IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA65/2022
[2023] NZCA 242

BETWEEN	JUKEN NEW ZEALAND LIMITED Appellant
AND	RED STAG TIMBER LIMITED Respondent

Hearing: 14 June 2022 (further submissions received 21 and 28 June 2022)

Court: Cooper P, Mander and Fitzgerald JJ

Counsel: A R Galbraith KC and C L Bryant for Appellant
N F Flanagan and C M Fleming for Respondent

Judgment: 16 June 2023 at 11.00 am

JUDGMENT OF THE COURT

A The appeal is allowed.

B We make an order striking out those parts of the fourth amended statement of claim that seek relief in respect of representations and/or conduct by JNL prior to December 2012 and all claims (or any part thereof) based or relying on such allegations.

C Red Stag is to pay JNL's costs on the appeal calculated for a standard appeal in band A, together with usual disbursements. We certify for second counsel.

D The order for costs made in the High Court is set aside and is to be reviewed in accordance with this judgment.

REASONS OF THE COURT

(Given by Cooper P)

Table of Contents

	Para No
Introduction	[1]
The proceeding in the High Court	[8]
The High Court judgment	[24]
The issues on appeal	[31]
Submissions	[37]
Analysis	[57]
Result	[75]

Introduction

[1] This is an appeal against parts of an interlocutory judgment of Gault J declining applications to strike out and for summary judgment in respect of claims brought by Red Stag Timber Ltd (Red Stag) against Juken New Zealand Ltd (JNL) under s 43 of the Fair Trading Act 1986 (the FTA).[1] The Judge granted leave to appeal to this Court under s 56(3) of the Senior Courts Act 2016.[2]

[2] The appellant, JNL, manufactures a product called J-Frame, which is a structural framing product made of laminated veneer lumber (LVL). J-Frame is marketed and sold to merchant outlets supplying building and timber products such as Independent Timber Merchants, PlaceMakers, Bunnings Warehouse and Mitre 10, and frame and truss manufacturing factories associated with them. The product is then purchased by tradespeople, including builders working in the commercial and residential building sectors, and individual consumers.

[3] The respondent, Red Stag, produces and sells a solid wood framing product that competes with JNL in the market for structural framing. On 17 November 2017, Red Stag commenced a proceeding in the High Court, claiming that JNL had acted contrary to the FTA. Red Stag alleged that JNL had, in trade, engaged in misleading or deceptive conduct generally in breach of s 9, misleading conduct in relation to goods in breach of s 10, and had made false or misleading representations contrary to s 13(a) and (e).

---

1 *Red Stag Timber Ltd v Juken New Zealand Ltd* [2021] NZHC 2662 [High Court judgment].
2 *Red Stag Timber Ltd v Juken New Zealand Ltd* [2022] NZHC 103.

[4] Red Stag alleges that JNL has, between 2007 and 2017, made misrepresentations about J-Frame in relation to its hazard class and associated preservative treatment requirements, its compliance with building standards for timber products derived from various applicable New Zealand and Australian standards and its compliance with the requirements of the Building Code.[3] Red Stag claims that JNL's representations allowed JNL to achieve a greater share of the market for timber framing in Aotearoa New Zealand. It is said that if customers knew the true position about J-Frame's treatment and failure to comply with standards, fewer customers would have purchased it, and they would have purchased Red Stag's products instead. Red Stag also claims its sales of timber by-products were adversely affected by JNL's presence in the market and that the presence of a non-compliant product in the market adversely affected the price of timber framing products generally. Due to these adverse effects, Red Stag claims relief under s 43 the FTA.

[5] However, a potentially serious impediment to some parts of Red Stag's claim is whether they are time-barred by the three-year limitation period in s 43A of the FTA. Section 43A requires proceedings seeking relief for unlawful conduct, to be commenced within three years after the date on which loss or damage, or the likelihood of loss or damage, was discovered, or ought reasonably to have been discovered.

[6] This case turns on the proper application of s 43A. The context of this claim is an application to strike out parts of Red Stag's claim that are based on representations and conduct prior to December 2012. JNL says the High Court should have struck out those parts of the claim based on conduct prior to December 2012. Red Stag responds by asserting its right to amend its claim, which it says was otherwise commenced in time, so as to include allegations that do not constitute a fresh cause of action.

[7] The issues fall to be addressed in the context of a reasonably complex procedural setting, which it is necessary to explain.

---

3 Building Regulations 1992, sch 1 (Building Code).

The proceeding in the High Court

[8] Red Stag's proceeding was commenced in the High Court on 17 November 2017 (the 2017 proceeding). Five causes of action were pleaded, each alleging a breach of ss 9, 10, 13(a) and 13(e) of the FTA in different time periods:

(a) 2008 to December 2012;

(b) 5 December 2012 to 18 June 2015;

(c) 18 June 2015 to 9 June 2017;

(d) 9 June 2017 to late August 2017; and

(e) late August 2017 to 31 August 2017.

[9] JNL filed a statement of defence on 22 December 2017. It denied the allegations and also raised limitation as an affirmative defence, pleading that:

> [Red Stag's] claims are statute barred under section 43A of the Fair Trading Act 1986. It is more than three years after the date on which the loss or damage, or likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

[10] Section 43A of the FTA provides:

> **43A Application for order under section 43**
>
> A person may apply to a court or the Disputes Tribunal for an order under section 43 at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

[11] The arguments on appeal can only be understood in the context of the way in which the pleadings have evolved. The first cause of action, covering the period between 2008 and December 2012, relevantly alleged that at all material times J-Frame did not comply with NZS 3640 and AS/NZS 1604.4. NZS 3640 is a New Zealand standard specifying preservative retention and penetration requirements for some species of sawn and round timber. The statement of claim alleged that JNL breached the standard by not using the "glueline method" for the treatment of J-Frame.

AS/NZS 1604.4 is a joint Australian and New Zealand standard specifying treatment standards for LVL. The statement of claim also alleged that JNL had breached this standard as it had treated J-Frame to an "envelope penetration pattern" but had failed to mark the product in accordance with the requirements for that treatment set by the standard.[4]

[12] It was further alleged that during the relevant period, JNL engaged in conduct, and made representations in trade, in relation to J-Frame's compliance with applicable laws and standards, and the treatment process to which J-Frame was subject. The pleadings stated that particulars would be provided following discovery.

[13] Red Stag alleged that through this impugned conduct JNL, "being in trade", had engaged in conduct or made representations that were misleading or deceptive, or were likely to mislead or deceive. The pleadings stated that, without discovery, Red Stag was unable to particularise all breaches of the FTA by JNL during the 2008 to 2012 period, but that it "claim[ed] relief in respect of all such acts".

[14] In March 2018, JNL applied to strike out the first cause of action on the basis of a lack of particulars. It also sought to have the limitation defence heard as a preliminary question.

[15] In a judgment delivered on 19 September 2018, Associate Judge Bell struck out the first cause of action.[5] He held that the pleading of that cause of action contained insufficient particulars, applying r 5.26(b) of the High Court Rules 2016.[6] No evidence had been called suggesting it might be appropriate to let the pleading stand until discovery had been provided to enable the plaintiff to provide particulars of the claim, nor was there any basis for ordering pre-commencement discovery.[7] The claim in the first cause of action was struck out accordingly, the Judge noting that the strike out was for procedural reasons (the absence of particulars), and would not bar Red Stag from starting a fresh proceeding alleging breaches of the FTA between

---

4 Specifically, it was pleaded that J-Frame ought to have been marked with both an "E" and an envelope treatment warning label.

5 *Red Stag Timber Ltd v Juken New Zealand Ltd* [2018] NZHC 2459.

6 At [29].

7 At [28].

2008 and 2012, so long as it was "procedurally compliant" and also met "substantive requirements (including any limitation rules)".[8] There was no appeal from that judgment.

[16] An amended statement of claim was filed on 26 March 2019. As in the first statement of claim, the allegations were divided into different time periods. As a consequence of the strike out, the period between 2008 and December 2012 was omitted. The allegations for the subsequent periods, in material respects, remained the same.

[17] However, the litigation subsequently followed an unusual procedural path. On 19 December 2019, Red Stag commenced a separate proceeding (the 2019 proceeding). This included a claim in respect of the period between "2007 to 2012" which again alleged that JNL, being in trade, engaged in conduct or made representations that were misleading or deceptive, or were likely to mislead or deceive. Further causes of action were alleged in respect of subsequent periods, although they did not correspond with the periods alleged in the 2017 proceeding.

[18] JNL once more applied to strike out the claim, but the 2019 proceeding was discontinued in accordance with an agreement reached between the parties. This was recorded in a joint memorandum of counsel, dated 3 July 2020, which included the following terms:[9]

> 1 This joint memorandum is filed in relation to CIV-2017-404-2753 (the 2017 proceeding) and CIV-2019-404-2783 (the 2019 proceeding).
>
> 2 The parties have conferred in relation to [Red Stag's] proposed discontinuance of the 2019 proceeding. They have agreed it shall be discontinued on the basis that:
>
> (a) To the extent that the first and third causes of action in the 2019 proceeding are pursued in the 2017 proceeding, as amended, they shall be treated for limitation purposes as if they had been filed on 19 December 2019. [JNL] retains the benefit of any limitation (or other) defences it has, or would have had, in the 2019 proceeding.

---

8 At [29]. The formal order made by the Judge referred in evident error to part of the pleading relating to the second cause of action, instead of the first. The reasoning of the judgment makes it plain that this was simply a mistake.

9 Footnote omitted.

(b) The parties' rights are otherwise preserved. [JNL]has signalled its intention to apply to strike out that part of the amended pleading in the 2017 proceedings that corresponds with the first cause of action in the 2019 proceeding.

(c) Costs are to be determined by the Court.

3 A notice of discontinuance is filed along with this Joint Memorandum by consent and on the basis set out above. Orders as to discontinuance are sought accordingly.

[19] A third amended statement of claim was also filed in the 2017 proceeding on 3 July 2020. This was followed by a fourth amended statement of claim filed on 21 October 2020. The latter is the vehicle for the further interlocutory proceedings that have taken place. The manner in which the claim was pleaded was substantially changed by the third amended statement of claim, an approach repeated in the fourth.

[20] Instead of alleging all of the FTA breaches in separate causes of action corresponding to time periods, the discrete causes of action pleaded corresponded with each section of the FTA allegedly breached: the first concerned s 9 of the FTA, the second s 10, the third s 13(a) and the fourth s 13(e). In each cause of action, it was said that JNL "was at all material times in trade" and had engaged in the relevant unlawful conduct. There was no definition of what the material times were. However, the claims include events, and rely on relevant regulatory controls, dating back to 2007. The time frame could be ascertained by noting the use of phrases such as:

(a) "[f]rom approximately 2007 onwards", referring to the period for which Red Stag and JNL had been direct competitors in New Zealand;

(b) "[s]ince in or around 2007", referring to the period in which JNL has manufactured, promoted and supplied J-Frame in New Zealand; and

(c) "[a]t all material times", referring to the development and publication of standards by Standards New Zealand | Te Mana Tautikanga o Aotearoa. Particular pleaded standards and specifications for preservative treatment (the relevant standards) were said to have been applicable to J-Frame between 1 April 2004 to 4 April 2011, from 4 April 2011 onwards, and before and after December 2012.

[21] This is also made explicit in sch 1 to the pleading (which lists particular representations relied on alongside the requirements of the relevant standards and reasons why the representations were alleged to be false or misleading) and sch 2 (which gives the details of the promotional representations relied on by Red Stag). In each case there are references to time frames extending back to 2007, and in some cases even earlier. It is not in dispute that the amended pleading is intended to capture representations and conduct occurring well before the date when, as Red Stag concedes, it had knowledge of loss or damage for the purposes of s 43A. As noted by Gault J:[10]

> [66] Red Stag does not dispute that it was aware of these facts before 19 December 2016; that is, three years before the claim for the earlier period was reinstated on 19 December 2019. Instead, it says that its reinstated claim is not a new cause of action as it is essentially the same as its claim for the later period (and 17 November 2014 remains the relevant date). …

[22] The reference to 19 December 2019 reflects the agreement reached on 3 July 2019 in the joint memorandum of counsel that the claims were to be treated as if they had been filed on 19 December 2019, with JNL retaining the benefit of any limitation defence it had or would have had in the 2019 proceeding. Three points should be noted:

(a) Initially, the reservation of the limitation rights was in respect of the first and third causes of action in the 2019 proceeding. However, as matters have developed it is only the reference to the first cause of action that matters here, being based on conduct allegedly in breach of the FTA in the period between 2007 and 2012.

(b) Relatedly, the importance of 19 December 2019 is that on that day, by filing the 2019 proceeding, Red Stag resurrected a claim purporting to reach back prior to December 2012. The new claim, advanced by amendment to the 2017 proceeding, included claims based on conduct prior to December 2012, but expressly subject to a limitation argument that JNL could raise in the circumstance that effectively such a claim was raised in December 2019 for the first time. Although pleaded in

---

10 High Court judgment, above n 1.

the first statement of claim, that cause of action had been struck out, and could only subsequently be resurrected as if advanced for the first time in December 2019. This required a focus on the point when Red Stag had acquired the actual or constructive knowledge required for time to commence running under s 43A.

(c) The Judge found, at least for the purposes of the strike out and summary judgment applications, that the relevant knowledge had not been acquired before 17 November 2014:[11]

> … I consider that JNL falls short of showing that Red Stag knew (or ought reasonably to have known) before 17 November 2014 that J-Frame was not treated with Zelam's [glueline] treatment and that the standards arguably required that. In relation to the period after December 2012, I cannot say there is no reasonable possibility that the case was brought within time. In strike out terms, JNL has not shown that Red Stag's claim is so clearly statute-barred that it can properly be regarded as frivolous, vexatious or an abuse of process. In summary judgment terms, I cannot say there is no real question to be tried or no real doubt or uncertainty.

[23] This meant, both in the High Court and in this Court on appeal, the arguments about the application of s 43A took place on the basis that the three-year period commenced to run on 17 November 2014. This had obvious implications for any new claim advanced after 17 November 2017, the date on which the 2017 proceeding was commenced.

The High Court judgment

[24] JNL's applications for strike out and summary judgment were both based on JNL's limitation defence under s 43A of the FTA. The Judge approached the issues by considering separately the claims relating to the periods after December 2012 and the period prior to December 2012, an approach adopted in response to the arguments he heard about the way in which the three-year period referred to in s 43A of the FTA should be calculated. Determining the method of calculations required consideration of what level of actual or constructive knowledge was necessary before time would begin to run, including knowledge about the legal interpretation of the building

[11] High Court judgment, above n 1, at [60].

standards underlying the dispute. In 2012, there had been changes to the provisions of two of the relevant standards, NZS 3640 and AS/NZS 1604.4, in respect of the requirements for preservative treatment appropriate for products such as J-Frame.

[25] In relation to the period after December 2012, the Judge concluded there was a reasonable possibility the case was brought within time. JNL had not shown that Red Stag's claim was so clearly statute-barred that it could properly be struck out as being frivolous, vexatious or an abuse of process. And in the context of the summary judgment application, it was not possible to conclude there was no real question to be tried or no real doubt or uncertainty.[12]

[26] With respect to the period prior to December 2012, he concluded that JNL had not shown that Red Stag knew or ought reasonably to have known that J-Frame was not treated to comply with the relevant standards and again, in these circumstances, he could not conclude that there was no reasonable possibility that the claim had been brought within time.[13]

[27] JNL had argued that Red Stag's original causes of action were based on J-Frame's alleged failure to comply with the 2012 editions of the relevant standards, essentially because Zelam's glueline treatment was the singular compliant treatment. Because that treatment had not been used, representations that J-Frame complied with the relevant statements were a breach of the FTA. Such representations could only logically relate to the period after the 2012 edition came into force. But representations made prior to December 2012 related to whether J-Frame complied with earlier editions of the standards. A claim based on alleged breaches prior to December 2012 would have to rely on allegations that different standards had been breached. This would constitute a new cause of action. The essential nature of the claim for the period prior to December 2012 was different from the claim for the period after December 2012.

[28] But, as summarised by the Judge, Red Stag countered that its claim remained one for breach of ss 9, 10 and 13 of the FTA, based on false or misleading claims about

---

12 At [60].
13 At [74].

J-Frame's compliance with applicable treatment standards, including a failure to label J-Frame as having an envelope treatment pattern.[14] The basic claim was that JNL had represented that J-Frame complied with the prevailing standards for the relevant class of product when it did not in fact comply, and adding NZS 3604 and NZS 3602 to its pleading, did not change the claim's essential character: Red Stag had simply "clarified" the claim, rather than alleging a fresh cause of action.[15]

[29] The Judge took the test for what constitutes a fresh cause of action from this Court's decision in *ISP Consulting Engineers Ltd v Body Corporate 89408.*[16] This required him to consider whether the amended pleading was "essentially different", which he accepted was a question of degree.[17] He considered the claim for the earlier period involved "the same legal basis", namely false or misleading representations in breach of the FTA.[18] While pleading new facts might in theory create a new cause of action, the Judge thought it would be rare that factual matters would be so vital as to affect the essence of the case brought.[19] Here, "at a level of generality" the claim for the two periods involved the same alleged representations, which he characterised as "compliance with applicable preservative treatment standards". He continued:

> [72] … It is necessary, however, to view the representations in context; that is, by reference to the prevailing standards. In that sense, the effect of the alleged representations varies over time and raises different factual interpretation issues. In particular, whereas the claim for the later period focuses on not using Zelam's glueline treatment, the claim for the earlier period involves the separate factual elements that J-Frame was not treated to comply with the penetration requirement and complete sapwood penetration was not achieved or always achieved (in the alternative to the claim that the standards did not recognise boron treatment).
>
> [73] Even so, I consider on balance that the claim for the period prior to December 2012 is not essentially different to the claim for the later period. Over both periods, the primary claim is that JNL used boron treatment, which was not compliant, even though the argument for the later period is that the standards required Zelam's glueline treatment (for LVL in hazard class H1.2).

---

14 At [69].
15 At [69].
16 At [67] quoting *ISP Consulting Engineers Ltd v Body Corporate 89408* [2017] NZCA 160, (2017) 24 PRNZ 81 at [21].
17 *ISP Consulting Engineers Ltd*, above n 165, at [21(c)] quoting *Chilcott v Goss* [1995] 1 NZLR 263 (CA) at 273 quoting *Smith v Wilkins and Davies Construction Co Ltd* [1958] NZLR 958 (SC) at 961; and High Court judgment, above n 1, at [72].
18 High Court judgment, above n 1, at [72].
19 At [72] citing *Commerce Commission v Visy Board Pty Ltd* [2012] NZCA 383, at [145]–[146].

> It is the alternative claims that raise additional factual allegations regarding penetration. The alternative claims are somewhat different, but I consider that applying the essential difference test they should not be characterised as new causes of action. Also, while assessment of whether the representations were false depends on the prevailing standards, I do not consider that every change in standard requires a separate cause of action.

[30] This meant that 17 November 2014 remained the date that knowledge was acquired for the period prior to December 2012. Even though Zelam's glueline treatment was not relevant for the pre-December 2012 claims, JNL had not shown that Red Stag knew or ought reasonably to have known prior to 17 November 2014 that J-Frame was not treated to comply with penetration requirements of the relevant standards in the period prior to December 2012. Consequently, the Judge was unable to conclude there was no reasonable possibility that the case was brought within time.[20]

The issues on appeal

[31] JNL appeals against those parts of the High Court judgment declining to strike out Red Stag's claim for alleged breaches of the FTA in the period prior to December 2012. Leave to appeal was not sought in respect of the part of the claim which related to conduct after December 2012.

[32] The appeal is advanced on the basis that Red Stag was purporting to make a claim for losses alleged to have been caused by contraventions in the period prior to December 2012, when it was acknowledged that Red Stag was aware of all of the elements of the claim for those losses before it reintroduced its claim on 19 December 2019. The relevant facts for the period prior to December 2012 included that J-Frame was treated with boron and that complete sapwood penetration was not achieved. As the Judge noted, Red Stag does not dispute that it was aware of those facts before 19 December 2016, that is three years before the reinstatement of the claim for the earlier period.[21]

[33] JNL argues that if Red Stag suffered loss or damage by a contravention in the period prior to December 2012, it was required under s 43A to make an application to

---

20 At [74].
21 At [66].

recover that loss within three years of the date on which it acquired actual or constructive knowledge of the loss. It had not done so. Consequently, Red Stag's claim for losses caused by contraventions in the period prior to December 2012 was time-barred, regardless of whether the claims for later contraventions of the FTA had a similar factual basis.

[34] JNL also argues that the treatment standards at issue in the proceeding changed significantly in December 2012. JNL argues that the respects in which J-Frame did not comply with the earlier standards had an essentially different factual basis to the claim for the period after December 2012.

[35] In opposing the appeal, Red Stag's principal argument rests on r 7.77 of the High Court Rules, and the right it gives to amend pleadings as of right, including by introducing relief in respect of a fresh cause of action which is not statute-barred. The issue, as framed by Mr Flanagan for Red Stag, is whether Red Stag introduced a "fresh cause of action" when it amended its claim to include allegations about JNL's conduct before 2012. He submits it is only if that part of the claim is a fresh cause of action that it must be treated as having been brought for the first time on 19 December 2019. In that eventuality, it would have been time-barred by s 43A of the FTA. But the Judge's reasoning and conclusion on this issue were essentially correct.

[36] On the other hand, if it is not a fresh cause of action, then it is simply part of the claim brought on 17 November 2017. Mr Flanagan also argues that JNL must be taken as accepting that the question of whether the claim brought on 17 November 2017 was then out of time was a question of fact to be determined at trial, because that aspect of the High Court's judgment had not been appealed.

Submissions

[37] The issue which must be addressed is whether Red Stag was barred as at 19 December 2019 from amending its claim to include allegations of breaches of the FTA in the period from 2007 to 2012.

[38] Section 43A of the FTA required any claim to be brought "within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was

discovered or ought reasonably to have been discovered". The key submission of Mr Galbraith KC for JNL was that the alleged contraventions causing loss which were discovered more than three years prior to 19 December 2019 had already ceased to be actionable at that date and could not subsequently be resurrected by dint of a pleading argument.

[39] Rule 7.77 of the High Court Rules, on which Mr Flanagan relies, relevantly provides as follows:

> **7.77 Filing of amended pleading**
>
> (1) A party may before trial file an amended pleading and serve a copy of it on the other party or parties.
>
> (2) An amended pleading may introduce, as an alternative or otherwise,—
>
> (a) relief in respect of a fresh cause of action, which is not statute barred; or
>
> (b) a fresh ground of defence.
>
> …
>
> (4) If a cause of action has arisen since the filing of the statement of claim, it may be added only by leave of the court. If leave is granted, the amended pleading must be treated, for the purposes of the law of limitation defences, as having been filed on the date of the filing of the application for leave to introduce that cause of action.
>
> (5) Subclause (4) overrides subclause (1).
>
> …
>
> (10) This rule is subject to rule 7.7 (which prohibits steps after the close of pleadings date without leave).

[40] The drafting of r 7.77(1) confers a general right to amend a pleading, whether a statement of claim or a statement of defence. However, if the amendment of a statement of claim introduces relief in respect of a fresh cause of action, it follows from r 7.77(2)(a) that the fresh cause of action must not be one which is statute-barred. The bar against the introduction of an amendment to advance a statute-barred claim is in the rule itself; this means that the right conferred by r 7.77(2)(a) to introduce a fresh cause of action can only be exercised to introduce claims that are not statute-barred. Mr Galbraith submits the rule cannot be relied on to introduce claims that are statute-barred by joining them with claims that are not.

[41] As noted above, the Judge's approach was based on the law set out in *ISP Consulting Engineers Ltd v Body Corporate 89408*.[22] In that case, this Court said:[23]

> … The relevant principles set out in *Ophthalmological Society of New Zealand Inc v Commerce Commission* were summarised in *Transpower New Zealand Ltd v Todd Energy Ltd*:
>
> (a) A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another (*Letang v Cooper* [1965] 1 QB 232 at 242–243 (CA) per Diplock LJ);
>
> (b) Only material facts are taken into account and the selection of those facts "is made at the highest level of abstraction" (*Paragon Finance plc v D B Thakerar & Co (a firm)* [1999] 1 All ER 400 at 405 (CA) per Millett LJ);
>
> (c) The test of whether an amended pleading is "fresh" is whether it is something "essentially different" (*Chilcott v Goss* [1995] 1 NZLR 263 at 273 (CA) citing *Smith v Wilkins & Davies Construction Co Ltd* [1958] NZLR 958 at 961 (SC) per McCarthy J). Whether there is such a change is a question of degree. The change in character could be brought about by alterations in matters of law, or of fact, or both; and
>
> (d) A plaintiff will not be permitted, after the period of limitations has run, to set up a new case "varying so substantially" from the previous pleadings that it would involve investigation of factual or legal matters, or both, "different from what have already been raised and of which no fair warning has been given" (*Chilcott* at 273 noting that this test from *Harris v Raggatt* [1965] VR 779 at 785 (SC) per Sholl J was adopted in *Gabites v Australasian T & G Mutual Life Assurance Society Ltd* [1968] NZLR 1145 at 1151 (CA)).

[42] But the issue in this case of whether a cause of action may be described as "fresh" cannot be assessed without asking at the same time whether the cause of action proposed to be added is statute-barred. Mr Galbraith argued that the Judge was wrong to consider whether the allegation was fresh as the first question, when the proper approach was to ask whether the proposed amendment would be to add a claim that was statute-barred. As Mr Galbraith put it in argument, if a cause of action has not been pleaded before becoming statute-barred, the question of whether it is fresh does not arise.

---

22 *ISP Consulting Engineers Ltd v Body Corporate 89408*, above n 15. Citing *Ophthalmological Society of New Zealand Inc v Commerce Commission* CA168/01, 26 September 2001 at [22]–[24]; and *Transpower New Zealand Ltd v Todd Energy Ltd* [2007] NZCA 302 at [61].

23 At [21] (footnotes omitted).

[43] He supported these propositions by reference to observations of this Court in *Murray v Eliza Jane Holdings Ltd*, a case decided under the FTA before it assumed its current form but which nevertheless provided, in s 43(5), for a three-year limitation period as s 43A of the FTA now does.[24] When *Murray* was decided, the three-year period provided by the statute ran "from the time when the matter giving rise to the application occurred", as opposed to the current point of when the loss or damage "was discovered or ought reasonably to have been discovered", but that difference is not significant for present purposes.

[44] The Court noted, under the heading "Policy considerations" that the FTA's three-year limitation period was less than the six-year limitation period for claims and contract, and tort.[25] The Court saw this as an indication that Parliament intended to shorten and confine the limitation period as a "counterweight against the potential width and reach of the Act for the purpose of giving to those engaged in trade some reasonable certainty as to when their potential liability under the Act will come to an end".[26]

[45] Mr Galbraith also referred to the report of Te Aka Matua o te Ture | the Law Commission titled "Tidying the Limitation Act".[27] That report contained a discussion of the limitation provision in the FTA.[28] The Law Commission noted that under the wording of what was then s 43(5) of the FTA, a claim might be barred by effluxion of time before a potential applicant became aware of the existence of the facts on which an application might be made.[29] To deal with this issue, the Law Commission favoured amending the FTA to provide for a five-year limitation period from the time when the matter giving rise to the application occurred, or a three-year limitation period which ran from the date on which the loss or damage, or its likelihood was discovered or reasonably ought to have been discovered.[30] But the

---

24 *Murray v Eliza Jane Holdings Ltd* (1993) 6 PRNZ 251 (CA).
25 At 258.
26 At 258–259.
27 Te Aka Matua o te Ture | Law Commission *Tidying the Limitation Act* (NZLC R61, 2000).
28 At [15]–[18].
29 At [15].
30 At [17].

Law Commission cited the policy considerations discussed in *Murray*, that justified a shorter limitation period than applies for claims in contract and tort, with approval.[31]

[46] The Law Commission's recommendation for three and five-year limitation periods was not adopted by the legislature. However, s 43(5) was amended by s 3 of the Fair Trading Amendment Act 2001 to read:

> An application under subsection (1) may be made at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

[47] Subsequently, s 32 of the Fair Trading Amendment Act 2013 inserted s 43A in its current form. The three-year limitation period has been preserved, and time runs from the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

[48] Mr Galbraith also relied on *Blackmount Forests Ltd v Trinity Foundation (Services No 2) Ltd*, in which the lack of exceptions to the FTA limitation period was referred to.[32]

[49] Mr Galbraith argued that by its 19 December 2019 pleading, Red Stag had sought to recover relief for alleged contraventions in the period prior to 2012 which were not the subject of the March 2019 pleading, and which relate to alleged loss discovered more than three years prior to that date. This was an attempt to treat earlier contraventions as part of the same course of conduct that took place after 2012, in effect maintaining that if a claim for later conduct was brought within time, the limitation period would not apply in respect of the earlier conduct.

[50] Mr Galbraith submitted that approach was inconsistent with the terms of s 43A, and wrong in principle. The limitation period should not be regarded as suspended, because the defendant subsequently engaged in further alleged wrongful acts of a similar nature. Red Stag's proposition that it could amend the claim to allege contraventions over an earlier period that are statute-barred, and which require the

---

31 At [15] and [18].

32 *Blackmount Forests Ltd v Trinity Foundation (Services No 2) Ltd* HC Auckland CIV-2004-404-4037, 9 June 2008 at [32] citing *Murray v Eliza Jane Holdings Ltd*, above 243, at 260; and *Gosper v Re Licensing (NZ) Ltd* [1998] 3 NZLR 580 (CA) at 583.

pleading of different factual and legal matters, lacked support in any relevant authority. Effectively, Mr Galbraith argued that Red Stag was impermissibly attempting to extend its claim backwards in breach of the bar in s 43A and r 7.77(2)(a) of the High Court Rules.

[51] Mr Flanagan submitted for Red Stag that JNL's argument rested on the idea that conduct could not be pleaded by amending a statement of claim to make a new allegation barred by s 43A. He claimed that proposition was incorrect. He submitted that the High Court had correctly approached the issues by asking whether what was proposed introduced a fresh cause of action, that is, whether the amended pleading would amount to an essentially different case.

[52] Mr Flanagan submitted that while it was correct that each time a false or misleading representation was made there was a breach of the FTA, it could also be breached by conduct comprising a number of actions or omissions assessed together and cumulatively. That is now how Red Stag has formulated its claim. Whether the facts were capable of giving rise to a cause of action is a different question than whether an amendment to a pleading amounted to a fresh cause of action. Mr Flanagan claimed that JNL was conflating those two distinct questions. In this respect, he referred to the observations of this Court in *ISP Consulting Engineers Ltd v Body Corporate 89408* that:[33]

> [36] Whether facts are capable of giving rise to a fresh cause of action for limitation purposes is a different issue than the issue to be decided in the present case, which is whether the amendment to the pleading amounted to a new cause of action. These two distinct areas, the start point for limitation periods and the amendment of pleadings, involve an examination through a different lens. Significantly, in this case, the claim of structural defects plainly cannot be said to be successive and distinct. …

[53] Mr Flanagan submitted that the distinction, on which JNL relied, between discrete breaches of the FTA and the continuing course of conduct, was irrelevant. The fundamental question was whether Red Stag's claim about JNL's conduct before 2012 was essentially different from claims that had been commenced in time. It was not, because the legal basis for Red Stag's claim was unchanged. And while the claim as amended would allege further instances of contravening conduct, the questions of

---

33 *ISP Consulting Engineers Ltd v Body Corporate 89408*, above n 15.

fact at the heart of the case were the same and concerned whether JNL's labelling and marketing of J-Frame was misleading or likely to mislead, because it conveyed to consumers that J-Frame had a certain level and type of treatment which it did not have, and that it complied with certain building standards when it did not.

[54] Mr Flanagan challenged JNL's proposition that there was a significant change to the requirements of the relevant standard in 2012 and claimed that there was no clear dividing line between the applicable regulatory standards. The key issue to be determined was whether Red Stag had introduced a "fresh cause of action" when it amended its claim to include allegations about JNL's conduct before 2012. It was only if that part of the claim constituted a fresh cause of action, that it must be treated as having been brought for the first time on 19 December 2019. If not, then it was simply part of the claim brought on 17 November 2017 and Red Stag had sued within the relevant limitation period by filing in 2017. Thereafter, the question was what amendment could be made of that proceeding.

[55] Mr Flanagan argued that Red Stag did not change the basis for its claim by introducing allegations about JNL's conduct before December 2012. The claim remained that JNL breached the FTA by marketing and labelling J-Frame in a way that was misleading or likely to mislead, including by omitting to label J-Frame as having an envelope treatment pattern. The addition of further instances of that conduct did not constitute a fresh cause of action.

[56] Importantly, Mr Flanagan submitted that the material facts relied on in the fourth amended statement of claim were largely unchanged from those previously pleaded in the amended statement of claim filed on 26 March 2019. In this respect, he referred to a list of material facts set out in the amended statement of claim which were repeated in the fourth amended statement of claim, and underpinned the pre-2012 claims:[34]

> (a) J-Frame is marketed for use in framing applications as a direct alternative to solid timber products, including Red Stag's products.

[34] Footnotes omitted.

(b) J-Frame has an envelope treatment pattern. It does not have glueline treatment or full sapwood penetration.

(c) At all material times, J-Frame therefore did not comply with H1.2, Acceptable Solution B2/AS1, NZS 3640 and AS/NZS 1604.4.

(d) Nonetheless, J-Frame was marketed and sold as if it did.

(e) Moreover, J-Frame did not comply with the relevant labelling requirements, as it had envelope treatment but was not labelled with an "E" and a warning label.

(f) JNL's conduct created the overall impression that J-Frame complied with the relevant standards, was an Acceptable Solution, and had full sapwood penetration.

Analysis

[57] We consider the starting point must be s 43A of the FTA. By its terms, the right to seek relief under FTA is conditional upon the application being made within three years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered. As a general proposition, it must be the case that a claim for relief which relates to a period more than three years after the date on which the loss or damage was discovered, or ought to have been discovered, would be contrary to the statute. We consider Mr Galbraith was correct to argue that in such a case the claim cannot be made, because it is not one countenanced by the FTA.

[58] The question then is whether r 7.77(2)(a) affects that conclusion. While r 7.77(1) gives a general right to file an amended pleading before trial, that right is subject to r 7.77(4) which provides that if a cause of action has arisen since the filing of the statement of claim, it may be added only by leave of the Court. The right is also subject to r 7.7, which prohibits steps after the close of pleadings date without leave.

[59] Turning then to r 7.77(2)(a), it provides that an amended pleading may introduce relief in respect of a fresh cause of action, which is not statute-barred. This means that an amended pleading may *not* introduce relief in respect of a fresh cause of action which is statute-barred. This is consistent with the fact relief cannot be sought which is statute-barred: that is not the consequence of application of the

rule, but rather the consequence of application of the statute which bars the relevant claim for relief. The wording of the rule refers to fresh causes of action, doubtless on the assumption that if a statement of claim has already been filed, it will not be seeking relief which is statute-barred. So, for the purposes of considering the right to amend, the purview of the provision is limited to an amended pleading which purports to advance a fresh cause of action. There is no need for the rule to deal with causes of action which are not fresh but statute-barred because the bar will be in the relevant statutory provision.

[60] We note that r 7.77(2)(a) assumed its present form by amendment pursuant to r 18(1) of the High Court Amendment Rules (No 2) 2010. That provision inserted the words "relief in respect of" before "a fresh cause of action" at the outset of r 7.77(2)(a). The explanatory note to the amendment referred to the change in the following terms:

> … Rule 7.77(2)(a) is amended so that it recognises clearly that the effect of a limitation defence, if established, is to bar by statute not a cause of action itself, but relief in respect of one. …

[61] It is therefore clear that any amended pleading advanced under the authority of r 7.77(2)(a) must not seek relief in respect of a cause of action which is statute-barred. It is not to be read as an authority to introduce an amended pleading seeking relief for actions that took place outside a limitation period. The policy underlying the three-year limitation period in s 43A of the FTA, addressed in *Murray*,[35] was preserved, as discussed above, following the Law Commission's review of the FTA, illustrating the importance of adhering to it. For these reasons, we consider that Mr Galbraith's argument that the limitation question should be considered first must be correct.

[62] In his submissions to the contrary, Mr Flanagan relied on a number of authorities. We refer first to *ISP Consulting Engineers Ltd v Body Corporate 89408*, the relevant extract from which we have set out above at [42].[36] It was itself derived from *Transpower New Zealand Ltd v Todd Energy Ltd*.[37] We do not consider that Red Stag can derive support for its position from the principles set out in that case.

---

35 *Murray v Eliza Jane Holdings Ltd*, above 23, at 258–259.
36 *ISP Consulting Engineers Ltd v Body Corporate 89408*, above n 15, at [21].
37 *Transpower New Zealand Ltd v Todd Energy Ltd*, above n 22, at [61].

[63] First, if reference is made to para (a), about what constitutes a "cause of action", the "cause of action" here, for the period between 2007 and December 2012, embraces a factual situation which does not entitle Red Stag to obtain a legal remedy. To acknowledge that would be to contemplate relief which is statute-barred under s 43A of the FTA. That is so regardless of anything in r 7.77(2)(a). In terms of the principle stated in para (b), while it may be necessary to select the material facts on the basis of the "highest level of abstraction", that cannot require the exclusion of the facts which establish that the claim is statute-barred, that is the actions relied on prior to December 2012.

[64] We now turn to paras (c), which states the test for whether an amended pleading is fresh, and (d), which states that a plaintiff cannot run, after the period of limitation, a new case "varying so substantially" from the previous pleadings such that it would involve investigation of different factual and/or legal matters. As to these principles, even if it were to be established that the new pleading was not otherwise different from causes of action already pleaded, there would remain the significant and important difference that the statement of claim filed in March 2019 did not seek relief in relation to the period between 2007 and December 2012. Relief in respect of that period would require the investigation of factual and legal matters relevant to that period, which had not previously been subject to the claim.

[65] Other cases on which Mr Flanagan relied included:

(a) *Bryan v Philips New Zealand Ltd*.[38] In that case, the plaintiff had been required to work with sheets of asbestos paper. He alleged that he had been exposed to and ingested significant volumes of airborne asbestos fibres to which he would not otherwise have been exposed. When commenced, the claim was advanced on the basis of a serious risk that the plaintiff would contract an asbestos-related condition. An amended statement of claim was then proffered which alleged actual harm. It was argued that the change from an allegation of fear or likelihood of asbestos-related harm to an allegation of actual harm was a new cause

[38] *Bryan v Philips New Zealand Ltd* [1995] 1 NZLR 632 (HC).

of action which was statute-barred and therefore not permitted. After referring to relevant authorities,[39] Barker J said:[40]

> Applying these tests to the present case …, the basis of the claim of negligence against the defendants is unchanged as is the allegation that the plaintiff was subjected to exposure to asbestos. The only change is from fear of future injury to actual injury. I do not think this change betokens a "new case" which would involve investigation of matters of fact or questions of law different from those already raised. The legal basis is the same.

(b) *Cridge v Studorp Ltd*.[41] In that case, claims made under s 43 of the FTA included claims based on incorrect instructions given in technical literature provided by James Hardie setting out installation rules for the Harditex system which was the subject of the litigation. The defendants opposed the amendment of the pleadings to rely on four further documents that had not previously been the subject of the pleadings. Simon France J noted that if the reference to the four further technical documents constituted a fresh claim, the amended pleading would be statute-barred under s 43A.[42] After referring to the relevant principles from *ISP Consulting Engineers Ltd*, the Judge said:

> [856] … The core allegations contained in the amendments are not fresh but substantially reflect existing allegations. The documents in which they are found are new and have independent relevance in that each may be, for some of the representative group, the JHTI operative at the time of building. That feature of new documents is capable of supporting a conclusion the amendments are time-based, but I prefer to focus on the concept underlying the idea of limitation. The amendments add nothing substantively new to the proceeding as it existed prior to the amendment. They are just further examples of existing alleged issues.

(c) *Minister of Education v H Construction North Island Ltd (formerly Hawkins Construction North Island Ltd)*.[43] That claim concerned nine

---

39 At 636 including *Gabites v Australasian T & G Mutual Life Assurance Ltd* [1968] NZLR 1145 (CA) at 1151; and *Harris v Raggatt* [1965] VR 779 at 785.

40 At 636–637.

41 *Cridge v Studorp Ltd* [2021] NZHC 2077, [2022] 2 NZLR 309.

42 At [854].

43 *Minister of Education v H Construction North Island Ltd (formerly Hawkins Construction North Island Ltd)* [2018] NZHC 871.

buildings at a secondary school built between 2003 and 2009 which allegedly leaked because of numerous construction defects. The claim was in negligence. The statement of claim was amended several times and the defendant alleged that in its final form it raised new defects which were time-barred under the 10-year limitation period in s 393 of the Building Act 2004. Downs J noted that the claim contained an allegation that certain buildings were built with inadequate roof pitch, but later iterations of the claim extended that allegation to different buildings and later construction stages. A further claim alleged inadequate provision for thermal movement, and amendments later included an additional building in that claim.[44]

The Judge noted that the original claim had identified all alleged defects, but subsequent amendment related the claim to different buildings and later construction stages. With each amendment, the quantum of the claim rose.[45]

The defendant argued that the successive addition of buildings to the claim had resulted in the claims becoming "essentially different in character" from the original claim.[46] After noting that the parties agreed the applicable yardstick was whether the claim introduced, in substance, a fresh course of action,[47] the Judge continued:[48]

> [264] The law's concern in this area is the protection of defendants from claims, which, through a change of nature or character, expose them to otherwise time-barred allegations. This is not such a case. The first amended statement of claim contained the same defects as later iterations. True, different language was used to describe some, but the gist of each was the same. And remained constant. The only material changes with each amendment were the construction stages and buildings. Put broadly, both expanded. So too, of course, quantum. Everything else, however, remained constant, including, materially, the nature of the allegations against [the defendant] vis-à-vis the School. In summary, while the

44 At [261].
45 At [264].
46 At [262].
47 At [263].
48 Footnotes omitted.

> claim has been enlarged since 25 September 2013, neither its ingredients nor character has changed to result in an essentially fresh (time-barred) cause of action.

(d) *Commerce Commission v Visy Board PTY Ltd*.[49] In that case this Court analysed an amended pleading in accordance with the principles set out in *Transpower New Zealand Ltd v Todd Energy Ltd* and other cases.[50] This Court concluded that the amended pleading did not change the essential nature of the claim.[51] It had merely added an additional fact, referring to the conduct of the defendant in New Zealand. While the new allegation was important to establish the jurisdiction of the New Zealand courts to deal with the Commission's claim against Visy Board, it did not change the essential nature of the claim against the defendant. The claim remained the same as it had always been.

[66] Mr Flanagan submitted that the rationale of all of these cases was that a fundamental change to the legal basis for the case that the defendant has to answer was required before there would be a finding that a new cause of action was alleged. Simply enlarging the claim, or even adding a critical allegation necessary for it to succeed is not enough. The fact that a claim added by amendment could have stood alone, and would be time-barred if filed as a separate proceeding, was not the issue.

[67] However, we do not consider the cases establish a proposition as broad as that which Mr Flanagan asserts. In each of the cases on which he relies, the amendments added causes of action able to be brought within the ambit of r 7.77(2) or its predecessors. But in each instance, the original proceeding had been commenced in time; and the new allegations sought to be added by the amended pleading did not reach back in time to a point earlier than that covered by the claim initially pleaded.

[68] An amendment to a statement of clam which seeks relief in relation to a period earlier than that covered by the existing claim, and in breach of a statutory bar, is not authorised by r 7.77(2)(a). The fact that it might be characterized as not "essentially different" in nature, or as not giving rise to legal issues different from those already

---

49 *Commerce Commission v Visy Board Pty Ltd*, above n 18.
50 At [142]–[148].
51 At [147].

raised by the claim, does not mean that the statutory bar can be ignored. That is reflected by the wording of r 7.77(2)(a) itself. The rule is not to be applied on a basis that treats the "freshness" inquiry as determinative of the issue of whether the statutory bar applies in circumstances where the proposed amendment would extend the period covered by the statement of claim to an earlier point in time and contrary to a statutory bar.

[69] That is essentially what was authorised by the judgment under appeal, and we do not consider it was correct.

[70] JNL's notice of appeal sought an order striking out those parts of the fourth amended statement of claim that comprised or contained allegations of representations and/or conduct by JNL prior to December 2012, and all claims (or any part thereof) based or relying on such allegations. At the conclusion of the hearing, against the possibility that the appeal might be allowed, we invited the parties to confer and file a memorandum identifying more particular relief that should be ordered if the appeal were allowed.

[71] The parties conferred but were unable to reach agreement on the form that the amendments should take. JNL filed an amended form of the claim with passages struck out. Red Stag did not agree with what was proposed and suggested the proposed amendments were "plainly overbroad".

[72] In the absence of agreement, we consider the appropriate course is to allow the appeal on the basis of the relief claimed, albeit in a slightly modified form. Consistently with the reasoning set out above, we consider the appropriate form of relief is to strike out those parts of the amended statement of claim that seek relief in respect of representations and/or conduct by JNL prior to December 2012 and all claims (or any part thereof) based upon or relying on such allegations.

[73] It will be for Red Stag to amend its pleading in a manner that conforms with this judgment. The pleadings will of course remain under the supervision of the High Court as the case proceeds.

[74] Gault J delivered a costs judgment on 21 December 2021.[52] In the costs judgment he had to assess what costs should be awarded to each party given the fact that both had succeeded in part on the various interlocutory applications dealt with in the High Court judgment. For reasons he gave, the net outcome was an order in favour of Red Stag in the sum of $11,828.60 (for both costs and disbursements).[53] Given the conclusions we have reached, it will be appropriate for that order to be set aside, and for the issue of costs in the High Court to be reviewed having regard to the terms of this judgment.

Result

[75] The appeal is allowed.

[76] We make an order striking out those parts of the fourth amended statement of claim that seek relief in respect of representations and/or conduct by JNL prior to December 2012 and all claims (or any part thereof) based or relying on such allegations.

[77] Red Stag is to pay JNL's costs on the appeal calculated for a standard appeal in band A, together with usual disbursements. We certify for second counsel.

[78] The order for costs made in the High Court is set aside and is to be reviewed in accordance with this judgment.

Solicitors:
Hesketh Henry, Auckland for Appellant
Meredith Connell, Auckland for Respondent

---

52 *Red Stag Timber Ltd v Juken New Zealand Ltd* [2021] NZHC 3584.
53 At [15].