



What's the limit?

Time bars and amended claims on defective building work.

IT MAY STILL BE POSSIBLE TO ARGUE THAT NEW AND DISTINCT DEFECTS CLAIMED AFTER A 10 YEAR LIMITATION HAS PASSED REPRESENT A NEW CAUSE OF ACTION AND SO SHOULD BE TIME BARRED.

An issue we encounter when representing councils in claims about defective building work is that the plaintiff sometimes amends the claim to include an entirely new category of building defects.

The claim, which might start out as a leaky building claim, might later be amended to include fire defects or structural defects. Often the amount of the claim sky rockets as a result of the newly-added defects.

The investigation required to evaluate the newly-claimed fire defects or structural defects is an entirely different enquiry to the investigation adopted for the originally-claimed leaky building defects.

Different experts will be required to provide advice such as a fire engineer or structural engineer and the method of repair is quite distinct from that required to remediate leaky building defects.

In addition, the amendment to the claim often occurs after the claim has been on foot for many years. In some cases the amendment occurs well after the Building Act 2004 10 year limitation period has expired.

When the 10 year limitation period has passed, the council has no ability to bring third party claims against those involved in causing the fire defects or structural defects. These parties might include the fire engineers or structural engineers who were involved during construction.

The unfairness of this situation to councils is clear.

This has raised the question of whether the belated introduction of a distinct and new category of building defects in a claim where 10 year limitation has passed, represents a new cause of action allowing councils to argue the new defects are time-barred given the expiry of the limitation period.

This has been considered by the High Court and more recently by the Court of Appeal.

In the decision of *ISP Consulting Engineers Limited v Body Corporate 89408 & Ors* [2017] NZCA 160, the Court of Appeal considered the situation where the plaintiffs amended their leaky building claim to include structural defects more than 10 years after limitation had expired.

The defendant argued the newly-claimed structural defects were a new cause of action and should be time barred. The plaintiffs argued the structural defects were not a new cause of action but were merely a particular of the already-claimed breach of duty of care by the engineers.

The Court of Appeal summarised the law stating that if an amended pleading puts forward a new legal basis for a claim, then that on its face will be a new cause of action.

The court concluded the assessment is objective and the consideration must be of the substance of what is claimed rather than the form.

In effect, the assessment is based on whether the newly-pleaded defects put the defendant on a fundamentally different enquiry.

In this case, the engineers had always been sued for negligence and there was no change to that in the amended claim.

While the plaintiffs had originally claimed for leaky building defects, interestingly, the Court of Appeal concluded those leaky building defects were not exclusively leaky building defects but that some descriptions of the leaky building defects had a structural component.

For this reason, the Court of Appeal concluded the newly-claimed structural defects did not represent a new cause of action and so were not time barred.

Nevertheless, it may still be possible in the appropriate case for councils to argue that new and distinct defects claimed after a 10 year limitation has passed represent a new cause of action and so should be time barred. **LG**