IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2010-404-7840
[2015] NZHC 1485

IN THE MATTER	of City Gardens Apartments
BETWEEN	BODY CORPORATE 330324 First Plaintiff
	MATTHEW NICHOLAS BROWN & ORS Second Plaintiffs
AND	AUCKLAND COUNCIL First Defendant
	Continued over

Hearing: 24 and 25 June 2015

Appearances: G B Lewis and C E Lane for the Plaintiffs
S A Thodey and S Mitchell for First Defendant
S Ladd and B J Ward for Third Defendant
K M Quinn and S M Thompson for Fourth Defendant

Judgment: 25 June 2015

Reasons: 1 July 2015

REASONS FOR JUDGMENT OF MUIR J

This judgment was delivered by me on Wednesday 1 July 2015 at 3.00 pm pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date:……

WATTS & HUGHES LIMITED
Second Defendant

DOWNER NEW ZEALAND LIMITED
(Formerly known as Downer Edi Works Limited)
Third Defendant

CCSNZ LIMITED (Formerly known as Symonite New Zealand Limited)
Fourth Defendant/Fourth Third Party

TYCO NEW ZEALAND LIMITED
(Trading as Climatecdh)
First Third Party

TAL LTD
Fifth Defendant/Second Third Party

1280899 LIMITED (Formerly known as Auckland Height Services 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

Counsel/Solicitors:
G B Lewis, Grimshaw & Co, Auckland
C E Lane, Grimshaw & Co, Auckland
S A Thodey, Heaney & Partners, Auckland
S Mitchell, Heaney & Partners, Auckland
SJP Ladd, Bell Gully, Auckland
B J Ward, Bell Gully, Auckland
G J Kohler QC, Barrister, Auckland
K M Quinn, Barrister, Auckland
S M Thompson, Barrister, Auckland
H Macfarlane, Hesketh Henry, Auckland
S Holderness Hesketh Henry, Auckland
A Hazelton, Hazelton Law, Wellington

[1] At the conclusion of almost two days of argument I issued a results judgment granting the first, third and fourth defendants' applications (respectively the Council, Downer and CCSNZ) for adjournment of the 12 week trial currently scheduled to commence on 20 July 2015. I indicated that written reasons would follow, which I now provide.

[2] My judgment was given with considerable reluctance given the inevitable costs burden that further delay imposes on all parties and the resulting disruption to the Court's scheduling. I have nevertheless reached the conclusion that, balancing the prejudice to the plaintiff from adjourning the fixture against prejudice to the defendants from its retention, the latter outweighs the former by a significant margin.

[3] This is the second adjournment application brought before me in relation to these proceedings. In my judgment dated 4 June 2015 I declined an application by the Council and Downer, nominally supported by the second defendant, primarily on the basis that:

(a) The application was premature in that it proceeded on an assumption as to the nature of the proposed amendments and of proposed evidence which may not be realised; and

(b) In so far as the application was based on a requirement to address supplementary evidence, the evidence relied on was at that stage privileged, having been provided on a without prejudice basis for the purposes of a cancelled mediation.

[4] In accordance with a timetable settled at the time of my previous judgment an application on behalf of the plaintiffs to amend their 10th statement of claim was filed on 12 June simultaneously with their supplementary/reply evidence. An application was also made to add a second plaintiff.

[5] The supplementary/reply evidence consists of 13 briefs totalling 335 pages with over a thousand pages of associated photographic and documentary exhibits.

[6] In terms of amendment:

(a) All of the defendants face a substantial increase in quantum. In the case of the Council, total quantum increases from approximately $30 m to approximately $36 m and in relation to Downer, from $15 m to $19 m. The increase in quantum in large part reflects a delay in commencement of the project to February 2017, itself occasioned by issues in relation to the testing and consenting of a proposed replacement cladding system.

(b) As against the Council, the proposed pleading changes in significant respects, in particular the point at which (whether pursuant to the Building Consent, inspection of the building work or issuance of the Code Compliance Certificate) negligence in respect of various breaches is said to have occurred.

(c) Defect (n) is substantially reworded, the existing allegation being in terms "the rigid air barrier is not sealed to the concrete at the base of the wall allowing air and moisture migration into the building structure" and the proposed wording being that, "the junction between the ACN panels/fibre cement sheet and concrete nib is not weathertight".

(d) Defect (u), that ventilation ducts are not connected to the extract grills, is alleged against CCSNZ for the first time.

[7] The adjournment application proceeded on the basis set out in my minute of 17 June 2015 where I recorded:

> [4] The plaintiffs' position is that the amendments and supplementary evidence are necessary for them properly to advance their case and therefore to effect justice between the parties.
>
> [5] If the Court considers an adjournment of the trial necessary to protect adequately the rights of any of the defendants then that course is, from the plaintiffs' perspective, preferable to a trial on the existing pleadings and without the supplementary evidence.

> [6] On that basis the renewed application for adjournment will proceed on the assumption of a grant of leave in respect of the applications referred to in [1]. That is consistent with the indication given to me at the conference on 3 June 2015 that the first and third defendants would withdraw their opposition in the event an adjournment was granted.

[8] The position of the defendants, as recorded at [6] of my minute, was confirmed at the second adjournment hearing with their agreement that, if an adjournment was granted, opposition to the proposed amended pleading and supplementary/reply evidence would be withdrawn. I note that the second defendant did not participate in the hearing because of its financial circumstances. It abides the decision on the adjournment application having been prior advised of the basis on which it would proceed.

[9] I do not intend to recite the very comprehensive and helpful submissions received from all parties on the application. There are essentially two groups of issues. The first relating to the proposed additional evidence, and the second to the proposed amendments. To some extent, of course, they overlap.

The proposed evidence

[10] The core complaint in respect of the proposed evidence is that it contains significant material not properly in reply, which is in reality supplementary evidence and which in its terms requires the defendants' experts to engage in extensive further testing. The principal complaints are in respect of the following defects:

(a) Roof defect (a) – Mastic asphalt membrane not fit for purpose;

(b) Roof defect (c) – inadequate waterproofing to parapet junction;

(c) Concrete – relevant to all defects directed at Downer and a substantial number directed at the Council; and

(d) Boiler room defect (l) – insufficient fall to boiler room floor.

[11] I take as examples the alleged mastic asphalt and concrete defects to illustrate how the evidence has developed in a way which I consider significantly prejudices the first and third defendants.

Roof defect (a)

[12] The principal evidence in chief in respect of this defect is provided by Mr Crichton, a building surveyor employed by CoveKinloch Consulting Limited (CoveKinloch) and a Mr Grayson, a consultant chemist and forensic analyst.

[13] Both briefs were served on 3 October 2014.

[14] Mr Crichton states that there are numerous failures with the roof membrane and refers to Mr Grayson's evidence in terms that, "He concluded that the Neuchatel asphalt membrane was not suitable for use on a building such as City Gardens and that consequently it has failed".

[15] Mr Grayson's evidence is summarised at [37] and [39] of his brief in terms:

> [37] In my opinion the Neuchatel Mastic asphalt membrane was not suitable for use in a warm temperate climate such as Auckland in a location exposed to direct sunlight such as the roof top of City Gardens.
>
> …
>
> [39] I have been unable to find any appraisal or testing of the Neuchatel mastic asphalt membrane confirming that it is suitable for use in conditions such as the roof top of City Gardens.

[16] In response, the defendants led evidence from Mr Durrant, who is said to be a world-leading expert in mastic asphalt and from Messrs Gabbitas and Smith. Mr Durrant responds in terms that the suggestion mastic asphalt was not suitable for City Gardens "is completely false and has no basis in fact". He points out that mastic asphalt has been used throughout Europe, the USA, Asia, Australia and New Zealand and that British Standards have been in existence for nearly 100 years. He further deposes that the condition of the roof is as expected for one 10 years old and that it does not need replacement and can simply be repaired.

[17] Mr Gabbitas deposes that mastic asphalt has a history of service in Auckland dating back to the early 1900s and the Neuchatel brand has been laid since 1905.

[18] He says that it is covered by British Standards, codes of practice by the Master Asphalt Council and BRANZ Documents and that the roof "is repairable and is certainly not ready to be replaced at this point in time".

[19] Mr Smith deposes that mastic asphalt meets the requirements of BS 6925 and complies with acceptable solution EA/AS1 1998.

[20] In purported reply Mr Grayson says that he agrees with Mr Smith that acceptable solution EA/AS1 was applicable during the construction of City Gardens and that it cross references BS 6925. He then deposes to a number of tests which he commissioned from consulting firm Opus, which he says confirms that, at temperatures which might be expected in terms of the application, there was a large increase in creep (melting of the asphalt product).

[21] This example crystalises the problem which has occurred with the evidence. The plaintiff's original position was that the product was simply inappropriate for the application. It appears the evidence was given without knowledge of, but at least without recognising, acceptable solution EA/AS1 and its associated reference to BS 6925. When it was pointed out that the product had a long pedigree and was indeed identified as an acceptable solution, the plaintiffs have attempted to "back fill" their evidence by reference to alleged non-compliance with BS 6925.

[22] In my view that is not an appropriate approach to reply evidence. As Dobson J observed in *Houghton v Saunders & Ors*:[1]

> Reply briefs are intended to address matters in the defendant's briefs that could not reasonably be anticipated in the plaintiffs' original briefs.

[23] Evidence of compliance (or not) with BS 6295 is a matter which in my view could and should have been reasonably anticipated and therefore been the subject of evidence in chief.

---

1 *Houghton v Saunders & Ors* [2014] 21 PRNZ 721 at 722.

[24] That then leaves the first and third defendants in a position where they have not had an adequate opportunity to respond to the new Opus testing. Fairness requires that they do so. Mr Durrant is based in the United Kingdom. Predictably he wishes to supervise the relevant testing there. I am told from the Bar that there is, in any event, limited opportunity for the testing to be undertaken in New Zealand. Mr Ladd advises that not even Opus is accredited for hardness testing and that it is a very specialised area.

[25] The third defendant's evidence was that the time required to obtain the necessary sample, dispatch it to the United Kingdom, undertake relevant testing (in what is anticipated to be the Surrey County Council's Materials Laboratory), analyse the results and report will take up to two months to complete.

[26] Even if this could be accelerated and even allowing for the plaintiffs' concession that it would accept evidence introduced part way through the trial, significant logistical difficulties result. This is particularly so in relation to the experts' conferences which are scheduled for three weeks commencing Monday 29 June 2015. In my view, the defendants correctly say that in relation to the mastic asphalt allegation (for which the associated defect value is said to be approximately $1 m), there is very limited utility in the experts' conferences proceeding until such time as necessary testing is complete. Indeed, I would regard the results of the testing as essential for any meaningful dialogue to take place. In a case such as this, which is acknowledged by all parties to be substantially "expert driven" the timely conduct of experts' conferences under competent chairmanship is essential to efficient dispatch of the trial. Such has been recognised in this case for an extended period with prior case management orders reflecting the necessity that these take place significantly before trial.

[27] In addition, the first and third defendants point out, based on Mr Crichton's new photographic evidence, that the investigations on which the reply evidence is based took place between 30 March and 27 May 2015. They say that what the plaintiffs are seeking is an indulgence and ask, in my view correctly, why they should be required to adhere to what they say is an unrealistic timetable for exploration of these issues when the plaintiffs took substantially longer themselves.

That submission, in turn, needs to be considered in the context of the other work which the defendants say they are required to complete between now and the commencement of trial on 20 July. I accept, without reciting all the work that is necessary, that the defendants are facing a multi-million dollar claim, and that they should, in the three weeks remaining prior to trial, properly be permitted to focus on preparation and not simultaneously on conducting an extensive testing regime and settling further evidence.

Concrete issues

Cracks

[28] Cracking in concrete throughout the building is not pleaded as a defect as such but underpins defects (a) – (c) for the roof, (d) – (g) for the decks and balconies, and (h) – (i) and (l) for the podiums, as there is alleged damage to the concrete structure from moisture ingress.

[29] In terms of the way the evidence has developed, similar issues emerge to those in the mastic asphalt context.

[30] The plaintiffs' evidence in chief was from Messrs Crichton and Thorburn.

[31] At 13(c) of his initial brief Mr Crichton refers to inspecting decks, balconies, and undertaking invasive testing at 60 locations. He annexes to his brief a schedule identifying concrete cracks but there is no commentary in relation to it in the brief itself. Indeed, the references thereafter are of a generalised nature (see 105, 109, 112, 118 and 124). 105 is characteristic in terms:

> This lack of waterproofing has allowed water to penetrate through cracks in the surface of the nib and compromise the concrete structure, including the reinforcing steel. I refer to the evidence of Roger Thorburn.

[32] Mr Thorburn refers to identification of "systemic hairline cracking on all decks and balconies, including the nibs" and refers to photographs. But the evidence is unsupported by specific test results.

[33] In response the defendants' expert, Mr Radley, was critical of the lack of investigations undertaken by the plaintiffs' experts and therefore the lack of evidential basis for the conclusions reached.

[34] The reply evidence endeavours to meet that criticism. Mr Crichton deposes to having undertaken destructive testing of balconies 19F and 20F in April and May 2015 and to having taken core samples. Mr Grayson undertook testing and measurements at the same time. Mr Crichton also refers, for the first time, to schedules detailing the results of extensive site inspections undertaken in 2013. He notes:

> Of the 196 decks/balconies that have nibs I found that 170 had cracks in the nibs (see nib crack schedule at BD). Of the 126 balconies on the east, southern and western elevations I found cracks in 65 suffits (see suffit crack schedule at BD.

[35] Mr Thorburn in turn deposes that core sampling is the "only reliable means of measuring a crack" and relies on the further testing conducted in April and May 2015 throughout his reply. He also relies on Mr Crichton's schedules for his supplementary evidence.

[36] The critical importance of the further testing is clear from [34] of Mr Thorburn's proposed supplementary evidence where he says:

> At paragraph 9 above I set out the deck/balcony investigations which included invasive testing of Unit 19F. 'On the basis of these investigations I again reiterate that the repairs recommended by Roger Crichton are appropriate.

[37] In his affidavit in support of the adjournment application Mr Radley refers to this history and, in particular, the fact that, in his opinion as an engineer, the plaintiffs' evidence in chief did not provide a proper basis for the conclusions reached and proposed remedial works.

[38] He then says:

> 11. To give an example, at paragraph 6.4(b) of my brief of evidence, I stated:
>
> > Where cracks have been identified, there is no indication that the plaintiffs have measured a sample (or any) of the

> cracks to evaluate whether particular cracks are within the recommended crack widths of NZS 3101
>
> Mr Thorburn responds to this comment at his paragraph [35](b), relying on the destructive testing to balcony 19F in April and May 2015 – and the associated measurements by Mr Grayosn.
>
> 12. At my paragraph 6.4(d), I stated:
>
> > Further, the plaintiffs' witnesses do not appear to have exposed the reinforcing steel in a sample of balconies (or any of them) to actually check the condition of the steel.
>
> Mr Thorburn responds at paragraph [35](c):
>
> > I refer to the invasive testing on the balcony of 19F that exposed the reinforcing steel. The invasive testing confirmed that the water tracking through the cracks was starting to corrode the reinforcing steel.
>
> 13. The destructive testing carried out in April and May this year is the sort of investigation I would have expected the plaintiffs' advisors to carry out before recommending their proposed remedial works. In my opinion, a prudent engineer would also have done so as part of preparing evidence addressing the presence of cracking in the concrete structure and its potential implications for durability under the building code.
>
> 14. If this testing had been included in the plaintiffs' evidence in chief, I would have responded to it. Because it was not, and because I was not given an opportunity to observe the testing, I recommend to Downer that the defendants' experts undertake their own core sample testing (as discussed below).

[39] Mr Radley then refers to the earlier (2013) investigations not addressed in the original briefs and to which he therefore had not had an opportunity to respond. Addressing Mr Crichton's schedule of 196 decks and balconies he comments:

> 17 These schedules and the description of the basis for them, are new. If this evidence had been provided with Mr Crichton's original brief, I would have carried out the same exercise myself to test the validity of the evidence and the conclusions drawn from it.

[40] He then identifies what further testing is required by Downer's in terms:

> 20. In order to evaluate the validity of this evidence, respond to it, and to fulfil my obligations as an expert to the Court, I would recommend to Downer that it undertake (at least) the following testing:
>
> > (a) the defendants undertake their own core sample testing (similar to the plaintiffs' testing of balcony 19F); and

(b) the defendants verify the claims made by Mr Crichton as to the extent of the cracking (as alleged in his new schedules).

21. The results of that testing will also be relevant to my responses to the plaintiffs experts at the concrete/structure expert conference – and to the advice I give Downer about the claim.

22. I note that the plaintiffs' testing occurred over April and May. I am unsure how long it took Mr Crichton to inspect the balconies of 196 apartments. I anticipate that 2 months would be required to complete both core sampling and the site inspections (pursuing both in parallel to minimise the time needed). That would cover reviewing the evidence and any further documents to be provided by the plaintiffs, instructions, arranging the concrete technologists to take samples, arranging site access, undertaking the testing, reinstating the balconies, and preparing my report. The site inspections are more straightforward but there are also a large number of balconies to inspect so timing is dependent on apartment availability (whether apartment owners will allow access) and the number of balconies that can be inspected per day.

[41] Again I consider the evidence which the plaintiffs propose to call is not properly categorised as reply evidence in that it could reasonably have been anticipated in the plaintiffs' original briefs. Mr Lewis, for the plaintiffs, fairly concedes that the core sampling, described by Mr Grayson as the "only reliable means of measuring a crack" could have been undertaken in the initial round of investigations and that the defendants' experts can reasonably be expected to undertake similar testing. Again, however, he suggests that, if the defendants were sufficiently motivated, such testing could be completed by the commencement of trial or soon after and that there is sufficient flexibility within the proposed trial schedule to accommodate late provision of briefs.

[42] Again I consider that unrealistic within the context of all of the other calls on experts and counsel's time in the three weeks remaining before commencement of trial. Although, as counsel for the defendants sensibly acknowledge it may have been possible to deal with isolated evidential issues in combination with trial preparation, it is the cumulative effect of the multiple issues arising out of the amended pleadings and proposed evidence which is the problem. Mr Ladd describes this as "death by a thousand cuts" which in my view accurately expresses the challenges and frustrations faced by these defendants. Moreover, as with the mastic asphalt allegation, the proposed additional evidence and necessity for further destructive testing significantly impacts on the experts' conferences. Clearly the

issue of waterproofing to the roof, decks, balconies and podiums and associated allegations of damaged concrete structure from moisture ingress are among the most critical in the litigation.

[43] The supplementary brief of evidence of the plaintiffs' quantity surveyor, Mr Johnson, indicates that something in the order of $8.5 m of the proposed remedial costs are attributable to these issues. Experts cannot be expected meaningfully to participate in conferences where there are outstanding evidential issues in relation to allegations of this significance. To force the matter on to trial, nominally attractive though this is in terms of the Court's scheduling, would, in my view, represent a false efficiency. Without meaningful conferences this expert led litigation has all of the portents of substantially exceeding its initial time allocation and of rapidly expanding in terms of the issues requiring adjudication.

Inadequate waterproofing to parapet junction and insufficient fall to boiler room floor

[44] Similar issues arise in relation to evidence the plaintiffs now wish to call in respect of the above defects. In both cases the proposed evidence indicates that further testing has been undertaken and, in the case of the waterproofing to parapet junction, it appears that the nature of the defect has been recast to focus on the adequacy of the chase and/or slumping of the asphalt. Again I consider the evidence more accurately described as supplementary than reply evidence and again I consider the defendants are entitled to respond after appropriate testing has been undertaken.

[45] In both cases counsel for the relevant defendants fairly concede that the testing required is not as time consuming as that in respect of the asphalt and concrete issues and that it could probably be completed in approximately two weeks. They make the valid point, however, that this compounds all of the other problems they face in meeting the new evidence.

The proposed amendments

[46] I would have been prepared to grant an adjournment based solely on the considerations I have referred to above but, in my view, the case for it becomes

almost irresistible in the context of the proposed amendments to the statement of claim. These are directed to the Council and CCSNZ.

[47] In relation to CCSNZ, it now faces allegations in relation to defects (n) and (u), neither of which are pleaded against it in the existing (10th amended) statement of claim.

[48] In relation to defect (n), this had, in various iterations prior to the 10th amended pleading, been directed to CCSNZ. However, when the 10th amended statement of claim was filed on 17 November 2014 it deleted that allegation. This was the point, says Mr Quinn, at which CCSNZ formulated its strategy. No longer was it alleged that the cladding system was the source of leaks and the remaining allegations were what he describes as being of a "theoretical nature" in terms that the system would not withstand ultimate load conditions (a one in 500 year wind event). CCSNZ's evidence was therefore focused on engineering matters. In that respect CCSNZ has (Mr Quinn says responsibly) admitted that there are issues with the adequacy of the cladding panel fixings and CCSNZ has proposed a remedial solution at its approximate cost of $450,000.

[49] Although Mr Quinn accepts that in relation to defect (n), as pleaded in the 10th amended statement of claim, the Council maintained a cross claim against CCSNZ, the company was not, for reasons which its director Mr Walsh explains in his affidavit, particularly troubled about it. That is because defect (n), as pleaded in the 10th amended statement of claim concerned the rigid air barrier (a fibrous cement sheet) and CCSNZ was not responsible for that aspect of construction.

[50] All that, says Mr Quinn, has changed. Not only has CCSNZ now been re-targeted in relation to defect (n) but the nature of the allegation has changed such that it now involves the ACM panels for which CCSNZ was responsible. Mr Quinn summarises the position in his submissions in terms:

> In other words, as well as alleging that the rigid air barrier (the fibrous cement sheet) is not weathertight at the concrete nib, the plaintiffs are also alleging that the junction between the ACM panel and the concrete nib is not weathertight. Since CCSNZ was responsible for the installation of the ACM panels, the pleaded defect (n) now directly concerns it.

[51] Mr Walsh deposes that, faced with this new allegation, CCSNZ must now test all of the relevant junctions in each of the 54 affected units. That is a complex task because the plaintiffs are also alleging that adjacent locations (for example the windows and deck membranes and the junction between the rigid air barrier and the concrete nib) are leaking. The expert concerned will need to be careful that any water ingress during the tests can be attributed solely to the junction between the ACM panels and the concrete nib as opposed to other causes.

[52] The testing will involve the application of water in a controlled and consistent manner and will be in part weather-dependent. Mr Walsh deposes that he does not consider such a testing regime can reasonably be completed prior to trial. Mr Quinn says that given the responsible way in which CCSNZ has approached the litigation, and in particular its concessions to date, its director should be taken at his word. He emphasises that CCSNZ does not have the resources of the first or third defendants and the appropriateness of its expert co-ordinating with the Council's expert in relation to the necessary investigations.

[53] In my view CCSNZ adopts a reasonable position in relation to the new allegation. Although remedial costs associated with this particular defect are said to be $200,000 only, I accept that this is a substantial sum from CCSNZ's perspective and that it is entitled to conduct appropriate testing in order to meet the new allegation. I also accept as reasonable its director's concern that this cannot be achieved prior to trial. Again that has significant implications in terms of the experts' conferences scheduled to commence this week. Cumulatively these issues, in my opinion, threaten the whole purpose of the conferences.

[54] Next Mr Quinn refers to the fact that CCSNZ now faces an entirely new allegation in terms of defect (u) – ventilation ducts not connected to extract grills. This allegation, in the terms developed in the evidence, relates not simply to connection of the ducts to the grills, but the fact that the cut outs for the grills through CCSNZ's cladding system are, in 109 cases, misaligned with the outlet for the ventilation ducts (whether through the edge of the concrete beam in the vertical plane (69 instances) or the suffit in the horizontal plane (40 instances)). It is now suggested that CCSNZ undertook insitu cutting of its ACM panels and that it thus

has a responsibility for the misalignment. CCSNZ's position is that the panels, including ventilations holes, were formed in its factory. However, given that the plaintiffs now say they have identified some remnants from cut outs apparently on site, that evidence needs to be checked, involving identification of relevant witnesses to an event now more than 10 years ago. It also says it is required to test at least 25 per cent of the misaligned holes both to:

1. measure the degree of misalignment; and

2. establish whether it is such as to cause resultant damage (it suggests that, in the case of partial misalignment, moisture laden air in the ventilation ducts may still adequately escape the building).

[55] In a number of cases ACM panels will have to be removed in order to conduct this inspection and although the extract grills are substantially located within the balcony areas, CCSNZ's director deposes to OSH requirements necessitating a small mobile scaffold.

[56] I am satisfied that if this was the only issue that CCSNZ was facing then it is likely that it could be accommodated in the time available prior to trial. However, it is not.

[57] I consider CCSNZ is prejudiced by the proposed amendments to an extent which outweighs prejudice to the plaintiffs from adjournment of the trial and that the proposed amendments also significantly threaten orderly conduct of the trial by virtue of their effect on the expert conferences.

[58] For the Council, Ms Thodey emphasises the significance of the proposed amendments in terms of the new focus on inspection issues which were previously only the subject of consenting allegations. She says in respect of defect (n) that the allegation was formerly that the Council had negligently consented to the rigid air barrier in the way in which it was deployed by failing to ensure some form of sealing at the bottom of the barrier. This was reflected in the allegation in terms "the rigid

air barrier is not sealed to the concrete at the base of the wall allowing air and moisture migration into the building structure".

[59] Counsel's evidence in opposition was that this was not a pressure equalised system and therefore did not require to be sealed in the manner alleged. That proposition is now apparently accepted by the plaintiffs' experts. The allegation has therefore been changed to one in terms that the junction between the ACM panel/fibre sheet and the concrete nib is not weathertight. In terms of the proposed supplementary evidence, that allegation now appears to be substantially based on the absence of a skirt or flashing.

[60] Ms Thodey therefore says that what was previously a consenting issue has now become an inspection issue and one relating to a defect of a fundamentally different character.[2]

[61] Ms Thodey says that, in consequence, the Council must now undertake the following process, emphasising that it is a public body, accountable to rate payers on an uninsured claim for $36 m.

1. She says that a further request for particulars is inevitable to establish the precise nature of the new complaint.

2. The Council is then required to review all of the discovery to identify whether the particular plan on which the plaintiffs now apparently rely was one in the possession of Council or created on site. The question will be did the Council or should the Council have had that plan?

3. It is then required to send its technical expert to site to establish whether the particular detail exists at the building. She says it is unclear at this stage where the detail is allegedly missing (at a few junctions or across the entire building). She emphasises that at the inspection stage, where it is now alleged the Council was negligent,

[2] Mr Lewis accepted in argument that the change was significant.

not every application of a particular detail is checked. Rather, a sampling process takes place. Council will need to establish the pervasiveness of the alleged defect.

4. Technical experts will then need to establish whether the defect is causing moisture ingress. This is the same point taken by Mr Quinn. That will in turn necessitate flood and dye testing.

5. At that point Ms Thodey says the Council will need to rebrief its inspection officers identifying whether they in fact inspected the relevant detail or whether that was left to someone else and, if so, why.

6. It will then need to review that information against the producer statements received from CCSNZ in terms that the installation was code compliant. It will need to consider any plaintiffs' allegation that the producer statements did not cover a particular junction detail. She notes CCSNZ's position that it was not responsible for installing any skirt flashing.

7. Next the Council needs to establish how to remedy any acknowledged problem. Will the panels have to be removed and how much will the remedial solution cost?

8. Finally, it will need to consider implications in terms of affirmative defences. If, for example, it is said that these defects were so clearly apparent that they should have been observed by a Council inspector, then that may have implications in terms of defences against subsequent purchasers on the basis that, if patently visible to a Council inspector, it should likewise have been visible to a pre-purchase inspector.

[62] I accept that to progress responsibly these inquiries will take significant time. Parallel inquiries will need to occur in respect of the many further defects which it is

now said Council should have identified at inspection stage. That, in turn, needs to take place in tandem with extensive further testing in relation to the mastic asphalt product and the concrete cracking. Cumulatively this creates, in my view, an untenable situation for the Council if it is forced into trial on 20 July and again the implications in terms of the proposed experts' conferences cause me considerable concern.

[63] Both Ms Thodey and Mr Ladd also point to the additional work required to meet the significantly increased quantum of claim. Because this is largely driven from an extrapolation of building costs through to February 2017, expert evidence suggests the necessary involvement of economists. While in isolation both counsel accept this matter could have been dealt with, albeit not before trial commencement, they again invoke the 'death by a thousand cuts' metaphor.

Have defendants done all they reasonably can to avoid adjournment?

[64] I accept that the applications for adjournment have been promptly made, properly supported and diligently prosecuted.

[65] My pre-trial conference minute of 3 June 2015 recorded by consent that, if the defendants were to make an application for adjournment of trial, they were to do so by 26 June with a view to a two day hearing in the week commencing 29 June. With the co-operation of all counsel and of the Court that timetable has been able to be accelerated.

[66] Mr Lewis submits, however, that the problems which he candidly admits have been created by some of the proposed evidence and amendments have been exacerbated by delays on the part of some defendants in provision of their briefs. That there was such delay by the Council and CCSNZ is undisputed. No criticism can, however, be levelled at Downer which was fully compliant in relation to provision of its evidence.

[67] I accept that in relation to some of the matters considered in the context of this application more timely provision of the Council's and CCSNZ's briefs *may* have allowed conclusion of the relevant testing prior to commencement of trial. But

Downer's application stands free of that criticism and there is also the point, emphasised by Mr Quinn, that a significant component of the additional testing now required relates to late amendments to the statement of claim involving new allegations against his client and the Council.

[68] Although there is some validity in what Mr Lewis says, in my view, the point is not one determinative of the application.

Summary

[69] Having considered counsel's careful submissions and balancing justice to the parties seeking the adjournment against justice to the plaintiffs in their desire to retain the fixture I consider the applications must be granted.

[70] That conclusion is with considerable reluctance for the reasons previously indicated and cognisant also of the disappointment that will be felt by the plaintiffs. I accept they face very considerable personal distress in owning unremediated apartments and funding litigation of this scale. However, to put the matter in its full context, it does seem to me significant that a previous 2014 fixture for this case was adjourned at the request of the plaintiffs in consequence of the unavailability of a façade expert and also that the remedial works themselves are not scheduled to commence until February 2017.

[71] In addition, I note also the commitment of all parties to a mediation of this dispute if allowed adequate time to conduct additional testing and for the experts to meet in conference. Such a mediation will now occur in October 2015.

[72] I commend the parties for their willingness to engage in such a process.

Result

(a) I grant the applications of the first, third and fourth defendants seeking adjournment of the fixture scheduled to commence on 20 July 2015.

(b) A new fixture will now be allocated by the Registry. As I understand it, the proposed new dates are 18 April 2016 or 18 July 2016.

(c) Consistent with the basis on which the argument took place I grant leave to the plaintiffs to:

(i) File the amended statement of claim annexed to the affidavit of Emily Anne Schwikkard, affirmed 12 June 2015.

(ii) Add an additional second plaintiff to the proceeding, Ms Sandie Alexandra Casano-Smirk.

(iii) Admit the briefs of evidence filed and served on 12 June 2015 (reserving any subsidiary challenges (for example hearsay) but resolving now existing challenges to admissibility on the basis that the evidence was not properly in reply).

(d) I invite the parties to settle a consent memorandum by Friday 3 July 2015 in which they identify a timetable for:

(i) completion of all outstanding investigations;

(ii) service of defendants' briefs responding to supplementary evidence;

(iii) conduct of all experts' conferences;

(iv) mediation;

(v) a proposed date (by month) for a reconvened pre-trial conference.

[73] I record my expectation, noted at the conclusion of the hearing, that the experts' conferences be scheduled to conclude by the end of September 2015 and that the proposed mediation take place in October 2015.

[74] To the extent matters cannot be settled by consent memorandum, individual memoranda are to be filed by the same date. If necessary I will convene a telephone conference.

[75] In relation to the adjournment application I reserve costs.

Muir J