IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2012-404-1203
[2014] NZHC 825

BETWEEN	P-ONEFIVE INVESTMENTS LIMITED Plaintiff
AND	AUCKLAND COUNCIL First Defendant
	HUGH KILFOYLE Second Defendant
	RUSSELL ALAN JAMES GREY Third Defendant
	ALAN ALFRED HEWLETT Fourth Defendant
	MRA LIMITED Fifth Defendant
	MARK DEAN RANTIN Sixth Defendant

Hearing: 4 December 2013

Appearances: K W Berman/M R Taylor for plaintiff
J R J Knight for first defendant
A M Swan for second defendant
H P Holland for fifth and sixth defendants

Judgment: 17 April 2014

JUDGMENT OF ASSOCIATE JUDGE ABBOTT

This judgment was delivered by me on Thursday 17 April 2014 at 3.30 pm,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Solicitors:
A Parlane, Auckland
Simpson Grierson, Auckland
Cooper Rapley, Palmerston North
Thomas Law, Auckland

[1] The plaintiff, P-Onefive Investments Ltd (P-15) is the owner of a stand-alone dwelling at 44A Rawhitiroa Road, Kohimarama. It is a leaky building. P-15 has issued this proceeding against various parties involved in the construction of the building, contending that they were negligent in carrying out their respective work, and are liable for the cost of remedying defects and damage suffered due to those defects.

[2] The first defendant, Auckland Council (the Council), has applied for leave to seek summary judgment against P-15, and for summary judgment, contending that it has a complete defence to all causes of action in P-15's current statement of claim. It says that it was not in a position to bring its application until it received P-15's discovery, which disclosed that P-15 had knowledge of defects prior to acquiring the property and that P-15 was also relying on an assignment to it of Staccato's causes of action.

[3] The second defendant, Mr Kilfoyle, and the fifth and sixth defendants, MRA Ltd (MRA) and Mr Rantin, have applied to strike out the claims against them on similar grounds to those advanced for the Council.

[4] P-15 did not oppose the Council's application for leave to bring its application for summary judgment. I accepted its position that it did not obtain material relevant to the substantive application until it received P-15's discovery, and granted leave at the commencement of the hearing.

Background

[5] The dwelling at 44A Rawhitiroa Road was constructed in 2002. Mr Kilfoyle was the owner of the property at that time. He arranged a subdivision of the underlying land and was the developer of the subdivided lot. Mr Rantin is an architect, who conducts his architectural practice through MRA. Mr Kilfoyle engaged MRA to design the new building and to draw up the plans and specifications to be submitted with the application for building consent.

[6] Auckland City Council issued a building consent in early 2002, on the basis of those plans and specifications. The building was constructed during 2002 and

Auckland City Council issued a code compliance certificate for it on 12 December 2002.

[7] Staccato Trading Ltd purchased the property from Mr Kilfoyle in February 2003, upon completion. Mr Craig Monk was the sole director of Staccato at the time of purchase. His wife, Mrs Nicola Monk, was appointed later. Mr and Mrs Monk have been directors of Staccato at all material times.

[8] Mr and Mrs Monk noticed minor damage, apparently caused by water, within a few months of moving into the dwelling. They contacted Mr Kilfoyle and were referred in turn to Mr Rantin and then to the builder, the third defendant, Mr Grey. It appears that Mr Grey undertook some minor repair work (the date of doing so is not clear, but it is accepted by both parties that it was some time in 2003 – 2004).

[9] Mr and Mrs Monk moved out of the property in early 2004. He is a professional sailor and at that time was spending a significant amount of time overseas. Staccato put tenants into the property. Mr Monk says that in late 2005 the tenant informed him of a further leak (through the garage ceiling). He says at that point he did not regard the property as a leaky building, but out of an abundance of caution he applied to the Weathertight Homes Resolution Service on 7 February 2006 for an assessor's report on the building.

[10] A WHRS assessor issued a report on 23 March 2006 which expressly stated that the dwelling was a "leaky building". The assessor estimated the cost of the remedial work he had identified at $12,857.62 (including GST). Mr Monk took the view that the defects identified were not significant and that the repair work suggested was relatively minor in nature. Staccato took no steps to have the repair work done at that time. Mr Monk says it was at a busy time in the Monk's life and that he was based in Spain full time from February 2006, returning only occasionally to New Zealand before returning permanently in late 2007.

[11] Mr Monk says that in late 2006 he undertook refinancing and, on the advice of his accountant, arranged for the incorporation of P-15 in November 2006, with himself and his wife as directors, and they arranged for Staccato to sell the property to P-15 in December 2006. The current market value was used as the sale price,

without any allowance being made for the defects identified in the assessor's report. The transfer to P-15 was registered on 8 January 2007. At that point, no remedial work had been undertaken apart from the minor repairs in 2003 or thereabouts.

[12] In October 2007, the assessor issued an addendum to his report, in which he identified additional defects not identified in his initial report and additional damage (I will refer to this as the addendum report, as distinct from the assessor's report of 23 March 2006). It is not clear from the evidence before the Court exactly what triggered that further report. It is common ground that the assessor suggested further remedial work to the estimated value of $62,457 (including GST). Again, it is not in dispute that P-15 did not undertake that remedial work.

[13] It appears that the leaks continued as in May 2011 Mr and Mrs Monk (presumably on behalf of P-15) engaged a building consultant, Neil Alvey of Kaizon Ltd, to peer review the assessor's reports, and to report on any defects not identified in those reports and on the remedial work needed to remedy all existing defects. Mr Alvey provided a report on 26 May 2011 (the Kaizon report). He subsequently undertook further investigation in August 2012 for the purpose of compiling a comprehensive list of defects and damage to define the scope of the remedial work. In his affidavit in support of P-15's opposition he sets out these four layers of investigation, and the substantial increase in defects, damage and remedial work each time.[1]

[14] In summary, he says that the Kaizon report identified twelve defects that were not identified in the assessor's report nor in the addendum report, and that the list compiled after the further investigation in August 2012 (in which a comprehensive assessment of the main roof was undertaken for the first time) contained fourteen primary defects causing moisture ingress and damage. He says that eight of the fourteen had been identified in the three previous reports (without being specific as to when each was first identified, particularly those that were identified in the assessor's report), and that two additional defects were identified during the assessment of the main roof. He adds that further internal damage was noticed and

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[1] Mr Alvey did not include in his May 2011 report an estimate of the cost of remedying the defects and damage he identified, but P-15 has since received tenders for the remedial work that range from $350,000 to $400,000 (in round figures)

lead to additional investigation and identification of four more defects. He concludes:

> 26. In my view, the defects that were identified during Kaizon Ltd's inspections on 13 May 2010, 01 August 2012 and 14 August 2012, but were not identified in the WHRS Assessor's Report, that is those defects set out in paragraphs 11,15 and 16 above, are sufficient in and of themselves to necessitate the full extent of the remedial works of the property as detailed in paragraph 25. Therefore, even if the defects which were identified by the WHRS Assessor were not present to [sic] the dwelling, the full extent of the proposed remedial works as detailed in paragraph 25 would still be required to successfully remediate the defects which were not identified by the WHRS Assessor.

[15] P-15 commenced this proceeding on 12 March 2012 to recover the estimated costs of the remedial work from Auckland Council (as the legal successor to Auckland City Council), from Mr Kilfoyle as developer, from Mr Grey as director of the building company, from a Mr Hewlett as director of the company that did the external plastering over the cladding of the building, and from MRA and Mr Rantin.

History of the pleadings

[16] In its initial statement of claim issued on 7 March 2012, P-15 pleaded that it owned 44A Rawhitiroa Road and that each of the defendants owed it (the current owner) duties of care in relation to the construction work, and had breached those duties. The defendants filed statements of defence denying that pleading.

[17] The parties proceeded to undertake discovery. On or about 18 December 2012, P-15 produced, as part of its discovery, an undated deed of assignment from Staccato to P-15 of any cause of action Staccato had in respect of the leaky building (the deed). The deed contained the following:

> **Background**
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> …
>
> E. At the time of signing the agreement the Assignor and Assignee intended that the Assignee would take over all the Assignor's rights, interests and causes of action against various parties responsible for the building defects in the property and to recover the losses arising from the defects in the property.

THIS DEED records:

1. Assignment

1.1 The assignors assign to the Assignee absolutely all of the Assignor's rights, interests and causes of action against various parties responsible for the building defects in the property and to recover the losses arising from the building defects in the property.

[18] Following discovery, Mr Kilfoyle and MRA/Mr Rantin filed applications to strike out P-15's claim, contending that P-15's claims were time barred, that it had known of the water ingress/the defects at the time it purchased the property and had voluntarily assumed the risk arising from those defects, and that the property had been sold to P-15 before the deed of assignment was executed, so that Staccato had no cause of action to assign.

[19] The Council subsequently issued its application for leave and for summary judgment, advancing the same defences on which Mr Kilfoyle and MRA/Mr Rantin relied for their strike out application. Shortly after filing its application for summary judgment, the Council also filed an amended statement of defence adding affirmative defences, including a defence of voluntary assumption of risk, on the basis that P-15 knew of the assessors' reports and that no repairs had been undertaken before it purchased the property, as imputed from the knowledge of Mr and Mrs Monk and their position as directors of the company.

[20] P-15 filed notice of opposition to all applications, essentially saying that it was not aware of the true nature and extent of the defects until after 7 March 2006, meaning that the claim was not time barred, and contending that Staccato had assigned its rights to the causes of action against the defendants at the same time as the sale to P-15.

[21] In an affidavit sworn in support of P-15's opposition, Mr Monk says that about the time of the transfer of the property he signed an agreement to assign rights (the agreement). He produced a copy of that document which states that Staccato assigned its rights to the leaky building claim to P-15:

AGREEMENT TO ASSIGN RIGHTS – LEAKY BUILDING CLAIM

1. The Assignor is the legal and beneficial owner of:

1.1 …

1.2 Rights under an agreement for sale and purchase between Hugh Thomson Kilfoyle as vendor and the Assignor as purchaser dated 7 December 2002 ("the Kilfoyle agreement"), a copy of which is annexed to this Deed as schedule "A", and in particular, the right as purchaser to enforce the vendor's warranties and undertakings contained in clause 6 of the agreement, and to bring a civil claim against Hugh Thomson Kilfoyle for breach of the Kilfoyle agreement;

1.3 The right as owner of the property to bring a civil claim against Hugh Thomson Kilfoyle, Rada Enterprises Limited, and Russell Grey and/or their contractors in respect of the failure of the building on the property ("the building") to comply with the Building Code, and/or for any loss suffered by the Assignor as a result of the building being a leaky building.

…

4. As the cost of rectifying the building defects is not yet able to be quantified, the Assignor agrees to assign to the Assignee its rights as set out in clauses 1.2 and 1.3 above, and the Assignee agrees to take an assignment of those rights on the basis that:

4.1 The purchase price shown in the agreement for sale and purchase is based on the current market value of the property as assessed by Quotable Value New Zealand, without taking into account any reduction in value on account of the building being a leaky building.

4.2 The purpose of this Deed is to ensure that the Assignee receives fair value, and that it does not suffer any loss on account of the building being a leaky building, provided that it takes on the responsibility for recovering such costs from the parties responsible, in the first instance.

4.3 The Assignee will use all reasonable endeavours to recover the losses resulting from the building being a leaky building, including the cost of repairing any defects and damage, from the parties responsible for the building defects. Such reasonable endeavours may include bringing a WHRS claim, or a claim in the District Court or High Court.

4.4 In the event that the Assignee suffers any loss as a consequence of the building defects which it is not able to recover from the parties responsible within a period of four years from the date of the agreement for sale and purchase, including legal expenses incurred, the Assignor will compensate the Assignee for those losses provided that the Assignee is able to

demonstrate that it has used reasonable endeavours to comply with clause 4.3.

4.5 In the event that the Assignor is required to compensate the Assignee under Clause 4.4, the Assignee shall, on receipt of the compensation in full, assign its rights as set out in clauses 1.2 and 1.3 back to the Assignor, and the Assignor will be entitled to seek to recover its losses from the parties responsible for its loss.

[22] P-15 discovered the agreement formally in a supplementary affidavit of documents sworn on 17 May 2013.

[23] P-15 subsequently, on 2 July 2013, filed the amended statement of claim that is the subject of the present application. In that amended statement of claim it changed its pleading as follows:

(a) It amended the original causes of action in two respects:

(i) Instead of previously saying merely that it was the owner of the property, it pleads:

[8] The plaintiff owns the property at 44A Rawhitiroa Road, Kohimarama, Auckland … and sues:

(b) In its capacity as owner of the property; and

(c) As assignee in respect of any rights and claims which Staccato Trading Limited (Staccato) might have against the defendants or any one of them.

(ii) Instead of previously pleading that each defendant owed it duties, it pleads that the defendants owed duties to subsequent owners of the property including Staccato and the plaintiff;

(b) It added a further and alternative cause of action against each defendant as follows (using the pleading against the first defendant, which is replicated in identical terms in the claims against the other defendants):

FURTHER AND ALTERNATIVE CAUSE OF ACTION AGAINST FIRST DEFENDANT

> The plaintiff repeats paragraphs 1 to 29 above.
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> 43. By written deed of assignment dated 26 December 2006 (the **December 2006 Deed),** executed in about October 2007, Staccato assigned absolutely to the plaintiff:
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> a. Rights under the agreement for sale and purchase of the property between Staccato and the second defendant; and
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> b. Rights as owner of the property to seek recovery against the second defendant, third defendant, and others for any loss suffered as a result of the property being a leaky building.
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> 44. By further written deed of assignment, executed in about February 2012 (the **February 2012 Deed**) Staccato assigned absolutely to the plaintiff all of Staccato's rights, interests and causes of action against the various parties respect for the building defects at the property and to recover the losses arising from the building defects at the property.
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> 45. In around June 2012 the plaintiff gave notice to the defendants to the February 2012 Deed.
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> 46. In around April 2013 the plaintiff gave notice to the defendants of the December 2006 Deed.
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> 47. So, the plaintiff is entitled to enforce the rights and interests of Staccato and recover loss suffered as a result of the first defendant's breaches as particularised above.

[24] In response to this amended pleading, the defendants have all amended their applications to address the assignment issues arising out of the amended statement of claim.

Principles for summary judgment

[25] The Council applies for summary judgment under r 12.1 of the High Court Rules, under which the Court may give judgment against a plaintiff if the defendant satisfies it that none of the causes of action in the statement of claim can succeed.

[26] The principles that the Court applies are well known. In relation to summary judgment generally they were enunciated by the Court of Appeal in *Pemberton v*

Chappell,[2] and that Court has recently given a convenient summary of them in *Krukziener v Hanover Finance Ltd*:[3]

> The principles are well settled. The question on a summary judgment application is whether the defendant has no defence to the claim; that is, that there is no real question to be tried: *Pemberton v Chappell* [1987] 1 NZLR 1; (1986) 1 PRNZ 183 (CA) at p 3; p 185. The Court must be left without any real doubt or uncertainty. The onus is on the plaintiff, but where its evidence is sufficient to show there is no defence, the defendant will have to respond if the application is to be defeated: *MacLean v Stewart* (1997) 11 PRNZ 66 (CA) . The Court will not normally resolve material conflicts of evidence or assess the credibility of deponents. But it need not accept uncritically evidence that is inherently lacking in credibility, as for example where the evidence is inconsistent with undisputed contemporary documents or other statements by the same deponent, or is inherently improbable: *Eng Mee Yong v Letchumanan* [1980] AC 331; [1979] 3 WLR 373 (PC), at p 341; p 381. In the end the Court's assessment of the evidence is a matter of judgment. The Court may take a robust and realistic approach where the facts warrant it: *Bilbie Dymock Corp Ltd v Patel* (1987) 1 PRNZ 84 (CA).

[27] The Court of Appeal stated the principles specifically in relation to a defendant's application for summary judgment in *Westpac Banking Corp v MM Kembla New Zealand Ltd*:[4]

(a) The procedure is not directly equivalent to a plaintiff's summary judgment as the rule permits summary judgment only where a defendant satisfies the Court the plaintiff cannot succeed on any of its causes of action;

(b) A defendant will not usually need to have recourse to the summary judgment procedure, but can apply to strike out where the claim is untenable on the pleadings as a matter of law;

(c) Summary judgment will usually be pursued where a defendant has a clear answer to the claim on evidence that cannot be contradicted;

(d) The defendant has the onus of proving, on the balance of probabilities, that the plaintiff cannot succeed, and summary judgment will usually

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2 *Pemberton v Chappell* [1987] 1 NZLR 1.

3 *Krukziener v Hanover Finance Ltd* [2008] NZCA 187; [2010] NZAR 307 at [26].

4 *Westpac Banking Corp v M M Kembla New Zealand Ltd* [2001] 2 NZLR 298; (2000) 14 PRNZ 631 (CA) at [58]-[64].

be given where the defendant can offer evidence that is a complete defence to the claim;

(e) An application for summary judgment will be inappropriate where there are disputed issues of material fact, or material facts need to be ascertained and cannot confidently be concluded from affidavits;

(f) It may also be inappropriate where ultimate determination turns on a judgment that can only be properly be arrived at after a full hearing of the evidence;

(g) It is not appropriate to determine a claim on the basis of the sufficiency of proof, particularly where the defendant may be in possession of material facts and the claim should not be determined before the plaintiff has discovery and is in a position to assemble all the material evidence;

(h) It is not enough that claims may have weaknesses;

(i) The Court must be satisfied that none of the claims can succeed, and this assessment is not to be one reached on a fine balance of available evidence, as may be the case at trial.

Arguments on the application for summary judgment

[28] The Council's application for summary judgment was argued ahead of the other defendants' applications to strike out, by consent of all parties (on the basis that it would narrow the issues for argument on the strike out applications).

The Council's arguments

[29] Counsel for the Council submitted that none of the three causes of action pleaded against the Council could succeed and that the Court was able to determine this by way of summary judgment on the basis of uncontested facts (mainly in the form of documents) or on Mr Monk's own evidence.

[30] Counsel submitted that P-15's claims could be analysed as:

(a) Claims made in its own right as a subsequent owner of the property, and;

(b) Claims advanced as an assignee of Staccato's rights to sue.

[31] In respect of P-15's claims in its own right, counsel submitted:

(a) the Council had a complete defence to the claim in negligence (the first cause of action) on the basis that P-15 had purchased with knowledge that this was a leaky building and voluntarily assumed the risks flowing from that knowledge: P-15 was fixed with the knowledge of Mr and Mrs Monk as its directors, and the risks were clearly identified in the assessor's report they had received in March 2006; and

(b) because of its knowledge of the defects and damage (identified in the assessor's report) P-15 could not show the requisite reliance on any statements in the code compliance certificate, for the purposes of its cause of action for negligent misstatement (the second cause of action).

[32] P-15's causes of action based on an assignment of Staccato's rights to sue were added as a third cause of action in the amended statement of claim filed on 2 July 2013. P-15 asserts that the rights to the causes of action were assigned both in an agreement that allegedly was part of the transfer of the property to P-15, and under a separate (and later) deed. Counsel for the Council submitted that there was no arguable basis on which these claims could succeed, irrespective of whether the amended pleading was merely an expansion and clarification of its earlier claims (as P-15 contends) or the claims were newly introduced in the amended claim:

(a) Staccato had no cause of action to assign because loss is a necessary element of negligence or negligent misstatement and Staccato suffered no loss as it sold to P-15 at the current market value.

(b) The agreement was explicit as to the rights of action that were assigned which did not include any right of action against the Council.

(c) Even if the agreement could be construed as assigning Staccato's rights of action against the Council, any claim was time barred because the assignment was not complete,[5] and the right to sue did not crystallise, until notice was given, and notice was not given until 22 April 2013 which was outside the time limits in s 4 of the Limitation Act 1950[6] and s 91(2) of the Building Act 1991.

(d) Even if P-15 had arguable claims based on an assignment (whether under the agreement or under the deed), the claims were not brought until the amended statement of claim was filed, and are time barred as that was more than ten years after the last act for which the Council could be sued,[7] namely the issuing of the code compliance certificate; and

(e) The alleged assignment had not previously been pleaded. The claims based on assignment are of a completely different character to the previous claims made by P-15 in its own right as a subsequent owner, and require different and new factual inquiries into new and distinct issues: as such they are new causes of action and are statute barred under both s 4 of the Limitation Act 1950 and s 91(2) of the Building Act 1991.

P-15's arguments

[33] P-15's over-arching argument is that the Council's applications are not suitable for a summary determination, essentially because they rely on the expiry of limitation periods that depend on when the causes of action accrue. Counsel for P-15 submitted that this question (when the causes of action accrue), calls for a

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5 Property Law Act 1952, s 130(1); *Mountain Road (No.9) Ltd v The Michael Edgely Corporation Pty Ltd* [1999] 1 NZLR 335 at 345.

6 The Limitation Act 1950 applies in this case as the causes of action are based on acts or omissions before 1 January 2011: Limitation Act 2010, s 59(1).

7 Building Act 1991, s 91(3).

determination which can properly be made only after a full examination of all relevant facts.

[34] Counsel submitted the assignment did not give rise to a separate cause of action: P-15's causes of action were in negligence and negligent misstatement and the assignment merely established a different legal basis on which P-15 was suing. Counsel also said that P-15 relied on the assignment only in respect of a cause of action relating to losses arising from the defects and damage specifically identified in the assessor's report, as it had claims in its own right as subsequent owner for losses arising out of the defects and damage identified in the addendum report and the Alvey reports. I will come back to this.

[35] In relation to the negligence claim, counsel submitted first that the critical issue was when the loss was suffered (the final element in a negligence cause of action). He relied on the principle established in *Invercargill City Council v Hamlin*[8] that in a claim for negligent construction of a residential dwelling loss occurs when the market value of the house is depreciated by reason of the construction defects. He noted that the Council's case was based on the contention that the cause of action accrued when Staccato approached the WHRS for an assessor's report and submitted that although that might be an indicator in some cases, it could not be decisive:

(a) there were several possibilities as to the effect that the defects identified in that report might have had on market value (and hence the economic loss that P-15 must establish), namely that there was an effect on value at the time the report was sought, or that there was an effect only on receipt of the report, or that there was no effect at all given the modest estimate of costs of repair; and

(b) evidence was needed on which the Court could determine whether, and if so, when the value of the property changed as a result of the defects identified in the assessor's report.

[36] Counsel submitted that P-15's cause of action in negligence (as subsequent owner) was only time barred if it accrued before 7 March 2006, which required a

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8 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC).

finding that the defects had caused a reduction in the value of the property before that date. He said that this was fact dependent and could not be determined summarily.

[37] Counsel also argued that P-15 also had further causes of action available to it in respect of defects that were latent at the time of the assessor's report, but which emerged first in the addendum report in October 2007 and then even more substantially in Mr Alvey's reports in 2011 and 2012. He submitted that these causes of action did not arise until the further defects, and damage flowing from them, were identified in those later reports, and in light of the substantial increase in the costs estimated for repair of those defects and that damage, there were further and corresponding reductions in value at those times and hence new causes of action available to P-15.

[38] Lastly, in response to the Council's argument that P-15 had purchased with knowledge of the property as a leaky building, and thereby voluntarily assumed the risk of the losses that eventuated, he submitted that the assessor's report was insufficient to give P-15 full knowledge of the nature and extent of the risk. He submitted that the semantic distinction suggested by counsel for the Council between knowledge of the nature and extent of the risks and knowledge of the nature and effect of the defects and damage, was not the correct approach. He argued that the Court had to determine whether the purchaser (P-15) had sufficient knowledge of the defects and damage in order to determine the nature and extent of the risk, and that this was not something that could be determined appropriately in a summary judgment application.

Issues

[39] These arguments give rise to the following issues:

In relation to P-15's claims in its own right

(a) Did P-15 voluntarily assume the risk of loss when it purchased the property, and can this issue be determined in this summary judgment application?

(b) Can P-15 establish the element of reliance for its claim in negligent misstatement, given its knowledge of the defects and damage, particularly as set out in the assessor's report? Again, it will be necessary to decide whether this question can and should be decided on a summary judgment application.

In relation to P-15's claim based on assignment from Staccato

(c) Did Staccato have a loss to assign at time of assignment (is there an issue over the timing of the assignment which makes the point unsuitable for summary judgment)?

(d) Can P-15 rely on the agreement to assign, given that it does not refer to Staccato's rights against the Council?

(e) Does the delay in giving notice of the agreement to assign make any claim based on it time-barred?

(f) Is any claim based on assignment time-barred as a fresh cause of action (and again, can this issue be determined by way of summary judgment)?

[40] Since these issues are being determined on a defendant's application for summary judgment, the Council needs to establish that none of P-15's claims can succeed. It must therefore have judgment entered against P-15's both for the claims brought in its own right and those based on assignment from Staccato.

[41] I will now address each issue in turn.

P-15's claims in its own right

The issue of accrual

[42] The issue of when the causes of action accrued was raised primarily in the context of P-15's claims made on the basis of assignment from Staccato. It is not necessary for me to determine when the causes of action accrued in respect of P-15's

claims in its own right, but for completeness I propose to make some preliminary comments on the issue.

[43] In *Burns v Argon Construction Ltd* this Court recognised that even where a cause of action is time barred, the discovery of new and distinct damage, and new defects, can give rise to new loss and hence a new cause of action.[9] Moreover, and of particular significance for this case, the Court considered that this question was a matter of fact and degree, and was best determined at a substantive hearing, and not on a strike out. The same may be said in relation to an application for summary judgment: to succeed the defendant seeking summary judgment must produce clear evidence negating any argument that the damage or defects give rise to new loss.

[44] The argument for the Council was that the building was identified in the assessor's report as a leaky building, and cracking in the exterior cladding was noticed at least at the time that the assessor inspected in February 2006. The potential for water ingress was noted as a concern at that time (the form of cladding was known to give rise to leaky building problems).

[45] P-15's expert, Mr Alvey, has traced the evolution of knowledge about the defects and damage. I note, in particular, that issues over cladding only started to emerge specifically with the addendum report (and even then it seems that only targeted repairs were considered necessary), and that the defects with the main roof did not emerge until Kaizon's investigations in 2012.

[46] On the face of Mr Alvey's evidence, these are further defects giving rise to specific loss, and at least arguably a new cause of action. These further causes of action are "wrapped up" in P-15's amended first cause of action. They are sufficient in my view to warrant a finding that the Council cannot show that none of P-15's causes of action can succeed on the basis of any argument based on the expiry of a limitation period. For the purposes of the present application I accept that it is arguable that the later defects and damage are sufficiently distinct to give rise to a separate cause of action.

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[9] *Burns v Argon Construction Ltd* HC Auckland CIV-2008-404-7316, 18 May 2009 at [66].

Voluntary assumption of risk

[47] The Council accepts that it owes a duty in tort to P-15 as subsequent purchaser, but it claims that P-15 voluntarily assumed the risk of defects and damage in the property and is therefore barred from bringing its claim against the Council.

[48] The circumstances under which a person will be held to have voluntarily assumed a risk, in the context of the risk of weathertightness issues, has been considered by this Court in two recent cases on appeal from decisions of the Weathertight Homes Tribunal: *Coughlan v Abernethy*,[10] and *Aldridge v Boe*.[11] The test was stated in *Coughlan* as follows:[12]

> It is well established that a person will not have voluntarily assumed a risk unless it is shown that he or she had full knowledge of the nature and extent of the risk and, with that full knowledge, in fact incurred it: *Heard v New Zealand Forest Products Ltd*.[13] Unlike contributory negligence, which is determined objectively, voluntary assumption of risk is determined subjectively: *The Law of Torts in New Zealand*.[14] The onus of proof is on the party alleging voluntary assumption of risk by the other party to establish the allegation: *James v Wellington City*.[15]

[49] In *Aldridge* the Court reviewed the underlying authorities,[16] before traversing the decision in *Coughlin* and then commenting:

> [134] The proposition put by Mr Wright, as I understand it, is that knowledge of the risk and the extent of the risk must include knowledge of the harm (cost to repair), that will flow from the negligence. I do not accept that proposition. Nor do I consider that the approach taken by White J in *Coughlan v Abernethy* supports that proposition. White J analysed on the facts of that case, that the Abernethys did not have full knowledge of the risk they were said to assume, because Mr Beazley's report failed to identify critical defects which eventually resulted in their home leaking in a way and to an extent they could not have known at the time they purchased on the basis of the information provided in Mr Beazley's report. In identifying that in his report Mr Beazley estimated repair costs to be around $10,000, White J was simply considering an aspect of the knowledge possessed by the Abernethys in determining the nature and extent of the risk they agreed to assume. I do not interpret the Judge's reasoning as requiring knowledge of the ultimate damage or loss as a component of the measure of risk. That

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10 *Coughlan v Abernethy* HC Auckland CIV-2009-004-2374, 20 October 2010.
11 *Aldridge v Boe* HC Auckland CIV-2010-404-7805, 10 January 2012.
12 *Coughlan v Abernethy*, above n 10 at [42].
13 *Heard v New Zealand Forest Products Ltd* [1960] NZLR 329 (CA).
14 Stephen Todd (ed) *The Law of Torts in New Zealand* (5th ed, Thomson Reuters, Wellington, 2009) at 1007.
15 *James v Wellington City* [1972] NZLR 978 (CA).
16 *Aldridge v Boe*, above n 11 at [117]-[122].

would not be logical when the damage has not occurred, or is not known to have occurred.

[135] However, in this case, the Aldridges, like the Abernethys, were not aware of the nature and extent of the defects in the house which would ultimately result in weathertightness problems costing in the vicinity of $900,000 to repair. No-one knew about the latent defects as identified by the Tribunal. Until invasive testing was carried out by Alexander & Co on the instructions of the DBH and the defects were identified in their February 2008 report, these defects were unknown. It follows that the Aldridges could not have known the nature and extent of the risk of water ingress problems when they purchased the property. It was not sufficient for the *volenti* defence that they knew that there was no CCC and there were potential, unidentified, weathertight issues.

[136] Stephen Todd relevantly continues in the section of his text dealing with assumption of risk from which the quotation referred to by Mr Napier is taken.[17]

> In order for a person to be held to have assumed a risk of harm it must be shown-
>
> (i) that he or she was *fully aware of the factual circumstances* and of the danger to which they gave rise, and
>
> (ii) that he or she freely and voluntarily decided to incur the danger.
>
> These are stringent conditions. The consequence is that in few cases does the defence succeed.
>
> (emphasis added)

[50] In both cases the Court considered that the central question was whether the party advancing the *volenti non fit injuria* defence had full knowledge of the nature and extent of the weathertightness problems and the risk arising from them to allow a finding that they consciously assumed that risk when proceeding to purchase the property.

[51] P-15 does not take issue with the proposition that Mr and Mrs Monk's knowledge (as directors of Staccato) can be imputed to P-15.[18] Conversely, the Council accepts that whether this knowledge is sufficient is a matter of degree.

[52] The Council contends that the water ingress noticed by the Monks in late 2005, the cracks noticed in February 2006 that gave them concern about potential

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17 *The Law of Torts in New Zealand*, above n 14 at para 21.4.01.

18 See, for example, the authorities cited in *Icon Central Ltd v Collingwood* HC Auckland CIV 2008-404-7424, 25 November 2009 at [138].

water ingress and further damage, the findings in the assessor's report of specific defects and the conclusion that this was a leaky building, and the reference to the potential for more problems given the nature of the building (stucco plastered cladding without a wall cavity) gave P-15 notice of the nature and extent of the risk they faced in purchasing the property.

[53] I am not persuaded that that is the case, nor that this issue should be decided summarily. Mr Monk has said he did not regard the building as a leaky building. That statement is to be assessed in light of the specific knowledge he had, and how that knowledge may have been augmented by the findings in the assessor's report. The required level of knowledge is high (Todd refers to it as "fully aware"). I accept that Mr and Mrs Monk knew something was wrong, but not that they were fully aware at the outset of what was to come. It must at least be arguable that they did not see the relatively few and randomly located defects, nor the targeted repairs proposed, as matters of great significance. It was only from the time of the Kaizon report in 2011 that the scope of the remedial work changed from targeted repairs in specific areas to the comprehensive recladding and remedial work affecting the whole house that is now said to be needed.

[54] I accept that knowledge of the nature of extent of the defects and damage increased exponentially as Mr Alvey has said, and if that is the case the knowledge of the risk that P-15 was assuming was different at the time of the addendum report and again by the time of the Kaizon report. I also note Mr Alvey's evidence that the new defects (such as those pertaining to the main roof) require all of the remedial work he has now identified to be undertaken, even if some could have been done under the targeted repairs suggested in the assessor's report.

[55] It seems that the issues over the main roof were not identified until 2012. If so, the case is similar to *Body Corporate 169791 v Auckland City Council* where the Court found the true nature and extent of the problems only came to light with the later reports.[19] These matters need proper investigation. They are not clear enough for summary determination on the Council's application.

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[19] *Body Corporate 169791 v Auckland City Council* HC Auckland CIV-2004-404-5225, 19 May 2009.

Reliance and the claim for negligent misstatement

[56] Counsel for the Council submitted that the case was analogous with that of purchasers of a unit (a Mr and Mrs Sangha) in the *Sunset Terraces* case,[20] where the High Court held that the purchasers bought on the basis of their own judgment (after negotiating an abatement of the purchase price) rather than in reliance on the code compliance certificate, so that the certificate did not cause their loss.[21]

[57] Although the present case is not on all fours with Mr and Mrs Sangha's claim in *Sunset Terraces*, there must be doubt as to whether P-15 relied on the code compliance certificate, given that by the time of purchase it knew of the defects that had caused the assessor to describe it as a leaky building (a term usually used in association with a failure to comply with the building code), and made provision for those risks, at least in the assignment agreement. However, a finding on reliance is also fact dependent and the point does not seem to be suitable for summary determination. In the end, given that the Council must show that none of P-15's causes of action can succeed, and my finding that P-15 has an arguable case in negligence for losses occurring after it purchased the property, it is not necessary for me to decide whether it has an arguable case on reliance.

P-15's claim based on assignment from Staccato

[58] I do not need to determine this point the Council's challenge to P-15's claim based on assignment, given the need for Council to show that none of P-15's claims can succeed, and my finding that it has an arguable claim for losses arising from defects discovered after it purchased the property. However, I will deal with it in case I am wrong in that conclusion and because the points are relevant to the strike out applications.

[59] P-15's third cause of action relies on the (contested) assignment of rights from Staccato to itself occurring on two separate occasions:

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[20] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [288]-[289].

[21] The High Court judgment was appealed (*North Shore City Council v Body Corporate 188529* [2010] NZCA 64; NZLR 486 (CA) and *North Shore City Council v Body Corporate 188529* [2010] NZSC 158; [2011] 2 NZLR 289) but not on the High Court's decision in relation to Mr and Mrs Sangha.

(a) first an agreement to assign rights, allegedly executed in October 2007; and

(b) second, a deed of assignment, allegedly executed in February 2012.

[60] The Council claims that the assignments were invalid, and even if they were valid, that P-15 is nevertheless time-barred from bringing its claim.

[61] Before addressing the issues particular to each assignment, it is convenient to consider the Council's argument that Staccato suffered no loss because (on Mr Monk's evidence) it was paid the current market value for the property, and therefore had suffered no loss for which it could assign the right to sue. This argument depends on a finding that the assignment did not take place before October 2007 (as pleaded).

[62] This point might have merit if it is ultimately found that the assignment agreement was an afterthought, rather than a part of the sale and purchase transaction in December 2006. I cannot determine that on this application. For present purposes, and on the strength of Mr Monk's evidence that the parties intended to assign the right to sue at the time of settlement, it is arguable that Staccato did have a loss and a right to sue for it at the point of settlement. I am conscious of the fact that the current pleading does not set out P-15's case on this point explicitly, but seems to be close enough to the existing pleading to allow appropriate amendment. The point is overtaken however, by the finding I am about to make about the assignment cause of action.

The October 2007 assignment

Did the 2007 agreement assign rights against the Council?

[63] Counsel for P-15 submitted that it was arguable that cl 1.3 of the 2007 agreement[22] could be construed to provide for assignment of all rights to sue that Staccato had for loss suffered as a result of the building being a leaky building (focusing on the phrases at the beginning and the end of cl 1.3). He submitted that

[22] At [21] above.

that interpretation accorded with the general intention of the parties (according to Mr Monk's evidence).

[64] Clause 1.3 must be construed in the context that the assessor's report had identified all parties who had had a part in the construction of the building, including the Council. The interpretation advanced for P-15 gives no meaning to the words used in the centre of the clause describing the rights covered by the agreement "… to bring a civil claim against [named parties] in respect of the failure of the building … to comply with the Building Code …".

[65] I find that that wording is clear, irrespective of what the parties subjectively may have intended. Under cl 4 of the agreement only the rights set out in cls 1.2 and 1.3 were assigned. P-15 cannot rely on the 2007 agreement for its cause of action against the Council.

Is P-15 nevertheless time barred from bringing a claim under the 2007 assignment?

[66] Any equitable assignment arising from agreement is governed by s 130(1) of the Property Law Act 1952. That section requires that notice be given to the other party before the assignee has a right to sue. Notice was given to the Council on 22 April 2013. Since this was more than 10 years after the Council issued the code compliance certificate, it was given outside the limitation period provided for in s 91(2) of the Building Act 1991. P-15 was not competent to enforce the cause of action relying on the 2007 agreement until that point, and any claim on that basis is time barred accordingly.[23]

The February 2012 assignment

[67] The Council argues that P-15's claims in respect of the February 2012 Assignment are time-barred. P-15 added its pleading of the assignment as a further and alternative cause of action in the amended statement of claim filed on 2 July 2013. According to the Council, P-15's claims of negligence and misstatement based on assignment of Staccato's rights of action are therefore outside:

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[23] *Mountain Road (No.9) Ltd v The Michael Edgely Corporation Pty Ltd*, above n 5 at 345.

(a) the ten year limitation period under s 91(2) of the Building Act 1991 (the last action by Council that can give rise to claim for negligence or negligent misstatement was the issue of the code compliance certificate on 12 December 2001); and

(b) the six year limitation period in s 4 of the Limitation Act 1950. Any loss in respect of matters identified in the assessor's report had occurred by the time P-15 purchased the property on 20 December 2012.

[68] The ten year limitation period will apply if P-15's amended statement of claim made on 2 July 2013 constituted a new cause of action rather than a mere clarification of P-15's earlier claims. Whether the six year limitation period applies depends on when the cause of action that P-15 relies on accrued.

The ten year limitation period

Is the claim based on assignment a new cause of action and therefore time barred?

[69] This aspect of P-15's claim cannot succeed unless the new pleading is merely clarification of the original claim. This calls for consideration as to whether the new pleading introduces a fresh cause of action.

[70] The Court of Appeal set out the principles to be applied in determining whether a pleading introduces a fresh cause of action in *Transpower New Zealand Ltd v Todd Energy Ltd*:[24]

> 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 (*Letang v Cooper* [1965] 1 QB 232 at 242 — 243 (CA) per Diplock LJ);
>
> (b) Only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction"

[24] *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61]-[62]; citing *Ophthalmological Society of New Zealand Incorporated v Commerce Commission* CA168/01, 26 September 2001.

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

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

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

[62] Transpower also relies on *Attorney-General v Carter* [2003] 2 NZLR 160 at [48] (CA) where the Court observed:

"The circumstance that the underlying facts may be the same or similar does not save a cause of action from being fresh if the plaintiff seeks to derive a materially different legal consequence from those facts."

[71] Counsel for P-15 submitted that there is a valid and relevant distinction to be made between the causes of action (negligence and negligent misstatement) and the legal basis for them (as subsequent owner or as assignee of Staccato's rights to sue). He said that all the amendment did was to plead the assignment as an alternative legal basis to the existing causes of action against the Council, in negligence and negligent misstatement. He argued that the added "cause of action" as assignee was not essentially different and did not vary substantially from P-15's claims as owner.

[72] I am not persuaded that the added pleading can be regarded as mere clarification of the original causes of action. First, if that was so, it could have been included as particulars of the original causes of action rather than pleading discretely as a separate cause of action. It is noteworthy that P-15's argument seems to be inconsistent with its pleading of assignment as a separate cause of action notwithstanding its contention that it has separate causes of action for later losses "wrapped up" in the existing cause of action for negligence.

[73] Secondly, I accept the submission of counsel for the Council that the new pleading introduces new legal issues and new matters of fact to investigate. In my view the change from a pleading as subsequent owner to a pleading as assignee of the rights of a previous owner, makes the new pleading "essentially different" in that it cannot succeed without establishing further facts (as to when Staccato's cause of action arose, and as to the circumstances surrounding the assignment, and without satisfying the legal requirements for assignment). These matters do not need to be addressed for the causes of action in P-15's own right. The fact that both claims are brought in negligence (or negligent misstatement), does not alter that. A different legal basis for liability must amount to something essentially different.

[74] If I had not found that P-15 had an arguable case for later loss, giving rise to further causes of action in negligence, I would have allowed the application for summary judgment in respect of the added cause of action as being outside the 10 year limitation period. However, that course is not open to me on a defendant's application for summary judgment given my findings on the *volenti non fit injuria* issue above. For that reason, the Council's application must be declined, notwithstanding my finding on this point.

The six year limitation period

When did the cause of action accrue?

[75] Following the conclusion reached above that P-15's cause of action filed on 2 July 2013 is new, P-15 will be time barred if that cause of action accrued six years or more prior to that date. The Council argues that, at the latest, accrual occurred in 2006 when Staccato applied for and received the WHRS assessor's report, meaning P-15 is time barred from bringing the claim under s 4 of the Limitations Act 1950.

[76] Before considering the arguments, I will set them in context by reviewing generally the law as to when a cause of action for negligence accrues.

[77] It is common ground that claims for negligent construction of residential buildings are claims for economic loss, and that loss occurs when the market value of the dwelling is depreciated by reason of the defects. As loss is a necessary

element, a cause of action in negligence will not accrue until that economic loss occurs. Where damage is observed, and the cause of the damage is obvious, the cause of action accrues when the damage becomes manifest. However, where the cause of the damage is latent the cause of action does not accrue until the cracks are so bad or the defects are so obvious to a potential purchaser (or the purchaser's expert) that the market value will be depreciated.[25]

[78] In *Trustees Executors Ltd v Murray*, the Supreme Court reviewed *Hamlin* in the course of addressing the accrual of a cause of action for limitation purposes in a different context and noted that in *Hamlin* loss did not occur until it was discovered or was reasonably discoverable.[26] In his judgment Tipping J rejected any general application of the concept of reasonable discoverability (in other words outside the *Hamlin*-type cases), commenting that generally accrual was an occurrence-based, not a knowledge-based concept.[27] After reviewing that decision in a defective building case, *Bayliss v Central Hawkes Bay District Council*, this Court commented:[28]

> … in a latent defect case such as *Hamlin* economic loss (a necessary element of the cause of action) does not occur until the market value of the property is affected on the defects becoming reasonably discoverable.

[79] The occurrence of loss is necessarily fact dependent. Although in *Hamlin* the Privy Council commented[29] that it could be taken that loss would have occurred by the time defects and damage were such as to cause the owner to obtain an expert's report, that decision followed a substantive hearing and, in my view, the Privy Council's comments will not necessarily be determinative in summary cases if there is uncertainty over the underlying facts:

(a) In *Bayliss* (an appeal from a summary judgment decision in the District Court) this Court held that it was arguable (for the purpose of the summary judgment application) that the plaintiffs did not suffer any loss on receipt of a Council report (a Land Information Memorandum) that made only oblique reference to construction defects, and applied *Hamlin* by analogy by finding that discoverability

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25 *Invercargill City Council v Hamlin*, above n 8 at 526.
26 *Trustees Executors v Murray* [2007] NZSC] 27; [2007] 3 NZLR 721 at [53].
27 At [69].
28 *Bayliss v Central Hawkes Bay District Council* (2010) 11 NZCPR 843 at [55].
29 *Invercargill City Council v Hamlin*, above n 8 at 526.

was relevant to occurrence of loss in that case even though the defects were not latent.[30]

(b) In *Burns* (an appeal from a decision of the Weathertight Homes Resolution Service on a strike out) the owner had obtained experts' reports to determine the extent of water-proofing problems.[31] The Court commented:[32]

> There are other relevant provisions in the 2006 Act. There is a long stop provision in s 14. When considering the application of s 37(1) it is necessary to bear in mind the purpose of the 2006 Act as set out in s 3:
>
> > **3 Purpose of this Act**
> >
> > The purpose of this Act is to provide owners of dwelling houses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for assessment and resolution of claims relating to those buildings.

I note that the Court held, in light of the owner's evidence that the identified defects required repairs to a value of $73,000 excluding GST, that it did not need specific evidence of devaluation of value in order to determine that a cause of action had accrued in relation to those defects.[33]

(c) In *Andrew Housing v Tutbury*,[34] another appeal to this Court in a strike out case, the Court took the view that no loss had occurred until expert reports had identified the underlying problem, some six years after the engineers were first engaged and provided their first report.

[80] Having regard now to the present facts, I accept that the fact that the owner has sought a report on the cause or causes of damage and the cost of repair is an indicator of loss, but not that it is necessarily determinative of loss, in the context of a summary application. The occurrence of loss may depend on what triggered the decision to seek the report, and that may be insufficient until the report is received.

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30 *Bayliss v Central Hawkes Bay District Council*, above n 28 at [68].
31 *Burns v Argon Construction Ltd*, above n 9.
32 At [22].
33 At [42]
34 *Andrew Housing v Tutbury* HC Invercargill AP 34/97, 28 November 1997.

It is also conceivable, depending on the facts (as was the case in *Andrew Housing*), that the report is inconclusive and a further report is needed before it can be said with certainty that the value of the property has been depreciated. It might be possible to take the request for a report as conclusive of the occurrence of loss if there is no evidence as to the reason for seeking it that could negate the implication of a necessary reduction in value in the property.

[81] The evidence in this case does not go that far. Apart from the fact that Staccato approached WHRS for a report, the Council points to Mr Monk's acknowledgement that there had been some early leaks and repair work, some further water ingress in late 2005, and to a concern expressed to the assessor by Staccato's representative (Mrs Monk's father) about external cracks. However, Mr Monk says that the report was sought out of an abundance of caution, and it must be borne in mind that he was regularly away from New Zealand about this time. There is no evidence that requires a conclusion of reduction in value until the assessor's report was received.

[82] I am not satisfied that it is possible or appropriate to determine on this summary judgment application that the property had suffered a reduction in value at the point that Staccato applied for the assessor's report, to allow a definitive finding that a negligence claim had accrued at that time. Therefore, it is not possible at summary judgment to determine whether P-15's claims made on the basis of assignment from Staccato are time barred under s 4 of the Limitation Act 1950. That conclusion, however, is not determinative of the availability of this cause of action due to my finding that the claim is time barred under s 93 of the Building Act 1991 as a new cause of action (nor is it determinative of the application as a whole given my other findings).

The claims for strike out

[83] Mr Kilfoyle and MRA/Mr Rantin have been sued in negligence only. They contend that the claims against them are time barred and therefore must be struck out on the grounds that they are vexatious and an abuse of process. Although their cases are put slightly differently, I will deal with them together (and refer to them jointly as the strike out defendants) as the respective arguments will apply to each.

Principles for strike out

[84] The defendants have applied to strike out the claims against them under r 15.1 of the High Court Rules:

> **15.1 Dismissing or staying all or part of proceeding**
>
> (1) The court may strike out all or part of a pleading if it—
>
> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
>
> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
>
> (d) is otherwise an abuse of the process of the court.

[85] It is common ground that the principles that the Court applies in determining these applications can be found in the classic statement of the Court of Appeal in *Attorney-General v Prince and Gardner*:[35]

> A striking out application proceeds on the assumption that the facts pleaded in the statement of claim are true. That is so even although they are not or may not be admitted. It is well settled that before the Court may strike out proceedings the cause of action must be so clearly untenable that they cannot possibly succeed … jurisdiction is one to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material … but the fact that applications to strike out raise difficult questions of law and require extensive argument does not exclude jurisdiction.

[86] Although generally a strike out application is determined on the basis of pleadings, the Court will accept affidavit evidence on undisputed matters. This will usually be limited to facts consistent with the pleading but in appropriate cases can allow evidence to show that an essential fact or allegation is demonstrably contrary to indisputable fact.[36]

[87] Where a defendant contends that it has a limitation defence, it may seek a strike out of the claim as frivolous and vexatious and an abuse of the process of the Court, because that it is statute barred.[37] The jurisdiction is used sparingly, and only in the clearest of cases.

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35 *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.

36 *Attorney-General v McVeagh* [1995] 1 NZLR 558 at 566.

37 *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525, applying at 531 *Ronex Properties Ltd v John Laing Construction Ltd* [1983] 1 QB 398; (1982) 3 All ER 961 (CA) at 966; see also *Body*

The grounds for the applications

[88] The applications to strike out largely mirror the grounds advanced by the Council for seeking summary judgment. In addition to the pleadings, each application relies on the evidence of Mr Monk, the various experts' reports (treating the assessor's report and the addendum report as coming within that description), and on brief affidavits by the respective defendants giving evidence largely of contextual matters. The grounds of each of the applications are essentially the same:[38]

Mr Kilfoyle's application

(a) The cause of action against him accrued on 7 February 2006, when Staccato applied to the WHRS for an assessor's report; as the claim was filed on 7 March 2012, it is statute barred by s 4 of the Limitation Act 1950, because it was commenced more than six years after the cause of action accrued.

(b) P-15 purchased the property on or about 8 January 2007 with full knowledge of the defects and damage and thereby voluntarily assumed the risk of loss.

(c) The assignments on which P-15 relies were executed after the sale of the property to P-15, at full value, so that Staccato suffered no loss and had nothing to assign; and

(d) P-15's claim based on the assignment was filed on 2 July 2013, more than six years after Staccato's cause of action accrued, and accordingly is statute barred by s 4 of the Limitation Act `950.

MRA/Mr Rantin's grounds

(e) P-15's causes of action on the basis of ownership accrued no later than 21 February 2006 (the date of the assessor's inspection of the

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Corporate 169791 v Auckland City Council HC Auckland CIV 2004-404-5225, 19 May 2009 at [25]-[26].

[38] As set out in the respective applications.

property with Staccato's representative), and thus is statute barred by s 4 of the Limitation Act 1950 as the claim was brought on 12 March 2012, more than six years after the date that the cause of action accrued.

(f) P-15 had full knowledge of the defects at the date of the purchase from Staccato and voluntarily assumed the risk of loss from those defects (in oral submissions counsel drew an analogy with the case of a Mr Devlin in the *Sunset Terraces* case, where Mr Devlin transferred his unit to a company after he had knowledge of water ingress, and the Court said that the company could not have sued the Council successfully because it had obtained title with knowledge of the defects.[39]

(g) Both the agreement to assign and the deed were executed after Staccato transferred the property to P-15, so Staccato had no cause of action to assign.

(h) There is a conflict between the pleading as to the date of execution of the agreement to assign (October 2007) and the date it bears (20 December 2006), but, regardless of that dispute, the claim based on the agreement was brought on 2 July 2013, more than six years after the effective date of the document and is therefore statute barred.

[89] P-15 opposed these applications essentially on the same grounds as it opposed the summary judgment application, namely that the strike out defendants had not demonstrated that P-15's claims were so clear and untenable that they could not possibly succeed, as the claims were dependent on findings of fact which could only be made properly after a full examination at trial.

[90] These grounds can be analysed as giving rise to the following issues:

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[39] *Body Corporate 188529 v North Shore City Council*, n 20, at [295] – [303].

(a) Can it be said in respect of P-15's claims in its own right (as owner) that the claims are so clearly untenable that they cannot possibly succeed because:

(i) the claims essentially comprise a single cause of action that arose before 12 March 2006; or

(ii) P-15, at time of purchase, voluntarily assumed the risk of loss in relation to the building (given its knowledge of the assessor's report).

(b) Can it be said in respect of P-15's claims as assignee of Staccato's rights to sue that the claims are so clearly untenable that they cannot succeed because:

(i) Staccato did not have any loss to assign, having regard to the pleaded dates of the assignments;

(ii) Staccato's cause of action arose prior to 12 March 2006 (either at the point of requesting the assessor's report on 7 February 2006, or at the point of investigating the defects and damage on 21 February 2006) so that the cause of action is time barred pursuant to s 4 of the Limitation Act 1950; or

(iii) the claims comprise new causes of action that were introduced by the amended statement of claim on 2 July 2013, and are therefore statute barred under both s 4 of the Limitation Act 1950 and under s 91(2) of the Building Act 1991.

[91] As will be apparent from the earlier parts of this judgment, I have largely dealt with all of these grounds in deciding the Council's summary judgment application. However, I add the following to address arguments advanced by the strike out defendants which may not have been fully covered by the earlier findings.

P-15's claims in its own right

[92] Mr Kilfoyle and MRA/Mr Rantin contend that P-15 does not have any tenable claims in its own right because the matters that emerged in the addendum report and the Kaizon report follow naturally from the defects and damage that caused P-15 to request an assessor's report, and were the matters that caused the assessor to call the building a leaky building.

[93] P-15 says that its claims in its own right are in respect of new and distinct defects and damage, latent at the time of the request for, and receipt of, the assessor's report, and hence for new losses under separate causes of action.

[94] Counsel for Mr Kilfoyle submitted that the only additional damage identified in the addendum report was a leak identified in para 9.1 of that report, and that all the matters identified in the Kaizon report were already present in February 2006. He referred to the photographs in the assessor's report, and said that they demonstrated that the damage and defects were on all sides of the building. Counsel for MRA/Mr Rantin submitted that the matters raised in the later reports were merely part of a continuum of discovery of damage flowing from the defective building.

[95] Both counsel relied on the comment of the Court of Appeal in *Pullar v R*,[40] that it was not necessary to pinpoint each and every aspect of damage before a cause of action accrued. They pointed out that the statement of claim is silent as to when leaks were noticed, and argued that the evidence of Mr Monk that leaks had been observed was a sufficient basis for a finding that it was reasonable for an owner to have called for an expert's report.

[96] This argument is met, for the purposes of this application, by the evidence of Mr Alvey. He has undertaken a review of all of the defects, and has expressed that a number of them (and particularly the main roof), had not been identified in the assessor's report. I am not in a position to reject that evidence.[41]

[40] *Pullar v R* [2007] NZCA 389 at [19].
[41] As discussed in [43]-[46].

[97] As I have said previously, the commencement of limitation periods in leaky building cases is highly fact dependent, making summary judgment and strike out inappropriate.[42] It is a matter for trial whether or not there were new defects and damage after the assessor's report, and hence new loss and a separate cause (or causes) of action. *Pullar* is distinguishable on the basis that the defects and damage were readily apparent (rather than latent) in that case.

[98] This takes me to strike out the defendants' contentions that P-15 voluntarily assumed the risk of loss in respect of the defective building. For the same reasons as I have given in relation to the Council's application,[43] I find that there are matters of fact to determine in relation to P-15's knowledge.

[99] In conclusion, I am not persuaded that P-15's claims in its own right against Mr Kilfoyle and MRA/Mr Rantin are so clearly untenable that they should be struck out.

P-15's claim as assignee of Staccato's rights

[100] The strike out defendants echo the argument of the Council that Staccato had no loss to assign at the time of assignment. In this respect they rely on the undisputed fact that the property was transferred at the current market value (leaving aside the arguments over assignment), and on the pleading that the assignment was either pursuant to the written agreement (signed in October 2007) or on the deed (executed in February 2012).

[101] Although P-15 pleads an assignment based on the agreement, I consider that it remains a moot point as to whether the written agreement reflected an earlier oral agreement, and P-15 could amend its pleading to make it explicit that the assignment was effective at the point of sale. If so, it could not be said that the claim was untenable on this basis. The wording of the agreement permits this possibility.

[102] An assignment on the basis of the deed is not so fortunate. The terms of the deed are merely that the parties intended to assign Staccato's rights, but did not go so

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42 *Body Corporate 169791 v Auckland City Council*, above n 38 at [25] and [27]; *Burns v Argon Construction Ltd*, above n 9 at [62] – [65]; *Cameron v* Stephenson HC Napier CIV-2009-441-437, 5 November 2009 at [81]

43 At [51]-[55] above

far as to state that it was with effect from 20 December 2006. On that basis, the claim based on an assignment under the deed cannot succeed, because Staccato had no loss to assign in February 2012.

[103] My finding on the effective date of the deed also flows through to the argument that any claim on this basis (assignment under the deed) is time barred. The cause of action based on the deed was not commenced until 2 July 2013. This is outside the ten year long stop limitation period under s 91(2) of the Building Act 1991. Accordingly, any claim on that basis is also time barred.

[104] This takes me to the other arguments in respect of an assignment based on the agreement. I do not have to determine whether there was an agreement prior to sale or subsequently because P-15 did not have a right to sue until notice was given to these defendants, and that did not occur until 22 April 2013. Accordingly, as with the claim against the Council,[44] any claim on this basis is time barred under s 4 of the Limitations Act 1950 and should be struck out.

[105] Lastly, I can deal briefly with the strike out defendants' argument that P-15's claims based on assignment are new causes of action, brought on 2 July 2013, and are statute barred under s 91(3) of the Building Act 1991. For the same reasons as I have given in relation to the Council's summary judgment application,[45] I find these are new causes of action that are time barred under s 91(3) of the Building Act 1991.

[106] P-15's claims against both strike out defendants, based on assignment, are to be struck out on this basis also.

Decision

[107] For the reasons I have given, I find that the Council has not established that none of P-15's causes of action can succeed, and for that reason its application for summary judgment is dismissed. Similarly, I find that Mr Kilfoyle and MRA/Mr Rantin have not shown that P-15's claims in its own right are so clearly untenable that they cannot succeed, and their applications to strike out those claims are also dismissed. However, for the reasons I have given, I find that P-15's claims

[44] At [66] above.
[45] At [72]-[73] above.

based on assignment of Staccato's rights to sue are clearly untenable, and they are struck out. This applies both to the cause of action added on separately on 2 July 2013, as well as the pleading added to the original causes of action on that date.

[108] In keeping with the Court's usual practice on dismissing applications for summary judgment, costs in respect of the Council's application are reserved. As both sides have had some success on the strike out applications, I make no order as to costs on those applications. Those costs are to lie where they fall.

[109] The Registrar is to allocate a further case management conference for the purpose of giving directions for the future conduct of the proceeding. P-15 is to file and serve a memorandum three working days in advance, and the defendants are to file and serve memoranda two working days in advance.

Associate Judge Abbott