**IN THE COURT OF APPEAL OF NEW ZEALAND**

**CA235/2016**
**[2017] NZCA 160**

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| BETWEEN | ISP CONSULTING ENGINEERS LIMITED<br>Appellant |
| AND | BODY CORPORATE 89408 AND ORS<br>Respondents |

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| Hearing: | 16 March 2017 |
| Court: | Asher, Brown and J Williams JJ |
| Counsel: | M G Ring QC and R C Woods for Appellant<br>A K Hough for Respondents |
| Judgment: | 5 May 2017 at 10am |

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**JUDGMENT OF THE COURT**

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**A The appeal is dismissed.**

**B The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.**

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**REASONS OF THE COURT**

(Given by Asher J)

## Introduction

[1] This appeal concerns the amendment of a statement of claim issued by the respondent owners of an apartment building against ISP Consulting Engineers Ltd (ISP) and others. The question to be determined is whether the pleading added a new cause of action that was time-barred, or did no more than particularise the

already pleaded and in-time cause of action. In a hearing that took the form of an amendment application under r 1.9 of the High Court Rules, Clifford J concluded that no new cause of action had been added.[1] That is the decision that is the subject of this appeal.

**Background**

[2] It is unnecessary to trace the factual history of the claim in detail. Body Corporate 89408 represents the owners of an apartment building (the Owners). ISP is an engineering firm that was responsible for the engineering work when the apartments were developed, and is alleged to have carried out work between May 1999 and December 2004.

[3] In 2005 individual owners of the apartments began lodging claims under the Weathertight Homes Resolution Services Act 2002 (WHRS Act). A multi-unit claim was registered in 2007. The claims were made against the Wellington Council. ISP was not a party to any of those claims.

[4] As was required under the WHRS Act, the Owners undertook the necessary work to make the apartments weathertight before seeking adjudication. That work revealed structural defects. Structural defects are beyond the jurisdiction of the WHRS Tribunal.

[5] So, in 2010, the Owners filed a separate claim for structural damage in the High Court against the Council, ISP and various other parties (the 2010 Structural Proceedings). An amended statement of claim was filed in those proceedings in December 2012 (the 2012 Structural ASOC).

[6] The Owners then considered it advantageous to file a fresh claim under the WHRS Act in February 2014 (the Second WHRS Weathertightness Proceeding). ISP was named as a defendant in the fresh claim. ISP successfully sought to be removed as a defendant from that proceeding on the basis that it was essentially a duplication of the 2010 Structural Proceedings against ISP in the High Court.[2] The Second

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1 *Body Corporate 89408 v MacRitchie* [2016] NZHC 844.

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

WHRS Weathertightness Proceeding was removed to the High Court. It was then consolidated with the existing 2010 Structural Proceedings. A consolidated statement of claim was filed on 1 October 2015 (First CSC).

[7] Importantly, in the First CSC the Owners omitted to plead certain structural defects that had been pleaded in the 2010 Structural Proceedings, alleged to be the responsibility of ISP. Realising their error, the Owners filed a second consolidated statement of claim (Second CSC) four days later, on 5 October 2015, correcting the omission.

[8] As we will discuss later, there is no doubt that there were some structural defect allegations in the First CSC. There is equally no doubt that those pleadings were based on the original weathertightness pleadings in the WHRS Tribunal, and the omission to also re-plead the structural defects from the 2012 Structural ASOC was the result of error during the consolidation process. The Owners quickly realised their error, and had within days sought to fix it by filing the Second CSC.

[9] The Owners, having filed the amended pleading, applied under r 1.9 of the High Court Rules to amend their statement of claim to include the structural defects. ISP objected to the amendment on the basis that the Second CSC pleaded a new cause of action which was now time-barred. Clifford J found that there was no fresh cause of action pleaded in the Second CSC.[3]

**The relevant rules**

[10] There are two general provisions in the High Court Rules that relate to the amendment of pleadings:[4]

> **1.9 Amendment of defects and errors**
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> (1) The court may, before, at, or after the 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.

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3 *Body Corporate 89408 v MacRitchie*, above n 1, at [41].

4 Emphasis added. Note that there are other rules about the amendment of pleadings, but these relate to specific types of proceedings. See r 21.12 (Cases stated) and r 22.25 (Patents).

(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.

(3) All amendments under subclause (1) or (2) may be made with or without costs and on any terms the court thinks just.

(4) This rule is subject to rule 7.7 (which prohibits steps after the close of pleadings date without leave).

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**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.

(4) If a cause of action has arisen since the filing of the statement of claim, it may be added only by leave of the court. If leave is granted, the amended pleading must be treated, for the purposes of the law of limitation defences, as having been filed on the date of the filing of the application for leave to introduce that cause of action.

(5) Subclause (4) overrides subclause (1).

…

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

(10) This rule is subject to rule 7.7 (which prohibits steps after the close of pleadings date without leave).

[11] Rule 1.9 gives the court a general discretionary power to amend pleadings or procedure at any stage, while r 7.77 is limited to amendment of pleadings before trial and sets out a more prescribed process. Rule 1.9 refers to the court amending pleadings at any stage (r 1.9(1)), either on its own initiative or on the application of a party (r 1.9(2)) when the amendments are necessary to determine "the real

controversy between the parties". Rules 1.9 and 7.77 are expressed to be subject to r 7.7, which prohibits steps after the close of pleadings date without leave. There is no specific reference to r 7.77 in r 1.9, but r 7.77(9) provides that r 7.77 does not limit the powers conferred in r 1.9.

[12] Given the view we take of the facts, it is not necessary for us to determine whether the discretion in r 1.9 can be exercised to allow an amendment that introduces a new time-barred cause of action. However, we make the following observations.

[13] We are not aware of any New Zealand case where a court has permitted an amendment that introduces a fresh time-barred cause of action. There have been some references in earlier cases to a discretion to allow such amendments in "exceptional" or "peculiar" circumstances.[5] Australia and England have specific rules that provide for such amendments in certain circumstances, for example when the new cause of action arises out of substantially the same facts as the originally pleaded cause of action and there is no prejudice to the other side in terms of preparation of its case.[6] There is no equivalent rule in New Zealand. In *Chilcott v Goss* this Court thought it "unlikely" that a time-barred cause of action would be allowed under the equivalent of r 1.9 when it was prohibited under the equivalent of r 7.77.[7]

[14] Although it is not directly applicable in the present case, the Limitation Act 2010 contains specific provision for a court to order that relief be available in respect of an "ancillary claim" as if no limitation defence applies to it, if the court thinks it just to do so.[8] This applies where the original cause of action is not time-barred, but the ancillary claim is or could be. The definition of "ancillary claim" includes "a claim that relates to, or is connected with, the act or omission on which the original claim is based", and includes a claim that is added to the original

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5 *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958 (SC) at 959; and *Weldon v Neal* (1887) 19 QBD 394 (CA) at 395.

6 The Civil Procedure Rules 1998 (UK), r 17.4. For Australia see Civil Procedure Act 2005 (NSW), s 65; Supreme Court (General Civil Procedure) Rules 2015 (Vic), r 36.01(6); Uniform Civil Procedure Rules 1999 (Qld), r 376(4); Supreme Court Rules 2000 (Tas), r 427(2A); and Supreme Court Civil Rules 2006 (SA), r 54(8).

7 *Chilcott v Goss* [1995] 1 NZLR 263 (CA) at 273.

8 Limitation Act 2010, s 50.

claim.[9] However, the present proceedings fall under the Limitation Act 1950, which contains no equivalent provision.

[15] Clifford J did not reach a final position on this issue, and the issue was not fully argued before us. We conclude that it is not necessary to express a final view on this.

**The High Court decision**

[16] Clifford J acknowledged that in his view the circumstances favoured the Owners' application, but focused primarily on the issue of whether there was a fresh cause of action. Before giving his reasons he summed up his conclusions:

> [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.

[17] He found that the amendments in the Second CSC did not amount to the pleading of a new cause of action. Therefore, the limitation argument was not available to ISP.[10] He noted that the central factual allegation remained that ISP undertook the work, defined in identical terms in each of the First and Second CSCs, negligently.

[18] He held that the details of further defects were a particularisation of facts, rather than a change to the legal basis for the claim.[11] Moreover, the damages claimed in the First and Second CSCs were substantially the same.[12] He stated that it would be "somewhat ironic" if, having successfully sought to be removed from the Second WHRS Weathertightness Proceeding on the basis of duplication with the 2010 Structural Proceedings, ISP could now substantially avoid liability for structural defects because of the Owners' error in the First CSC.[13] Given that the

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9 Section 4.
10 *Body Corporate 89408 v MacRitchie*, above n 1, at [46].
11 At [45].
12 At [44].
13 At [20].

amendments did not amount to the pleading of a new cause of action, ISP could not rely on limitation.[14] There was no basis for objecting to the Second CSC.

**Fresh cause of action?**

[19] The issue before Clifford J was an application by the Owners for an amendment under r 1.9. However such an application was unnecessary. If there was no fresh cause of action rr 1.9 and 7.77 did not arise, as parties could amend as of right before the close of pleadings date. As Clifford J noted, the issue before him was akin to an application by ISP to strike out the challenged part of the Second CSC.[15] The question to be determined was whether the Second CSC pleaded a new cause of action. If no new cause of action was pleaded, no issue of limitation arose and the amendment would be allowed.

[20] We accept Mr Ring QC's submission that the Second CSC must be considered without reference to the pleadings prior to the First and Second CSCs. A new pleading must render the pleading it replaces inoperative. It no longer has any legal effect.[16] This approach must apply equally to a consolidated statement of claim. Therefore, it is irrelevant, in considering whether there is a fresh cause of action, that structural defects not pleaded in the First CSC were included in the pleadings prior to consolidation, thereby putting ISP on notice of those allegations.

[21] What constitutes a fresh cause of action in the context of the predecessor of r 7.77 has been considered in a number of New Zealand cases. The relevant principles set out in *Ophthalmological Society of New Zealand Inc v Commerce Commission*[17] were summarised in *Transpower New Zealand Ltd v Todd Energy Ltd*:[18]

> (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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14 At [46].
15 At [54].
16 *Price Waterhouse v Fortex Group Ltd* CA179/98 30 November 1998 at 17. See also *Warner v Sampson* [1959] 1 QB 297, [1959] 2 WLR 109 (CA) at 129–130.
17 *Ophthalmological Society of New Zealand Inc v Commerce Commission* CA168/01, 26 September 2001 at [22]–[24].
18 *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61].

(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 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)).

[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?[19] The assessment is objective and the consideration must be of the substance of what is pleaded, rather than the form.

[23] If an amended pleading puts forward a new legal basis for a claim, that will be on its face a new cause of action. That consideration does not arise in this case. The legal basis for the claim, breach by ISP of its duty of care, remains the same. The fact that there may be a separate limitation regime for weathertightness issues under the WHRS Act does not change the legal basis of the claim.

[24] In relation to new facts, McCarthy J stated in *Smith v Wilkins & Davies Construction Co Ltd*:[20]

> On the other hand, more often alterations of fact do not affect the essence of the case brought against the defendant. Lord Wright said of a certain

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[19] The same approach was adopted in *Smith*, above n 5, at 961, and approved in *Chilcott*, above n 7, at 273 and *Opthamological Society*, above n 17, at [23]–[24].

[20] *Smith*, above n 5, at 961 (footnotes omitted) (emphasis added).

> alteration "in my view, therefore, the proposed amendment would, if allowed, have set up a new cause of action, involving quite new considerations, quite new sets of facts, and quite new causes of damage and injury, and the only point of similarity would be that the plaintiff had suffered certain injuries". I do not read that passage as implying a prohibition against any alteration of the facts. In each case it must, I consider, *be a question of degree*.

[25] 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?[21] 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.[22]

[26] Significant new facts were pleaded by the Owners in the Second CSC, as they inserted structural allegations that had been included but were mistakenly omitted in the First CSC. This appeal demonstrates how, in the end, the assessment of whether there is a fresh cause of action can come down to a question of degree. Both of the Owners' statements of claim initially set out a general duty of care. It is alleged that ISP owed the Owners a duty to exercise care and skill as the engineers responsible for the construction of the apartments. There is no distinction drawn, in the words used, between weathertightness and structural responsibilities. The "Engineering Work" pleaded is the same in both.

[27] In the First CSC there is a schedule setting out "Weathertightness Defects" and a schedule summarising defects in the cladding/timber subframing (Third Schedule). In the Second CSC there is an added schedule of "Structural Defects" and the pleaded damage is extended to particulars of "Structural Damage". Save for the reference to the particulars of structural damage, the pleading remains much the same.

[28] In listing the defects the introductory phrase of the First CSC contained the words "including, but not limited to". Likewise, in listing the damage the introductory phrase also stated "including, but not limited to".

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21 *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383 at [142].

22 *Attorney-General v Carter* [2003] 2 NZLR 160 (CA) at [48].

[29] Importantly, the summary of defects in the Third Schedule of the First CSC included reference to a number of defects that were structural in nature, which resulted in weathertightness defects. There was reference in the Third Schedule in the First CSC to timber framing that was inadequate to meet wind-loading requirements for cladding at the height of installation; to mixed installation with areas of studs set on edge and others set on the flat; and to the timber subframe being mechanically fixed or wedged to an adjacent building for support and with no allowance for a seismic gap. In relation to the roofdeck, there is mention of "timber furring supporting plywood substrate set out with no relation to the supporting timber joists promoting excess movement to plywood weakening and opening joints". Some of the other pleaded "Weathertightness Defects" appear to have a structural element. It is further pleaded in the First CSC that as a result of the defects and damage, certain works have to be done and these include "structural strengthening".

[30] Therefore, it is our overall reading of the First CSC that, while it is focused on weathertightness issues, it is not expressed to be exclusively directed at such issues, and contains specific reference to defects of a structural nature. It is against this background that we consider the argument that the Second CSC includes a new cause of action.

[31] There is no doubt that the Second CSC, unlike the First CSC, divides the allegations of defects and damage into weathertightness and structural defects and damage, and includes a lot more particulars of structural defects and damage, including a new schedule entitled "Structural Defects". However, apart from the addition of the schedule, the Second CSC maintains the same general structure and core allegation, being breach of a duty of care resulting in a variety of defects and damage, as the First CSC.

[32] The First CSC cannot be said to be limited to weathertightness issues. The pleaded cause of action contains no such limitation, and refers to a number of express structural defects that we have referred to. Although form is not conclusive, the structure of the Second CSC has remained the same as the First CSC, and the Second CSC does not in its form set out a new or fresh cause of action. More

importantly the weathertightness and structural categories of defect are to an extent causally linked, and there is likely to be some overlap in the remedial work required.

[33] We note the case of *Ophthalmological Society of New Zealand Inc v Commerce Commission* in which the majority, Richardson P and Blanchard J, held that despite there being no particular change in the form of the pleading, a new cause of action was pleaded where the size of the market pleaded was extended from Southland to the whole of New Zealand.[23] The pleading of a national market rather than a limited one was coupled with a different and more wide-ranging allegation concerning the nature of the proposed arrangement or understanding. The majority concluded that it was a new cause of action.[24] However, the difficulty of the assessment was illustrated by the fact that Gault J dissented, and regarded the changes as inconsequential.[25] We do not consider that the addition of further structural defects in the Second CSC is akin to the situation in *Ophthalmological Society*. Here, although the Second CSC enlarged the claim, it did not do so to such a degree as to create a new cause of action.

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

[35] Mr Ring relied on a number of weathertightness cases where, in relation to a negligence claim, and notwithstanding that a duty could be pleaded generally in relation to the allegations of negligence, it was held that discrete losses discovered

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23 *Opthamological Society*, above n 17.
24 At [32].
25 At [48].

on successive occasions can give rise to separate causes of action for limitation purposes.[26] These cases recognise there will be separate causes of action if the same acts of negligence cause discrete damage and that damage is discovered on successive occasions. Mr Ring referred to the statement in *Bowen v Paramount Builders (Hamilton) Ltd* adopting a passage in *Salmond on Torts* stating, "successive actions will lie for each successive and distinct accrual of damage."[27]

[36] Whether facts are capable of giving rise to a fresh cause of action for limitation purposes is a different issue than the issue to be decided in the present case, which is whether the amendment to the pleading amounted to a new cause of action. These two distinct areas, the start point for limitation periods and the amendment of pleadings, involve an examination through a different lens. Significantly, in this case, the claim of structural defects plainly cannot be said to be successive and distinct. The structural defects and weathertightness defects were closely interrelated. This is clear from the First CSC, which states that structural defects were a cause of weathertightness issues. Structural defects were pleaded within time in the First CSC. The Second CSC expands that pleading by adding more particulars of the core allegation of negligence.

[37] Mr Ring submitted that, if the weathertightness and structural claims were treated as a single cause of action, and ISP had concluded their weathertightness claim before discovering the structural defects, they would have been precluded from running their structural defects claim by res judicata. He submitted that this would be an inconceivable result, and that the structural allegations must therefore be treated as a separate cause of action. We do not accept that submission, as again the tests for res judicata and that for amendment are different. Moreover, we do not accept that, in Mr Ring's counterfactual, res judicata could necessarily be successfully raised to prevent the bringing of the structural claim. It would depend on all the circumstances of the later proceeding.

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[26] *Colby v Pinnock* HC Auckland CIV-2011-404-3743, 16 December 2011; *Burns v Argon Construction Ltd* HC Auckland CIV-2008-404-7316, 18 May 2009; *Cameron v Stevenson* HC Napier CIV-2009-441-437, 5 November 2009; and *Kay v Dixon Lonergan Ltd* HC Auckland CIV-2005-483-201, 31 May 2006.

[27] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 424.

## Conclusion

[38] We conclude, therefore, that both the legal basis and the essential area of factual enquiry of the Owners' claim against ISP in the First and Second CSCs are the same. The Second CSC merely provided further particulars in respect of the originally pleaded cause of action in negligence. The pleading is part of the originally pleaded claim, which was lodged within the limitation period. Therefore the basis of what was effectively an application for strike-out by ISP has not been made out, and the appeal cannot succeed.

[39] In those circumstances, as we have stated, like Clifford J we do not consider it necessary to determine whether under r 1.9 the court could exercise its discretion in favour of amendment even where the amendment would introduce a new time-barred cause of action. We leave open the particular question of whether the court could allow an amendment under r 1.9 where, upon consolidation of statements of claim, an inadvertent error excludes a cause of action pleaded previously, and raises a limitation issue.

## Result

[40] The appeal is dismissed.

[41] Costs should follow the event. The appellant must pay the respondents costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Robertsons, Barristers and Solicitors, Auckland for Appellant
Grimshaw & Co, Wellington for Respondents