IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

I TE KŌTI MATUA O AOTEAROA
ŌTAUTAHI ROHE

CIV-2017-409-000691
[2019] NZHC 808

BETWEEN	J R BRINSDON Plaintiff
AND	G H BEAZLEY First Defendant
	VERO INSURANCE NEW ZEALAND LIMITED Second Defendant

Hearing: 26 February 2019

Appearances: M J Borcoski and S J Deavoll for the Plaintiff
W J Hamilton for the First Defendant
A J Wakeman for the Second Defendant

Judgment: 12 April 2019

JUDGMENT OF ASSOCIATE JUDGE P J ANDREW

This judgment was delivered by me on 12 April 2019 at 2:00 pm pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Introduction

[1] The plaintiff, Ms Brinsdon, is the owner of a house at Rutland Street, Christchurch that was damaged in both the September 2010 and February 2011 Canterbury earthquakes.

[2] The first defendant, Mr Beazley, was the insurance broker who placed total sum insurance cover for the house with the second defendant, Vero Insurance New Zealand Ltd (Vero).

[3] The plaintiff contends that she was under-insured as a result of defective advice from Mr Beazley on inception and renewal of the policies. The damage to the plaintiff's house as a result of the earthquakes well exceeds the total sum cover. She sues Mr Beazley in contract and tort and for breach of the Consumer Guarantees Act 1993. Vero is said to be vicariously liable for Mr Beazley's failures.

[4] The pleadings were not filed until September 2017. Both defendants have brought applications to strike out all three causes of action on the grounds that each claim is limitation barred. The plaintiff accepts that the proceedings have been brought outside the primary six year limitation period. However, she contends there is arguable case:

(a) for the postponement of the limitation period under s 28(b) of the Limitation Act 1950 on the grounds of equitable fraud; and

(b) that she had late knowledge of the claim pursuant to s 14 of the Limitation Act 2010 and that her claims were filed within three years of that knowledge date (s 11(2)).

[5] In response, the defendants say there is no "air of reality" to the claim for postponement under s 28(b), the plaintiff having failed to discharge the persuasive burden that she carries. They further contend that the grounds for late knowledge have not been made out, that the proposed amended pleading does not disclose a reasonably arguable cause of action, and that the claims in the amended pleading would in any event constitute a fresh cause of action that is now limitation barred.

Relevant legal principles

[6] The Court may strike out all or part of a pleading if, among other things, it discloses no reasonably arguable cause of action or otherwise an abuse of the process of the Court.[1]

[7] The general principles applicable are summarised in the Court of Appeal';s decision in *Attorney General v Prince*[2], as endorsed by the Supreme Court in *Couch v Attorney General.*[3] These include:

(a) pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation;

(b) the cause of action or defence must be clearly untenable; and

(c) the jurisdiction is not excluded by the need to decide difficult question of law, requiring extensive argument.

[8] In respect of applications to strike out on the grounds of limitation, the Supreme Court in *Murray v Morel & Co Ltd* held:[4]

> … the proper approach, based essentially on *Matai*, is that in order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the court that the plaintiff's cause of action is so clearly stature-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process. If the defendant demonstrates that the plaintiff's proceeding was commenced after the period allowed for the particular cause of action by the Limitation Act, the defendant will be entitled to an order striking out that cause of action unless the plaintiff shows that there is an arguable cause for an extension or postponement which would bring the claim back within time.
>
> (footnotes omitted)

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1 High Court Rules 2016, r 15.1.
2 *Attorney General v Prince* [1998] 1 NZLR 262.
3 *Couch v Attorney General* [2008] NZSC 45 at [33].
4 *Murray v Morel & Co Ltd* [2007] NZSC 27 J at [33].

[9] The Court of Appeal in *Wrightson Ltd v Blackmount Forest Ltd & Anor* referred to the issue of the burden in the following way:[5]

> The ultimate burden, therefore, remains on the defendant: it is the defendant who must satisfy the Court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process. But there is a shifting evidential burden. Once a defendant has demonstrated that the plaintiff's proceeding was commenced after the period allowed for the particular cause of action by the Limitation Act, the persuasive burden shifts to the plaintiff to show that he or she has an arguable case for an extension or postponement which would bring the claim back within time.
>
> One other consideration needs to be borne in mind, although it did not arise on the pleadings or facts in *Murray*. That is the Court's traditional reluctance to strike out a claim which might, by suitable repleading, be saved.[6] That principle might be applicable here if the crucial particular could legitimately be answered differently.

Factual background

[10] Ms Brinsdon first arranged home insurance cover with Vero through Mr Beazley for the Rutland Street house in December 2001. The property was insured on a sum insured basis for the initial period of insurance and subsequent periods of insurance. Prior to that, Ms Brinsdon had full replacement cover through another insurance company. A sum insured basis means that the sum specified in the policy is the maximum amount that the insurer will pay out under the policy. By contrast, a full replacement cover has no specified financial limit.

[11] Vero sent Ms Brinsdon renewal/expiry notices setting out key policy details, including the expiry date, applicable policy wording, and the sum insured premium. Each renewal included an automatic increase in the sum insured. The last renewal was on 12 December 2010. That renewal followed the first Canterbury earthquake of 4 September 2010 but took place before the second and more destructive earthquake of 22 February 2011.

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5 *Wrightson Ltd v Blackmount Forest Ltd & Anor* [2010] NZCA 631 at [18] and [19].
6 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] and [123].

[12] The renewal notice for the period 12 December 2010 to 12 December 2011 read:

> **DETAILS OF RISK**
>
> Insured: **J R BRINSDON**
> Vero BasicPlan Replacement Wording Applies
>
> Situation: **149 RUTLAND STREET SAINT ALBANS CHRISTCHURCH 8052**
>
> **SUMS INSURED**
>
Replacement	$194,038	
Govt EQC Natural Disaster Insurance	$100,000	(plus GST)
Additional Benefits – "Natural Disaster Insurance) Included		
EXCESS		
Voluntary	$200	
The above excesses are cumulative	$100	

[13] Following the Canterbury earthquakes, Ms Brinsdon submitted a claim under her policy for earthquake damage to the property caused by both earthquakes. She also submitted a similar claim for a property at Bishop Street (the cover also having been arranged through Mr Beazley on a sum insured basis).

[14] Vero was advised by EQC in August 2013 that the claim for the property had been assessed as over the EQC cap. Vero then set about obtaining a scope of works and costing for the repairs to the property and engaging experts.

[15] During 2014 Vero corresponded with Ms Brinsdon regarding the repairs to be carried out to the property through the Vero/MWH managed repair programme.

[16] Vero subsequently made Ms Brinsdon a formal offer to cash settle the claim being the sum insured figure, less the EQC contributions in policy excess. This was based on a total sum insured of $223,143.70 (GST inclusive). The estimated repair costs for the property are said to be $350,741 (GST inclusive). The formal offer was contained in an email dated 26 March 2015.

> 1. Your policy type is a Basic Vero plan and the basis of this Insurance is a Sum Insured of $223,143.70 (GST inclusive). This applied to your February claim as the September claim is undercap with EQC. However what we can do in this instance is allocate a % of damage based on the overall reinstatement figure to the Sept event. We would use the EQC allocation of

damage as the basis for the calculation (which was 15% of the overall scope cost). This means that Vero would pay the following (on a without prejudice basis):

$49,369.50	15% allocated to September 2010 event
$223,143.70	Sum insured for February event – GST inclusive (maximum liability for this event)
-$35,939.35	EQC Contribution for the September 2010 event (incl excess)
-$115,000.00	EQC Contribution for the February 2011 event (incl excess)
-$450.00	Policy excess for September 2010 event
-$450.00	Policy excess for February 2011 event
$120,673.86	Total settlement to reinstate on existing site

We would generally deduct fees such as geo technical investigations and engineering however as these helped us scope your property, we will not be doing so in this instance.

2. You originally did have a Maxi Plan replacement policy (which is a m2 replacement policy) which I understand was revised to a basic plan replacement policy (Sum Insured replacement policy). This was amended when you moved to the UK I 2004 as a result of the property being tenanted. Your subsequent policy renewals have been done on the basis of sum insured replacement.

[17] On 2 November 2015 Ms Brinsdon filed a proceeding in the Christchurch District Court against Mr Beazley in relation to the 123 Bishop Street property.

[18] On 1 September 2017 Ms Brinsdon filed a proceeding in this Court against Mr Beazley. On 21 December 2017 a first amended statement of claim was filed joining Vero to the proceeding.

[19] Ms Brinsdon alleges that Mr Beazley failed on inception of the policy, and on each renewal, to advise her:

(a) that she had a sum insured policy;

(b) of the risks of insuring her property for a sum insured less than that required to replace the property in the event of a total loss;

(c) that insurance was available in the New Zealand market that did not have a fixed sum insured; and

(d) of her insurance options and to arrange an appropriate and effective insurance cover for her property.

The pleaded causes of action

[20] The current pleading[7] contains three causes of action against Mr Beazley, they are:

> 11.1 Breach of an implied term of the contract to use reasonable care and skill, on inception and on each renewal of the policy, to:
>
> (a) Advise the plaintiff of the insurance options to ensure she had adequate cover for the property including the availability of no sum insured cover;
>
> (b) Advise the plaintiff of the risks of insuring the property for a sum insured less than that required to replace the property in the event of a total loss;
>
> (c) Arrange insurance based on a sum insured sufficient to ensure replacement of the property in the event of a total loss;
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> (d) Advise the plaintiff that insurance was available in the New Zealand market that did not have a monetary sum insured;
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> (e) Advise the plaintiff clearly that she had a sum insured policy; and
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> (f) Arrange appropriate and effective insurance cover for the property;
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> 11.2 Negligence, based on the particulars referred to above; and
>
> 11.3 Breach of Consumer Guarantees Act 1993, based on the particulars referred to above/

Analysis and decision

[21] As noted above, the parties agree that the primary limitation period of six years for claims in tort and contract has expired. Ms Borcoski accepts, for the purposes of

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7 The third amended statement of claim dated 10 August 2018.

the strike-out application, that the latest date the cause of action in negligence accrued would have been 22 February 2011, the date of the second Canterbury earthquake.[8]

[22] In its current form, the statement of claim alleges that Mr Beazley breached duties of care to the plaintiff on inception and renewal of the policies. The last relevant renewal date was 12 December 2010. Both that date and the date of the second Canterbury earthquake are more than six years before the proceedings were filed in September 2017. The defendants thus submit that the three pleaded causes of action are clearly limitation-barred.

[23] In anticipation that the pleadings may need to be amended, the plaintiff, in a notice of opposition to the strike out, seeks to postpone the start date for limitation purposes as follows:

(a) If the 1950 Limitation Act applies, the period of limitation should not begin to run until she discovered or with reasonable diligence have discovered the fraud pursuant to s 28(b) of the 1950 Act on the basis that:

(i) her right of action was concealed by the fraud of Vero and/or Mr Beazley; and/or

(ii) Vero and/or Mr Beazley failed to disclose certain matters to her in breach of a special duty of disclosure (and in the case of Mr Beazley a fiduciary duty) to her.

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[8] Ms Borcoski did not argue that the causes of action in negligence did not accrue until it was determined that the costs of repairs would exceed the total sum insured. (See Mr Youl's affidavit of 11 October 2018, with reference to 28 September 2014). There may be a tenable argument that until that time, there was no actual and quantifiable loss; as at the date at inception and renewal of the policy, it was not necessarily a damaged asset. On this view the damage would be wholly contingent, and therefore not actual for limitation purposes, because the plaintiff suffered no damage at all unless and until the contingency was fulfilled (i.e. that the total sum insured was less than the actual costs of repairs). It is at this date that the necessary proof of damage to ground an action in negligence crystallises. On that basis the Supreme Court decision of *Thom v Davys Burton* [2008] NZSC 65, [2009] 1 NZLR 437 might be distinguished. (see *Roose v Duthie* [2016] NZCA 600 at [27], [28], [32] and [43].). On this analysis, the cause in action in negligence could be said to have accrued on 28 September 2014 when, according to Mr Youl's affidavit (sworn 11 October 2018), a building contractor provided Vero with its estimate of the costs to repair the plaintiff's house as being $350,471 (GST inclusive). If this is correct, the plaintiff's proceeding having been filed on 1 September 2017, the primary limitation period would not then have expired on the filing date. Having heard no argument from the parties on this point, I express no concluded view on it, and it is not necessary for me to do so for the purposes of determining this application.

(b) If the Limitation Act 2010 is held to apply, then she had late knowledge of the claim pursuant to s 11(2) of that Act. The late knowledge specified by the plaintiff is 26 March 2015 (the late knowledge date).

[24] The plaintiff's claim for both postponement under the 1950 and late knowledge under the 2010 Act, is based on an allegedly arguable claim that subsequent to the last renewal on 12 December 2010, the defendants owed her ongoing duties of care to advise her of issues pertaining to her insurance (of the kind referred to at [20] above).

[25] Because the time period over which the ongoing duty of disclosure is said to have arisen, it is necessary to address both the application of the 1950 Act (i.e. postponement) and the 2010 Act (late knowledge). The Limitation Act 2010 applies to all acts or omissions subsequent to and including 1 January 2011 and the 1950 Act applies to all acts or omissions in December 2010.

[26] The defendants accept that there is an arguable case that Mr Beazley (and Vero on a vicarious basis) owed duties of care on inception and renewal of the policy. However, they take issue with the contention that there is an arguable case of ongoing duties of care subsequent to the last renewal of 12 December 2010. They also say that the grounds for postponement and/or late knowledge have not been made out. It is further said that the plaintiff's claim for ongoing duties of care subsequent to the last renewal, as yet not pleaded, constitutes a fresh cause of action and that this too must fail on limitation grounds.

[27] In the circumstances, the critical issues I must determine are as follows:

(a) Is there an arguable case that the defendants owed ongoing duties of care, subsequent to the last renewal of the policy in December 2010 to keep the plaintiff informed of the matters she alleges?

(b) Has the plaintiff discharged the persuasive burden to show an arguable case for an extension or postponement of the limitation period under s 28(b) of the 1950 Act, on the grounds of equitable fraud? In particular,

is there is an arguable case that the defendants had a duty of disclosure and that the failure to disclose was wilful?

(c) Has the plaintiff established the grounds for late knowledge under s 11(2) of the 2010 Act?

(d) If so, is the claim for ongoing duties of care a fresh cause of action (r 7.77) that ought to have been brought at the latest by 26 March 2018 (i.e. three years after the late knowledge date of 26 March 2015)?

Issue: Duty of care post-renewal of policy

[28] In support of her claim of Mr Beazley's having had a continuing duty of care post-renewal to ensure that she had adequate insurance cover, the plaintiff relies upon the English Court of Appeal decision in *HIH Casualty General & Insurance Ltd v JLT Risk Solutions Ltd.*[9]

[29] The *HIH Casualty* case concerned the post-placement duty of an insurance broker (the defendant) on learning of a potential coverage risk to an insurer with which it had placed back-to-back reinsurance cover. It arose in circumstances in which the insurer (the plaintiff) had paid claims of the insured without indemnity from the reinsurers, and sought to recover from the broker damages for the loss of availability of the indemnity through failure to alert it timeously to that potential risk.

[30] The Court of Appeal held that an insurance broker who, after placing the risk, became aware of information which had a material and potentially deleterious effect on the insurance cover which he had placed, is under an obligation to act in his client's best interests by drawing it to the attention of his client, and to obtain his instructions in relation to it. It further held that the role of an insurance broker was notoriously anomalous for its inherent scope for engendering conflict of interest in the otherwise relatively tidy world of legal agency. In his simplest role of negotiating insurance, the broker acted as agent for the insured, but normally received his remuneration from the insurer in the form of commission.

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9 *HIH Casualty General & Insurance Ltd v JLT Risk Solutions Ltd* [2007] EWCA Civ 710, [2008] Bus LR 180.

[31] Counsel for Mr Beazley, Mr Hamilton, contended that there was no arguable basis for a finding that Mr Beazley was under a continuing duty. He contended that to do so would cut across what are clear authorities, including *Thom v Davys Burton*, which confirm that in cases where the plaintiff alleges "it did not get what it should have got", the date the cause of action accrues is the date of the "flawed transaction".[10] He further contended that there are good policy reasons why plaintiffs should not be able to answer strike-out applications by alleging, without evidence, that there is a duty to self-report a breach.[11]

[32] Mr Wakeman on behalf of Vero also submitted that there was no continuing obligation to monitor the plaintiff's insurance needs, particularly where no such advice was sought by her. He relied on the following passage from in *Colinvaux's Law of Insurance in New Zealand*:[12]

> The HIH case turned on the specific facts of the case, and in particular the central role of the broker in establishing the entire funding scheme backed by insurance and reinsurance, and thereafter administering the scheme. **Plainly it cannot be the case, for example, that a broker who was employed to place a particular cover is under a duty to monitor the interests and activities of the assured so that unrequested advice can be given as to whether the policy remains adequate for the assured's needs. Equally, it must be doubtful whether, in the absence of an agreement or other exceptional circumstances, a broker is under any duty to given continuing advice to the assured on coverage issues unless the broker requested to do so and assumes responsibility for giving accurate answers.**
>
> (emphasis added)

[33] The plaintiff's proposed amended pleadings are based, it appears, on an allegation of continuing omissions which occurred up until 22 February 2011. These allegations give rise to a novel duty of care, but there is some support for it in the UK decision of *HIH Casualty* relied upon by Ms Borcoski.[13] As the Supreme Court held in *Couch v Attorney-General*, the courts should be slow to rule on novel categories of duty of care at the strike-out stage.[14]

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10 *Thom v Davys Burton* [2008] NZSC 65, [2009] 1 NZLR 437 at [17].

11 See *Macdonald v Somerset Smith Partners* [2015] NZHC 1839 at [102].

12 Rob Merkin and Chris Nicoll, *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters, Wellington) at 12.5.6(2).

13 *HIH Casualty General & Insurance Ltd v JLT Risk Solutions Ltd* [2007] EWCA Civ 710, [2008] Bus LR 180.

14 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

[34] The omissions are said to have occurred subsequent to the first Canterbury earthquake in September 2010, and prior to the second one. This was of course during a period of aftershocks (following the first earthquake), and against a heightened awareness and understanding, arguably, of the importance of adequate insurance cover. There may well be merit to the defendants' objections to the impositions of a duty of care, but in my view these are all matters to be determined at trial following a testing of all the relevant evidence. I find in the circumstances here, particularly in light of the *HIH Casualty* case, that there is an arguable case for an ongoing duty of care by the defendants, as the plaintiff contends.

[35] I therefore conclude that the plaintiffs have established a tenable case that the defendants owed ongoing duties of care to ensure and/or advise about the adequacy of insurance cover.

Issue – Postponement of limitation period 1950 on grounds of equitable fraud

[36] Section 28(b) of the 1950 Act extends the start date of the limitation period with a right of action that is concealed by the "fraud" of the defendant or his agent until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it.

[37] Once a defendant demonstrates that the proceedings or cause of action was commenced after the relevant limitation period under the 1950 Act, the persuasive burden then shifts to the plaintiff to show an arguable case for an extension or postponement of the limitation period. The plaintiff must establish something by way of pleadings, particulars, or evidence which gives "an air of reality" to the claim that the extension is justified.[15] A pleading of fraud must only be made if it is responsible to do so.

[38] For the purposes of s 28(b), "fraud" has been held to cover deliberate or reckless concealment of the cause of action.

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[15] Stephen Todd, *Tort – A to Z of New Zealand Law, Limitation* (online ed, WestLaw, New Zealand) at [26.5.09].

[39] The plaintiff does not assert actual fraud for the purposes of the s 28(b) claim of postponement, but rather relies upon equitable fraud. Equitable fraud covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other:[16]

> In order to show that he 'concealed' the right of action 'by fraud', it is not necessary to show that he took active steps to conceal his wrong-doing or his breach of contract. *It is sufficient that he knowingly committed it and did not tell the owner anything about it. He did the wrong or committed the breach secretly. By saying nothing he keeps it secret.* He conceals the right of action. He conceals it by 'fraud' as those words have been interpreted in the cases. To this word 'knowingly' there must be added '*recklessly'* … It may be that he has no dishonest motive: but that does not matter. He has kept the plaintiff out of the knowledge of his right of action: and that is enough … *If the defendant was, however, quite unaware that he was committing a wrong or a breach of contract, it would be different*.

[40] Tipping J in *Matai Industries Ltd v Jensen* surmised the applicable principles as follows:[17]

(a) the circumstances must be shown to be such that the defendant had a duty of disclosure. If he had no such duty, then the fact that he did not disclose does not avail the plaintiff;

(b) having such duty, the failure to disclose must be wilful. One cannot conceal something of which one is unaware; and

(c) for the concealment to be wilful, the defendant must be shown to have *known the essential facts constituting the cause of action*. It is, after all, the right of action which must be concealed by the fraud.

[41] In *Wrightson Limited v Blackmount Forests Limited* the Court of Appeal explained the focus of s 28(b) as being: [18]

> [47] … not on whether or not the non-disclosure is wilful. The focus is on knowledge of relevant facts, and on knowledge of a duty to disclose them. If,

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16 *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC) at 704 at 705-706 (emphasis added).

17 *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC) at 536 as cited in *Ryan v Sovereign Assurance Co Ltd* [2013] NZHC 3300 at [82].

18 *Wrightson Limited v Blackmount Forests Limited* [2010] NZCA 631 at [47].

> despite such knowledge, the defendant decides not to disclose the facts, then almost always that decision will be worthy of the epithet 'wilful'.

[42] The Court went on to note that the concealment must be of the "facts giving rise to the cause of action".[19]

[43] In her notice of opposition, the plaintiff alleges that the defendants concealed and/or failed to disclose (in breach of the fiduciary duty and/or a special duty of disclosure) that:

(a) her home insurance policy at the time of the earthquakes was subject to a monetary sum insured;

(b) reinstatement through the Vero/MWH programme would only proceed if the cost of the repair was under the sum insured for the 2010 policy period; or

(c) any settlement of the claim would be limited to the sum insured for the 2010 policy period.

[44] The defendants contend that there is no "air of reality" to the plaintiff's claim that they concealed (deliberately or otherwise) from her that there was a sum insured limit on her policy or that there may have been any issues regarding the adequacy of her insurance cover. They refer to the renewal notice for the 2010 period which sets out the sum insured limit of $194,038 (plus GST). They also refer to various references in the renewal notice that make it clear to the insured (i.e. Ms Brinsdon) that she needed to check to make sure that the information in the notice was correct, to contact the insurance representatives if matters were not clear, and to check the amount of the home sum insured to ensure that it is adequate.

[45] It is further argued that, prior to the commencement of the claims process there was nothing to suggest to Mr Beazley that the sum insured cover he arranged did not meet the plaintiff's requirements. It is also said that had he been aware of any issue prior to the second earthquake on 22 February 2011, it would not have made sense for

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[19] *Wrightson Limited v Blackmount Forests Limited* [2010] NZCA 631 at [48].

him to conceal this because it would have been a simple matter for the type of cover to be changed. It was further argued that there was no specific event that would have alerted Mr Beazley or Vero to the fact that the plaintiff might have a different belief from him about the extent of cover, or that, following the February 2011 earthquake, Ms Brinsdon was made aware (at least in relation to 123 Bishop Street) that claim settlements were limited to the sum insured. It was submitted that the correspondence with respect to Bishop Street stated the obvious – that Vero would not pay more than the amount of the insurance.

[46] The defendants further contend that the plaintiff has not established that Mr Beazley and/or Vero had knowledge of all the facts that give rise to the cause of action, namely:

(a) that the cover Mr Beazley had arranged did not meet Ms Brinsdon's requirements on inception or on renewal; and

(b) chose not to disclose those facts to Ms Brinsdon.

[47] It is clear from the affidavit evidence filed that the facts in relation to these critical issues are in dispute. It is of course not the role of the Court at this interim strike-out stage, to determine questions of fact unless, of course, it can be determined that there is no "air of reality" to the claim that the limitation period should be postponed.

[48] I find that the plaintiff has discharged the persuasive burden that she carries and that she has an arguable case that the defendants owed her a fiduciary duty and/or a special duty of disclosure and that in breach of that duty they failed to disclose to her that the 2010 policy was subject to a monetary sum insured.

[49] Mahon J in *Inca Ltd v Autoscript (New Zealand) Ltd*, described the requirements of a special relationship in the following way:[20]

> What had to be shown in order to raise the application of the equitable doctrine was breach of a special duty. That duty was one which could only arise out of

[20] *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC) at 708.

> a special relationship, and the common instance was the fiduciary relationship recognised to exist in specified cases such as trustee and cstui que trust, solicitor and client and the like. But in addition, a special duty might arise from contractual and other relationships falling short of fiduciary status. Leaving aside duties of disclosure which might arise in pre-contract negotiations, and also those contracts of uberrimae fidei where full disclosure is required, a special duty of disclosure of certain facts, and sometimes the material facts, might be held to be created by the terms of the contract itself.

[50] An insurance broker acts as the agent of the insured in giving advice to the insured and in dealing with the insurer.[21] Brokers, as agents, arguably owe a fiduciary duty to the insured in a number of contexts.[22] Here Mr Beazley was the plaintiff's broker. He was instructed by the plaintiff to arrange insurance cover for the property and appears to have had some ongoing relationship with the plaintiff. The plaintiff has established that there is an arguable special relationship giving rise to a duty of disclosure.

[51] I also conclude that it is arguable that the defendants knew the essential facts constituting the cause of action (ie the concealment was wilful in the sense described by the Court of Appeal in *Wrightson Ltd*).[23]

[52] It is reasonably arguable that the defendants knew that Ms Brinsdon was under a misapprehension as to the scope of the cover. They also knew that she had not been advised as to the scope and adequacy of cover prior to or subsequent to the renewal in December 2010, and in particular during the period following the first Canterbury earthquake (September 2010). This is evidenced in Ms Brinsdon's affidavit (sworn 1 November 2018):

> 14. … Prior to renewal of the policy in December 2010 and from the December 2010 renewal until the 22 February 2011 earthquake, Mr Beazley failed to provide me with any advice about my insurance cover over the Property or whether it was adequate.
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> …
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> 17. On 2 August 2013, I received an email from Vero … I was advised by Vero in that email that Vero and MWH Recovery would complete the

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21 Rob Merkin and Chris Nicoll, *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters, Wellington) at 877.

22 Rob Merkin and Chris Nicoll, *Colinvaux's Law of Insurance in New Zealand* (2nd ed, Thomson Reuters, Wellington) at 928, and *Newlands v Sovereign Assurance Co Ltd* [2014] NZHC] 803 at [59].

23 *Wrightson Limited v Blackmount Forests Limited* [2010] NZCA 631.

> reinstatement of the Property. I was not advised that my cover was limited to a monetary sum insured or that Vero and MWH would only complete the reinstatement of the Property if the cost did not exceed the sum insured.

[53] Ms Brinsdon previously had full replacement insurance with ANZ. The defendants arguably knew that Ms Brinsdon did not fully understand the implications of a sum insured as opposed to a full replacement insurance. Her affidavit states:

> 10. Mr Beazley did not advise me in 2001 that Royal and Sun Alliance had not agreed to provide full replacement cover based on the area of square metres due to the age of the dwelling … He did not advise me that the cover was limited to a monetary sum insured and he did not asked [sic] me to set the sum insured value. I was unaware that the insurance cover arranged with Royal and Sun Alliance by Mr Beazley was limited to a monetary sum insured. If I had known, I would have questioned him about it as I previously had full replacement cover through ANZ.
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> …
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> 12. … Like with the Property [Rutland Street], I was not involved in setting the sum insured for the Bishop Street insurance and I believed I had full replacement insurance for Bishop Street with no monetary sum insured.
> …
>
> 13. … the Policy Schedules do not make it clear to someone not familiar with insurance that there is limited cover. The Policy Schedules refer to the policy wording which is called a "Replacement Policy". Under the words "Sum Insured" it repeats the word "Replacement". … Given that Mr Beazley did not advise me that the insurance policy was limited to a monetary sum insured, I was simply unaware that I did not have full replacement cover. I believed that he had arranged full replacement insurance like I had with ANZ and relied on Mr Beazley to ensure that I had appropriate insurance cover in place.

[54] In my view there is some force in Ms Brinsdon's contention about the lack of clarity in the policy wording. To the ordinary reader, particularly someone who had previously held a replacement policy (and understood that to mean there was no specified sum limit) the words used do tend to convey the concept that the insurer will pay for the full cost of replacing the house in the event that it is destroyed.

[55] Furthermore, as evidenced in Mr Youl's affidavit (sworn 11 October 2018):

> 35. … the plaintiff [Ms Brinsdon] emailed Mr Beazley informing him that she was "having some difficulty with the sum insured situation" and asked him to advise whether he offered policies with anyone other than Vero prior to 2009 and if not, to provide her with a copy of his intermediaries or agency agreement with Vero.

[56] The contention that Ms Brinsdon was under a misapprehension is also referred to in the email from Mr Beazley to Ms Brinsdon dated 10 March 2014 where he refers to Ms Brinsdon having "indicated to me that you were finding the sum insured situation confusing and would like a copy of the agreement in order to get to grips with the situation".

[57] It is arguable that the defendants also knew that the scope of the work may be over the sum insured but did not inform Ms Brinsdon about this. This is again evidenced in Ms Brinsdon's affidavit evidence (sworn 1 November 2018):

> 27. … On the Bishop Street claim Vero had advised me that the claim was limited to a sum insured. However, on the Property claim I had not received any such advice and I thought that Vero were going to proceed with the reinstatement of the Property through the MWHR programme without any limitation as they had not mentioned the sum insured and neither had Mr Beazley.
>
> 28. … Mr Beazley's discovery documents that shows that he identifies the Property claim … as being sum insured and he has made a note … This shows he is being kept informed about the process and is aware of what is going on with the claims. Despite this, both Vero and Mr Beazley failed to advise me that the settlement for the Property would be limited to the sum insured. Instead, Vero continued to correspond with me about the reinstatement of the property without mentioning the sum insured.
>
> …
>
> 29.3 In early 2014 [according to internal correspondence between Vero and Mr Beazley] … Vero considered whether there would be any impact on the claims if the policy renewed between the September 2010 and February 2011 events.
>
> …
>
> 31. In an email to me from Max Walker at Vero on 15 October 2014 … there is no mention of the fact that the costing of the scope of works is over the sum insured or that they would not carry out the reinstatement because the cost exceeded the sum insured. Vero continued to deal with me as if the Property was going to be reinstated through the MWHR programme.
>
> 33. In early November 2014 I exchanged further emails with Vero about the details of the repair work. …
>
> 34. In all this time, Mr Beazley still had not spoken to me about the fact that any settlement by Vero would be limited to the sum insured, despite knowing about the issues with Bishop Street …

[58] The relevance of the Vero/MWH programme is that it is arguable that Ms Brinsdon believed that under that programme she would have full insurance cover and would not be out of pocket in any way. The defendants knew that that programme also had its limits but this was not disclosed to her for some time.

[59] Therefore, it is at least arguable that the concealment was wilful (that is, that the defendants knew Ms Brinsdon misapprehended the nature and scope of the cover, and that she had not been advised of the adequacy of her cover).

[60] This is not a case of the defendants concealing facts of which they were not aware. They knew that the policy was limited to the sum insured, that there would be no cover for losses in excess of the sum insured, and that, particularly against the backdrop of the first Canterbury earthquake, that a sum insured policy might not meet the plaintiff's requirements. They knew that the plaintiff's property was damaged in both earthquakes. They also knew, at least by the time of the MWH recovery report dated 30 May 2013, that the claim was over cap.

[61] In reaching the conclusions I have in relation to the defendants' knowledge, I am of course only making an assessment as to whether matters are reasonably arguable and whether the plaintiff has discharged the persuasive burden. Ultimately, all these matters will need to be tested at trial. I accept that there are documents which might contradict some of the contentions of the plaintiff, but I cannot resolve those disputed matters at this stage. This includes documentation relating to the Bishop Street property (including the email of 31 October 2013), the policy documentation, the advice contained in the renewal notices themselves (i.e. December 2010 and others) and the email correspondence of September 2013 relating to Melrose Street (another property owned by Ms Brinsdon. In referring to this documentation, I accept, as Ms Borcoski submits, that it is important to consider the various responses to the defendants' emails from Ms Brinsdon. The facts are clearly in dispute.

[62] I also accept that there may have been a period following the second Canterbury earthquake, during which it was uncertain as to whether the costs of repairs would exceed the total sum insured limit. However, it would be wrong in my view to determine that issue (including the state of the defendants' knowledge about it) and

the implications for example of the internal email of 13 March 2014 (said by Ms Borcoski to be relevant to the defendants' state of knowledge of essential facts) without the full testing of all the evidence. I note in this regard that concealment does not have to occur at the same time as the cause of action accrues; it can occur at a later date.[24]

[63] The defendants further argue, in reliance on the decision *Newlands v Sovereign Assurance Company Ltd & Ors* that it is not enough to support a claim of fraudulent concealment that the defendant should have had the requisite knowledge.[25] The defendant must have had knowledge of his own negligence that he then concealed, either actively or passively.[26]

[64] I find, however, that there is an arguable basis for distinguishing the *Newlands* decision. There is a tenable claim that the defendants knew Ms Brinsdon was not aware of the limitations of her policy and they delayed taking action to inform her of the correct position when they knew that the policy would not cover the full cost of repairs or that there was a real risk of that occurrence.

[65] I thus conclude that the plaintiff has established a tenable basis for postponement of the limitation period under s 28(b) of the Limitation Act 1950 and on the grounds of equitable fraud.

Issue – Late knowledge under s 14 of the Limitation Act 2010

[66] For the late knowledge provisions of the 2010 Act to apply, Ms Brinsdon must show that the acts or omissions on which her claim is based occurred after 31 December 2010.

[67] I have of course already determined there is an arguable case for ongoing duties of care owed and breached by the defendants. The late knowledge issue relates to

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24 *Roose v Duthie* [2016] NZCA 600 at [58].

25 *Newlands v Sovereign Assurance Company Ltd & Ors* [2014] NZHC 803; see also *MacDonald v Somerset Smith Partners* [2015] NZHC 1839.

26 *Newlands v Sovereign Assurance Company Ltd & Ors* [2014] NZHC 803 at [63].

omissions said to have occurred from 1 January 2011 until 22 February 2011, the date of the second Canterbury earthquake.

[68] The starting presumption is that the claimant does not have late knowledge of a claim unless he or she can prove that at the close of the start date of the primary limitation period under the 2010 Act (six years from the date of the act or omission) the claimant neither knew nor ought reasonably to have known the matters listed in s 14(1) of the 2010 Act (ie s 14(2)).

[69] Section 14 of the 2010 Act provides:

> **14 Late knowledge date (when claimant has late knowledge) defined**
>
> (1) A claim's late knowledge date is the date (after the close of the start date of the claim's primary period) on which the claimant gained knowledge (or, if earlier, the date on which the claimant ought reasonably to have gained knowledge) of all of the following facts:
>
> (a) the fact that the act or omission on which the claim is based had occurred:
>
> (b) the fact that the act or omission on which the claim is based was attributable (wholly or in part) to, or involved, the defendant:
>
> (c) if the defendant's liability or alleged liability is dependent on the claimant suffering damage or loss, the fact that the claimant had suffered damage or loss:
>
> (d) if the defendant's liability or alleged liability is dependent on the claimant not having consented to the act or omission on which the claim is based, the fact that the claimant did not consent to that act or omission:
>
> (e) if the defendant's liability or alleged liability is dependent on the act or omission on which the claim is based having been induced by fraud or, as the case may be, by a mistaken belief, the fact that the act or omission on which the claim is based is one that was induced by fraud or, as the case may be, by a mistaken belief.
>
> (2) A claimant does not have late knowledge of a claim unless the claimant proves that, at the close of the start date of the claim's primary period, the claimant neither knew, nor ought reasonably to have known, all of the facts specified in subsection (1)(a) to (e).
>
> (3) The fact that a claimant did not know (or had not gained knowledge), nor ought reasonably to have known (or to have gained knowledge), of a particular fact may be attributable to causes that are or include

> fraud or a mistake of fact or law (other than a mistake of law as to the effect of this Act).

[70] I find that the plaintiff has established a credible and arguable case that she has satisfied the elements of late knowledge within s 14(1). She did not have knowledge, and it was not reasonable for her to have knowledge, until March 2015 of:

(a) the omissions by the defendants to advise her about the adequacy or otherwise of her insurance cover that she says have occurred (she believed that she had full replacement cover and understood the defendants had not made any omissions);

(b) the fact that the omission was attributable to the defendants; and

(c) the fact that she had suffered damage or loss in the sense that she would be out of pocket for any costs in excess of the total sum insured limit.

[71] I accept the submission of Ms Borcoski that ss 14(1)(d) and (e) are not relevant in this case.

[72] In accordance with s 11(3) of the 2010 Act, the plaintiff had until March 2018 (three years after the late knowledge date) to bring her proceedings. They were filed within time.

Issue – Fresh cause of action

[73] Rule 7.77 of the High Court Rules 2016 provides that an amended pleading introducing a fresh cause of action is only allowable where the cause of action is not statute-barred.

[74] The defendants contend that the claim of an ongoing duty owed by the defendants (i.e. post the last renewal of 10 December 2010) is statute-barred because:

(a) the primary period in respect of the continuing duty claim closed, at the latest, on 22 February 2017 being six years after the date of the actual omission on which the claim is based; and

(b) the plaintiff's late knowledge date of 26 March 2015 meant that the late knowledge period closed three years later, namely on 26 March 2018.

[75] The principles for determining whether amended pleadings raise a fresh cause of action were summarised by the Court of Appeal in *Transpower New Zealand Ltd v Todd Energy Ltd* as follows:[27]

> (a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another.
>
> (b) Only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction".
>
> (c) The test of whether an amended pleading is "fresh" is whether it is something "essentially different". Whether there is such a change is a question of degree. The change in character could be brought about my alterations and matters of law, or a fact, or both.
>
> (d) A plaintiff will not be permitted, after the period of limitation has run, to set up a new case "varying so substantially" from the previous pleadings that it would involve allegations of factual or legal matters, or both "different from what have already been raised and at which no fair warning has been given."

[76] In *Commerce Commission v Visy Board Pty Ltd*, the Court of Appeal added 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.[28] That can, in theory, occur through the addition of new facts, but only where the facts are so fundamental that they change the essence of a case against the defendant.

[77] I find that the proposed amended pleading alleging an ongoing duty of care by the defendants to advise the plaintiff about the adequacy (or otherwise) of her insurance cover would be a fresh cause of action.

[78] The essence of the plaintiff's existing claims against the defendants in negligence is that, over a substantial time period, during which there is an alleged ongoing relationship with Mr Beazley, the defendants were under continuing obligations to act reasonably and with care in relation to advising Ms Brinsdon about insurance cover. The proposed amended claim is in substance the same kind of claim.

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27 *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61].
28 *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383.

The proposed amended claim will not be a substantial change (it is a question of degree) and in essence the legal basis for the claim remains the same.

[79] I thus reject the defendants' submission that r 7.77 means that the proposed amended pleading will be out of time.

Conclusion

[80] I have determined all of the issues pertaining to the defendants' strike-out applications in favour of the plaintiff. Ms Brinsdon has discharged the persuasive burden that she carries. I conclude that:

(a) she has an arguable claim that the duties of care owed and breached by the defendants are duties of an ongoing nature and extended from 10 December 2010 until 22 February 2011;

(b) there are grounds for postponing the limitation period under s 28(b) of the Limitation Act 1950 on the grounds of equitable fraud and in respect of omissions up until 31 December 2010;

(c) she has established an arguable basis for a late knowledge claim giving rise to a late knowledge date of 26 March 2018, being three years after she had knowledge of the matters in s 14(1). (See s 11(3)(a) of the 2010 Act); and

(d) any amended pleading alleging a breach of ongoing duties of care subsequent to 10 December 2010 would not be a fresh cause of action that is statute-barred.

[81] The plaintiff accepts that her pleading will need to be amended to disclose causes of action (on grounds for postponement and late knowledge) such that they are not limitation barred. I find that the pleading is capable of being amended to disclose tenable and non-limitation barred claims. On that basis, the applications for strike out are to be dismissed.

Result

[82] The interlocutory application by the first defendant to strike out the plaintiff's claim, dated 10 October 2018 and the interlocutory application by the second defendant to strike out the plaintiff's claim dated 10 October 2018 are dismissed.

[83] My preliminary view is that the plaintiff, having succeeded, should be entitled to costs on a 2B basis. I acknowledge that the current pleading may be defective and that the issue of postponement under the 1950 Act and late knowledge were not raised until the plaintiff filed her notice of opposition. However, the hearing proceeded on the basis that postponement and late knowledge were live issues and the plaintiff was nevertheless successful in defending the strike out applications. If the parties cannot agree on costs, then memoranda are to be filed by the defendants within 14 days, and the plaintiff 14 days thereafter. The Court would then make a decision on the papers.

Associate Judge P J Andrew

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