

**IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY**

**CIV 2010-404-001415  
[2014] NZHC 2644**

BETWEEN                      BODY CORPORATE NO. 338356  
First Plaintiff

DANIEL JAMES HALASKA AND  
OTHERS  
Second Plaintiffs

AND                              WILLIAM ARTHUR ENDEAN  
JOHN EDWARD ENDEAN  
CHRISTINE HEATHER ENDEAN  
First Defendants

CLARK BROWN ARCHITECTS  
LIMITED  
Second Defendant

Contd.../...

Hearing:                      20 October 2014

Appearances:                C Baker for the Plaintiffs  
A Barker for the First Defendant  
R Hollyman and A Holmes for the Second Defendant  
J Morrison for the Third Third Party  
No Appearance for Other Defendants or Third Parties

Judgment:                    28 October 2014

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**[RESERVED] JUDGMENT OF WYLIE J**

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This judgment was delivered by Justice Wylie  
on 28 October 2014 at 4.45 pm  
Pursuant to r 11.5 of the High Court Rules

Registrar/Deputy Registrar

Date:



AND

JAMES HARDIE NEW ZEALAND  
LIMITED

Fourth Defendant and First Third Party

GRAHAM HENRY WILLIAM  
WHITE

Sixth Defendant

BOSTIK (AUSTRALIA) PTY  
LIMITED

Third Third Party

BONDOR NEW ZEALAND LIMITED

Fourth Third Party



## **Introduction**

[1] These proceedings concern an apartment building on St Paul's Street near Auckland University. It comprises 78 units and was constructed between 2002 and 2004.

[2] The first and second plaintiffs allege that the building leaks and they have brought proceedings against those they say are responsible. Their original statement of claim was dated 9 March 2010. There have been a number of amendments to the pleading since. These culminated in the fourth amended statement of claim dated 24 May 2013. It was filed on 27 May 2013.

[3] The proceeding has been allocated a fixture. It is due to proceed to hearing on 9 February 2015.

[4] The close of pleadings date was 2 July 2014.

[5] On 3 July 2014, the plaintiffs applied for leave to further amend their statement of claim. A proposed fifth amended statement of claim was served on the parties. That document has subsequently been amended yet again, albeit in relatively minor ways. To explain the proposed fifth amended statement of claim, the plaintiffs also served copies of their expert reports. They set out the factual basis for the amendments proposed.

[6] The first defendants were the owners of the land on which the building now sits. They developed the complex. The second defendant is a firm of architects. They prepared the plans and specifications for the building. Both the first and second defendants oppose the application to file the fifth amended statement of claim.

[7] The sixth defendant was a director of the company that certified the various stages of the development and completed the final code compliance certificate. The company has since been struck off. He also opposes the application. His appearance



was excused by Faire J in a minute issued on 16 October 2014. The minute recorded that the sixth defendant supports the position taken by the first and second defendants.

[8] There was an appearance for the third third party. It did not oppose the application and Mr Morrison on its behalf simply had a watching brief. The remaining defendant, James Hardie New Zealand Limited, and the fourth third party, Bondor New Zealand Limited, did not oppose the application and they did not attend the hearing.

### **Applicable Provisions**

[9] The plaintiffs require leave to file the proposed fifth amended statement of claim because they seek to file it after the close of pleadings date. Relevantly, r 7.7 provides as follows:

#### **7.7 Steps after close of pleadings date restricted**

- (1) No statement of defence or amended pleading or affidavit may be filed, and no interlocutory application may be made or step taken, after the close of pleadings date without the leave of a Judge.

...

[10] The plaintiffs are unable to obtain leave if the proposed amendments raise a new cause of action which is statute barred. The relevant rule is r 7.77(2). It provides as follows:

#### **7.77 Filing of amended pleading**

...

- (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.

...

[11] The hearing raised two issues for the Court:



- (a) whether the plaintiffs, through the proposed amendments, are seeking to raise a new cause(s) of action, that is statute barred, and
- (b) if not, whether leave to file the proposed fifth amended statement of claim should nevertheless be refused under r 7.7.

**Rule 7.77(2)**

*Relevant law*

[12] There was no dispute between the parties as to the relevant law.

[13] The primary purpose of pleadings:<sup>1</sup>

is to define the issues, and thereby to inform the parties in advance of the case they have to meet, and so enable them to take steps to deal with it.

A pleading is intended to supply an outline of the case advanced, sufficient to enable a reasonable degree of pre-trial briefing and preparation.<sup>2</sup>

[14] While there is no scheduled form mandated for statements of claim, the rules do put in place minimum requirements. The general nature of the claim to the relief sought must be set out. The statement of claim must give sufficient particulars of relevant details and other circumstances to inform the Court and the party or parties against whom relief is sought of the plaintiff's cause of action.<sup>3</sup>

[15] A cause of action is every fact which it will be necessary for the plaintiff to prove, if traversed, to support his or her right to a judgment of the Court.<sup>4</sup>

[16] Whether or not a proposed amendment to pleadings introduces a new cause of action has been considered by the courts on a number of occasions. The leading

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<sup>1</sup> *Farrell v Secretary of State* [1980] 1 All ER 166 (HL) at 173.

<sup>2</sup> *Price Waterhouse v Fortex Group Ltd* CA179/98, 30 November 1998.

<sup>3</sup> High Court Rules, r 5.26(a) and (b).

<sup>4</sup> *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 536; *Letang v Cooper* [1965] 1 QB 232 (CA) at 242.



authority is the decision of the Court of Appeal in *Smith v Wilkins & Davies Construction Co.*<sup>5</sup> McCarthy J discussed the relevant principles as follows:

...The issue is, I think, put as clearly as anywhere in the words of Lord Wright MR in *Marshall v London Passenger Transport Board*,<sup>6</sup> ...[1936] 3 All ER 83 as being whether the new pleading involves "a new departure, a new head of claim, or a new cause of action".<sup>7</sup> ... ibid 87. In other words, is it something essentially different from that which was pleaded earlier? Such a change in character may be brought about, in my view, by alterations in matters of law or of fact, or both. Alterations of fact could possibly be so vital and important as by themselves to set up a new head of claim. On the other hand, more often alterations of fact do not affect the essence of the case brought against the defendant... In each case it must, I consider, be a question of degree.

[17] This statement has been adopted and applied in a number of subsequent cases.<sup>8</sup> Recently, the principles were restated by the Court of Appeal in *Transpower New Zealand Limited v Todd Energy Limited*.<sup>9</sup> The Court observed as follows:

[61] The relevant principles as to when a cause of action is fresh are summarised in the *Ophthalmological* case at [22] - [24] as follows:

- (a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another...;<sup>10</sup>
- (b) Only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction"...;<sup>11</sup>
- (c) The test of whether an amended pleading is "fresh" is whether it is something "essentially different"...<sup>12</sup> 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

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<sup>5</sup> *Smith v Wilkins & Davies Construction Company* [1958] NZLR 958 (SC) at 962.

<sup>6</sup> *Marshall v London Passenger Transport Board* [1936] 3 All ER 83 (CA).

<sup>7</sup> At 87.

<sup>8</sup> For example, *Gabites v Australasian T & G Mutual Life Assurance Soc* [1968] NZLR 1145 (CA); *Steens Bros Ltd v Youth Hostels Assn New Zealand* CA 3/86, 17 April 1986; *Chilcott v Goss* [1995] 1 NZLR 263 (CA); *Ophthalmological Soc of New Zealand v Commerce Commission* CA168/01, 26 September 2001.

<sup>9</sup> *Transpower New Zealand Limited v Todd Energy Ltd* [2007] NZCA 302.

<sup>10</sup> *Letang v Cooper* [1965] 1 QB 232 at 242 – 243 (CA) per Diplock LJ.

<sup>11</sup> *Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 at 405 (CA) per Millett LJ.

<sup>12</sup> *Chilcott v Goss* [1995] 1 NZLR 263 at 273 (CA) citing *Smith v Wilkins & Davies Construction Co Limited* [1958] NZLR 958 at 961 (SC) per McCarthy J.



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”.<sup>13</sup> ...

[18] The principles set out in *Transpower* were adopted in *Commerce Commission v Visy Board Pty Limited*.<sup>14</sup> The Court of Appeal there noted that the question is whether an amendment to pleadings changes the claim against the defendant, so that it is something essentially different from what it was before the amendment. It recorded that such a change could occur as a result of an alteration in matters of fact. It went on to consider *Smith v Wilkins & Davies*, and two other cases.<sup>15</sup> It then observed as follows:

[146] ...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.

[147] ... the importance of the pleaded fact to the success of the claim is not the test; the question is whether the amendment has changed the essential nature of the claim...

[19] It was common ground that if the proposed fifth amended statement of claim raises a new cause(s) of action, then the same is statute barred. The building work at issue in these proceedings took place when the Building Act 1991 was in force. It contained a 10-year limitation provision.<sup>16</sup> The 1991 Act was repealed by the Building Act 2004 as from 31 March 2005.<sup>17</sup> The 2004 Act did not contain any transitional provision relevant to the limitation period. Rather, it put in place a new provision providing for the same limitation period.<sup>18</sup> The current provision states that civil 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. In the present

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<sup>13</sup> *Chilcott*, above n 8, 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*, above n 8.

<sup>14</sup> *Commerce Commission v Visy Board Pty Limited* [2012] NZCA 383.

<sup>15</sup> *Seddon v Ryans Carriers Ltd* (1992) 6 PRNZ 355 (HC); *Bryan v Philips (NZ) Ltd* [1995] 1 NZLR 632 (HC).

<sup>16</sup> Building Act 1991, s 91.

<sup>17</sup> Building Act 2004, s 416(c).

<sup>18</sup> Section 393.



case, it may be arguable that the relevant building work was done some time in 2002, but I did not need to address that issue. The construction of the building was completed at the latest by April 2004, when the code of compliance certificate was issued. As I have already noted, the proposed fifth amended statement of claim was not served until 3 July 2014, outside the 10-year limitation period.

[20] In determining whether a new cause(s) of action is raised by the plaintiffs' proposed fifth amended statement of claim, it is necessary first to look at the fourth amended statement of claim and further particulars of that pleading provided by the plaintiffs, and then to consider the proposed fifth amended statement of claim.

*Fourth amended statement of claim/further particulars provided*

[21] The basic structure of the fourth amended statement of claim is as follows:

- (a) It identifies the parties, and sets out the background to the construction of the building.
- (b) It records the role of each defendant, and identifies the second plaintiffs as being those persons who purchased their respective units direct from the first defendants.
- (c) Under the heading "Defects", it asserts that the first plaintiff commissioned a building investigation which was completed in November 2006. In [20] various defects in the design and construction of the building revealed by that investigation are alleged. It is expressly recorded that the listed defects include, but are not limited to, the various matters there set out. Under the heading "Cladding", it is asserted that there is leaking at express jointed fibre cement clad columns on the decks between what are referred to as "unit types B and C". Further, it is alleged that the base of some fibre cement claddings is buried into or below the deck tiling finish. Various defects said to be specific to the decks are then alleged under the heading "Decks". There is then a separate heading, "Other". Under this heading, cl (n) reads as follows:



The junctions between the fibre cement cladding and the poly-panel cladding are express jointed and are not adequately waterproofed or flashed.

Under the same heading, cl (o) reads as follows:

The fire rated internal linings and structural steel are affected by leaking.

- (d) Various breaches of the building code are then alleged. The provisions said to have been breached relate to durability, external moisture and surface water.
- (e) It is asserted that, as a result of the defects, there has been extensive moisture ingress causing damage to building elements.
- (f) It is asserted that, due to the presence of the defects, and the resulting damage, the plaintiffs have to carry out extensive remedial works. No particularisation of the required remedial works is given, but losses are itemised in the total sum of \$12,421,879.11 (GST inclusive). As part of this sum, it is asserted that the estimated cost of the remedial works is \$10,604,150.00 (inclusive of GST). This includes \$6,999,000.00 for construction costs.

[22] The primary cause of action against the first defendants is based in tort. It is alleged that the first defendants owed a non-delegable duty to all original and subsequent purchasers to exercise reasonable care in relation to the construction of the building. Particulars are given. It is then said that the duty owed has been breached, and that the plaintiffs have suffered the various losses detailed in the statement of claim. There is a second cause of action based in contract. Nineteen of the second plaintiffs, who purchased direct from the first defendants, allege that the first defendants gave them various warranties in their respective agreements for sale and purchase. It is alleged that those warranties have been breached.

[23] As against the second defendant, it is alleged that Clark Brown Architects Limited owed each of the plaintiffs a duty to exercise reasonable skill and care in preparing the written plans and specifications, and in supervising those who were



involved in their preparation. It is alleged that that duty of care has been breached. Particulars are given. Breach is pleaded and it is alleged that the plaintiffs suffered damage as a result.

[24] It is noted that negligence is also alleged against the fourth defendant, James Hardie New Zealand Limited. It is asserted that it provided cladding services in connection with the construction of the building, and that it owed a reasonable duty of care in designing and/or manufacturing the cladding, and in installing or supervising its installation.

[25] It should also be noted that the solicitors for the first defendant sought further particulars of the damage alleged by the plaintiffs by letter dated 11 June 2013. The plaintiffs were asked to identify areas where there had been moisture ingress and the damage it had caused to building elements in those areas, and also to identify each unit into which moisture had ingressed. The plaintiffs, by letter dated 24 June 2013, advised as follows:

2. The following are further particulars of damage caused to building elements where there has been moisture ingress:
  - 2.1 Damage to internal skirting and wall lines at the junctions between the polypanel and fibre cement sheet cladding systems to the internal wall sections of balcony apartments and at balcony apartment door sill liners.
  - 2.2 Mould around window and door openings and a breakdown of paint coating and movement to window sill liners between the aluminium joinery and the Tuff Wall walling system.
  - 2.3 Movement in gib-board cracking around windows, window frames and architraves as well as the joint wall lining.
  - 2.4 Moisture damaged internal linings and fire rating materials in the express jointed fibre cement clad columns between units and around structural steel and within the main walls which impairs fire rating capacity.
  - 2.5 Partitions between deck areas are set up off the tiled floor finish on a packing material. These packers are supporting the frame and are fixed through the tiled deck and membrane beneath causing moisture staining and extensive rusting to the structural framing elements of the deck areas.



A schedule was provided detailing those units into which it is alleged moisture has ingressed. Thirty of the 78 units were identified.

[26] Although the remedial works are not detailed in the fourth amended statement of claim, counsel for both the first and second defendants accepted that the quantum claimed made it clear that what was being sought by the plaintiffs was a complete re-clad of the building, and not simply targeted repairs.

*Proposed fifth amended statement of claim*

[27] The proposed fifth amended statement of claim makes a number of relatively minor amendments, to which the first and second defendants do not take exception. Further, at the hearing, the plaintiffs agreed to delete some words to appease the first and second defendants. For example, in [23], the plaintiffs agreed to take out the words “through the exterior envelope”, and in [40](b)(vi), the words “The architectural plans did not provide details of how the head flashings should be terminated”.

[28] The basic structure of the pleading does not change. There is no alteration to the defects listed in [20] of the document. Although initially, the plaintiffs did seek to add to the provisions in the building code which they allege have been breached, they have now resiled from any amendment in this regard.

[29] The main problem from the perspective of the first and second defendants arises from the proposed insertion of a new [25].

[30] To understand [25], it is necessary to first set out proposed [24]. It reads as follows:

In the course of attending to the necessary remedial works to remedy the defects the plaintiffs will need, and the Auckland City will require the plaintiffs, to include as part of the remedial works described in paragraph 25 below, the work necessary to address all the Defects and the Damage.

[31] Proposed [25] asserts that, due to the presence of the defects, and the resultant damage, it is necessary for the plaintiffs to carry out extensive repairs to the exterior envelope, structural elements, and internal finishes of the building.



Particulars are given. Inter alia, it is asserted that it is necessary to remove and dispose of all wall claddings, and to expose timber framing and the structural steel framing. It is said that the structural steel framing needs to be prepared, treated and painted. As part of this process, it is alleged that all exterior windows and doors have to be removed and disposed of, and that a replacement curtain wall cladding system including all related components such as flashings, trims, finishes, windows and doors, will have to be installed. It is asserted that in the interior of the building, all “exterior facing” internal wall linings have to be removed and disposed of, and then replaced. Under the heading “Structural strengthening”, it is alleged that all corroded structural steel must be prepared, treated and painted.

[32] In proposed [26], it is alleged that total damages that the plaintiffs have suffered or will suffer is \$16,327,236.17 (GST inclusive). Construction costs are said to be \$9,446,899.00. The total cost of remedial works, including design and supervision fees, local authority consent fees, insurance and the like, are alleged to be \$14,319,672.24.

[33] There is no substantive change to the legal basis for the cause of action in tort against the first defendants or the second cause of action in contract, also against the first defendants – other than in relation to the quantum of damages claimed. Nor is there any substantive change, other than in relation to the quantum of damages claimed, against the second defendant, although particulars are given of each alleged failing, by reference to specific defects listed in cl 20.

### *Submissions*

[34] Both Mr Barker, for the first defendants, and Mr Hollyman, for the second defendant, asserted that the defects listed in the fourth amended statement of claim related only to leaks around the decks and balconies. They argued that the defendants could reasonably anticipate that the extent of those leaks, their cause and who was liable for them, would be live issues at trial, and that the most significant issue which would require resolution is whether the repair of those defects requires a full re-clad as claimed by the plaintiffs, or whether more targeted repairs are all that is necessary.



[35] They submitted that the proposed fifth amended statement of claim is an attempt by the plaintiffs to support their claim for a full re-clad by reference to new, and to date unpleaded, allegations of further defects and damage. They said that the plaintiffs are, in effect, seeking to alter the schedule of defects found in the building to allege:

- (a) an inherently defective or leaking cladding system which needs to be replaced in its entirety;
- (b) that all exterior windows and doors are faulty and need to be replaced;
- (c) that structural steel throughout the building is corroded and needs to be treated;
- (d) that fire-rated walls are damaged and need to be replaced.

They argued that the plaintiffs are indirectly attempting to provide alternative and independent bases on which to justify a re-clad of the building.

[36] Counsel argued that each of the new alleged defects creates a new cause of action, and that all involve a fundamental shift in the basis for the plaintiffs' claim.

[37] Mr Baker, for the plaintiffs, argued that the building has been damaged by water ingress through the exterior building envelope, and that the remedial works now said to be required to fix the damage do not differ so significantly from the damage alleged, and the remedial works identified, in the fourth amended statement of claim, as to give rise to a fresh cause(s) of action. He argued that the additional remedial works identified in the proposed fifth amended statement of are part of, and consequential upon, the defects and damage which was particularised in the fourth amended statement of claim.

### *Analysis*

[38] In broad terms, the fourth amended statement of claim made it clear that the plaintiffs are alleging that the building leaks, and that, as a consequence, it has



suffered damage. It is implicit from the pleading that the remedial works required to fix the damage extended to a re-clad of the entire building.

[39] While it is correct that the majority of the defects listed in the fourth amended statement of claim related to alleged leaks in the deck/balcony areas, those defects appeared primarily under the heading “Decks” in the fourth amended statement of claim.

[40] In my view, a plain reading of the fourth amended statement of claim makes it clear that it was not limited to leaks around the decks and balconies. The heading “Other” in the fourth amended statement of claim extended to defects not associated with the decks/balconies. Clause (o), which I have set out above, specifically referred to fire-rated internal linings and to structural steel. It was alleged that each of these items was affected by leaking. There was nothing to suggest that the fire-rated lining and structural steel said to be affected by leaking was only the fire-rated internal linings and structural steel in the vicinity of the balconies and decks. Were it otherwise, cl (o) would have appeared under the heading “Decks”, and not under the heading “Other”. Similarly, in cl (n), there is a reference to junctions between the fibre cement cladding and the poly panel cladding. It is alleged that those areas are not adequately waterproofed or flashed. Clause (n) also appears under the heading “Other”. Again, there is nothing to restrict the defect there alleged to the decks or balconies.

[41] Similarly, [2.2], [2.3] and [2.4] in the further particulars provided are not confined to the decks and balconies. They broadly identify problems with the exterior cladding, the windows and doors, and the structural steel generally.

[42] I also note that Mr Rankin, a building surveyor retained by the plaintiffs, has filed an affidavit in which he attributes the required remedial works identified in the proposed fifth amended statement of claim to various listed defects, all of which were found in the fourth amended statement of claim, and all of which are repeated in the proposed fifth amended statement of claim. There is no affidavit from the defendants denying that assertion.



[43] In my judgment, the remedial works detailed in the proposed fifth amended statement of claim do not, in reality, differ from those that were pleaded in the fourth amended statement of claim, and which are said to arise directly from alleged wrongful acts of the first and second defendants which were pleaded in the fourth amended statement of claim. The remedial works said to be required are simply those works which the plaintiffs say are required as an ulterior consequence of the defects and resultant damage which have been pleaded. They are not entirely distinct damage accruing from the defendants' acts independently of the damage already listed in the fourth amended statement of claim. Further, it appears from the limited materials before me, that the damage to the building has been continuous, and that there has been no marked interval which might justify treating the damage more recently discovered by the plaintiffs as distinct.<sup>19</sup>

[44] It follows, in my judgment, that there has been no substantive change to the legal basis for the plaintiffs' claim. While they propose to add additional material detailing the remedial works said to be required, that detail is not so fundamental that it changes the essence of the case against the defendants. On the materials before me, I do not consider that the plaintiffs are seeking to introduce a fresh cause(s) of action against the defendants. In my judgment, r 7.77(2) is not engaged.

#### **Should leave be granted?**

[45] As noted above, leave is nevertheless required under r 7.7. In order to obtain leave, any amendment must be in the interests of justice, not significantly prejudice the defendants and not such as to cause significant delay.<sup>20</sup>

[46] The first defendants asserted that there has been no attempt to explain the delay in raising the issues. I accept that there is no explanation, but delay per se does not preclude the grant of leave.

[47] Mr Barker also asserted that:

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<sup>19</sup> And see *Bowen v Paramount Builders (Hamilton) Limited* [1997] 1 NZLR 394 (CA) at 424 per Cooke P; compare *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

<sup>20</sup> *Elders Pastoral Ltd v Marr* (1987) 2 PRNZ 383 (CA); *Thornton Hall Manufacturing Ltd v Shanton Apparel Ltd* [1989] 3 NZLR 304 (CA).



- (a) there is a “clear and significant prejudice” to the first defendants if the amendments are to be allowed. He argued that they directly put in issue such the advice as the first defendants received from their structural engineer, and that any potential claim against the structural engineer is now time barred, as a consequence of s 393 of the Building Act. He argued that, as a consequence, the first defendants will face new claims which could clearly relate to work carried out by others, but with no right of contribution or indemnity.
- (b) that allowing the amendments would significantly expand the issues for trial, and that there would be additional cost and potential delay.

[48] I do not accept Mr Barker’s submissions.

[49] First, I note that there is no affidavit evidence from the first defendants in regard to the alleged prejudice. If a court is being asked to exercise its discretion against the grant of leave, there should be some material on which the court can be asked to exercise that discretion.<sup>21</sup> Secondly, in my judgment, the fourth amended statement of claim does raise the issue of damage to the structural steel as a result of the alleged leaking. The first defendants were or should have been on notice that that issue was going to be raised, and they should have been alert to the need to join the structural engineer as a party to the proceedings if they considered that they had a potential claim against him/her.

[50] While I accept that there may be some additional cost, and that the issues for trial could be expanded, I do not consider that any delay or additional cost is likely to be significant. There is no evidence before me as to any likely additional cost, or time that may be required, and the issue of whether or not a re-clad is required was to be argued even under the fourth amended statement of claim. In my judgment, it is important that the plaintiffs should be able to proceed to a hearing on all matters which are in issue between them and the defendants, and the proposed amendments are necessary so that the real controversy between the parties is before the Court.

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<sup>21</sup> *Fordham v Xcentrex Communications Ltd* (1996) 9 PRNZ 682 (HC).



[51] In my view, the interests of justice require that the plaintiffs be granted leave.

## **Result**

[52] Accordingly, the plaintiffs are granted leave to file the proposed fifth amended statement of claim (subject to the agreed deletions noted in [27] above).

[53] I record that this judgment does not foreclose argument on whether or not the additional parts of the fifth amended statement of claim are statute barred under the Limitation Act. I have considered the issue solely on the basis of the briefs of evidence, and affidavits, filed by the plaintiffs' experts. There may well be a contrary view. The issue of compliance with the limitation period remains live. It is a matter which the defendants are free to raise afresh in their respective defences to the amended statement of claim and at trial. Nor should this judgment be seen as concluding that any of the briefs of evidence made available by the plaintiffs from Messrs Boulton, Parker, Edkins and Rankin, are necessarily relevant to matters raised in the pleadings. That is a matter which will have to be determined by the trial judge.

## **Costs**

[54] The plaintiffs are entitled to their reasonable costs and disbursements. In my view, category 2B is appropriate. I anticipate that counsel will be able to agree costs. In the unlikely event that there is any dispute, I direct as follows:

- (a) Within 10 working days of the date of release of this judgment, the plaintiffs are to file a memorandum seeking costs;
- (b) Within a further 10 workings days, the defendants are to file such memoranda as they wish to file in opposition;
- (c) Memoranda are not to exceed 10 pages in length.



[55] I will then deal with the issue of costs on the papers, unless I require the assistance of counsel.

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Wylie J