



Supreme Court  
New South Wales

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Case Name: Rafailidis v Camden Council

Medium Neutral Citation: [2021] NSWSC 1087

Hearing Date(s): 4 December 2020

Date of Orders: 27 August 2021

Decision Date: 27 August 2021

Jurisdiction: Equity

Before: Robb J

Decision: See par [123]. The Court orders that the plaintiffs' statement of claim be struck out, that the plaintiffs' application for leave to file the proposed amended statement of claim be dismissed and that the proceedings be dismissed. The Court further orders that the plaintiffs pay the defendant's costs of its notice of motion filed on 28 August 2020 and that the plaintiffs pay the defendant's costs of the proceedings not otherwise the subject of any costs order.

Catchwords: CIVIL PROCEDURE — Pleadings — Fraud — Specific and particular allegations — Where the plaintiffs filed a statement of claim alleging fraud on the part of the defendant — Where the statement of claim was 150 pages long and comprised obscure allegations, was repetitive and generally did not comply with the applicable rules of pleading — Where the fraud alleged was not pleaded and particularised specifically — Where the defendant sought by notice of motion that the plaintiffs' statement of claim be struck out pursuant to UCPR r 14.28 — Where the plaintiffs submitted in response a proposed amended statement of claim — Where the proposed pleading was infected with substantially the same defects as the filed statement of

claim — Where the Court held that the whole of the statement of claim should be struck out — Where the Court further held that it would involve an abuse of process to permit the plaintiffs to continue to prosecute the current proceedings against the defendant — Where the Court dismissed the proceedings

Legislation Cited: Civil Procedure Act 2005 (NSW)  
Crimes Act 1900 (NSW)  
Environmental Planning and Assessment Act 1979 (NSW)  
Independent Commission Against Corruption Act 1988 (NSW)  
Local Government Act 1993 (NSW)  
Uniform Civil Procedure Rules 2005 (NSW)

Cases Cited: Camden Council v Rafailidis (No 3) [2012] NSWLEC 217  
Camden Council v Rafailidis (No 4) [2014] NSWLEC 22  
Camden Council v Rafailidis (No 5) [2014] NSWLEC 85  
Camden Council v Rafailidis [2012] NSWLEC 51  
Rafailidis v Camden Council [2015] NSWCA 185  
Wentworth v Rogers (No 5) (1986) 6 NSWLR 534

Texts Cited: RP Balkin and JLR Davis, Law of Torts (5th ed, 2013, LexisNexis Butterworths)  
Ritchie's Uniform Civil Procedure NSW (LexisNexis Butterworths, loose-leaf)

Category: Procedural rulings

Parties: Koula Rafailidis (first plaintiff)  
Efrem Rafailidis (second plaintiff)  
Camden Council (defendant)

Representation: Counsel:  
D Kelly (defendant)  
First and second plaintiff self-represented

Solicitors:  
McCulloch & Buggy Lawyers (defendant)

File Number(s): 2020/084897

## **JUDGMENT**

- 1 The plaintiffs, Koula Rafailidis and Efrem Rafailidis, commenced these proceedings against the defendant, Camden Council, by filing a statement of claim on 17 March 2020.
- 2 By notice of motion filed on 28 August 2020, the defendant applied pursuant to *Uniform Civil Procedure Rules 2005* (NSW) (UCPR) r 14.28 for an order that the statement of claim be struck out, and for an order that the plaintiffs pay the defendant's costs of the motion and of the proceedings.
- 3 As filed, the statement of claim is a complex document that is 150 pages in length, with 34 prayers for relief and 524 paragraphs containing allegations of fact. The statement of claim does not contain any notation that it was prepared by a lawyer; however, there are many aspects of the document and the expressions used that are consistent with the document having been prepared by a person with considerable legal training and experience. At the hearings of the defendant's notice of motion that have taken place, Mrs Rafailidis made submissions for the plaintiffs.

### **Background**

- 4 It is necessary to record that the plaintiffs allege that they were both owners of the land, but the statement of claim is drawn in a manner that frequently refers to Mrs Rafailidis as the sole plaintiff, and there is an inconsistent use of the singular and plural in references to the plaintiffs.
- 5 The dispute between the parties arises out of the redevelopment by the plaintiffs of land owned by them within the defendant's local government area. The plaintiffs' land initially had an old dwelling on it. The plaintiffs applied to the defendant for development approval to enable the plaintiffs to construct a new dwelling on the land. The immediate cause of the dispute is the stance taken by officers of the defendant concerning the application of the then current Local Environmental Plan (LEP), concerning whether the plaintiffs were permitted to leave two dwellings on the land. The plaintiffs allege that the defendant's officers took the view that the LEP did not permit that outcome, so that it would be necessary for the plaintiffs to demolish and remove the existing structure on the land after they had completed the construction of their new dwelling. The

development approval issued by the defendant to the plaintiffs contained a condition to that effect. After some communications between Mrs Rafailidis and an officer of the defendant, in which Mrs Rafailidis claims she was required to write a letter to the defendant in which the plaintiffs agreed that they would demolish the existing structure, a letter to that effect was sent to the defendant. After the new dwelling was completed by the plaintiffs on the land, they failed to demolish the existing structure.

- 6 The defendant responded to the failure by the plaintiffs to comply with the condition in the development approval by instituting proceedings against them in the Land and Environment Court. That led to a number of judgments by judges of that Court. The statement of claim refers to a judgment of Lloyd AJ in *Camden Council v Rafailidis* [2012] NSWLEC 51 (5 March 2012); of Biscoe J in *Camden Council v Rafailidis (No 3)* [2012] NSWLEC 217 (18 September 2012); and of Sheahan J in *Camden Council v Rafailidis (No 4)* [2014] NSWLEC 22 (18 March 2014) and *Camden Council v Rafailidis (No 5)* [2014] NSWLEC 85 (25 June 2014). I will refer to these judgments collectively as the Land and Environment Court judgments. The judgments of Sheahan J related to an application by the defendant for orders punishing the plaintiffs for contempt of court in failing to comply with earlier orders. The plaintiffs succeeded on an appeal to the Court of Appeal in respect of the contempt application: *Rafailidis v Camden Council* [2015] NSWCA 185 (17 February 2015).
- 7 Because of its length, it is difficult for the Court to explain clearly and concisely the content of the allegations made in the statement of claim. It is drafted in relatively clear language, and is obviously a work of substantial endeavour. However, the particulars appended to many of the allegations of fact are stated in such great detail as to make the statement of claim in its entirety difficult to comprehend.
- 8 Speaking broadly, the plaintiffs seek declarations that each of the Land and Environment Court judgments was procured by fraud on the part of the defendant, as well as orders from this Court setting aside those judgments as

well as the orders made against the plaintiffs following those judgments, such as orders that the plaintiffs pay the defendant's costs.

- 9 It is no exaggeration to say that the plaintiffs allege in the statement of claim that everything relevant to their case that was done by the officers of the defendant who were involved was done fraudulently, and accordingly, the defendant was fraudulent in the way that it dealt with the plaintiffs' application for development approval and the prosecution of the plaintiffs in the Land and Environment Court.
- 10 As the present application is for an order striking out the statement of claim on the ground that it does not comply with the applicable rules of pleading, it is no part of this judgment to decide whether or not the steps taken by the defendant's officers conformed with the relevant planning law principles. It may be observed, however, that while, on the one hand, it is not difficult to accept that the defendant's officers may have been mistaken in decisions that they made concerning the application of the planning law principles to the plaintiffs' application for development approval, it is difficult to accept, on the other hand, that the defendant's officers would have had any interest or purpose in defrauding the plaintiffs; let alone in respect of everything that the officers did in response to the plaintiffs' development application, and the enforcement by the defendant of the condition to the development approval.
- 11 The plaintiffs do not accept that an order should be made that their statement of claim be struck out. Following the hearing that occurred on 4 December 2020, the plaintiffs served on the defendant and delivered to my Associate a document called "proposed amended statement of claim" dated 15 March 2021. The plaintiffs have deleted a number of the claims contained in the original statement of claim, and they have generally reduced the complexity of the pleading, particularly by limiting the complexity of the particulars given. The proposed draft statement of claim is 35 pages in length, contains seven prayers for relief and 156 paragraphs that make allegations of fact.
- 12 As I understand the submission made by Mrs Rafailidis, the plaintiffs do not abandon their statement of claim, but say that, if the Court finds that the pleading is defective in accordance with the rules of pleading, the Court should

give the plaintiffs leave to amend the statement of claim in accordance with the proposed amended statement of claim.

- 13 The defendant's response was to submit that the leave sought to file the proposed amended statement of claim should be refused, as the proposed document suffers from substantially the same pleading deficiencies from which the statement of claim suffers. The defendant submits that the Court should make the strikeout order sought in the notice of motion.

### **Relevant pleading principles**

- 14 It will therefore be necessary for the Court to consider the adequacy of both the statement of claim and the proposed amended statement of claim as pleadings.

- 15 Uniform Civil Procedure Rules r 14.28 provides:

(1) The court may at any stage of the proceedings order that the whole or any part of a pleading be struck out if the pleading—

(a) discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading, or

(b) has a tendency to cause prejudice, embarrassment or delay in the proceedings, or

(c) is otherwise an abuse of the process of the court.

(2) The court may receive evidence on the hearing of an application for an order under sub-rule (1).

- 16 The defendant attacked the statement of claim on the ground that it was embarrassing and an abuse of process, because it sought relief that could only be granted by the Land and Environment Court, or was, in effect, a collateral appeal out of time from the judgments of that Court. The defendant pointed to the many claims that alleged breaches of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, and for offences against the *Local Government Act 1993* (NSW), the *Crimes Act 1900* (NSW), the *Environmental Planning and Assessment Act 1979* (NSW) or the *Independent Commission Against Corruption Act 1988* (NSW), and submitted that those claims were not justiciable in this Court. It submitted that the statement of claim contained many paragraphs that were irrelevant, embarrassing and scandalous, such as a claim that an officer of the defendant lied to and misled a Member of Parliament.

17 The defendant also submitted that the statement of claim does not comply with the rules that govern when a pleading is a proper one. In *Seidler v Carroll & O'Dea* [2013] NSWSC 338 at [6], McCallum J (as her Honour then was) accepted a submission that stated the applicable pleading rules as follows: I respectfully agree. Her Honour said:

The principles relevant to the application of that rule were set out in a helpful summary (not intended to be exhaustive) in the written submissions for the solicitor defendants, as follows:

- a. the position must be considered in light of the requirements of s.56 *Civil Procedure Act* which obliges the court to exercise its powers to 'facilitate the just, quick and cheap resolution of the real issues in the dispute or proceedings: *Gangi v Boral Resources (NSW) Pty Ltd* [2012] NSWSC 398 per Carling J at [30]; *Pacanowski & Anor v Wakerman & Ors* [2009] NSWCA 402 per Tobias JA at [19];
- b. a pleading is to contain, and contain only, a statement in summary form of the material facts on which the applicant relies. The material facts are all those facts necessary for the purpose of formulating a complete cause of action: *Bruce v Odhams Press Ltd* (1936) 1 KB 697 at 712; *Pinson v Lloyds and National Provincial Foreign Bank Ltd* (1941) 2 KB 72 at 75; *Fleet v Royal Society for the Prevention of Cruelty to Animals* [2007] NSWSC 1420 at [24]; r 14.7 UCPR;
- c. the function of a pleading is to inform the opponent of the material facts on which the claimed relief is sought. The object of pleadings and the meaning of the rules is to define issues and thereby diminish expense and delay: *Thorp v Holdsworth* (1876) 3 Ch D 637 at [639] quoted in *Szanto v Bainton* [2011] NSWSC 985 at [122];
- d. a pleading must state the material facts. The word "*material*" means necessary for the purpose of formulating a complete cause of action, and if any one "*material*" fact is omitted, the statement of claim is bad: *Szanto* at [123];
- e. a pleading must be as brief as the nature of the case allows: *McGuirk v The University of New South Wales* [2009] NSWSC 1424 at [27]; r 14.8 UCPR;
- f. the material facts must be pleaded with a sufficient degree of specificity, having regard to the subject matter, to convey to the opposite party the case it has to meet. Pleadings define the issues for decision in the litigation and thereby enable the relevance and admissibility of evidence to be determined at trial: *Fleet v Royal Society for the Prevention of Cruelty to Animals* [2007] NSWSC 1420 at [24]; *Ratcliffe v Evans* (1892) 2 QB 524 at 532; *Dare v Pulham* (1982) 148 CLR 659 at [664]; *Banque Commerciale SA (in liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286 - 287; *Szanto* at [124];
- g. all material facts should be *plainly stated* in the pleading itself: *Travel Compensation Fund v Blair* [2003] NSWSC 720 per Einstein J at [29H30];
- h. A pleading must plead specifically any matter that, if not pleaded specifically, may take the defendant by surprise: *Fleet v Royal Society for the Prevention of Cruelty to Animals* [2007] NSWSC 1420 at [24]; r. 14.14 UCPR;

i. a pleading is embarrassing if, in succinct fashion, it does not put the other properly on notice of the real substance of the claim made against it and to know what case it is that the other party is to meet. Thus, a pleading is embarrassing if it is unintelligible, ambiguous, or so imprecise in its identification of material factual allegations as to deprive the opposing party of proper notice of the real substance of the claim: *Szanto v Bainton* [2011] NSWSC 985 at [107]; *Shelton v National Roads 81 Motorists Assn Ltd* [2004] FCA 393 at [8];

j. a pleading may be embarrassing even though it does contain allegations of material facts sufficient to constitute a cause of action, if the material facts alleged are couched in expressions which leave difficulties or doubts about recognizing or piecing together what is referred to, or if imprecise words are used with unduly broad ranges of possible meanings or without clear meanings. What is referred to must be clearly stated showing, as appropriate, when and where an event happened, who participated, what was said, what was the relevant effect of any document and so forth: *Northam v Favelle Favco Holdings Pty Ltd* (unreported, NSWSC, Bryson J, 7 March 1995);

k. although the pleading of a conclusion may, in some circumstances constitute a material fact, nevertheless, the pleading will be embarrassing if allegations are made at such a level of generality that the defendants do not know in advance the case it/they has/have to meet: *McGuirk v The University of New South Wales* [2009] NSWSC 1424 at [33]; *Charlie Carter Pty Limited v Shop Distributive and Allied Employees Association* (1987) 13 FCR 413 at 417 - 418. In such a case, the appropriate remedy is to strike out the pleading rather than to order the provision of particulars, as it is not the function of particulars to take the place of the necessary averments in a pleading: *McGuirk v The University of New South Wales* [2009] NSWSC 1424 at [33]; *Trade Practices Commission v David Jones (Australia) Pty Limited* (1985) 7 FCR 109 at 112-114;

l. a pleading is also embarrassing where alternatives are confusingly intermixed or where irrelevant allegations are made that tend to increase expense: *Shelton v National Roads & Motorists Association Limited* [2004] FCA 1393 at [18];

m. objectionable material within a pleading that is so mingled with other matters may lead to the conclusion that the pleading as a whole would tend to embarrass the fair trial of the action and ought be struck out: *National Australia Bank v Priestley* [2012] NSWSC 387 at [6]; *Fleet v Royal Society for the Prevention of the Prevention of Cruelty to Animals NSW & Ors* [2005] NSWSC 926 at [55]; *Turner v Bulletin Newspapers Co Pty Limited* (1974) 131 CLR 69 at 72, 87 - 88, 97 - 98; *Gunns Limited v Marr* [2005] VSC 25 at [57] - [58];

n. a pleading must not claim an amount for unliquidated damages: r 14.13(1) UCPR;

o. if any documents or spoken words are referred to in a pleading, the effect of the documents or spoken words must, so far as material, be stated, and the precise terms of the documents or spoken words must not be stated, except so far as those terms are themselves material: r 14 UCPR;

p. where there has been a clear infringement of the rule as to stating all material facts and not merely a failure to give sufficient particulars of facts which have been pleaded, the preferable course is to strike out the offending

pleading, with liberty to amend, rather than to order particulars: *Szanto v Bainton* [2011] NSWSC 985 at [127]; *National Australia Bank v Priestley* [2012] NSWSC 387 at [34];

q. a pleading that alleges any condition of mind must give particulars of the facts on which the party pleading relies: r 15.4(1) UCPR. Condition of mind includes any disorder or disability of mind: r 15.4(2) UCPR.

18 These individual principles are all manifestations of the paramount entitlement of the Court to exercise control over its procedures to ensure that proceedings are conducted in a manner most conducive to the administration of justice. The Court is now subject to a statutory obligation imposed by s 56 of the *Civil Procedure Act 2005* (NSW), which relevantly provides:

(1) The overriding purpose of this Act and of rules of court, in their application to civil proceedings, is to facilitate the just, quick and cheap resolution of the real issues in the proceedings.

(2) The court must seek to give effect to the overriding purpose when it exercises any power given to it by this Act or by rules of court and when it interprets any provision of this Act or of any such rule.

19 The multiplicity of the allegations of fraud made by the plaintiffs against the defendant and its officers, including with respect to the manner in which the defendant conducted all of the proceedings in the Land and Environment Court, requires that the Court have particular regard to the principles that must be observed by a plaintiff who alleges fraud against another person.

20 Uniform Civil Procedure Rules r 14.14 specifies that, if a plaintiff wishes to mount a case alleging fraud against the defendant, the statement of claim must plead fraud specifically. Any allegation of fraud must be clearly pleaded and properly particularised: see the cases listed in *Ritchie's Uniform Civil Procedure NSW* (LexisNexis Butterworths, loose-leaf) at [14.14.25]. In *Wentworth v Rogers (No 5)* (1986) 6 NSWLR 534, Kirby P (Hope and Samuels JJA agreeing) said (at 538-539): "As in all actions based on fraud, particulars of the fraud claimed must be exactly given and the allegations must be established by the strict proof which such a charge requires: *Jonesco v Beard* [1930] AC 298 at 301; *McHarg v Woods Radio Pty Ltd* (at 497)". It is not sufficient for a plaintiff simply to assert in the statement of claim that the defendant acted fraudulently. The basis of the allegation that the conduct was fraudulent must be stated in the statement of claim.

- 21 Generally, conduct involving the making of an assertion may be fraudulent if the maker knows the assertion is false, has no belief as to its truth at the time the assertion is made, or the maker is recklessly indifferent as to whether it is true or not. It is not an adequate pleading for the statement of claim simply to assert that one of those criteria was present. So, if the plaintiff claims that the defendant made a fraudulent assertion, it is not enough for the plaintiff to plead that the defendant knew that the assertion was false. The plaintiff must not only plead that the assertion was false, but must plead or give particulars of the facts that show that the defendant knew of the falsity of the assertion. It is not permissible for the plaintiff to allege fraud and knowledge of falsity, and hope that, at the hearing, the plaintiff will be able to establish facts by the evidence that is led that will lead the Court to find that the defendant knew that the assertion was false when it was made. The detail that will be required in the statement of claim will depend upon the particular circumstances. But there must be sufficient detail to inform the defendant of the basis of the fraud claim. That means, where it is alleged that the defendant knew that the assertion was false when it was made, that it will usually be necessary for the plaintiff to allege the facts that were known to the defendant that were sufficient to tell the defendant that the assertion was false.
- 22 This rule of pleading is strictly enforced by the courts. Plaintiffs are not permitted to oppress defendants by making allegations of fraud in cases where the plaintiff is not able to specify the underlying facts known to the defendant that would justify a finding by the Court that the defendant knowingly made the false statement. The rule is reflected in the requirement in UCPR r 15.3: "A pleading must give particulars of any fraud...on which the party relies".

### **Outline of claims made in statement of claim**

- 23 In their statement of claim, the plaintiffs also seek a significant number of declarations that individual aspects of the defendant's officers' conduct were fraudulent, or false and misleading, or were otherwise unlawful. The plaintiffs seek declarations concerning the application of the relevant planning principles to the plaintiffs' circumstances (which are likely to be orders that can only be made by the Land and Environment Court). The plaintiffs seek declarations that the bringing of proceedings against them by the defendant in the Land and

Environment Court was an abuse of process. The plaintiffs seek orders that they not be required to comply with orders made by the Land and Environment Court. The plaintiffs also seek damages from the defendant, including for malicious prosecution. The total amount of the damages claimed is \$2,330,347.10, which includes \$300,000 in exemplary damages and \$300,000 in aggravated damages.

24 The scope of the allegations of fact made in the statement of claim will appear from the following summary of the individual claims, which has necessarily been set out in outline and under the headings appearing in the statement of claim, given the scale of the pleading.

- (1) Fraudulent misrepresentation by Anthony Krillic: pars 15 to 50. The plaintiffs allege that Mr Krillic, a member of the defendant's department responsible for development applications and approvals, fraudulently advised Mrs Rafailidis that the plaintiffs could not obtain development approval to construct a new dwelling, without the approval being subject to a condition that the existing structure be demolished, and also fraudulently required the plaintiffs to write a letter to the defendant agreeing to the condition, when Mr Krillic knew that the applicable planning law principles permitted the plaintiffs to retain the existing structure for a purpose other than use as a dwelling. At that stage, as alleged by the plaintiff, the relevant planning instrument was the Camden Local Environmental Plan (LEP) 48. The plaintiffs allege, in par 48, that the defendant "did not act in accordance with social justice principles", and the particulars referred to Article 17 of the Universal Declaration of Human Rights and Article 26 of the International Covenant on Civil and Political Rights.
- (2) Serious corrupt conduct – s 440A(b) of the *Local Government Act 1993* (NSW): pars 51 to 137. The plaintiffs claim that Mr Krillic's alleged fraudulent conduct was corrupt conduct within the meaning of the *Independent Commission Against Corruption Act 1988* (NSW) and the *Local Government Act 1993* (NSW). They allege, in pars 57 to 59, that Mr Krillic committed a serious indictable offence, and elsewhere allege serious breaches of the criminal law. They allege, in par 73, that the defendant's prosecution of the proceedings in the Land and Environment Court "was intended to pervert the course of justice".
- (3) Enforcing the development consent against the plaintiff: pars 138 to 152. The plaintiffs claim that the defendant did not comply with the requirements of s 131A of the *Local Government Act*, and s 121G of the *Environmental Planning and Assessment Act*, and failed to comply with the rules of natural justice, and acted harshly and unconscionably in serving an order on the plaintiffs requiring them to demolish the original structure on the land, as that had the effect of making homeless the long-term aged and ill tenants who had rented the original dwelling.

- (4) Penalty infringement notice: pars 153 to 162. This claim related to a penalty infringement notice served by the defendant that fined Mr Rafailidis \$1,500 for not having demolished the existing structure. The plaintiffs' complaint is that the failure by the defendant to provide (unidentified) information to the plaintiffs' tenants was "a continuation of the fraudulent and deceitful statements by" Mr Krillic, and another named officer of the defendant, Mal Kashro, and that "Mr Krillic and the defendant was determined, and it was the intent of the defendant, to have the plaintiff's existing structure demolished in defiance of the law, in defiance of the plaintiff's rights under the law, and in pursuit of the defendant's personal policy and objectives to have all 'eyesore' structures demolished..." The failure to provide the information to the tenants was a failure to observe the rules of natural justice.
- (5) The ORD02 Report prepared by the defendant: pars 163 to 198. The defendant's Director, Development and Health, Mr Carey McIntyre, prepared a report dated 19 April 2011 for submission to the defendant's counsellors on whether the defendant should institute proceedings against the plaintiffs for breach of the condition in the development approval. By the time of the report, the relevant planning instrument was the Camden LEP 2010. The plaintiffs plead that this LEP permitted a secondary dwelling on the plaintiffs' land, although a restriction was placed on the size of such a dwelling. The plaintiffs claim, in respect of Mr McIntyre's report, that its purpose was to seek a resolution to commence legal proceedings against the plaintiffs, and that it was false and misleading for Mr McIntyre to claim in the report that the development of the land was prohibited by the Camden LEP 2010, when that LEP did not apply because of a savings provision. The plaintiffs claim that the report relied mainly on the fact that the plaintiffs were "in breach of the fraudulently induced agreement to demolish and the fraudulently induced development consent". The plaintiffs make complicated and obscure allegations concerning the significance of observations made by the judges in the Court of Appeal in the hearing that led to *Rafailidis v Camden Council* [2015] NSWCA 185, concerning the circumstances in which the retention of the original structure would be permitted under the Camden LEP 2010, and also to a second development approval that was sought by the plaintiffs in performance of an order made by Lloyd AJ, which permitted the retention of the original structure with certain alterations. They allege that Mrs Rafailidis made complaints to Mr McIntyre about having been misled by Mr Krillic, and that Mr McIntyre had a duty to inform himself as to the truth of Mrs Rafailidis' accusations, but he did not do so. The plaintiffs plead that Mr McIntyre misled the councillors of the defendant in his report in order to falsely induce the councillors to authorise the prosecution of the plaintiffs for breaching the development approval. The plaintiffs allege in pars 188 and 189 that Mr McIntyre's report to the councillors was fraudulent. This series of allegations ends at par 197, with the claim that the actions of Mr McIntyre in preparing his report resulted in the plaintiff "being fraudulently, falsely and maliciously prosecuted by the defendant" in the Land and Environment Court.

- (6) Prosecution of the plaintiff by the defendant: pars 199 to 201. In these paragraphs, the plaintiffs allege that the action of the defendants in prosecuting the plaintiffs “were fraudulent and/or based on its fraudulent actions”. The fraudulent actions referred to are those of Mr Krillic, Mr McIntyre and Mr Kashro.
- (7) Peaceful resolution of the dispute privately: pars 202 to 215. The plaintiffs complain that they attempted to settle the dispute with the defendant in private, but the defendant rebuffed those attempts. The plaintiffs allege that they contacted a Member of Parliament, the Ombudsman, the Department of Local Government, ICAC, all councillors of the defendant and certain named officers. The plaintiffs allege that Mr McIntyre “lied and misled and deceived” the Member of Parliament, which caused him to take no further action to assist the plaintiffs. That conduct is said to be “a continuation of the fraudulent and deceitful statements by Anthony Krillic and Mal Kashro”, “showed a contemptuous disregard for the plaintiff’s rights” and “was harsh, oppressive, unfair, unconscionable and lacked good faith”.
- (8) The hearing before Lloyd AJ in the Land and Environment Court 5 March 2012: pars 216 to 228. The plaintiffs plead that this conduct was “a continuation of the fraudulent and deceitful statements by Anthony Krillic and Mal Kashro”. The action “showed a contemptuous disregard for the plaintiff’s rights” and was “harsh, oppressive, unconscionable and lacking in good faith”. The plaintiffs allege that the action involved a “concealed fraud” by the defendant, because the defendant did not reveal to the Court the fraud that had been perpetrated by Mr Krillic and Mr Kashro. The defendant’s prosecution of the plaintiffs “was therefore fraudulent and a continuing wrong”.
- (9) The judgment of Lloyd AJ was fraudulently obtained by the defendant: pars 229 to 264. This claim is in essence a repetition of the claim that the defendant continued the fraudulent conduct of Mr Krillic, Mr Kashro and Mr McIntyre. It adds a claim that the defendant made a material misrepresentation to Lloyd AJ, by the silence of its solicitor, by concealing the fraudulent conduct of the defendant in obtaining the plaintiffs’ consent to demolish the original structure. The judgment of Lloyd AJ was “fraudulently induced by the defendant”.
- (10) Collateral abuse of process: pars 265 to 270. The plaintiffs allege that, in addition to inducing the judgment of Lloyd AJ fraudulently, the defendant “engaged in collateral abuse of process before Lloyd AJ”, as it instituted the proceedings “for an improper or illegitimate purpose or to effect an object beyond that which the legal process offers and foreign to the law”.
- (11) Plaintiff’s attempt to obtain a section 96 amendment from the defendant: pars 271 to 282. The plaintiffs allege that they responded to the judgment of Lloyd AJ by seeking advice from an officer of the defendant, who advised them to make a s 96 application under the *Environmental Planning and Assessment Act* to amend the development approval. The plaintiffs made such an application, but it

was rejected one day later by the defendant. The plaintiffs allege that this conduct was “unreasonable”, “showed a contumelious disregard for the plaintiff’s rights”, and was “harsh and oppressive and unconscionable”. Further, they allege that the rejection of the application “was premised on the fraud that had been perpetrated by Anthony Krillic and Mal Kashro”.

- (12) Application for a stay of Lloyd AJ’s judgment before Biscoe J: pars 283 to 295. The plaintiffs allege that the defendant opposed the making of the stay order on a ground that was false and misleading, and “was premised on not revealing to the court the fraud that had been perpetrated by Anthony Krillic and Mal Kashro and that the plaintiff had been fraudulently induced not to appeal the development consent”. The opposition to the application was “therefore fraudulent” and “was a continuation of the fraud perpetrated on the plaintiff by the defendant pursuant to the fraudulent misrepresentation made by Anthony Krillic and Mal Kashro”.
- (13) Section 34(3) conference before Commissioner Hussey to obtain a development approval: pars 296 to 312. The plaintiffs appealed from the rejection of the application to vary the initial development approval and the Land and Environment Court directed that an on-site conciliation conference be held before a Commissioner. The plaintiffs complain that the defendant initially opposed the application, but on 4 July 2012 they reached an agreement and a development consent was given that permitted the existing structure to remain as a secondary dwelling, subject to making the secondary dwelling comply with the Camden LEP 2010. The plaintiffs allege that the agreement reached was unconditional, but then the defendant insisted that the work be done within 90 days. The plaintiffs began works in accordance with the consent on or about 17 July 2012. The plaintiffs then allege that the defendant’s opposition to the stay application “was a continuation of the fraud perpetrated on the plaintiff by the defendant pursuant to the fraudulent misrepresentation made by Anthony Krillic and Mal Kashro”. The opposition was “premiered on not revealing to the court the fraud that had been perpetrated”.
- (14) The second proceedings before Biscoe J: pars 313 to 353. These proceedings are alleged to have involved an application by the defendant for an order that required the plaintiff to carry out and complete all conditions of the development consent issued on 4 July 2012 within 120 days. The plaintiffs appear to confuse the second development approval with the first one that was the subject of the judgment given by Lloyd AJ. The plaintiffs allege that the “action of the defendant in continuing proceedings that had been finalised before Commissioner Hussey was a continuation of the fraud perpetrated on the plaintiff by the defendant pursuant to the fraudulent misrepresentation made by Anthony Krillic and Mal Kashro”.
- (15) The judgment of Biscoe J was fraudulently obtained by the defendant: pars 354 to 368. The plaintiffs plead that the defendant’s application before Biscoe J “should not have been made because it relied upon the

material false and misleading representations made by Anthony Krillic and Mal Kashro not being brought before the court”.

- (16) Collateral abuse of process: pars 369 to 374. The plaintiffs allege that the application by the plaintiff that was heard by Biscoe J was “an abuse of process”, and was brought “for an improper or illegitimate purpose or to effect an object beyond that which the legal process offers”. They claim the conduct was “fraudulent and that fraud was a continuation of the fraudulent and deceitful statements by Anthony Krillic and Mal Kashro. It was premised on the defendant concealing the fraud”.
- (17) Prosecution for contempt of court before Sheahan J: pars 375 to 389. The plaintiffs claim that, in prosecuting them for contempt, the defendant breached Article 14 of the International Covenant on Civil and Political Rights, which required that the plaintiffs be informed promptly and in detail in a language which they understood of the nature and the cause of the charge against them. The plaintiffs give the following particulars: “The charge by Council against the plaintiff and her husband was beyond understanding... The charge made no sense. It was, on its face, incomprehensible because the plaintiff had already obtained a development consent...” The plaintiffs plead that the application before Sheahan J “was a continuation of the fraud perpetrated on the plaintiff by the defendant pursuant to the fraudulent misrepresentation made by Anthony Krillic and Mal Kashro. It was a continuation of the defendant’s fraudulent intention...”
- (18) The judgment of Sheahan J was fraudulently obtained by the defendant: pars 390 to 405. This claim also repeats the allegation that, in making the application to Sheahan J, the defendant relied “upon the material false and misleading representations made by Anthony Krillic and Mal Kashro not being brought before the court”.
- (19) Collateral abuse of process: pars 406 to 409. This claim relates to the proceedings before Biscoe J, and the plaintiff’s claim that it “involved a continuing fraud that was concealed from the court”.
- (20) The defendant lied in order to successfully move Sheahan J to find contempt of court: pars 410 to 430. The plaintiffs plead that the defendant’s counsel lied to Sheahan J that the plaintiffs were in court on the day Biscoe J handed down his decision.
- (21) Claim by defendant for costs: pars 431 to 439. The plaintiffs say that a judgment for costs of \$44,669.57 of proceedings in the Land and Environment Court was entered by the Supreme Court after an assessment of the costs in the name of Camden City Council, but the plaintiff in the Land and Environment Court was Camden Council (that is, the word “City” was missing).
- (22) Appeal to the Court of Appeal by the plaintiff: pars 440 to 450. The plaintiffs allege that the defendant proceeded to enforce its judgment for costs in the Land and Environment Court, contrary to an alleged direction of Meagher JA in the Court of Appeal, which caused fear and

distress that led the plaintiffs to sell other property owned by them, and later to sell the family business.

- (23) Malicious prosecution by the defendant before Sheahan J: pars 451 to 467. The plaintiffs claim that, in bringing proceedings for contempt of court, the defendant “acted without reasonable and probable cause” and “maliciously”, and that the defendant “failed to inform the court of the fraud perpetrated on the plaintiff by Anthony Krillic and Mal Kashro and that the defendant concealed the fraud from the court”.
- (24) Malicious prosecution before Lloyd AJ and Biscoe J: pars 468 to 486. The plaintiffs substantially repeat the malicious prosecution claim made in respect of the proceedings before Sheahan J.
- (25) Unconscionable conduct: pars 487 to 490. The plaintiffs list, in 41 separate sub-paragraphs, in summary form many of the allegations of wrongdoing on the part of the defendant that they make elsewhere in the statement of claim. The plaintiffs allege that the actions “were harsh, unconscionable, unconscientious, oppressive, unfair, unjust and not in good faith”.
- (26) Breach of international covenant: pars 491 to 498. This is a further allegation that the defendant breached Article 14 of the International Covenant on Civil and Political Rights by obtaining the conviction of the plaintiffs for contempt of court.
- (27) Statute of limitations: pars 499 to 513. This is a claim to support the plaintiffs’ claims in tort to the effect that the plaintiffs “did not suffer any damages until the Court of Appeal gave its judgment” in favour of the plaintiffs on 17 February 2015. The plaintiffs say that the judgment established that the existing structure on the plaintiffs’ land was a secondary dwelling within the meaning of Camden LEP 2010, and it was then that the plaintiffs knew of their right to retain the existing structure. The plaintiffs also plead that, in fraudulently inducing the judges of the Land and Environment Court to make orders in their favour, “the defendant successfully concealed its own fraud”. The plaintiffs then list the same 41 instances of alleged wrongful conduct by the defendant as being “a continuing wrong based upon the fraud of the defendant that started in 2008 and continued right through until 2015”, so that the limitation period did not commence to run until the Court of Appeal judgment in 2015.
- (28) Damages, aggravated damages and exemplary damages: pars 514 to 524. The particulars to the claim for aggravated damages include: “The manner in which the harm was done was to act fraudulently against the defendant [meaning plaintiffs] and to attempt to deprive the plaintiff of a valuable property right, the retention of the existing structure...”

### **Conclusion concerning compliance with pleading principles**

- 25 The summary of the claims made by the plaintiffs in their statement of claim that is set out above is not adequate to convey a true sense of the extent and complexity of the allegations made by the plaintiffs. It is a reasonably adequate

record of how almost all of the plaintiffs' claims depend upon and rehearse the allegations of fraudulent conduct by Mr Krilic, Mr Kashro and Mr McIntyre. Those allegations of fraudulent conduct are a constant thread that the plaintiffs weave through all of their claims. The plaintiffs not only claim that the defendant prosecuted all of the proceedings in the Land and Environment Court to further the fraudulent aims of its officers, but, in addition, that the defendant concealed the fraud from the Court. The statement of claim is replete with allegations that the conduct of the defendant – most of which could not practicably be individually identified in the outline set out above – constituted either malicious prosecution or a wide range of dishonourable conduct on the part of the defendant.

- 26 I have not been able, in the summary, to convey the extent, the complexity, the obscurity, or the level of repetition in the particulars provided, for a majority of the allegations made by the plaintiffs. The only way to approach an understanding of the statement of claim is to attempt to read it; but the document largely defies comprehension, and the reader will almost certainly be lost before reaching the middle of the document. The person who drafted the particulars may have thought that the plaintiffs were obliged to explain in seemingly endless detail the reasoning in support of their claims. In a substantial proportion of cases, the result has been that the particulars are not readily comprehensible, as they require reference to other sources of information, and they are in any event argumentative.
- 27 I am satisfied that an order should be made striking out the statement of claim in its entirety. Any legitimate claims that may reside in the statement of claim are obscured by a thicket of impermissible and obscure allegations and submissions, most of which are not limited to the material facts relevant to any particular cause of action. There is a very substantial level of repetition. The result is that the statement of claim cannot be understood on the basis of a careful reading. A minute analysis is required to attempt the task, and the result is the production of summaries of the individual claims that, at the one time, do not record the full extent of the allegations made, and also do not permit an adequate understanding of the collective effect of the allegations. The level of unnecessary and irrelevant detail and repetition defeats a conscientious

attempt to gain an adequate, fair and balanced understanding of the claims made by the plaintiffs.

- 28 Furthermore, the mixture of prayers seeking the setting aside of orders of the Land and Environment Court, with a substantial number of claims strewn throughout the pleading for declarations as to the effect of matters dealt with by that Court, along with a welter of disconnected allegations of wrongdoing by the defendant, impose on both the defendant and the Court an oppressive task of discrimination between claims that may be justiciable in this Court, and claims that are not.
- 29 The statement of claim is, in my opinion, within that relatively extreme category where its deficiencies defeat any reasonable attempt at analysis and segregation of the good from the bad, so that the proper course for the Court to take is to strike out the statement of claim in its entirety.
- 30 I have not attempted to match the myriad of pleading deficiencies in the statement of claim with the individual pleading rules accepted by McCallum J in *Seidler*. That would be an entirely senseless exercise, as, in various combinations, many of the deficiencies identified by her Honour applied to nearly every one of the allegations made in the statement of claim.

#### **Deficiencies in the manner in which fraud is pleaded against the defendant**

- 31 There is a further fundamental deficiency in the statement of claim, which separately justifies an order that it be struck out in its entirety. That is that, in my view, substantially the whole of the claims made are dependent upon allegations of fraud that have not been properly pleaded, and are fundamentally oppressive to the defendant, and unfair to the officers of the defendant against whom the allegations have been made.
- 32 I will firstly address the manner in which the plaintiffs have pleaded the case that officers of the defendant engaged in fraudulent conduct, and that this had the result that the defendant itself procured the Land and Environment Court judgments by fraud.
- 33 I will adopt, as an example, the first claim pleaded by the plaintiffs, in pars 15 to 50 of the statement of claim, as summarised above, where the plaintiffs plead a

claim against the defendant based upon an alleged fraudulent misrepresentation by an officer of the defendant, Mr Krillic. The allegations are complex and cannot readily be summarised.

34 I will extract the following paragraphs from the statement of claim to demonstrate the plaintiffs' approach to making allegations of fraud against the defendant:

16. The plaintiff spoke to Anthony Krillic, an employee of the defendant employed in the defendant's Development Department. Anthony Krillic said there was no way the existing structure could be retained. He said it was not permitted by the law and the existing structure is an eyesore and it must be demolished after the new proposed home was completed. These representations by Anthony Krillic were false and misleading.

Particulars

Camden LEP 48 permitted the retention of the existing structure in a number of formats other than as a secondary dwelling. Therefore, there was a way for the plaintiff to retain the existing structure and it did not have to be demolished

17. Anthony Krillic then demanded that the Plaintiff write a letter whereby the Plaintiff confirmed that she would demolish the existing structure after completion of the new home. This demand by Anthony Krillic was false and misleading.

Particulars

The law did not require the plaintiff to write such a letter. The demand to write a letter misled the plaintiff to believe that the existing structure had to be demolished.

18. Anthony Krillic stated that the Plaintiff's development application would not be approved without the letter from the Plaintiff. This representation by Anthony Krillic was false and misleading.

Particulars

The law permitted the retention of the existing structure and therefore the defendant was obliged to comply with the law and issue the development consent.

19. It was the policy of the defendant to have demolished any secondary structures that it considered to be an eyesore.

35 The plaintiffs then, in pars 20 to 27, plead detailed allegations about why in fact the applicable planning principles permitted the plaintiffs to retain the original structure on the land, even if it could not be used as a dwelling, and as to why the plaintiffs would not have agreed to demolish the structure if they had known the real position.

36 The plaintiffs then allege:

28. Mr Krillic intended to make the false representations to the plaintiff and he intended that the plaintiff act on the false representations, which she did.

37 The particulars given to this allegation distil into a claim that Mrs Rafailidis wrote the letter requested by Mr Krillic and he “did not protest receiving that letter”, but used it to support the inclusion of the condition in the development approval that the plaintiffs demolish the existing structure, and that the defendant relied upon the letter in the proceedings in the Land and Environment Court.

38 The plaintiffs then allege in par 29 that, in order to induce the plaintiffs not to appeal any development consent issued by the defendant, Mr Krillic made five “false, misleading and deceptive representations”. The representations listed by the plaintiffs are alleged assertions by Mr Krillic concerning the planning approval process.

39 Then, out of the blue, in the course of alleging, in par 30, that the statements were made by Mr Krillic in the course of his employment with the defendant, the plaintiffs allege: “The defendant gained a benefit from the fraudulent representations Anthony Krillic made”. There is no allegation of the basis of the claim that the representations were fraudulent.

40 The plaintiffs then allege:

31. The statements and representations made by Anthony Krillic were all representations of material fact made by the defendant to the plaintiff that were untrue, fraudulent, false, misleading and deceptive.

Particulars

Camden LEP 48 permitted the retention of the existing structure in some format other than as a dwelling.

41 At par 34, the plaintiffs allege:

34. Anthony Krillic and therefore the defendant knew, or he must be taken to know, that the representations of fact that he made, as pleaded in paragraph 29 were false and misleading or else he was reckless in his ignorance of the truth or he made the representations not caring whether they were true or false.

42 The particulars to this allegation are important, as they are the first time that the plaintiffs explain why the conduct of Mr Krillic was fraudulent. The particulars given are almost three pages long, which is an example of the

proximity of the statement of claim. I have abbreviated the particulars where possible:

(a) Camden LEP 48 permitted the existing dwelling to remain in some format (other than as a secondary dwelling) subject to approval from the defendant. Anthony Krillic was an employee of the defendant's department responsible for development applications and their approval or rejection. He knew, or must be taken to know, the law as it relates to the defendant's responsibilities to approve or disapprove development applications. He knew, or must be taken to know, Camden LEP 48 and what it permitted and did not permit as that was part of his job. He knew, or must be taken to know, that LEP 48 permitted the retention of the existing structure in some format other than as a secondary dwelling, subject to the defendant's approval.

If Mr Krillic did not know the terms of LEP 48, then he deliberately shut his eyes to the facts, he purposefully abstained from investigation or consciously lacked sufficient information to support an assertion couched in positive and unqualified form, therefore the conclusion is open that Mr Krillic's belief about the terms of LEP 48 and the requirement to demolish is not really honest and that there is sufficient intention to deceive.

...

Anthony Krillic must have known that the law did not require the plaintiff to demolish the existing structure because to believe otherwise would be destitute of all reasonable foundation. To claim to the contrary would be a claim that Mr Krillic could not have reasonably entertained and therefore the representation was a fraudulent representation. Lack of reason is evidence of lack of reality in the truth of a false statement.

- 43 Important parts of these particulars depend upon an assertion as to what Mr Krillic "must be taken to know".
- 44 Paragraph (a) of the particulars concerned the alleged statement by Mr Krillic that it was not lawful for the plaintiffs to retain the original structure on the land after the construction of their new dwelling. Paragraph (b) made structurally equivalent allegations concerning the alleged demand by Mr Krillic that the plaintiffs send to the defendant a letter agreeing to demolish the existing structure. Paragraph (c) made the same allegations in relation to the defendant's reliance on the letter as a ground for ordering the plaintiffs to demolish the existing structure. Paragraph (d) made similar allegations in relation to Mr Kashro and Mr McIntyre, as well as a Jeremy Swan (who otherwise does not appear to be mentioned in the statement of claim). The particulars finished with the following allegations:

(e) Alternatively, if Anthony Krillic did not in fact know that his statements were false, then the demand that the plaintiff produce the letter agreeing to demolish is strong circumstantial evidence of conscious misbehaviour or

recklessness which leads to an inference that Anthony Krillic knew of the falsity of his statements. Why demand the letter whereby the plaintiff agreed to demolish if the defendant already had the power to enforce demolition under the law?

If Anthony Krillic did not know in fact that his statements were false, he should have remained silent. Alternatively, if he did know the terms of LEP 48, he should have remained silent.

(f) In any event, false representations made recklessly and without regard for their truth in order to induce action by another are the equivalent of misrepresentations knowingly and intentionally uttered.

- 45 The logical structure of these particulars of fraud is: (a) The effect of the relevant planning law principles was X. (b) Mr Krillic was an employee of the defendant responsible for the application of planning law principles. (c) Mr Krillic knew, or must be taken to have known, the planning law principles. (d) Mr Krillic knew, or must be taken to have known, X. (e) If Mr Krillic did not know X, then he deliberately shut his eyes to the fact that the application of the planning law principles had the effect of X.
- 46 Notwithstanding the lengths to which the plaintiffs have gone to enunciate the basis of their claim that Mr Krillic's conduct was fraudulent, their pleading is not a proper allegation of fraud, but merely an assertion of that claim without any specific facts being pleaded that are capable of establishing that Mr Krillic acted fraudulently. It is simply insufficient for the plaintiffs to say that, because their view of the application of the planning laws differed from the one adopted by Mr Krillic, his conduct must have been fraudulent, because he was proficient in the proper application of the planning laws.
- 47 This is but one example of a long series of tangled allegations of fraudulent conduct by the defendant and its officers, all of which on close examination fail to plead an arguable factual basis for the existence of fraud.

### **Claim of fraudulent conduct in the Land and Environment Court**

- 48 The plaintiffs plead in the statement of claim that they were aware of the alleged fraud committed by Mr Krillic at the time of the first hearing in the Land and Environment Court before Lloyd AJ, and that they attempted to make a case based upon the fraud before his Honour, but they were unsuccessful because they did not make the case in accordance with the Court's procedure or on the basis of admissible evidence. Mrs Rafailidis attempted to put the case

from the bar table and, according to the statement of claim, Lloyd AJ did not deal with the issue in his reasons for judgment.

- 49 In the particulars given to par 246, the plaintiffs make the following allegations:

The plaintiff thought that she had to give her evidence in person. When the court ordered evidence by affidavit, she provided one for her husband but not for herself. The plaintiff attempted to give evidence from the bar table, which was listened to by Lloyd AJ but the plaintiff's "evidence" was not admitted and not accepted by the court. The plaintiff's "evidence" was not referred to in the judgment of Lloyd AJ.

...

The plaintiff acknowledges that she failed to properly put the issue of fraud before the court and she failed to provide any admissible evidence at all in the trial before Lloyd AJ in relation to the fraud. The plaintiff did not know that the issue of fraud must be specifically pleaded... In fact, the plaintiff acknowledges that she failed completely to place any admissible evidence before the court on her own behalf...

- 50 The plaintiffs then plead in par 248 of the statement of claim:

The plaintiff referred to fraud in her defence, so she did attempt to bring the matter before the court, but she was unsuccessful. The court failed to give the plaintiff procedural fairness. The court did not give the plaintiff the opportunity to present her evidence and to make submissions in support of her case because the plaintiff did not understand that she had to provide her evidence by affidavit... The plaintiff thought that she had successfully raised the issue of fraud, when she had not. This gave the plaintiff no opportunity to consider appealing on the issue of fraud. The plaintiff simply thought the court had not agreed with her fraud allegations and that she must have been wrong.

- 51 These allegations are fatal to the plaintiffs attempt to prosecute a claim in this Court based upon the alleged fraudulent conduct by the defendant through the actions of Mr Krilic. Whatever other deficiencies may exist in respect of this claim, the plaintiffs' own pleading establishes that they were aware of the fraud, but unsuccessfully attempted to obtain relief based upon that allegation, notwithstanding that they brought it to the attention of Lloyd AJ in the Land and Environment Court. It is clear that the plaintiffs, by seeking to make the same claim in their statement of claim in this Court, are impermissibly seeking to appeal in this Court by a collateral action against the failure of the Land and Environment Court to accept their claim.

- 52 Notwithstanding that the plaintiffs make allegations of fraudulent conduct by the defendant and its officers in a substantial number of manifestations, on careful

analysis, all of those manifestations spring out of the original alleged fraudulent conduct of Mr Krillic.

**Plaintiffs' proposed amended statement of claim**

- 53 As an order will be made that the plaintiffs' existing statement of claim be struck out in its entirety, it will be necessary to analyse the proposed amended statement of claim in detail, particularly with regard to how the allegations of fraud are pleaded. These allegations are relied upon by the plaintiffs to support their claim that the orders made in the various Land and Environment Court judgments should be set aside on the ground that they were procured by fraud.
- 54 While the current statement of claim contains 34 prayers for relief, including a substantial number of applications for declarations concerning the effect of orders of the Land and Environment Court and specific aspects of alleged wrongful conduct by the defendant and its officers, the proposed amended statement of claim contains seven prayers for relief. Six of those prayers seek declarations that the judgments of Lloyd AJ, Biscoe J and Sheahan J in the Land and Environment Court were procured by the fraud of the defendant, and for orders setting those judgments aside.
- 55 By prayer 7, the plaintiffs also claim damages of \$3,616,176.66, on the basis of the alleged fraud committed by the defendant.
- 56 The proposed amended statement of claim is now 35 pages in length and contains 156 paragraphs.
- 57 It should be acknowledged that the proposed amended statement of claim is much more concise and comprehensible than the original one. Much of the overwhelming detail in the particulars has been deleted. Most of the more exotic and untenable allegations of breach of duty by the defendant and its officers have also been deleted.
- 58 The plaintiffs allege, in pars 12 and 30, that Mr Krillic informed Mrs Rafailidis that the law did not permit the plaintiffs to keep the existing dwelling on the land, and that if the defendant approved the plaintiffs' application for development approval to construct a new home on the land, it would be

necessary for the plaintiffs to demolish the existing structure. The plaintiffs allege that the representations by Mr Krilic were "false and misleading".

59 The plaintiffs then allege, in par 16, that Mr Krilic made a false and misleading demand that the plaintiffs write a letter confirming that they would demolish the existing structure after completion of the new home.

60 The plaintiffs then allege, in par 17, that Mr Krilic made a false and misleading representation that the plaintiffs' development application would not be approved without the letter being written.

61 In par 22, the plaintiffs allege that Mr Krilic intended to make the false representations to Mrs Rafailidis.

62 No basis is pleaded as to why Mr Krilic would actually have intended to give false information to Mrs Rafailidis concerning the effect of the relevant planning laws.

63 The plaintiffs substantially repeat these allegations concerning the making of false, misleading and deceptive representations by Mr Krilic in par 23, and they then plead in par 24 that the representations were false. In par 25 they allege that Mr Krilic, and therefore the defendant, knew or must be taken to have known, that the representations "were false and misleading or else he was reckless in his ignorance of the truth or he made the representations not caring whether they were true or false".

64 The plaintiffs use the word "fraudulent" in par 34, where they allege that the plaintiffs' agreement to demolish the existing structure "was induced by the fraudulent representations of the defendant's officers".

65 The plaintiffs appear, by par 36, to make a claim against the defendant in the tort of deceit, based upon the alleged false representations that led them to write the letter agreeing to demolish the existing structure. They refer to the "damages as pleaded below".

66 Paragraph 37 contains the first allegations concerning the three judgments of the Land and Environment Court. It says:

37. When:

(a) the defendant prosecuted the plaintiff for failure to demolish and in seeking the demolition of the existing structure before Lloyd AJ in the Land and Environment Court in 2011/2012, *Camden Council v Rafailidis* [2012] NSWLEC 51 (5 March 2012); and

(b) pursued the plaintiff before Biscoe J *Camden Council v Rafailidis (No 3)* [2012] NSWLEC 217; and

(c) prosecuted the plaintiffs before Sheahan J *Camden Council v Rafailidis (No 4)* [2014] NSWLEC 22, *Camden Council v Rafailidis (No 5)* [2014] NSWLEC 85, the defendant relied upon the letter of the plaintiff which contained the agreement of the plaintiff to demolish after the proposed new dwelling was completed, and the defendant relied upon the development consent which contained the condition to demolish. The defendant also relied upon the Masterton Homes letter agreeing to demolish, pleaded to below.

67 It may be noted that the plaintiffs allege that the letter that they wrote to the defendant agreeing to demolish the existing structure, if the development application was approved, was procured by the fraud of the defendant. Then, in par 37, the plaintiffs allege that the defendant relied on the fraudulently procured letter in the Land and Environment Court proceedings.

68 As has been noted above in relation to the current statement of claim, the plaintiffs plead that they knew of the alleged fraudulent conduct of the defendant, but they unsuccessfully attempted to rely upon that fraud claim in the Land and Environment Court proceedings heard by Lloyd AJ.

69 In pars 38 to 43, the plaintiffs plead allegations under the heading "The defendant issued a fraudulently induced development consent". Why that should be so is not entirely clear, although it is pleaded in par 38 that the defendant granted the relevant development consent, and stapled to the consent the plaintiffs' letter to Mr Krillic that contained the allegedly fraudulently procured agreement of the plaintiffs to demolish the existing structure on the land. The plaintiffs state that the development consents that were issued contained a condition that the plaintiffs demolish the existing dwelling on the land after the new dwelling was constructed.

70 In pars 44 to 49, the plaintiffs allege that a different employee of the defendant, Mr Kashro, repeated the claim that the law required the existing dwelling on the land to be demolished. They allege, in par 46, that Mr Kashro must have known that the existing structure could be retained and that his representation

to Mrs Rafailidis that the law required the existing structure to be demolished was false, or that he was recklessly indifferent to the truth.

- 71 As is the case with the current statement of claim, the plaintiffs' pleading proceeds on the basis that the defendant's officer's understanding of how the planning laws applied to the situation was wrong, and that the plaintiffs' understanding is right, and it follows from the fact that the officer must be taken to have understood the correct operation of the planning laws, that it was fraudulent for the officer to act in accordance with his own understanding.
- 72 The plaintiffs allege, in par 48, that, in reliance on the false representations made by Mr Krillic and Mr Kashro, they did not appeal the development consent to the Land and Environment Court, and consequently lost their right to appeal and to seek approval to retain the existing structure.
- 73 In par 49, the plaintiffs plead a claim for damages against the defendant, based upon the alleged false representations made by Mr Krillic and Mr Kashro. The particulars given simply list the various judgments given by the Land and Environment Court.
- 74 After the plaintiffs' new home was completed, they moved in on around 19 October 2009, but did not, as required by the development consent, demolish the existing structure.
- 75 The plaintiffs allege, in par 52, that the defendant issued a penalty infringement notice fining Mr Rafailidis \$1,500 for non-compliance with the development consent.
- 76 The plaintiffs say, in par 54, that they had every intention of demolishing the existing structure, as they believed, in reliance on the fraudulent representations made by the defendant, that the law required its demolition.
- 77 In respect of the report prepared for the defendant's councillors by Mr McIntyre, the plaintiffs allege, in par 58, that Mr McIntyre made a false and misleading claim in the report that the plaintiffs had carried out a development that was prohibited by the relevant LEP. The plaintiffs allege that, by this time, the LEP had been amended to permit a secondary dwelling on the land.

78 In pars 59 to 68, the plaintiffs make allegations concerning the preparation of the report to the councillors by Mr McIntyre, including as to why the LEP then permitted secondary dwellings to be retained on the land. In par 63, they allege that Mr McIntyre made no attempt to ascertain whether the plaintiffs' complaints were true, being that Mrs Rafailidis had been falsely informed by the defendant's employees that the existing dwelling must be demolished. They say in par 64 that, in the report, the defendant relied mainly on the fact that the plaintiffs were in breach of the fraudulently induced agreement to demolish and the fraudulently induced development consent. They allege, in par 67, that Mr McIntyre misled the councillors of the defendant in the report in order to falsely induce the councillors to authorise the prosecution of the plaintiffs, and, in par 68, that Mr McIntyre continued to mislead the councillors to ensure that the councillors would agree to the prosecution of the plaintiffs by the defendant for failing to comply with the development consent. In pars (a) to (o) of the particulars to par 68, the plaintiffs set out a detailed criticism of Mr McIntyre's report.

79 The plaintiffs then allege in par 69:

69. The actions of Mr McIntyre, as set out in the ORD02 report, in ensuring that the defendant prosecuted the plaintiff were unconscionable and fraudulent and were intended to induce the Councillors of the defendant, on false and misleading grounds, to agree to prosecute the plaintiff to enforce demolition. Mr McIntyre's actions were successful.

80 The proposed amended statement of claim does not contain any allegations of fact capable of establishing that Mr McIntyre's conduct was motivated by the objectives asserted by the plaintiffs. These claims are no more than a series of bare allegations.

81 The plaintiffs then allege, in par 70, that the defendant's councillors, in reliance on the false representations made by Mr McIntyre, gave approval to the defendant to proceed to prosecute the plaintiffs and that "approval was fraudulently induced".

82 Then, in pars 72 to 75, the plaintiffs allege the circumstances in which the defendant prosecuted the plaintiffs in the Land and Environment Court, having the result, as alleged in par 73, that they were "fraudulently, falsely and maliciously" prosecuted by the defendant in proceedings giving rise to the four

judgments of which the plaintiffs complain, and forcing the plaintiffs to appeal in *Rafailidis v Camden Council* [2015] NSWCA 185.

83 The plaintiffs allege in pars 74 and 75 that they suffered damage as a result of "that fraud".

84 The plaintiffs allege, in par 76, that, in "reliance on the defendant's fraudulently obtained development consent, fraudulently obtained by the deceit of" Mr Krillic and Mr Kashro, and in reliance upon the "false and misleading" report prepared by Mr McIntyre, "the defendant continued with its fraud and proceeded to prosecute the plaintiffs to enforce the demolition of the plaintiffs' existing structure".

85 As alleged in par 77:

77. The actions of the defendant in prosecuting the plaintiffs were fraudulent and/or based on its fraudulent actions.

Particulars

Carey McIntyre knew the plaintiffs had been deceived into agreeing to the defendant's development consent and he knew the existing dwelling was not prohibited by law yet he calculatedly prepared a report: the ORD02 report (paragraph 68) for consent to prosecute the Plaintiffs for breach of development consent, and to enforce demolition.

86 The plaintiffs allege, in par 78, that they suffered damage because the defendant, through Mr McIntyre, "abused its authority as a local government and used the greater resources available to it to commence prosecution".

87 Then, the plaintiffs allege in par 79:

79. The defendant by commencing and prosecuting the plaintiffs in the proceedings before Lloyd AJ, Biscoe J and Sheahan J, relied upon not revealing to the court the fraud that had been perpetrated by the defendant Council on the plaintiffs, as pleaded above. The Land and Environment Court did not know the true facts. If the court had all the facts to hand, a different outcome would have occurred.

Particulars

The defendant relied upon not revealing to the court that the plaintiff had been fraudulently induced to "agree" to demolish. The defendant also relied upon the fact of not revealing to the court that its development agreement was based on the plaintiff's fraudulently induced agreement to demolish which meant that the development consent was fraudulent. The defendant also relied upon the fact of not revealing to the court that the plaintiff had been fraudulently induced not to appeal the development consent. The defendant's application before Lloyd AJ relied on a concealed fraud. Therefore the prosecution of the plaintiffs by the defendant was fraudulent.

- 88 The allegation in this paragraph is directly inconsistent with the plaintiffs' pleading in the current statement of claim that they were aware of the alleged fraud committed by Mr Krillic, and made submissions to Lloyd AJ on the subject, albeit that his Honour did not accept or act upon the claim of fraud made to him by the plaintiffs.
- 89 To this point, the plaintiffs have positively pleaded that the defendant issued a development approval that permitted the plaintiffs to construct a new dwelling on the land, but subject to a condition that, after construction of the new dwelling, the original structure would be demolished. They also pleaded that they had written a letter to the defendant in which they agreed to demolish the existing structure. They pleaded that they did not do so. In various ways, the plaintiffs allege that, at each step in this process, the defendant, through its officers, acted on a wrong view as to what the applicable LEP permitted. They go further to assert that the relevant officers of the defendant, Mr Krillic, Mr Kashro and Mr McIntyre, knew or were recklessly indifferent as to the true legal position, and that each step leading up to the prosecution of the plaintiffs in the Land and Environment Court by the defendant was done fraudulently.
- 90 The plaintiffs' claim that the defendant conducted the proceedings in the Land and Environment Court fraudulently is not in reality a claim that the *conduct* of the proceedings was fraudulent, but is a claim that the defendant proceeded by "not revealing to the Court" that the conduct of its officers in dealing with the plaintiffs was fraudulent. In the particulars to par 79, the plaintiffs say: "The defendant relied upon not revealing to the court that the plaintiff had been fraudulently induced to "agree" to demolish..." They say that the failure of the defendant to inform the Court of the conduct of its officers involved reliance "on a concealed fraud" which, according to the plaintiffs, had the consequence that the proceedings themselves were fraudulent.
- 91 The plaintiffs do not allege that, in the actual conduct of the proceedings in the Land and Environment Court, the defendant acted fraudulently by *knowingly* suppressing the existence of the earlier alleged fraudulent conduct by its officers. The plaintiffs' complaint is, in reality, that the defendant prosecuted the

plaintiffs based upon facts and circumstances that were liable to be vitiated by fraud – not that the defendant itself conducted the proceedings fraudulently.

92 This conclusion is supported by the allegations made by the plaintiffs, in pars 80 to 82, in relation to the hearing before Lloyd AJ, in which his Honour ordered the plaintiffs to demolish and remove the existing structure on the land, or otherwise obtain appropriate development consent to allow it to remain in some form or another.

93 The plaintiffs allege in par 81 that the commencement of the legal action by the defendant "showed a contumelious disregard for the plaintiffs' rights". The plaintiffs say that the defendant's action in prosecuting the plaintiffs was "harsh, oppressive, unconscionable and lacking in good faith".

94 They then allege in par 82 that, by "fraudulently procuring the plaintiff to "agree" to demolish the existing structure, the defendant fraudulently created the legal right to force demolition when it had no legal basis to demand demolition". Again, this is an allegation that the agreement between the plaintiffs and the defendant, upon which the defendant relied in the proceedings before Lloyd AJ, was procured by the defendant's fraud. There is no allegation that the defendant itself knew that the agreement had been procured fraudulently. This is not an allegation that the defendant conducted the proceedings fraudulently, in the sense of knowingly inducing the Court to act on false evidence.

95 Paragraph 84 alleges:

84. The plaintiff says that the plaintiff knew of the fraud when appearing before Lloyd AJ. The plaintiff says that the defendant also knew of its fraud before Lloyd AJ.

96 There are two parts to this allegation. The first is that the plaintiffs knew of the fraud. Paragraphs 85 to 86 contain an explanation of how Mrs Rafailidis attempted to give evidence of the fraud to Lloyd AJ, but her attempt was rebuffed by his Honour, because the evidence was given from the bar table "and his Honour did not consider that evidence in his judgment".

97 The plaintiffs assert, in pars 87 to 89, that they are entitled to bring the present action, as there is no cause of action or issue estoppel, or any abuse of

process, because the evidence of the fraud is evidence that has never been considered by a court.

98 Accordingly, the plaintiffs plead in par 90, that the Land and Environment Court judgments were procured by the fraud of the defendant.

99 The second part to this allegation is that, so far as the defendant is concerned, while the plaintiffs allege in par 84 that the defendant knew of its fraud before Lloyd AJ, the plaintiffs do not plead any facts that would bring the alleged fraud of the defendant's officers to the knowledge of the defendant itself. That proposition must be considered in the light of the fact that, throughout the proposed amended statement of claim, where the plaintiffs make their many allegations of fraud against the defendant's officers, those allegations are stated in the form of bare assertions. That is, the plaintiffs do not plead precise facts capable of establishing that the defendant's officers acted as they did with knowledge, or no genuine belief, or with reckless indifference as to whether the steps that they took were valid. At this stage of the proceedings, the Court is not in a position to form a view as to whether or not the course that the plaintiffs allege was taken by the defendant's officers was in accordance with planning law principles. Even if it was not, the plaintiffs do not plead facts that would support the allegation that the officers knew that they were not acting in accordance with the applicable planning law principles.

100 Consequently, the plaintiffs' allegation in par 84 that the defendant also knew of its fraud at the time of the proceedings before Lloyd AJ, and the allegation in par 85 that: "The defendant remained silent about its fraud", do not properly plead a claim that the defendant conducted the proceedings before Lloyd AJ in a fraudulent manner.

101 In pars 95 to 111 of the proposed amended statement of claim, the plaintiffs make allegations about the prosecution by the defendant of the plaintiffs for contempt of court that was decided by Sheahan J, and which was set aside by the Court of Appeal. The plaintiffs allege, in par 104, that Sheahan J relied upon the fraudulently obtained letter from the plaintiffs to the defendant, in which the plaintiffs agreed to demolish the existing structure. They allege in, par 105, that "the defendant's actions were harsh, oppressive, unconscionable

and lacking in good faith", and in par 107 that the defendant "acted without reasonable and probable cause". They allege in par 109 that the defendant instituted the proceedings "maliciously".

- 102 The allegations made by the plaintiffs in respect of fraudulent conduct on the part of the defendant in relation to the contempt proceedings are as follows. In par 108 the plaintiffs plead: "The facts known to the plaintiff was the fraud the defendant knew it had committed against the plaintiffs". Further, they allege in par 110: "In bringing the proceedings before Sheahan J, the defendant failed to inform the court of the fraud perpetrated on the plaintiff by Anthony Krillic and Mal Kashro and that the defendant concealed the fraud from the court to obtain the judgments of Lloyd AJ and Biscoe J".
- 103 The comments that have been made above concerning the deficiencies in the proposed amended statement of claim in relation to the allegations of fraud against the defendant in conducting the proceedings in the Land and Environment Court apply equally to this claim. That is, to the extent that the plaintiffs assert that fraud on the part of the defendant infected the conduct of the proceedings, rather than the underlying events, the pleading is no more than bare assertion.
- 104 However, the allegations of fraud on the defendant's part in this part of the proposed amended statement of claim are peripheral to the actual relief sought, which is stated in par 111 as a claim for damages: "As a consequence of the defendant's malicious prosecution, the plaintiff suffered damages and claims damages from the defendant".
- 105 Having thus made a claim for malicious prosecution against the defendant in respect of the contempt proceedings heard by Sheahan J, the plaintiffs then, in pars 112 to 124, plead a further claim for damages for malicious prosecution by the defendant in relation to the proceedings determined by Lloyd AJ and Biscoe J.
- 106 The reference in par 113 to the orders made by Lloyd AJ having been "fraudulently obtained", and in par 123 that, in bringing the proceedings before Lloyd AJ and Biscoe J, "the defendant failed to inform the court of the fraud perpetrated on the plaintiff by Anthony Krillic and Mal Kashro and that the

defendant concealed the fraud from the court" are peripheral to the plaintiffs' malicious prosecution claim.

107 The plaintiffs' claim in pars 125 to 128 is for damages against the defendant for engaging "in collateral abuse of process" and "for an improper or illegitimate purpose or to effect an object beyond that which the legal process offers and foreign to the law". This claim is stated to be in the alternative to the claim that the defendant fraudulently induced the judgments of the Land and Environment Court.

108 The plaintiffs plead a further alternative claim for damages in pars 129 to 132, based upon the alleged "unconscientious and oppressive conduct of the defendant".

109 In pars 133 to 138, the plaintiffs plead a claim against the defendant under the heading "Conspiracy to Defraud". In many of the particulars given to par 137, the plaintiffs repeat the bare assertions against the defendant's officers of fraudulent conduct that are made elsewhere in the proposed amended statement of claim.

110 The principal allegation is in par 134, which asserts:

134. The defendant, through Anthony Krilic, Mal Kashro, Carey McIntyre and other unknown employees of the defendant, conspired and combined together wrongfully and with the sole and predominant intention of injuring the plaintiff and/or causing loss to the plaintiff by wrongfully seeking the demolition of the plaintiffs' existing structure, contrary to law.

111 Taking this allegation at face value, it is an alleged conspiracy to injure the plaintiffs, but not strictly a conspiracy to defraud.

112 The allegation proceeds upon the principle that a single party, the defendant, can conspire to injure another party through the activities of its employees. Although, as a matter of law, it may be that a company, and presumably a local council, may conspire with its employees, it would be necessary for the plaintiffs to make a proper allegation that there was an agreement between the defendant and its employees to engage in the conduct the subject of the alleged conspiracy. The plaintiffs do not allege any such agreement. See the discussion in RP Balkin and JLR Davis, *Law of Torts* (5th ed, 2013, LexisNexis

Butterworths) at [21.47]. It is not sufficient for the plaintiffs to allege that the defendant acted by its employees.

113 The particulars set out in par 137 of the alleged “furtherance of the conspiracy” contain, in pars (a) to (ll), a list of 36 alleged actions that, in substance, collects together and repeats all of the individual allegations that the plaintiffs make against the defendant and its officers elsewhere in the proposed amended statement of claim. The particulars are stated in terms of bare assertion. Many of the particulars consist of assertions of wrongful conduct that are not otherwise referred to or are the subject of allegations of fact in the balance of the proposed amended defence. The following are some examples:

- (f) engaging in serious corrupt conduct by the defendant;
- (g) Breaching sections 8 and 8a of the *Local Government Act 1993* (NSW);  
...
- (k) Breaching section 665 of the *Local Government Act 1993* (NSW);
- (l) The pursuit of the plaintiffs before the courts to enforce the policy of the defendant to have demolished all existing structures that represented an eyesore...;
- (m) The rejection of the attempts by the plaintiffs at peaceful resolution of the disputes privately;  
...
- (q) The failure to provide information for alternative accommodation for the tenants...;  
...
- (t) Unreasonably and unfairly opposing the plaintiff's section 96 application in the plaintiff's attempt to comply with the orders of Lloyd AJ;  
...
- (v) Not informing Commissioner Hussey of the fraud that had been perpetrated against the plaintiff;  
...
- (bb) Ignoring the law and demanding that the plaintiff comply [with] all conditions of development consent inside 2 years, contrary to the law;  
...

114 Apart from the fact that the allegation of conspiracy is an allegation of a conspiracy perpetrated by a single party, it is clear that a substantial number of the particulars of the alleged conspiracy consist of bare assertions that do not involve sufficiently precise allegations of the relevant facts.

- 115 The plaintiffs allege in pars 140 and 141 that the defendant is vicariously liable for the conduct of Mr Krillic, Mr Kashro and Mr McIntyre.
- 116 The claim for damages, as set out in prayer 7 and pleaded in pars 142 to 148, is based on the allegation that the plaintiffs were required to sell their 5 acre property out of fear of the consequences of the legal costs and fines awarded against them, and also for the damage to their reputation that they claim to have suffered as a result of the publication of the steps taken by the defendant and the orders made by the Land and Environment Court.
- 117 In pars 149 to 156, the plaintiffs claim \$300,000 in aggravated damages, as well in exemplary damages, and state the total amount of the damages claimed as \$3,617,319.66.

### **Conclusion**

- 118 The Court will not give the plaintiffs leave to file the proposed amended statement of claim.
- 119 Although, as I have explained above, the proposed amended statement of claim has been revised to eliminate the majority of the more egregious pleading deficiencies in the current statement of claim, the allegations that are retained still breach a significant number of the requirements for a proper pleading accepted by McCallum J in *Seidler*, as set out above.
- 120 The most significant vice contained in both the current and the proposed amended statement of claim is comprised in the allegations directed at procuring orders by this Court setting aside the judgments of the Land and Environment Court on the basis that they were procured by the fraudulent conduct of the defendant in circumstances where, (a) the plaintiffs plead that they knew of the alleged fraud and failed in an attempt to persuade Lloyd AJ to accept that the defendant had acted fraudulently; (b) the plaintiffs allege that sundry employees of the defendant acted fraudulently, but not that the defendant itself procured the judgments against the plaintiffs with knowledge of the fraudulent conduct; and (c) the multitude of individual allegations of fraudulent conduct by the employees of the defendant consist of bare assertions that assume what needs to be proved. Both the current and the proposed amended statement of claim are devoid of allegations of fact from

which the Court at a hearing could make findings as serious as that the employees acted fraudulently. I have tried to show, from a detailed analysis of the pleadings, that all the manifestations of alleged fraud consist of nothing more than the defendant's employees acting upon an understanding of the application of the planning laws that is different to that for which the plaintiffs contend. If the process of thought that underpins the plaintiffs' current and proposed amended statements of claim were valid, a judge who acted upon a view of the law that was rejected by the Court of Appeal will have acted fraudulently, because judges may be taken to know the correct application of the law.

- 121 In my view, it would involve an abuse of process to permit the plaintiffs to continue to prosecute the current proceedings against the defendant.
- 122 I note that, as the application has been conducted on the basis that the outcome will depend upon the application of the rules that govern when a pleading is proper, I have not found it necessary to consider the principles that may be involved in deciding whether, and if so in what circumstances, the Supreme Court may set aside orders made by the Land and Environment Court.
- 123 The orders of the Court are:
- (1) Order that the plaintiffs' statement of claim be struck out pursuant to *Uniform Civil Procedure Rules 2005* (NSW) r 14.28.
  - (2) Dismiss the plaintiffs' application for leave to file the document styled "Proposed Amended Statement of Claim".
  - (3) Order the plaintiffs to pay the defendant's costs of its notice of motion filed on 28 August 2020.
  - (4) Order that the proceedings be dismissed.
  - (5) Order the plaintiffs to pay the defendant's costs of the proceedings not otherwise the subject of any costs order.

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