upon on the issue of damage. He referred to sub-pars 160(b) and (c). Sub-

paragraph (b) asserts that the plaintiffs had incurred significant legal expenses, experts' costs and other expenses, and sub-par (c) pleads that the values of their properties have been diminished, noting a diminution in their valuation by the Valuer General of New South Wales over the years since 2010.

51 As to the reference to the New South Wales Coastline Manual in par 147, Mr Bannon acknowledged that it did not amount to guidelines for the purpose of s 55D(2) of the *Coastal Protection Act*. Nevertheless, he argued that it was obviously an important document for any council attempting to prepare a draft plan, and provided the only guidelines available for that purpose. He also noted that in par 60.4 of the amended defence the defendants assert the exercise of statutory functions "in undertaking steps in response to the Manual."

52 The proposed amendments in the further amended statement of claim are in large part a response to developments since the amended statement of claim of January 2011. These include the withdrawal of the draft CZMP and the adoption of the Emergency Action Sub-Plan. The thrust of Mr Bannon's argument was that these paragraphs also are relevant to the Council's continuing duty of care and to the continuing damage suffered by the plaintiffs.

53 While the proposed amended paragraphs do plead particular duties and the breach of them, I understand Mr Bannon's position to be that they do not create new causes of action. They remain founded upon the duty to protect expressed in par 102, and are sought to be incorporated into par 105 as separate and independent breaches by the Council of that duty. The failure of the Council to draft a new CZMP following the withdrawal of the draft plan is said to constitute a continuing breach of that duty, as is its ongoing consideration of planned retreat. The same is said to be true of the lack of provision for the protection of private property in the Emergency Action Sub-Plan, and the proposals to enforce planned retreat in the continued preparation of a new LEP. In written submissions it is said that because no State Minister has granted consent to those provisions, they must await the finalisation of a valid CZMP (par 159V).

54 As to damage, Mr Bannon's position was that, apart from the draft CZMP itself, the Emergency Action Sub-Plan, the draft LEP and the public exposure by the

Council of its ongoing consideration of planned retreat have continued to affect the value of the plaintiffs' properties. Further, he argued, the plaintiffs are vulnerable not only to further damage to their properties but also to planning intervention of the kind evidenced by the draft DCZM, the underlying theme of which he described as letting "nature have its way." Yet the problems at Belongil Beach are the product of human intervention, not nature. The conduct of the Council after the withdrawal of the draft plan, he submitted, is pleaded as "evidencing a state of mind to act in a manner consistent with the draft plan into the future."

55 Mr Bannon argued that all these matters, including the pleaded circumstances in which the draft CZMP was withdrawn, also bear upon the Council's defence of acting in good faith. He submitted that the plaintiffs are entitled to plead the full circumstances known to them of the withdrawal of the draft plan and the subsequent conduct of the Council, in the light of that defence and also a defence pleaded under s 43A of the *Civil Liability Act 2002*. The Council's breach of duty and lack of good faith were said in written submissions to be demonstrated "not only by the failure to take positive steps to protect the properties of the plaintiffs but also by the positive steps the Council took ... which were directed in ensuring that the plaintiffs could not by their own action protect their own properties and in removing the existing protection which the plaintiffs then had." The draft plan was said to be "a plan to continue the commission of a tort and to prevent the plaintiffs from having a self-help remedy in relation to that tort."

56 I understand the force of Mr Donaldson's submissions, and I have not found these matters easy to resolve. However, I am persuaded by Mr Bannon's submissions that the paragraphs of the existing amended statement of claim which are sought to be struck out and the proposed amended paragraphs do raise matters properly pleaded in a case where a continuing duty of care, and continuing breaches of that duty and resultant damage, are alleged. Certainly, the impugned pleadings raise issues properly to be tried and it is inappropriate to dispose of them by striking them out or refusing amendments. Taking a practical approach, I include in that conclusion aspects of the pleadings more

properly directed to rebuttal of the defences, even though they are strictly more appropriate for a pleading in reply. (Such a pleading has in fact been filed.)

57 I find Mr Bannon's response to the objections mounted by Mr Donaldson, and his exposition of the rationale of the paragraphs subject to challenge, sufficient to deal with those objections. Specific reference should be made, however, to two matters raised. In relation to the Council's ongoing consideration of planned retreat, Mr Donaldson queried the relevance of par 104NR, alleging that the Council had taken erosion protection steps at other locations. This was not responded to in terms by Mr Bannon, but I take it that what is sought to be conveyed is that if that option were available at other locations it should also be at Belongil Beach. Mr Donaldson also objected to par 101AA, dealing with an aspect of enforcement of the planned retreat policy, on the basis that it is vague and ambiguous. It is, I must say, somewhat opaque. However, its import was articulated by Mr Bannon in oral submissions, and I accept his argument that it is a matter which can be dealt with by particulars.

58 As to the strike out motion, the delay in bringing it and the steps taken towards preparation of the case in the meantime are certainly factors giving rise to a discretion to dismiss the motion. However, I am persuaded that the motion should be dismissed on its merits and find it unnecessary to resort to that discretion.

59 Accordingly, the plaintiffs' motion seeking leave to file the further amended statement of claim is granted. The defendants' amended motion to strike out certain paragraphs of the existing amended statement of claim is dismissed. I have not dealt with the question of the addition of further plaintiffs but, as I have said, I understand that to be a matter which the parties can resolve. If necessary, I shall hear the parties on costs.
