IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

I TE KŌTI MATUA O AOTEAROA
WAIHŌPAI ROHE

CIV-2015-425-36
[2022] NZHC 1494

IN THE MATTER	known as "Oaks Shores"
BETWEEN	BODY CORPORATE 355492 First Plaintiff
AND	JOHN ROBERT CHESTNEY & ORS Second Plaintiffs
AND	QUEENSTOWN LAKES DISTRICT COUNCIL First Defendant
AND	ELLIOTT ARCHITECT LIMITED (IN LIQUIDATION) Second Defendant
AND	OTHERS (in the Schedule to this Judgment)

Hearing:	6 May 2022
Appearances:	R W Raymond QC and D J Powell for the Plaintiffs S D Campbell and M L Rhodes for the First Defendant
Judgment:	27 June 2022

JUDGMENT OF OSBORNE J

This judgment was delivered by me on 27 June 2022 at 12 pm pursuant to Rule 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

Introduction

[1] The issue on this review application is whether amendments to the statement of claim on 22 February 2019 and thereafter are statute-barred by the longstop provision under the Building Act 2004 (the Act).

[2] The defendant, Queenstown Lakes District Council (QLDC), brought a successful partial strike-out application in relation to the amendments, with Associate Judge Lester making an order striking out the amendments and consequentially an order striking out QLDC's third party claim against the tenth third party.[1]

[3] The plaintiffs apply for review of the order striking out the amendments.

The litigation context

[4] The plaintiffs are the body corporate (the Body Corporate) and individual unit owners of the buildings of the Oaks Shores building complex (the buildings) in Queenstown. They sue QLDC for allegedly negligent conduct in issuing building consents, undertaking inspections of the works and issuing code compliance for the buildings ("the negligent conduct").

[5] The plaintiffs assert that soon after the construction of the buildings they discovered issues with the weathertightness of the buildings.

[6] It is common ground between the parties that the last relevant involvement of QLDC with the project was on 19 September 2007, being the date of QLDC's last inspection and the issue of code compliance.

[7] The plaintiffs commenced this proceeding in April 2015, the Body Corporate having previously (in May 2013) applied to the Ministry of Business, Innovation and Enterprise (MBIE) for an assessor's report under the Weathertight Homes Resolution Services Act 2006 (WHRS Act).

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1 *Body Corporate 355492 v Queenstown Lakes District Council* [2022] NZHC 678 [Judgment].

[8] By their sixth amended statement of claim (6ASOC) dated 22 February 2019, the plaintiffs added to their pleaded list of defects a structural defect identified as "bathroom pods structurally deficient floor slab" ("the Bathroom pods claim").

[9] The plaintiffs' claim as it now stands in relation to bathrooms in their thirteenth amended statement of claim (13ASOC), filed 17 December 2021, is wider.

[10] The close of pleadings date was 17 December 2021. On that date QLDC issued third party claims against De Geest Bathrooms Ltd (De Geest) and a related company. De Geest was the bathroom manufacturer. QLDC asserted that, if the bathroom pods are leaking, then it is the responsibility of De Geest. De Geest promptly applied to strike out the QLDC claims and/or for summary judgment.

[11] QLDC then applied for leave to bring a partial strike-out application against the plaintiffs in relation to the bathroom pod amendments, and the strike-out order resulted.

Application for review

[12] The plaintiffs have the right to apply for a review of the Associate Judge's decision because this proceeding was pending on 1 March 2017.[2]

[13] The approach on a review is essentially appellate.[3] The Court makes its own assessment as to whether the original decision is wrong.[4]

The evolution of the plaintiffs' claim

[14] The statements of claim preceding the 6ASOC alleged the buildings suffered from weathertightness and structural issues.

[15] The fifth amended statement of claim (5ASOC) (dated 30 August 2017), as summarised accurately by the Associate Judge, described the defects arising and the

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2 High Court Rules 2016, r 2.3; Judicature Act 1908, s 26P; Senior Courts Act 2016, sch 5 cl 11.

3 Andrew Beck and others *McGechan on Procedure* (online ed, Thomson Reuters) at HR2.3.02(1)(a); *Perriam v Wilkes* [2014] NZHC 2192 at [4].

4 *Austin, Nichols & Co Inc v Stichting Lodestar* [2007] NZSC 103, [2008] 2 NZLR 141 at [16]; *Burmeister v O'Brien* [2008] 3 NZLR 842 (HC) at [29].

remedial work required as a result of the negligent conduct under the following headings:[5]

…

(a) Balconies – a claim the balcony membranes have failed allowing water to penetrate and that balcony rainwater outlets were formed in a way that water enters between the membrane and the structure and then penetrates the building. It is also pleaded the balconies do not shed rain and snow.

(b) Roof and barge junctions – these are said to allow the penetration of water that can cause undue dampness. There is also reference to junctions between skylights and roof allowing penetration of water.

(c) Miscellaneous – service penetrations were alleged to have been installed in external walls which allow penetration of moisture and cause dampness, the construction of the cavity behind the lightweight wall cladding prevents drainage and bottom plate framing to projecting windows is said to be allowing water to cause undue dampness.

(d) Fire defects – fire systems in ceiling voids were alleged not to have stopping that would prevent the spread of fire or smoke to other fire cells, penetrations in fire rated walls were alleged not to have a means of preventing the spread of fire and structural steel/supports were not sufficiently fire rated to avoid collapse during a fire.

(e) Structural – this concerns connections between the tilt slab wall panel to tilt slab wall panels, and tilt slab wall panels to foundation connections. It is pleaded there was insufficient grout to panel inserts around the foundation and wall starter bars and there was corrosion of the starter bars at the foundation to wall connections.

(f) Structural and/or fire and/or acoustic and/or other defects to be particularised.

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5 Judgment, above n 1, at [7].

[16] Reference to the bathroom pods was introduced on 22 February 2019 in the 6ASOC. In the schedule of defects in the 6ASOC, the plaintiffs pleaded — under the heading "Structural" — "Bathroom pods structurally deficient floor slab".

[17] The bathrooms for each of the units in the building were constructed off-site by the tenth third party, De Geest. The prefabricated pods were then craned into location. The concrete slabs of the building had rebates into which the pods were located, the pods themselves having concrete floors. The floor levels of the pods and the floors in the building were then matched on-site using shims.

[18] In the seventh amended statement of claim (7ASOC) dated 1 May 2020, the plaintiffs dealt with the bathroom pods claim under its own heading in the schedule of defects, with the defects identified as:

> 15. Shower outlets constructed in a way that allows water to penetrate behind linings and/or into concealed spaces.
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> 16. Junctions between tiling, waterproofing and screens to baths or showers constructed in a way that allows water splash to penetrate behind linings and/or into concealed spaces.
>
> 17. Lack of seal to junctions between fibre cement boards behind waterproofing membrane on bathroom walls.
>
> 18. Bathroom pods have structurally deficient floor slab in that they were installed on plastic shims with no or insufficient grout applied underneath concrete bases.

(the 7ASOC pleadings).

[19] In subsequent pleadings (in the tenth amended statement of claim onwards), including the current (13ASOC) pleadings in relation to the bathroom pods, the 7ASOC pleadings have been largely reproduced, albeit split under two headings, namely "Bathrooms" and "Structural".

[20] The plaintiffs' bathroom pods claim as pleaded therefore relates to a lack of internal watertightness and a structural claim relating to how the pods were installed in the rebated floor slabs.

[21] The progression of the bathroom pods claim from 22 February 2019 (6ASOC) has involved allegations as to:

(a) a structural defect (6ASOC);

(b) the structural defect together with a lack of watertightness of the bathrooms themselves (7ASOC); and

(c) the same defects with additional particulars (except with the alleged defect of a lack of seal to junctions defect 17 listed (at [18]) being dropped.

The operation of the longstop provision: s 393 Building Act

[22] QLDC asserts (as it did before the Associate Judge) the Court will be precluded from granting the plaintiffs relief in relation to any damages arising in connection with the bathroom pods. QLDC says the proceedings are statute-barred, having been brought more than 10 years after the date of the relevant act or omission (19 September 2007).

[23] The 10-year longstop provision is contained in s 393 of the Act, which provides:

> **393 Limitation defences**
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> (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.

[24] QLDC says it follows that the 22 February 2019 amendments in the 6ASOC were precluded under r 7.77(2) High Court Rules 2016 because they constitute a statute-barred cause of action. Rule 7.77 relevantly provides:

Subpart 6—Amendment of pleading

7.77 Filing of amended pleading

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

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

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

(b) a fresh ground of defence.

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

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

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

(6) If an amended pleading introduces a fresh cause of action, the other party must file and serve that party's defence to it within 10 working days after the day on which the amended pleading is actually served on the other party.

(7) When an amended pleading does not introduce a fresh cause of action, the other party may, within 5 working days after the day on which the amended pleading is served on that other party, file and serve an amended defence to it.

(8) If an amended pleading has been filed under this rule, the party filing the amended pleading must bear all the costs of and occasioned by the original pleading and any application for amendment, unless the court otherwise orders.

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

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

The strike-out principles

[25] QLDC invokes r 15.1 High Court Rules which permits the striking out of all or part of a pleading, relevantly providing:

15.1 Dismissing or staying all or part of proceeding

(1) The court may strike out all or part of a pleading if it—

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

…

[26] Counsel were agreed on the central principles applying to such applications as identified by the Court of Appeal in *Attorney-General v Prince*.[6] It was also common ground that, where a strike-out application relates to only part of a claim, a careful assessment is required as to whether the time and expense of the application will, overall, be a compelling and efficient use of the resources of all involved.

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6 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA); Judgment, above n 1, at [21]. *McGechan on Procedure,* above n 3, at [HR 15.1.08(3)], citing *Whitman v Airways Corp of New Zealand Limited* (1994) 8 PRNZ 155 (HC).

The leave principles

[27] As the strike-out application was filed on 25 February 2022 (after the close of pleadings date (17 December 2021)) QLDC required leave.[7]

[28] Both counsel recognised in their submissions to the Associate Judge and accept here that the settled approach is that identified by the Court of Appeal in *Elders Pastoral Ltd v Marr.*[8]

The judgment

[29] The Associate Judge set out the pleading background and the nature of the plaintiffs' bathroom pods claim.[9]

[30] He set out s 393 of the Act and summarised the submissions made by counsel at the hearing.[10]

[31] The Associate Judge identified the leave requirement and granted QLDC leave to make the application.[11] The Judge took into account four particular matters in finding it appropriate to grant leave:

(a) the relatively proximity of the application (25 February 2022) to the close of pleadings date (17 December 2021), meaning the application, if filed so as to be brought as of right, would not have been heard earlier than an application filed in the New Year;

(b) the application, if successful, would "surgically excise" the discrete issues relating to bathroom pods; and

(c) the damages claim in relation to the bathroom pods exceeds $7,665,000.

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7 High Court Rules, r 7.7(1).
8 *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA) at 385.
9 Judgment, above n 1, at [1]–[13].
10 At [14]–[49].
11 At [37]–[41].

[32] The Associate Judge then made his findings on the substance of the application.

[33] The Associate Judge found:[12]

(a) "proceedings" in this context refers to an application to the court for the exercise of the court's civil jurisdiction or, in other words, a request to the court for relief;

(b) the relevant "proceedings" for the purposes of s 393(2) of the Act were the statement of claim as it existed at the time the statute-bar was asserted;

(c) relief for defects in the bathroom pods said to arise from negligent conduct was first claimed by the plaintiffs in the 6ASOC (22 February 2019); and

(d) the plaintiffs' catch-all pleading (set out at [15](f) above) did not oust the operation of the longstop; but

(e) rather, the pleading in relation to bathroom pods claim in the 6ASOC was "fresh" and "essentially different" in terms of the principles identified by the Court of Appeal in *Commerce Commission v Visy Board Pty Ltd* (*Visy Board*)[13] and *Transpower New Zealand Ltd v Todd Energy Ltd* (*Transpower*).[14]

[34] The Associate Judge concluded that the plaintiffs had therefore added a new claim for relief outside the longstop period.[15]

[35] Following the hearing, at a point when the Associate Judge had drafted his judgment, counsel for QLDC applied for leave to refer the Court to the decision *Body Corporate 360683 v Auckland Council* (*Orewa Grand*).[16] That authority had been

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12 At [34] and [50]–[57].
13 *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383 [*Visy Board*] at [141].
14 *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 [*Transpower*] at [61].
15 At [57].
16 *Body Corporate 360683 v Auckland Council* [2017] NZHC 1785 [*Orewa Grand*].

overlooked by counsel at the hearing. Leave was granted to counsel to make further submissions in relation to it.[17]

[36] The Associate Judge summarised the supplementary submissions then made by counsel.[18]

[37] He found that the decision in *Orewa Grand* accorded with his own conclusion, namely that the reference in s 393(2) of the Act to when "proceedings are brought" is a reference to when the relevant claim is brought, not when the proceeding is first filed in Court.[19] The Judge, adopting the "highest level of abstraction" test in *Transpower*, rejected the plaintiffs' submission that the bathroom pods claim was based on the same acts or omissions as pleaded throughout, namely the negligent conduct.[20] He also rejected a related proposition that the pleadings in relation to bathroom pods claim constitute mere particulars as opposed to allegations, identifying that the s 393 longstop is concerned with "substance, not labels".[21]

[38] Counsel for the plaintiffs submitted, on the basis that the purpose of s 393 of the Act is to put parties on notice that a proceeding has been brought against them in respect of an act or omission within the 10 year period, that Parliament cannot have intended to deprive plaintiffs of the ability to add fresh causes of action based on the same act or omission. The Associate Judge, applying the "fair warning" approach under *Transpower* and *Visy Board*, found the plaintiffs' claim as it existed before the 6ASOC did not give QLDC notice of a claim for relief in relation to bathroom pods.[22]

[39] Finally, the Associate Judge rejected a further point of distinction of *Orewa Grand* urged by the plaintiffs, namely that the Body Corporate's (May 2013) application for a WHRS assessor's report stopped time running for the purposes of any claim in relation to the buildings. The Associate Judge, recording that s 37(1) WHRS Act does not refer to the stopping of time running, found that the consequences

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17 Pursuant to r 11.8A High Court Rules.
18 At [65]–[66].
19 At [63]–[64].
20 At [66]–[67], citing *Transpower*, above n 14, at [61(b)]; and *Orewa Grand,* above n 16, at [11].
21 At [71], implicitly referring to *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA 160, (2017) 24 PRNZ 81 [*ISP Consulting*] at [22].
22 At [77], citing *Transpower*, above n 14, at [61](d)]; and *Visy Board*, above n 13, at [141].

of an application for an assessor's report are to be approached on the same basis as if the proceeding had been filed in a court.[23]

[40] The Associate Judge accordingly concluded that the findings in *Orewa Grand* were consistent with the view that he had previously reached.[24]

[41] An order was therefore made striking out those parts of the 13ASOC relating to the bathroom pods claim.

[42] Consequentially, QLDC's third party claim against De Geest was also struck out.

Issue One — leave?

[43] For the plaintiffs, Mr Raymond QC submitted the Associate Judge failed to apply the principles applying to leave. In his submission, the leave application should have been declined.

[44] Mr Raymond submitted that the Associate Judge did not have proper regard to a number of matters, namely:

(a) *the late timing of the strike-out application* — the application was brought long after bathroom defects were first pleaded (22 February 2019) and then pleaded in more detail (1 May 2020). The prospect of a review application followed by an appeal means that a Court of Appeal decision might not be available until 2023, after the trial is to commence;

(b) *the consideration should be forward-looking* — the Associate Judge focused on what would have happened if the strike-out application had been filed in time (by 17 December 2021) whereas the assessment should have been forward-looking;

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23 At [78].
24 At [78].

(c) *the threat to the trial* — the likely outcome of the application (should it have merit) is the trial will have to be adjourned because the appeal process will be incomplete in time for trial;

(d) *no saving of resources* — striking out the bathroom pods claim is unlikely to avoid pre-trial preparation (or trial time) as the trial and appeal processes will be running concurrently;

(e) *QLDC's earlier preparedness to deal with the issue at trial* — given QLDC brought the application as a consequence of the De Geest third party strike-out application, it is apparent QLDC was content to leave the matter for trial;

(f) *prejudice to plaintiffs' trial preparation* — the plaintiffs will be prejudiced by having to deal with these interlocutory issues (including on appeal) when preparing for and conducting the trial. The process will also be expensive; and

(g) *completion of the plaintiffs' briefs* — the plaintiffs' briefs were served on 5 October 2021, incorporating evidence in relation to the bathroom pods claim. The plaintiffs would be faced with re-casting their overall claim to exclude the struck out claim.

[45] The well-settled principles accepted by both counsel require the applicant to surmount the "three formidable hurdles" identified by the Court of Appeal in *Elders Pastoral Ltd v Marr*.[25] The applicant must show:

(a) the order sought will be in the interests of justice;

(b) it will not significantly prejudice the other party; and

(c) it will not cause significant delay.

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[25] *Elders Pastoral Ltd v Marr*, above n 8, at 385.

If those hurdles are surmounted, any concept of denunciation of the applicant for its late application has little part to play.[26]

[46] In recent years, this Court has consistently applied the three basic *Marr* principles in a slightly more nuanced way, as articulated by Katz J in *Body Corporate 325261 v McDonough* (*McDonough*).[27] That formulation may be summarised as follows:[28]

> (a) The paramount consideration is that the parties should have every opportunity to ensure that the real controversy goes to trial so as to secure the just determination of the proceeding.[29]
>
> (b) Due regard must also be had to whether the proposed amendment will cause significant delay or prejudice another party.[30]
>
> (c) Even where serious prejudice and significant delay will arise, an amended pleading may nevertheless be permitted if the proposed claim has substantial merit and will not cause injustice to the defendants.[31]
>
> (d) The Court should consider the merit, or absence thereof, in a proposed amended pleading.[32]

[47] The vast majority of applications for leave under r 7.7 relate to proposed amendments to pleadings, the amendments being frequently late or even at trial. Such applications often turn on the extent to which an entirely new claim would be introduced that requires the plaintiffs to deal factually and/or legally with that new matter as trial approaches.[33]

[48] The difference that may arise with an interlocutory application, as it does in this case, is that the interlocutory application if successful may serve to reduce (rather than extend) the factual and/or legal issues for trial. Both situations (amendment of

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26 At 385.
27 *Body Corporate 325261 v McDonough* [2014] NZHC 1821[*McDonough*].
28 *Oraka Technologies Ltd v Geostel Vision Ltd* [2015] NZHC 991 at [17].
29 See *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* [1989] 3 NZLR 304 (CA) at 309; *Chilcott v Goss* [1995] 1 NZLR 263 (CA) at 272–273; *Marr v Arabco Traders Limited* (1986) 2 PRNZ 72 (HC), affirmed on appeal in *Elders Pastoral Ltd v Marr*, above n 8.
30 *Elders Pastoral Ltd v Marr,* above n 8.
31 *Body Corporate 177519 v Auckland City Council* HC Auckland CIV-2005-404-5563, 24 May 2011.
32 *Fordham v Xcentrix Communications Ltd* (1996) 9 PRNZ 682 (HC) at 683.
33 See, for instance, *Body Corporate 177519 v Auckland City Council*, above n 31.

pleadings and interlocutory applications) may nevertheless share the potential to cause prejudice and/or expense to the other party in their preparation for trial.

Discussion

[49] The Associate Judge exercised a discretion. While his statement of reasons was brief, the circumstances of the case clearly justified the exercise of the discretion and it would not be appropriate on this appeal to interfere with it on the facts of this case.

[50] Just as the Court should consider the merit of any proposed amended pleading, it must consider the merit of the proposed interlocutory application, in this case an application to strikeout the bathroom pods claim. For the reasons I come to, the proposed application itself clearly had merit as I conclude the Associate Judge was correct to strike-out the bathroom pods claim.

[51] The most significant issues raised on behalf of the plaintiffs relate to prejudice in their preparation for trial and the prospect of delay, should an unresolved interlocutory appeal lead to a successful application to vacate the trial. Those considerations do not assume the significance that would apply if the plaintiffs had yet to finalise and serve their briefs of evidence. The reality is their case must have been fully prepared on the basis their bathroom pods claim is included.

[52] I recognise the very existence of this interlocutory application (and any appeal therefrom) is a distraction in the period before trial. However the level of distraction is significantly different from virtually all the decided cases where the trial date was much closer than the eight months still left in this case. Here the plaintiffs, having already completed and served their briefs, are not due to receive the defendants' briefs of evidence before 30 September 2022. Conferral of experts is not scheduled to commence until 31 October 2022. With cooperation between counsel and having regard to the extensive submissions already prepared for the initial hearing and now this review, the impact of any interlocutory appeal on counsels' time should be able to be limited.

[53] I do not view the plaintiffs' concern in relation to prejudicial costs as a significant factor. If the bathroom pods claim remains struck out, the saving of greater

time and cost at trial will balance out the costs incurred on the review and any appeal. That applies not only to the plaintiffs and defendants but to all other parties, including particularly de Geest.

[54] As has been recognised in *McDonough* and the cases that have applied it, even where serious prejudice and significant delay will arise, an amended pleading (and implicitly an interlocutory application) may nevertheless be permitted if the outcome sought has substantial merit and will not cause injustice to the other party.[34]

[55] There is one aspect of the leave application which could result in injustice if the bathroom pods claim is not ultimately struck out. There could be an injustice for the plaintiffs if the time taken by QLDC to provide its evidence in relation to the bathroom pods and prepare for hearing meant the trial date had to be vacated.

[56] QLDC pursued its application late. The just outcome, to protect the reasonable interests of the plaintiffs, is that the time and cost of QLDC in the interim preparing to meet the bathroom pods claim should sit with QLDC. As Mr Raymond submitted, it is plainly the case that QLDC was preparing to meet the bathroom pods claim, without bringing a strike-out application, at the time the pleadings closed.

[57] In these circumstances, I am satisfied the Associate Judge was correct to grant leave in this case but ought to have done so subject to a condition requiring QLDC, in the event the strike-out application is not finally determined before 30 September 2022, to serve its briefs of evidence upon the basis the plaintiffs' claims still include the bathroom pods claim.

[58] The review will succeed to the extent the grant of leave is so modified.

Issue two — a fresh cause of action?

[59] There is an issue as to whether a cause of action analysis is relevant to the operation of the s 393 longstop. Mr Raymond submitted (as had Mr Lewis before the Associate Judge) that the 10-year longstop does not relate to the accrual of causes of

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[34] *McDonough*, above n 27, at [10], affirmed in *Oraka Technologies Lid*, above n 28, at [17]; and *Norman v Tūpuna Maunga o Tūmaki Makaurau Authority* [2020] NZHC 492 at [3].

action but to the negligent act or omission (in this case the negligent act of issuing the building consent). Mr Raymond submitted the Associate Judge incorrectly rejected that analysis.

[60] It is necessary to discuss the concept of cause of action as it applies in this case. Did the 6ASOC (and the 7ASOC and so on) introduce a fresh cause of action?

[61] To determine whether the bathroom pods claim in the 6ASOC constituted a fresh cause of action, this Court is bound to apply the principles as to when a cause of action is fresh identified by the Court of Appeal in *Transpower* and *Visy Board* (as quoted by the Associate Judge):[35]

> (a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another (*Letang v Cooper* [1965] 1 QB 232 at 242 – 243 (CA) per Diplock LJ);
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> (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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> (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)).

[62] Mr Raymond submitted the Associate Judge had incorrectly applied the *Transpower* and *Visy Board* principles when concluding the bathroom pods claim was a fresh claim. Mr Raymond referred in particular to a further passage in *Visy Board*

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[35] Judgment, above n 1, at [24], citing *Transpower*, above n 14, at [61]; *Visy Board*, above n 13, at [141].

where the Court of Appeal emphasised the fresh legal basis of a claim rather than facts newly pleaded, and observed:[36]

> The theme running through all three cases is that in order for an amendment to amount to a new cause of action, there must be a change to the legal basis for the claim. That can, in theory, occur through the addition of new facts, but only if the facts added are so fundamental that they change the essence of the case against the defendant. If the basic legal claims made are the same, and they are simply backed up by the addition or substitution of a new fact, that is unlikely to amount to a new cause of action.

[63] In Mr Raymond's submission, the relevant acts or omissions that form the basis of the plaintiffs' claim have remained the same since this proceeding was commenced, in that the plaintiffs have in all their statements of claim pleaded that:

(a) QLDC owed a duty of care with respect to its issue of the building consents, its inspections of the building work and its issue of code compliance certificates;

(b) QLDC breached those duties of care in that:

(i) it issued the building consents when it did not have reasonable grounds to be satisfied the proposed building work would comply with the Building Code;

(ii) it failed to ensure a sufficient inspection regime was undertaken and/or did not undertake inspections with sufficient thoroughness as to ensure the building work complied with the building consents and Building Code; and

(iii) it issued code compliance certificates when it did not have reasonable grounds to be satisfied the building work complied with the Building Code and/or the building consents.

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[36] *Visy Board*, above 13, at [146].

[64] Mr Raymond submitted that the addition of defects relating to the bathroom pods, with further particularisation, was not a fundamental amendment and did not change the essence of the case against QLDC.

[65] Mr Raymond rejected, as involving the wrong test, a submission made for QLDC before the Associate Judge that the bathroom pods claim requires "an essentially different area of factual enquiry by QLDC's experts". Mr Raymond submitted the correct test is whether a new factual enquiry changes the legal basis of the claim. In this case he submitted the amendment to include the bathroom defects involved the same factual enquiry as under the 5ASOC, namely: did QLDC breach its duty at the consent, inspection and code compliance stages and (if it did) what are the consequences of those breaches?

[66] In determining whether the bathroom pods claim represented a fresh cause of action under r 7.77 High Court Rules, a passage in the judgment of the Court of Appeal in *ISP Consulting Engineers Ltd v Body Corporate 89408* (*ISP Consulting*) is relevant.[37] Asher J, delivering the judgment of that Court, adopted the *Transpower* principles (above at [61]) and, immediately thereafter, referred to the way in which a fresh cause of action may come about through both its factual and legal implications:[38]

> [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 [consolidated statement of claim] have an essentially different character from the First [consolidated statement of claim]?[39] The assessment is objective and the consideration must be of the substance of what is pleaded, rather than the form.

[67] When the relevant question is identified as in *ISP Consulting* (rather than the arguably more restricted wording identified by Mr Raymond in the earlier decision in *Visy Board* — (above at [62])), the question is whether the bathroom pods claim

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37 *ISP Consulting,* above n 21.

38 *ISP Consulting*, above n 21.

39 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,* above n 29, at 273, and *Ophthalmological Society of New Zealand Inc v Commerce Commission* CA168/01, 26 September 2001 at [23]–[24].

requires investigation of an area of fact of a new and different nature not identified in the earlier pleading?

[68] The answer to that question, as found by the Associate Judge, is plainly "yes". It is of course the case, as emphasised by Mr Raymond, that the plaintiffs have all along asserted the breach of a duty of care by QLDC in relation to code compliance. But the case as formulated up to and including the 5ASOC was a case turning on external weathertightness and some structural defects, unrelated to the bathrooms. All those claimed defects were identified in the pleadings and able to be investigated by the other parties. The issues relating to the bathroom pods were of an essentially different nature. The pods are in a physically different, discrete area of the buildings. The structural elements in relation to the bathroom pods are of a different nature to the other alleged structural defects. The issues relating to internal moisture ingress are of a different nature to the previous (externally sourced) weathertightness issues.

[69] Counsel for QLDC did not base their argument in relation to the fresh cause of action solely on the submissions made in relation to the pleadings. The lead expert witness for QLDC, Clinton Smith (a registered building surveyor and quantity surveyor), provided a detailed analysis of the bathroom pods claim and its relationship with the previously pleaded defects. He opined that from a building surveyor's perspective the bathroom pod defects are a different area of enquiry from the weathertightness defects.[40] Mr Smith identified the different regulatory issues involved (cls E1 and E2 of the Building Code applying to external moisture and cl E3 applying to internal moisture). The plaintiffs did not file any evidence in response to Mr Smith's evidence.

[70] The pleading of the bathroom pods claim from the time of the 6ASOC is not a matter simply of particulars, as the plaintiffs suggest. If one applies the settled principle that particulars have a different function from pleadings in that their role is to illuminate but that is all,[41] it is apparent the bathroom pods pleadings were not mere particulars. They were not "illuminating" or "making clear" a claim already

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40 See *Orewa Grand*, above n 16, at [19].

41 See, for instance, *Ayers v LexisNexis NZ Ltd* [2012] NZHC 3055, (2012) 21 PRNZ 313 at [49].

communicated through pleadings. They were identifying a location and nature of damage discrete from any previously pleaded.

[71] The fact that the plaintiffs had in their earlier pleadings (including the 5ASOC) included a catch-all as to "structural … and/or other defects to be particularised" does not cut across the conclusion that the bathroom pods claim is a fresh cause of action — it had not before the 6ASOC been identified at all as a claim (with its particulars yet to be identified).

[72] This conclusion accords with the *Transpower/Visy Road* requirement for facts to be considered at the highest level of abstraction. Such abstraction is not to reach an absurd level where an essential factual element of the cause of action (such as that the bathroom pods are defective) has not been identified.

[73] In terms of r 7.77(2), the bathroom pods claim as introduced in the 6ASOC and subsequently amplified in the 7ASOC constituted a fresh cause of action.

Issue three: what is meant by "proceedings" in s 393 of the Act?

[74] The Associate Judge found the relevant "civil proceedings" for the purposes of s 393(2) of the Act lay in the statement of claim as it existed at the time the statute-bar was said to apply. In doing so he rejected the submission that the original claim pleading the negligent conduct (as issued in 2015) constituted the "proceedings" in respect of which the relief relating to the bathroom pods would be granted. As noted by the Associate Judge, a similar argument was rejected in *Orewa Grand*.

[75] Woodhouse J in *Orewa Grand* identified the argument that he went on to reject:[42]

> … the owners argue that the reference in s 393(2) to when "proceedings are brought" is a reference … to "the date when a proceeding is commenced initially and not when amendments to the claim may be brought".
>
> [Counsel] acknowledged that her argument is novel. …

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42 *Orewa Grand*, above n 16, at [24]–[25].

[76] Counsel on this review presented parallel submissions to those advanced before the Associate Judge.

[77] Mr Raymond submitted that the enactment of s 393(2) cannot have been intended to prohibit amendments to the relief sought more than 10 years after the acts or omissions on which a proceeding is originally based. Mr Raymond emphasised the time that may be required for a plaintiff to know all the implications of particular negligent acts or omissions. He drew support for the intended right of a plaintiff to change its claimed relief during the course of proceedings from the Report of the Government Administration Committee on the Building Bill in 2004 which anticipated a period in which to *instigate* proceedings.[43] The Committee said:[44]

> Clause 345 continues the provision in the 1991 Act that establishes a limit of 10 years on the period in which civil proceedings may be taken against any person in relation to building work or the performance of a function under the bill. The bill intends that no civil proceedings may be taken in relation to such matters after 10 years or more from the date of the act or omission on which the proceedings are based.
>
> While submissions asked that the 10 year limitation on taking proceedings be removed, we did not recommend any change to clause 345. Without this limitation, the provisions of the Limitation Act 1950 and the common law would apply to enable proceedings to be taken only up to 6 years after the matter that gave rise to the proceedings accrued, that is, occurred, or the damage was or could reasonably have been discoverable. In the case of latent defects, which are common in relation to buildings with a long life expectancy, this could provide for a considerably longer time than *10 years in which to instigate.*
>
> We were advised that the 10-year limitation was set as a result of concerns about the length of time building defects can arise after completion, and the difficulty in establishing liability. The limitation was initiated after suggestions from the court that building work was different enough in nature to require different statutory limitations.
>
> (Emphasis added)

[78] In Mr Raymond's submission the term "proceedings" has an ordinary meaning, namely the entire proceedings that flow from an original statement of claim filed in court.

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43 Building Bill 2004 (78–2) (select committee report),
44 At 51–52.

[79] Mr Raymond recognised that Woodhouse J in *Orewa Grand* rejected the interpretation of "proceedings" which the plaintiffs advance in this proceeding. (Woodhouse J considered the argument "misconceived".)[45]

[80] Mr Raymond submitted that *Orewa Grand* cannot assist QLDC for two reasons:

(a) the interpretation of "proceedings" in *Orewa Grand* was incorrect in that it equated "proceedings" as used in s 393(2) of the Act with "claim" in the Limitation Act 1950. Mr Raymond submitted, by reference to observations in *Body Corporate 328392 v Auckland City Council*, that the six-year and 10-year limitation periods have different purposes;[46] and

(b) the plaintiffs in *Orewa Grand* were seeking to introduce fresh acts or omissions (a fresh cause of action) through pleading negligent observation in addition to the previous pleading of negligent design.

[81] For QLDC, Mr Campbell submitted that the plaintiffs' approach to interpreting s 393(2) of the Act serves to obscure what is referred to by "civil proceedings". A table (Table A as now set out) provided by Mr Campbell breaking down the elements of s 393(20 summarised his submissions as to the correct interpretation of that subsection.

TABLE A

Elements of section	Interpretation
"however"	A qualification to s 393(1) that "[t]he Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from" the matters listed at s 393(1)(a) and (b).
"no relief may be granted"	Reflective of the general limitation position that a limitation defence debars relief being

[45] *Orewa Grand*, above n 16, at [26].
[46] *Body Corporate 328392 v Auckland City Council* [2021] NZHC 2412 at [33].

	granted but does not destroy the underlying cause of action.
"in respect of"	Connecting the two related subject matter of the granting of relief and civil proceedings.
"civil proceedings"	Means an application to the court for the invocation of its jurisdiction and/or the grant of relief.
"relating to building work"	Imports a causative element that the civil proceeding must relate to "building work" as defined in s 7 of the Building Act 2004. This is not an abstract concept but must relate to specific building work. In this case, the building work is the construction and installation of the bathroom pods.
"if those proceedings are brought against a person after 10 years or more from the date of the act or omission"	Imports the temporal qualification that is tied to the "act or omission". Here, the last act or omission QLDC was involved in was the grant of a final CCC on 19 September 2007.
"on which the proceedings are based"	Imports a subject matter requirement that ties the subject matter to the specific proceeding by use of the definite article "the". This subject matter requirement is referable to the nature of the claim (in this case negligence) and the facts that would entitle the plaintiff to relief.

Discussion

[82] The meaning of s 393(2) is to be ascertained from its text and in the light of its purpose and its context.[47]

[83] Focusing on the text, the key issue here is on the meaning of the expression "proceedings" as used in the subsection.

[84] Unsurprisingly, case law recognises the ambiguity of the terms "proceeding" and "proceedings" and the critical nature of purpose and context when construing them. The point was well made by Smart J in the New South Wales Supreme Court in *Blake v Norris* where he observed:[48]

> In *Stroud's Judicial Dictionary* … some fifty-five instances are given of the use of the words "proceeding" or "proceedings" in legislation, rules of court

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47 Legislation Act 2019, s 10(1).

48 *Blake v Norris* [1990] 20 NSWLR 300 (NSWCA) at 306.

> or documents having legal significance. The meaning depends on the context in which the word is used. In some cases it is equivalent to "an action" whereas in others it may mean a step in an action. Sometimes it may include a counter claim. The *Oxford Companion To Law* (1980) by Professor Walker states (at 1002-1003) that "proceedings" is sometimes used as including, or meanings, an action or prosecution, and sometimes as meaning a step in an action. The word "proceeding" is capable of such a variety of meaning that dictionary definitions as to its ordinary or natural meaning are not of much use. They tend to highlight the number of meanings which the word can bear.
>
> Any assistance as to its meaning has to be derived from the statutory context and the objects of the legislation in question.

In *Blake v Norris*, the Court was considering a power to transfer a proceeding to another court. Smart J found that, if there are several causes of action, there is power to transfer one of those causes of action because "[a] separate cause of action is a proceeding".[49] Smart J observed that there would also be power to transfer a cross-claim.[50]

[85] The decision in *Blake v Norris*, while adopting a similar interpretation of a statutory provision relating to "proceedings" to that reached by the Associate Judge and supported by QLDC here, indicates the term is potentially ambiguous.

[86] It is therefore important to consider the purpose and the context as well as the text.

[87] In my view, there is a matter of context that makes the meaning of the word "proceedings" as used in s 393(2) Building Act clear. It arises from the fact that under s 393(1) the Limitation Act applies to the "civil proceedings" referred to in s 393(2). Once it is accepted (as it therefore must be) that s 393 needs to be construed consistently with the Limitation Act there is, in that context, a clear meaning of "proceedings". That is explained in the reasoning of Woodhouse J in *Orewa Grand*, which I respectfully adopt:[51]

> [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

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49 At 307, adopting *Jackson v John Fairfax & Sons Ltd* (1988) 96 FLR 145 (ACTSC) at 152.
50 At 307.
51 *Orewa Grand*, above n 16.

> 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.
>
> (emphasis omitted)

[88] I do not accept Mr Raymond's submission that the interpretation favoured by Woodhouse J incorrectly treated the six-year and 10-year limitation periods as having the same purpose. As explained by Woodhouse J (and I refer again [110]), s 11 Limitation Act provides that a claim has three periods for limitation purposes — the claim's "primary period" (that which Mr Raymond refers to as the "six-year period"); the claim's "late knowledge period" (three years beyond the primary period, to deal with latent defects); and the claim's "longstop period".

[89] Hence I apply the reasoning and conclusion in *Orewa Grand*.

[90] I also find that the Associate Judge's interpretation of the term "proceedings" as used in s 393(2) is supported by reference to the purpose of the provision and by reference to its history, including the work of the Law Commission relating to limitation periods and the parliamentary material relating to the relevant enactments.

[91] The discussion which follows is necessarily somewhat extended.

[92] The interpretation of s 393(2) as identified in *Orewa Grand* is reinforced when the purpose of the longstop provision is examined through the materials that led to its

enactment. The introduction of a longstop to the limitation periods regime came about as a compromise to what might have otherwise become an indeterminate liability through the Courts' emerging recognition of a late knowledge period, which effectively extended the standard limitation period. The legislative background makes it clear that all the limitation periods (that is the standard period, the standard period as extended for late discovery and the longstop period) are measured from the same date. Mr Raymond's submission that the enactment of s 393(2) cannot have been intended to prohibit the addition of a claim (such as the plaintiffs now seek to add) more than 10 years after the acts or omissions cannot stand alongside the legislative purpose. The time required for a plaintiff to be able to identify all defects that flow from particular acts or omissions is to be provided through the mechanism of the extended standard period (for late knowledge) albeit always subject to the 10-year longstop. That purpose of the legislation was clear for the reasons that follow. It also explains the Associate Judge's reference to the fact that the policy behind the longstop would be undermined if a claim such as the bathroom pods claim was able to be introduced in 2019 — the plaintiffs' argument would render the longstop provision subservient to reasonable discoverability.[52]

[93] The intended role of a longstop provision, and its relationship to the primary limitation period, was discussed in the work of the Law Commission conducted from 1987 to 2000, and reflected in four reports or papers:

(a) a 1987 discussion paper;[53]

(b) a 1988 report;[54]

(c) a 2000 preliminary paper;[55] and

(d) a 2000 report.[56]

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52 Judgment, above n 1, at [55].
53 Law Commission *The Limitation Act 1950: A discussion paper* (NZLC PP3, 1987).
54 Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988).
55 Law Commission *Limitation of Civil Actions: A discussion paper* (NZLC PP39, 2000).
56 Law Commission *Tidying the Limitation Act* (NZLC R61, 2000).

[94] The Limitation Act 1950 imposed limitation periods by providing that certain "actions shall not be brought" after a given period (in the case of contract or tort being six years from the date on which the cause of action accrued).[57] "Action" was defined to mean "any proceeding in a Court of law other than a criminal proceeding".[58]

[95] Although it was not then referred to as a "longstop" provision, s 24(e) of the 1950 Act contained a 30-year longstop provision in relation to persons whose right of action accrued when they were under a disability. Their primary limitation period "ran for six years from the date when they ceased to be under a disability or died, but with a proviso that "[n]o action to recover land or money charged on land shall be brought … after the expiration of 30 years from the date on which the right of action accrued".[59]

[96] Accordingly, the commencement of the longstop period was calculated from the same point as the primary limitation period.

[97] In its 1987 Discussion Paper, the Law Commission tentatively proposed a "long-stop" of 15 years as part of a reform of the 1950 Act. This proposed new regime had four features:[60]

(a) A standard (at that point) three-year limitation period (that is, the primary period);

(b) the standard period commenced from the date of the act or omission complained of;

(c) the standard period was subject to a period of suspension in the event of non-discoverability or other identified circumstances (that is, the late knowledge period); and

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57 Limitation Act 1950, s 4(1).
58 Section 2(1).
59 Section 24(e).
60 Law Commission *The Limitation Act 1950*, above n 53, at [46]–[48].

(d) an overall "long-stop" limitation period of 15 years, except that this would not apply to an extension by reason of fraud (that is, the longstop period).

[98] In its 1988 Report, the Commission's discussion of a "long-stop" followed its consideration of developments taking place in the law relating to limitation periods generally. Key developments were in relation to building cases,[61] and the extension of the standard period when the plaintiffs lacked knowledge of defects ("non-discoverability").[62] The Commission was also responding to a period of expanding tort liability.[63] The underlying concern had been encapsulated in the frequently-cited observation of Cardozo CJ in *Ultramares Corporation v Touche* that defendants ought not to be exposed to a liability "in an indeterminate amount for an indeterminate time to an indeterminate class".[64]

[99] The Commission, in the 1988 Report also referenced the then very recent judgment of the Court of Appeal in *Askin v Knox*.[65] Cooke P, delivering the judgment of the Court, had recognised the potential for the New Zealand courts to confirm a principle that a cause of action accrued on discovery of a previously latent defect.[66] Cooke P noted the English solution had involved legislation (by way of the Latent Damage Act 1984) which introduced rights for plaintiffs but balanced those with a longstop provision.[67] The ground for such a regime was recognised, but also the need for legislative intervention if a longstop was to be imposed.[68] The introduction of a longstop was considered to be "a question of policy for Parliament and the advice of the Law Commission" — hence, the Commission's work in 1987 and 1988.[69]

[100] These issues were not being considered uniquely in New Zealand but were the subject of scrutiny throughout common law jurisdictions. The High Court of Australia in *Bryan v Maloney* was to refer to the New Zealand authorities, including *Askin v*

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61 Law Commission *Limitation Defences in Civil Proceedings*, above n 54, at [69]–[83].
62 At [176]–[234].
63 At [285].
64 At [285], citing *Ultramares Corp v Touche* 174 NE 441 (NY Ct App 1931) at 444.
65 At [77] and [99], citing *Askin v Knox* [1989] 1 NZLR 248 (CA).
66 *Askin v Knox*, above 65, at 255.
67 At 255–256.
68 At 256.
69 At 256.

Knox, in the process of recognising the potential for an open-ended outcome arising from the application of existing limitation periods with respect to claims for latent defects.[70] Legislation directly parallel to that enacted in New Zealand followed — for example through the enactment in New South Wales of a 10-year longstop provision for actions arising out of defective building work, irrespective of when the existence of defects first becomes manifest.[71]

[101] In its 1988 Report, the Commission identified general support for the approach identified in its 1987 Discussion Paper (above at [97]),[72] including that the legitimate interests of defendants could be promoted by a "'long stop' or ultimate limitation period".[73] The interests of the building industry in particular (in relation to architectural and design practices) were discussed,[74] in the context of the impact of expanding negligence liability on their insurance.[75] The benefit of precluding liability for an indeterminate time was identified.[76] The alternative was that there would remain "[t]he cost of potential claims which surface a long time after the event which gave rise to them".[77] The Commission recommended a 15-year longstop model.[78] In a draft Bill forming part of the 1988 Report, the Commission proposed a scheme involving a standard limitation period, a late knowledge extension period, and a longstop period.[79] The longstop provision read:[80]

> (1) It is also a defence to a claim if the defendant proves that the date on which the defendant was served with the claim was:
>
> (a) 15 years or more after the date of the act or omission on which the claim is based; or
>
> (b) if a later date described in subsection (2) applies to the claim, after that later date.
>
> …

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70 *Bryan v Maloney* (1995) 182 CLR 609, 617 and 629 per Mason CJ, Deane and Gaudron JJ.
71 Environmental Planning and Assessment Act 1979 (NSW), s 109ZK. See also the discussion in *Dinov v Allianz Australia Insurance Limited* [2017] NSWCA 270, (2017) 96 NSWLR 98.
72 Law Commission *Limitation Defences in Civil Proceedings*, above 54, at [280]–[309].
73 At [280].
74 At [289].
75 At [286]–[291].
76 At [291].
77 At [288].
78 At [302].
79 At 150–181.
80 At 154.

[102] Significantly in relation to the present issue, the longstop was not a stand-alone provision arising in a different legislative context. It was put forward as part of a single scheme with each of the periods clearly intended to operate from the same date.

[103] The Commission's 1987 and 1988 work did not promptly lead to reform of the Limitation Act.[81] The topic of a full review of the limitation of civil actions was not revisited again by the Commission until 2000 (leading ultimately to the 2010 Act).

[104] In the meantime, however, Parliament was to reform construction law through what became the Building Act 1991. Parliament took the opportunity to bring into the Building Act a longstop provision (s 91 in the 1991 Act, becoming s 393 of the 2004 Act). The legislative history of s 91 of the 1991 Act was set out by Glazebrook J in *Klinac v Lehmann.*[82] The provision which became s 91 of the 1991 Act was not included in the first tabled draft of the Building Bill. It was instead introduced upon the reporting back of the relevant select committee. Originally it was proposed to be for 15 years rather than 10.[83] John Carter MP explained the rationale for inclusion by reference to the very lengthy period in which the owner of the building was currently able "to lay claim against local government".[84]

[105] In *Klinac*, Glazebrook J noted that the Law Commission material to which I have referred on the subject of limitation periods was relevant to interpretation given that the Select Committee had assistance from the Commission in drafting s 91.[85]

[106] By the time of the Bill's second reading, the limitation period had been reduced to 10 years, in response to concerns of local government and the construction industry (and insurers).[86] That became the longstop period as enacted in the Building Act.

[107] The longstop provision contained no exception in relation to issues concealed by fraud.[87] The 10-year longstop was designed to provide for potential defendants the

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81 As explained in Law Commission *Limitation of Civil Actions*, above n 55, at [1].
82 *Klinac v Lehmann* (2002) 4 NZ ConvC 193,547 (HC) at [13]–[26].
83 At [14], citing Building Bill 1990 (54–2) (select committee report).
84 At [14], citing (31 October 1991) 520 NZPD at 5296.
85 At [17].
86 At [21]. See also *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [130]; and (20 November 1991) 520 NZPD 5490.
87 *Klinac v Lehmann*, above n 82, at [25].

absolute certainty that at that 10-year point fresh claims relating to the same acts or omissions could no longer be brought.

[108] The structure of s 91 of the 1991 Act then became as follows:

(a) by s 91(1), the provisions of the Limitation Act 1950 were made to apply to civil proceedings in relation to (what may be summarised as) the construction of buildings, except to the extent provided through the longstop provision in s 91(2); and

(b) s 91(2)–(3) contained the longstop provision.

[109] In the s 91 longstop provision, Parliament essentially adopted the existing Limitation Act formula in relation to limitation periods but replaced the word "action" with the word "proceedings" to provide that "[c]ivil proceedings may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based".[88] (In the Limitation Act 1950, as noted at [94] above, "action" was defined in any event to mean any proceeding in a court of law, other than a criminal proceeding.)

[110] Thus, in relation to matters concerning the construction of buildings (albeit not in relation to more general proceedings), there had been achieved a three-staged approach to the limitation of proceedings (or "actions") which subsequently applied to limitation defences for money claims generally through s 11 Limitation Act 2010, namely:

(a) the claim's "primary period";

(b) the claim's "late knowledge period"; and

(c) the claim's "longstop" period.[89]

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88 Building Act 1991, s 91(2).

89 The longstop period provided as a defence to money claims generally by s 11(3)(b) Limitation Act 2010 differs from the longstop period under s 393 Building Act 2004 in that it is 15 years rather than 10 years.

[111] The claim's longstop period under s 393 Building Act is the point 10 years from the start of the claim's primary period. It is the cut-off point beyond which a potential defendant, be it a local authority, builder or associated professional (or their insurers), knows they will have no liability for fresh claims. The fact that a plaintiff may not know all of what Mr Raymond referred to as the "implications" of particular negligence is the very compromise involved in the legislature's selection of the 10-year longstop. The unknown implications — meaning the latent damage — are the very latent damage items that the Law Commission and Parliament intended to subject to a 10-year cut off for claims, running from the commencement date of the claim's primary period.

[112] Section 91 of the 1991 Act was subsequently amended. Two amendments in 1993 are not material here.[90] When Parliament enacted the replacement Building Act in 2004, it retained the provisions of s 91 of the 1991 Act, including the 10-year longstop period. Mr Raymond had referred (above at [77]) to observations in the Report of the Government Administration Committee on the Building Bill 2004.[91] Mr Raymond noted that the Committee, in discussing the 10-year limitation on taking proceedings, observed that the previous law relating to latent defects referred to "instigating" proceedings (or, as he put it, "getting them off the ground"). Mr Raymond suggested the concept of "instigating proceedings" supports the view that the legislation was intended to permit the filing of an initial statement of claim, with subsequent changes to the relief more than 10 years after the acts or omissions on which the proceedings are based. I do not consider that discussion of the Committee assists the plaintiff's argument at all. The focus of the Committee's discussion at that point was on recognising the concerns in relation to indeterminate liability that arise when the law recognises a late knowledge period in order to accommodate the possibility of latent defects.

[113] As observed by counsel, s 393(2) was also later amended through s 58 Limitation Act 2010 so as to bar the granting of *relief* in respect of civil proceedings relating to building work after the longstop period. Counsel noted that the Parliamentary materials from 2010 appear to provide no guidance as to the intention

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90 See *Klinac v Lehmann*, above n 82, at [23]–[24].
91 Building Bill 2004 (78-2) (select committee report).

behind this amendment. It is one of an appreciable number of parallel amendments made (through s 58 and the Schedule to the Act) to several statutes so as to refer specifically to "relief". Both Mr Campbell and Mr Raymond recognised that the 2010 amendment was likely intended to reflect the fact that a limitation defence debars relief being granted but does not destroy the underlying cause of action. A limitation defence bars the relief but not the underlying right — such is made express in s 43 Limitation Act 2010.

[114] Mr Raymond submitted the Associate Judge incorrectly concluded that the addition of the concept of "relief" to s 393(2) had introduced a different focus to s 393. I accept that it did not. That said, I do not read the Associate Judge to have suggested the amendment introduced a different focus to the section. Rather, the introduced reference to "relief" reinforced the Judge's conclusion that the term "proceeding" or "proceedings" as used in s 393 had the same meaning as that adopted in r 1.3 High Court Rules where it is provided:

> **proceeding** means any application to the court for the exercise of the civil jurisdiction of the court other than an interlocutory application.

[115] As the Associate Judge observed, the plaintiffs' application here is for the exercise of the court's civil jurisdiction, that is, its request for relief, through a statement of claim. It was the 6ASOC on 22 February 2019 that introduced for the first time the bathroom pods claim said to rise from the negligent conduct.[92]

[116] While Mr Raymond placed emphasis upon the right of a plaintiff to amend its prayer for relief, and relied on r 7.7 as providing for parties to amend their pleadings during a proceeding, that entitlement is expressly excluded by r 7.77(2) where the amendment would introduce a statute-barred fresh cause of action.

[117] I have therefore found the bathroom pods claim would introduce a statute-barred cause of action.

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92 Judgment, above n 1, at [55].

Issue four — the application of the WHRS Act

[118] The plaintiffs' application to MBIE for an assessor's report under the WHRS Act became an issue for the Associate Judge to determine. Although counsel for the plaintiffs had acknowledged during oral submissions that the WHRS application would not improve the plaintiffs' position in terms of limitation, counsel was allowed to develop contrary written submissions (in the context of further submissions relating to *Orewa Grand*) as to the application of s 37 WHRS Act.

[119] Section 37 WHRS Act relevantly states:

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

[120] The Associate Judge rejected the plaintiffs' submission that the plaintiffs' application to MBIE in May 2013 had stopped time running for limitation purposes in relation to all damages claims that might arise from QLDC's negligent conduct.

[121] Mr Raymond invoked the finding of the Supreme Court in *Lee v Whangarei District Council* as to the effect in that case of the plaintiffs' application for an assessor's report.[93] In *Lee,* counsel and the Court spoke in terms of the application for the assessor's report "stopping time running" and "stopping the clock" for limitation purposes.

[122] In Mr Raymond's submission, time stopped running for limitation purposes in respect of all the building defects in the plaintiffs' claim when the Body Corporate applied to MBIE for an assessor's report.

[123] Mr Raymond referred in particular to the following provisions of the WHRS Act:

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

(a) section 32(1) which provides:

> **32 Application for assessor's report**
>
> (1) An owner of a dwellinghouse who wishes to bring a claim in respect of it may apply to the chief executive—
>
> (a) to have an assessor's report prepared in respect of it; or
>
> …

(b) section 8, which defines "claim" to mean:

> **claim** means a claim by the owner of a dwellinghouse that the owner believes—
>
> (a) has been penetrated by water because of some aspect of its design, construction, or alteration, or of materials used in its construction or alteration; and
>
> (b) has suffered damage as a consequence of its penetration by water

(c) section 3, which identifies a purpose of the Act as being:

> (a) to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for the assessment and resolution of claims relating to those buildings; …

[124] While Mr Raymond accepted the plaintiffs, in order to have a claim, had to have a dwellinghouse with water penetration issues, in his submission the claim itself was not limited to weather tightness issues.

[125] For QLDC, Mr Campbell submitted the Associate Judge correctly concluded that the WHRS Act stops time running only for matters falling within the subject-matter of the weather tightness claim.

[126] Mr Campbell submitted the plaintiffs' argument is anathema to the purpose of the WHRS Act and ignores central aspects of the Act, including:

(a) "deficiency", in relation to a building, is defined to refer only to construction or work on a building that has "enabled water … to penetrate it";

(b) sections 14 to 16 all require the penetration of water into a building and damage caused by such water penetration;

(c) sections 40 to 42 (dealing with the assessor's report) contemplate that the assessor is able to report only on water penetration issues, and the damage associated with them and the work needed to repair that damage; and

(d) section 50 (dealing with the remedies) makes it clear a claim under the Act can relate only to water-tightness.

[127] The Associate Judge, in considering similar submissions, in my view correctly observed that s 37 WHRS Act does not say "time stops running".[94] What s 37(1) provides is that the application under s 32(1) "has effect as if it were the filing of proceedings in a court".

[128] The Associate Judge then explained his conclusion that the plaintiffs' application to MBIE did not stop time running for the purposes of the bathroom pods claim:

> [74] It is clear that the effect of applying for an assessor's report on limitation is the same as if proceedings had been filed in a court. Filing a claim in court does not rob the longstop provision under the Act of any effect. Accordingly, requesting an assessor's report cannot have that effect. Where an assessor's report was requested, one approaches the question of whether an amendment to a pleading is barred by the longstop on the same basis as if the proceeding had been filed in the Court from the outset. That is how s 37(1) directs the question of limitation to be addressed.

[129] The Associate Judge's analysis was clearly valid. He was accordingly correct in concluding the plaintiffs' application for an assessor's report had not stopped time running in relation to the claim which was the subject of the strike-out application.

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94 Judgment, above n 1, at [73].

Outcome

[130] The plaintiffs' grounds of review fail.

[131] QLDC's strike-out application was correctly granted. Consequentially, the tenth third party's strike-out application was also correctly granted.

[132] Costs must follow the event.

Orders

[133] I order:

(a) the application for review is dismissed, save to amend the grant of leave to the first defendant so that it is now conditional, reading:

(i) leave is granted to the first defendant to apply for an order striking out part of the statement of claim, but subject to the condition that the first defendant, pending the first of the expiry of any of the appeal periods from this judgment or the determination of an appeal from this judgment, shall in completing its evidence and preparing for trial do so on the basis that the plaintiffs' bathroom pods claim remains for the time being part of the statement of claim; and

(b) the plaintiffs are to pay the first defendant's costs of the review, fixed on a 2B basis,[95] together with disbursements.

Osborne J

Solicitors:
Grimshaw & Co, Auckland (for Plaintiffs)
Wynn Williams, Christchurch (for First Defendant)

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[95] High Court Rules, rr 14.3(1) (Category 2) and r 14.5(2) (band B).

SCHEDULE

AND	EDWIN GERARD ELLIOTT Third Defendant
AND	HOLMES STRUCTURES LIMITED (IN LIQUIDATION) Fourth Defendant
AND	ARCH UNDERWRITING AT LLOYD'S LIMITED Fifth Defendant/Fifth Third Party
AND	ASTA MANAGING AGENCY LIMITED Sixth Defendant/Sixth Third Party
AND	HARDY (UNDERWRITING AGENCIES) LIMITED Seventh Defendant/Seventh Third Party
AND	LIBERTY MANAGING AGENCY LIMITED Eighth Defendant/Eighth Third Party
AND	STEPHEN BRUCE McLEAN First Third Party
AND	JULIE RAEWYN WENSLEY JACK Second Third Party
AND	PETER LAWSON Third Third Party
AND	DANIEL STEWART Fourth Third Party