IN THE HIGH COURT OF NEW ZEALAND
WHANGAREI REGISTRY

CIV-2014-488-94
[2015] NZHC 2777

BETWEEN	OLIVIA WAI YEE LEE Plaintiff
AND	WHANGAREI DISTRICT COUNCIL Defendant
	ROBIN FREDERICK LITTLEJOHN Third Party

Hearing: 8 June 2015

Appearances: Plaintiff in person with Therese Connor (McKenzie friend)
F Divich and H Waldron for Defendant
A G Jackson for Third Party

Judgment: 10 November 2015

JUDGMENT OF ASSOCIATE JUDGE R M BELL

This judgment was delivered by me on ***10 November 2015*** *at* ***3:30pm***
pursuant to Rule 11.5 of the High Court Rules

……
Registrar/Deputy Registrar

Solicitors:
Heaney & Partners (Frana Divich/HollyWaldron), Auckland, for Defendant
Perkinson Law (S W Perkinson), Whangarei, for Third Party

Counsel:
Anthony G Jackson, Whangarei, for Third Party

TABLE OF CONTENTS

Paragraph

[1] The defendant, the Whangarei District Council, applies for summary judgment against the plaintiff, Ms Lee, on the ground that her proceeding is statute-barred under s 4(1)(a) of the Limitation Act 1950. Ms Lee started this proceeding on 21 May 2014.[1] Accordingly the District Council needs to show that Ms Lee's cause of action against it accrued earlier than 22 May 2008. Opposing, Ms Lee says that the proceeding is within time.

[2] This is a leaky building case. Ms Lee sues the District Council for alleged negligence in inspection while her house at 183 Sandford Road, Ruakaka, was under construction between 2006 and 2008. Ms Lee moved into the house in late 2007. She accepts that by early 2008 she was aware that there were defects in the workmanship but says that that knowledge was not enough for the cause of action against the Whangarei District Council to have accrued.

[3] On a defendant's application for summary judgment under r 12.2 of the High Court Rules, the court applies the principles in *Westpac Banking Corporation v M M Kembla New Zealand Ltd*:[2]

> The applications for summary judgment were made under R 136(2) of the High Court Rules which permits the Court to give judgment against the plaintiff "if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed".
>
> Since R 136(2) permits summary judgment only where a defendant satisfies the Court that the plaintiff cannot succeed on any of its causes of action, the procedure is not directly equivalent to the plaintiff's summary judgment provided by R 136(1).
>
> Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure because a defendant can apply to strike out the claim under R 186. Rather R 136(2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The difference between an application to strike out the claim and summary judgment is that strike-out is usually determined on the pleadings alone whereas summary judgment

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1 Ms Lee says that she began the proceeding on 19 May 2014. The Registrar has stamped the statement of claim as received on 21 May 2014. In the circumstances of the case, nothing turns on the difference.

2 *Westpac Banking Corporation v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298 (CA) at [58]-[64].

requires evidence. Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.

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. Examples, cited in *McGechan on Procedure* at HR 136.09A, are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.

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.

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.

The defendant bears the onus of satisfying the Court that none of the claims can succeed. It is not necessary for the plaintiff to put up evidence at all although, if the defendant supplies evidence which would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. Even then it is perhaps unhelpful to describe the effect as one where an onus is transferred. At the end of the day, the Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment made by the Court on interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial.

[4] I emphasise these matters:

(a) On a summary judgment application the legal onus remains on the defendant throughout to show that none of the plaintiff's causes of action can succeed.

(b) It is not enough that the plaintiff's case may be weak.

(c) The decision is not made on a fine balance of the evidence.

[5] The starting point for limitation defences for claims arising from building work or inspection of work under the Building Act 2004 is s 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, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and
>
> (b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

[6] Subsection (2) provides a longstop bar on proceedings "10 years or more from the date of the act or omission on which the proceedings are based." The council does not rely on that provision in this case. It accepts that all its actions in relation to the house took place within 10 years before the proceeding started. Instead, it relies on the limitation provision in subs (1). The Limitation Act 2010 came into force on 1 January 2011. It repealed the Limitation Act 1950, but the 1950 Act continues to apply to proceedings based on acts or omissions before 1 January 2011.[3] Accordingly, Ms Lee's cause of action in tort against the council

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[3] Limitation Act 1950, s 2A; Limitation Act 2010, ss 57 and 59.

for its acts and omissions before 1 January 2011 is subject to the six year limitation in s 4(1)(a) of the Limitation Act 1950:

> (1) Except as otherwise provided in this Act … the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say, -
>
> (a) actions founded … on tort; …

[7] Under Part 2 of the Limitation Act 1950 limitation periods may be extended in various cases, including fraud and mistake, but Ms Lee does not say that any of the cases for extension apply in this case.

The legal test for accrual of a cause of action in negligence in a leaky building case

[8] In *Invercargill City Council v Hamlin*, McKay J said: [4]

> The ordinary time limit for an action in contract or in tort is thus calculated from the date on which the cause of action accrued. The phrase "cause of action" has been defined as meaning every fact which it will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court: *Cook v Gill* (1873) LR 8 CP 107 at p 116 and *Read v Brown* (1888) 22 QBD 128 (CA). ….
>
> In an action in tort based on a wrongful act which is actionable per se without proof of actual damage, the cause of action will accrue at the time the act was committed. Where the claim is based on negligence, however, damage is an essential part of the cause of action, and until the damage has occurred the cause of action is not complete.

[9] In *Hamlin*, a local authority was sued for negligence in inspection when the foundations of a house were found to be defective. In the Privy Council, the plaintiff's loss was held not to be physical damage to the structure, but economic loss which arose only when defects were discovered:[5]

> Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and not for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.

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4 *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 536.

5 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 526.

> But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious. In *Dennis v Charnwood Borough Council*, a case decided in the Court of Appeal before *Pirelli* reached the House of Lords, Templeman LJ said at p 420 that time would begin to run in favour of a local authority:
>
> > "… if the building suffers damage or an event occurs which reveals the breach of duty by the local authority or which would cause a prudent owner-occupier to make investigations which, if properly carried out, would reveal the breach of duty by that local authority."
>
> In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation of the market value if it is not. …

[10] Accordingly, a discoverability test is applied in a claim for building defects. Where limitation turns on accrual of a cause of action, such as negligence, in which damage is a component, time does not run against the owner of a defective building until the defects are discovered, or could with reasonable diligence be discovered. It is also necessary to note that the defects must cause a loss in value, for otherwise the owner will suffer no economic loss. In a claim against a local authority for negligence in carrying out functions under the Building Act, the defects must relate to compliance with the Building Code or other requirements of the Building Act, for which a local authority has a regulatory responsibility.

[11] In *Murray v Morel & Co Ltd* the Supreme Court reviewed the "reasonable discoverability" test.[6] The majority upheld the traditional approach that the test for accrual of a cause of action is based on occurrence rather than discoverability, but held that the decision in *Hamlin* was consistent with this because damage occurred at the time a defect was discovered, not earlier.[7] The test in *Hamlin* still applies.

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6 *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721.

7 At [42].

[12] In *North Shore City Council v Body Corporate 188529* the Supreme Court confirmed that a cause of action accrued when damage was discovered or could have been discovered with reasonable diligence.[8]

[13] Accordingly, for Ms Lee's claim to be time-barred under s 4 of the Limitation Act 1950, the council will need to show that before 22 May 2008 Ms Lee knew or could with reasonable diligence have discovered that the house had construction defects that resulted in water ingress. In deciding whether Ms Lee's claim is barred under 4(1)(a) of the Limitation Act 1950, it does not matter how weak or strong her claim is. The court cannot adjust the limitation period according to its view of the merits.

Admissibility of reports and notices

[14] The evidence for the council's application is largely documentary, much of it obtained on discovery. Both sides have included in their evidence notices and reports made by building inspectors and reports made by building consultants. Neither side objected to them going in evidence. Insofar as those documents are relied on to show that Ms Lee became aware of the condition of the house, a hearsay question arises. Insofar as the documents are used to prove the defects, they are hearsay, as their authors have not given evidence. All the documents relied on to prove the defects are business records under s 16(1) of the Evidence Act[9] as their authors were under duties to make the reports and their authors had personal knowledge of the matters in them. Given that the existence of the documents is not in dispute, in the circumstances of this case it is unnecessary for either side to have the authors of those documents make affidavits. Undue expense would be caused by

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8 *North Shore City Council v Body Corporate 188529* [2010] NZSC 158, [2011] 2 NZLR 289 at [63]-[75].

9 Evidence Act 2006, s 16(1):
business record means a document—
(a) that is made—
(i) to comply with a duty; or
(ii) in the course of a business, and as a record or part of a record of that business; and
(b) that is made from information supplied directly or indirectly by a person who had, or may reasonably be supposed by the court to have had, personal knowledge of the matters dealt with in the information he or she supplied.

requiring each author to give an affidavit. The various reports are accordingly admissible as business records under s 19 of the Evidence Act:

> **Admissibility of hearsay statements contained in business records**
>
> (1) A hearsay statement contained in a business record is admissible if—
>
> (a) the person who supplied the information used for the composition of the record is unavailable as a witness; or
>
> (b) the Judge considers no useful purpose would be served by requiring that person to be a witness as that person cannot reasonably be expected (having regard to the time that has elapsed since he or she supplied the information and to all the other circumstances of the case) to recollect the matters dealt with in the information he or she supplied; or
>
> (c) the Judge considers that undue expense or delay would be caused if that person were required to be a witness.

Events up to 22 May 2008

[15] In August 2006 Ms Lee applied for a building consent for the house. The District Council granted her consent on 26 October 2006. Building work began in January 2007. The builder was Rob Littlejohn Builders Ltd, which apparently worked under a labour-only contract. The third party is its director. Other contractors who worked on site included Composite Cladding and Signage Manufacture and Installation Ltd (a cladding contractor), Altherm Aluminium Northland Ltd (a joinery installer), Northland Waterproofing Solutions Ltd, Design Metal Roofing Ltd, and K J Fong (a draughtsman). Ms Lee had engaged a civil engineering practice on some geotechnical, structural and design matters at the consent stage but it does not appear that any professionals had any later involvement in the project.

[16] During construction the council carried out a number of inspections, including two of significance on 18 June 2007 and 26 June 2007. The inspection on 18 June 2007 was a pre-clad inspection. The inspectors required further information for assessment before cladding could be installed. The council returned on 26 June 2007 to deal with questions relating to the cladding system and details surrounding this. The exterior cladding for the building was a material Ms Lee had imported

from China. It is now accepted that it did not by itself provide adequate protection against water penetration.

[17] In October 2007 and again in November 2007 Ms Lee observed leaking at the top of the internal staircase. On the second occasion she drew this to the builder's attention.[10] Ms Lee moved into the house in December 2007.

[18] By January 2008 Ms Lee was in dispute with Rob Littlejohn Builders Ltd. The contractor was asking for payment. She was not satisfied with the workmanship. In January 2008 Ms Lee emailed Mr Littlejohn, taking issue with his workmanship. Amongst other things she stated:

> I believe what is remaining is more serious than can be remedied in the maintenance period.

She enclosed a cheque, but made deductions. She sought legal advice on 26 January 2008.

[19] In February 2008 Ms Lee engaged Mr Ian Beattie of Kaimamaku Consultancy Ltd to provide an assessment of the house including on matters of weathertightness issues. Mr Beattie describes himself as a "property and building consultant". On his business letterhead he is described as a building surveyor, weathertightness and cladding specialist and as having qualifications in construction. In comparison with other reports on Ms Lee's house, Mr Beattie's report of 5 February 2008 to Ms Lee's lawyers is relatively short. All the same, while noting a number of deficiencies in the work, the report includes this:

> The exterior cladding is a unique system that introduces numerous challenges within the complex inter-change of walls, joinery and soffits. Most of the exterior would not meet the requirements of the New Zealand Building Code in either durability, weathertightness or alignment. Resolution will necessitate the removal of extensive sections of cladding, after which a close assessment of the construction will quantify the extent of the remediation necessary.

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[10] Lee affidavit of 23 June 2008 in District Court proceeding, *Rob Littlejohn Builders Ltd v Lee*, DC Whangarei, CIV 2008-088-332 at [6.5].

In later proceedings, Ms Lee acknowledged having received Mr Beattie's report.[11]

[20] On 12 March 2008, Ms Lee's lawyer wrote to the builder's lawyer. Although the letter is said to be "without prejudice - except as to costs" Ms Lee has not claimed privilege for it and it was put in evidence without objection. The letter was sent following a further technical survey by Mr Beattie. It said that this survey had established that numerous constructional elements were deficient and had not been constructed in accordance with consent plans. The letter proposed mediation as an alternative to protracted litigation.

[21] The council carried out a final inspection on 26 March 2008. The house failed that inspection.

[22] Following the inspection on 26 March 2008, the council's inspector sent a field advice notice to Ms Lee on 2 April 2008, identifying a number of matters requiring attention. (The council issued a further field advice notice on 18 June 2008, in which it required sill flashings to be installed as per the approved building consent drawings). In this proceeding, the council refers to these matters in the March notice as particularly relevant:

(a) Spouting required to upper roof as per consented drawings.

(b) Internal gutters not lined with materials as noted on consent drawings. Provide proper information for assessment as to suitability for end use and compliance with NZBC (E1, B2). Plans will need to be amended to reflect these changes (if approved).

(c) Roof gutters (internal) require overflows to be sized as per consented documents.

(d) Rainwater heads required as per consented documents.

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[11] Lee submissions dated 11 May 2009 in CIV-2009-488-192 *Rob Littlejohn Builders Ltd v Olivia Lee* DC Whangarei CIV-2008-088-332..

(e) Vent/drain holes are required to the lower end of the parapet cladding area and the lower end of the cladding over the windows (water entrapment).

(f) The timber used for the external staircase on the south eastern face is not as per the consent drawings. Ms Lee was asked to provide information that verifies compliance with the code: B2 (durability) and B1 (structure).

(g) Confirmation is required that:

(a) the balcony membrane fully extends under the aluminium handrail channel at upper deck level (clear detail required);

(b) the decking membrane is suitable for this possibly flooded situation, and fully protects the structure below from water entry (E2) and

(c) the method of fixing the aluminium channel through the membrane maintains the water proof situation which continues to satisfy E2 – clear details required.

(h) A producer statement from both the membrane installer and the barrier installer is required for the respective situations.

(i) The council required a producer statement (PS3) for the installation of external cladding to ensure compliance with E2 of the building code.

[23] The council did not issue a code compliance certificate.[12] Ms Lee's case accordingly alleges negligence in inspections, not negligence in issuing a code compliance certificate.

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[12] That by itself is not necessarily fatal to Ms Lee's claim: *North Shore City Council v Body Corporate 188529*, above n 8, at [60]-[62]. A duty is owed at the inspection phase. Whether the council breached the duty in this case is another matter.

[24] In an affidavit in opposition to the council's security for costs application in this proceeding, Ms Lee said: [13]

> The discovery of the house leaking was not long after the final inspection.

[25] In a statement of evidence she gave in a District Court proceeding against the cladding contractor,[14] Ms Lee says that on 28 April 2008 she saw water dropping down from the ceiling at the stairway area; water dropping internally from the ground floor windows and doors, and from the top of the wall linings in the lounge on the north and east faces; water dropping internally from the eastern and southern windows, doors and tops of walls on the ground floor in the night lounge; and on the north side of the night lounge water dropped internally from the windows and doors.[15]

[26] On 29 April 2008, Ms Lee took photographs showing leaks around windows, doors, from the ceiling and top of walls, near an internal stairwell and in a lounge.

[27] By the end of April 2008, Mr Beattie made a further report for Ms Lee, called "Assessment of Construction of Dwelling". Mr Beattie's invoice for the report is dated 30 April 2008. The report includes the following statements:

> Most of the structure is totally obscured by exterior cladding and the roof. However, interior walls displayed sufficient misalignment to cast doubt on the acceptable tolerances of alignment and plumb of the entire structure. … Most of the exterior would not meet the requirements of the New Zealand Building Code in either durability, weathertightness or alignment. Resolution will necessitate the removal of extensive sections of cladding, after which a close assessment of the construction will quantify the extent of the remediation necessary.

At paragraph 1.10 this appears:

> Of particular concern to the owner was the weathertightness of the roof installation and deficiencies evident in the balcony structure adjoining the north east elevation.

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13 Lee affidavit of 5 November 2014 at [10].

14 *Composite Cladding & Signage Manufacture and Installations Ltd v Lee* DC Whangarei CIV-2008-088-562, at paragraph [76].

15 I add from my own memory that there was very heavy rainfall on 28 April 2008. It caused widespread flooding and landslips on the east coast of Northland. It was reputedly a one in a hundred year event.

[28] The report considers roof drainage, the north-east balcony and the south-east balcony. Mr Beattie found defects in all these areas. The drainage system in the roof was found to be inadequate and did not cater for storm events required by AS/NZS 3500.5:2000. The north-east balcony was found to have been modified significantly from that detailed on the consent drawings, with insufficient fall provided, preventing adequate drainage and drying. This was said to introduce a number of high risk aspects to the integrity of the structure. The south-eastern balcony was found to have been built with insufficient cross-fall to a purpose-made outlet and had a deficient drainage system.

[29] The conclusion to the report stated that significant elements of construction of the dwelling did not comply with the New Zealand Building Code and associated standards. It said that the roof drainage system was entirely inadequate for catchment and remediation needed to be addressed with some urgency. The north-east balcony did not comply with consent documents and the modifications compromised the integrity of the structure and the adjoining dwelling, with remediation to be addressed quite urgently. A qualification was added (at paragraph 6.6):

> This assessment report and estimates are to be qualified by the limited access that could be made available to concealed elements within the structure. It may be found that the concealed downpipes are of sufficient capacity but should this not be the case then extensive redesign and re-estimation may be necessary to completely replace the sub-terrain elements across to the water tanks.

[30] Ms Lee referred to this report in an email to Composite Cladding & Signage Manufacture and Installations Ltd on 18 May 2008. Her email refers to attachments, "the Whangarei City Council report and the independent building consultant reports," and states:

> According to the report from independent builder consultant, the cladding need to removal.

[31] On 19 May 2008, Ms Lee signed a letter prepared by her lawyer addressed to Rob Littlejohn Builders Ltd, giving a notice of dispute/adjudication under the building contract of 27 November 2007. In briefly describing the dispute, the notice stated that the house had not been built in accordance with the contract, the Building

Act and the Building Code. Because of these breaches, the notice said that moisture and water ingress had entered into the dwelling which was defective and required extensive remediation. The notice referred to the assessments made by Mr Beattie and included this:

> Most of the exterior would not meet the requirements of the New Zealand Building Code in durability, weathertightness or alignment. Resolution will necessitate removal of the existing cladding.
>
> Deficiencies are evident in respect of the weathertightness of the roof installation and the balcony structure adjoining the north-east elevation – both of which will require extensive remediation.

[32] The notice gave particulars of alleged defects in workmanship. It also alleged breach of duty of care to carry out work in accordance with the Building Act and the Building Code.

[33] For its summary judgment application, the council can rely only on matters arising before 22 May 2008 to show that a cause of action against the council had arisen then.

[34] There is one further matter the council relies on – Ms Lee's decision not to file a claim under the Weathertight Homes Resolution Services Act 2006 at that stage. It shows her knowledge that the defects causing water ingress had reduced the value of the house. In her submissions of 11 May 2009 in a proceeding against Rob Littlejohn Builders Ltd,[16] Ms Lee outlined the relevant history. Between a paragraph recording the leaking she saw on 28 April 2008 and service of a summary judgment application on 9 May 2008, she stated this:

> Regent Law suggested defendant go to Weathertight Home Resolution Services at that time, after defendant had read all the details of WHRS noticed that that service will diminish house values. What defendant wants was to have family house to live and can carry on her business. So defendant just want plaintiff come back to fix his defective work problem and move on the life.

[35] The council relies on all the above facts to submit that:

1 Ms Lee knew that the house had been built with significant defects.

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[16] *Rob Littlejohn Builders Ltd v Lee* DC Whangarei CIV-2009-488-192, 11 May 2009.

2 By reason of those defects, the construction of the house did not comply with the New Zealand Building Act and the Building Code.

3 The defects resulted in a loss of value.

[36] On those facts, the council submits that the cause of action had already accrued before 22 May 2008. Ms Lee does not contest the facts, only whether they go to show that the cause of action had already accrued. She says that time did not start to run until later: from 12 August 2008 when she applied for an assessor's report under the Weathertight Homes Resolution Service Act, or from 6 April 2011 when Mr Gill, another building expert, found a defect in construction that had not been identified until then.

Events after 22 May 2008

[37] Ms Lee cannot be accused of lethargy over the six years before she started this proceeding. Instead disputes over the construction of her house seem to have dominated her life. There has been an adjudication under the Construction Contracts Act 2002, an attempted proceeding in the Weathertight Homes Tribunal and an unsuccessful appeal from its decision, a hearing in the District Court, a successful appeal from that court's judgment, a rehearing and an unsuccessful appeal, and an arbitration. For some of that time Ms Lee has represented herself, at other times she has had a lawyer. She has obtained more information about the defects in her house.

The adjudication under Construction Contracts Act 2002

[38] On 6 June 2008, Ms Lee signed an application to nominate an adjudicator under the Construction Contracts Act 2002, the other party to the dispute being Rob Littlejohn Builders Ltd. Ms Lee alleged defective work by the builder and relied on information showing weathertightness failure.

[39] In July 2008 there was an adjudication under the Construction Contracts Act. The decision made on the papers went against Ms Lee, with the adjudicator rejecting Ms Lee's counterclaim, drawing a distinction between defective work on the one

hand and defects appearing after the work had been completed on the other. He held that the fact that defects became apparent after the work was completed by Rob Littlejohn Builders Ltd was not of itself evidence of defective work by the builder which would have entitled Ms Lee to claim reductions in the price.

[40] Ms Lee appealed against that decision, but that was put on hold while the dispute with Rob Littlejohn Builders Ltd on the entire merits went to arbitration.

Application for assessor's report under the Weathertight Homes Resolution Service Act

[41] On 12 August 2008, Ms Lee applied for an assessor's report under the Weathertight Homes Resolution Service Act. The assessor inspected the property on 16 and 17 August 2008 and made a report on 20 October 2008. The report found that the house met the eligibility criteria under s 14 of the Weathertight Homes Resolution Services Act. The assessor listed the parties who were potentially liable, including the Whangarei District Council as building certifier and as the territorial authority which issued the building consent and undertook all site inspections. The assessor estimated the remedial cost at $430,000. The report recorded that the assessor had interviewed Ms Lee. The report records information she gave him as to the house suffering leaks and ensuing damage.

The proceeding in the Weathertight Homes Tribunal

[42] Ms Lee lodged a claim in the Weathertight Homes Tribunal. The respondents were the District Council, Mr K J Fong (a draughtsman), Altherm Aluminium Northland Ltd, Northland Waterproofing Solutions Ltd and Design Metal Roofing Ltd. The tribunal held in March 2013 that Ms Lee was barred from making a claim in the tribunal under s 60(5) of the Weathertight Homes Resolution Service Act because the subject matter before the tribunal was also the subject of other proceedings. Ms Lee tried to appeal against the decision of the Tribunal. As she was out of time she needed leave, but Wylie J dismissed her application.[17] He

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[17] *Lee v Whangarei District Council* [2014] NZHC 1002.

gave his decision on 14 May 2014. Ms Lee began this proceeding very shortly afterwards.

Proceeding by Composite Cladding and Signage Manufacture and Installations Ltd

[43] Composite Cladding and Signage Manufacture and Installations Ltd sued Ms Lee in the District Court for the unpaid balance of the contract price. Ms Lee counterclaimed, alleging defective workmanship. In October 2009, Judge David Harvey gave judgment in favour of Composite Cladding and Signage Manufacture and Installations Ltd and dismissed Ms Lee's counterclaim, making strong findings against Ms Lee. Ms Lee did not have legal representation in that proceeding.

[44] She appealed - this time, with legal assistance. Rodney Hansen J allowed her appeal, primarily on procedural grounds, and directed a re-hearing.[18] Ms Lee was represented this time. Judge Sharp dismissed Ms Lee's counterclaim and again made findings adverse to Ms Lee. While Judge Sharp accepted that there were watertightness defects, she held that Ms Lee had not shown that Composite Cladding and Signage Manufacture and Installations Ltd was responsible for them. Ms Lee appealed against the decision of Judge Sharp. She applied for leave to adduce further evidence but Wylie J dismissed that application.[19] Woodhouse J heard the appeal and dismissed it.[20]

Arbitration with Rob Littlejohn Builders Ltd

[45] Ms Lee's dispute with Rob Littlejohn Builders Ltd went to arbitration. That resulted in an award on 8 November 2014. Against her run of losses, Ms Lee had a win. She obtained an award of over $700,000 against Rob Littlejohn Builders Ltd. That appears however to have been a barren remedy.

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18 *Lee v Composite Cladding and Signage Manufacture and Installations Ltd* HC Whangarei, CIV-2009-488-828, 16 December 2010.

19 *Lee v Composite Cladding and Signage Manufacture and Installations Ltd* [2012] NZHC 3189.

20 *Lee v Composite Cladding and Signage Manufacture and Installations Ltd* [2013] NZHC 354.

The Gill report

[46] In March 2011, Auckland lawyers acting for Ms Lee commissioned a further weathertightness report by a Mr Gill, a registered building surveyor. The report of 6 April 2008 is thorough and wide-ranging. It was prepared for the various cases then in progress: with Composite Cladding and Signage Manufacturing Installations Ltd, with Rob Littlejohn Builders Ltd, and the claim in the Weathertight Homes Tribunal. The significance of this report is that it found defects that had not been identified by earlier consultants. One of those defects is that plywood pre-cladding had not been sealed and joints were not taped.[21] He said that as a result the barrier between the precladding and cladding was not effective and wind-driven moisture penetrated the building envelope. Ms Lee described the exterior cladding, an aluminium composite panel, as a "rain screen".

[47] In May 2013 the Weathertight Homes Resolution Service assessor made an addendum to his report, which confirmed the findings by Mr Gill. A full reclad was recommended.

Ms Lee's response to the council's summary judgment application

[48] Against the council's unchallenged evidence that by 21 May 2008 she knew that her house had construction defects, that it had not been built in accordance with the Building Code, that the house leaked, that she had taken legal advice about these problems, had obtained advice from a consultant on leaky buildings and was aware that the defects affected the value of the house, Ms Lee says:

(a) The reports by Mr Beattie of Kaimamaku Consultancy Ltd can be disregarded because they were commissioned to deal with a dispute as to workmanship with Rob Littlejohn Builders Ltd, not a leaky building claim.

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[21] Another is "the north-east balcony deck joined with the north wall of office 2, and that north-east balcony deck was not built according to the approved plan".

(b) Time stopped running when she applied for the WHRS assessor's report on 12 August 2008.

(c) She is suing for the new defects identified by Mr Gill in his report, not for defects identified earlier.

Beattie reports

[49] As to the reports by Mr Beattie, the reason for obtaining the reports is not relevant. What counts is that through those reports Ms Lee was made aware of the defects in construction, including those going to water ingress. Moreover, his reports were only one source of her knowledge. She also knew from observing leaks herself.

The application for an assessor's report

[50] Ms Lee's application on 12 August 2008 for an assessor's report under s 32 of the Weathertight Homes Resolution Services Act is important for limitation purposes under that act. Section 37 of the Weathertight Homes Resolution Services Act says:

> **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.
>
> …

[51] Under s 9 of the Weathertight Homes Resolution Services Act a person brings a claim in respect of a dwellinghouse when they apply for an assessor's report under s 32.

[52] For Ms Lee's proceeding in the Weathertight Homes Tribunal, the effect of s 37 is that time stopped running when she applied for the assessor's report on 12 August 2008. She contends that it also stopped running for this proceeding, even though the Tribunal struck out her claim under s 60(5).

[53] Cases have held that s 37 applies only to claims under that act, not to proceedings in other courts (unless they are transferred under s 119). In *Bunting v Auckland City Council* a claim had been found to be ineligible, but the claimants were not able to use the time of the application for an assessor's report to say that their later proceeding in this court was in time.[22] The court approved this submission by the council:[23]

> The respondent submits that the present case is analogous with the circumstances that prevail when a civil proceeding is discontinued before the expiry of the relevant limitation period or what used to occur when the procedural rules relating to non suit were in force. In those circumstances, a plaintiff could commence a second proceeding but time for the purposes of the Limitation Act ran from the filing of the second proceeding. A plaintiff could not rely on the date of filing the original proceeding (once discontinued) in order to avoid any subsequently filed proceeding being time barred. Here the respondent contends that the application has been extinguished by the claim being ineligible so that any subsequent claim or proceeding (which would include the struck out proceeding) must qualify on its own account under any relevant limitation period. There is no possibility of relating a later claim or proceeding back to the time of the filing of the original application.

[54] In *Osborne v Auckland Council* the Supreme Court was invited to rule on the question, but declined to do so.[24] *Bunting* accordingly continues to apply. It seems implicit in the judgment of the Court of Appeal in *Osborne* that an application for an assessor's report under the act could not apply to a later proceeding in this court.[25] In the light of these authorities it is not open to Ms Lee to rely on the application for an assessor's report to say that this proceeding is in time.

[55] Ms Lee also contended that *Osborne v Auckland Council* helped her. The decision of the Supreme Court is primarily about eligibility criteria in the Weathertight Homes Resolution Services Act, especially s 14(a). It does not help Ms Lee.

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22 *Bunting v Auckland City Council* HC Auckland CIV-2007-404-2317, 13 August 2008.
23 At [22].
24 *Osborne v Auckland Council* [2014] NZSC 67, [2014] 1 NZLR 766 at [15].
25 *Osborne v Auckland City Council* [2012] NZCA 199, (2012) 21 PRNZ 76 at [10].

Fresh defects identified by Mr Gill

[56] Ms Lee argues that she is suing only in respect of the defects identified by Mr Gill in 2011. She is not suing in respect of the defects identified by Mr Beattie or in the assessor's eligibility report of 20 October 2008. Indeed, the only defect her statement of claim alleges is that the plywood ridged backing was not sealed and joints were not taped. She claims that this was discovered only in April 2011.

[57] Woodhouse J described the new defect in *Lee v Composite Cladding and Signage Manufacture and Installations Ltd*, Ms Lee's appeal from Judge Sharp's District Court judgment:[26]

> As indicated in the introduction to this judgment, the aluminium cladding panels are fixed to what is called pre-cladding. There is a cavity between the aluminium cladding and the pre-cladding. The cavity is maintained between the cladding and the pre-cladding by the installation of packers which sit between the cladding and the pre-cladding.
>
> The aluminium pre-cladding is intended to be a rain screen only. It is not intended to be impermeable to all water. It is accepted that some water will get behind the cladding. I am satisfied from the evidence in this case, as was the Judge in the District Court, that the pre-cladding may be described as the primary line of defence against water ingress which might cause damage to the structure of the house. Water that could penetrate the pre-cladding does get into the cavity. The pre-cladding for this house was required to be impermeable to water. The pre-cladding is plywood panels. The pre-cladding specifications to ensure impermeability to water ingress are that, amongst other things, the panels are to be treated and sealed plywood and the joints between the pre-cladding panels are to be sealed with tape. The evidence is that the joints between pre-cladding panels are not sealed and there is some suggestion of other defects. As earlier recorded CCS had no responsibility for the pre-cladding. The design of the pre-cladding, as just described, is intended to prevent ingress of water that gets into the cavity before it drains away or evaporates. The aluminium cladding is also required to be designed and installed in ways which will enable water that does get into the cavity to drain away.

[58] In September 2014, Ms Lee prepared an amended statement of claim but that was not filed in court. The defects in that draft pleading are more extensive. They include defects identified by Mr Beattie and in the assessor's eligibility report. It is open to a plaintiff facing a summary judgment application to amend a statement of

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[26] *Lee v Composite and Cladding and Signage Manufacture and Installations Ltd* above n 20, at [28]-[29].

claim to show a viable case. But Ms Lee's proposed amended pleading does not help for the present point, given that she is relying on the late discovery of additional defects by Mr Gill.

[59] The question is whether time under s 4(1)(a) of the Limitation Act 1950 can be deferred because not every defect is identified at the time of discovering damage.

[60] In *Pullar v R (acting by and through the Secretary for Education)*, the Ministry of Education sued for weathertightness defects in Ruatoki School.[27] The work was completed during 1996. In October 1997 the ministry's architects wrote to the contractors regarding leaking windows, plaster and paintwork. In 1998 the ministry asked a consultant to provide a report as to defects in the building. The ministry received that in late December 1998. The ministry commissioned a follow-up report in 1999. It issued a proceeding in May 2005, suing the building contractors and the architects in tort. On the building contractors' summary judgment application, the Court of Appeal held that the claim was time-barred, applying the *Hamlin* test. The court suspected that any cause of action in negligence had accrued in October 1997 when the architect requested the contractor to return to fix leaking windows and other damage. It went on to say:[28]

> But, even if we are wrong about that, there can be no doubt whatever that a cause of action had definitely accrued by the time of Mr Barnett's inspection and report of December 1998. We do not need to ask, in *Hamlin* terms, whether "any reasonable [building] owner" would or should have called in "an expert" by then: the Ministry after all had called one in. The defects were obvious. So was the remedial action required.

And:[29]

> …It is not necessary, in order for time to start running, to be able to pinpoint with precision the exact cause of every defect. Indeed, that would frequently mean time could not start running until the remedial work was under way! That would in turn mean that the building owner could not sue the builder in advance of the repair work as no cause of action would have by then accrued. That is not and never has been the law. What one is concerned to ascertain is when economic loss occurred: when was the market value of the building affected? We suspect the market value of this building was affected back in 1997. But it was clearly affected by the time the Barnett report was prepared in December 1998.

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27 *Pullar v R (acting by and through the Secretary for Education*) [2007] NZCA 389.
28 At [16].
29 At [19].

[61] Similarly in this case, it is unnecessary to enquire whether the building owner should have called in an expert, because in this case, with legal advice, Ms Lee did call in a consultant who held himself out as having expertise in weathertightness and building quality issues. From the time of Mr Beattie's report of 30 April 2008 if not earlier, Ms Lee had discovered actionable damage. Time started to run from then, if not earlier. On the basis of *Pullar*, the later discovery of further defects by Mr Gill does not put back the point when time starts running under s 4(1)(a).

[62] In response Ms Lee referred to *Burns v Argon Construction Ltd*.[30] That is a case of intermittent damage in a leaky building case. *Pullar* was not followed. Asher J set aside a decision of the Weathertight Homes Tribunal striking out a claim on the ground that it was barred under s 4 of the Limitation Act 1950. Defects had been identified and repairs carried out, but later the defects in the house were found to be more serious, going to design as well as construction. The discovery of the more serious problems was held arguably to give rise to a new cause of action, so as to bring the claim within time. The limitation question could not be decided on the pleadings.

[63] Intermittent damage is to be distinguished from one-off damage and continuous damage in limitation cases. In *Bowen v Paramount Builders (Hamilton) Ltd* Cooke J said:[31]

> I agree with the President and Woodhouse J that the mere fact that a purchaser was later in the chain than the present plaintiffs, or that a much longer time went by before damage occurred, should not automatically rule out a cause of action against the builder. Causation would always have to be proved, and a reasonable expectation of adequate intermediate examination would always be a defence. In practice those two difficulties would militate against successive actions, which are certainly not to be encouraged, but in principle I would adopt as applicable the following passage in Salmond on Torts:
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> > "Where the act of the defendant is actionable per se, there is no doubt that all damage, both actual and prospective, may and must be recovered in one action. But where the act of the defendant is not actionable per se, but is actionable only if it produces actual damage, and it produces damage twice at difference times, is there one cause of action, or are there two? If, for example, the defendant by an act of negligence has created a source of danger which on two

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30 *Burns v Argon Construction Ltd* HC Auckland CIV-2008-404-7316, 18 May 2009.

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

> successive occasions causes personal harm to the plaintiff, is the plaintiff barred from recovery for the second harm because he has already recovered damages or accepted compensation for the first? Both on principle and on authority it seems that when an act is actionable only on proof of actual damage, successive actions will lie for each successive and distinct accrual of damage. But where the damage sued for in the second action is not in reality distinct from that sued for in the first, but is merely a part of it or consequential upon it, it cannot be recovered. For it is clear that the second damage in order to be recoverable in a second action must arise directly from the wrongful act of the defendant ant [sic.] not indirectly through the damage already sued for. In other words, compensation for the first damage includes compensation for all the ulterior consequences of that damage whether already accrued or not, but it does not include compensation for entirely distinct damage accruing from the defendant's act independently of the damage first sued for".

That principle may be quite easily workable when the plaintiff has suffered personal injuries from the same cause on different occasions. Its application is less straightforward when property suffers damage more or less continuously. In cases of interference with the natural support of land it is well settled that each further slip creates a fresh cause of action: *Morris v Redlands Bricks Ltd*, per Lord Upjohn. Salmond speaks of that kind of case as one of "intermittent" damage. In *Maberley v Henry W Peabody & Co of London Ltd*, a nuisance case and the main authority cited in Salmond for the passage already set out, Stable J went as far as to say:

> "It may well be that a fresh cause of action arises as each brick topples down, and that there is a continuing cause of action until the root of the trouble is eradicated . . ." (ibid, 194).

Presumably, however, it is a question of fact and degree whether damage is sufficiently distinct to result in a separate cause of action. On the evidence in the present case it seems to me that the damage suffered by the building was not truly continuous; and that between the slight damage during the McKays' ownership and the considerable damage after the Bowens bought there were a difference and an interval marked enough to justify treating the latter damage as distinct.

(Citations omitted.)

[64] In *S v G* Gault J said:[32]

> Separate and distinct damage may give rise to a separate cause of action in negligence: *Bowen v Paramount Builders (Hamilton) Ltd*, *Mount Albert Borough Council v Johnson*, and where the cause of action is in respect of sufficiently separate and distinct damage or injury the reasonable discoverability test might be applied to that.
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> (Citations omitted)

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[32] *S v G* [1995] 3 NZLR 681 (CA) at 687.

[65] The courts have found separate causes of action in some cases of successive ownership where a subsequent owner has sued: *Bowen v Paramount Builders (Hamilton) Ltd* and *Mt Albert Borough Council v Johnson*,[33] but that is not a test for distinct causes of action and, in any event, that aspect is not present here. In some cases, a separate cause of action has been found when initial damage has been repaired, but it is later found that the cause of damage is more deep-rooted: *Mt Albert Borough Council v Johnson* and *Burns v Argon Construction Ltd.* But the test for a separate and new cause of action cannot turn on whether intermediate repairs have been carried out. The fact that Ms Lee has not carried out intermediate repairs does not count conclusively against her.

[66] A better way to assess the matter is to consider the effect of upholding Ms Lee's submission. On her argument, she could still not sue for damage discovered more than six years before she sued the council, but she could sue for the plywood ridged backing not being sealed and joints not taped. Those are the only relevant defects discovered inside the six years. Such a claim would not allow her to claim for damage to the house from defects in other parts of the house. But if the damage she says she can sue for as a newly-discovered defect was discoverable more than six years before she began this proceeding, her claim is still statute-barred. It is not a case of saying that she ought to have known. Such a finding is likely to require a fuller hearing with expert evidence. It cannot be made in this summary judgment application.

[67] But there is unchallenged evidence that she was on notice that the defects in construction would require the replacement of cladding, the matter she now raises as a new matter. In her affidavit in opposition to the council's security for costs application, she said:[34]

> It was at the final inspection, the inspector showed me that exterior flash around openings require to be installed to tape further down. (Please see the photocopy below). This is the exterior, it can be fixed very easy. And the exterior cladding (joints, corner), the exterior cladding is "**rain screen**" only. The importance of requirement is the plywood ridged backing have to be sealed and joints taped with approved tape to form rigid air barrier to perform the function of weathertightness. The exterior cladding (joints,

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33 *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).
34 At [11].

> corner) is the nature of this kind of the cladding installation. It has been noted in the suspension letter about the building consent application from WDC.

[68] Mr Beattie's report of 5 February 2008 advised her that most of the exterior would not meet Building Code requirements in weathertightness and resolution would require removal of extensive sections of cladding.[35] He repeated this in his report of 30 April 2008. [36] Her email of 18 May 2008 to Composite Cladding and Signage Manufacture and Installations Ltd shows that she understood this.[37] Her lawyer's letter of 19 May 2008 to Rob Littlejohn Builders Ltd claimed that defects would require reinstating all "cladding and soffits".

[69] It may be that by 21 May 2008 Ms Lee's knowledge of the cladding defects was not as full as it is now, but she did know enough to realise that the value of the house was adversely affected by defects in the cladding system. What she found out from Mr Gill's report did not change that damage or point to fresh damage. This is a continuous damage case. Mr Gill's report did not show a new cause of action.

Result

[70] The council has shown by a strong margin that Ms Lee discovered the damage to her house before 21 May 2008. She knew that it had defects, that it did not comply with the Building Code, that those defects caused the house to leak and that they lowered the value of the house. She also knew that the defects went to the weathertightness of the cladding system. None of the matters that she has raised change the fact that her cause of action against the council arose more than six years before she began this proceeding. Accordingly the council succeeds in its application. That brings this proceeding to an end.

[71] I make these orders;

(a) I grant summary judgment to the Whangarei District Council.

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35 At [19] above.
36 At [27] above.
37 At [30] above.

(b) I award costs to the council against Ms Lee. If the parties cannot agree costs, memoranda may be filed.

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Associate Judge R M Bell