IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-7840
[2015] NZHC 995

BETWEEN	BODY CORPORATE 330324 "CITY GARDENS APARTMENTS" First Plaintiff
	MATTHEW NICHOLAS BROWN AND ORS Second Plaintiffs
AND	AUCKLAND CITY COUNCIL First Defendant

Continued next page

Hearing: 1 May 2015

Counsel: S East and L Mannis for Third Defendant/Applicant
S Thodey and TC Wood for First Defendant/Respondent

Judgment: 12 May 2015

JUDGMENT OF FOGARTY J

This judgment was delivered by me on 12 May 2015 at 4.00 p.m.,
pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date: ……..

Solicitors:
Grimshaw & Co, Auckland
Heaney & Partners

AND

WATTS & HUGHES LIMITED
Second Defendant

DOWNER NEW ZEALAND LIMITED
Third Defendant

CCSNZ LIMITED
Fourth Defendant/Fourth Third Party

TYCO NEW ZEALAND LIMITED (TRADING AS CLIMATECH)
First Third Party

TAL LIMITED
Fifth Defendant/Second Third Party

1280899 LIMITED
Third Third Party

ARCHITECTURAL WINDOW SOLUTIONS LIMITED
Fifth Third Party

MacMILLAN PLUMBING LIMITED
Sixth Third Party

POSITIVE INSTALLATION LIMITED
Seventh Third Party/Fourth Party

Introduction

[1] This proceeding concerns a claim by owners of a commercial-type building made up of an eight-storey carpark and a further 21 levels of apartments.

[2] The plaintiffs have issued proceedings against the head contractor and two of the major subcontractors involved in the construction of the building. They have also issued proceedings against the Auckland Council. They seek to recover losses in excess of $35m.

[3] The plaintiffs allege that each of the defendants, Auckland Council, Downer New Zealand Limited (Downer) and Watts & Hughes Limited, are liable for defects in the design and construction of the City Gardens Apartment (City Gardens).

[4] The Auckland Council has filed cross-claims for contribution against Watts & Hughes and Downer. The Council argues that if it is found liable to the plaintiffs (which it denies), Downer is also responsible as a concurrent tortfeasor, in equity and pursuant to s 17(1)(c) of the Law Reform Act 1936. Watts & Hughes then followed filing cross-claims against the Auckland Council and Downer, including liability for concurrent tortfeasor.

[5] The third defendant, Downer, now seeks leave to file cross-claims against the first defendant, Auckland Council, and the fifth defendant, TAL. A similar order was sought by Downer against the second defendant, Watts & Hughes. Watts & Hughes did not oppose the granting of such order, but reserved its right to raise any applicable limitation defences at the trial. The order in respect of Watts & Hughes was made pursuant to the Court's minute dated 24 April 2015.

[6] The fifth defendant, TAL, has taken no steps in these proceedings at all.

[7] Downer seeks leave to file the cross-claims because the application was after the date for close of pleadings, which was on 26 September 2014. Downer says it decided to file cross-claims following a review of the plaintiffs' evidence. The Downer cross-claim argues that if it is found liable to the plaintiffs (which it denies), the Council, Watts & Hughes and TAL are joint tortfeasors for which Downer claims

contribution or indemnity, again, pursuant to s 17 of the Law Reform Act and, alternative, pursuant to the equity principles of contribution.

[8] In response, the Auckland Council argues that it is too late. The Auckland Council argues that Downer's cross-claim against the Council is time barred by s 393 of the Building Act. Section 393 provides:

> **393 Limitation defences**
>
> (1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.
>
> (2) However, [no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought] against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
>
> (3) For the purposes of subsection (2), the date of the act or omission is,—
>
> (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and
>
> (b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

[9] The Auckland Council argue that the following timeline is relevant in determining the ability of Downer now to file a cross-claim against the Council:

(a) On 15 November 2002 and 23 May 2003, the Council issued consents permitting the building works.

(b) During the period 15 November 2002 until 30 April 2004, the building works were carried out with the Council carrying out inspections from time to time.

(c) During the period from at least May 2003 until February 2004, Downer carried out waterproofing work and was "on site".

(d) The Council issued code compliance certificates on 3 April and 3 May 2004.

[10] On 30 November 2010, the plaintiffs issued proceedings against the Council, Downer and others.

[11] On 11 May 2012, the Council issued cross-claims against the other defendants, including Downers.

[12] The Auckland Council argue that 3 May 2004, the date of the last code of compliance certificates, is the date from which the ten-year period under s 393 of the Building Act is calculated. So that on 3 May 2014, time expired for the last time in respect of claims based on acts and omissions relating to building works by any of the parties. By that date the Council had issued cross-claims against the other defendants, including Downer. Downer, however, had not issued any cross-claims against the Council.

[13] The Council argues that there is a clear line of High Court authorities to the effect that a cross-claim is (as is a claim and a third party claim) a "civil proceeding" as the term is used in s 393. Accordingly, a cross-claim by Downer is caught by s 393(2), as it is "relating to building work".

[14] The line of authority relied upon by the Auckland Council are the following cases:

Dustin v Weathertight Homes Resolution Service & ors[1]

---

1 *Dustin v Weathertight Homes Resolution Service & ors* HC Auckland CIV-2006-404-276, 21 June 2006.

Carter Holt Harvey Ltd v Genesis Power Ltd (No 8)[2]
Davidson & ors v Banks & anor[3]
Body Corporate 169791 & ors v Auckland City Council & ors[4]
Perpetual Trust Ltd & anor v Mainzeal Property & Construction Ltd & ors[5]
Lee v North Shore City Council[6]

These are all cases where the High Court has held that third party proceedings, and combinations of cross-claims and third party proceedings are caught by s 393(2) as "relating to building work".

[15] Downer's cross-claims rely on the Law Reform Act 1936. Section 17 provides:

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
>
> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
>
> (a) Judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage:
>
> (b) If more than one action is brought in respect of that damage by or on behalf of the person by whom it was suffered, or for the benefit of the estate, or of the wife, husband, [civil union partner, de facto partner,] parent, or child of that person, against tortfeasors liable in respect of the damage (whether as joint tortfeasors or otherwise), the sums recoverable under the judgments given in those actions by way of damages shall not in the aggregate exceed the amount of the damages awarded by the judgment first given; and in any of those actions, other than that in which judgment is first given, the plaintiff shall not be entitled to costs unless the Court is of opinion that there was reasonable ground for bringing the action:
>
> (c) Any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this

---

2 *Carter Holt Harvey Ltd v Genesis Power Ltd (No 8)* HC Auckland CIV-2001-404-1974, 29 August 2008, Randerson J.
3 *Davidson & ors v Banks & anor* HC Auckland CIV-2006-404-6150, 23 March 2009, Faire AJ.
4 *Body Corporate 169791 & ors v Auckland City Council & ors* HC Auckland CIV-2004-404-525, 17 August 2010, Lang J.
5 *Perpetual Trust Ltd & anor v Mainzeal Property & Construction Ltd & ors* [2012] NZHC 3404.
6 *Lee v North Shore City Council* HC Auckland CIV-2009-404-2091, 12 April 2010, Bell AJ.

section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

(2) In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the Court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity.

(3) For the purposes of this section—

(a) The expressions "parent" and "child" have the same meanings as they have for the purposes of the [Deaths by Accidents Compensation Act 1952]:

(b) The reference in this section to "the judgment first given" shall, in a case where that judgment is reversed on appeal, be construed as a reference to the judgment first given which is not so reversed, and, in a case where a judgment is varied on appeal, be construed as a reference to that judgment as so varied.

(4) Nothing in this section shall—

(a) Affect any criminal proceedings against any person in respect of any wrongful act; or

(b) Render enforceable any agreement for indemnity which would not have been enforceable if this section had not been passed.

(5) Section 94 of the Judicature Act 1908 shall not hereafter apply with respect to any action or other proceeding to which this Part of this Act applies.

[16] It is common ground that the plaintiffs' claims against the Auckland Council and against Downer are in tort. If the plaintiffs succeed against both of them, then, at least on some defects, Auckland Council and Downer will be joint tortfeasors. If they are, then s 17(2) of the Act applies and the Court can appropriately apportion the contribution to judgment in favour of the plaintiffs between the two parties on a "just and equitable" basis. The sums recoverable under the judgments cannot, in the aggregate, exceed the amount of damages awarded in the judgment.[7]

---

[7] Law Reform Act 1936, s 17(1)(b).

[17] In a recent judgment[8] I set out the United Kingdom practice of how this apportionment is done. It is by way of an exercise of judgment having regard both to the extent to which a party caused loss and the financial worth of a party.[9]

[18] Because of the relevance of solvency, the "just and equitable" standard can be applied only after the judgment. It has to take into account the findings of fact, liability and quantum in the judgment and receive evidence as to the current financial worth of the judgment debtors. It may be applied after the successful plaintiff has enforced the judgment against one of the tortfeasors.

[19] Under the Law Reform Act, s17(1)(c) Act, the Court is given power to allocate the contribution to the total judgment amongst all the tortfeasors, including those who were not defendants in the proceedings. Section 17(1)(c) distinguishes between tortfeasors who were defendants in the action from any other tortfeasor "who ... would if sued in time have been, liable in respect to the same damage ...".

[20] So before a Court embarks on the exercise of making a judgment as to contribution, it is open for any of the joint tortfeasors to bring proceedings to join any other tortfeasor. In that case, there is a special limitation period of two years. Section 34 of the Limitation Act 2010 provides:

> **34 Claim for contribution from another tortfeasor or joint obligor**
>
> (1) This section applies to a claim under section 17 of the Law Reform Act 1936—
>
> (a) by a tortfeasor (A) liable in tort to another person (B) in respect of damage; and
>
> (b) for contribution from another tortfeasor (C) who is, or would if sued in time by B have been, liable in tort to B (whether jointly with A or otherwise) in respect of that damage.
>
> (2) This section also applies to a claim—
>
> (a) made by a person (A) who is liable (otherwise than in tort) to another person (B) in respect of a matter; and

---

8 Body Corporate 160361 (Fleetwood Apartments) v BC 2004 Ltd and BC 2009 Ltd [2014] NZHC 1514, 4 July 2014.

9 See [92] – [95] above.

(b) for contribution from a third person (C) who is, or would if sued in time by B have been, liable (otherwise than in tort) to B (whether jointly with A or otherwise) in a coordinate way in respect of that matter.

(3) C is liable to B in a coordinate way for the purposes of subsection (2)(b) if, and only if,—

(a) a common obligation underlies C's liability to B and A's liability to B; and

(b) payment or other discharge of C's liability to B would have the effect of relieving A, in whole or in part, from A's liability to B.

(4) It is a defence to A's claim for contribution from C if C proves that the date on which the claim is filed is at least 2 years after the date on which A's liability to B is quantified by an agreement, award, or judgment.

[21] If judgment is given against more than one tortfeasors, it follows that none of them had any Limitation Act defences against the plaintiff nor were able to take advantage of the ten-year long stop in s 393 of the Building Act 2004 against the plaintiff.

[22] Downer argue that s 393 does not apply in circumstances when the issues that fall to be determined by the Court are by way of cross-claim against defendants in those proceedings who are found to be joint tortfeasors.

[23] Alternatively, if s 393 of the Building Act applies, then the Court has an equitable jurisdiction to allocate the contribution of each joint tortfeasor to the total damages awarded to the plaintiff.

[24] None of the cases relied upon by the Auckland Council have the same material facts as the case before me. For all of these cases involve, in part, the question of applications by a defendant to join a third party, in other words, to add a party to the proceedings as distinct from a cross-claim against an existing defendant. Limitation and long stop issues, not applying to the existing defendants may arise in that class of case.

[25] There is no doubt that after judgment in a tort action, that when one of the judgment debtors who is a tortfeasor seeks to join a person who has not been a party

to the proceedings, that is a new proceeding. The plaintiff must establish, firstly, that the defendant is a tortfeasor and, secondly, a joint tortfeasor with the plaintiff. It is clearly arguable that that aspect of the claim is a claim "relating to building work". Once that is proved, then comes the entitlement to contribution. That it is a separate and new cause of action is reinforced by there being a special limitation period imposed under s 34(4) of the Limitation Act, as we have seen. There is no need to engage in this judgment, however, in an examination of the issue as to the application of s 393 to such a distinct cause of action for contribution against a non-party to the judgment.

[26] There is another decision of *Cromwell Plumbing Drainage & Services Ltd v de Geest Brothers Construction Ltd*[10] which Auckland Council does not rely on. It too is distinguishable on its material facts. It was not a set of material facts where the relevant parties were both indisputably defendants. In this case, the plaintiff had issued proceedings against de Geest in February 1992, within ten years after the date of the act or omission on which the proceedings were based.[11] The ten year long stop applied to all proceedings except those commenced before 1 July 1993. Cromwell Plumbing was joined after 1 July, on the 21st, so outside the ten years. In November 1993, the first defendant, de Geest, served a notice of claim of contribution on the second defendant. The plaintiffs accepted that they could not maintain an action against Cromwell Plumbing as a defendant. John Hansen J, however, allowed the properly joined first defendant to seek contribution against Cromwell Plumbing. Because Cromwell Plumbing had a ten-year long stop defence against the plaintiff, this was in substance a third party proceeding.

Are cross-claims essential to the application of the Law Reform Act?

[27] Downer says that it is in the interests of justice that it should be granted leave to file a cross-claim so that if liability of the plaintiffs is established against more than one defendant, as joint tortfeasors, it can be appropriately apportioned between these joint tortfeasors for each of the common defects to which the Court has found both have contributed to by reason of negligence.

---

10 *Cromwell Plumbing Drainage & Services Ltd v de Geest Brothers Construction Ltd* (1995) 9 PRNZ 218.

11 Building Act 1991, s 9, the predecessor of Building Act 2004 s 393.

[28] Before judgment, a cross-claim by a defendant is against the contingency of being found a tortfeasor and pleading the particulars as to why another tortfeasor would be a joint tortfeasor, is not necessary. The law does not require a party to make a claim for contribution before being found a tortfeasor. My reasons follow.

The application of the Law Reform Act 1936

[29] The history of contribution can be reliably taken from the Australian text, *Equity Doctrines and Remedies*, by Meagher Gummow and Lehane.[12] The opening sentences of the chapter are as follows:

> The application by the Court of Chancery of the doctrine of contribution is an example of its concurrent jurisdiction with the common law courts. Both equity and law came to share the view that, in the words of Kitto J in *Albion Insurance Co Ltd v GIO (NSW)* (1969) 121 CLR 342 at 350; [1970] ALR 441 at 446, "persons who are under *co-ordinate liabilities* to make good the one loss (eg sureties liable to make good a failure to pay the one debt) must share the burden pro rata" (emphasis supplied). There were a number of relationships cognisable both at law and in equity which involved co-ordinate liabilities in this sense. … Joint tortfeasors were long in a different position. For the common law turned its face against contribution between joint tortfeasors in *Merryweather v Nixon* (1799) 8 TR 186; 101 ER 1337, and equity followed the law, with the result that the right as it exists today rests upon statutes modelled after the ambiguously phrased Imperial law Reform (Married Women Tortfeasors) Act 1935.

[30] The New Zealand Law Reform Act 1936 followed the Imperial Law Reform.

[31] So it is important to appreciate that the enactment of the Law Reform Act 1936, placed joint tortfeasors back under the general rubric of the common law courts that persons:

> who <u>are</u> under *coordinate liabilities* must contribute to making good the one loss. (Emphasis added to "are".)

It is immaterial as to why the persons have coordinate liabilities.

---

[12] Meagher, Gummow and Lehane's, *Equity Doctrines and Remedies* (4th ed) Butterworths LexusNexus Australia 2002, Chapter 10.

[32] There are twin principles of "natural justice" applying here.[13] On the one hand, it would be unjust for the plaintiff to over-recover an award of damages by being able to collect more than the aggregate damages. And, on the other hand, it would also be contrary to natural justice for the plaintiff to be able to select from several judgment debtors, the one from whom to collect the judgment, the law leaving that party bereft of any ability to collect a fair contribution from the other parties who shared the liability.

[33] The natural justice of the Law Reform Act adopts the longstanding policy of the common law courts. This common law court views with caution the proposition that claims brought against two or more defendants, all within time under the various statutes of limitation and resulting in a judgment against two or more defendants as joint tortfeasors, can, by way of another statute, allow the successful plaintiff to pick and choose as to who of the judgment debtors should ultimately pay the debt. And, moreover, prevent the party that actually pays from recovering contributions from the co-debtors under the same judgment.

[34] None of the counsel before me suggested that the purpose of s 393 of the Building Act was to prevent application of the Law Reform Act on the facts of this case where the plaintiff has commenced proceedings against both defendants within the ten year deadline. The Auckland Council considered itself driven by the case law to argue that that is a side-wind consequence of the enactment of s 393 of the Building Act.

[35] As I have noted above, there is no liability of tortfeasors as between each other until judgment is recovered by a plaintiff against more than one tortfeasor on the plaintiffs' tort action(s). Moreover, their contribution cannot be established at the time that judgment is awarded to the plaintiff: for the standard of "just and equitable" must then be applied. In a claim by a plaintiff against more than one party alleging that each of the parties committed the tort, the most the first judgment can do is find for the plaintiff the liability of one or more tortfeasors and then, or eventually, the total amount of damages recoverable by the plaintiff as judgment creditor against

---

[13] See Meagher at [10-020] citing Kitto J in *Albion Insurance Co Ltd v GIO (NSW)* (1969) 121 CLR 342.

more than one judgment debtor. The remedy afforded by the Law Reform Act in s 16(2) then comes into effect after that judgment.

[36] The function of contingent cross-claims by defendants in tort actions are a means of signalling in advance of the application of s 17(1)(c) and (2) allegations. This can be helpful, for example, here Downer pleads the particular alleged defects in respect it alleges commonality of liability if it is found negligent.

[37] The Limitation Act 2010 envisages in s 34(1)(b), 2(b) and (4) that the plaintiff may not have identified all possible tortfeasors causing the damage the plaintiff suffered. And, second, that the defendants joined to the proceedings by the plaintiff may not have joined by way of third party procedures additional persons who they can argue were causative of the damage. Section 34(4) of the Act then sets abbreviated limitation periods for the joinder of additional tortfeasors. For those claims the time runs from the date of the judgment. Those are claims brought by judgment debtors, as claimants, against persons alleged to be joint tortfeasors. They are not claims brought by the plaintiff.

[38] This case is not concerned about that interaction between s 34 of Limitation Act 2010 and s 393 of the Building Act, as there has been no trial, let alone a judgment.

[39] What this case is concerned about is whether or not one defendant, against the contingency of being found a tortfeasor, can allege by cross-claim the particulars that make another defendant a co-tortfeasor for contribution.

[40] This is not a case of a defendant seeking to join another person as a third party, alleging that person is a tortfeasor also, but more than ten years from the date of the act or omission on which the proceedings against that person are based. If that was the case, then by way of joinder of third parties, the plaintiff could get the benefit of a longer period of time than ten years. The decisions of this Court, cited above, say it in this circumstance that engages the application of the long stop clause in s 393.

[41] Where, however, the plaintiff has successfully joined defendants within the limitation period, the cross-claims between the defendants are not causes of action that one defendant has against another defendant but are preliminary arguments as to the commonality of liability as tortfeasors, preliminary as they cannot reliably anticipate the findings in the judgment.

[42] It is no defence to the application of the Law Reform Act that the person seeking contributions from another tortfeasor did not bring a cross-claim before judgment. Cross-claims filed in proceedings are not a prerequisite to a later claim for contribution by a tortfeasor against another tortfeasor consequent upon a judgment in favour of the plaintiff. A defendant is entitled to rigorously dispute liability, not pleading upon the contingency that it may be liable.

Distinguishing the cases relied upon by Auckland Council

Dustin v Weathertight Homes Resolution Service & ors[14]

[43] This was an application for judicial review arising from a claim brought under the Weathertight Homes Resolutions Service Act 2002. Mr Dustin was a non-party, who was joined to the proceedings after they commenced at the instigation of the Auckland Council. This is equivalent to a third party claim. Mr Dustin opposed on the ground that he was outside the ten year period.

Carter Holt Harvey Ltd v Genesis Power Ltd (No 8)[15]

[44] This is another third party issue. The plaintiff sought leave to amend its claim to incorporate allegations relating to defects in the construction of a co-generation plant at Kinleith Mill. The proposed amendment sought to introduce a complaint that the boiler that formed part of the plant did not, from a design or build perspective, comply with various design codes specified under the contract. So that it was alleged that it could lead to the boiler structure failing during an earthquake on a maximum design magnitude.

---

14 *Dustin v Weathertight Homes Resolution Service & ors*, above n 1.
15 *Carter Holt Harvey Ltd v Genesis Power Ltd (No 8)*, above n 2.

[45] The Judge first considered whether the proposed amendment constituted a further particular, as contended by the applicant, or a new cause of action, as contended by those who opposed the application. He concluded that it amounted to a further particular and not a new cause of action. He went on to find, however, that the introduction of the particular, although not time barred, should not be permitted as once introduced those defendants affected would be time barred from issuing third party proceedings on the grounds that such a claim would be the subject of the long stop limitation defence.

Davidson & ors v Banks & anor[16]

[46] This is another case in which the issue is whether the long stop limitation defence applied to a third party claim. The third party claim was brought more than ten years after the code of compliance certificate was issued. Again, the distinguishing factor here is that the parties sought to be joined was not by definition an existing party in the proceedings, joined within time.

Body Corporate 169791 & ors v Auckland City Council & ors[17]

[47] This is another case involving a question of the long stop defence applying to a defendant Council issuing a third party claim.

Perpetual Trust Ltd & anor v Mainzeal Property & Construction Ltd & ors[18]

[48] The matter that came before Andrews J was whether Mainzeal, as the first defendant, could file cross-claims against other defendants and issue third party proceedings against individual companies or persons who were not defendants in the proceeding.

[49] This case is substantially a third party issue, when its curious pleading history is understood. The subject of the proceedings were a number of buildings that make up the Botany Town Centre in Auckland. It was constructed between September 2000 and June 2001. Within ten years of the completion of the building, the plaintiff

---

16 *Davidson & ors v Banks & anor*, above n 3.
17 *Body Corporate 169791 & ors v Auckland City Council & ors*, above n 4.
18 *Perpetual Trust Ltd & anor v Mainzeal Property & Construction Ltd & ors,* above n 5.

issued proceedings against the head contractor, and later against the waterproofer and the painter. Then, more than ten years after completion of the building works, the plaintiff sought leave to discontinue its claim against the waterproofer, the painter and a number of other parties.

[50] On 23 November, Associate Judge Doogue had the hearing to consider whether or not the plaintiff be granted leave to discontinue against the defendant waterproofer, painter and a number of other parties. He reserved his judgment and did not deliver it until 23 February 2012. While his decision was reserved the head contractor filed and served cross-claims against the waterproofer, the painter and the carpenter/joiner/installer: entitled "cross-claims", not "third party proceedings". We can infer that the head contractor knew that the application to discontinue was reserved and if allowed, these cross-claims would have to be treated as third party claims.

[51] In Andrews J's judgment there was no consideration of the position as between defendants. In the intituling of her decision, she records seven defendants as discontinued. There were appearances only for the tenth and twelfth defendant and for a second third party. Although Downer are recorded as the tenth defendant discontinued and likewise, Contract Coatings Limited, they were the two "defendants" who opposed. But in context while they still had the title "defendant" on the intituling, they were in fact proposed third parties.

Lee v North Shore City Council[19]

[52] This was a case of co-ordinate causes of action in contract and tort.

[53] The second defendant established that the negligence suit was outside the ten year period. As a result, Bell AJ reached the conclusion that the plaintiffs have an arguable case against the second defendants in contract, but not in tort. The plaintiffs also have a cause of action in tort against the first defendant. There is no basis therefore on which the two defendants could become joint tortfeasors. Accordingly, the application of the Law Reform Act 1936 could not apply.

---

[19] *Lee v North Shore City Council* HC Auckland CIV-2009-404-2091, 12 April 2010, Bell AJ.

Conclusion

[54] The cross-claim by Downer to the Court is helpful as it identifies certain defects pleaded in the plaintiffs' claim, which it says if proved against Downer and the Auckland Council as defects caused negligently by each of them, then Downer and the Council are joint tortfeasors.

[55] The pleading is helpful in identifying what may be a commonality of defects. But the pleading is not helpful in advising the Court that if the Court finds them both tortfeasors in respect of those defects, that they will be joint tortfeasors. That follows as a matter of law.

[56] This cross-claim by Downer against the Auckland Council does not raise any limitation point, as any limitation issues are between the plaintiffs and the Council and the plaintiffs and Downer, not between Downer and the Council.

[57] This cross-claim is not "in respect of civil proceedings relating to building work".[20]

[58] It was not argued that allowing this cross-claim by Downer would imperil the fixture date or the timetable in advance of it.

[59] Downer is granted leave to file these cross-claims against the Auckland Council and against the fifth defendant, TAL (who has taken no part).

[60] Downer is entitled to costs on a 2B basis.

---

[20] Building Act, s 393(2).