IN THE COURT OF APPEAL OF NEW ZEALAND

CA182/2016
[2017] NZCA 264

BETWEEN	SONSRAM TRUSTEE LIMITED First Appellant
	ARJUN SAMI Second Appellant
AND	HARRISON GRIERSON CONSULTANTS LIMITED Respondent

Hearing:	29 May 2017
Court:	Harrison, Venning and Simon France JJ
Counsel:	P L Twist and R K Nand for Appellant M J Dennett for Respondent
Judgment:	26 June 2017 at 10 am

JUDGMENT OF THE COURT

A The application to adduce new evidence is declined.

B The appeal is dismissed.

C The appellants must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Venning J)

[1] Sonsram Trustee Ltd (Sonsram Trustee) and Arjun Sami appeal the decision of Associate Judge Christiansen in which he entered summary judgment for Harrison Grierson Consultants Ltd (Harrison Grierson) as defendant.[1]

Background

[2] Between 2005 and 2008 Redhill Development (NZ) Ltd (Redhill) carried out a major subdivision development at Papakura. Harrison Grierson acted as engineering consultant to Redhill. Vinod Chand of Harrison Grierson was appointed as engineer to the construction contract between Redhill and HEB Contractors Ltd (HEB).

[3] A Certificate of Practical Completion (CPC) was issued by Harrison Grierson on 8 May 2008. The CPC was issued to Redhill and HEB and certified that in accordance with the construction contract the works had been completed and qualified for the certificate on 28 March 2008; and that the obligations under the contract to remedy any omissions or defects commenced on that date and continued until 28 June 2008. In issuing the CPC Harrison Grierson were discharging their contractual obligation to certify for practical completion where execution of the contract works had reached the stage where the consultants were able to certify them as complete. It is unclear when Harrison Grierson issued a final completion certificate but both Redhill and HEB had by 3 July 2008 reached a position where the only issues between them related to liability for payment of the amounts finally owing under the contract.

[4] Redhill failed to pay the balance of $2,191,816 claimed by HEB under the construction contract. HEB took adjudication proceedings under the Construction Contracts Act 2002 against Redhill, Sonsram Development Holdings Ltd (Sonsram Development) and Mr Sami. The adjudicator found that Redhill had failed to provide a valid payment schedule in response to HEB's payment claim issued on 23 May 2008. In doing so the adjudicator rejected Mr Chand's evidence that the period for responding to the payment claim had been extended by agreement. On 8 June 2009 the adjudicator made an award holding Redhill liable for $2,039,307

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1 *Harrison Grierson Consultants Ltd v Sonsram Trustee Ltd* [2016] NZHC 581 [HC judgment].

together with costs of $45,000. He held Sonsram Development and Mr Sami jointly and severally liable with Redhill as owners of the site works on the basis Redhill was an "associate" of theirs on the basis of their relationship.[2] Sonsram Development and Mr Sami were related to Redhill. Sonsram Development was the sole shareholder of Redhill. Sonsram Trustee was the sole shareholder of Sonsram Development. Mr Sami was the sole shareholder of Sonsram Trustee. Mr Sami was also the sole director of Redhill and Sonsram Development.

[5] By a deed dated 30 October 2009 Redhill agreed to assign its rights against Harrison Grierson to Sonsram Trustee. Shortly after, on 2 December 2009, Redhill went into liquidation. Sonsram Trustee pleads that subsequently, in January or February 2010, it gave notice of the assignment to Harrison Grierson.

[6] Ultimately, Mr Sami settled with HEB by paying $350,000 plus GST. Nothing further has been paid to HEB under the award it obtained.

[7] Sonsram Trustee and Mr Sami issued proceedings against Harrison Grierson on 3 June 2015. Sonsram Trustee alleges Harrison Grierson caused Redhill loss by over-certifying payments and variations and wrongly approving lump sums payable to HEB. It also alleges breach of contract and negligence in relation to design and project management. Mr Sami claims Harrison Grierson was negligent in relation to its obligation to Redhill which ultimately caused him personal loss. In addition to the $350,000 he paid to HEB he seeks to recover "special damages for financial losses and profits".

[8] Harrison Grierson applied to strike out the claim and/or for summary judgment on the basis the claim was time-barred.

Judgment

[9] On 6 April 2016 Associate Judge Christiansen entered defendant's summary judgment against Sonsram Trustee and Mr Sami.[3] The Judge noted that the strike-out application would also have succeeded.

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2 See Construction Contracts Act 2002, ss 7 and 50.

3 HC judgment, above n 1, at [74]–[78].

[10] The Judge held that the consultancy contract required Harrison Grierson's consultancy services to be concluded by 31 March 2008. He considered the services were completed by or about that date, noting the CPC was issued in May 2008. He rejected a submission that the contract had been extended beyond that date. The Judge also considered the principle of reasonable discovery did not apply because the claims of negligence brought against Harrison Grierson were capable of investigation from the time the consultancy services were completed. The date from which time began running was not extended by the claim that the extent of loss was not able to be calculated until much later.

Further evidence

[11] Sonsram Trustee and Mr Sami seek to adduce further evidence on appeal. The evidence is contained in an affidavit of Mr Sami and two affidavits of Emmanuel Nagaiya. While Harrison Grierson opposes the application, Michael Benning, Harrison Grierson's regional manager, filed an affidavit in response to Mr Sami's affidavit and Mr Nagaiya's first affidavit. Mr Nagaiya's second affidavit responds to Mr Benning's affidavit.

[12] Rule 45 of the Court of Appeal (Civil) Rules 2005 applies to the admission of further evidence for the purposes of the appeal. The evidence must be fresh, credible and cogent. It will not be regarded as fresh if it could, with reasonable diligence, have been produced at the trial.[4] Particular weight will be accorded in summary judgment proceedings to the need for finality. However, lack of "freshness" is not an absolute disqualification where there are exceptional circumstances and compelling grounds to justify admission.[5]

[13] The further evidence sought to be adduced by the appellants is neither fresh nor cogent. In the case of Mr Nagaiya's evidence it also suffers from the fact it does not meet the criteria for admission as expert evidence.

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4 *Rae v International Insurance Brokers (Nelson Marlborough) Ltd* [1998] 3 NZLR 190 (CA) at 192–193.

5 *Paget v Station Properties Ltd* [2011] NZCA 570, (2011) 21 PRNZ 46 at [16].

[14] Mr Sami attached an email from Papakura District Council to Redhill dated 18 September 2009 that identified a number of matters needing attention on the subdivision. The Council required Redhill to certify the works had been carried out. The letter is not fresh evidence. There is no suggestion it has only recently been located. It could have been produced for the High Court hearing. The plaintiffs knew the defendant's application relied on a limitation defence. Importantly, nor is it cogent. It contains a list of items related to the clearing of debris from manholes and stormwater lines. The work is minor in nature. There is no suggestion Harrison Grierson had a role to play in the work. The letter is not addressed to them and on its face was not copied to them. In his affidavit in reply Mr Benning deposed Harrison Grierson had not seen the letter.

[15] Mr Nagaiya is a civil engineer and a director of N-Compass Ltd, a project management company. Mr Nagaiya was directly involved in the subdivision on behalf of Redhill. He assisted in negotiating the engineering consultancy services contract between Redhill and Harrison Grierson. He also acted as project manager for Redhill from October 2007 until mid 2009.

[16] Although Mr Nagaiya says he has read the Code of Conduct for expert witnesses and agreed to comply with it, his evidence is not consistent with an expert's obligations under the Code. An expert has an overriding duty to act independently and to assist the Court impartially. Mr Nagaiya is not independent. His first affidavit filed for the purposes of appeal is effectively a submission on behalf of the appellants. The second affidavit purports to reply to Mr Benning's affidavit. It is argumentative. Mr Nagaiya's evidence is inadmissible as expert opinion. It is not of substantial help and, given Mr Nagaiya has failed to comply with the rules of Court, we decline permission for it to be read.[6]

[17] The application to adduce new evidence is declined. One aspect of it, however, was not contentious and can be admitted by consent. Mr Dennett acknowledged that while Harrison Grierson issued a defects list dated 17 April 2008, Mr Chand had not issued a Defects Liability Certificate (DLC).

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6 Evidence Act 2006, ss 25 and 26.

Analysis

[18] We now address the arguments raised on the appeal.

The CPC was invalid and therefore Harrison Grierson's services were never completed

[19] Underpinning Sonsram Trustee's and Mr Sami's claims is the proposition that, as Harrison Grierson has never completed its services under the contract, the relevant limitation period has not commenced running so that Harrison Grierson is unable to rely on the provisions of the Limitation Act 1950. The first point taken by the appellants to support the argument is that Mr Chand did not personally sign the CPC. As such the certificate was invalid so that the work was "never completed by 8 July 2008 or any other date". The CPC was issued on Harrison Grierson's letterhead and was executed as:

> **Harrison Grierson Consultants Limited**
>
> pp [Signature]
>
> Vinod Chand
> Engineer to the Contract

[20] Taken to its logical conclusion, the appellants' argument is that the contract between Redhill and Harrison Grierson is still on foot. The argument is based on the definition of "engineer" under s 1.2 of the Standard Conditions of Contract for Building and Civil Engineering construction (the Standard Conditions),[7] which provides the engineer shall not be a body corporate or a firm; and s 6, which provides for the powers and responsibilities of the engineer under the contract, particularly s 6.3.3 which precludes the engineer's representative from issuing, amongst other certificates, a CPC.

[21] The submission also relies on the decisions in *Brown & Doherty Ltd v Whangarei County Council* and *Nelson Carlton Construction Co (in liq) v A C Hatrick (NZ) Ltd*.[8]

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7 NZS 3910:2003.

8 *Brown & Doherty Ltd v Whangarei County Council* [1988] 1 NZLR 33 (HC); *Nelson Carlton Construction Co (in liq) v A C Hatrick (NZ) Ltd* [1965] NZLR 144 (CA).

[22] In *Brown & Doherty Ltd* the issue was whether a report to the Council was a certificate under cl 19.1 of the relevant conditions of contract. The clause provided that if the engineer certified in writing to the Council that in his opinion the contractor had failed to proceed with the works with due diligence, or had failed to employ sufficient labour, staff or materials, or had otherwise failed to make such progress as the engineer deemed sufficient to ensure completion within the time specified under the contract, the Council was entitled to determine the contract on seven days' notice. Noting the "drastic and far reaching consequences" of the clause Smellie J strictly construed its provisions and held that a report to the Council prepared by the engineer's representative rather than the engineer, albeit agreed to by the engineer, was not sufficient to satisfy the express requirements of cl 19.1.[9] The report was not the engineer's opinion; it was the assistant engineer's report which the engineer agreed with. It was neither in form nor in substance the opinion of the engineer.

[23] In coming to that conclusion Smellie J quoted the following passage from the decision of the Court of Appeal in *Nelson Carlton Construction Co (in liq) v A C Hatrick (NZ) Ltd* where Turner J had said:[10]

> It is not the opinion of the respondent, but the opinion of its engineer, by which the parties contracted to be bound; and it is reasonable to assume that, in agreeing to entrust the granting of a certificate to an engineer as yet not appointed but whose nomination was left in the hands of respondent, these parties placed their reliance on the professional integrity which was to be expected in one of the requisite technical qualifications.

[24] Both *Brown & Doherty Ltd v Whangarei County Council* and *Nelson Carlton Construction Co (in liq) v A C Hatrick (NZ) Ltd* are distinguishable from the present facts. Unlike the document in *Brown & Doherty*, the CPC in the present case is in form and substance a CPC. It contains everything a CPC should contain. It is issued under the name of the engineer to the contract, Mr Chand. The CPC was signed on Mr Chan's behalf but there is no evidence to displace its representation that it was prepared by and issued under his authority. But what is decisive is that neither of the parties to the construction contract has ever challenged the CPC's meaning or effect.

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9 *Brown & Doherty Ltd v Whangarei County Council*, above n 8, at 36–38.

10 At 39 quoting *Nelson Carlton Construction Co (in liq) v A C Hatrick (NZ) Ltd*, above n 8, at 153.

Both accepted the document and acted upon it as a CPC as the basis for regulating their rights and obligations arising under the construction contract.

[25] The passage cited from *Nelson Carlton Construction Co (in liq) v A C Hatrick (NZ) Ltd* does not assist the appellants. In that case the issue was whether the engineer had been unduly influenced during a meeting with his employer prior to issuing his certificate under the contract. Turner J's comments referred to above were made in that context. It is relevant that Turner J went on to observe:[11]

> [I]t seems to me contrary to the common sense which should be the basis of all decisions in commercial cases, to contend that, if it is manifest that no injustice was in fact done by the procedural irregularity, nevertheless the certificate must still be set aside — perhaps with serious consequences as regards damages.

The lack of Mr Chand's signature on the CPC in the present case can properly be regarded as a procedural irregularity.

[26] Next, as Smellie J noted, referring to the decision of Devlin J in *Minster Trust Ltd v Traps Tractors Ltd* relating to a certificate:[12]

> The main test appears to be whether the certificate is intended to embody a decision that is final and binding upon the parties.

[27] The CPC was intended to confirm the practical completion of HEB's contract with Redhill. The parties acted on it on that basis. We accept it as a valid CPC.

The DLC was never issued and therefore Harrison Grierson's services were never completed

[28] Mr Twist submitted there was another reason Harrison Grierson's services were never completed. Mr Chand had never issued a DLC as was required under the Standard Conditions. As such Harrison Grierson had not completed its services. Under s 11 of the Standard Conditions the engineer was required to issue to the principal and contractor a DLC for the contract works when the period of defects liability provided for under s 11.1.1 had expired and after the contractor had

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11 *Nelson Carlton Construction Co (in liq) v A C Hatrick (NZ) Ltd*, above n 8, at 155.

12 *Brown & Doherty Ltd v Whangarei County Council*, above n 8, at 40 quoting *Minster Trust Ltd v Traps Tractors Ltd* [1954] 1 WLR 963 (QB) at 973.

remedied any minor omissions or minor defects in the defects list and any other defects that had become evident since the issue of the CPC.

[29] Mr Twist submitted that Mr Chand's failure to issue the DLC meant Harrison Grierson could not say the consulting contract was at an end. To allow Harrison Grierson to say the contract was at an end would be permit it to rely on its failure to perform its obligations under the contract. In making that submission Mr Twist relied on *Maritime National Fish Ltd v Ocean Trawlers Ltd*.[13] In that case Maritime argued their charterparty with Ocean Trawlers was frustrated by legislation which required licences for types of trawlers. Maritime had applied for licences for three trawlers, but had not applied for a licence for the trawler chartered from Ocean Trawlers. The Privy Council held the charterparty was not frustrated as the lack of a licence for the relevant trawler was due to Maritime's election.[14]

[30] The present case is quite different. Accepting for present purposes Mr Chand was in breach of his obligations as engineer by not issuing a DLC, that factor has no impact on whether Harrison Grierson's contract with Redhill was at an end in 2008. The principle that a party may not rely on its own default to avoid or frustrate a contract is well settled, but it is not applicable to the present case. Harrison Grierson does not seek to rely on Mr Chand's failure to issue the DLC to frustrate the contract or otherwise to avoid their obligations under it. Rather, they say that, despite that breach, the contract was at an end by 8 May 2008 when the CPC was issued or at the latest by 28 June 2008, the date when Mr Chand was due to issue the DLC.

[31] The Conditions of Contract for Consultancy Services between Redhill and Harrison Grierson (the Specific Conditions) are relevant. Sonsram Trustee and Mr Sami plead, and Harrison Grierson accepts, that in February 2005 Redhill engaged Harrison Grierson as a consultant to provide professional services to the subdivision in respect of Stages 1 and 2 in accordance with those Conditions of Contract.

[32] On 29 June 2005 Redhill and Harrison Grierson entered a new written agreement pursuant to which Redhill engaged Harrison Grierson as a consultant to

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13 *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 (PC).
14 At 531.

provide further professional services including design review, detailed design contract administration, project management and to complete development and subdivision of the balance block (the area defined as the lots remaining once Stages 1 and 2 had been completed).

[33] Appendix A to the Conditions of Contract set out the Scope and Purposes of Services including:

1. Preparation of engineering specifications, schedule of quantities and tender documents.

2. Engineering Contact Administration, observation and quality monitoring for the civil engineering construction of Stages 3, 4 and 5 from July 2006 to August 2007.

3. Project management associated with the civil engineering construction of Stages 3, 4 and 5 from July 2006 to August 2007.

4. As built, Section 224(c) application [preparation] to be lodged with Papakura District Council (PDC) and certification of the civil engineering construction work for Stages 3, 4 and 5 from July 2006 to August 2007.

5. Land Transfer survey, Section 223 approval, boundary pegging, preparation of the cadastral survey dataset for lodgement with Land Information New Zealand for Stages 3, 4 and 5 from July 2006 to August 2007.

Additional Specific Tasks

6. Preparation of two possible subdivision plans options for the rural block, for consideration by [Redhill] Development (NZ) Limited.

7. Preparation of TP108 pre and post development stormwater flow calculations.

8. Topographical survey of completed earthworks as at 31.03.2006 and preparation of a digital terrain model and earthworks volume model.

9. Full topographical survey and remodelling for the end of season earthworks as at 30 June 2006.

10. Hydraulic modelling required by PDC, beyond the industry accepted rational method calculation.

11. Harrison Grierson Consultants Limited services as required when dealing with the sediment pond failure and subsequent PDC and ARC on-site requirements.

12. Update of the civil work schedule of quantities and providing separate detailed schedules for the retaining walls and sewer pump station.

13. Harrison Grierson Consultants Limited attendance at Risk Management Workshop instigated by [Redhill] Development (NZ) Limited.

14. Harrison Grierson Consultants Limited construction inputs for the reserve improvement works (excluding the eastern gully) including as built survey and preparation of as built plans for PDC Parks and Reserves approval.

15. Harrison Grierson Consultants Limited survey and earthworks modelling for monitoring of earthworks construction progress (approximately bi-monthly in December 2006 and late February 2007).

[34] In about December 2005 Harrison Grierson completed its services with respect to stages 1 and 2.

[35] The parties then subsequently agreed Harrison Grierson would provide further engineering and survey services to complete Stages 3 and 4 from 30 June 2007 to 31 March 2008. The arrangements were recorded in a letter from Harrison Grierson of 13 July 2007 and Redhill's acceptance of the terms in its letter of 14 February 2008.[15]

[36] Relevantly the Harrison Grierson letter of 13 July 2007 noted that:

> Please be aware that Engineering Contract Administration includes the following tasks.
>
> - Construction observation on site.
> - Providing the Contractor with support information.
> - Council (PDC & ARC) inspections and liaison.
> - Review of Contractors payment certificates.
> - Payment Certificate recommendations to Client.
> - Monitoring the Contractors progress.

[15] The letter sent by Harrison Grierson was addressed to Ramwall Homes (NZ) Ltd, a related company since removed from the register of which Mr Sami was sole director and Sonsram Trustee Ltd was sole shareholder. But the attached short form agreement for consultant engagement was between Redhill and Harrison Grierson, and Mr Sami's letter in acceptance was signed on behalf of Redhill.

- Monitoring the Contractors work quality.

Construction Management includes the following tasks:

- Client liaison.
- Attendance at site meetings.
- Liaison with other consultants.
- Liaison with utility authorities.

Please note that this component of our work is limited to the above tasks and does not provide a full project management and co-ordination role.

[37] It is not in issue that Mr Chand never issued a DLC. However, that does not mean that the contract between Redhill and Harrison Grierson for engineering services was somehow still on foot.

[38] The contractual arrangements between the parties contemplated that Harrison Grierson's work would be completed by 31 March 2008. The CPC was issued on 8 May 2008. The defects liability period expired on 28 June 2008. The appellants' submission that the contract somehow still remains on foot in 2017 cannot stand given the contractual arrangements agreed by the parties. While the failure to issue the DLC may have been a breach of Mr Chand's duty as engineer, it does not extend the term of the contract.

Harrison Grierson was under a continuing duty to ensure that the defects were remedied

[39] Mr Twist next submitted, in reliance on the decision of *Kerr v South Wairarapa District Council*, that Harrison Grierson through Mr Chand as engineer was under a continuing duty to ensure the defects were remedied and that duty continued until the DLC was issued or at least until Mr Chand ceased to retain the practical ability to ensure the defects were remedied.[16] He submitted that it was impossible without full discovery and inspection to determine when Mr Chand's practical ability to ensure the defects were remedied ceased.

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[16] *Kerr v South Wairarapa District Council* HC Wellington CIV-2010-035-156, 9 December 2011 at [23].

[40] In *Kerr v South Wairarapa District Council* Miller J accepted as arguable for summary judgment purposes that time did not run for limitation purposes while the builder or developer was under a continuing duty to remedy the defects.[17]

[41] Mr Twist relied on Miller J's reference in *Kerr v South Wairarapa District Council* to the observation of this Court in *Johnson v Watson* that:[18]

> … there may be an argument for saying that where original building work is faulty the builder is under a continuing duty to remedy it right through until the date of completion, and there is a continuing "omission" until that date. On that basis the Johnsons would have had until December 2000 within which to sue without falling foul of s 91(2) [of the Building Act 1991].

[42] It is important to put that observation into its factual context. Mr Watson, the defendant builder, constructed a home for the plaintiffs between March and December 1990. In October 1999 an expert report obtained by the plaintiffs stated the original work and subsequent repairs Mr Watson had carried out after December 1990 were not up to standard and remedial work was required. The Johnsons filed proceedings in March 2001. Mr Watson was granted summary judgment on the basis the claims were barred by the limitation provision in s 91(2) of the Building Act 1991.[19] The Johnsons appealed.

[43] This Court held that claims based on the original work to December 1990 had been brought more than 10 years after the work was completed and were therefore barred by s 91(2) of the Building Act.[20] The continuing obligation to repair the original work could not run past the date the building work was completed.

[44] Harrison Grierson's work as consulting engineer under the contract was largely completed by the date the CPC was issued. By that date the application pursuant to s 224(c) of the Resource Management Act 1991 was lodged with Papakura District Council. Mr Nagaiya accepted in his affidavit before the High Court that Harrison Grierson received the s 224(c) certificate from the Council on 8 May 2008. To the extent it could be argued that Mr Chand's obligations as

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17 At [20].

18 *Johnson v Watson* [2003] 1 NZLR 626 (CA) at [27] cited in *Kerr v South Wairarapa District Council*, above n 16, at [20].

19 *Johnson v Pitts* HC Whangarei CP10/01, 4 December 2001.

20 *Johnson v Watson*, above n 18, at [8].

engineer extended his employer Harrison Grierson's obligations in relation to contract administration, those obligations also came to an end with the issue of the CPC on 8 May 2008 or at the latest by the time Harrison Grierson issued a final progress payment schedule on 3 July 2008. Harrison Grierson did write to Papakura District Council on 7 October 2008 proposing a final inspection to walk over the drainage lines but this event never occurred and there was no suggestion that Harrison Grierson performed any contractual services relating to it.

[45] *Johnson v Watson* does not support the submission made for the plaintiff that the continuing duty to ensure the defects were remedied extended the period Redhill could claim against Harrison Grierson for previous breaches of contract or negligence under its consulting contract past the end of the contract or past the date the DLC was due.

Need for full discovery and inspection

[46] Mr Twist repeated the submission he had made to the Judge at the hearing that summary judgment should not have been entered until the appellants had an opportunity to obtain full discovery and inspection.

[47] Mr Twist's argument is essentially that, even if on the evidence before it the Court was satisfied summary judgment should be entered, the Judge should have exercised his discretion not to enter summary judgment for the defendant in the absence of full discovery and inspection.

[48] The discretion not to enter summary judgment is generally restrictively applied.[21] Where the argument is, as in the present case, that summary judgment ought not to be entered to enable full discovery and inspection to be carried out then the respondent to the application should be able to point to a document or category of documents which may be relevant.

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[21] *Berg v Anglo Pacific International (1988) Ltd* (1989) 1 PRNZ 713 (CA) at 717.

[49] The appellants have had access to all Redhill's relevant documents. It is accepted that no DLC was issued. The appellants have not been able to identify further documents which might be relevant to their claim.

The parties contracted out of the Limitation Act 1950

[50] Mr Twist next referred to the Special Conditions to the Conditions of Contract between Redhill and Harrison Grierson entered in February 2005 and submitted that Harrison Grierson had contracted out of the provisions of the Limitation Act by specifying that the duration of Harrison Grierson's liability was six years from the date on which the services were completed. As the CPC was invalid and no DLC was ever issued Harrison Grierson's services have never been completed. Time continues to run.

[51] For the reasons given above this submission must fail, relying as it does on the argument that Harrison Grierson has not completed its services under the contract. We have rejected that argument. We have found the CPC to have been validly issued. While the failure to issue the DLC may have been a breach of contract, it did not have the effect of extending the consultancy contract past its completion date.

[52] There are further difficulties for the appellants with this argument. As a matter of construction, the express terms of the Conditions of Contract were not intended to extend liability but rather are directed at constraining it by providing certainty as to when Harrison Grierson's exposure to a claim ends. The General Conditions provide for "Duration of Liability" at cl 6.4:

> Neither party shall be liable for any loss or damage occurring after the period stated in the Special Conditions from the date on which the Services were completed.

[53] Rather than extend the period of liability, that clause has the effect of confirming a definite end point for liability, namely six years after the services were completed. It is an answer to any argument about when the relevant cause of action may have accrued for the purposes of the Limitation Act.

[54] Mr Twist also sought to rely on cl 6.1 headed "Consultant's Liability":

> Where the Consultant breaches this Agreement, the Consultant is liable to the Client for reasonably foreseeable claims, damages, liabilities, losses or expenses caused directly by the breach.

The clause constrains the extent of damages but does not extend the period of liability as Mr Twist suggested.

[55] In Mr Sami's case there is a further point. Mr Sami's causes of action are claims in negligence. He is unable to rely on the contractual condition.

Do the principles of reasonable discoverability apply?

[56] Mr Twist's final submission was that the principles of reasonable discoverability as discussed in *Invercargill City Council v Hamlin* apply to the present case.[22] He submitted that the present case was "analogous to building cases".

[57] Mr Twist submitted that none of the causes of action assigned to Sonsram Trustee could have accrued until Redhill went into liquidation in December 2009 because Redhill could not have reasonably discovered the extent of its loss or damage until then. He also submitted that Mr Sami's claim in the eighth cause of action — that Harrison Grierson knew or ought to have known that Mr Sami and his family interests would pay the fees and costs of Redhill and Sonsram and therefore assumed responsibility to Mr Sami to serve the payment schedule on time and pay fees and costs[23] — was not reasonably discoverable until the date of adjudication on 8 June 2009 when HEB was awarded the $2,039,307 plus $45,000 costs against Mr Sami. Both dates are within six years of 3 June 2015 when the proceedings were filed.

[58] Mr Dennett referred to the Supreme Court decision of *Davys Burton v Thom* and submitted that the fact the amount of the loss may not have been specifically quantified or crystallised until the award of 8 June 2009 or until Redhill went into

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22 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 526–527.

23 See also [73]–[74] of this judgment.

liquidation in December 2009 was irrelevant.[24] The causes of action in contract accrued for limitation purposes on the breach of the contract. The causes of action in negligence accrued when the losses were suffered which was in 2008.

[59] In *Murray v Morel & Co Ltd* the Supreme Court considered whether the principle of reasonable discoverability should apply more generally than to the limited examples of building cases and abuse cases.[25] That case involved a forestry partnership. Units in the partnership were participatory securities. The Securities Act 1978 applied. By October 1994 the minimum subscription required to establish the partnership had not been achieved. The closing date was extended until November 1994. The landowners decided to take up the unsubscribed units. However they asked that their subscription cheque be held and offset against the amount payable to them on settlement of the purchase of the forest. Once settlement had taken place the cheque was to be destroyed. The statutory supervisor accepted the applications and cheque on that basis.

[60] The investment was not a success. In December 2001 the other investors discovered what had happened in respect of the landowners' cheque. They claimed the way in which the matter had been dealt with was unlawful and sought to recover their invested moneys and interest. The promoters of the scheme successfully applied to the High Court to strike out all causes of action as statute-barred.[26]

[61] This Court found on appeal that the cheque had been delivered subject to a condition it never be presented but accepted that the limitation period had expired.[27] On appeal the Supreme Court held the cheque had been a deemed payment under the Securities Act.[28] Importantly for present purposes the Supreme Court held there was no general principle that a cause of action did not accrue for limitation purposes until the elements were reasonably discoverable by the plaintiff.[29] Tipping J emphasised that the element of knowledge of discoverability is relevant to the date when the loss occurs but the focus always remains upon the occurrence of loss rather than on

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24 *Davys Burton v Thom* [2008] NZSC 65, [2009] 1 NZLR 437 at [16].
25 *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721.
26 *Murray v Morel & Co Ltd* HC Auckland CIV 2003-404-4897, 8 April 2004.
27 *Murray v Morel & Co Ltd* [2006] 2 NZLR 366 (CA).
28 *Murray v Morel & Co Ltd*, above n 25.
29 At [74] per Tipping J and [148] per Henry J

discoverability of a loss which has already occurred.[30] A plaintiff's state of knowledge has no bearing on limitation issues because accrual is "an occurrence-based, not knowledge-based, concept".[31]

[62] In *Davys Burton v Thom* the Supreme Court again confirmed the plaintiff in that case had suffered actual and quantifiable loss at the time he obtained a damaged asset — namely a matrimonial property agreement that was not legally enforceable — even though the extent of the resultant damage did not become clear until later.[32]

[63] While the appellants must accept that there is no general principle of reasonable discoverability, they urge this Court to extend the principle of reasonable discoverability to the alleged negligence of an engineer in relation to a subdivision by analogy with building cases. That overlooks that the present case is essentially a case of alleged professional negligence. It is not analogous at all to building cases in which the rationale for extending the time period is, as described above, based on the latent defects in a building.

[64] Generally, the measure of loss recoverable for negligent professional advice or services is the cost of putting the plaintiff in the position he would have been in had the defendant fulfilled his duty.[33] Difficulties in quantification do not mean that no measurable loss has been sustained so that the cause of action has not accrued. The cause of action accrues as soon as the plaintiff relying on the professional advice or services suffers financial harm, even if quantification is difficult.[34] The economic loss or damage may be reflected in a number of ways including a diminution in the value of an asset or by the incurring of a liability.[35]

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30 At [63].
31 At [69].
32 *Davys Burton v Thom*, above n 24, at [24]–[26] per Elias CJ and [47]–[51] per Tipping, McGrath and Wilson JJ.
33 At [16] per Elias CJ.
34 At [16] per Elias CJ citing *Law Society v Sephton & Co (A Firm)* [2006] UKHL 22, [2006] 2 AC 543 at [41] per Lord Walker and *Nykredit Mortgage Bank plc v Edward Erdman Group Ltd (No 2)* [1997] 1 WLR 1627 (HL) at 1632 per Lord Nicholls.
35 *Davys Burton v Thom*, above n 24, at [17] per Elias CJ.

Conclusion

[65] Consideration of the various claims raised by the appellants confirms that they accrued more than six years before the proceedings were issued on 3 June 2015.

[66] The first cause of action alleges that, in breach of contract, Harrison Grierson over-certified lime usage by HEB in 2007. The cause of action in contract accrued on the date of the breach, which on the appellant's pleading was in 2007.

[67] The second cause of action alleges that, in breach of contract, Harrison Grierson over-certified and overpaid preliminary and general lump sum items to HEB between 2006 and 2008. Again any loss must have occurred at the time of the over-certification.

[68] The third cause of action alleges that, in breach of contract, Harrison Grierson wrongfully over-certified and overpaid to HEB $3,290,322 between 2006 and 2008. Again the breach must have been in 2008 at the latest. The claim is statute-barred.

[69] The fourth cause of action alleges breaches of the consultancy contract in various ways, all of which caused Redhill to suffer loss of profit on the subdivision. All the alleged breaches relate to Harrison Grierson's actions or omissions prior to the issue of the CPC in May 2008. The claim is statute-barred.

[70] The fifth cause of action alleges Harrison Grierson was negligent and breached the duty of care it owed to Redhill. However, it is based on the same allegations raised in the fourth cause of action. While the loss of profits claimed may not have been quantified until a later date, the accrual of the cause of action is not dependent on the quantification of the loss. The cause of action in negligence arises when the damage occurred. The focus is on the occurrence of loss rather than on the discoverability of a loss which has already occurred.[36] In this case the loss occurred when Harrison Grierson carried out the alleged negligent acts or omissions, which was mid 2008 at the latest. At that time, Redhill either had not obtained the

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[36] *Murray v Morel & Co Ltd*, above n 25, at [42] per Tipping J.

full value of the subdivision or had incurred liabilities or obligations arising from the alleged acts of negligence.

[71] The sixth cause of action alleges a breach of contract by defective design which caused HEB to cut less fill than was required. The breach is alleged to have occurred between 2007 and 2008. The claim is statute-barred.

[72] The seventh cause of action alleges negligence but on the same basis as the sixth cause of action. Again the damage occurred when the alleged negligent defective design was provided in 2007 or 2008.

[73] The eighth cause of action is the first by Mr Sami. He alleges that he has sustained loss arising from the adjudication in HEB's favour against him. As Mr Sami was liable through his association with Redhill, any liability must stem from the obligations Redhill incurred to HEB. To the extent it could be said that any negligence by Harrison Grierson caused those losses, the date of the accrual of the cause of action must be the same date as Redhill's cause of action accrued.

[74] Further, in any event, on 3 April 2009 HEB served its adjudication claim seeking amongst other things, a determination that Redhill was liable to pay $2,191,816 plus GST and a determination that Mr Sami and Sonsram Development were associates of Redhill and jointly and severally liable with Redhill to pay the claimed amount. On any view of it by that time at the latest, Mr Sami should have been aware of his liability.

[75] In the ninth cause of action Sonsram Trustee claims Harrison Grierson were negligent leading to direct loss. It claims that Harrison Grierson should have known of Sonsram Trustee's financial interest in Redhill and Sonsram Development and that it should have known that its breaches of contract would cause Sonsram Trustee loss. It seeks damages and costs to be quantified. It also makes a rather extraordinary claim for general damages on behalf of the company for $100,000 for distress and anxiety. Again, even if the claim otherwise had any merit Sonsram Trustee's loss was incurred when the damage to its interests occurred which was when Harrison Grierson's actions caused loss to Redhill and therefore Sonsram Trustee. That was

when Redhill incurred a liability to HEB as a result of Harrison Grierson's actions or otherwise suffered a diminution in value of its asset — the subdivision — as a result of Harrison Grierson's actions. That must have been 2008 at the latest.

[76] The tenth cause of action is the second by Mr Sami. It pleads negligence in relation to general loss. He claims special damages be fixed and the $350,000 be paid. He also claims general damages. Again, even if the claim otherwise had any merit for the reasons given in relation to Sonsram Trustee's claim in the ninth cause of action the cause of action accrued in 2008 at the latest.

[77] All the causes of action accrued by 3 July 2008 at the latest. They are statute-barred.

[78] We add that summary judgment was entered in Harrison Grierson's favour in accordance with the orthodox principles that none of the numerous causes of action in the statement of claim could succeed at trial. If the case had gone to trial Sonsram Trustee would have been exposed to the additional defence that Redhill's assignment on 30 October 2009 was of a bare right of action and thus invalid. Also, most if not all the losses claimed by Sonsram Trustee would have been irrecoverable. Sonsram Trustee is claiming for overpayments made by Redhill to HEB in accordance with allegedly negligent certificates issued by Harrison Grierson when in fact Redhill was adjudicated liable to pay $2,039,307 plus costs to HEB but failed to do so.

Result

[79] The application to adduce new evidence is declined.

[80] The appeal is dismissed.

Costs

[81] The appellants are ordered to pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

Solicitors:
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