IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2018-404-2053
[2020] NZHC 1701

IN THE MATTER OF	Washington Apartments
BETWEEN	BODY CORPORATE 378351 First Plaintiff
	CATHERINE RACHEL KEMP & ORS Second Plaintiffs
AND	AUCKLAND COUNCIL First Defendant
	DOWNER NEW ZEALAND LIMITED Second Defendant

…Cont over

Hearing:	5 December 2019
Appearances:	TJ Rainey & G Grant for the Plaintiffs TC Weston QC and SB Mitchell for the First Defendant LL Fraser and Z Wall-Manning for Ninth Third Party CJ Booth for the Twelfth Third Party
Judgment:	15 July 2020

RESERVED JUDGMENT OF ASSOCIATE JUDGE SMITH

This judgment was delivered by me on 15 July 2020 at 3pm pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Solicitors/Counsel:
Rainey Law, Auckland
Heaney & Partners, Auckland
Bell Gully, Auckland
Chapman Tripp, Auckland
Kensington Swan, Auckland
Chancery Chambers, Auckland

STEPHEN MITCHELL ENGINEERS LIMITED
First Third Party

STEPHEN ROBERT MITCHELL
Second Third Party

MAXINE BRANNIGAN
Third Third Party

WOODHAMS MEIKLE ZHAN ARCHITECTS LIMITED
Fourth Third Party

MICHAEL JOHN STEPHEN WOODHAMS – Discontinued
Fifth Third Party

JEFFREY LAWRENCE BIRD
Sixth Third Party

FAÇADE DESIGN SERVICES LIMITED
Seventh Third Party

RONALD CHARLES HANLEY
Eighth Third Party

BECA CARTER HOLDINGS & FERNER LIMITED
Ninth Third Party

BRIAN CHIN
Tenth Third Party

RACHEL CARTER
Eleventh Third Party

STAHLTON PRESTRESSED CONCRETE an operating division of Fulton Hogan Limited
Twelfth Third Party

… Cont over

BRADNAM'S WINDOWS & DOORS
an operating division of Altus NZ Limited
Thirteenth Third Party

WARWICK BELL – Discontinued
Fourteenth Third Party

GAVIN SMITH
Fifteenth Third Party

[1] There are three applications before the Court. First, the first defendant (the Council) applies to strike out parts of the plaintiffs' amended statement of claim. Secondly, the ninth third party (Beca) applies for orders striking out the Council's third party claim against it. Thirdly, the twelfth third party (Stahlton) applies for orders striking out the Council's claim against it. In the alternative, Stahlton applies for summary judgment on the claims against it.

The plaintiffs' amended statement of claim dated 12 April 2019 ("the Claim")

[2] The plaintiffs sue the Council in relation to a residential development complex in Eden Terrace, Auckland, known as the Washington Apartments ("the development"). The first plaintiff is the body corporate for the development, and the second plaintiffs are proprietors of residential apartments in the development.

[3] The Council issued all relevant building consents for the development, and it carried out inspections on the building work during the course of construction. On 17 May 2007, the Council also issued its Code Compliance Certificate ("the CCC") in respect of the building work, confirming that it met the performance requirements of the Building Code.

[4] The second defendant (Downer) is said to have carried out certain waterproofing work at the development, for which it issued a Producer Statement in February 2007.

[5] The plaintiffs contend that the building work was subject to a number of weathertightness defects. On 11 July 2013, the first plaintiff applied to the Weathertight Homes Resolution Service (the WHRS) for an assessor's report in respect of the development.

[6] On 15 January 2014, a WHRS assessor, Mr Bolderson, issued a report identifying weathertightness defects in the development and confirming the existence of an eligible claim under the Weathertight Homes Resolution Services Act 2006 (WHRSA).

[7] The plaintiffs say in the Claim that subsequent investigations carried out at the request of the first plaintiff have revealed the existence of defects which have resulted in moisture ingress and damage to the development. They say they have incurred actual repair costs to date, for Stage 1 of the repair work, in the sum of $3,381,871.70. The total cost of Stage 2 repairs is estimated to be approximately $10,009,766.83. Various other losses are claimed by the plaintiffs.

[8] The plaintiffs sue the Council in negligence. They say that the Council owed the plaintiffs a duty to exercise reasonable skill and care in performing its statutory building control functions under the Building Act 2004, in particular:

> (a) Processing the Building Consent application and issuing the Building Consent and amendments to that consent;
>
> (b) Inspecting the building work to ensure compliance with the Building Consent and the Building Code;
>
> (c) Issuing the CCC.

[9] The plaintiffs say that the Council failed to exercise reasonable skill and care in the following respects:

> (a) The Council issued the Building Consent when the plans and specifications failed to provide sufficient detail to allow a reasonably skilled and prudent Council officer to be satisfied on reasonable grounds that the proposed building work would comply with the relevant manufacturer's technical requirements/guidelines and following clauses of the Building Code:
>
> (i) B1 – Structure;

(ii) B2 – Durability; and

(iii) E2 – External moisture.

(b) The Council failed to carry out a sufficient number of inspections or to ensure the inspections that were carried out were undertaken with sufficient thoroughness, to ensure that the building work complied with the requirements of the Building Consent and/or the provisions of the Building Code (as particularised in Schedule 3).

(c) The Council failed to identify the defects during the course of its inspections of [the development].

(d) The Council failed to take reasonable steps to ensure the defects were rectified during construction of [the development].

(e) The Council issued the CCC notwithstanding that as at 17 May 2007, [the development] had the defects, all of which ought to have been identified by a reasonably skilled and prudent Council officer undertaking the inspections of the building work, and notwithstanding that the Council did not have sufficient grounds to be satisfied that the building work would comply with the performance requirements of the Building Code; and

(f) As fully particularised in Schedule 3 to [the Claim].

[10] The plaintiffs contend that, as a result of the Council's breaches of its duty of care, the development was built with the damage pleaded, and in breach of the following performance requirements of the Building Code:

(i) B1 – Structure;

(ii) B2 – Durability; and

(iii) E2 – External moisture.

[11] Particulars of the alleged defects, and the damage allegedly caused by each defect, were set out in Schedule 3 to the Claim.

[12] Schedule 3 to the Claim included the following allegations of structural defects in the development ("the structural defects"):

(a) Defect 6.1 – Timber framed construction lacks adequate connections and bracing capacity. The level four construction comprised timber frame wall and roof construction. The Structural Engineer discovered that the internal and external walls lacked adequate structural connection to the ceiling and/or roof framing to provide adequate bracing capacity required to resist design wind or earthquake loads.

(b) Defect 6.2 – Timber framed infill walls lack adequate connection to the concrete structure. The infill wall framing lacked adequate connections to secure the framing to the reinforced concrete structure. The Structural Engineer required additional fixings to cover adequate connections where provided in accordance with good trade practice.

(c) Defect 6.3 – Hollow core slab structurally compromised. A number of hollow core slabs over the ground and first floor carports were observed to have significant gaps to the bottom flange of the hollow core units. The cause of the defect was identified by the Structural Engineer to be related to poor vibration of the units during manufacture.

[13] These structural defects had not been pleaded before the plaintiffs filed the Claim on 12 April 2019.

[14] Schedule 3 to the Claim also included the following alleged fire defects ("the fire defects"):

> Defect 7.1 – Services through fire rated walls and floors have not been installed per the manufacturer's requirements and have incorrect or no fire stopping system applied;
>
> Defect 7.2 – Intertenancy fire rated wall and concrete floor junctions are inadequately fire stopped;
>
> Defect 7.3 – Intertenancy wall construction does not extend to the external wall framing/concrete wall construction;
>
> Defect 7.4 – Fire rated wall construction is incomplete;
>
> Defect 7.5 – External cavity wall construction are not vertically subdivided with construction needed to prevent the passage of fire and smoke;
>
> Defect 7.6 – The external cavity walls are not horizontally subdivided with construction needed to prevent the passage of fire;
>
> Defect 7.7 – Ventilation ducts have inadequate passive fire protection;
>
> Defect 7.8 & 7.9 – Fire door installation will not meet the required Fire Resistance Design rating;
>
> Defect 7.10 – Sprinkler pipe fire protection will not achieve the design fire rating requirement

> Defect 7.11 – Inadequate ventilation needed to remove smoke from the internal vertical safe paths.

[15] Again, the alleged fire defects had not been pleaded before the Claim was filed.

The Council's strike-out application

[16] The Council applies to strike out the plaintiffs' allegations relating to some of the alleged defects, on the basis that the damages claims arising from these alleged defects are out of time under the "longstop" 10 year limitation period contained in s 393 of the Building Act 2004. The parts of the Claim the Council wishes to have struck out relate to the structural defects and the fire defects. The Council says these are not weathertightness defects to which the Weathertight Homes Resolution Services Act 2006 (WHRSA) applied, and the first plaintiff's application to the WHRS in July 2013 for an assessor's report did not "stop the clock running" for limitation purposes for anything other than weathertightness claims.

[17] It was common ground between the parties that the making of the application under s 32 of the WHRSA for an assessor's report had the same effect for limitation purposes as if it were the filing of a proceeding in court. That is the broad effect of s 37 of the WHRSA, which provides:

> **37 Application of Limitation Act 2010 to applications for assessor's report, etc**
>
> (1) For the purposes of the Limitation Act 2010 (and any other enactment that imposes a limitation period), the making of an application under section 32(1) has effect as if it were the filing of proceedings in a court.
>
> (2) This section is subject to sections 54, 133, 141, 146, 152, and 155.

[18] In *Lee v Whangarei District Council*, the Supreme Court held that an application for an assessor's report under the WHRSA stops time running for limitation purposes not only in respect of claims that proceed under the WHRSA (that is, claims that proceed to adjudication by the Weathertight Homes Tribunal), but for all subsequent court proceedings.[1] However, the Supreme Court was not concerned in *Lee* with the question of whether s 37 of the WHRSA stops time running for court claims to recover damages for non-weathertightness defects.

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1 *Lee v Whangarei District Council* [2016] NZSC 173, [2017] 1 NZLR 401 at 402.

[19] Mr Weston identified this as the central issue on the Council's strike-out application. He submitted that s 37 does not have the effect of stopping time running for non-weathertightness claims, even if, in order to obtain a Code Compliance Certificate for work required to repair weathertightness defects, the owner is also required to remedy the non-weathertightness defects. In this case, the Council did not carry out any relevant building work after it issued the CCC, and the claims in respect of the structural defects and the fire defects were not made until April 2019, nearly 12 years after the CCC was issued on 17 May 2007. On that basis, the Council says the Claim, insofar as it seeks relief in respect of the structural defects and the fire defects, is statute-barred under s 393 of the Building Act 2004.

The plaintiffs' notice of opposition

[20] In their notice of opposition, the plaintiffs oppose the strike-out application on the following grounds:

(1) The proceeding is not time-barred, because of s 37 of the WHRSA.

(2) The relief sought in relation to the structural defects and the fire defects is consequent on the penetration of water into the building.

(3) The inclusion of the structural defects and the fire defects do not give rise to a fresh cause of action.

[21] The plaintiffs say that the addition of the structural defects and the fire defects in the Claim amounted to no more than the provision of further particulars of the claims against the defendants.[2] It did not give rise to a "fresh cause of action" against them. On that basis, the plaintiffs say that the claims in respect of the structural defects and the fire defects are deemed to have been commenced when the cause of action of which they formed part was commenced, namely on 11 July 2013 when application for the assessor's report was made.

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2 Further particulars of the breaches of the duty of care alleged by the plaintiffs, and further particulars of the loss said to have been caused by those breaches.

[22] The plaintiffs say that the structural and fire defects were all discovered in the course of undertaking remedial work to repair the weathertightness defects, during Stage 1 of the remedial works on the development. In order to repair the weathertightness defects, it was necessary for the plaintiffs to obtain an amended Building Consent for those repairs so that the non-weathertightness defects could also be remedied (the Council had to be satisfied that the completed remedial work for Stage 1 would comply with the Building Code). The repair of the non-weathertightness defects is part and parcel of the repair of the weathertightness defects, and cannot be severed from the plaintiffs' claim.

[23] The plaintiffs say that there was no delay in amending their claim to include the structural defects and the fire defects, and the Council has not been prejudiced by their inclusion in Schedule 3 to the Claim.

[24] Whether or not the addition of the structural defects and the fire defects amounted to the pleading of a new cause of action, the plaintiffs say that in any event the effect of s 37 of the WHRSA was to stop the clock for the purposes of limitation on all claims they might have had relating to the development, regardless of the nature of the defects giving rise to the claims, and regardless of whether the claims were known or unknown as at the date the application for the assessor's report was made. The proceeding (including the third party claims) is deemed to have been brought when the application for the assessor's report was made on 11 July 2013, and was accordingly filed within the 10 year longstop limitation period.

Evidence for the plaintiffs

[25] The plaintiffs notice of opposition was supported by an affidavit of Mr Martin Hill, a chartered building surveyor. Mr Hill expressed the opinion that the structural defects and the fire defects were required to be repaired as a consequence of the pleaded weathertightness defects. The necessary repair work was identified in (i) the assessor's report and (ii) in subsequent assessments and investigations of the development made by Mr Hill's company.

[26] Mr Hill said that, from the outset of a building remediation process, it is understood that unknown latent defects may be found to be present in buildings with defects. It is understood that the Building Consent for the remedial work may require amendment, or minor variation, as further defects are found.

[27] Mr Hill expressed the view that professionals involved in remedial weathertightness work cannot simply do the work originally prescribed by the Building Consent for the remedial work, and ignore any new defects they discover. The Council would typically refuse to pass inspections if such latent building defects were not addressed and rectified.

[28] Mr Hill gave the example of a Ministry of Business, Innovation and Employment (MBIE) determination under s 112 of the Building Act 2004, which confirmed that a territorial authority would be properly exercising its powers, consistent with s 112 of the Building Act, if it required the remediation of latent fire defects that were uncovered in the course of carrying out weathertightness repairs, even if the remediation of the latent fire defects was not part of the original Building Consent.[3]

[29] The MBIE determination contained the following statement:

> It is not an uncommon scenario when alterations are being carried out for additional information to come to light during construction and for authorities to become aware of matters of non-compliance in the existing building work. At that point the relevant authority must consider whether there is a requirement to address the defects for one of the following reasons:
>
> - the consented building work is reliant on the performance of existing building elements to achieve compliance with the Building Code
>
> - the existing non-compliance will affect the compliance of the consented building work in other ways (that are not related to the building work being reliant on the existing building work)

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3 MBIE determination 2016/048 (Shirley Road Determination).
Regarding the requirements under s 112 to remediate the fire separation between units in an apartment complex, and the compliance of the proposed solution at 287-289 Shirley Road, Papatoetoe, Auckland (Ministry of Business, Innovation and Employment, Determination 2016/048, 3 October 2016) at 8.2.7.

- the existing non-compliance is required to be addressed under s 112
- The defects are such that the building is dangerous, insanitary or earthquake prone

[30] Specifically with respect to fire defects, Mr Hill drew attention to the requirement in s 112 of the Building Act that building work must comply "as near as reasonably practicable" with the requirements of the Building Code concerned with means of escape from fire. He said that, in practice, that means that councils will not permit a building consent to be issued unless the requirements of Clause C of the Building Code – Fire – are met with new work for parts of the building not directly affected by the proposed remedial works.

[31] Mr Hill also said that he is aware that MBIE, through the Financial Assessment Package ("the FAP") takes the view that any work (including structural or fire-related) that is consequential on the need to do weathertightness repairs may be the subject of compensation under the FAP. Had the first plaintiff chosen to apply under the FAP in this case, Mr Hill considered it highly likely that MBIE would have considered the structural defects and the fire defects as being defects that were required to be remediated as a consequence of the weathertightness work. The defects would have been included in the Crown's contribution under the FAP.

[32] Mr Hill discussed the particular defects which are the subject of the Council's strike-out application. He expressed the view that it would not have been possible to complete the weathertightness repairs without also fixing the structural defects.

[33] The repairs to the wall framing were said to be necessary to ensure the structure met the requirements of the Building Code, and to ensure the structural and façade engineers were confident that the building works complied with the Building Consent. In Mr Hill's view, the remediation work could not proceed until the structure to which the cladding was attached was sound.

[34] The fire defects were all identified during Stage 1 of the remedial works. Mr Hill said that in each case the fire defect was either resolved as part of the approved design, or the defect was uncovered during the course of Stage 1 weathertightness remediation work. With respect to the defects discovered during the remedial works,

the Council exercised its powers (consistent with s 112 of the Building Act and the Shirley Road Determination), and did not permit the building work to continue without these defects being addressed.

[35] In the main, the structural defects and the fire defects were addressed through minor variations to the existing consent.

The Council's third party claims

[36] At the same time it filed its strike-out application, the Council issued third party proceedings seeking contribution from a number of third parties, including the parties it says were responsible for creating the structural defects and the fire defects. Beca is alleged to have been responsible for the fire defects, and Stahlton for one of the structural defects. As noted above, Beca and Stahlton have each filed applications to strike out the third party claims (and, in the case of Stahlton, for summary judgment on the Council's claims against it).

The applications by Beca and Stahlton and the Council's notices of opposition

[37] In its strike-out application, Beca contends that all of the Council's claims against it concerned "building work" to which the 10-year longstop limitation provisions in s 91 of the Building Act 1991 and/or s 393 of the Building Act 2004 applied. Under those sections, no relief may be granted in respect of building work if proceedings are not brought against the defendant within 10 years from the date of the act or omission on which the proceedings are based.

[38] Beca says that its relevant acts or omissions all occurred on or before 17 May 2007, being the date on which the Council issued the CCC for the development. As the Council's claim against Beca was not filed until 14 June 2019, the claim is time-barred under the 10-year limitation period.

[39] Beca also pleads that the fire defects are non-weathertightness defects. Subject to the application by the Council to strike out the allegations in the Claim relating to the fire defects, Beca contends that s 37 of the WHRSA has no application to the Council's claim against it in relation to the fire defects. It says that the WHRS has no

jurisdiction over non-weathertightness defects, and specifically had no jurisdiction over the fire defects. Thus s 37 of the WHRSA did not stop time running for the purposes of s 91 of the Building Act 1991 and/or s 393 of the Building Act 2004.

[40] The Council opposes Beca's strike-out application, but only to the extent its own application to strike out relevant parts of the Claim may be declined.

[41] Stahlton's strike-out/summary judgment application relies essentially on the same grounds pleaded by the Council in its application to strike out the structural defects allegations.

[42] Stahlton says that the claims against it are also based on alleged acts or omissions which occurred before the CCC was issued on 17 May 2007. The Council's causes of action against it are statute-barred under s 393 of the Building Act 2004, as the claims were not brought until the Council filed its third party claim on 14 June 2019.

[43] In its (alternative) application for summary judgment, Stahlton says that, as the Council cannot succeed on any of its causes of action against it, judgment should be entered for Stahlton. In relation to the hollow core precast cement slabs (alleged Defect 6.3), Stahlton's involvement in the development was limited to the design, manufacture and delivery of the slabs; it did not extend to their installation or to the supervision or observation of their installation. It was the builder who installed the slabs and performed additional work on or adjacent to them, and any liability of Stahlton for the hollow core slabs ceased when the builder took delivery of them. All of that took place before the CCC was issued.

[44] The Council opposes the strike-out/summary judgment application by Stahlton on similar grounds to those advanced in opposition to Beca's strike-out application. Stahlton's application is only opposed if and to the extent that the Council's own strike-out application against the plaintiff is declined. In the event the Court should find that any claim by the plaintiffs against the Council in respect of Defect 6.3 is not time-barred under s 393 of the Building Act 2004, then the claim by the Council against Stahlton in respect of the same defect is similarly not time-barred.

The judgments of Associate Judge Bell and the Court of Appeal in *Body Corporate 202692* (*Retro Apartments*) *v Auckland Council*

[45] The principal issue identified by Mr Weston was very recently considered by Associate Judge Bell in *Body Corporate 202692 v Auckland Council* (*Retro Apartments*), a case concerned with the Retro Apartments in Brown Street, Auckland.[4] Associate Judge Bell declined leave to appeal from his principal decision in *Retro Apartments*,[5] and on 11 December 2019 the Court of Appeal dismissed an application made under s 56(5) of the Senior Courts Act 2016 for leave to appeal against the Associate Judge's decision.[6]

The first Retro Apartments decision

[46] The plaintiffs in *Retro Apartments* were the body corporate and the individual apartment owners in a residential apartment building in Ponsonby. They sued Auckland Council for negligence in inspection work and issuing a CCC under the Building Act 1991. A structural engineering firm and its director had been added as third parties, on the basis of an allegedly negligent producer statement for the development.

[47] Leaking issues arose at the development, and in June 2011 the body corporate applied for an assessor's report under s 32 of the WHRSA. The assessor's report was issued in May 2013, and it found that the body corporate had an eligible claim under the WHRSA.

[48] More than 10 years after the Council had issued the CCC for the development, the plaintiffs discovered other defects in the building going to structural integrity and fire safety. Auckland Council required those defects to be remedied as a condition of issuing a building consent to fix the weathertightness defects. The Court approved a scheme under s 74 of the Unit Titles Act 2010 to carry out remedial works, and the repairs were completed at a cost of $9,000,000. The Court proceeding was commenced in September 2017.

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4 *Body Corporate 202392 v Auckland City* [2019] NZHC 1976.
5 *Body Corporate 202692 v Auckland Council* [2019] NZHC 2696.
6 *Auckland Council v Body Corporate 202692* [2019] NZCA 635.

[49] As in this case, there was no issue between the parties that s 37 of the WHRSA applied to the plaintiffs' claims for weathertightness defects, and the proceeding was filed in time to the extent that relief was sought for those defects. The issue with which the Associate Judge was concerned was essentially the same issue I am being asked to decide on this application: what was the limitation position in respect of the plaintiffs' claims relating to structural integrity and fire safety? The claims relating to those defects were made long after the expiry of the longstop limitation period in s 393 of the Building Act 2004.

[50] Associate Judge Bell summarised his conclusion on the legal issue as follows:[7]

> [5] Superficially it might seem that s 393 of the Building Act and s 37 of the [WHRSA] can be reconciled. One limitation rule applies to weathertightness defects in homes and the other to all other defects. But in practice they cannot be made to work together. Where a home has weathertightness and other defects and the owners co-ordinate repairs and proceedings, one of the rules has to give. Parliament has not said how this is to be solved. Deciding which one is not so much a matter of statutory interpretation as making a judgment by considering the purposes of the inconsistent provisions and the weight to be given to them to work out which should prevail. In my judgment s 37 applies to all cases of eligible claims under the [WHRSA] in proceedings in this court against those defendants alleged to be liable for both weathertightness and other defects, even if the limitation period under s 393 of the Building Act has passed.

[51] The Associate Judge noted that it is common to see overlapping defects and damage, and, as a matter of practicality, owners tend to deal with all defects together. He expressed the view that it would be "awkward", and would "not make sense", if owners had to sue separately for water penetration and other defects, when all defects will be remedied at the same time.[8] The difficulty with the issue was that Parliament had not said how to deal with cases where both leaks and other defects in a house need to be addressed at the same time, when there are different limitation rules which serve competing purposes – one to give owners generous time to bring claims, and the other to set a time limit so that those involved in construction are released from claims after a longstop period.[9] The Associate Judge concluded that Parliament had left the Court

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7 *Body Corporate 202392 v Auckland Council*, above n 4, at [5].
8 At [35].
9 At [39].

to work out whose interests should prevail, even if that meant deciding matters of policy.[10]

[52] In the end, the Associate Judge appears to have grounded his decision on the solution that appeared to him to be more sensible, just and practical (as opposed to rigidly applying the longstop under s 393). In so doing, he expressly disclaimed any suggestion that he was giving effect to the intention of the legislature – that would, as he put it, have been artificial.[11]

The application to the High Court for leave to appeal

[53] On 21 October 2019, the Associate Judge refused an application for leave to appeal to the Court of Appeal. The decision to refuse leave appears to have been influenced significantly by the fact that a trial of the proceeding was scheduled to commence on 4 May 2020. However His Honour did note that the plaintiffs had filed a further amended statement of claim, specifically pleading that the claimed structural defects were connected with the weathertightness defects.[12] He noted that he had assumed in giving his judgment that the structural and fire safety defects were distinct from and unconnected with the water penetration defects (as the plaintiffs had pleaded). The plaintiffs might be able to prove at trial that the fire safety and structural defects were related to water penetration defects, or the defendant and the third parties might be able to show that the structural defects and fire defects could be repaired independently of other defects.[13]

The application for special leave to appeal

[54] Auckland Council and the engineer then sought special leave to appeal to the Court of Appeal, under s 56(5) of the Senior Courts Act 2016. That application was declined in a judgment given by the Court of Appeal on 11 December 2019.[14]

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10 *Body Corporate 202392 v Auckland Council*, above n 4, at [41].
11 At [50].
12 *Body Corporate 202692 v Auckland Council*, above n 5, at [4].
13 At [12].
14 *Auckland Council v Body Corporate 202692*, above n 6.

[55] The Court of Appeal accepted that the proposed appeal raised important issues, which required analysis of the extent, if any, to which s 37 of the WHRSA impacted on the limitation provisions of the Building Act, and the extent to which the Supreme Court's judgment in *Lee v Whangarei District Council* applied in the circumstances of the case.

[56] However, the Court refused leave on three briefly stated grounds.

[57] First, there remained unresolved factual issues about the extent to which the structural and fire safety defects were interconnected to the weathertightness issues. The Court noted that the body corporate had submitted that the repairs to the structural and fire safety defects were necessary in order to remedy the weathertightness defects in the apartment building, so that the cost of the structural and fire safety repairs formed part of the cost of repairing the weathertightness defects. That aspect of the body corporate's claim would require careful assessment of the evidence adduced at trial.[15]

[58] The second consideration was that, while the factual and legal issues associated with the structural and fire safety defects would add to the time and cost of the trial, that concern was outweighed by the prejudice the body corporate would suffer if the trial were delayed pending the hearing of an appeal.[16]

[59] The third consideration was that it was open to Auckland Council and the engineer to advance the arguments they wished to pursue at the trial, and any subsequent appeal they might consider necessary if they were held liable for the structural and fire safety defects.[17]

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15 *Auckland Council v Body Corporate 202692*, above n 6, at [14(a)].
16 At [14(b)].
17 At [14(c)].

Application by a defendant to strike-out all or part of a plaintiff's statement of claim – legal principles

[60] Rule 15.1 of the High Court Rules 2016 provides that the Court may strike out all or part of a pleading if it discloses no reasonably arguable cause of action, or case appropriate to the nature of a pleading, or is likely to cause prejudice or delay.

[61] The following principles have been established by the Supreme Court:[18]

(1) the jurisdiction to strike out a cause of action is one which is exercised rarely and only where the cause of action is clearly untenable (i.e. has no prospect of success);

(2) a strike-out application proceeds on the basis that the facts pleaded against the applicant are true;

(3) the Court should be particularly slow to strike out a claim in any developing area of the law, particularly where a duty of care is alleged in a new situation;

(4) developments in negligence need to be based on proved rather than hypothetical facts; and

(5) if a pleading may be saved by amendment, that amendment should be allowed.[19]

Application by a defendant for summary judgment – legal principles

[62] Stahlton's submissions were principally addressed to its application to strike out the Council's third party claims against it. However it does ask in the alternative for summary judgment on those claims.

[63] Rule 12.2(2) of the High Court Rules provides:

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18 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725.
19 *Kupenga v Hayes* HC Auckland A1523/84, 4 February 1986.

> (2) The court may give judgment against a plaintiff if the defendant satisfies the court that none of the causes of action in the plaintiff's statement of claim can succeed.

[64] For the purposes of this rule, a defendant who issues a third party claim is treated as the plaintiff; the third party is treated as the defendant.

[65] The principles applicable to an application for summary judgment by a defendant were discussed by Elias CJ in *Westpac Banking Corp v MM Kembla NZ Limited*:[20]

> [61] The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim ...
>
> [62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.
>
> [63] Except in clear cases, such as a claim upon a simple debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary procedure the sufficiency of the proof of the plaintiff's claim. That would permit a defendant, perhaps more in possession of the facts than the plaintiff (as is not uncommon where a plaintiff is the victim of deceit), to force on the plaintiff's case prematurely before completion of discovery or other interlocutory steps and before the plaintiff's evidence can reasonably be assembled.

Issues

[66] The following are the issues for determination:

> Issue (1): Is a finding for the Council effectively precluded by the Court of Appeal's decision on the application for special leave to appeal in *Retro Apartments*?

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[20] *Westpac Banking Corp v M M Kembla NZ Limited* [2001] 2 NZLR 298 (CA) at [61] - [63].

Issue (2): If the answer to Issue (1) is "no", does s 37 of the WHRSA have the effect of stopping the longstop limitation period running on additional claims (not being weathertightness claims) a homeowner may bring in this Court?

Issue (3): Are the plaintiffs' claims relating to the structural defects and the fire defects (being non-weathertightness claims) arguably in time because they do no more than provide further particulars of the plaintiffs' negligence cause of action (which was filed in time because of the effect of s 37 of the WHRSA)?

Issue (4): Should the Court exercise its discretion to strike out the plaintiffs' claims in respect of the structural defects and the fire defects?

Issue (5): Whatever might be the answers on Issues (1)-(3):

(a) should the Council's third party claims against Beca be struck out because they are clearly out of time?

(b) should the Council's third party claims against Stahlton be struck out because they care clearly out of time?

(c) should summary judgment be entered for Stahlton on the Council's third party claims against it?

[67] I will address each issue in turn.

Issue (1): Is a finding for the Council effectively precluded by the Court of Appeal's decision on the application for special leave to appeal in *Retro Apartments*?

[68] In his judgment refusing leave to appeal to the Court of Appeal in *Retro Apartments*, Associate Judge Bell noted that, since his decision on the Council's strike-out application, the plaintiffs had filed another statement of claim. Under the amended pleading, the alleged defects numbered 7, 8, 11 and 12 were said to be connected with the weathertightness defects. The Associate Judge said that he had assumed that the structural and fire safety defects were distinct from and unconnected with the water penetration defects (as the plaintiffs had previously pleaded). His Honour considered that the apparent inter-relationship between weathertightness defects on the one hand, and fire safety and structural defects on the other, raised factual issues that would not be suitable for determination on a strike-out application.[21]

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[21] *Body Corporate 202692 v Auckland Council*, above n 5 at [12].

[69] On the Council's application for special leave to appeal, the Court of Appeal noted:[22]

> There are important unresolved factual issues about the extent to which the structural and fire safety defects are interconnected to the weathertightness issues. The Body Corporate has submitted before us that the repairs to the structural and fire safety defects were necessary in order to remedy the weathertightness defects in the apartment building. Accordingly, the cost of the structural and fire safety repairs forms part of the cost of repairing the weathertightness defects. This aspect of the Body Corporate's claim would require careful assessment of the evidence that is adduced at trial.

[70] I do not have before me the amended statement of claim that was before the Court of Appeal in the *Retro Apartments* case. However, it appears from the Court of Appeal's observation that the structural and fire safety defects were or may have been "interconnected" in some way with the weathertightness defects. The situation was not one, for example, where the structural and fire defects were clearly distinct from the weathertightness issues, so that, apart from the issue of a building consent or consents for the repair work, the different kinds of defects could be repaired separately.

[71] I do not understand that there is an allegation in this case that the structural defects and the fire defects are somehow interconnected with the weathertightness defects in that sense. The structural defects in this case have been identified separately, with separate quantum claims for the repair work, in the schedules to the Claim. Mr Rainey did refer in his submissions to paragraphs 16 and 17 of the Claim, where the plaintiffs refer to all of the defects (as particularised in Schedule 3 to the Claim) "… which have resulted in moisture ingress and damage to [the plaintiffs] as described in Schedule 3". But if you look at Schedule 3 as a whole, where the damage said to have been caused by a particular defect includes water entry, or mould damage, or decay, that is expressly stated under a heading "Damage/material testing analysis". No such references to water entry, mould, decay or the like appears in the description of the damage said to have been caused by the structural defects and the fire defects.

[72] Nor did I see anything in Mr Hill's evidence to suggest that the weathertightness defects in this case are inter-connected with the structural defects, or the fire defects, in the manner apparently contemplated by the Court of Appeal in *Retro*

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22 *Auckland Council v Body Corporate 202692*, above n 6, at [14](a).

Apartments. The main thrust of Mr Hill's evidence was that the Council simply would not issue a building consent for the repair of the weathertightness defects without also requiring the building owner to repair latent structural defects and latent fire defects uncovered during the weathertightness investigations (regardless of whether it was physically necessary to carry out the structural repairs in order to correct the weathertightness defects). As Mr Hill put it, covering over significant latent defects is not acceptable. He stated:

> 21. … in my experience it will be impossible for owners to progress their weathertightness remedial work without addressing significant latent defects that are uncovered during this work and ultimately they will not be issued with a [Code Compliance Certificate] unless those defects are remedied to the satisfaction of the council concerned.

[73] Mr Hill went on to note that the remediation of latent defects can cause additional costs, as a result of delays in the construction programme for the remediation of the weathertightness defects. But the fact that the Council might require latent defects that are unrelated to weathertightness defects to be remediated as a condition of granting a building consent for the weathertightness repair work, does not in my view make the repair of the latent structural or fire defects somehow "part of" the work required to repair the weathertightness defects. As the matter has been pleaded, there appear to be separate and distinct defects alleged, causing separate and distinct damage.

[74] I think that is also consistent with how Mr Rainey argued the case for the Body Corporate. I was invited to address head on the issue of the effect of s 37 of the WHRSA, and whether it stopped the clock running for claims relating to non-weathertightness defects being made in conjunction with claims for the repair of weathertightness defects. There would have been no need to grapple with that issue on a strike-out application if the repair work required to fix the latent structural and fire defects was the same as, or formed part of, the work required to fix the weathertightness defects. Indeed, it would arguably have been unnecessary to plead the structural defects and the fire defects at all, if and to the extent that were the case.

[75] I note also that the Council has abandoned its strike-out application in respect of one of the structural defects (Defect 5.1), where it appeared that there *was* a clear "inter-connection" between the structural defects (cracks in concrete tilt slabs) and the ingress of water.[23] I apprehend that no such "inter-connection" issues arise in respect of the remaining structural defects, numbers 6.1, 6.2 and 6.3, or any of the fire defects.

[76] In those circumstances I conclude that the inter-connection issue with which the Court of Appeal appears to have been concerned in *Retro Apartments* is not present in this case. I will accordingly proceed on the basis that the Court of Appeal's view on the special leave application in *Retro Apartments* was decided on different facts from those which are alleged in this case, and that the decision does not preclude the Court from proceeding further to consider the Council's strike-out application. My answer to Issue (1) is "no".

Issue (2): If the answer to Issue (1) is "no", does s 37 of the WHRSA have the effect of stopping the longstop limitation period running on additional claims (not being weathertightness claims) a homeowner may bring in this Court?

[77] I have come to the view that the answer to this question is "yes". In so doing, I respectfully disagree with the contrary view reached by Associate Judge Bell in *Retro Apartments*.

[78] I accept the submissions made by Ms Fraser and Mr Weston that s 37 of the WHRSA and s 393 of the Building Act 2004 are not irreconcilable, or somehow in conflict. The two sections can in my view be read sensibly together, so that the Court has no need to have regard to considerations such as whether it might be sensible or convenient for an owner of a leaky building to carry out any unrelated structural repairs at the same time as weathertightness defects are repaired.

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23 Mr Hill said that the concrete tilt slabs in question have cracked in proximity to window openings and to walls forming the ground floor and level 1 carparks, and he expressed the view that the cracks will allow water to be absorbed by the concrete panels, creating a risk of corrosion affecting the concrete panel reinforcement. Also, he considered that there was potential for moisture to migrate through the panels where it can affect internal linings.

[79] I will set out below my approach to the interpretation exercise, and then address contrary arguments advanced for the plaintiffs by Mr Rainey.

[80] In my view, the starting point in the analysis is the longstop provision in the Building Act 2004. Section 393 of that Act materially provides:

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

[81] Applying that section to the present circumstances, for the moment without reference to the WHRSA, it is clear that claims for the cost of repairing the structural and fire defects are time-barred under s 393. It is common ground that the proceeding is a civil proceeding relating to building work performed by the Council, and the proceeding was brought over 10 years from the particular acts or omissions on which the proceeding against the Council is based. The last relevant act or omission of the Council was the issue of the CCC, and that occurred on 17 May 2007.[24] The proceeding was not filed until 2018, and the particular allegations relating to the structural defects and the fire defects were not added until the Claim was filed on 12 April 2019.

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[24] Building Act 2004, s 393(3)(a).

[82] Section 393 is not concerned with when a cause of action may have accrued – it is concerned with the dates of the particular acts or omissions of the defendant "on which the proceedings are based".

[83] So the claims against the Council are clearly out of time under the longstop provision, unless and to the extent they can be saved by the application of s 37 of the WHRSA.

[84] Section 37 of the WHRSA requires, in effect, that the Court is to apply s 393(2) on the basis that the expressions "civil proceedings", "those proceedings" and "the proceedings", are to be read not as referring to the proceedings in which the claims for damages are actually made, but to the application for an assessor's report under s 32(1) of the WHRSA. In other words, the application for the assessor's report is deemed by s 37(1) to be the relevant "proceedings" for the purposes of s 393(2).

[85] If that is so, and I think it is, in a case such as the present, the next step in the application of s 393 is to identify the particular "acts or omissions" on which the application for the assessor's report under s 32(1) of the WHRSA might be said to have been based.

[86] Any way you look at it, I do not think the application for an assessor's report under s 32(1) of the WHRSA could be regarded as having been arguably "based on" any act or omission which has not caused or contributed to moisture ingress problems. The concern of the WHRSA was to provide homeowners with access to speedy, flexible, and cost-effective procedures for the assessment and resolution of claims relating to buildings that were leaky buildings[25], and I think every other conceivably relevant provision of the WHRSA is consistent with the view that building defects which do not give rise to water penetration problems are not within the ambit of the WHRSA.

[87] By way of example only, the eligibility criteria for a multi-unit complex claim under the WHRSA include:[26]

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25 Weathertight Homes Resolution Services Act 2006, s 3.
26 Weathertight Homes Resolution Services Act 2006, s 16.

16 Multi-unit complex claim

The criteria are that the claimant is the representative of the owners of the dwellinghouses in the multi-unit complex to which the claim relates; and—

…

(c) water has penetrated the complex because of some aspect of its design, construction, or alteration, or of materials used in its construction or alteration; and

(d) the penetration of water has caused damage to the complex.

[88] Section 32 of the WHRSA provides that an owner of a dwellinghouse who wishes to bring a claim in respect of it may apply to the Chief Executive to have an assessor's report prepared in respect of it. On receiving an application for an assessor's report, the Chief Executive is required to make an initial assessment as to whether the information in the application indicates that the claim meets or is capable of meeting the eligibility criteria. If it does not, the Chief Executive must decline to arrange for an assessor's report to be prepared.

[89] Clearly structural or fire defects in the construction of a dwelling which have not caused or contributed to water penetration to the dwelling would not meet the eligibility criteria for a dwellinghouse set out in s 14 of the WHRSA, and the Chief Executive would be required under s 32(4) to decline to arrange for an assessor's report to be prepared. Water penetration is essential.

[90] I think the WHRSA eligibility criteria provide the key to how s 37 is to be applied to a claimed defence under s 393 of the Building Act. The relevant "act or omission" on which the application for the assessor's report was made, must have been an act or omission, associated with some aspect of the design, construction, or alteration (or materials used in the construction or alteration) of the building, which has or may have caused or contributed to water penetration into the building (which has caused damage).

[91] In this case, the application for the assessor's report on 11 July 2013 cannot be said to have been based on any act or omission of the Council, Beca or Stahlton which did or may have given rise to the structural defects and/or the fire defects. It was

(necessarily) based on acts or omissions (of then unidentified parties) that were believed to have caused or contributed to water penetration.

[92] It follows that the deemed "proceeding" constituted by the application for the assessor's report, was not a proceeding "based on" the acts or omissions of the Council which are now said to have caused or contributed to the structural defects and/or the fire defects. The only possible "proceeding" based on acts or omissions of the Council that may have caused or contributed to the structural defects and/or the fire defects, is the present proceeding, which was commenced outside the 10 year longstop period.

[93] I conclude that, in applying the s 393 longstop provision in a case where the homeowner is claiming in respect of both weathertightness defects and non-weathertightness defects, it is not enough to simply stop with the application for an assessor's report, relying on s 37(1) and s 32 of the WHRSA. In respect of non-weathertightness defects, you have to go further and ask, in effect, what were the "acts or omissions" on which the application for the assessor's report was based. Following that track, the only sensible answer is that the application for the assessor's report could only have been based on acts or omissions (associated with some aspect of the design, construction, or alteration, or of materials used in the construction or alteration, of the building) that have caused or contributed to water penetration. Where no water penetration is alleged, the deemed "proceeding" constituted by s 37(1) and s 32 of the WHRSA cannot be the relevant "proceeding" for the purposes of s 393 of the Building Act.

[94] I do not think that analysis of the wording of the statutory provisions is displaced by any relevant policy considerations. The WHRSA was enacted to deal with a particular, widespread problem that had arisen in the community, namely the leaky homes problem. The legislation was not in my view intended to alter the limitation periods in respect of homeowners' claims that had nothing to do with water penetration to their homes, and I do not think considerations of convenience in carrying out any necessary non-weathertightness repairs could form any proper basis for abrogating the limitation rights of those in the building industry whose negligence might have caused non-weathertightness defects.

[95] The distinction between weathertightness defects and (possibly more serious) non-weathertightness defects might appear to be arbitrary, but arbitrary distinctions in the area of limitation are common place in the law, and the legislation in this case (the WHRSA) was clearly and deliberately confined to only one category of case – cases of water penetration into buildings because of some aspect of their design, construction, or alteration (or of materials used in the construction or alteration).

[96] I do not think any of the authorities referred by counsel alter the view I have come to as set out above. If anything, authorities such as the decision of the Court of Appeal in *ISP Consulting Engineers Ltd v Body Corporate 89408* support the analysis set out above, to the extent they make it clear that structural defects (not causing or contributing to water penetration) are beyond the jurisdiction of the Weathertight Homes Tribunal.[27] And the decision of the Supreme Court in *Lee v Whangarei District Council*[28] does not affect the position. I accept Mr Weston's submission, adopted by counsel for Beca and Stahlton, that *Lee* was concerned only with the *forum* in which the relevant proceeding was commenced: for the clock to stop running under s 37 of the WHRSA, the proceeding did not have to be commenced in the Weathertight Homes Tribunal; it could be commenced in a court or before an arbitrator.[29] In my view, *Lee* was concerned only with water ingress claims, and it says nothing on the issue with which I am presently concerned: whether s 37 of the WHRSA has the effect of stopping time running on a claim for the cost of non-weathertightness defects, which have not caused or contributed to water penetration into the building.

[97] In his submissions, Mr Rainey said that the alleged defects the Council seeks to strike out are no more than further particulars of the negligence cause of action against the Council, and of the loss suffered by the plaintiffs because of that negligence. The addition of these particulars in the Claim did not add any new and separate cause of action.

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27 *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA 160.

28 *Lee v Whangarei District Council*, above n 1.

29 The fact that the Supreme Court's focus was on the appropriate forum, is illustrated by the following passage in *Lee*:
"[44] [After referring to the homeowner's ability to obtain a full assessor's report under s 42(2) of the WHRSA] This is of use to owners *in whatever forum they choose to resolve their problems with water ingress"* (emphasis added).

[98] I accept Mr Weston's submissions in response to this submission. We are not here concerned with the question of whether a new and separate cause of action has been added. Section 393 is concerned with the particular acts or omissions of the defendant on which the proceeding is based and in respect of which relief is sought. Thus in a negligence cause of action, which does not accrue until the plaintiff has suffered damage, a proceeding might be filed within the six year time limits in the Limitation Act 1950 or the Limitation Act 2010, if no damage was suffered until, say, 11 years after the defendants' relevant acts or omissions, but it would still be statute-barred under s 393. Reasonable discoverability of loss is not a relevant factor under s 393.

[99] Mr Rainey submitted that the structural defects and the fire defects did not cause separate remedial work which can be carried out separately from the repairs to the cladding and the so-called weathertightness defects. He submitted that the measure of economic loss caused by the discovery of the structural defects and the fire defects is the overall costs of the repair work (including repairing the weathertightness defects), not some part of it. He referred to paragraphs 16 and 17 of the Claim, and to Mr Hill's affidavit in support.

[100] I have already addressed paragraph 16 of the Claim, which I think has to be read with Schedule 3 to the Claim. Reading the Claim in that way, no moisture problems appear to be pleaded in respect of the structural defects and the fire defects, and they are both pleaded separately and distinctly, with separate repair costs or repair cost estimates. Paragraph 17 of the Claim does not appear to add anything which would support Mr Rainey's submission. And I do not think the fact that the structural defects and the fire defects might have to be remediated before the weathertightness defects can be repaired avails the plaintiffs. That follows from (i) the fact that the longstop limitation in s 393 is concerned only with when particular acts or omissions of the defendant occurred, and (ii) my view that a claim arising out of those acts or omissions will only be saved by s 37 of the WHRSA if and to the extent that the acts or omissions have caused or contributed to a defect in some aspect of the design, construction, or alteration work (or the materials used in it) which has caused water penetration and consequent damage. For that reason, I do not accept Mr Rainey's submission that the repairs required to rectify the pleaded defects in this case are

"indivisible". The repairs might have to be carried out at the same time, but that does not deprive the Council of the benefit of the longstop limitation period in respect of acts or omissions which have not caused or contributed to water penetration and consequent damage. In any event, the s 393 longstop provision is concerned not with any particular damage, but with the date or dates of the defendant's relevant acts or omissions on which the plaintiff's proceeding is based.

[101] Mr Rainey next submitted that I should follow the decision of Associate Judge Bell in *Retro Apartments*. For the reasons I have set out above, I find myself unable to agree with the decision reached by the Associate Judge in that case.

[102] Mr Rainey then submitted that the Council's argument has started from the false premise that this is a proceeding under the WHRSA. I do not think that is the case. As I understood Mr Weston's submissions, the simple starting point for the Council was that, at least in respect of the structural defects and the fire defects, it is being sued for building work carried out by it more than 10 years ago.

[103] Mr Rainey submitted that s 37 of the WHRSA does not create a special limitation period applying to leaky building claims. It takes pre-existing limitation laws as a given, and then imposes a special statutory rule that tells the Court (or an adjudicator under the WHRSA) when the proceeding is deemed to have commenced if a defendant raises a limitation defence. Ms Fraser made the same point in her submissions, and I agree with those submissions as far as they go. Section 37 does not create any special limitation period – it simply imposes a statutory rule telling the Court when a particular kind of proceeding is deemed to have commenced.

[104] In my view, the particular kind of proceeding is a proceeding to enforce claims which qualify as "eligible claims" under the WHRSA. That means claims in respect of water penetration of the building. Section 37 does not provide a rule stopping the clock for claims in respect of acts or omissions associated with aspects of a building's design, construction, or alteration (or materials used in the construction or alteration) which have not caused or contributed to water penetration.

[105] I reject Mr Rainey's submission that the purpose of s 37 is to protect all potential legal claims relating to the dwelling from the expiry of the limitation period, after the date the owner applies for an assessor's report. I have already rejected that submission based on my analysis of s 393, read with s 37 and s 32 of the WHRSA. I add only that I find it difficult to discern any statutory purpose which might be served if this submission were correct. Section 3 of the WHRSA makes it clear that the purpose of the WHRSA is to provide particular procedures for the assessment and resolution of claims relating to leaky buildings, and the whole tenor of the WHRSA, including the eligibility criteria for claims, makes it clear that the "claims" in question must relate to water penetration. I see nothing in the WHRSA which suggests that the legislature might have intended to deprive a builder or council of the longstop limitation defence in circumstances where any negligence or other breach of duty on their part did not cause or contribute to any water penetration issues.

[106] Mr Rainey submitted that adding further latent defects, which contributed to the plaintiffs' economic loss, does not change the legal basis for their claim. I think that is true as far as it goes, but in applying s 393 I do not think I am concerned with the legal basis of the plaintiffs' claim. Rather, the issue is identifying particular acts or omissions of the defendant on which the proceeding is based, and in respect of which relief is sought, and asking whether those acts or omissions occurred more than 10 years before the proceeding was commenced.

Issue (3): Are the plaintiffs' claims relating to the structural defects and the fire defects (being non-weathertightness claims) arguably in time because they do no more than provide further particulars of the plaintiffs' original negligence cause of action (which was filed in time because of the effect of s 37 of the WHRSA)?

[107] Substantially for the reasons set out above in my discussion on Issues 1 and 2, the answer to this question is "no". Section 393 is not concerned with causes of action, but with the particular acts or omissions of the defendant on which the proceeding is based, and whether they were done or omitted more than 10 years before the proceeding was filed. A proceeding might be filed in time under the Limitation Acts, but the plaintiff might still be precluded by s 393 from seeking relief against a defendant arising from acts or omissions, whether pleaded as particulars or not, that occurred more than 10 years before the proceeding was commenced. That in my view

is the whole point of introducing any longstop limitation period – the focus goes onto the defendant's acts or omissions, and not on when the plaintiffs' cause of action accrues. In circumstances where damage might not be suffered by the plaintiff for many years, that is necessary to give defendants some certainty over the period they will remain exposed to possible claims.

Issue (4): Should the Court exercise its discretion to strike out the plaintiffs' claims in respect of the structural defects and the fire defects?

[108] It follows from what I have said on Issues 1 to 3 that the Council has made out its argument for striking out the allegations in respect of the structural defects and the fire defects. However, I think the Court retains a residual discretion as to whether strike-out orders are appropriate in respect of only part of a plaintiff's claim, or whether that part may be better left for trial.

[109] In this case, the structural defects and the fire defects have been pleaded separately from the other parts of the Claim. Also, the estimated costs of the remedial work for the structural defects and the fire defects are substantial - $8,117,977.26 for the structural defects, and $9,589,051.62 for the fire defects. It appears then, that striking out the allegations relating to the structural defects and the fire defects at this stage may save substantial time at trial.

[110] Also, I think Beca and Stahlton are entitled to have these arguments dealt with now. The effect of the Council's success on its strike-out application must be that the third party claims against them come to an end.

[111] For those reasons, I see no reason for the Court to exercise its discretion to refrain from making strike-out orders as sought by the Council.

Issue (5): Whatever might be the answers on Issues (1)-(4):

(a) should the Council's third party claims against Beca be struck out because they are clearly out of time?

(b) should the Council's third party claims against Stahlton be struck out because they care clearly out of time?

(c) Should summary judgment be entered for Stahlton on the Council's third party claims against it?

[112] It follows from my decision upholding the Council's strike-out application that the third party claims against Beca and Stahlton must also be struck out. The third party claims have only been maintained by the Council to the extent that it might have some liability to the plaintiffs for the structural defects and the fire defects, and my finding that the Council cannot be liable to the plaintiffs for those defects effectively removes any basis for the third party claims against Beca and Stahlton. The third party claims made by the Council against Beca and Stahlton will be struck out accordingly.

[113] In case the matter goes further, and I am held to have erred in striking out the plaintiffs' claims against the Council in respect of the structural defects and the fire defects, I record my view that the third party claims made by the Council against Beca should be struck out in any event.

[114] I accept the view expressed in a line of High Court decisions, including *Dustin v Weathertight Homes Resolutions Services*,[30] *Carter Holt Harvey Ltd v Genesis Power Ltd*,[31] *Body Corporate 169791 v Auckland City Council*,[32] and the decision of Fitzgerald J in *Minister of Education v James Hardie New Zealand,*[33] that longstop provisions *do* apply to contribution claims such as that made by the Council against Beca in this case. As Fitzgerald J said in *Minister of Education v James Hardie New Zealand*:[34]

> … there is no suggestion in the legislative history that cross-claims as between building professionals and/or territorial authorities, or third party contribution proceedings, were to be excluded from the finality and certainty which was sought through the longstop provision. Had such an important and broad exclusion been intended from the otherwise plain words used, one might have expected Parliament to have said so expressly.

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30 *Dustin v Weathertight Homes Resolutions Services* HC Auckland, CIV-2006-404-276 25 May 2006.

31 *Carter Holt Harvey Ltd v Genesis Power Ltd (No.8)* HC Auckland, CIV-2001-404-1974 29 August 2008.

32 *Body Corporate 169791 v Auckland City Council* HC Auckland, CIV-2004-404-5225 17 August 2010.

33 *Minister of Education v James Hardie New Zealand* [2018] NZHC 22.

34 At [64].

[115] I accept Ms Fraser's submission that the third party claim against Beca has nothing to do with weathertightness, and no party, including the Council, has made any allegation against Beca that its conduct has contributed to weathertightness issues.

[116] As far as Beca is concerned, the relevant proceeding against it must be regarded for limitation purposes as the Council's third party claim against it, and I accept that the third party claim, which does not raise weathertightness issues, must be unaffected by s 37 of the WHRSA. In those circumstances, Beca is entitled to rely on s 393, as the building work performed by it was performed more than 10 years before the Council's proceeding against it was commenced.

[117] It is true that in *Heaney v Auckland Council*, Associate Judge Andrew did take the view that a defendant could join a third party after the expiry of the 10 year limitation period (running from the date of the third party's relevant acts or omissions), but I accept Ms Fraser's oral submission that *Heaney* is distinguishable, as there is nothing in the judgment to suggest that the third party claims were claims arising from non-weathertightness issues.[35]

[118] For those reasons, I would have struck out the Council's third party claim against Beca even if I had not struck out the plaintiffs' claims against the Council relating to the fire defects.

[119] Essentially for the same reasons, I would also have struck out the Council's third party claim against Stahlton. The Council's third party claim against Stahlton related to only one of the structural defects, being Defect 6.3 ("hollow core slab structurally compromised"). There appear to be no weathertightness issues alleged by the Council against Stahlton: the allegations concern only the manufacture and/or installation of hollow core slabs, and a certificate given by Stahlton on 31 April 2007 to the effect that its system had been designed and manufactured, in compliance with accepted engineering principles, to support the loads shown on the Stahlton drawings and in accordance with the requirements of the New Zealand Building Code. The Council's allegations clearly relate to building work, and in an affidavit supporting Stahlton's strike-out/summary judgment application Mr Scott Meehan, a regional

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35 *Heaney v Auckland Council* [2018] NZHC 2738.

manager for Stahlton, said that the concrete hollow-core slabs are all internal components which do not provide waterproofing to the project.

[120] In those circumstances, I would have made an order striking out the Council's third party claims against Stahlton even if I had not struck out the plaintiffs' claims relating to the structural defects.

[121] Stahlton did ask for summary judgment in the alternative, but Mr Booth's submissions were primarily directed to the strike out application, and it seems to me that striking out the third party claim against Stahlton is the appropriate relief. The summary judgment application does appear to raise issues as to the extent of Stahlton's involvement in the construction of the development which may not be suitable for resolution on a summary judgment application, and an order striking out the Council's claims against Stahlton on limitation grounds is all that is necessary to bring the proceeding against Stahlton to an end.

Result

[122] I make the following orders:

(1) Striking out defects 6.1, 6.2, 6.3, 7.1, 7.2, 7.3, 7.4, 7.5, 7.6. 7.7, 7.8, 7.9. 7.10, and 7.11 in Schedule 3 (Defects and Causation Schedule) of the Claim;

(2) Striking out the Council's third party claims against Beca;

(3) Striking out the Council's third party claims against Stahlton;

(4) Dismissing Stahlton's application for summary judgment against the Council;

(5) Costs – the Council will be entitled to costs against the plaintiffs, and Beca and Stahlton will be entitled to costs on their strike-out applications. My impression is that those costs should be on a 2B basis, but I will allow time for counsel to confer on that and also on any

question of who should bear the costs of Beca and Stahlton (the Council or the plaintiffs). If the parties are unable to agree on costs, they may file memoranda and I will deal with costs on the papers. Any costs memoranda from Beca and Stahlton are to be filed and served within **10 working days,** and any memorandum from the Council is to be filed and served within five working days of service of the memoranda filed by Beca and Stahlton. The plaintiffs may file and serve a memorandum in response within **five working days** after service of the Council's memorandum.

(6) The Registrar is to allocate a case management conference, as soon as may be practicable after **20 July 2020**, so that further directions can be given for the exchange of evidence and any other matters that need to be addressed before the trial.

Associate Judge Smith