IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2017-404-001772
[2022] NZHC 2218

IN THE MATTER OF	THE "BIANCO APARTMENTS"
BETWEEN	BODY CORPORATE 406198 and HHTS LIMITED & OTHERS Plaintiffs
AND	ARGON CONSTRUCTION LIMITED & OTHERS Defendants
	CALLANDAR ELECTRICS LIMITED & OTHERS Third Parties
	PACIFIC CONSULTANTS BUILDING ENGINEERS LIMITED Fourth Parties

Hearing:	4 August 2022
Appearances:	H Chung for Plaintiffs D J Neutze and G E Hughes for Defendants
Judgment:	1 September 2022

JUDGMENT OF EDWARDS J

This judgment was delivered by me on 1 September 2022 at 3.30 pm pursuant to r 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors/Counsel:
Lane Neave, Auckland
Brookfields, Auckland

[1] The Bianco Off Queen Apartment complex (Complex) in Auckland is an allegedly defective building. The plaintiffs in this proceeding are the Body Corporate and the owners of units in the Complex. They sue various parties involved in the construction of the Complex, including the seventh defendant (Beca). Beca is sued in negligence for its work in reviewing and inspecting fire engineering work and issuing producer statements.

[2] The plaintiffs seek leave to file a ninth amended statement of claim (9ASOC). Beca opposes the grant of leave. It says the proposed amendments to the claim against it introduce a fresh cause of action that is statute-barred and leave should otherwise be declined.

The pleaded claim and proposed amendment

[3] The current pleading is set out in the eighth amended statement of claim (8ASOC). The core allegations of the claim against Beca are at paragraphs 57 and 58 of the 8ASOC which provide:

> 57. As fire engineers engaged to provide construction services at Bianco Off Queen the seventh defendant owed a duty of care to the plaintiffs when reviewing and/or inspecting the fire engineering work at Bianco Off Queen and when issuing its producer statements, to exercise reasonable care and skill to ensure that Bianco Off Queen achieved compliance with the Building Act 2004 and the standards in force at the time relating to the requirements at Building Code C.
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> 58. The seventh defendant breached its duty of care in that Bianco Off Queen contains defect 7 listed at Schedule C. The particulars of the breaches include failing to inspect, failing to call for inspections and/or failing to comply with the requirements for inspection and reporting in the Building Consents and MBIE Determination 2006/52, and issuing a producer statement without reviewing the records or requiring from the first defendant the records reasonably necessary to issue the producer statement.

[4] Paragraph 58 of the 8ASOC refers to "defect 7 listed at Schedule C". Schedule C is a four-column table. Defect 7 in Schedule C is currently pleaded as follows:

#	Breaches and Damage	Defects causing breaches and damage	Location
7.	**Fire stopping** Timber framework in the basement with embedded fire collars, penetrations missing fire collars and/or wrap and/or sealant, pipes and wires passing without right angles to the wall or too close to the wall/ceiling intersection, and absence of fire rated materials between the ceiling and slab above, in breach of the requirements of the Building Code at C3 - Fire Affected Areas Beyond the Source and C4 - Movement to a Place of Safety	Failure to construct or ensure construction of fire stopping measures. Failure to construct or ensure construction of fire stopping to penetrations to the consented standard, in accordance with MBIE determination 2006/52 and the consented specifications and/or failure to ensure penetrations are fire stopped to the same fire rating as the material being penetrated. Failure to construct fire rated barrier in ceiling spaces between ceiling and slab above.	Basement pipes, and timber framework. Between fire cells in all units and common property, including areas adjacent to or including risers.

[5] The plaintiffs claim loss as a result of these breaches and seek judgment to be entered in the sum of $1,207,500.00 (including GST), general damages of $1,630,500.00, consequential losses (unquantified), interest and costs.

[6] The proposed amendments would leave paragraphs 57 and 58 of the 8ASOC unchanged. The major changes are to defect 7 in Schedule C. The extent of those changes is shown in the marked-up version of defect 7 as follows:[1]

#	Defects causing breaches and damage	Breaches and Damage	Location
7.	**Fire stopping and fire rating** Failure to construct or ensure construction of adequate fire stopping measures, including: - Lack of fire-rated foam backfill in shower tray penetrations; - Lack of or incorrectly installed steel flush boxes and/or correct provision of intumescent pads at power points and phone and data penetrations; - Lack of tested fire proofing measures around pipe and cable penetrations; - Lack of fire stopping around ducts that penetrate walls between apartments and risers; - Incorrect installation of Allproof Fire Bands and Pipe Wraps at penetrations in the hot water risers and other locations;	~~Timber framework in the basement with embedded fire collars;~~ ~~p~~Penetrations missing fire collars and/or wrap and/or sealant; ~~pipes and wires passing without right angles to the wall or too close to the wall/ceiling intersection, and~~ absence of fire rated materials between the ceiling and slab above; and absence of properly constructed fire rated barriers in breach of the requirements of the Building Code at C2 – Means of Escape and C3 – Spread of	~~Basement pipes and timber framework.~~ Between fire cells in all units and common property, including at walls, floors and ceilings, areas adjacent to or including risers, fire walls from apartment to stairs, intertenancy walls and

[1] The headings of the first two columns in the table have been swapped in the proposed amendment. Neither party highlighted this change and nothing appears to turn on it.

	- Insufficient sealant depth. ~~Failure to construct or ensure construction of fire stopping to penetrations to the consented standard in accordance with MBIE determination 2006/52 and the consented specifications and/or failure to ensure penetrations are fire stopped to the same fire rating as the material being penetrated.~~ Failure to construct firewalls from apartment to stairs in accordance with the 60-minute fire rating in the consented drawings and specifications. Failure to ~~construct fire rated barrier in ceiling spaces between ceiling and slab above~~ install GIB within apartment firewalls in accordance with the manufacturer's literature as specified in consented drawings, including the following requirements: - 300mm screw spacings; - With no fixings to the top channel; - Friction fitting to allow for expansion of the steel stud; - A continuous barrier from walls to the floors above; ~~Failure to construct fire rated barrier in ceiling spaces between ceiling and slab~~; - Plastering of screw heads at joins; Failure to construct firewalls as continuous barriers in the electrical risers and around apartment doors, including around door frames	Fire ~~Affected Areas Beyond the Source and C4 – Movement to a place of Safety:~~	floors; wall to door junctions and ~~in~~ ceiling spaces between ceiling and slab above.

[7] Beca objects to all the proposed changes except for the six points listed as particulars of the alleged failure to construct or ensure construction of adequate fire stopping measures.

[8] In broad terms, the proposed changes add fire rating issues to the fire stopping issues already pleaded and expand the areas of the Complex affected. The proposed changes allege failure to properly fire rate the intertenancy walls and floors (walls and floors between apartments), walls between apartments and stairwells, and wall to door junctions in individual apartments. It is also pleaded that there has been a breach of C2 of the Building Code, in addition to the breach of C3.

[9] The proposed changes also alter the quantum of loss sought. If leave was granted, judgment would be sought in the sum of $27,224,041.63 (including GST), general damages of $1,575,000, consequential losses of $5,545,000, interest and costs.

Relevant legal principles

[10] Rule 7.77(2)(a) of the High Court Rules 2016 provides that an amended pleading may introduce, as an alternative or otherwise, relief in respect of a fresh cause of action which is not statute-barred.

[11] In this case, there is no dispute that if the amendments introduce a fresh cause of action then they will be statute-barred as they sit outside the 10-year limitation period which applies. The key issue in dispute concerns whether the proposed amendments introduce a "fresh cause of action".

[12] The principles relevant to determining what constitutes a fresh cause of action were set out in *Ophthalmological Society of New Zealand Inc v Commerce Commission*,[2] and were summarised in *Transpower New Zealand Ltd v Todd Energy Ltd* as follows:[3]

> (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);
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> (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);
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> (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
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> (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

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2 *Ophthalmological Society of New Zealand Inc v Commerce Commission* CA168/01, 26 September 2001 at [22]–[24].

3 *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61].

> which no fair warning has been given" (*Chilcott* at 273 noting that this 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)).

[13] Those principles were affirmed more recently in *ISP Consulting Engineers Ltd v Body Corporate 89408.*[4] After setting out the principles, the Court of Appeal said:[5]

> 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.
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> (footnotes omitted)

[14] A new cause of action can arise as a result of an alteration in matters of fact. That was confirmed by the Court of Appeal in *Commerce Commission v Visy Board Pty Ltd*.[6] However, the Court concluded 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. While that could, in theory, occur through the addition of new facts, the facts added must be "so fundamental that they change the essence of the case against the defendant".[7]

[15] A proposed change to the alleged facts was also considered by the Court of Appeal in *ISP*:[8] The Court of Appeal framed the relevant enquiry in these terms:[9]

> It is clear that the importance of the pleaded fact to the success of the claim is not the test. The question is whether the proposed amendment will change the essential nature of the claim; is there a new area of factual enquiry? The fact that the underlying facts may be the same or similar does not save a cause of action from being fresh if the plaintiff seeks to derive a materially different legal consequence from the facts.
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> (footnotes omitted)

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4 *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA 160, (2017) 24 PRNZ 81.
5 At [22].
6 *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383 at [142].
7 At [146].
8 *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA 160, (2017) 24 PRNZ 81.
9 At [25].

[16] In *Body Corporate 355492 v Queenstown Lakes District Council*, Osborne J observed that this formulation of the test is arguably less restrictive than the test set out in *Visy*.[10] I agree with that observation.

Do the proposed amendments introduce a fresh cause of action?

[17] The first point to note is that there is no proposed change to the core claim of negligence against Beca. The claim that Beca owed a duty of care when reviewing and inspecting the fire engineering work and when issuing its producer statements remains the same. That duty extends to ensuring compliance with the Building Act 2004 and the standards in force at the time relating to the requirements in "Building Code C".

[18] The core allegations of breach also remain the same. The plaintiffs plead that Beca breached its duty of care in that the Complex contains defect 7 listed at Schedule C. Particulars of that breach include failing to inspect, failing to call for inspections, failing to comply with the requirements for inspection and reporting, and issuing producer statements without first reviewing the records or requiring the records reasonably necessary to do so. I understand this pleading to mean that the defects listed in defect 7, Schedule C are a consequence of the alleged breaches of Beca's duty of care.

[19] The question is whether the amendments to defect 7, and in particular the addition of fire rating, changes the essential nature of this claim.

[20] Both parties filed affidavits from their respective fire experts, in support and in opposition to the application. Mr Reddin is engaged by the plaintiffs; Mr Dixon by Beca. The experts agree that fire rating and fire stopping are different concepts. In very simple terms, fire rating refers to the resistance of a system to fire. For example, it may relate to the specification and construction of walls to operate as a fire barrier. Fire stopping, on the other hand, refers to the mechanisms used to stop a penetration,

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[10] *Body Corporate 355492 v Queenstown Lakes District Council* [2022] NZHC 1494 at [67] referring to *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383; and *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA 160, (2017) 24 PRNZ 81.

or other weak points in a wall, so as to preserve the fire rating of the wall. Mechanisms used to ensure this include, for example, sealants, fire collars, and dampers.

[21] Although the concepts are different, they are nevertheless interrelated. Both experts agree that fire rating and fire stopping are targeted at achieving a code compliant building and preventing the spread of fire through walls. Fire rating relies on fire stopping – although the same cannot be said in reverse.

[22] The overlap between the two concepts is evident in the relevant provisions of the applicable Building Code. Clauses C2 and C3 of the Building Code which applied at the time the Complex was constructed, relate to both fire stopping and fire rating. Mr Reddin refers to C2.3.3(d) as an example of this. That clause requires escape routes to be "resistant to the spread of fire as required by clause C3". Mr Reddin says that both C2 and C3 must be satisfied in full to have complete fire separations with appropriate fire stopping.

[23] Compliance with the requirements of C3 may also involve both fire stopping and fire rating. For example, C3.3.2 provides "fire separations shall be provided within buildings to avoid the spread of fire and smoke to other fire cells, spaces intended for sleeping, household units and other property". Mr Reddin opines that this cannot be said to address fire rating but not fire stopping, because fire stopping is an essential part of the fire rating of a fire separation. I accept that evidence.

[24] The overlap and interrelationship between the two concepts is confirmed by the fact that fire rating is already referred to in the current pleading of defect 7 of Schedule C. The pleading refers to a failure to construct a fire rated barrier in the ceiling spaces between the ceiling and the slab above. It is true that the overall effect of the proposed amendments means that additional areas of the Complex are said to contain defects, thus expanding the scope of the claim. Mr Neutze, for Beca, put particular emphasis on the fire rating of intertenancy walls which, he submits, significantly increases the scope of repair.

[25] Nevertheless, that extended scope must be seen in context. The existing pleading identifies the location of the alleged defects as being "between fire cells in all units and common property" and expressly includes "risers, ceiling spaces between ceiling and slab above". Although the focus in the current pleading is on specific areas, others are not excluded. The effect of the proposed amendment is to add specificity to those areas expressly included between fire cells in all units and common property.

[26] The change to the damages claim is significant (an increase of approximately 1210 per cent) and it has given me considerable pause. There is merit in the submission that an increase of that scale suggests an expansion of the claim to such an extent it amounts to an entirely different claim.

[27] However, this proposed change must also be seen in context. Ms Chung submits that the damages claim has not been revised recently, and the proposed amendment represents the most up to date assessment. Further, she submits that the increase in damages is partly explained by increased construction costs and because the revised figure encompasses the cost of repair for defects which are not the subject of any opposition. The increased claim for damages does not, therefore, necessarily indicate a fresh cause of action.

[28] When the proposed changes are considered as a whole, I am not persuaded that they introduce a fresh cause of action. Although they expand and add to the factual particulars of the claim, they do not constitute a claim that is essentially different. As the Court of Appeal said in *ISP*, the assessment is a question of degree.[11] While the new amendments will involve the investigation of new factual matters, it cannot be said that these factual matters are so different in character as to constitute a new claim. The essence of the negligence claim against Beca for failures in relation to reviewing and inspecting fire engineering work and issuing producer statements remains the same.

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[11] *ISP Consulting Engineers Limited v Body Corporate 89408* [2017] NZCA 160 at [26].

[29] This case may be distinguished from *Body Corporate 355492 v Queenstown Lakes District Council*.[12] 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.[13]

[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.

[31] I consider *ISP* to be analogous.[14] That case also concerned an apartment building which was alleged to be defective. The issue was whether the addition of structural defects and damage introduced a new cause of action to a claim which simply listed weathertightness defects. The Court considered that while the first amended statement of claim was focused on weathertightness issues, it was not expressed to be exclusively directed at such issues, and the claim already contained specific reference to defects of a structural nature.[15] There was also a causal link between the weathertightness and structural categories of defect and so some overlap in the remedial work required.[16] The Court concluded:[17]

> We conclude that the Second CSC was not essentially different from the First CSC. The claim continues to rest on ISP's breach of the same duty of care. The new allegations do not involve the investigation of an area of fact of a new and different nature, not raised in the First CSC. The case will involve the investigation of further factual matters, but given the already existing

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12 *Body Corporate 355492 v Queenstown Lakes District Council* [2022] NZHC 1494.
13 At [68].
14 *ISP Consulting Engineers Limited v Body Corporate 89408* [2017] NZCA 160.
15 At [29]–[30].
16 At [32].
17 At [34].

> overlap in the pleadings between weathertightness and structural defects, the Second CSC is not essentially different from the First CSC.

[32] Those observations apply equally to this case. The plaintiffs' claim rests on the same breach of the same duty of care. Although the case will involve the investigation of further factual matters, given the overlap between fire stopping and fire rating, the proposed 9ASOC is not essentially different from the 8ASOC.

[33] It follows that I am not satisfied that the proposed amendments introduce a fresh cause of action let alone one which is statute barred.

Should leave to amend the claim be granted?

[34] Beca says that leave should otherwise be declined because the plaintiffs seek to expand a defect that has always been out of time and which would create significant prejudice for Beca.

[35] This submission rests on the Court accepting that a cause of action relating to fire rating arose on the filing of the sixth amended statement of claim dated 1 July 2019 (6ASOC), by which time it was already statute-barred. To understand that submission in context, it is necessary to consider the evolution of the pleaded claim.

[36] The initial claim against Beca was contained in the fourth amended statement of claim dated 23 November 2018 (4ASOC). The core claim was the same as currently pleaded, that is, breach of a duty of care owed in relation to the reviewing and inspection of fire engineering work and the issue of producer statements. Those breaches were pleaded as leading to defects set out in a schedule annexed to the claim. The schedule was in a different format to the current pleading and the alleged defects were described very broadly. They appeared to include (without limitation) fire stopping, and fire rating issues. Nevertheless, a column in the schedule of defects identified Beca's liability as being limited to fire stopping work.

[37] The focus of the claimed defects for Beca remained on fire stopping in the fifth amended statement of claim dated 29 March 2019 (5ASOC). However, the form of the schedule of defects changed in the 6ASOC. There were also additional particulars included in the schedule, including the absence of fire-rated materials in the ceiling

and slab above. The 6ASOC was filed on 1 July 2019. Beca's services concluded no later than January 2009, and so Beca says the claim in relation to fire rating was filed more than 10 years after Beca's services were concluded.

[38] I accept that the particulars of the claim against Beca were expanded to include fire rating in the 6ASOC. However, I do not consider a separate cause of action in relation to fire rating arose at this time. The essential claim against Beca remained the same. It was a claim in negligence for the reviewing and inspection of fire engineering work and the issue of producer statements. That claim has been consistently pleaded throughout each iteration of the claim. And, while it is true that the focus of Beca's liability had been on fire stopping, the defects, and the location of the defects, were drafted in broad terms. For these, and the other reasons canvassed in relation to the first issue above, I do not accept that a cause of action relating to fire rating arose on the filing of the 6ASOC.

[39] As to other factors relevant to the grant of leave, there is no suggestion in this case that the filing of the amended pleading will jeopardise the trial commencing 1 May 2023. Issues raised in the proposed amendments were canvassed in the plaintiffs' evidence served over a year ago. To the extent there is any prejudice to Beca in filing its evidence in accordance with current timetable orders, that prejudice may be met by appropriate amendments to those orders.

[40] Nor is there any opposition to leave being granted due to a lack of merit in the pleaded claims. Granting leave to allow the amendment to be filed will ensure that the real controversy between the parties goes to trial and a just determination of the proceeding may be secured. The interests of justice favour the grant of leave and I order accordingly.

Result

[41] The plaintiffs' application for leave to file the ninth amended statement of claim is granted.

[42] The plaintiffs are the successful party and are entitled to an award of costs. The parties are encouraged to confer and agree quantum. If agreement cannot be

reached, then a memorandum in support of an order of costs may be filed and served 20 working days after delivery of this judgment, with a memorandum in opposition filed 10 working days thereafter. Costs shall be determined on the papers.

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Edwards