

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA259/2022
[2024] NZCA 313

BETWEEN	ANTHONY JAMES REA AND JUDITH MARY REA AS TRUSTEES OF THE WAIATARUA TRUST Appellants
AND	AUCKLAND COUNCIL First Respondent
AND	360 DEGREES LIMITED Second Respondent
AND	ANTHONY MARK CATHRO Third Respondent
AND	TONY CATHRO CONSTRUCTION LIMITED Fourth Respondent

Hearing:	6 June 2023
Court:	Courtney, Katz and Wylie JJ
Counsel:	T J Rainey, N Stone and D A Cowan for Appellants T Weston KC, E P Colenbrander and JRJ Knight for First Respondent No appearances for Second, Third and Fourth Respondents
Judgment:	15 July 2024 at 10.30 am

JUDGMENT OF THE COURT

- A** The appeal is dismissed.
- B** The appellants must pay the first respondent costs on a band A basis for a standard appeal and usual disbursements. We certify for second counsel.

REASONS OF THE COURT

(Given by Courtney J)

Introduction

[1] In September 2021, Mr and Mrs Rea filed proceedings against a number of parties, including Auckland Council, claiming the costs of repairing defects in the residential property they owned as trustees of the Waiatarua Trust. They alleged negligence by the Council in relation to a Code Compliance Certificate (CCC) issued in 2013.¹ The primary period under s 11(1) of the Limitation Act 2010 had expired in early 2019. The Council applied to strike out the claim on the ground that it was time-barred. Associate Judge Taylor granted the application.² Mr and Mrs Rea appeal against that decision.

[2] Mr and Mrs Rea maintain that the time in which a claim could be brought was extended by the late-knowledge provisions in the Limitation Act and that the “late knowledge” date is after 9 September 2018, less than three years before the claim was filed and therefore within time.³ The issues on appeal are:

- (a) What is required for the appellants to have “late knowledge” under ss 11 and 14 and in particular:
 - (i) What is the “act or omission” on which the claim against the Council is based, for the purposes of s 14(1)(a) and (b)?
 - (ii) For the purposes of s 14(1)(c), do the appellants require knowledge of a causal connection between the act or omission on which the claim is based and their loss or damage?

¹ Other allegations of negligence were made that pre-date the issue of the CCC, but we confine our discussion to the CCC as it is the latest act or omission in time.

² *Rea v 360 Degrees Ltd* [2022] NZHC 916.

³ Sections 11(2), (3) and 14(1).

- (b) When did the appellants gain actual or constructive “late knowledge” for the purposes of s 14(1)?
- (c) Is it arguable that some of the appellants’ claims against the Council constitute a fresh cause of action that is not time barred?

The facts of the case

[3] The property is a split-level dwelling with an internal-access double garage in a basement. The building consent, issued on 18 December 2012, also included reinforced masonry concrete block retaining walls and decks. The property was developed by 360 Degrees Ltd and built by Tony Cathro Construction Ltd, of which Mr Cathro is a director and shareholder.

[4] The CCC was issued on 18 October 2013. The same day, 360 Degrees purchased a Master Build Guarantee under which Master Build Services Ltd (MBS) guaranteed the obligations of the builders to rectify workmanship defects for two years after completion. It also covered structural defects causing actual physical damage within 10 years of practical completion. Under the Master Build Guarantee the primary responsibility for remedying defects fell to the builder, but if the builder failed to undertake the work, MBS could be required to do so.

[5] Mr and Mrs Rea purchased the property in February 2014, in their capacity as trustees of the Waiaturua Trust. They took an assignment of the Master Build Guarantee. In August 2014, they notified MBS of some minor workmanship issues and were advised to contact the builder directly. The builder returned to the property and undertook the necessary work. However, by November 2015, the builder was no longer carrying out this work so Mr and Mrs Rea contacted MBS.

[6] MBS engaged building surveyors, Maynard Marks Ltd, in February 2016. Maynard Marks identified 31 defects in their report dated 10 March 2016. Seven defects were described as potentially constituting breaches of the building code.⁴ Two deviations from the consented plans were also identified. Maynard Marks

⁴ See Building Regulations 1992, sch 1.

advised that an opinion be sought from a structural engineer in relation to two areas — the foundations and the retaining walls.

[7] ACH Consulting Ltd (ACH) were engaged and reported to Maynard Marks on 24 May 2016. ACH identified four structural and weathertightness issues and advised: work to the northern foundations, monitoring of and preventive work to the southern foundations, work to the northern retaining wall and work to the southern retaining wall. In addition, the report identified some non-structural issues, being water leaching through the back wall of the garage and cracking of the overlay applied to the garage floor. The ACH report did not attribute any of these defects to any failure by the Council.

[8] On 23 March 2017, Maynard Marks issued a second report which provided a scope of works covered by the Master Build Guarantee. This included the work identified in the ACH report.

[9] On 19 October 2018, Mr and Mrs Rea engaged engineering and surveying consultants, Fraser Thomas Ltd, to report on the compliance of the house under the building code. In its report of 19 March 2019, Fraser Thomas identified: defects in the garage block work, including mould on the internal face of the block walls; cracking and delamination of the garage floor slab; defects in the foundations on the north and south sides; defects in the retaining walls on the north and south sides; and defects in the timber stairs on the south side. It also identified a number of non-structural defects.

[10] On 30 March 2019, Mr and Mrs Rea applied to the Ministry of Business, Innovation and Employment | Hīkina Whakatutuki (MBIE) for a determination under the Building Act 2004 in relation to the CCC issued by the Council.⁵ During the course of the determination, further reports were commissioned from a building surveyor and a structural engineer. The building surveyor identified several new issues including non-compliance with the building code in relation to issues previously identified by Maynard Marks as non-building-code issues. The structural engineer confirmed the structural defects identified in the earlier reports. On 4 May 2021, MBIE issued a final

⁵ See Building Act 2004, pt 3 sub-pt 1.

determination in which it concluded that the Council was correct to issue the CCC but that, on the information before it, the house did not comply with the building code.⁶ The CCC was therefore reversed.

The case in the High Court

The pleadings

[11] The statement of claim was filed on 9 September 2021. As against the Council, it alleged a variety of negligent acts and omissions relating to the construction of the house, the latest in time being the issuing of the CCC. It asserted that the Council owed Mr and Mrs Rea a duty to exercise reasonable skill and care in carrying out its functions under the Building Act. It pleaded that a reasonably skilled and prudent council officer would have addressed the defects identified in the various reports (including the Maynard Marks, ACH and Fraser Thomas reports). It was alleged that, as a result of those defects, together with “[a]ny additional defects to the Dwelling that may be discovered before trial” and the manner in which the house was constructed, the house had sustained damage, and Mr and Mrs Rea had suffered losses including the cost of repairs.

[12] The Council’s statement of defence raised the Limitation Act as an affirmative defence on the basis that the alleged acts or omissions of the Council had occurred on or before 18 October 2013, with the proceedings filed at least six years after those acts or omissions.

[13] Mr and Mrs Rea filed a reply, which was a bare denial, with no mention of late knowledge.

The strike-out application

[14] The Council brought its strike-out application on the grounds that (1) the alleged negligence occurred more than six years before the proceeding was filed, (2) prima facie the proceeding was outside the primary limitation period prescribed by

⁶ Ministry of Business, Innovation and Employment | Hikina Whakatutuki *Determination 2021/008 Regarding the authority’s decision to issue a code compliance certificate for a new dwelling at 19A Te Atatu Road, Auckland* (4 May 2021).

s 11 of the Limitation Act and (3) there was no pleading or other assertion that the primary limitation period had been extended or postponed.

[15] Mr and Mrs Rea opposed the application on the grounds that the claim was brought within the late knowledge period or, alternatively, that the essential parts of the claim were made within the primary period.⁷ On the first ground, they submitted that the “late knowledge” period under s 14(1) ran from the receipt of the Fraser Thomas report in March 2019, because it was not until receipt of that report that Mr and Mrs Rea had sufficient knowledge of the defects due to negligent advice in the previous reports. On the second ground, in the alternative, they submitted that the primary period under s 11(1) ran from the date of the Fraser Thomas report. The second ground relied on several English cases involving reliance by plaintiffs on negligent expert advice, where the courts had considered that the plaintiffs should not be penalised for the inadequacy of the advice received.⁸

[16] The Judge identified the relevant principles applying to strike-out applications, both generally and those brought on limitation grounds.⁹ As to the latter, he noted the Supreme Court’s observations in *Murray v Morel & Co Ltd*:¹⁰

... in order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the Court that the plaintiff’s cause of action is so clearly statute-barred that the plaintiff’s claim can properly be regarded as frivolous, vexatious or an abuse of process. If the defendant demonstrates that the plaintiff’s proceeding was commenced after the period allowed for the particular cause of action by the Limitation Act, the defendant will be entitled to an order striking out that cause of action unless the plaintiff shows that there is an arguable case for an extension or postponement which would bring the claim back in time.

[17] The Judge dismissed the arguments advanced on behalf of Mr and Mrs Rea. He held that s 11 does not involve any element of knowledge and the primary period

⁷ These were the grounds actually advanced at the hearing and referred to by the Judge: see *Rea v 360 Degrees Ltd*, above n 2, at [38]. The notice of opposition contained a number of other grounds that were not advanced in either written submissions or (apparently) oral argument.

⁸ *Oakes v Hopcroft* (2000) 56 BMLR 136 (CA); and *Gravgaard v Aldridge & Brownlie (a firm)* [2004] EWCA Civ 1529, [2005] PNL 19.

⁹ *Rea v 360 Degrees Ltd*, above n 2, at [47]–[49], citing High Court Rules 2016, r 15.1; *Attorney-General v Prince* [1998] 1 NZLR 262 (CA) at 267; and *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

¹⁰ *Rea v 360 Degrees Ltd*, above n 2, at [49], citing *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [33].

has to be calculated from the date of the act or omission on which the claim was based.¹¹ The submission that the primary period did not commence until the plaintiffs acquired particular knowledge was therefore incorrect. The primary period ran from the date of the CCC and had expired by the time the proceedings were commenced.

[18] As to the issue of late knowledge, the Judge rejected the submission that Mr and Mrs Rea did not have the requisite knowledge until the defects were fully exposed by the Fraser Thomas report.¹² He accepted the Council's submission that, even on Mr and Mrs Rea's own analysis, most (12 of 19) of the defects complained of had been identified in the reports that preceded the Fraser Thomas report.¹³ He did not accept that any assistance could be drawn from the English cases relied on because there was no evidence to suggest that the earlier reports had been prepared negligently.¹⁴

[19] The Judge concluded:

[66] ... it is clear that upon receipt of the ACH Consulting Ltd report in May 2016, the respondents had sufficient knowledge of the defects and economic loss resulting from them (assisting in the reduction in value of the house due to the defects) to have acquired late knowledge for the purpose of s 14 of the Act. Consequently, the claim against the defendant was filed after the late knowledge period of three years had expired and the Council have a defence to the claim under s 11 of the Limitation Act.

What is required for Mr and Mrs Rea to have late knowledge?

Mr and Mrs Rea's argument on appeal

[20] Subject to the arguments addressed at [72] below, Mr and Mrs Rea now accept that the primary period under s 11 had expired before the proceeding was filed. Their argument on appeal rests on the late knowledge ground.

[21] Under s 14(1), a claimant does not have late knowledge of a claim unless they prove that, at the close of the start date of the primary period (in this case

¹¹ *Rea v 360 Degrees Ltd*, above n 2, at [57].

¹² At [66].

¹³ At [64].

¹⁴ At [65].

18 October 2013), they neither knew, nor ought reasonably to have known of the facts specified in s 14(1). Those facts, relevantly, include:¹⁵

- (a) the fact that the act or omission on which the claim is based had occurred;
- (b) the fact that the act or omission on which the claim is based was attributable (wholly or in part) to, or involved, the defendant; and
- (c) if the defendant's liability or alleged liability is dependent on the claimant suffering damage or loss, the fact that the claimant had suffered damage or loss.

[22] Mr Rainey, for Mr and Mrs Rea, started from the position that, to establish the claim in negligence against a council arising from building defects, a claimant needs to prove that the defects were ones that a reasonably skilled and prudent council ought to have identified and which would have precluded the issuing of a CCC. Mr and Mrs Rea allege that the Council failed to ensure that the building work authorised under the building consent complied with the building code, and therefore should not have issued the CCC. Mr Rainey argued that s 14(1) required Mr and Mrs Rea to know (actually or constructively) that there were breaches of the building code, that those breaches were matters the Council ought to have identified and that those breaches were causative of their loss. He argued that the reports, which pre-dated the Fraser Thomas report, did no more than identify errors by the builder as opposed to errors by the Council. Therefore, Mr and Mrs Rea neither knew, nor could reasonably have known, of the relevant facts until 19 March 2019 when they received the Fraser Thomas report.

[23] The Judge's analysis was criticised as wrongly equating knowledge of the defects with knowledge of the facts necessary to establish negligence on the part of the Council, or, at the very least, knowledge of facts that would reasonably cause a prudent and honest claimant to investigate the Council's conduct.

¹⁵ Limitation Act 2010, s 14(1)(a), (b) and (c).

The Law Commission's recommendations

[24] The extent of the knowledge required of the facts specified in s 14(1) has not attracted much judicial, or other, attention. Mr Rainey's submissions relied largely on the Law Commission reports that pre-dated the current Act. We therefore start by considering those reports.

[25] Under the Limitation Act 1950, time ran for most causes of action (including negligence) from the accrual of the cause of action.¹⁶ For some 20 years leading up to the introduction of the current Limitation Act, the Law Commission and the courts had expressed concern at the complexity of the regime, including particularly the potential for unfairness in relation to claimants who were unaware of the facts necessary to bring a claim until after the limitation period had expired.

[26] The 1988 Law Commission report, *Limitation Defences in Civil Proceedings*, recommended a new limitations regime of fairly general application with three new central features: a standard limitation period starting on the date of the act or omission that was the subject of the claim, extension of the standard period when the claimant showed an absence of knowledge of relevant facts, and a "long stop" limitation period of 15 years.¹⁷

[27] Explaining the "act or omission" formula, the Law Commission said:

169 In most cases the date of the "act or omission" will be clear. It refers to that conduct of the defendant of which the claimant complains. In relation to a contract, it will usually be the date of breach and thus correspond with the present rule as to the date of accrual. In other cases, the act or omission may be an earlier date than accrual – in negligence, for example, where a delay in the occurrence of damage would relate to our proposed extension provisions rather than the date of accrual. ...

[28] It considered that the relevant facts that a claimant would need to know for the purpose of extending the standard limitation period should be:¹⁸

- (a) the occurrence of the act or omission;
- (b) the identity of the person responsible;

¹⁶ Limitation Act 1950, s 4.

¹⁷ Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) at [128].

¹⁸ At [180].

- (c) the act or omission has caused harm;
- (d) that the harm is significant.

[29] In its 2000 report, *Tidying the Limitation Act*, the Law Commission again addressed the need for a means of extending the standard limitation period where the relevant facts were not (and could not) have been known within time.¹⁹ By this time, it had been settled by *Invercargill City Council v Hamlin* that a cause of action in negligence based on latent building defects does not accrue until the damage has either been discovered or is reasonably discoverable.²⁰ However, the Law Commission recognised the need to address more generally the issue of time running against a claimant before they become aware of the existence of facts on which their claim is based. It identified two approaches to reform in this area:²¹

- 11 ... One is to define the commencement date of the limitation period by substituting for the date the cause of action arose, the date by which the plaintiff either knew or ought reasonably to have discovered the facts on which the claim is based. ... The second, which we prefer (consistently with the view expressed in paragraph 168 of our 1988 report), is a solution that squarely places on the intending plaintiff the onus of establishing that the relevant facts were neither known or reasonably discoverable by the plaintiff for the period asserted. ... So what we recommend is that time should continue to run from when the cause of action arose, but that time should not run during any period in respect of which the plaintiff establishes that the plaintiff was unaware of the facts on which the claim is based and that such facts were not reasonably discoverable.
- 12 This solution, which we advanced in our preliminary paper, has been criticised because “it perpetuates the irrational distinction between those causes of action where proof of damage is an element, and those where it is not”. In fact, of course, it is inherent in the existence of different causes of action that they should have different elements, and it scarcely advances discussion of limitation problems to complain that these differences are irrational. It is in our view very important that in respect of the primary limitation period, the onus being on the defendant to show that the plaintiff is out of time, the date from which time runs should be defined in terms that are as certain and objectively ascertainable as possible, and that in relation to matters turning on the knowledge or potential knowledge of the plaintiff, it is on the plaintiff that the onus should lie.

¹⁹ Law Commission *Tidying the Limitation Act* (NZLC R61, 2000) [Law Commission (2000)].

²⁰ *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 526.

²¹ Law Commission (2000), above n 19 (footnotes omitted).

[30] The Law Commission proposed a new section (s 28A) be inserted in the Limitation Act 1950 which would provide:²²

28A Where in the case of any action for which a period of limitation is prescribed by this Act the plaintiff establishes that immediately after the cause of action arose the plaintiff either knew or ought to have known the following facts, namely—

(a) That the loss, injury or damage for which the plaintiff seeks a remedy had occurred; or

(b) That such a loss, injury or damage was attributable to the defendant,—

the period of limitation shall not begin to run until the plaintiff discovers such facts or could with reasonable diligence have discovered them, but an action seeking a remedy for such loss, injury or damage may not be brought against any person 10 years or more after the date on which the cause of action accrued.

[31] Relatedly, it proposed an additional provision:

In sections 4 and 28A of this Act, references to the date of accrual of a right of action mean the date when all facts necessary to establish the claim are in existence whether or not their existence is known to the plaintiff.

[32] A 2007 miscellaneous paper for the Law Commission, *Limitation Defences in Civil Cases: Update Report for the Law Commission*, again considered what knowledge a plaintiff should have to start time running under an extended knowledge period.²³ It compared two possible approaches — requiring knowledge only of the injury loss or damage or, alternatively, requiring the knowledge necessary to enable an action to be brought:

127. What knowledge must a plaintiff have to start time running under a knowledge period? Broadly there are two magnetic poles of attraction.

128. *Knowledge of injury, loss or damage.* The contention is that time should not run until discovery of the injury, loss or damage ... Lack of knowledge of facts entitling a plaintiff to bring a claim (apart from injury, loss or damage) is not a ground for a knowledge based extension of time on this basis. The New Zealand cases on discovery of the damage are examples of this approach.

²² At [14].

²³ Law Commission *Limitation Defences in Civil Cases: Update Report for the Law Commission* (NZLC MP16, 2007) [Law Commission (2007)].

129. *Knowledge necessary to enable an action to be brought.* This is wider than knowledge of the injury, loss or damage. Since there is more to know, a knowledge based extension on this basis will favour the plaintiff. How much more is considered in *Haward v Fawcetts* [2006] 3 All ER 497 (HL), but in the context of specific legislation.
130. At the extreme, if a knowledge based period depends on the plaintiff knowing everything there is to be known about the facts entitling a plaintiff to bring a claim, then for practical purposes there might as well be no start date based simply on the occurrence of an event (whether known or unknown) from which time begins to run. The knowledge based extension will in every case override the “occurrence” start date.

[33] The paper referred to the recommendation in the Law Commission’s 2000 report that the start date under a knowledge period be the discovery of injury, loss or damage, and that the injury, loss or damage was attributable to the defendant and observed that:

133. ... Once damage has been discovered or is suspected, it seems reasonable to require a plaintiff to start investigating and that time should run from the time when the plaintiff should have started investigating – that is when the injury, loss or damage is discovered – rather than defer the start date until the plaintiff knows the whole story.

And recommended that:

137. A knowledge period should be based on discovery (or knowledge) of the injury, loss or damage, and nothing more. Discovery of injury, loss or damage should trigger investigation, including investigation into cause and to the responsibility of the defendant. ... It is recommended that the knowledge required for the purposes of the knowledge period is knowledge of the injury[, loss or damage.

The current statutory scheme

[34] Parliament’s intention was to clarify and simplify the limitation regime. The stated purpose of the current Limitation Act is to encourage claimants to make claims for monetary or other relief without undue delay by providing defendants with a defence to stale claims.²⁴ The accrual of a cause of action as the mechanism for starting time running was abandoned in favour of a single formula applying to all money claims, namely the act or omission on which the claim is based.²⁵

²⁴ Limitation Act 2010, s 3.

²⁵ Section 11(1). Compare with Limitation Act 1950, ss 4 and 5.

The “primary period” of six years (or two years in the case of defamation) runs from the date of the act or omission on which the claim is based.

[35] The time for bringing a claim is, however, extended if the claimant has “late knowledge” of specified facts and brings their claim after the primary period. Such a claimant may bring their claim within three years of acquiring actual or constructive knowledge of those facts (the “late knowledge period”).²⁶ This is intended to address the potential unfairness to claimants who do not become aware of their right to claim until after the primary period has expired. A long-stop period of 15 years from the date of the act or omission on which the claim is based provides certainty for defendants.²⁷

[36] The onus is on the defendant to show that a claim has been brought outside the primary period. However, a plaintiff who asserts late knowledge bears the onus of proving that, at the close of the start date of the primary period, they did not have actual or constructive knowledge of the facts required for late knowledge.²⁸ If they discharge that onus, the burden shifts back to the defendant to show that the late knowledge date is three years or more before the filing of the proceedings.²⁹

[37] Section 11 provides for both the primary and late knowledge periods:

11 Defence to money claim filed after applicable period

- (1) It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based (the claim’s **primary period**).
- (2) However, subsection (3) applies to a money claim instead of subsection (1) (whether or not a defence to the claim has been raised or established under subsection (1)) if—
 - (a) the claimant has late knowledge of the claim, and so the claim has a late knowledge date (*see* section 14); and
 - (b) the claim is made after its primary period.

²⁶ Limitation Act 2010, ss 11(2), 11(3)(a) and 14.

²⁷ Section 11(3)(b).

²⁸ Section 14(2).

²⁹ *Body Corporate 449665 v CMP Construction Ltd* [2023] NZHC 449 at [54].

- (3) It is a defence to a money claim to which this subsection applies if the defendant proves that the date on which the claim is filed is at least—
- (a) 3 years after the late knowledge date (the claim's **late knowledge period**); or
 - (b) 15 years after the date of the act or omission on which the claim is based (the claim's **longstop period**).

[38] The “late knowledge date” for the purposes of s 11(2) and (3) is defined in s 14:

14 Late knowledge date (when claimant has late knowledge) defined

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

[39] There is nothing specific in the parliamentary material preceding the introduction of the Limitation Act to indicate the extent to which s 14(1) was intended to reflect the options considered by the Law Commission. The explanatory note to the Limitation Bill 2009 simply stated that the Bill implemented the Law Commission's recommendations to introduce a three-year late knowledge period for situations in which the claimant neither knew nor ought reasonably to have known specified facts that the claimant must know in order to make the claim.³⁰ The select committee report on the Bill simply stated that the Bill was intended to implement the Law Commission's recommendation to replace the current Act with a modern regime and outlined some minor changes to the specified facts.³¹

Interpretation of s 14(1) of the Limitation Act

[40] Mr Rainey argued that the text of s 14(1) more closely reflects the second wider approach identified by the 2007 miscellaneous paper under which a claimant would not have late knowledge until they had actual or constructive knowledge of all the facts necessary to bring the claim. Therefore, s 14(1) should be interpreted on that basis.

[41] We agree that s 14(1) requires more than just “discovery (or knowledge) of injury, loss or damage, and nothing more”, as recommended in the 2007 paper — that approach would have been satisfied by s 14(1)(c) alone. The other facts required by s 14(1) — relevantly, knowledge of the act or omission on which the claim is based and that the act or omission is attributable to the defendant — necessarily mean that the first approach was not implemented.³² But we still do not agree that s 14(1) requires knowledge of all the facts necessary to bring a claim, as Mr Rainey argues.

[42] First, it can reasonably be inferred that the drafting of s 14(1) reflects the fact that the late knowledge period (as with the primary period) applies to all money claims, including those that do not depend on proof of damage such as breach of contract and defamation. Using knowledge of damage alone as the trigger for the

³⁰ Limitation Bill 2009 (33-1) (explanatory note) at 4.

³¹ Limitation Bill (33-2) (select committee report) at 1 and 5.

³² Limitation Act 2010, s 14(1)(a) and (b). The further facts required where liability depends on consent (s 14(1)(e)) and fraud or mistake (s 14(1)(f)) do not arise for consideration in this case.

late knowledge period would have precluded a single provision for late knowledge. The inclusion of facts beyond loss or damage is therefore explicable other than by an intention that the late knowledge period would only begin once a claimant had knowledge of the much wider set of facts suggested by Mr Rainey.

[43] Secondly, while the wider approach in the 2007 miscellaneous paper was described as “knowledge necessary to enable an action to be brought”, there was nothing explicit to indicate what that knowledge was intended to be. To the contrary, the question of “how much more” knowledge was required was left open, with only a reference to *Haward v Fawcetts (a firm)* to suggest what that might be. Even then, it was noted that *Haward* was decided in the context of different legislation.³³ Mr Rainey placed significant reliance on *Haward*, but, as we come to later, we do not see it as having any relevance to the question of interpretation of s 14(1) because of the difference in the wording of the relevant statutory provision.

[44] Against those observations, we turn to consider, first, how the words “act or omission on which the claim is based” should be interpreted and, secondly, whether late knowledge requires knowledge of a causal link between the claimed loss or damage, and the act or omission on which the claim is based.

The meaning of the “act or omission on which the claim is based” in s 14(1)(a) and (b)

[45] On Mr Rainey’s argument the “act or omission” formula would require a broad interpretation. We start by looking at cases that have considered the meaning of the same phrase in the analogous context of the limitation provision in the Building Act 1991.³⁴ We accept Mr Weston KC’s submission for the Council that it can reasonably be inferred that the phrase carries the same meaning in both statutes and s 14(1) should be construed accordingly.

[46] In *Klinac v Lehmann*, Glazebrook J in the High Court considered the meaning of “act or omission on which the proceedings are based” under the long-stop provision

³³ Law Commission (2007), above n 23, at [129]–[132] citing *Haward v Fawcetts (a firm)* [2006] UKHL 9, [2006] 1 WLR 682.

³⁴ To the extent relevant here, s 393 of the Building Act 2004 mirrors s 91 of the (repealed) Building Act 1991.

in s 91 of the Building Act 1991.³⁵ The claim was based on an oral representation as to the fitness of building work and a written warranty that previous building work had complied with the Building Act. The Judge held that the acts on which the proceeding was based were the misrepresentation and entry into the agreement, not the faulty building work, which was relevant only because it went to prove the alleged misrepresentation or breach of contract.³⁶

[47] This Court's judgment in *Gedye v South* also concerned the meaning of "act or omission on which the proceedings are based" in the context of the long-stop period in s 91 of the Building Act.³⁷ The proceedings had been brought in relation to the warranty in a sale and purchase agreement as to compliance with the Building Act. The vendors had unsuccessfully applied for summary judgment on the basis that the proceeding was time-barred under s 91 because more than ten years had elapsed since the building work had been done. They appealed the High Court's refusal of the summary judgment application. The issue on appeal was whether the act or omission on which the proceedings were based was the faulty building work or completion of the sale and purchase agreement containing the warranty.³⁸

[48] This Court considered that the phrase "act or omission on which the proceedings are based" was not sufficiently precise to provide an immediate and obvious answer to the question.³⁹ The Court reviewed the history and purpose of s 91 and considered that the use of the "act or omission" formula had likely been based on the Law Commission's 1988 report but that, ultimately, it was the meaning of the words in the section and the Act as a whole, with regard to its purpose, that was determinative.⁴⁰ The Court concluded that:

[41] Subsections (3), (4) and (4A) of s 91 define the date of the act or omission on which a proceeding against an authority or certifier is based, as the date of the relevant consent, certificate or determination; or the date on which an accreditation certificate was relied on. Hence, it is not the building work itself which comprises the act or omission, but the approval of the work

³⁵ *Klinac v Lehmann* (2002) 4 NZ ConvC 193,547 (HC).

³⁶ At [50].

³⁷ *Gedye v South* [2010] NZCA 207, [2010] 3 NZLR 271 [*Gedye v South* (CA)]. Application for leave to appeal was declined by the Supreme Court: [2010] NZSC 97, [2010] 3 NZLR 271 at [5].

³⁸ *Gedye v South* (CA), above n 37, at [12].

³⁹ At [29].

⁴⁰ At [36]–[38], citing Law Commission (2007), above n 23, at [168]–[169].

(or reliance on that approval) which sets time running for the purposes of the longstop provision. ...

...

[43] We are satisfied that the terms of the section are clear. Read in context the act or omission referred to in s 91(2) is that of the defendant on which the proceeding is based. ... In this instance the basis of the proceeding was the act of warranting that previous building work was compliant.

[49] The Court expressed its general agreement with the approach taken in *Klinac*.⁴¹

[50] Mr Rainey sought to distinguish *Gedye* and *Klinac* on the basis that they involved breaches of contractual warranties. He argued that, in the context of a negligence claim against the Council for a breach of the duty owed in performance of its statutory building-control functions, the act or omission on which the claim is based is not merely the issuing of the CCC, but rather the issuing of it in circumstances where the Council did not have reasonable grounds to be satisfied that the building work complied with the building consent or the building code.. Therefore, for a claimant to have knowledge of the relevant act or omission, and that it was attributable to or involved the Council, they must also know the facts necessary to establish that the Council had breached its obligation.

[51] The fact that *Gedye* and *Klinac* involve contractual rather than tortious claims is not a valid distinction because the late knowledge provisions in ss 11(2), 11(3) and 14(1) deliberately do not distinguish between contractual and tortious claims. As discussed, the Law Commission recommended that a single approach be applied to all money claims and that was clearly the approach taken by the drafters of the Limitation Act 2010. The fact that knowledge of the same facts was intended to trigger the late knowledge period regardless of the type of claim being brought is a strong indicator that the scope of the “act or omission” formula was to be narrow, as identified in *Gedye* and *Klinac*. Also relevant is the Court’s express, albeit obiter, reference in *Gedye* to the position of authorities and certifiers in respect of which the “act or omission” was defined in s 91(3), (4) and (4A) as being the act of giving approval, without more.⁴²

⁴¹ At [44], citing *Klinac v Lehmann*, above n 35.

⁴² *Gedye v South (CA)*, above n 37, at [41].

[52] As noted earlier, Mr Rainey also sought to rely on *Haward* to argue that the knowledge required in s 14(1)(a) and (b) included the fact that the defect complained of was one that the Council should have identified. *Haward* involved alleged negligence by an accountant and concerned the question of late notice under s 14A of the United Kingdom's Limitation Act 1980.⁴³ That provision extended the limitation period where a claimant had both "the knowledge required for bringing an action for damages in respect of the relevant damage" and a right to bring the action.⁴⁴ Knowledge for that purpose included knowledge of the "material facts about the damage in respect of which damages are claimed" and "that the damage was attributable in whole or in part to the act or omission which is alleged to constitute negligence".⁴⁵

[53] It can be seen immediately that the wording of the statutory provision with which *Haward* was concerned is much broader than s 14(1). Nevertheless, Mr Rainey relied on the following observation made in *Haward*:⁴⁶

[15] In many cases the distinction between facts (relevant) and the legal consequence of facts (irrelevant) can readily be drawn. In principle the two categories are conceptually different and distinct. But lurking here is a problem. There may be difficulties in cases where a claimant knows of an admission by say, a solicitor, but does not know the damage he has suffered can be attributed to that omission because he does not realise the solicitor owed him a duty. The claimant may know the solicitor did not advise him on a particular point, but he may be totally unaware this was a matter on which the solicitor should have advised him.

[54] Applying that observation to the present case, Mr Rainey posed the question of how a claimant would know that a council had failed them until they knew the defect was something the council should have identified. That question does not advance the issue before us because it assumes that the statutory scheme in New Zealand takes the wider approach, which is the very question in issue.

[55] We note too that in *Commerce Commission v Carter Holt Harvey*, in the context of the limitation provision in s 43(5) of the Fair Trading Act 1986, which also uses the "act or omission" formula, the Supreme Court observed that the statutory

⁴³ *Haward v Fawcetts (a firm)*, above n 33.

⁴⁴ Limitation Act 1980 (UK), s 14A(5).

⁴⁵ Section 14A(6) and (8)(a).

⁴⁶ *Haward v Fawcetts (a firm)*, above n 33, at [15] per Lord Nicholls.

provisions under consideration in *Haward* were substantially more detailed and specific than those in s 43(5) of the Fair Trading Act.⁴⁷ Further, it pointed to statements in the various speeches which suggested that even under those provisions, time started to run before the claimant had enough knowledge to start proceedings:⁴⁸

Lord Nicholls himself said that to start time running there needed to be “something which would reasonably cause [the plaintiff] to start asking questions about the advice he was given”. That is a very low threshold. Lord Walker spoke narratively of time starting to run when the claimant’s knowledge about his claim was “far from complete”. Both Lord Scott and Lord Brown spoke of the claimant needing to know “the essence of the act or omission” to which his damage was attributable; and “the substance of what ultimately comes to be pleaded as his case in negligence”. Lord Mance said that actual knowledge involved knowing “enough to make it reasonable to [begin to] investigate whether or not there is a claim”.

[56] We consider that, for the purposes of s 14(1)(a), the words “act or omission on which the claim is based” have their plain and ordinary meaning. There is no reason to add any gloss to include the circumstances in which the act was done. We therefore reject Mr Rainey’s submission that a claimant needs to know all the facts necessary to show that the Council had breached the duty to exercise reasonable skill and care in the performance of its building-control functions under the Building Act. All that was required under s 14(1)(a) in this case was knowledge that the CCC had been issued.

[57] Likewise, in relation to s 14(1)(b), Mr Rainey argued that the words “act or omission on which the claim is based was attributable (wholly or in part) to ... the defendant” mean that Mr and Mrs Rea needed to know that the defects identified in the Maynard Marks report or the ACH report were attributable (wholly or in part) to the Council. This interpretation would put a gloss on the otherwise plain meaning of s 14(1)(b) that is not justified. We have concluded that in s 14(1)(a), the words “act or omission on which the claim is based” refer only to the issuing of the CCC. There is no basis on which to interpret the same words in s 14(1)(b) differently. It is not knowledge that the defects are attributable to the issuing of the CCC that is required but, rather, knowledge that the issuing of the CCC is attributable to the Council.

⁴⁷ *Commerce Commission v Carter Holt Harvey* [2009] NZSC 120, [2010] 1 NZLR 379 at [37].

⁴⁸ At [37] (footnotes omitted).

For the purposes of s 14(1)(c), do the appellants require knowledge of a causal connection between the act or omission on which the claim is based and their loss or damage?

[58] It will be recalled that “if the defendant’s liability or alleged liability is dependent on the claimant suffering damage or loss”, s 14(1)(c) requires knowledge of “the fact that the claimant had suffered damage or loss”.

[59] As noted earlier, *Invercargill City Council v Hamlin* decided that a cause of action in negligence involving latent defects to buildings accrues when the defects become so obvious that the market value of the building is affected.⁴⁹ That remains the position in terms of the accrual of the cause of action. Mr and Mrs Rea were well aware from 24 May 2016, when they received the ACH report, that the house had several structural defects. On the basis of *Hamlin*, they had, at that point, suffered loss that would have permitted them to bring an action against the Council. However, Mr Rainey argued that time did not begin to run until Mr and Mrs Rea were in a position to draw a causal connection between the damage and the act or omission of the Council.

[60] Mr Rainey submitted that it is clear from the text of s 14(1)(c) that the knowledge being referred to is knowledge of damage or loss which is causally connected to the defendant’s liability or alleged liability. A generalised knowledge that a claimant has suffered some loss is insufficient — there must also be knowledge of the facts necessary to draw the causal connection between the loss and the acts or omissions of the defendant. Mr Rainey argued that in all its reports, the Law Commission had considered it important the claimant know that they had suffered loss because of the acts or omissions of the defendant, and it is at least implicit that the facts known should be sufficient to connect the loss to the defendant.

[61] It is correct that the provision proposed in the Law Commission’s 2000 report — a new s 28A inserted into the Limitation Act 1950 — would have required knowledge either that “the loss, injury or damage for which the plaintiff seeks a remedy had occurred” or that “such loss, injury or damage was attributable to the defendant”. The second limb of that proposed provision could have had the effect for

⁴⁹ *Invercargill City Council v Hamlin*, above n 20, at 526.

which Mr Rainey contends. However, there is no indication that this requirement was ever intended to be adopted.

[62] The text of s 14(1)(c) makes it plain that the only fact of which knowledge is required under this limb is “the fact that the claimant had suffered damage or loss”. Those words do not convey, even implicitly, any requirement for knowledge of a causal link between the defendant’s act or omission, and the loss or damage. Indeed, the opening words, “if the defendant’s liability or alleged liability is dependent on the claimant suffering damage or loss”, are to the contrary. They expressly provide the prerequisite for s 14(1)(c) to be engaged but cannot be read naturally as adding to the specified fact.

When did Mr and Mrs Rea gain “late knowledge” for the purposes of s 14(1)?

[63] We have concluded that in this case that the act or omission on which the claim is based for the purposes of s 14(1)(a) and (b) is the issuing of the CCC by the Council, without more. Damage for the purposes of s 14(1)(c) will exist if there are defects that are noticeable and not minor. On the basis of our conclusions as to the proper interpretation of s 14(1), we now consider when Mr and Mrs Rea gained — actual or constructive — late knowledge of the claim. Mr Rainey argued that the information they received before the March 2019 Fraser Thomas report was not sufficient for either.

[64] In *Driver v Radio New Zealand Ltd*, Clark J considered what was required for constructive knowledge for the purposes of s 14(1) in the context of a defamation case.⁵⁰ The Judge looked to both New Zealand and United Kingdom for assistance on the question of constructive knowledge in the limitation context.⁵¹ We agree with the approach she took. *Hamlin* and *Haward*, in particular, provide sound guidance on this question.

[65] In *Hamlin*, the Privy Council considered that:⁵²

⁵⁰ *Driver v Radio New Zealand Ltd* [2020] 3 NZLR 76, [2019] NZHC 3275.

⁵¹ At [31], citing *Invercargill City Council v Hamlin*, above n 20, at 526; *Broadley v Guy Clapham & Co* [1994] 4 All ER 439 (CA) at 448; and *Haward v Fawcetts (a firm)*, above n 33, at [9].

⁵² *Invercargill City Council v Hamlin*, above n 20, at 526, citing *Dennis v Charnwood Borough Council* [1983] QB 409 (CA).

... the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious. In *Dennis v Charnwood Borough Council*, ... Templeman LJ said at p 420 that time would begin to run in favour of a local authority:

“... if the building suffers damage or an event occurs which reveals the breach of duty by the local authority or which would cause a prudent owner-occupier to make investigations which, if properly carried out, would reveal the breach of duty by that that local authority.”

In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert.

[66] In *Haward*, Lord Nicholls made the following observations.⁵³

... knowledge does not mean knowing for certain and beyond possibility of contradiction. It means knowing with sufficient confidence to justify embarking on the preliminaries to the issue of a writ, such as submitting a claim to the proposed defendant, taking advice, and collecting evidence: “[s]uspicion, particularly if it is vague and unsupported, will indeed not be enough, but reasonable belief will normally suffice.” In other words, the claimant must know enough for it to be reasonable to begin to investigate further.

[67] For the purposes of s 14(1), a claimant will have constructive knowledge of the requisite facts if they have information that would lead a reasonable person to begin investigating whether a right to claim exists. They cannot close their eyes to the obvious. They cannot postpone taking action if a reasonable person in their circumstances would take action.

[68] Mr and Mrs Rea knew from the 10 March 2016 Maynard Marks report that: the Council had issued a CCC in 2013, the house had defects that were potentially breaches of the building code and that repairs would be required. They knew from the 24 May 2016 ACH report that some of the defects were structural. The extent of the work that would be required was known to them from the 23 March 2017 Maynard Marks report.

[69] We therefore agree with Mr Weston that the information contained in these reports meant that, by 23 March 2017 at the latest, Mr and Mrs Rea had either actual

⁵³ *Haward v Fawcetts (a firm)*, above n 33, at [9], citing *Halford v Brookes* [1991] 1 WLR 428 (CA) at 443.

or constructive knowledge of all the relevant facts, namely that: the CCC had been issued on 18 October 2013; the Council had issued the CCC; there was damage to the property that was more than minor; and repairs would be required including, with some specificity, what those repairs would be. We consider it beyond argument that this information would have led a reasonable person to begin investigations, including taking legal advice. Had they sought legal advice, there can hardly be any doubt that they would have learned that the matter required urgent attention because of the limitation period.

[70] Mr Rainey argued that it was reasonable to delay investigating a claim against the Council because of the uncertainty as to the Council's involvement in the defects in the house. Further, he argued that it was reasonable to delay commencing proceedings until the MBIE determination had been received. We do not accept these submissions. The fact that the Maynard Marks and ACH reports did not expressly identify failings by the Council is not the point. A reasonable person who knew that there were potential breaches of the building code would — or ought to — have appreciated the possibility that CCC had wrongly been issued and the consequent possibility that the Council had acted negligently in issuing it. A reasonable person would have made further enquiries. A reasonable person would not have risked the expiry of the limitation period by awaiting the MBIE determination.

[71] We conclude that Mr and Mrs Rea gained knowledge of the facts required for late knowledge by 23 March 2017 at the latest. The late knowledge period therefore expired, at the latest, on 23 March 2020 and the claim against the Council is time-barred.

A fresh cause of action?

[72] As already noted, the statement of claim does not particularise the loss claimed in relation to the different defects; all the defects are pleaded together with the asserted loss being the cost of repairing both known defects and any others identified before trial. Mr Rainey submitted, however, that some of the defects pleaded are, arguably,

sufficiently separate and distinct as to amount to a fresh cause of action that is not time-barred.⁵⁴ If so, Mr and Mrs Rea should be permitted to amend their pleading.

[73] The basis on which a cause of action may be determined as fresh was reviewed by this Court in *ISP Consulting Engineers Ltd v Body Corporate 89408*.⁵⁵ The relevant principles are those set out in *Ophthalmological Society of New Zealand Inc v Commerce Commission*⁵⁶ and summarised in *Transpower New Zealand Ltd v Todd Energy Limited*:⁵⁷

- (a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another (*Leetang 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” (*Paragon Finance PLC v DB Thackerar & 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 changing 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 has already been raised and of which no fair warning has been given” (*Chilcott* at 273 noting that this test from *Harris v Raggatt* [1965] VR779 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)).

[74] As Mr Rainey acknowledged, this Court in *Pullar v R (acting by and through the Secretary for Education)* made it clear that time may start running even though the cause of every defect has not yet been identified:⁵⁸

It is not necessary, in order for time to start running, to be able to pinpoint with precision the exact cause of every defect. Indeed, that would frequently mean time could not start running until the remedial work was under way! That

⁵⁴ This argument was not raised in the High Court.

⁵⁵ *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA 160.

⁵⁶ *Ophthalmological Society of New Zealand Inc v Commerce Commission* CA168/01, 26 September 2001 at [22]–[24].

⁵⁷ *Transpower New Zealand Ltd v Todd Energy Limited* [2007] NZCA 302 at [61].

⁵⁸ *Pullar v R (acting by and through the Secretary for Education)* [2007] NZCA 389 at [19].

would in turn mean that the building owner could not sue the builder in advance of the repair work as no cause of action would have by then accrued. That is not and never has been the law. What one is concerned to ascertain is when economic loss occurred: when was the market value of the building affected? ...

[75] Mr Rainey, however, likened the present case to those which have recognised (in the context of strike-out applications) that multiple causes of action can arise in relation to the same property at different times.⁵⁹

[76] While we accept that, in some cases, the factual uncertainty as to the cause of specific defects may make striking a claim out on limitation grounds premature, we do not consider that is the case here. No draft pleading was produced showing how the pleading might be amended to include a new cause of action that is not time-barred. Mr Rainey simply submitted the various building defects could be pleaded to show a fresh cause of action based on those defects disclosed by the Fraser Thomas report. It is not tenable to suggest, on the available evidence, that a new cause of action that is not time-barred could be identified because it is evident that all but one of the structural defects identified by Fraser Thomas in 2019 had already been identified by ACH in 2016.

Garage blockwork

[77] Fraser Thomas reported significant mould on the internal face of the concrete block walls to the garage, leading and efflorescence to the garage blockwork around the stairwell, and deterioration of timber framing in the stairwell due to water ingress. It noted horizontal cracks to the plaster coating on the south, east and north elevations of the garage. It speculated as to the purpose of post-construction plasterboard lining on the western wall of the garage.

[78] ACH had identified, as a non-structural issue, the fact that the back wall of the garage had water leaching through the block wall and that there had been a repair done to the bottom corner of the wall with a paint on membrane. These defects, although

⁵⁹ See *Kay v Dickson Lonergan Ltd* HC Auckland, CIV-2005-483-201, 31 May 2006; *Body Corporate No 169791 v Auckland Council* HC Auckland, CIV-2004-404-5225, 14 November 2007; and *Colby v Pinnock* HC Auckland, CIV-2011-404-3743, 16 December 2011.

more extensively described by Fraser Thomas, were clearly evident from the ACH report.

Garage floor slab

[79] Fraser Thomas reported that the garage concrete floor slab appeared to have had an overlay installed over the original slab which had suffered from delamination and cracking. It considered the likely cause to have been inadequate preparation of the original slab and possibly insufficient thickness of the overlay product.

[80] ACH had identified extensive cracking and delamination of the overlay product from the original slab and thought that likely to have been due to insufficient preparation of the existing slab and the overlay not being thick enough.

Foundation construction

[81] Fraser Thomas identified that in several areas the base of the perimeter, foundation had been constructed above ground level which could potentially result in leakage to the subfloor hard-fill material and damage to the floor slab.

[82] ACH reported that, on the northern elevation, the perimeter foundation had been undermined due to a shallow embedment depth of the footing. It found that the perimeter foundation had been piled, which was the cause of the shallow embedment, and the shallow foundation embedment was allowing the soil to spill out from below the foundation and slab, leaving the slab partially unsupported. ACH also identified a similar problem along the southern wall of the house. There is no significant difference in the reports by ACH and Fraser Thomas on this issue.

Timber pole retaining walls

[83] Fraser Thomas identified excessive movement in the timber pole retaining walls on the north side of the building, which had resulted in gaps opening up between the paving and the dwelling. It also observed timber rails on the southern and northern retaining walls which were not adequately supported.

[84] Likewise, ACH noted there were obvious signs of movement of timber posts on the retaining wall on the northern perimeter, and that the retaining wall on the southern boundary lacked adequate support with movement and separation between the boards being observed. Again, there is no significant difference between ACH and Fraser Thomas on this point.

Timber stairs on south elevation

[85] Fraser Thomas identified that the concrete landing at the bottom of the external timber stairs on the south elevation had been constructed on steeply sloping ground without the landing being adequately embedded into the slope. This was not a matter on which ACH reported. However, in the context of the other, more serious defects identified it could not reasonably be said that this defect (being non-structural and therefore outside the scope of the ACH report anyway) could found a fresh cause of action.

Other items

[86] The Fraser Thomas report identified a variety of other non-structural engineering matters that it considered to be defects. But most of these had already featured in previous reports. Defects in the bathroom wall and shower, poor installation of the timber overlay to the kitchen floor, and cracks to the plasterboard finishing were all identified in early 2016 by Maynard Marks. Other defects such as out-of-plumb doors and rusting hinges on joinery are too minor to support a fresh cause of action.

Result

[87] The appeal is dismissed.

[88] The appellants must pay the first respondent costs on a band A basis for a standard appeal and usual disbursements. We certify for second counsel.

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