IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2013-404-3415
[2017] NZHC 1785

BETWEEN	BODY CORPORATE 360683 First and Plaintiffs
	WILLIAM FREDERICK MULHOLLAND AND OTHERS Second Plaintiffs
AND	AUCKLAND COUNCIL First Defendant
	WOODHAMS MEIKLE ZHAN ARCHITECTS LIMITED AND WOODHAMS MEIKLE LIMITED Second Defendants
	OTHERS Third to Ninth Defendants and Third and Fourth Parties

Hearing:	16 June 2017
Appearances:	G R Grant for the Plaintiffs PJL Hunt and T W Clark for the Second Defendants
Judgment:	1 August 2017

JUDGMENT OF WOODHOUSE J

This judgment was delivered by me on 1 August 2017 at 4:00 p.m. pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Solicitors:
Ms G R Grant, Rainey Law, Solicitors, Auckland
Mr PJL Hunt and Mr T W Clark, McElroys, Solicitors, Auckland

[1] This is an application by the second defendants (the architects) to strike out those parts of an amended statement of claim of the plaintiffs (the owners) which allege that the architects negligently carried out on-site observations and inspections (the observation claim) during the construction of an apartment building.

[2] The central issues are:

(a) Whether the observation claim is a new cause of action or whether allegations relating to observation are no more than further particulars in respect of a cause of action pleaded in the previous statement of claim.

(b) If the observation claim is a new cause of action, is it time barred?

Factual and procedural background

[3] The owners have claims against eight defendants relating to the construction of a 34 unit residential apartment building known as Orewa Grand. The factual background is taken from the third amended statement of claim. This is the version of the claim containing the pleadings the architects seek to strike out. I will refer to this as the new pleading. It is to be compared with the second amended statement of claim which I will call the prior pleading.

[4] The building was constructed between approximately November 2004 and February 2006.

[5] The architects were engaged by the developer to provide three categories of architectural services:

(a) Preparation of drawings to obtain necessary consents and to enable construction of the building.

(b) Assistance to the developer in obtaining building consents.

(c) On-site observation during the course of construction.

[6] The relevant dates during which the architects carried out relevant services were:

(a) Design drawings and specifications were prepared in 2004 and 2005.

(b) Working drawings were prepared between approximately October 2004 and July 2005.

(c) On-site observations were undertaken between approximately January 2005 and January 2006.

(d) Post-construction defects inspections were carried out from December 2005 to February 2006.

(e) The last alleged on-site attendance was on 16 August 2006.

[7] This proceeding was commenced against the architects, and other defendants, on 20 December 2013. The second amended statement of claim was filed and served around 6 November 2014. The current pleading was filed and served around 27 October 2016.

Comparison of the pleadings

[8] The relevant paragraphs in the prior pleading and the current pleading are set out below. The italicised paragraphs of the current pleading are those which the architects seek to strike out. There is also an application to strike out any reference in schedule 2 of the current pleading to on-site observations or inspections by the architects, but it is unnecessary to reproduce that part of the current pleading. Acronyms used in the pleadings have been replaced with descriptive names, recorded in square brackets, and some explanatory background of no relevance to the present issue has been omitted.

PRIOR PLEADING	NEW PLEADING
I. Parties to the proceedings	**I. Parties to the proceedings**
4. … The [architects were] contracted to design the Orewa Grand Apartments, including preparing the plans and specifications for the construction of the buildings.	4. … The [architects were] involved in the design and construction of Orewa Grand Apartments in that they provided architectural services as set out in detail at paragraphs 15, 16, 19, 20, 22 and 24 below.
II Construction of the Orewa Grand Apartments	**II Design and Construction of the Orewa Grand Apartments**
15. In or about 2004, [the developer] entered into a contract with the … architects … for the provision of professional services pursuant to which [the architects] agreed to, inter alia: (a) Prepare plans and specifications for the Orewa Grand Apartments for the purpose of obtaining the necessary building consents for the construction of the buildings from the Council and any amendments required to those consents; and (b) To act as agent for [the developer[in making all necessary building consent applications and to provide such further information as the Council may require from time to time to process those applications or any amendments required to them. ("**the architectural services**")	15. On or about 19 April, [the developer] … entered into a contract with the … architects … for the provision of architectural services for the design and construction of Orewa Grand Apartments for a fixed fee of $500,000 plus GST, subsequently amended by agreement to $480,000 plus GST. Pursuant to that contract, [the architects] agreed to, inter alia: (a) Prepare preliminary design, developed design and working drawings for Orewa Grand Apartments for the purpose of obtaining the necessary resource and building consents from the Council and to enable construction of the buildings, for a fee of $355,000 plus GST, and (b) Act as agent for [the developer] in obtaining all necessary building consent approvals for construction of Orewa Grand Apartments, including any amendments required to them and any related matters. *(c) Provide onsite observation during the course of the construction of Orewa Grand Apartments, for a fee of $125,000 plus GST.* (*collectively referred to as* "**the architectural services**")
16. In 2004, [the architects] prepared written plans and specifications for the proposed building work necessary to build the Orewa Grand Apartments, being:	16. In 2004 and 2005, pursuant to its contract to provide preliminary and developed design, [the architects] prepared plans and specifications for the building work necessary to build

(a) Written plans and details including all subsequent revisions and amendments marked with the job reference number 1024-04 and titled "Residential Development for Orewa Grand Apartments Ltd – 252 Centreway Road, Orewa";

(b) A written specification dated December 2004 marked with the job number 1024-04 entitled "Orewa Grand Apartments" together with any subsequent revised specifications.

("**the Plans and Specifications**")

17. …

("**the Building Consent applications**")

22. Between approximately 1 November 2004 and 28 February 2006:

(a) …

(b) The second to seventh and ninth defendants each provided professional services and/or completed their parts of building work required for the construction of the Orewa Grand Apartments as referred to in paragraphs 4-9 and 11 above and as authorised by the Building Consents;

…

the Orewa Grand Apartments, being:

(a) Written plans and details including all subsequent revisions and amendments marked with the job reference number 1024-04 and titled "Residential Development for Orewa Grand Apartments Ltd – 252 Centreway Road, Orewa";

(b) A written specification dated December 2004 marked with the job number 1024-04 and entitled "Orewa Grand Apartments" together with any subsequent revisions to that specification.

("**the Plans and Specifications**")

17. …

("**the Building Consent applications**")

22. Between approximately 1 November 2004 and 28 February 2006:

(a) …

(b) [The architects] provided working drawings to [the builder] and/or its subcontractors between October 2004 and July 2005 or thereabouts to further enable construction of the Orewa Grand Apartments;

(c) [The architects] undertook onsite observation of the construction work on Orewa Grand Apartments and attended site meetings with inter alia [the developer], Cordite and the engineer to the contract between January 2005 and January 2006;

(d) [The architects] attended site and undertook inspections on or about 15 December 2005, 17, 23 and 16 January 2006 for the purposes of identifying defects in the building work on Orewa Grand Apartments and set out in a letter dated 10 February 2006 a list of all defects it had located in the Orewa Grand Apartments;

…

24. On or about 27 March, 26 May, 29 May, 15 and 16 August 2006, [the architects] attended site and carried out further inspections of the building

work for the purposes of identifying defects in Orewa Grand Apartments at the end of the Defects Liability Period and/or in connection with the certification of Practical Completion in relation to the building work.

CAUSE OF ACTION AGAINST SECOND DEFENDANTS – NEGLIGENCE

33. The plaintiffs repeat paragraphs 1 to 28 above and say that at all material times, [the architects] performed the architectural services and obtained Building Consents for the Orewa Grand Apartments as referred to in paragraph 15 above.

34. In the circumstances, [the architects] owed the plaintiffs a duty to exercise reasonable skill and care in performing the architectural services.

35. In breach of their duty of care, [the architects] failed to prepare adequate plans and specifications to ensure that the building work would comply with the Building Code, the Building Act 2004 and all other applicable legislation and industry standards.

CAUSE OF ACTION AGAINST SECOND DEFENDANTS – NEGLIGENCE

34. At all material times, [the architects] owed the plaintiffs a duty to exercise reasonable skill and care in providing and undertaking the architectural services and other professional services as set out at paragraphs 15, 16, 17, 20, 22 and 24 above.

35. [The architects] breached [their] duty of care by:

    (i) Failing to prepare and provide adequate plans and specifications and working drawings to ensure that the building work on Orewa Grand Apartments would comply with the Building Code, the Building Act 1991/2004 and all other relevant technical literature and standards referred to in Schedule 2;

    (ii) Failing to use reasonable care and skill when attending onsite to observe the construction of Orewa Grand Apartments, and by so doing, failing to ensure that the building work on the Orewa Grand Apartments complied with the requirements of the Building Code, clause 7.5.3.2 of NZS3604 and the other relevant technical literature and standards referred to in Schedule 2 and was free from defects;

    (iii) failing to identify any of the defects during the course of any of its inspections of the Orewa Grand Apartments as set out in paragraphs 22 and 24 above, or in its follow-up letter dated 10 February 2006;

	(iv) for the detailed reasons set out in Schedule 2 to this claim.
36. As a result of [the architects'] negligence as described above: (a) Orewa Grand Apartments were built with the Defects which have caused or contributed to the Damage and the plaintiffs will have to undertake the Remedial Works; (b) The plaintiffs have and/or will suffer and will continue to suffer losses set out in paragraph 28 above.	36. As a result of [the architects'] negligence as described above: (a) Orewa Grand Apartments were built with the Defects which have caused or contributed to the Damage and the plaintiffs will have to undertake the Remedial Works to prevent water ingress into the buildings and achieve compliance with the Building Code for their units and common property; (b) The Body Corporate and second plaintiffs have suffered and/or will suffer significant losses as set out in paragraph 29 above; (c) The second plaintiffs listed in Schedule 6 have suffered, and will continue to suffer, distress, inconvenience, anxiety and other non-pecuniary harm as a consequence of the acts and omissions of [the architects], for which they seek an award of general damages as particularised in Schedule 6.

What is a fresh cause of action?

[9] The general principles for identifying a cause of action were discussed by the Court of Appeal in *Ophthalmological Society of New Zealand Inc v Commerce Commission*.[1] The Court of Appeal in *Transpower New Zealand Ltd v Todd Energy Ltd* summarised the principles as follows:[2]

> (a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another (*Letang v Cooper* [1965] 1 QB 232 at 242-243 (CA) per Diplock LJ);
>
> (b) Only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction" (*Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 at 405(CA) per Millett LJ);

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

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

(c) The test of whether an amended pleading is "fresh" is whether it is something "essentially different" (*Chilcott v Goss* [1995] 1 NZLR 263 at 273(CA) citing *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958 at 961(SC) per McCarthy J). Whether there is such a change is a question of degree. The change in character could be brought about by alterations in matters of law, or of fact, or both; and

(d) A plaintiff will not be permitted, after the period of limitations has run, to set up a new case "varying so substantially" from the previous pleadings that it would involve investigation of factual or legal matters, or both, "different from what have already been raised and of which no fair warning has been given" (*Chilcott* at 273 noting that this test from *Harris v Raggatt* [1965] VR 779 at 785(SC) per Sholl J was adopted in *Gabites v Australasian T & G Mutual Life Assurance Society Ltd* [1968] NZLR 1145 at 1151(CA)).

[10] The propositions at (a) and (b) are closely linked. Millett LJ's statement that the selection of the material facts must be made at the highest level of abstraction was at the end of a discussion of definitions of a cause of action. The full discussion in the *Paragon Finance* case is as follows:[3]

> The classic definition of a cause of action was given by Brett J in *Cooke v Gill* (1873) LR 8 CP 107 at 116: '"Cause of action" has been held from the earliest time to mean every fact *which is material to be proved* to entitle the plaintiff to succeed,—every fact which the defendant would have a right to traverse.' (My emphasis.) In the *Thakerar* case Chadwick J cited the more recent definition offered by Diplock LJ in *Letang v Cooper* [1964] 2 All ER 929 at 934, [1965] 1 QB 232 at 242–243, and approved in *Steamship Mutual Underwriting Association Ltd v Trollope & Colls Ltd* (1986) 6 ConLR 11 at 30: "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person." I do not think that Diplock LJ was intending a different definition from that of Brett J. However it is formulated, only those facts which are material to be proved are to be taken into account. The pleading of unnecessary allegations or the addition of further instances or better particulars do not amount to a distinct cause of action. The selection of the material facts to define the cause of action must be made at the highest level of abstraction.

[11] The highest level of abstraction does not mean the highest theoretical level of abstraction. The abstraction cannot go to a point where the facts relied on by the plaintiff are so abstract that an essential factual element of the cause of action has not been identified.

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3 *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 at 405 (CA).

[12] In this case, the new pleading will involve investigation of factual matters which are not referred to in the prior pleading. Issues of this nature were recently discussed by the Court of Appeal in *ISP Consulting Engineers Ltd v Body Corporate 89408* as follows:[4]

> [22] The issue is whether the Owners were setting up a new case, in the sense of making new allegations that would involve the investigation of an area of fact of a new and different nature, or a new and different legal basis for a claim not put forward in the earlier pleading. To put the question more generally, does the Second CSC have an essentially different character from the First CSC?[5] The assessment is objective and the consideration must be of the substance of what is pleaded, rather than the form.
>
> [23] If an amended pleading puts forward a new legal basis for a claim, that will be on its face a new cause of action. That consideration does not arise in this case. The legal basis for the claim, breach by ISP of its duty of care, remains the same. The fact that there may be a separate limitation regime for weathertightness issues under the WHRS Act does not change the legal basis of the claim.
>
> [24] In relation to new facts, McCarthy J stated in *Smith v Wilkins & Davies Construction Co Ltd*:[6]
>
> > "On the other hand, more often alterations of fact do not affect the essence of the case brought against the defendant. Lord Wright said of a certain alteration 'in my view, therefore, the proposed amendment would, if allowed, have set up a new cause of action, involving quite new considerations, quite new sets of facts, and quite new causes of damage and injury, and the only point of similarity would be that the plaintiff had suffered certain injuries'. I do not read that passage as implying a prohibition against any alteration of the facts. In each case it must, I consider, *be a question of degree*."
>
> [25] It is clear that the importance of the pleaded fact to the success of the claim is not the test. The question is whether the proposed amendment will change the essential nature of the claim; is there a new area of factual enquiry?[7] …

Analysis: is this a new cause of action?

[13] The heart of the architects' contention is that, in the prior pleading, they were facing a claim that they had negligently designed the building and losses allegedly sustained by the owners were caused by that negligent design. The critical

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

5 The same approach was adopted in *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958 (SC) at 961, and approved in *Chilcott v Goss* [1995] 1 NZLR 263 (CA) at 273 and *Ophthalmological Society of New Zealand Inc v Commerce Commission*, above n 1, at [23]-[24].

6 *Smith*, above n 5, at 961 (footnotes omitted) (emphasis added).

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

paragraphs in the prior pleading in that regard are paragraphs 15, 22 and centrally, 33 to 35. The architects argue that, in the new pleading, there is a new cause of action because a claim has been added that the architects were negligent in carrying out on-site observations of the construction and in undertaking inspections, with the pleadings of this new claim being, in particular, in the italicised paragraphs.

[14] The owners' contention is that the added paragraphs in the new pleading are merely further particulars of a cause of action pleaded in the prior pleading. The essence of Ms Grant's submission was: the prior pleading was a claim that the architects had negligently provided architectural services; paragraph 15 of the prior pleading recorded two particulars of the architectural services – preparation of plans and specifications and acting as agent of the developer in respect of consent applications; the additional allegations in respect of on-site observations and inspections are further particulars of architectural services.

[15] I do not agree with the owners' argument.

[16] The expression "architectural services" used in paragraph 15 of the prior pleading is simply a convenient label for two fundamentally different activities carried out by the architects. The allegations added to the new pleading in respect of on-site observations and inspections are, in turn, another activity fundamentally different from the two pleaded in the prior pleading.

[17] The cause of action in the prior pleading was not that the architects had been negligent in the provision of architectural services. A pleading to that effect would have been so abstract that, although it retained linguistic meaning, it would not be sufficient to identify the activity which, in the words of Brett J in *Cooke v Gill*, "the defendant would have a right to traverse".

[18] In the prior pleading the level of abstraction was taken to the highest level of abstraction that could be reached to maintain an arguable cause of action and one capable of being responded to by the defendant. These are the precise allegations found, in particular, at paragraphs 33 to 35 of the prior pleading – in breach of their of duty care, the architects failed to prepare adequate plans and specifications. That,

with the allegations of causation and loss, constitutes an entire cause of action. And it is one in respect of which detailed particulars could be provided.

[19] The new pleading, in respect of the allegations of negligent observations and inspections, introduced an area of factual enquiry which was not in any way relevant to the area of factual enquiry in respect of preparation of the plans and specifications. The essential nature of the factual enquiry into observations and inspections is different. The new pleading also introduces fundamentally different areas of enquiry in respect of the nature of essential elements of the duty of care, breach, causation and loss. These new areas of enquiry and the extent of them are summarised below at [36].

[20] The new enquiries that will be required are not in respect of particulars of a cause of action already pleaded in the prior pleading. This may readily be seen by comparing the sub-paragraphs in the new pleading which are directed to the original claim of negligence in preparation of plans and specifications, and those that are directed to the new claim of negligence in carrying out observations and inspections: paragraphs 15, 22, 24 and, in particular, 35 of the new pleading.

[21] For these reasons I am satisfied that the observation claim introduces a new cause of action. It remains to consider arguments for the owners on two further issues.

Is the observation claim time barred?

[22] The architects contend that the observation claim is time barred under s 393(2) of the Building Act 2004. Section 393 provides as follows:

> **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.

[23] The architects submit that, although this proceeding as a whole – *Body Corporate 360683 v Auckland Council* – was filed within 10 years of the observation work being carried out, the observation *claim* (or *cause of action*, which means the same thing), was not filed within 10 years of the observation work being carried out.

[24] The time calculations are not contested by the owners. They acknowledged that, if the 10 year limit in s 393(2) relates to the date the new pleading was filed, the observation claim is time barred. But the owners argue that the reference in s 393(2) to when "proceedings are brought" is a reference, as Ms Grant submitted, to "the date when a proceeding is commenced initially and not when amendments to the claim may be brought".

[25] Ms Grant acknowledged that her argument is novel. The 10 year limitation period was introduced in s 91 of the Building Act 1991 in terms essentially the same as those in s 393. Although a provision with the 10 year time limit has therefore been in force for some 25 years, counsel were not able to find any cases where the point now made by the owners has been argued. The approach of the architects in this case appears to have been accepted. As Mr Hunt noted for the architects, there are cases where this Court has discussed s 393 on the basis that the relevant enquiry is when the particular claim, or cause of action, is first brought, not when the

proceeding was first filed. In those cases the word "proceedings" in s 393 has been treated as being synonymous with "claim" or "cause of action".[8]

[26] The fact that the owners' argument has apparently not been addressed in cases over the last 25 years is not determinative against the owners, but it does suggest that the argument may be misconceived. For the reasons that follow I am satisfied that it is misconceived.

[27] Ms Grant's submissions were directed only to the word "proceedings" and the use of that word in the expression "if the proceedings are brought". The argument ignores the opening words of s 393(1) – the Limitation Act 2010 applies to civil proceedings as defined in s 393(1). Section 393 must be given effect consistently with the Limitation Act because that Act governs s 393.

[28] The time limits under the Limitation Act are expressly directed to the date on which the *claim* is brought, not when the proceeding is first filed in Court. The word "claim" replaced the word "action", and the expression "cause of action" used in the Limitation Act 1950, but that makes no difference.

[29] Under s 11(1) of the Limitation Act 2010, the primary limitation period for the owners' observation claim is six years after the date of the act or omission on which the claim is based. A further provision in s 11 extends the period by three years after the "late knowledge period", and there is a "long stop period" of 15 years after the date of the act or omission on which the claim is based.

[30] Section 393(2) of the Building Act introduced the 10 year long stop period for civil proceedings of the type defined in s 393(1). Construing s 393 consistently with the relevant provisions of the Limitation Act 2010, it is clear in my judgment that the word "proceedings" is to be given the same meaning as "claim" in the Limitation Act 2010, and the word "action" in the Limitation Act 1950.

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[8] *Body Corporate No. 338356 v Endean* [2014] NZHC 2644 at [19]; *Body Corporate 325261 v McDonough* [2015] NZHC 764 at [58]-[59]; *Body Corporate 325261 v Stephen Mitchell Engineers Ltd* [2014] NZHC 761 at [27]; *Perpetual Trust Ltd v Mainzeal Property & Construction Ltd* [2012] NZHC 3404 at [85].

Striking out part only of a pleading

[31] The architects' application is made in reliance on r 15.1 of the High Court Rules. Rule 15.1 provides that the Court may strike out all or part of a pleading on one of four grounds. It is unnecessary to discuss the general principles relating to striking out a pleading, which are well established and not in issue on this application.

[32] However, Ms Grant advanced an argument on a narrower point relating to strike out applications: a proposition, as she put it, that "partial strike-outs are rare and are generally discouraged unless there is a clear advantage in doing so". Ms Grant referred to an observation in *Body Corporate 325251 v McDonough*.[9]

[33] In respect of partial strike out applications, the discussion in *McGechan* is as follows:[10]

> **(3) Caution about partial strike-out applications**
>
> Although r 15.1(1) expressly contemplates the striking out of part of a proceeding, the warning (contained in cases such as *Whitman v Airways Corp of NZ Ltd* (1994) 8 PRNZ 155, and see [HR15.1.02(3)]) about partial strike-out applications is reiterated. A careful assessment is required as to whether the time and expense of such an application will, overall, be a compellingly efficient use of the resources of all involved. The point is well demonstrated by *Apple Fields Ltd v New Zealand Apple and Pear Marketing Board* HC Wellington CP35/94, 21 April 1994, where Doogue J, having warned that the application should not be proceeded with if it would not fully dispose of the case, although he subsequently struck out three of the causes of action, nevertheless awarded $2,000 against the applicant.

[34] Ms Grant submitted that striking out the paragraphs or sub-paragraphs in question "will not significantly reduce the evidence required at trial or the duration of the trial".

[35] I am not persuaded that the application should be declined on these grounds.

[36] In the circumstances of this case, I do not consider that it is appropriate or necessary to consider the practical effects of retaining, or striking out, the paragraphs

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9 *Body Corporate 325251 v McDonough*, above n 8, at [47].

10 Andrew Beck and others *McGechan on Procedure* (online looseleaf ed, Brookers) at [HR15.01.08].

in question. But, to the extent that that might be relevant, I agree with Mr Hunt's submission that the observation claim introduces substantial areas of new enquiry. The submissions are as follows:

> 5.10 In practical terms, if the case is restricted to design the factual inquiry will be limited to:
>
> (1) The architects brief in terms of design (scope of duty);
>
> (2) What was the design prepared by the architect (the design);
>
> (3) Expert evidence as to what constituted prudent design at the time (circa 2004/2005) and whether the design was adequate/met the relevant standard;
>
> (4) If the design was defective, what if any loss is attributable to the alleged defective design.
>
> 5.11 The owners' new claim in relation to observation, in contrast, clearly increases the scope of the Court's inquiry both in terms of the evidence required to be adduced, and the relevant timeframe of the inquiry. In practical terms, if the claim is expanded to include observation, the following expanded factual inquiry is required:
>
> (1) What was the architects' contractual obligation in terms of observation (scope of duty);
>
> (2) When were the architects onsite, and what were they onsite to observe? This will involve consideration of the site meeting minutes and other extensive documentation, which is not relevant to the design inquiry;
>
> (3) What was actually seen and done by the architects, contrasted with expert advice as to what the architects should have seen and observed. This will involve consideration of both what defects were observable and what should have been done once the defects had been observed;
>
> (4) If the architect's onsite observation was negligent, what loss is attributable to the alleged defective observation? Significantly, Schedule 2 of the [third amended statement of claim] which identifies the Defects with Orewa Grand, identifies the architect's liability for the Defects in terms of either "design" and/or "observation".

[37] In my judgment the owners' argument is not soundly based in principle or rules of practice. If an application to strike out part of a statement of claim will be determinative of an entire cause of action, and if the Court accepts the applicant's argument, the relevant part of the statement of claim should be struck out. There may be exceptional circumstances where the Court should exercise a residual

discretion to decline the application and, therefore, leave it for the substantive hearing. But there have been numerous cases where partial strike out applications, brought before trial, have been granted. As noted in the commentary in *McGechan*, cited above, r 15.1(1) expressly contemplates striking out part of a proceeding.

[38] The commentary in *McGechan* on striking out on limitation grounds is as follows:[11]

> **(1) Limitation**
>
> In order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the Court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process: *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (SC) at [33]. The correct procedure where an application is made under s 4(7) of the Limitation Act 1950 is spelt out in *W v A-G* [1999] 2 NZLR 709 (CA) at 737.

[39] In this case the architects have established that the owners' observation claim is clearly time-barred. In my judgment it would be an unprincipled exercise of the Court's discretion to decline the architects' application.

Result

[40] For these reasons the architects' application is granted and there is an order accordingly.

[41] The architects are entitled to costs and reasonable disbursements, with costs to be fixed on a 2B basis. Any issue relating to quantification is to be determined by the Registrar in the first instance.

Woodhouse J

[11] *McGechan on Procedure*, above n 10, at [HR15.01.07].