IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2010-485-545
CIV-2015-485-048
[2016] NZHC 844

BETWEEN	BODY CORPORATE 89408 AND ORS Plaintiffs
AND	JOHN MACRITCHIE First Defendant
	DONALD JOHN MACRITCHIE Second Defendant
	DAVID JAMES UNDERWOOD Third Defendant
	ISP CONSULTING ENGINEERS LIMITED Fourth Defendant
	WELLINGTON CITY COUNCIL Fifth Defendant

Hearing:	22 February 2016
Counsel:	A K Hough and P H Bremer for Plaintiffs R C Woods for Fourth Defendant S H Macky for Fifth Defendant
Judgment:	29 April 2016

JUDGMENT OF CLIFFORD J

Introduction

[1] These are consolidated proceedings involving a dispute relating to the development of the Townsend Apartments at 26–32 Allen Street, Wellington (the Apartments). The plaintiffs are the body corporate and the individual owners of the Apartments (together, the Owners). Following consolidation, the Owners filed an

amended, consolidated, statement of claim. That statement of claim omitted certain factual allegations against the fourth defendant, ISP Consulting Engineers Limited, that had been pleaded in CIV-2010-485-545. Shortly thereafter, the Owners filed a second consolidated statement of claim, including those allegations. ISP and the fifth defendant, the Wellington City Council, then filed amended statements of defence, including affirmative defences against the re-pleaded allegations based on the expiry of the limitation period.

[2] This is an application under rule 1.9 of the High Court Rules by the Owners for the amendment of the consolidated statement of claim to include the omitted, and then re-pleaded, factual allegations. That application is opposed by ISP and the Council.

Facts

[3] The Apartments were developed in 1998 and 1999 by the renovation and extension of an existing building. The first, second and third defendants were the developers of the Apartments (the Developers). ISP, the fourth defendant, was the engineer for the project. The Council, the fifth defendant, was the local authority. The Apartments are a leaky building.

[4] In or about August 2005 individual owners of the Apartments began lodging individual claims under the Weathertight Homes Resolution Services Act 2002. A multi-unit claim was registered in 2007 under the Weathertight Homes Resolution Services Act 2006 (the WHRS 2006). ISP was not a party to any of those claims. The Council was a party to all of them.

[5] After filing their multi-unit claim the Owners decided, as is provided for by the WHRS 2006, to undertake the necessary work to make the Apartments weather tight, and then to seek adjudication. During repair work in 2010 structural issues were discovered to exist. As the WHRS tribunal's jurisdiction is limited to weathertightness issues, the Owners then filed a separate claim in the High Court against the Developers, the Council and – for the first time – ISP for structural damage. They did so in some haste, to avoid limitation issues. That claim is CIV-2010-485-545 (the 2010 Structural Proceedings). An amended statement of

claim was filed in the 2010 Structural Proceedings in December 2012 (the 2012 Structural SC).

[6] In the course of the 2010 Structural Proceedings, the Owners considered it advantageous to file a fresh claim under the WHRS 2006. They did so in February 2014 (the 2014 WHRS Claim). That claim was, as is the practice, in the form of a fully pleaded civil proceeding in the High Court. As in the 2012 Structural SC, ISP was named as the fourth defendant to that claim. ISP subsequently applied to the WHRS tribunal to be removed from that claim on the basis that, as regards the pleadings involving ISP, the 2014 WHRS Claim was a duplication of the 2010 Structural Proceedings as pleaded in the 2012 Structural SC. The tribunal declined that application, and ISP sought judicial review. I heard that application on 16 March 2015. In a judgment of 21 May 2015 I granted ISP's application for judicial review of that decision, and ordered that it be removed from the 2014 WHRS Claim, including as that claim had, by then (by tribunal order of 19 January 2015) been removed to this Court.[1] I summarised my reasons in the following terms:

> [22] On that basis, I am satisfied that the claim against ISP in the 2014 WHRS Claim is the same claim as made against it in the 2010 High Court Structural Claim. That is, the claim alleges that ISP negligently, or in breach of a contractual term, provided defective advice on structural matters. If those structural defects have contributed to structural damage and associated water ingress and weathertightness issues, then, subject to the usual rules, ISP may be liable accordingly. It is not an answer from ISP to such a claim to say that it had no formal responsibility for "weathertightness" issues. Rather, the question would be one principally of causation.
>
> [23] When pressed by me, neither counsel for the Owners, Messrs Bremer and Baldwin, were able to identify any way in which the 2014 WHRS Claim added to the 2010 High Court Structural Claim.
>
> [24] Moreover, I think the concern as to limitation, which would appear to have been the reason for the filing of the 2014 WHRS Claim, is – at least as regards ISP – misplaced for the same reason. That claim is effectively pleaded in the 2010 High Court Structural Claim, which – at least as I understand it – is not suggested to be out of time.

[7] In that context, I recorded ISP's reasons for its removal application in the following terms:

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1 *ISP Consulting Engineers Ltd v The Weathertight Homes Tribunal* [2015] NZHC 1106.

> [25] It might be wondered why, in those circumstances, ISP objected to being part of the 2014 WHRS Claim. In response to that question, Mr Freeman submitted that ISP, as an engineer, has a liability policy that does not cover or extend to claims for weathertightness issues. If it was not removed, therefore, it would have to itself fund its defence to the 2014 WHRS Claim. I was advised by Mr Freeman that its insurer's legal representatives could not undertake that task.

[8] On removal to this Court, the 2014 WHRS Claim became CIV-2015-485-048.

[9] On 28 August 2015, and by consent, this Court ordered consolidation of the 2010 Structural Proceedings (CIV-2010-485-545) and CIV-2015-485-048. It did so on the basis, as requested, that the plaintiffs were then to file and serve an amended statement of claim reflecting the consolidation of proceedings (and updated quantum) by 30 September 2015.

[10] A consolidated statement of claim was filed on 1 October 2015 (the First Consolidated SC). As noted, the plaintiffs omitted to plead certain structural defects, alleged to be the responsibility of ISP, that had been pleaded in the 2012 Structural SC. The plaintiffs, realising their error, filed a second consolidated statement of claim on 5 October 2015 (the Second Consolidated SC), pleading those defects. ISP and the Council filed amended statements of defence on 5 and 20 November respectively. They pleaded limitation, based on the assertion that the structural defects, when pleaded on 5 October 2015, were outside the limitation period.

[11] ISP does not argue that there is, when compared with the pleading for the 2010 Structural Proceedings in the 2012 Structural SC, anything new in the Second Consolidated SC. It argues, however, that having omitted the relevant allegations of structural defects from the First Consolidated SC, the plaintiffs could not include those defects in the Second Consolidated SC. It says to do so is to bring a fresh (relative to the First Consolidated SC) cause of action outside the limitation period provided by the Limitation Act 2010. The Council endorses the position taken by ISP.

Law

[12] ISP applies under r 1.9, which provides:

> (1) The court may, before, at, or after trial of any proceeding, amend any defects and errors in the pleadings or procedure in the proceeding, whether or not there is anything in writing to amend, and whether or not the defect or error is that of the party (if any) applying to amend.
>
> (2) The court may, at any stage of a proceeding, make, either on its own initiative or on the application of a party to the proceedings, any amendments to any pleading or the procedure in the proceeding that are necessary for determining the real controversy between the parties.

[13] *McGechan* explains the general principle on which the rule is based, and its application in the context of new causes of action, as follows:[2]

> **HR1.9.03 Amendment of pleadings**
>
> Rule 7.77 is limited to the amendment of pleadings. It is only available before trial and can be invoked before the proceeding is set down without application to Court. Any party seeking to amend a pleading would ordinarily proceed under r 7.77. Where r 7.77 cannot be used, it may still be possible to amend under r 1.9. In *Elders Pastoral Ltd v Pemberton* (1990) 2 PRNZ 188, an amendment to the statement of claim was permitted during the hearing. A similar situation arose in *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA).
>
> **HR1.9.04 General principle**
>
> Determination of the real controversy is the fundamental yardstick for all amendments under r 1.9. This aspect of the rule was stressed in *Kirton v Prospecdev Holdings Ltd* (1990) 2 PRNZ 412, where Master Williams QC pointed out that the question of service was not the real controversy. In *Elders Pastoral Ltd v Pemberton* (1990) 2 PRNZ 188, Eichelbaum CJ was reluctant to bring about a situation where a party was forced either to forgo a cause of action or to elect to be nonsuited. See generally, *G L Baker Ltd v Medway Building & Supplies Ltd* [1958] 1 WLR 1216, [1958] 3 All ER 540 (CA).
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> In *Wright Stephenson & Co Ltd v Copland* [1964] NZLR 673, Wilson J said that the Court was not limited to the mere correction of defects and errors, but should allow all amendments necessary to determine the real controversy unless satisfied that the applicant was acting in bad faith or that the order would cause some prejudice which could not be remedied by an appropriate award of costs.

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2 Andrew Beck and others *McGechan on Procedure* (looseleaf ed, Brookers) at [HCR1.9.03]–[HCR1.9.05]

Although the Court is empowered to act of its own motion, the Court would generally ensure that all parties were given an opportunity to put their case. See *J Leavey & Co Ltd v George H Hirst & Co Ltd* [1944] KB 24, [1943] 2 All ER 581 (CA) at 27.

HR1.9.05 New causes of action

There is no jurisdictional barrier to introducing a new cause of action in an application under r 1.9: *Elders Pastoral Ltd v Pemberton* (1990) 2 PRNZ 188. In the case of a new cause of action that is statute-barred, the Court will follow the same procedure under this rule as it would under r 7.77, and will generally refuse to allow such an amendment after trial: *Elders Pastoral* (above) at 190. This principle was affirmed by the Court of Appeal in *Chilcott v Goss* [1995] 1 NZLR 263 (CA) at 273.

In *Young v De Lautour Partners* (1992) 6 PRNZ 148, an amendment raising a fresh cause of action was sought during the trial. The Court refused to allow it on the grounds of prejudice to the other party and lack of particularity.

[14] Specific, and more limited, provision is made in r 7.77 for the amendment of pleadings. As relevant, that rule provides:

7.77 Filing of amended pleading

(1) A party may before trial file an amended pleading and serve a copy of it on the other party or parties.

(2) An amended pleading may introduce, as an alternative or otherwise,—

(a) [relief in respect of] a fresh cause of action, which is not statute barred; or

(b) a fresh ground of defence.

(3) An amended pleading may introduce a fresh cause of action whether or not that cause of action has arisen since the filing of the statement of claim.

[15] *McGechan* explains:[3]

The rule permits the addition of a fresh cause of action or a fresh ground of defence, whether or not as an alternative, provided only that it is not statute-barred.

[16] Rule 7.77(9) provides:

This rule does not limit the powers conferred on the court by rule 1.9.

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3 *McGechan on Procedure* at [HR7.77.04].

[17] In relying on r 1.9, and not r 7.77, the Owners appear to accept that, on the face of things, the limitation point raised by ISP precludes reliance on r 7.77. Rather, they seek to rely on the broader powers given to the Court under r 1.9. In that context the following commentary from *McGechan* is also of relevance:

> **HR1.9.07 Restrictions on amendment**
>
> Although r 1.9 is couched in very wide terms and has generally been liberally interpreted, it does contain restrictions. ...
>
> The rule cannot be used to override the provisions of a statute: *Kristensen v Global Flags Ltd (in liq)* (2001) 15 PRNZ 581. It may not be used to extend the time allowed for an appeal where this is not provided for in the statute conferring the appeal right: *Inglis Enterprises Ltd v Race Relations Conciliator* (1994) 7 PRNZ 404. ...

Submissions

[18] The Owners first argue that there is no fresh cause of action pleaded in the Second Consolidated SC: rather, all they have done is to introduce further particulars of the claim of negligence they brought, within the limitation period, against ISP in the 2010 Structural Proceedings as re-pleaded in both the 2012 Structural SC and the First Consolidated SC. On that basis, my understanding is that the Owners say they are entitled to re-plead under r 7.77. At the same time, they point to the breadth of r 1.9. They say the structural defects that are pleaded in the Second Consolidated SC are not fresh; they are matters of detail. Further, ISP has, from at least the time of the filing of the 2012 Structural SC, been fully aware of the nature of the allegations against it. It was on the basis that the 2014 WHRS Claim duplicated the 2010 Structural Proceedings that ISP applied to be removed from that claim. The omission was, moreover, an inadvertent error. The whole point of r 1.9 is to ensure that a proceeding disposes of the real controversy between the parties. To do so, the Owners need the full range of the alleged defects considered by the Court. The First Consolidated SC needs to be amended, as sought, to enable that to occur.

[19] ISP and the Council oppose this application on the basis that the Owners acted deliberately when filing the First Consolidated SC, and that the relief they seek would have the effect of re-introducing a cause of action or causes of action which would otherwise be statute-barred. That is not an error or omission that is capable of

rectification under r 1.9. To the extent that it might be, any discretion ought not to be exercised in the plaintiffs' favour in the circumstances of this case.

Analysis

[20] I acknowledge at once that in my view the merits of the circumstances favour the plaintiffs' application. I accept the affidavit evidence for the plaintiffs that the omission of the defects was an inadvertent error: given the history of the proceedings, it is difficult to see how it could be anything else. As ISP had been removed from the 2014 WHRS Claim and, hence, CIV-2015-485-048, the consolidated proceeding against it was necessarily a continuation of the 2010 Structural Proceedings. Since 2010, ISP has been on notice that it faces claims for negligence arising out of its role in the development of the Apartments. It has been aware that the defects alleged to be its responsibility were discovered when the plaintiffs undertook work to fix the Apartments. Since December 2012, it has had a full understanding of the allegations against it. It would be somewhat ironic if, having sought successfully to be removed from the 2014 WHRS Claim (and hence CIV-2015-485-048) on the basis of duplication with the 2010 Structural Proceedings, it could now avoid substantial liability because of the Owners' error in the First Consolidated SC.

[21] At the same time, ISP and the Council point to authority that:

(a) a pleading ceases to be of effect once an amending pleading is filed; and

(b) the fact that the application of that rule would give a party protection – by reason of limitation – where an amended pleading erroneously omits a cause of action does not overcome that effect and, hence, the intervention of limitation rules.[4]

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[4] In particular *Wheldon v Neal* (1887) 27 QBD 394; *Warner v Sampson* [1959] 1 All ER 120 (CA); *Pricewaterhouse v Fortex Group Limited* (CA 179/98, 30 November 1998); *Bilsland v Terry* [1972] NZLR 43; *Walker Nurseries Limited v Carlile Dowling* HC Auckland CIV-1994-441-57, 8 July 2004; and *Jamieson v Topline Plumbing & Roofing Limited* [1996] DCR 934.

[22] I first consider ISP's assertion that the Second Consolidated SC introduces, relative to the First Consolidated SC, a new, that is a "fresh", cause of action. I conclude that it does not. On that basis, the Limitation Act provides no bar to the amendment of the First Consolidated SC in the manner sought. On that basis, I do not need to consider whether r 1.9 would provide a basis for amendment to include a new cause of action that would otherwise be time-barred. I make some limited observations on that argument.

The Second Consolidated SC – a fresh cause of action?

Law

[23] What constitutes a fresh cause of action was considered by the Court of Appeal in *Commerce Commission v Visy Board Pty Limited*:[5]

> [141] The applicable principles to determine whether an amendment creates a fresh cause of action are summarised by this Court in *Transpower New Zealand Ltd v Todd Energy Ltd*:[6]
>
> (a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another;
>
> (b) Only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction";
>
> (c) The test of whether an amended pleading is "fresh" is whether it is something "essentially different". 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".
>
> [142] The question is therefore whether the amendment to the pleadings changes the claim against the defendant so that it is something essentially different from what it was before the amendment. A change of that nature can, as is clear from paragraph (c) of the passage from *Transpower* above, occur as a result of an alteration in matters of fact. In determining whether a particular factual amendment has the effect of inserting a new cause of

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5 *Commerce Commission v Visy Board Pty Limited* [2012] NZCA 383.

6 *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61] (referring to *The Ophthalmological Society of New Zealand Inc v The Commerce Commission* CA168/01, 26 September 2001 at [22]–[24]). Leave to appeal refused: *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZSC 106.

> action, it is helpful to refer to three cases that have considered amendments altering factual matters.

[24] Having considered those three cases, *Smith v Wilkins and Davies Construction Co Ltd*; *Seddon v Ryans Carriers Ltd*; and *Bryan v Philips New Zealand Ltd*,[7] the Court observed:

> [146] ... 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.

The relevant pleadings

[25] In order to consider whether, relative to the First Consolidated SC, the Second Consolidated SC introduces a fresh cause of action it is helpful first to understand how the Owners plead their claims against ISP in the 2012 Structural SC and the 2014 WHRS Claim.

[26] In both, the Owners first plead a largely identical factual narrative (based on a set of identical defined terms) which identifies in turn the parties, the circumstance of the sale of the units, the issue of building consents, the work that was undertaken by the Developers and ISP respectively, the issue of producer statements by ISP and the issue of code compliance certificates by the Council.

[27] Minor differences reflect the addition, in the 2014 WHRS claim, of a limited number of specific references, in "weathertightness" terms, to the work carried out.

[28] Both pleadings then assert that ISP carried out the work for which it was responsible defectively. In the pleading of defects, the two claims diverge more significantly.

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7 *Smith v Wilkins and Davies Construction Co Ltd* [1958] NZLR 958 (SC) at 961 per McCarthy J; *Seddon v Ryans Carriers Ltd* (1992) 6 PRNZ 355 (HC) and *Bryan v Philips New Zealand Ltd* [1995] 1 NZLR 632 (HC).

[29] In the 2012 Structural SC those defects are first expressed in five, relatively general, ways:

(a) Inadequate steel structural framing;

(b) Inadequate welding;

(c) Inadequate timber framing size;

(d) Inadequate fixing of timber framing; and

(e) Inadequate or omitted fire protection systems and materials.

[30] Reflecting its different focus, the 2014 WHRS Claim pleads defects not so much by reference to defects in the structure, but rather to the defective weathertightness characteristics of the Apartments. It does so under some 12 headings, namely:

(a) Inadequate installation of joinery into wall claddings;

(b) Inadequate installation of building wrap;

(c) Inadequate weatherproofing to flat topped balustrade;

(d) Inadequate jointing of wall cladding;

(e) Inadequate installation of overflow to balconies;

(f) Inadequate termination of cladding and waterproofing to decks/balconies;

(g) Inadequate installation of deck/balcony substrates and failure of liquid applied membrane;

(h) Absence of external wall cladding and incorrectly rated internal wall linings resulting in inadequate weatherproofing and fire rating;

(i) Inadequate flashings/detail of balcony wall openings;

(j) Inadequate transition flashings to adjacent properties;

(k) Further defects causing water ingress; and

(l) The buildings were not adequately designed.

[31] There is overlap between the two sets of pleadings, particularly under the headings "Further defects causing water ingress" and "The buildings were not adequately designed". Both the 2012 Structural SC and the 2014 WHRS claim include extensive particulars by reference to those general headings: in the 2012 Structural SC running to some 60 clauses and sub-clauses; in the 2014 WHRS claim, to over 100 clauses and sub-clauses.

[32] The two sets of pleadings, again in virtually identical terms, then plead the discovery of the defects, damage and loss and, as against ISP, two causes of action: negligence and misleading and deceptive conduct. The core of the cause of action in negligence is the existence of ISP's professional duty of care to inspect and monitor the development of the Apartments for the purposes of ascertaining whether "the work and buildings complied with all relevant statutes, regulations, bylaws and codes" and to ensure that "the buildings were safe and structurally sound". That cause of action is particularised in 11 ways, and then pleaded in two similar, but alternative, sets of propositions.

[33] As perhaps can be seen from that limited analysis, both sets of pleadings are lengthy, complex, repetitive and confusing.

[34] In the First Consolidated SC the Owners take a simpler approach to the pleading of their claims. They first plead, in very similar terms to those found in the 2012 Structural SC, the general narrative, including as to the work undertaken by the Developers (defined here as the Building Work) and the work undertaken by ISP

(defined as the Engineering Work). The defects in that work are then pleaded as follows:

> **Defects**
>
> 21. The [Apartments] contain building defects including, but not limited to:
>
> (a) The defects as listed in Schedule 2; and
>
> (b) The defects of the cladding / timber framing found before and during recladding works, as listed n Schedule 3.

[35] The defects listed in Schedules 2 and 3 are, in effect, the weathertightness and other defects pleaded in the 2014 WHRS claim, rather than the structural defects pleaded in the 2012 Structural SC.

[36] The First Consolidated SC continues:

> **Damage**
>
> 22. As a result of the Defects the Townsend Apartments have suffered damage including but not limited to extensive moisture ingress into the building causing decay and damage to the framing and other building elements, further described in Schedules 2 and 3 (“**the Damage**”).
>
> 23. As a result of the Defects and the Damage it has been and will be necessary for the proprietors of the units to undertake extensive remedial work, including a re-clad of the Townsend Apartments and associated works as identified in Schedule 2, and including but not limited to:
>
> (a) Structural strengthening;
>
> (b) Treating corrosion;
>
> (c) Re-roofing and re-flashing;
>
> (d) Recladding the exterior envelope of multiple elevations;
>
> (e) Removal and replacement of damaged framing and other timbers;
>
> (f) Removal and replacement of walls and flooring;
>
> (g) Removing and replacing interior fitout and services; and
>
> (h) Redecorating and associated work.
>
> (“**the Remedial Work**”)

[37] Based on that narrative, the Owners plead a single, negligence, cause of action against ISP in the following terms:

> FIRST CAUSE OF ACTION AGAINST THE ENGINEER – NEGLIGENCE
>
> 33. The plaintiffs repeat paragraphs 1 to 27 above and say that the Engineer owed the plaintiffs a duty to exercise reasonable skill and care in undertaking the Engineering Work as set out at paragraphs 11 and 12 above.
>
> 34. In breach of its duty of care as set out in the paragraph above, the Engineer undertook the Engineering Work in such a way that the Townsend Apartments were built with the Defects.
>
> 35. As a result of the Engineer's breaches:
>
> (a) The Townsend Apartments have been built with the Defects;
>
> (b) The Townsend Apartments have suffered and will suffer the Damage;
>
> (c) The plaintiffs have had, and will have to, undertake the Remedial Work; and
>
> (d) The plaintiffs have suffered, and will suffer, the losses and distress described at paragraphs 24 to 27 above.

[38] In the Second Consolidated SC the Owners add a new schedule of defects, Schedule 4. Schedule 4 is in very similar terms to the description of structural defects found in the 2012 Structural SC. Based on that additional Schedule, the Owners plead defects and damage as set out below. The changes from the First Consolidated SC are marked:

> **Defects**
>
> 21. The [Apartments] contain building defects including, but not limited to:
>
> (a) The weathertightness defects as listed in Schedule 2;
>
> (b) The defects of the cladding/timber framing found before and during recladding works, as listed in Schedule 3; and
>
> (c) The structural defects as listed in Schedule 4.
>
> **("the Defects")**
>
> 22. As a result of the Defects the [Apartments] have suffered damage including but not limited to:

(a) Extensive moisture ingress into the building causing decay and damage to the framing and other building elements as further described in Schedules 2 and 3;

("the Damage")

(b) The land and buildings being:

(i) Unsafe;

(ii) Subject to water ingress;

(iii) At undue risk from earthquakes;

(iv) At undue risk from fire;

(v) Liable to have building consents withdrawn or be subject to rectification notices or similar requirements from the relevant local body or territorial authority;

(vi) Difficulties obtaining insurance cover and/or an increase in the cost of obtaining insurance cover;

(vii) Not suitable as security for mortgage finance;

(viii) Subject to depreciated market values;

(ix) Not readily re-sellable; and

(x) In all respects non-compliance with the Code.

("the Structural Damage")

23. As a result of the Defects, the Damage, and the Structural Damage, it has been and will be necessary for the proprietors of the units to undertake extensive remedial work as identified in Schedule 2, and including but not limited to:

(a) Structural strengthening;

(b) Treating corrosion;

(c) Re-roofing and re-flashing;

(d) Recladding the exterior envelope of multiple elevations;

(e) Removal and replacement of damaged timbers;

(f) Removal and replacement of walls and flooring;

(g) Removing and replacing interior fitout and services; and

(h) Redecorating and associated work.

("the Remedial Work")

[39] Based on that narrative, the Owners again plead a single, negligence, cause of action against ISP in the following terms. Again, changes from the First Consolidated SC are marked:

> **FIRST CAUSE OF ACTION AGAINST THE ENGINEER – NEGLIGENCE**
>
> 33. The plaintiffs repeat paragraphs 1 to 27 above and say that the Engineer owed the plaintiffs a duty to exercise reasonable skill and care in undertaking the Engineering Work as set out at paragraphs 11 and 12 above.
>
> 34. In breach of its duty of care as set out in the paragraph above, the Engineer undertook the Engineering Work in such a way that the Townsend Apartments were built with the defects as listed in schedule 3 and schedule 4
>
> 35. As a result of the Engineer's breaches:
>
> (a) The Townsend Apartments have been built with the defects as listed in schedule 3 and schedule 4;
>
> (b) The Townsend Apartments have suffered and will suffer the Structural Damage;
>
> (c) The plaintiffs have had, and will have to, undertake the Remedial Work; and
>
> (d) The plaintiffs have suffered, and will suffer, the losses and distress described at paragraphs 24 to 27 above.
>
> 36. The plaintiffs' losses, to the extent which they arise from the defects as listed at schedules 3 and 4, are a reasonable foreseeable consequence of the Engineer's breaches.

[40] Accordingly, it can now be seen that the essential difference between the First and Second Consolidated SCs is in the pleading of defects, as further reflected in the separate identification of the Damage and the Structural Damage.

Analysis

[41] Do those changes represent a pleading of a fresh cause of action? In my view, they do not.

[42] The central factual allegation remains that ISP undertook the work, defined in identical terms in each of the First and Second Consolidated SCs, negligently.

[43] As a consequence of the negligent way ISP undertook the work, the defects exist. To address those defects, the remedial work, again defined identically in each of the First and Second Consolidated SCs, is necessary.

[44] The cost of that remedial work is, in effect, the measure of the damages due from ISP to the Owners. The damages claimed in each of the First and Second Consolidated SCs are substantially the same.

[45] As between the First Consolidated SC and the Second Consolidated SC, further particulars of defects are provided. That particularisation is in my view, in the terms used in *Visy Board*,[8] the addition of new facts, rather than a change to the legal basis for the claim. The same, negligent, performance of the same work is the legal basis of the claim. The same remedial work is required to address the defects. The same measure of damages is suffered by the Owners, namely the cost of those remedial works.

[46] I am therefore satisfied that the legal basis for the Owners' claims against ISP in each of the First and Second Consolidated SCs is the same. A new cause of action is not pleaded in the Second Consolidated SC, and therefore the issues of limitation that ISP and the Council sought to rely on are not available to them.

Rule 1.9

[47] In invoking r 1.9 as a basis upon which the First Consolidated SC might be amended, the Owners would appear to have argued that the fact that the structural defects had all been pleaded in the 2012 Structural SC, and that ISP and the Council were therefore not in any way prejudiced by such an amendment, were relevant considerations. ISP and the Council's response was to point to the decisions, referred to earlier, that on the filing of the First Consolidated SC the 2012 Structural SC ceased, in the eyes of the law, to exist. Rule 1.9 could not therefore be used, by reference to the contents of that statement of claim, to defeat ISP and the Council's right to plead limitation.

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8 *Visy Board*, above n 5.

[48] I only intend to make one brief observation on that argument. I am of the view that the concept that a superseded pleading has ceased to exist in the eyes of the law needs to be understood in context. This point is illustrated by the decision in the early case of *Wheldon v Neal*.[9]

[49] There a plaintiff alleging slander was non-suited for failure to plead special damage. Leave to amend was refused. The Court of Appeal granted such leave. The slander was then repleaded but, in addition, the statement of claim included fresh claims in respect of assault, false imprisonment and other causes of action. At the time of the amendment, those claims were barred by the statute of limitations. They had not been so barred at the date of the original writ. The Court of Appeal upheld the decision at Queen's Bench that those amendments ought not to be allowed, as they would deprive the defendant of the benefit of the statute. The question was, their Lordships asked on appeal, what was just? The settled rule of practice was that amendments were not admissible when they prejudiced the rights of the opposite party as existing at the date of such amendments. To allow the amendments would permit the plaintiff to take advantage of the former writ to defeat the statute. That would be improper and unjust. Under very peculiar circumstances, the Court might perhaps have power to allow such an amendment, but certainly as a general rule it would not do so. Lopes LJ put the matter in the following terms:[10]

> ... I think the Court ought to give all reasonable indulgence with regard to amending, and I quite agree with the rule that has been laid down, viz, that, however negligent or careless the first omission and however late the proposed amendment, the amendment should be allowed if it can be allowed without injustice to the other side. But here the amending paragraphs set up causes of action which were not in the original claim and which are now barred by the Statute of Limitations. The effect of allowing those amendments would be to take away from the defendant the defence under that statute and therefore unjustly to prejudice the defendant.

[50] As can be seen, their Lordships determined the question of what was just at least in part by reference to the contents of the original statement of claim and writ. To that extent, it may be observed, those pleadings had not "ceased to exist".

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9 *Wheldon v Neal*, above n 4.

10 At 396.

[51] On that basis, the absolute statement that a superseded pleading has ceased to exist in the eyes of the law may go too far. Moreover, for the same reason, I have reservations about Judge MacIlray's decision in the District Court in *Jamieson v Topline Plumbing and Roofing Limited.*[11] The Judge would not appear to have considered the implication that, in *Wheldon v Neal*, the fresh cause of action had never been pleaded at all. I acknowledge that in *Walker Nurseries v Carlile Dowling* Master Faire, as he then was, expressed the principle very much as ISP and the Council put it.[12] But, as I read that decision, the issue there principally concerned a new pleading. Whilst the Master did find that a resurrected pleading was out of time, that question would not appear to have been the focus of argument.

[52] Where, in consolidated proceedings, there is an attempt to raise a limitation defence because of an apparent difference between a consolidated statement of claim and the earlier, separate, statements of claim, any dispute can only be resolved by reference to the earlier statements of claim. On that basis, I do not think the cases decide the question of whether, on consolidation, an inadvertent error which raises limitation issues is beyond the scope of r 1.9. But that is an issue I need not resolve here.

[53] I make a final comment. The Owners' application raised a limitation issue in a procedurally unusual, if indeed not irregular, manner. Normally, this issue would have been determined on an application by ISP and the Council for strikeout on the basis that, as relevant, the claims advanced in the Second Consolidated SC were frivolous, vexatious and an abuse of process. That is not how the parties approached the question. This matter already has a lengthy and unproductive history. I did not think it was necessary to lengthen that history when that irregularity occurred to me.

[54] The result of this decision is, in effect, that the Second Consolidated SC survives what would normally be an application by ISP and the Council to strikeout the challenged part of the pleading.

Clifford J

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11 *Topline Plumbing and Roofing Limited*, above n 4.
12 *Walker Nurseries v Carlile Dowling*, above n 4.

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