IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2013-404-4646
[2023] NZHC 641

BETWEEN	"IMPERIAL GARDENS APARTMENTS" BODY CORPORATE 348047 First Plaintiff
	CHRISTIAN WAN & ORS Second plaintiff
AND	AUCKLAND COUNCIL First Defendant
	WHL LIMITED (formerly Watts & Hughes Limited) (Removed) Second Defendant
	DOWNER NEW ZEALAND LIMITED Third Defendant

Cont/…

Hearing:	16 August 2023
Appearances:	DJ Powell and SN Zellman for Body Corporate 348047 SC Price and CM Fairnie for Auckland Council B O'Callahan and RY Yang for Stephen Mitchell Engineers Ltd
Judgment:	22 March 2024

JUDGMENT OF BECROFT J

This judgment was delivered by me on 22 March 2024 at 4pm pursuant to r 11.5 of the High Court Rules 2016.
Registrar/Deputy Registrar
……

Solicitors:
Grimshaw & Co, Auckland
MinterEllisonRuddWatts, Auckland
B O'Callahan, Auckland

ALUMINIUM TECHNOLOGY LIMITED
First Third Party

ARCHITECTURAL WINDOW SOLUTIONS LIMITED (in liquidation and receivership)
Second Third Party

ABBAS LIMITED
Third Third Party

STEPHEN MITCHELL ENGINEERS LIMITED
Fourth Third Party

METROPOLITAN GLASS & GLAZING LIMITED (Discontinued)
Fifth Third Party

RICHARD ORMAN BUILDERS LIMITED (in liquidation)
Sixth Third Party

RICHARD LEONARD ORMAN
Seventh Third Party

TAL LIMITED (Removed)
Eighth Third Party

The application

[1] This is an application to strike out "Defect 7" which was alleged for the first time in the plaintiffs' sixth amended statement of claim. The proceedings as a whole allege building failures in a major central Auckland "high rise" complex. The defendant applies for strike-out on the basis that the amendment is statute-bared because of the time limitation provisions in s 393 of the Building Act 2004.

[2] In essence, "Defect 7" alleges structural and seismic integrity issues where thus far the claim has been primarily focused on alleged watertightness and moisture prevention failings, exterior panel affixation problems, and fire safety issues.

[3] Counsel agree that the sixth amended statement of claim was filed well outside the relevant limitation period from the date of the alleged negligent acts or omissions. Accordingly, Defect 7 can only be added to the proceeding if it is not caught by the operation of s 393, and if it is, is not a fresh cause of action.

[4] In this case I have decided that the high standard for striking out "Defect 7" from the statement of claim is met. While I accept it is a power to be exercised sparingly, I consider that in this case, it is appropriate to do so. In my view, the amended statement of claim introduces facts that are qualitatively different from those which have already been pleaded so as to constitute a fresh cause of action which is eight years out of time. As a time-barred fresh cause of action it must be struck out.

[5] What follows are the reasons why.

Laying the foundations

[6] Imperial Gardens is a 15-storey apartment complex in Hobson Street, Central Auckland. The building is comprised of two levels of basement parking and 13 levels of apartments. It was constructed in stages under separate building consents between October 2003 and May 2005 by Watts & Hughes Limited (WHL) (now in liquidation). The relevant building consents were issued by the Auckland Council.

[7] The third defendant, Downer New Zealand Limited (Downer), was selected by WHL as the waterproofing contractor for the project. A key part of that work involved applying torched-on bituminous membranes to various parts of the building.

[8] On 18 May 2005, the Council issued final code compliance certificates (CCCs) for all building work completed under the project's building consents.

[9] Soon after its completion, allegations were made that Imperial Gardens was constructed with building defects. These include alleged moisture ingress problems, interior moisture problems connected with poor design and construction, improper affixation of exterior panels and cladding, and inadequate compliance with fire safety ratings and standards.

[10] A first statement of claim was filed on 23 October 2013, but was deemed a nullity because of failures to particularise any defects.[1]

[11] Subsequently, a first amended statement of claim was filed on 20 August 2014. In the following decade, various further amended statements of claim have been filed, which has culminated in the sixth amended statement of claim being filed on 23 February 2023 being the last day before pleadings closed.

The substantive claims

[12] The claim against the Council is in negligence. The plaintiffs' say that the Council breached its duties to the Body Corporate and each individual owner of an apartment within the complex, by failing to exercise reasonable skill and care in issuing the building consents, inspecting the building work performed under those consents, issuing the CCCs, and in failing to establish and enforce a system of inspections that would give effect to the Building Code.

[13] As I understand it, a claim for negligent issue of earlier construction consent documentation does not arise because the first amended statement of claim was filed outside the 10-year time limit from when those documents were issued.[2]

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1 *Body Corporate 348047 v Auckland Council* [2014] NZHC 2971.
2 Building Act 2004, s 393.

[14] The claim against the Council is for the cost of repairing the building which totals over $41 million, plus consequential loses that are said to exceed $15 million (at the time of filing).

[15] WHL, as the second defendant, was sued in respect of faulty building work but that claim has been stayed given the company's liquidation.

[16] The cause of action against the third defendant, Downer, is in negligence for failing to exercise reasonable skill and care when performing the membrane work. Downer is not involved in the current application.

[17] The Council has previously added numerous third parties to the proceedings. This includes the fourth third-party, Stephen Mitchell Engineers Limited (SMEL), which provided various assurances and certifications regarding the proper and competent completion of parts of the building's construction, which the Council says it relied upon.

Defect 7

[18] The sixth amended statement of claim essentially issues a new and seventh defect to the existing list of six defects, particularised in sch 2 of the statement of claim. That list of defects has been varied, amended, and in some instances reformulated over the various iterations of the statement of claim.

[19] The seventh defect was particularised as "The precast concrete wall panels and precast concrete columns were constructed in such a way that they do not have a low probability of becoming unstable or collapsing". Further particulars were provided as follows:

> The vertical connections to precast concrete wall panels and precast concrete columns have insufficient grout to the panel inserts around the starter bar connections/reinforcement, resulting in a reduced seismic capacity and therefore more than a low probability of rupturing, becoming unstable, losing equilibrium, or collapsing throughout its life.
>
> The insufficient grout results in a gap along the joint between wall panels and columns which allows water to access the starter bar and cause corrosion to the starter bar and panel insert.

[20] The defect is said to be present in all the precast walls and columns on all the floor levels. The consequences of this defect could be disastrous given it threatens the building's structural integrity.

The parties' positions

[21] The plaintiffs say that the time limit for issuing proceedings set out in s 393 of the Building Act is not triggered here. They submit that the time limit applies to the first and original proceedings so that additional defects particularising the negligence can be added to the proceedings at any time thereafter.

[22] The plaintiffs say Defect 7 is introduced in the context of the same general cause of action arising from negligent inspection and issue of the CCCs, and it provides further particulars as to the consequences of the alleged negligent acts/omissions. Accordingly, it does not change the essential character of the proceeding.

[23] The first defendant, the Council, says that the Building Act time limit must relate to the specific and particularised claims that are the subject of the proceedings. Properly interpreted, and consistent with other limitation provisions, s 393 prevents fresh causes of action being added outside the 10-year time limit (regardless of when the proceeding was originally brought).

[24] The Council highlights that nearly 18 years have passed since the act or omission that is relied upon by the plaintiffs—being the issuance of the CCCs.

[25] The Council and SMEL, the fourth third party, say that this additional defect also changes the character of the claim by introducing into the proceeding, for the first time, a profound structural issue which affects the entire structural and seismic integrity of the building.

[26] SMEL also says that, if Defect 7 is not struck out, it is put in an impossible position. It will be very difficult to locate those of its then staff that inspected the installation of the pre-cast wall panels. Also, there are real concerns with the workmanship surrounding the installation of the precast concrete wall panels and

SMEL believes deliberate, and possibly fraudulent, attempts may have been made by the now removed second defendant or its employees to "cover up" shortcuts or shoddy workmanship. SMEL would have consulted with at least some of these employees in its inspections. Now, 18 years after those actions, it would be near impossible to find those responsible. SMEL also claims that quite different, and new, expert analysis would be required to meet this newly pleaded defect, all of which place an intolerable burden upon it.

Strike out legal principles

[27] Counsel agree that the legal principles governing strike-out applications are well settled. The following principles for strike out were summarised in *Attorney-General v Prince,* and affirmed by the Supreme Court in *Carter Holt Harvey v Minister of Education*:[3]

(a) The pleaded facts are assumed to be true.

(b) The causes of action must be so clearly untenable that they cannot possibly succeed.

(c) The jurisdiction is to be used sparingly, and only in clear cases.

(d) The jurisdiction is not excluded by the need to decide difficult questions of law that require extensive argument.

(e) The Court should be slow to strike out a claim based on a novel duty of care.

[28] Mr Price, for the first defendant, submits, and I understand without disagreement, that building construction claims that are statute-barred on limitation grounds will commonly be struck out by the courts. To succeed in striking out a cause of action on limitation grounds, the defendant must satisfy the court that the plaintiffs' cause of action is so clearly statute-barred that the claim can properly be regarded as

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3 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA), affirmed in *Carter Holt Harvey v Minister of Education* [2016] NZSC 95, [2017] NZLR 78 at [10].

meeting the statutory test of being frivolous, vexatious, or an abuse of process.[4] That is a high bar indeed.

[29] During argument, it became clear that the central focus of this application is to determine whether the plaintiffs' claim against the Council for Defect 7 is time-barred under s 393 of the Building Act.

[30] Two specific issues arise. The first legal; and the second intensely factual.

[31] The first issue concerns the ambit and effect of s 393 of the Act. The second, if s 393 applies, focusses on the nature of the newly pleaded Defect 7 and whether it constitutes a fresh cause of action.

First issue: the ambit and effect of s 393 of the Building Act

[32] In my view, this issue should be considered first. It is not without difficulty. Tempting as it might be to proceed to the second issue first, the limitation question cannot be avoided.[5] I also observe that counsel did not explicitly refer to r 7.77 of the High Court Rules 2016 in their submissions. That provision governs the filing of amended pleadings, and in particular it allows an amended pleading to introduce a fresh cause of action *which is not statute-barred*. The ambit of that rule was clarified in *Juken NZ Ltd v Red Stag Ltd.*[6] Given this application turns on the operation of the limitation provision, I accept that any arguments arising under r 7.77 are subsumed by the parties' wider submissions concerning s 393.

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4 *Driver v Radio New Zealand Ltd* [2019] NZHC 3275, [2020] 3 NZLR 76 at [19]; citing *Trustees Executors Ltd v Murray*, [2007] NZSC 27, [2007] 3 NZLR 721 at [33], and *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZSC 120, [2010] 1 NZLR 379 at [39].

5 *Juken NZ Ltd v Red Stag Ltd* [2023] NZCA 242 at [61]. There, the starting point was consideration of s 43A of the Fair Trading Act 1986.

6 *Juken NZ Ltd v Red Stag Ltd,* above n 5, at [58]–[61]. At [61] the Court concluded, "It is therefore clear that any amended pleading advanced under the authority of r 7.77(2)(a) must not seek relief in respect of a cause of action which is statute-barred. It is not to be read as an authority to introduce an amended pleading seeking relief for actions that took place outside a limitation period…"

[33] Therefore, the starting point is s 393 of the Building Act, which currently provides:[7]

> **393 Limitation defences**
>
> (1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building or the manufacture of a modular component manufactured by a registered MCM who is certified to manufacture it; or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building or the modular component.
>
> (2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
>
> (3) For the purposes of subsection (2), the date of the act or omission is,—
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> (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and
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> (b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

[34] The essence of the plaintiffs' argument opposing the strike out, focusses on the words, "… after 10 years or more from the date of the act or omission on which the *proceedings* are based" (emphasis added).

[35] Mr Powell, for the plaintiff Body Corporate, clearly presented the argument that the "*proceedings*" are the original proceedings—here the first amended statement of claim, which was filed within the 10-year time limit. He submits that where the original proceedings comply with the s 393 time-limit, then new defects can be added by way of amended statement of claim as and when they are found—even if they would otherwise be time-barred. In Mr Powell's view, this is a simple and

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[7] I note that the first alleged negligent acts or omissions in this case took place in as early as 2003. The relevant Building Act provision has since undergone several amendments. However, the relevant statutory language has not substantively changed in that time and counsel agree the current provision is not materially different from its predecessors.

straightforward reading of the provision and there is no need for any complications or cross-referencing to any other statute.

[36] In his view, when there are defects in buildings, particularly large-scale commercial buildings, it is often only when detailed remediation begins that further and, sometimes, hidden defects are discovered. He submits it would be distinctly unfair to the plaintiffs if, in the course of finding new defects in the context of proceedings already issued, they were not allowed to amend their original "within time" claim to include such defects. Mr Powell says that s 393 should be interpreted in such a way to allow for this reality.

[37] Mr Powell agreed that the logic of his argument is that because the original proceedings are not time-barred, any newly discovered defect can be added to the proceedings provided the defect arises from Council's alleged negligent inspection and issue of the CCCs. He agreed, theoretically at least, there could be no end to the additional defects provided they were pleaded and particularised prior to the date set by the Court for the close of pleadings. In his view, therefore, Defect 7 is not time-barred by s 393 even if it does constitute a fresh cause of action. Its "freshness" or otherwise is irrelevant as, in this case, it is properly related to a valid set of original proceedings that are not time-barred.

[38] I have some sympathy for Mr Powell's argument. It would mean that the plaintiffs would have a means of redress for what appear to be negligently constructed apartments, even where some defects, such as Defect 7, could take some time to emerge or be found. But I observe, in passing, that limitation defences serve an important purpose in litigation. They require plaintiffs to bring causes of action with reasonable diligence to protect defendants against claims where the evidence that might have "answered" them is now difficult to obtain.

[39] Mr Price, for the Council, drew my attention to the following passages from the relevant provisions of the Limitation Act and the Building Act:

> **Limitation Act 1950 (s 4)**
>
> … the *following actions* shall not be brought after the expiration of 6 years *from the date on which the cause of action accrued.*

…

Limitation Act 2010 (s 11)

… it is a defence to *a money claim* if the defendant proves that the date on which *the claim is filed* is at least 6 years after *the date of the act or omission on which the claim is based*.

…

Building Act 1981 (s 91)

… *civil proceedings* may not be brought against any person 10 years or more *after the date of the act or omission on which the proceedings are based*.

…

Building Act 2004 (s 393)

… no relief may be granted in respect of *civil proceedings* relating to building work if those proceedings are brought against a person after 10 years or more *from the date of the act or omission on which the proceedings are based*.

…

[40] Mr Price submits that consistent with the current Limitation Act and its predecessor, the word "proceedings" in the Building Act should be read and understood as bearing the same meaning as the word "claim" or "action". The Building Act provision, according to Mr Price, is not a special species of limitation or longstop provision and accordingly, it should be interpreted in line with similar provisions.

[41] That issue has previously been the focus of close judicial consideration. Indeed, the plaintiffs' argument has previously been rejected in the following cases.

[42] In *Body Corporate 360683 v Auckland Council* (*Orewa Grand*), the architects of a building successfully applied to strike out the plaintiffs' amended statement of claim that alleged the architects negligently carried out on-site observations and inspections during the building's construction. Woodhouse J found that the new pleading, "[introduced] an area of factual enquiry which was not in any way relevant to the area of factual enquiry in respect of preparation of the plans and specifications".[8] The plaintiffs had argued that the reference in s 393(2) to when "proceedings are brought" meant the date when a proceeding is initially commenced, not when any amendments to the claim were made.

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8 *Body Corporate 360683 v Auckland Council* [2017] NZHC 1785 [*Orewa Grand*] at [19].

[43] Woodhouse J reasoned:

> [27] Ms Grant's submissions were directed only to the word 'proceedings' and the use of that word in the expression 'if the proceedings are brought'. The argument ignores the opening words of s 393(1) — the Limitation Act 2010 applies to civil proceedings as defined in s 393(1). Section 393 must be given effect consistently with the Limitation Act because that Act governs s 393.
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> [28] The time limits under the Limitation Act are expressly directed to the date on which the claim is brought, not when the proceeding is first filed in Court. The word 'claim' replaced the word 'action', and the expression 'cause of action' used in the Limitation Act 1950, but that makes no difference.
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> [29] Under s 11(1) of the Limitation Act 2010, the primary limitation period for the owners' observation claim is six years after the date of the act or omission on which the claim is based. A further provision in s 11 extends the period by three years after the 'late knowledge period', and there is a 'long stop period' of 15 years after the date of the act or omission on which the claim is based.
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> [30] Section 393(2) of the Building Act introduced the 10 year long stop period for civil proceedings of the type defined in s 393(1). Construing s 393 consistently with the relevant provisions of the Limitation Act 2010, it is clear in my judgment that the word 'proceedings' is to be given the same meaning as 'claim' in the Limitation Act 2010, and the word 'action' in the Limitation Act 1950.

[44] Woodhouse J described the plaintiffs' argument as "misconceived" and struck out the negligent observation claim on the basis that it was time-barred.[9] In doing so, the Judge said, "it is clear in my judgment that the word 'proceedings' is to be given the same meaning as 'claim' in the Limitation Act 2010, and the word 'action' in the Limitation Act 1950."[10]

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9 *Orewa Grand*, above n 8, at [26]. His Honour also noted at [25] that the argument was novel, and the plaintiffs could not find any cases where it had been argued, but there were cases "where this Court had discussed s 393 on the basis that the relevant inquiry is when the particular claim, or cause of action, is first brought, not when the proceeding was first filed. In those cases the word 'proceedings' in s 393 has been treated as being synonymous with 'claim' or 'cause of action'", citing *Body Corporate 338356 v Endean* [2014] NZHC 2644 at [19]; *Body Corporate 325261 v McDonough* [2015] NZHC 764 at [58]–[59]; *Body Corporate 325261 v Stephen Mitchell Engineers Ltd* [2014] NZHC 761 at [27]; and *Perpetual Trust Ltd v Mainzeal Property & Construction Ltd* [2012] NZHC 3404 at [85].

10 *Orewa Grand*, above n 8, at [30].

[45] Osbourne J reached the same conclusion in *Body Corporate 355492 v Queenstown Lakes District Council* (*Oaks Shores*).[11] Defects relating to bathroom pods (built off-site) and craned into place were introduced in a sixth amended statement of claim where the original proceeding related only to weathertightness and structural issues of the primary building. The plaintiffs in *Oaks Shore* advanced the same argument as the plaintiffs in the current case in opposing the strike-out application.

[46] In relation to the meaning of "proceeding", Osbourne J held that:

> [87] In my view, there is a matter of context that makes the meaning of the word "proceedings" as used in s 393(2) Building Act clear. It arises from the fact that under s 393(1) the Limitation Act applies to the "civil proceedings" referred to in s 393(2). Once it is accepted (as it therefore must be) that s 393 needs to be construed consistently with the Limitation Act there is, in that context, a clear meaning of "proceedings" …

[47] The Judge also held that this interpretation was supported by reference to the purpose of s 393 and its history, including the work of the Law Commission relating to limitation periods and the parliamentary materials relating to the relevant enactments.[12]

[48] In *Body Corporate 406198 v Argon Construction Ltd* (*Bianco Apartments*), Edwards J applied the same legal principles as those applied in *Oak Shores*, however she held that on the facts, the amended pleading, did not introduce a fresh cause of action.[13]

[49] I do not overlook that in his submissions Mr Powell took me to several passages from different authorities dealing with the application of s 393.[14] Mr Powell submitted that these passages support the view that the focus of s 393 is on the act or omission of the defendant against which the plaintiff is claiming, and the important

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11 *Body Corporate 355492 v Queenstown Lakes District Council* [2022] NZHC 1494 [*Oaks Shores*], at [130], [131] and [133]; *Body Corporate 355492 v Queenstown Lakes District Council* [2022] NZHC 678.

12 *Oaks Shores*, above n 11, at [90].

13 *Body Corporate 406198 v Argon Construction Ltd* [2022] NZHC 2218 [*Bianco Apartments*].

14 That included exerts from *Klinac v Lehmann* (2002) 4 NZ ConvC 193,547 (HC) at [35] and [39]; *Johnston v Watson* [2003] 1 NZLR 626 (CA) at [8]; *Gedye v South* [2010] NZCA 207, [2010] 3 NZLR 271 at [48]; *Body Corporate 378351 v Auckland Council* [2020] NZHC 1701 at [107]; and *Body Corporate 328392 v Auckland Council* [2021] NZHC 2412 at [33].

need to commence proceedings within 10 years from the date of that act or omission. He says that those passages suggest that s 393 only requires that the proceeding be filed within the 10-year period from the relevant act or omission. In other words, it is not concerned with when subsequent amendments are made so long as they relate to the same act or omission. However, those cases relate to the specific issue of defining when the relevant limitation period *begins*—being when the general act or omission takes places—rather than when that period *ends*. Essentially, those authorities do not focus on the meaning of the word "proceedings" and should not be interpreted as such.

[50] In summary, I have concluded that the word "proceedings" in s 393 should be interpreted to mean "claim", the consequence of which is that the limitation period applies to the introduction of fresh causes of action regardless of whether the original claim was filed in-time. With respect, I reject Mr Powell's argument for the plaintiffs.

[51] In light of that conclusion, I now turn to consider whether Defect 7 introduces a fresh cause of action/fresh claim.

Second issue: does "Defect 7" introduce a fresh cause of action?

[52] It is necessary to explain Defect 7 in a little more detail. Defect 7 relates to, "vertical connections to precast concrete wall panels and precast concrete columns [having] insufficient grout inside the panel inserts around the starter bar connections/enforcement".

[53] Based on the briefs of Messrs Ball and Holliss, respectively a registered building surveyor and a structural engineer, the precast concrete wall panels seem to be the 15-level high external walls of the building except the two internal walls with balconies overlooking the podium.

[54] Mr Holliss elaborates about the "vertical connections" which are alleged to have insufficient grout:

> The precast walls rely on a system of hollow cast iron inserts (grout sleeves) which are threaded onto the end of the vertical reinforcing bars that are cast into the wall panel, providing a row of sockets into which reinforcing bars extending out of the end of the next wall panel can then be inserted into and locked into place by filling the sleeve with grout.

[55] I observe that SMEL, the fourth third-party, would want to argue that the grout sleeves were, in many cases, deliberately not filled with grout either as a shortcut or, even worse, as a fraudulent act rendering the building unsafe and that in its inspections SMEL was misled by those who did that. The consequence of the grout sleeves not being filled is that the panels effectively "wobble" and provide no structural security or seismic resilience. Currently the top of the grout holes, but not their interior, are grouted over giving the misleading impression that grout had been fully and properly injected into the whole sleeve. Full discovery of the defect apparently involved drilling numerous bore holes into the slabs and grout sleeves to determine whether the grout had been properly pumped in. Specific engineering expertise was required.

[56] Put colloquially, the apartment complex is now said to be not only a "leaky building" as set out in many of the previous defects, but also with this newly alleged defect, a "shaky building".

[57] To determine whether Defect 7 introduces a fresh cause of action, it is necessary to set out the nature of the remaining defects. In summary, the other defects currently allege:

(a) Defect 1 (Podium): the podium was constructed in such a way that it does not shed precipitated moisture, convey surface water to an appropriate outfall, prevent the penetration of water, or have a low probability of causing loss of amenity.

(b) Defect 2 (Decks): the deck/column injunctions were constructed in such a way that they do not prevent the penetration of water or have a low probability of causing loss of amenity through degradation.

(c) Defect 3 (Bathrooms): the bathroom ventilation systems were constructed in such a way that they do not provide adequate ventilation or collect and remove moisture from bathing and showering.

(d) Defect 4 (ACM cladding): the ACM cladding was constructed in such a way that it does not have a low probability of becoming unstable or collapsing or have a low probability of causing loss of amenity through

undue deformation or degradation. The plaintiffs allege that the cladding lacks adequate panel stiffeners and as a result it is unable to resist design loads, and there is risk of detachment.

(e) Defect 5 (Joinery): the joinery was constructed in such a way that it does not avoid the likelihood of damage caused by the presence of internal moisture.

(f) Defect 6 (Fire): the Imperial Gardens complex was constructed in such a way that it does not adequately resist the spread of fire and smoke.

[58] Counsel agree that the correct starting point for the approach to determining whether Defect 7 introduces a fresh cause of action is the law set out in *ISP Consulting Engineers Ltd v Body Corporate 89408*.[15]

[59] In that case, the Court of Appeal noted:

> … The relevant principles set out in *Ophthalmological Society of New Zealand Inc v Commerce Commission* were summarised in *Transpower New Zealand Ltd v Todd Energy Ltd*:
>
> (a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another (*Letang v Cooper* [1965] 1 QB 232 at 242–243 (CA) per Diplock LJ);
>
> (b) Only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction" (*Paragon Finance plc v D B Thakerar & Co* (a firm) [1999] 1 All ER 400 at 405 (CA) per Millett LJ);
>
> (c) The test of whether an amended pleading is "fresh" is whether it is something "essentially different" (*Chilcott v Goss* [1995] 1 NZLR 263 at 273 (CA) citing *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958 at 961 (SC) per McCarthy J). Whether there is such a change is a question of degree. The change in character could be brought about by alterations in matters of law, or of fact, or both; and
>
> (d) A plaintiff will not be permitted, after the period of limitations has run, to set up a new case "varying so substantially" from the previous pleadings that it would involve investigation of factual or legal matters, or both, "different from what have already been raised and of which no fair warning has been given" (*Chilcott* at 273 noting that this

[15] *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA 160, (2017) 24 PRNZ 81 at [21] (footnotes omitted); citing *Ophthalmological Society of New Zealand Inc v Commerce Commission* CA168/01, 26 September 2001 at [22]–[24]; and *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61].

> test from *Harris v Raggatt* [1965] VR 779 at 785 (SC) per Sholl J was adopted in *Gabites v Australasian T & G Mutual Life Assurance Society Ltd* [1968] NZLR 1145 at 1151 (CA)).

[60] The Court also made the following observation:

> [22] The issue is whether the Owners were setting up a new case, in the sense of making new allegations that would involve the investigation of an area of fact of a new and different nature, or a new and different legal basis for a claim not put forward in the earlier pleading. To put the question more generally, does the Second CSC have an essentially different character from the First CSC? The assessment is objective and the consideration must be of the substance of what is pleaded, rather than the form.
>
> (Footnote omitted)

[61] Another leading authority is *Commerce Commission v Visy Board Pty Ltd*, where the Court of Appeal stated:[16]

> … The theme running through all three cases is that in order for an amendment to amount to a new cause of action, there must be a change to the legal basis for the claim. That can, in theory, occur through the addition of new facts, *but only if the facts added are so fundamental that they change the essence of the case against the defendant*. If the basic legal claims made are the same, and they are simply backed up by the addition or substitution of a new fact, that is unlikely to amount to a new cause of action.
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> (Emphasis added)

[62] The principles may be clear enough, but their application in these kinds of cases is much more difficult.

[63] In applying those principles here, I begin by noting counsels' agreement that Defect 7 does not introduce a new *legal* basis for the claim. The new defect still rests on the claim of negligent inspection and subsequent issue of the CCCs.

[64] This is Mr Powell's very point for the Body Corporate. He argues that Defect 7 should be understood as a further instance of the way in which the construction of the apartment complex does not comply with the Building Code and did not comply at the time the Council issued the CCCs. In his view this Court need not, and should not, go any further in its analysis than that. Conversely, counsel for the Council and SMEL

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16 *Commerce Commission v Visy Board Pty Ltd* at [146].

argue that a more detailed assessment of the facts is required and that will result in Defect 7 being struck out.

[65] And here is the nub of this issue: to what extent should I undertake a detailed analysis of the facts and select material facts at a lower level of abstraction than might, for instance, have been envisaged by Millet LJ in *Paragon*;[17] as referred to by the Court of Appeal, in *ISP Consulting Engineers Ltd,* quoted at [59(b)] above.

[66] There are two competing approaches in the New Zealand cases. I now highlight what appear to be the most relevant cases (of the many raised by counsel) that illustrate those approaches.

[67] In *Body Corporate 346799 v KNZ International Co Ltd (Victopia Apartments)*, the Council applied to strike out a new category of defects, namely fire safety defects, on the basis they constituted a new cause of action which was time-barred.[18] The defects already pleaded were cladding and balcony waterproofing defects, and a "podium" defect.

[68] Palmer J's conclusions were based on a broad and high-level comparison between the alleged defects, and he readily concluded the proposed new cause of action was generally similar as it was still based in negligence and faulty construction and did not justify strike-out. I observe that Palmer J was dealing, as here, with a strike-out application. As I read the case, there is at least the implication that he was of the view the application was more appropriately dealt with by the trial Judge and perhaps he was reluctant to make a final decision about the new cause of action at the strike-out stage.[19]

[69] By comparison, Osborne J undertook a much more detailed analysis of the facts of the additional claim in *Oaks Shores*.[20] This case involved a review of a strike-out application previously determined by Associate Judge Lester. Osborne J concluded that the alleged defects in the bathroom pods were "plainly" a new cause

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17 *Paragon Finance Plc v DB Thakerar & Co* [1999] 1 ALL ER 400 (CA).
18 *Body Corporate 346799 v KNZ International Co Ltd* [2016] NZHC 1523 [*Victopia Apartments*].
19 I note that many of the cases referred to on this point were also strike-out applications.
20 *Oaks Shores*, above n 11.

of action in that they required new and different factual investigations than the defects already pleaded. The Judge upheld the findings of Associate Judge Lester, which are persuasive in themselves, and concluded:[21]

> … But the case as formulated up to and including the [fifth amended statement of claim] was a case turning on external weathertightness and some structural defects, unrelated to the bathrooms. All those claimed defects were identified in the pleadings and able to be investigated by the other parties. The issues relating to the bathroom pods were of an essentially different nature. The pods are in a physically different, discrete area of the buildings. The structural elements in relation to the bathroom pods are of a different nature to the other alleged structural defects. The issues relating to internal moisture ingress are of a different nature to the previous (externally sourced) weathertightness issues.

[70] In Bianco Apartments,[22] Edwards J also undertook the same detailed factual analysis–albeit coming to the conclusion that the new cause of action was not substantially different. In broad terms, the proposed amendment in that case added fire rating issues to the already pleaded fire stopping issues and expanded the affected area of the building complex.

[71] In distinguishing the facts before her from those in *Oaks Shore,* Edwards J reasoned:

> [29] This case may be distinguished from *Body Corporate 355492 v Queenstown Lakes District Council*. An issue in that case was whether the addition of "bathroom pods" in the amended statement of claim introduced a fresh cause of action. Osborne J considered that the issues relating to the bathroom pods were of an essentially different nature to the previously pleaded allegations. The pods were in a physically different, discrete area of the building. The structural elements were also of a different nature to the other alleged structural defects, and the issues relating to internal moisture ingress were of a different nature to the weathertightness issues previously pleaded.
>
> [30] In contrast, this case involves the expansion of a claim which essentially relates to the inspection of fire engineering work and the care taken to ensure compliance with fire safety requirements stipulated in the relevant Building Code in force at the time. Fire stopping and fire rating are not of an entirely different nature and there is some overlap between them. Although the focus of the claim will expand, the proposed amendments do not introduce an entirely different claim.
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> (Footnotes omitted)

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21 *Oaks Shores*, above n 11, at [68].
22 *Bianco Apartments*, above n 13.

[72] Given the overlap and the interrelationship between the two fire safety issues, Edwards J was not persuaded that the amended pleading introduced a fresh cause of action. The application for leave for file the amended statement of claim was accordingly granted.

[73] I acknowledge this clear difference in the two approaches, particularly as to the level of detail of material facts that are selected for analysis (the "level of abstraction" principle as previously referred to in *Paragon)*, and I admit it is difficult to reconcile. I conclude that a detailed analysis of the factual basis of the various pleaded defects, including Defect 7, is required in this case. An intensely factual exercise is justified. I prefer the approach of Osborne and Edwards JJ, and Associate Judge Lester. Otherwise, the door is opened to substantially new causes of action being added without any filtering process. In my view, it simply will not do for the plaintiffs to say that Defect 7 merely adds another dimension to the claim of negligence in the same building and which like all the other defects is caused by poor construction and will require significant remediation.

[74] However, I accept that to justify strike-out, the factual variations involved in the new cause of action would need to be so fundamental that they would change the essence of the case against the defendant/third party. It was this part of the issue which generated considerable submissions arising out of a comparison between the six existing defects set out in sch 2 of the sixth amended statement of claim, and the new Defect 7.

[75] There is an important initial question. Should I make a decision about the future of Defect 7 or leave that to the trial Judge? I consider that in this case it would be wrong in principle and practice to postpone the decision. There is enough in the affidavit material, in my view, to decide the issue at the strike-out stage. In any case, counsel have taken me through the relevant affidavits and briefs on the assumption that there is sufficient material for me to make a decision. I also bear in mind, and this reinforces the heart of the respondents' case, that this decision may save significant trial time, additional witnesses and avoid the necessity of briefing quite different experts.

[76] Although Mr Powell did not accept that a more detailed level of factual analysis of the defects was appropriate, he noted that if the Court carried out this exercise, there was considerable overlap between Defect 7 and the other existing claimed defects, especially Defect 1, so that Defect 7 should not be viewed as a fresh cause of action. Mr Powell drew my attention to the following similarities:

(a) The defects in the podium area of the building, alleged in Defect 1, abutted part of the Defect 7 precast concrete panels on one side of the wall beneath the podium. Defect 7 was, therefore, "geographically"—in terms of the building's layout—closely located to Defect 7.

(b) Part of Defect 7 and Defect 1, in respect of the podium area, would require remediation at the same time.

(c) Just as water can get into the podium floor slab as a result of the allegedly faulty torched-on bituminous membrane, so too, can water enter the un-grouted holes in the grout sleeve between the concrete panels, the subject of Defect 7.

(d) "Structural defects", though different to Defect 7, were previously pleaded in this proceeding, although they have since been discontinued.

[77] I note that there is not a seriously claimed similarity with Defect 4, and understandably so. As I understand it, the exterior cladding is superficial. It is not so much a fundamental structural issue for the building as it is an exterior 'decorative' and safety issue. That is quite different to the nature of Defect 7.

[78] I need to say that, with respect, I do not find Mr Powell's argument compelling. The first thing to say is that Defect 7 raises the issue of the overall structural integrity of the building, including seismic resilience. This has not been pleaded before. All the other defects in this case as pleaded until this final amended statement of claim, all overlapped, and could all be heard and determined together with largely the same witnesses. The issue of structural/seismic integrity is quite new.

[79] Secondly, there is some (but only limited) "geographical or location overlap" between a small proportion of all the precast concrete panels comprising Defect 7 and Defect 1 which concerns the podium. The so called "overlap" is with one side of a wall (Defect 7) just beneath the podium (which is the focus of Defect 1). There is said to be overlap also in the required remediation works. However, the problem with the precast concrete wall beneath the podium would be rectified by the proper pumping of grout into the grout sleeves and sealing of the gaps between the panel, which is a quite different solution from that required for the podium remediation. I understand Mr Powell's submission that there will be some theoretical overlap in remediation between the two defects, but the remediation for Defect 7 is quite different and is qualitatively unrelated to Defect 1.

[80] Third, while I accept there are water ingress issues into the unfilled grout sleeves, they are of a qualitatively different nature to the ingress allowed by the faulty membrane in Defect 1. The significant difference is that the alleged Defect 7 causes intrinsic structural deficiencies, irrespective of whether water ingress occurs. In Defect 7, the precast panels are wobbly and insecure from the start, without the need for water ingress. The walls of the building are thus at risk. The ingress of water into the grout sleeves, causing possible corrosion of the steel bars, at most, exacerbates a profound pre-existing structural problem.

[81] In my view the attempt to link Defect 7 to Defect 1 is fundamentally flawed. The nature of the two defects is quite different. Defect 1 relates to deficiently applied torched-on membrane and Defect 7 concerns insufficiently grouted sleeves within precast concrete walls. The locations of the defects are different, with Defect 1 located on the ground level podium and Defect 7 being in all the precast walls and columns.

[82] In short, I agree with Mr Price that Defect 7 is not a weathertightness or watertightness issue at all. Instead, this defect alleges that the structural integrity of virtually the entire building is compromised. That claim is substantively different from the defects currently alleged by the plaintiff.

[83] And there are other very significant differences.

[84] The defects in Defect 1 (and the other defects) are the result of work by different subcontractors. And the relevant evidential expertise required to establish, or disprove, Defect 7 fundamentally differs. Defect 7 requires structural engineering expertise and seismic assessments. By way of example, the investigations required for Defect 7 involved the plaintiffs' experts initially sampling 344 "sleeves" or ducts by drilling holes in the precast concrete to assess sufficiency of grout—an exercise quite unrelated to the remaining defects.

[85] The type of remediation for Defect 7 also supports the conclusion that it is a new cause of action. The remediation work is said to require not only the inspection and grouting of the affected sleeves, but also the removal and replacement of inside kitchens, plasterboard linings, insulation, and light gauge steel framings.

[86] There is a final matter which concerns me. That is, the serious prejudice that would be caused to SMEL the fourth third-party if this new claim is allowed. The employees of SMEL who carried out the inspection are apparently now hard to find. And, as I have previously mentioned, the defendant and fourth third-party are of the view that if the grout was only placed in the top of the sleeves (essentially for cosmetic purposes) and is the result is gross incompetence or deliberate "short cuts" verging on construction fraud.

[87] Eighteen years later, it will be impossible to find those involved —either a group of employees of the now liquidated second defendant—or a supervisor or manager(s) who provided oversight. SMEL's inspecting engineers would have talked to these people about what they did and why—and that would have likely influenced SMEL's inspection and certification. With such a passage of time, the chances of finding these employees would be akin to finding a needle in a haystack. This is not a matter of simply locating culprits and effectively exposing their malpractice—although it may achieve that end—it would be a necessary step in SMEL's defence against the allegation of negligent inspection. Mr O'Callaghan for SMEL presented a thoughtful and compelling argument that the prejudice to his client is irretrievable.

[88] Accordingly, after undertaking a detailed factual enquiry, I find that Defect 7 introduces a fresh claim or cause of action into these proceedings.

Conclusion

[89] To sum up, s 393 of the Building Act cannot be circumvented as a matter of legal interpretation. The limitation period bites. Only additional defects that do not constitute a fresh cause can be added to these proceedings that are now well outside the relevant limitation period.

[90] Here, in my view, after carrying out what I consider to be the necessarily detailed examination of the factual basis of the claims, Defect 7 is plainly a fresh cause of action, and is therefore time-barred.

[91] I accept that this conclusion may be seen as unfair to the plaintiffs, especially the apartment owners. However, it would also be unfair to the first defendant and particularly the fourth third-party to allow the amended claim. Eighteen years later, the Council and SMEL would have to meet a claim that would be near impossible to fully defend given the passage of time.

Result

[92] Defect 7 in the sixth amended statement of claim is struck out.

[93] In my view, the first defendant and the fourth third-party are entitled to scale 2B costs. If any party disagrees, then the parties are to file brief memoranda on the issue (less than three pages including schedules). The plaintiffs would need to file within 10 days of this decision and the defendant and fourth third-party to respond within a further 10 days.

[94] I rule accordingly.

Postscript

[95] Well after this hearing, Counsel advised me that a similar limitation issue has arisen and been decided at a substantive hearing that concerned a building on Gore Street, central Auckland, where the Council is also a defendant. I had been waiting for the public release of that judgment before releasing this decision.

[96] However, I realise there is now real urgency in releasing my decision given the impending trial date. Accordingly, this decision has been released without reference to the findings in the Gore Street judgment.

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Becroft J