

Additional fire safety defects not struck out as a new cause of action

Body Corporate 346799 v KNZ International Co LTD - BC201661516 is a recent strike out decision of Palmer J. The Court considered whether the inclusion of additional defects in defective building proceedings amounted to a new cause of action. If they were found to be a new cause of action, as opposed to mere further particulars, their inclusion would be time-barred.

**Partner Stuart Dalzell and Solicitor Tim Daley consider the decision and its implications*

Background and decision

The Body Corporate, in an amended statement of claim, included additional fire safety defects. This increased the overall quantum of the claim by more than \$4 million. The Council submitted that as the further defects alleged were of a different nature to those already pleaded (the previous defects relating to cladding, waterproofing and the podium), this amounted to a new cause of action which was time-barred under the Limitation Act.

However, rejecting the Council's arguments, Palmer J concluded that the fire safety defects were simply additional particulars of the same cause of action, rather than a new or "essentially different" cause of action. The duty and breaches pleaded against the Council remained the same; given that the claim remained based on the "issuance of consents, inspection and issuance of code compliance certificate". While they raised "new factual claims for the Council to meet", the inclusion of the fire safety defects did not change the essence of the claim. Applying the Court of Appeal's words in *Commerce Commission v Visy Board Pty Ltd* (2012), Palmer J considered the basic legal claim was

the same and was simply backed up by the addition of new facts. Palmer J declined to strike-out the fire safety defects on that basis.

The Council also argued that due to the delay in including the fire safety defects, the Council had been prejudiced in that it would be time barred from bringing claims against potential third parties. Although Palmer J sympathised with the Council in this respect, ultimately he did not consider it to be grounds for striking out the further defects. The final statement of claim was filed and served prior to the date for close of pleadings and so the Body Corporate was entitled to include the fire safety defects.

Comment

This decision is clearly a useful authority for leaky-building owners involved in litigation based on investigations which are quite often ongoing, where defects, such as structural and fire defects, are only discovered at a later stage and on the wrong side of a time-bar.

The approach adopted by Palmer J has now been applied in a string of High Court cases involving tort and other claims, in which the Court has refused defendants' attempts to strike-out new and "even significantly different" particulars of defects and/or remedial works before trial, so long as they fall within the same essential allegations of duty and breach. Each case will depend on its facts. But, that said, it seems clear that the allegations of duty and breach must be viewed "at the highest level of abstraction", such as the Council's alleged inadequacies in its consent, inspection and code

compliance certification functions at issue in the instant case.