IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA **SC 59/2024**

BETWEEN	**Whangarei District Council** Appellant / Cross-Respondent
AND	**Malcolm James Daisley** Respondent / Cross-Appellant

SUBMISSIONS FOR APPELLANT RESPONDING TO RESPONDENT'S SUBMISSIONS IN SUPPORT OF JUDGMENT ON ANOTHER GROUND (CONTINUOUS TORTIOUS BREACH)

Dated 21 January 2025

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May it please the Court—

Part A: Introduction, overview and issues

1 Overview and scope of appeal

1.1 The Respondent seeks to support the result in the Court of Appeal on another ground under s 20A of the Supreme Court Rules 2004, contending that the original proceeding was issued in time because the Appellant's tort was a "continuing breach".[1]

1.2 Mr Daisley advances two grounds for this:

(a) First, he submits that WDC continuously breached its common law duty to Mr Daisley (who in turn suffered continuing damage) until September 2009 when the LUC was discovered.[2] He says he filed the proceeding within six-years of that date and it was therefore in time.[3] This is the primary basis on which Mr Daisley supports the result below.

(b) Second, he appears to submit that the High Court's decision is justified based on the principles laid down in *Bowen v Paramount Builders (Hamilton) Ltd* and *Mt Albert Borough Council v Johnson*.[4] Together, those authorities stand for the proposition that successive actions lie for successive and distinct accruals of damage. By that submission, he appears to rely on the successive actions doctrine which is separate from (but doctrinally related to) continuing breach.[5]

1.3 WDC submits that neither the continuing breach doctrine nor the successive actions doctrine applies to extend time under the Limitation Act 1950 (the **LA1950**). Applying orthodox principles, the right of action against WDC accrued in September 2006 when Mr Daisley first suffered loss. Once accrued, a negligence action embraces all subsequent losses caused by the breach of duty. Time does not refresh simply because losses continue to grow. What is required is either (i) a repeated series of breaches that cause fresh damage going beyond that caused by the time-barred breach (i.e. the continuing torts exception) or (ii) a single breach of duty which causes distinct damage that is of a different kind to the damage caused by the time-barred breach (i.e. the successive actions doctrine). Neither of those exceptions is available on the facts based on the lower Court's findings. Mr Daisley's negligence action remains time-barred.

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1 Memorandum of counsel for the Respondent (1 November 2024) at [6].
2 Submissions by Respondent in Reply to Submissions by Appellant (dated 6 December 2024) [Continuing Breach Submissions] at [8]–[12].
3 At [8]–[12] and [48]–[51].
4 *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) and *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA). See at [51] of the Continuing Breach Submissions.
5 See the discussion below at [2.3]–[2.4]. In short, the continuing breach doctrine holds that a right of action accrues afresh day to day when a defendant repeats a course of wrongful acts/omissions which causes new damage going beyond that caused by breaches before the limitation date. By contrast, under the successive actions theory one single breach (rather than a series of breaches) can give rise to successive actions if that breach causes distinct damage on different occasions.

Part C: Applicable principles and lower court judgments

2 Orthodox principles: Accrual, continuing torts and successive actions

Negligence accrual date and the cause of action rule

2.1 Time begins to run under s 4 of LA1950 on the date of accrual of the cause of action. Accrual is an occurrence-based concept. It is triggered when everything has happened entitling a plaintiff to commence proceedings.[6]

2.2 Negligence is actionable on proof of special damage. The accrual date is the day on which the defendant's breach of a duty of care owed to the plaintiff causes more than trivial damage.[7] From that point, the limitation clock starts to run even if the plaintiff is unaware of a loss.[8] The cause of action covers all subsequent loss and damage attributable to the same cause of action even if the loss and damage only manifests itself later in stages.[9] For brevity, these submissions refer to that concept as the **cause of action rule**. Further injury or damage arising at a later date from the same breach does not trigger a new right of action,[10] nor does it restart the running of time. Damages must be recovered once and for all.[11] Continuing damage is merely an "incident of the initial cause of action".[12]

Exceptions to the rule — Continuing torts and successive actions

2.3 Two relevant exceptions exist to the cause of action rule, the effect of which is to disaggregate an otherwise time barred claim into discrete rights of action and thereby enable the plaintiff to sue in respect of the non-barred claim:

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6 *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [69]–[73] per Tipping J. See *Ophthamological Society of NZ Inc v Commerce Commission* CA168/01, 26 September 2001 at [22] for the definition of a cause of action for the purposes of s 4 of the Limitation Act 1950.

7 *Davys Burton v Thom* [2008] NZSC 65, [2009] 1 NZLR 437 at [15]–[16] per Elias CJ; and *Knapp v Ecclesiastic Insurance Group plc* [1998] Lloyd's Rep IR 390 (CA) at 397 per Hobhouse LJ.

8 See generally *Murray*, above n 6; *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL); and *Pirelli General Cable Works Ltd v Oscar Faber & Partners (a firm)* [1983] 2 AC 1 (HL).

9 See G E Dal Pont *Law of Limitation* (2nd ed, LexisNexis, Chatswood (NSW), 2021) [Dal Pont on Limitation] at 122 (referring to *Davys Burton*, above n 7, at [25]) and 124 (citing *Australia and New Zealand Banking Group Ltd v Dzienciol* [2001] WASC 305 at [440], *The Darley Main Colliery v Mitchell* (1886) 11 App Cas 127 (HL) and *Sutherland Shire Council v Heyman* (1985) 157 CLR 424 at 490–492 per Brennan J) and citing *Wilkinson v Verity* (1871) LR 6 CP 206 at 209 per Wiles J for the proposition that once accrued, time starts to run so that "subsequent circumstances which would but for the prior wrongful act or default have constituted a cause of action are disregarded". Dal Pont explains why. A "cause of action" is premised on the occurrence of all the facts that the plaintiff must prove to sustain an action: at 125. Following that point, the cause of action crystallises as its constitutive elements have been made out, meaning that time begins to run in respect of the action. Events after that moment "may impact the damage caused by the tort that substantiated the cause of action" but they play no role in deferring or restarting time. Subject to the exceptions below, there is one cause of action and it embraces all subsequent loss.

10 *Cartledge*, above n 8, at 771–772 per Lord Reid and 779–780 per Lord Pearce.

11 Dal Pont states that *Fitter v Veal* (1706) 12 Mod 542, 88 ER 1506 established the principle which underlies the cause of action rule, namely that damages must be recovered once and for all in the same action: see at 125 n 74. In *Fitter*, the Court held that "every new ill consequence of the [tort] is not any new wrong of the defendant". See the discussion of this principle in *Darley Main Colliery*, above n 9, at 132–133 per Lord Halsbury and at 138 per Lord Blackburn (dissenting in the result) who cited *Lamb v Walker* (1878) 3 QBD 389. The House of Lords in *Darley Main* endorsed that principle as a general rule of law, although in the result it found that each subsidence constituted a fresh cause of action. In *Cartledge*, Lord Pearce endorsed *Fitter* and stated that the principle that emerged from that case has "never since been doubted": at 780. That reasoning was applied to negligence actions in *Pirelli*, above n 8, at 14.

12 See Stephen Todd (ed) *Todd on Torts* (online ed, Thomson Reuters) at [25.5.2(4)(f)] citing *T v H* [1995] 3 NZLR 37 (CA) at 52.

(a) **Continuing torts** — a continuing tort arises where there is a repetition of the wrongful act / omission within the limitation period which causes fresh loss going beyond that resulting from the barred cause of action.[13] Where the continuing tort exception applies, the cause of action rule is ousted.[14] By contrast, under the continuing torts theory, there is not one *single* action. Rather, the action accrues "afresh every day".[15] A continuing course of wrongful conduct which straddles the 6-year limitation period can thereby be broken down into multiple causes of action. The plaintiff can recover damages for the part of the wrong committed within the past six years[16] even though the initial breach occurred before the limitation cut-off.[17]

(b) **Successive actions** — another exception to the cause of action rule is where a single breach of duty causes "distinct" damage on different occasions.[18] Successive rights of action will lie for each successive and distinct accrual of damage.[19] This exception militates against the strict consequences of the cause of action rule. Without the exception, the rule would require a plaintiff to bring a single action seeking to recover all damages "actual, possible or contingent for all time".[20] New damage that arises decades after the causative breach would be irrecoverable because the rule would treat it as forming part of the now time-barred action for limitation purposes.[21] The successive actions exception provides a solution when the subsequent damage is sufficiently distinct that it can be characterised as a fresh right of action.[22]

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13 See below at [4.1]–[4.22]. See also Dal Pont on Limitation, above n 9, at 126–127 citing *Hawkins v Clayton* (1986) 5 NSWLR 109 (CA) [*Hawkins* (CA)] at 124–125 per Glass JA; Todd on Torts, above n 12, at [25.5.2(4)(f)]; and Andrew McGee *Limitation Periods* (9th ed, Sweet and Maxwell, London, 2022) at [5.005].

14 Dal Pont on Limitation, above n 12, at 125. Continuing torts were referred to in *Fitter*, above n 9, where the Court stated at 1507: "[T]his is not like the case of a nuisance in erecting a penthouse, whereby the rain falls upon my house or garden; or stopping my lights, wherein I shall recover damages for every new hurt *in infinitum*: for, first, the battery is a transitory act, and the nuisance is a continued one as long as it lasts; therefore damages cannot be recovered for it at once; secondly, every new rain that falls, or every light that is stopt, is a new nuisance; but every new ill consequence of the battery is not any new wrong of the defendant".

15 McGee, above n 13, at 81.

16 At 81.

17 Todd on Torts, above n 12, at [25.5.2(4)(f)].

18 At [25.5.2(4)(f)].

19 Dal Pont on Limitation, above n 9, at [6.21]. See also *Ward Ranch Ltd v Minister of Conservation* [2018] NZHC 2893 at [46] citing *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) at 243, *Darley Main*, above n 9, at 135, *Crumbie v Wallsend Local Board* [1891] 1 QB 503 (CA) at 508, *T v H*, above n 12, at 40–41, *Attorney-General v Edmonds* CA97/05, 28 June 2006 at [64]–[66], and *Taylor v Auto Trade Supply Ltd* [1972] NZLR 102 (SC) at 108–109. See also the discussion in Todd on Torts, above n 12, at [25.5.2(4)(f)].

20 *Darley Main*, above n 9, at 147 per Lord Bramwell.

21 Dal Pont on Limitation, above n 9, at 126. For example, a plaintiff whose house is swept away on two occasions by water that escaped from a reservoir on their neighbour's land would only be able to bring a single negligence action. They could not recover for the second house even if the loss happened many years later. Instead, in bringing a negligence action following loss of the first house, the plaintiff would be required to seek damages including for the "possibility of any future invasion of water flowing from the same reservoir": see *Darley Main*, above n 9, at 133–134 per Lord Halsbury. Put another way, they would need to recover in a single action all damages "actual, possible or contingent for all time": see at 147 per Lord Bramwell.

22 The successive actions doctrine has not, however, received unqualified support. For example, in *Sutherland*, above n 9, at 490–491 Deane J doubted the doctrine (referring to *Bowen*). He stated that *Bowen* is "inconsistent with the principle in *Darley Main Colliery Co v Mitchell* — the once and

2.4 Both exceptions to the cause of action rule are necessarily narrow to preserve the integrity of limitation law. Without strict limits, a defendant would be faced with open-ended tortious liability not subject to a limitation period. The exceptions would overwhelm the cause of action rule with the effect that an otherwise time-barred claim could always be disaggregated into a non-barred claim(s). No meaningful limitation period would exist, and such an approach would nullify the policy rationales of limitation law including promoting fairness to defendants, securing public confidence in the fair administration of justice, facilitating harmonious social relations and societal repose, encouraging certainty, and incentivising plaintiffs to commence their proceedings in a timely manner.[23]

2.5 Consequently, commonwealth courts have imposed strict controls to ensure that both exceptions remain narrowly tailored. Mr Daisley's r 20A challenge concerns the application of those orthodox controls. To summarise:

(a) For continuing torts, the delimiting principle is the twin requirements of a fresh breach (occurring within the six-year limitation period) that has caused additional loss beyond that caused by the time-barred action.[24] Without a new breach, any continuing damage is simply the product of the earlier time-barred breach of duty and is thus caught by the cause of action rule. Similarly, if the damage that occurred inside the six-year limitation period is not additional or new, then it is merely a continuing accretion of the loss caused by the barred action and is irrecoverable. Accordingly, there must be a fresh breach which causes new loss, both of which must occur inside the limitation period.

(b) For successive actions, the doctrinal control is the requirement that new damage be sufficiently "*distinct*" or separated by time, place and/or nature to be treated as separate causes of action. Where the damage sued for in the second action is "not in reality distinct from that sued for in the first but is merely a part of it or consequential upon it, it cannot be recovered".[25] To be recoverable, the second action must arise directly from the wrongful act / omission and not "indirectly through the damage already sued for".[26] Compensation for the first damage — according to the cause of action rule — includes compensation for all the "ulterior consequences of that damage whether already accrued or not.[27] But it does not include relief for "*entirely distinct damage*" which accrues from

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for all rule — that is fundamental not only to the theory but to the practical operation of the law of negligence. If the 'later stages of suffering' when they become much different in degree from the initial injury are to be treated as fresh damage, the once-for-all rule is of uncertain operation" and "in the field of damage to real property, the notion that some degrees of damage manifested at a later stage than the initial damage constitute fresh damage is at odds with principle". See McGee, above n 13, at [1.017] who considers that the result in *Darley Main* was incorrect as the two sets of subsidence were caused by one breach of duty and therefore the cause of action rule applied.

23 See the discussion of the policy objects of limitation law in WDC's substantive appeal submissions dated 15 November 2024 at [6.2]–[6.5] and the cited authorities.

24 See below at [4.1]–[4.22]. See generally Dal Pont on Limitation, above n 9, at 126–127.

25 *Bowen*, above n 4, at 424 per Cooke J where his Honour "adopt[ed] as applicable" a passage from *Salmond on Torts* (16th ed, Sweet & Maxwell, London, 1973) at 606–607 (emphasis added). See also *Johnson*, above n 4, at 239 and 243–24; Dal Pont on Limitation, above n 9, at 126–127.

26 *Bowen*, above n 4, at 424.

27 At 424.

the defendant's conduct "independently of the damage first sued for".[28] It is a question of "fact and degree" whether that threshold test is met.[29]

3 Lower court judgments

High Court concluded that the negligence action continuously refreshed[30]

3.1 The High Court found that the negligence action against WDC first accrued in September 2006 holding, in summary:

(a) The Council owed common law duties to the public to exercise skill and care in keeping / providing information about the LUC and in carrying out reasonably diligent inquiries into its existence.[31]

(b) The Council breached its duties to the respondent by a combination of failing to keep a copy of the LUC in its register of current files relating to the property, issuing an incorrect LIM, failing to diligently search for the LUC, and periodically informing Mr Daisley (incorrectly) that no consent existed in respect of commercial quarrying.[32]

(c) Material loss first occurred in September 2006 when Mr Daisley applied for a resource consent. WDC required that Mr Daisley's application be notified and then opposed it "on the grounds that no consent existed".[33] Mr Daisley suffered loss through the added cost of a notified hearing.[34]

3.2 Having decided that the negligence action accrued in September 2006, the corollary would ordinarily be that the proceeding (filed nearly 9 years later) was time-barred under the LA1950. Instead, the Court found that Mr Daisley had issued proceedings within the six-year period.[35]

3.3 In reaching that finding, the Court referred to both exceptions to the cause of action rule — successive actions and continuing torts. While the reasoning is not fully explained, the Court appeared to reject the former exception in preference for the latter (although it did not draw a clear distinction between the two). The Court found that WDC's conduct could be characterised as either (i) separate breaches and losses (i.e. the successive actions doctrine) or (ii) a continuing course of conduct with various types of damage occurring at different times but "not materially distinct from the losses" which first began to accrue in September 2006 (i.e. the continuing torts exception).[36] The Court decided against the first characterisation. It referred to the leading authorities on successive actions (being *Bowen* and *Johnson*) but concluded that it was

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28 At 424.
29 At 424; and *Johnson*, above n 4, at 239–240 per Cooke and Somers JJ and at 243–244 per Richardson J. See also Todd on Torts, above n 12, at [25.5.2(4)(f)]; and Dal Pont on Limitation, above n 9, at 126–127.
30 The detail of the High Court's judgment has been addressed in the Council's appeal submissions. For that reason, these submissions address only the aspects of the High Court decision relevant to Mr Daisley's r 20A notice and the submissions on "continuing breach".
31 *Daisley v Whangarei District Council* [2022] NZHC 1372, (2022) 23 ELRNZ 839 [HC judgment] at [185] and [276(a)].
32 At [230]–[231] and [276(b)].
33 At [70] and [237]. See also at [70], [355] and [378].
34 At [237].
35 At [380].
36 At [238].

"artificial" to regard WDC's conduct as "separate breaches of duty"[37] giving rise to "separate and distinct" damage.[38]

3.4 Ultimately, the judgment rested on the continuing torts exception. It held that WDC was continuously in breach of its duties from the time it issued the LIM in 2004 until the discovery of the LUC in September 2009.[39] It also held that Mr Daisley "suffered continuing damage or loss" from September 2006 "until the Council withdrew the enforcement proceedings in the Environment Court in July 2011". Put together, those factors led the Court to find that the right of action "accrued on a continuing basis" until September 2009.

Court of Appeal reversed due to High Court's misapplication of the law

3.5 Besides s 28(b) of the LA1950, the Court of Appeal concluded that there was no basis for extending time. The High Court was incorrect in its interpretation and application of the "continuing breach" exception. Nor did the successive actions doctrine apply (subject to the below). In summary:

(a) Clarifying the parameters of the exception, the Court determined that a continuing tort arises from the repetition of wrongful acts / omissions in the six-year limitation period which cause further loss.[40] What matters is that the wrong continues on a "daily or other regular basis" such that the right of action "accrues afresh on a continuing basis".[41] The action does not refresh simply because loss from the *original wrong* continues to accrue.[42] The exception was not available because the pleading did not allege any fresh breach of duty after the limitation date (being 14 August 2009).[43] Without repeated breaches of duty within the limitation period, WDC cannot have committed a continuing wrong. Nor can any of the damage suffered after August 2009 have been caused by a non-time barred breach (which is implicit in the Court's judgment).

(b) The Court re-affirmed that the successive actions doctrine only allowed Mr Daisley to recover post-August 2009 losses if they were "sufficiently distinct from losses suffered outside the limitation period".[44] While the Court of Appeal did not call this the "successive actions doctrine", it did cite *Bowen* in support which (as noted above) endorsed the exception. The Court held that Mr Daisley could not recover lost profits if they were merely part of the earlier losses or consequential upon them.[45] Overall, it held that the lost profits after August 2009 were irrecoverable as they were no different from the losses that began in 2006. Nor was he able to recover direct costs incurred as a result of WDC's proceeding in the Environment Court. These were simply the continuation of costs which

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37 At [376]–[377] referring to *Bowen*, above n 4, at 424 and *Johnson*, above n 4, at 239.
38 At [231].
39 At [378].
40 *Whangarei District Council v Daisley* [2024] NZCA 161 [CA judgment] at [83]–[84].
41 At [83] citing *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16, [2023] 2 WLR 1085 at [26].
42 CA judgment, above n 40, at [83].
43 At [86].
44 At [87].
45 At [87].

begun before the limitation date.[46] The only "distinct" loss identified by the Court was the $90,000 lost on the property sale, in respect of which WDC submits the Court of Appeal erred.

Part C: Continuing torts exception does not apply

4 The exception requires fresh breach and additional damage

4.1 When applying the exception, the High Court proceeded on the premise that it is not necessary to show a repeated breach that has caused additional loss going beyond that caused by the time-barred claim. The Court characterised the losses suffered by Mr Daisley as "continuing damages or loss"[47] and as not "materially distinct from the losses that began to accrue" in 2006.[48] That reasoning contradicts the orthodox principes set out at [2.3]–[2.5]. As noted, those principles limit the scope of the exception to preserve the policy objects of limitation law.

4.2 To that end, the Court of Appeal was correct to disagree with the High Court. Its treatment of the exception is consistent with orthodoxy and is supported by leading Commonwealth authorities uniformly requiring (i) repetition of the tortious wrong together with (ii) additional loss caused inside the limitation period as a result of the continuing breach of duty.

New Zealand authorities reflect those twin requirements

4.3 Summarising New Zealand law, Cooke P described a continuing tort in *T v H* (a proceeding based on allegations of sexual abuse) in terms mirroring [2.3]–[2.5].[49] He endorsed an excerpt from *Salmond on Torts* explaining that a continuing tort arises where the "act of the defendant is a continuing injury" still in the course of being committed and that is not wholly in the past.[50] By continuing to inflict injury, the defendant's act or omission gives rise to a right of action that continues to refresh day-to-day until the injury is discontinued.[51] To continuously refresh in this way, though, "*new* damage" must accrue as a result of the continuing wrong.[52]

4.4 The decision in *Ward Ranch Ltd v Minister of Conservation* re-affirmed these principles.[53] In 1994, the Minister built a weir upstream of the plaintiff's land. From 2000, the weir periodically flooded the property. On 5 October 2017, Ward Ranch sued the Minister in nuisance. It sought damages of $780,000 in relation to the flooding events in the six years before the claim was filed.[54]

4.5 The central issue was which limitation act applied. On the Minister's case, the LA1950 applied — the right of action was complete in 2000 following the first flooding event and any ongoing damage was merely the continuation of loss

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46 At [87].
47 HC judgment, above n 31, at [378].
48 At [238(b)].
49 *T v H*, above n 12, at 40–41 citing and endorsing *Salmond & Heuston on the Law of Torts* (20th ed, 1992) at 563–564. Cooke P described the summary in *Salmond* as "the received general law". While Cooke P was in the minority in *T v H*, the majority reasons do not differ on this point.
50 At 41.
51 At 41.
52 At 41.
53 *Ward Ranch Ltd v Minister of Conservation* [2018] NZHC 2893.
54 At [18], [27], [41].

or damage sustained in the first flooding event. Put another way, the Minister invoked the cause of action rule to argue that the nuisance claim was barred. The Limitation Act 2010 did not apply because the nuisance claim was based on an act that took place in 2000 well before the Act came into force.[55] Ward Ranch relied on the continuing torts exception to argue that the right of action accrued afresh between 2011–2017 due to the ongoing flooding events over that period. On that basis, the LA1950 did not apply. Although the right of action first accrued in 2000 (covered by the LA1950), it renewed continuously between 2011–2017 (covered by the LA2010) when flooding caused a continuing nuisance. Ward Ranch sought damages for that 6 year period.[56]

4.6 Because Ward Ranch's case was limited to acts and omissions that occurred after 2011, the Court held that the LA2010 applied.[57] Ward Ranch's case was that the flooding between 2011–2017 was new damage distinct from flooding that had previously occurred.[58] It was not a "progression" of previous damage caused by events in 2000 (which would have fallen under the LA1950). For that reason, the High Court held that there was no limitation defence because the claim was brought within six years of the pleaded acts or omissions.

4.7 Even if the LA1950 applied, Wylie J found that the nuisance could be viewed as a continuing tort.[59] He accepted that where subsequent damage is merely the progression of damage arising from a tortious wrong before the limitation cut-off date, the claim would be barred.[60] However, for claims actionable on proof of damage, a claim would survive the Limitation Act (on the basis of the continuing torts exception) where a continuing breach causes fresh damage. Equally, a claim could survive (under the successive actions doctrine) where one breach causes distinct damage on different occasions. In either case, a plaintiff must "show a *new wrong* committed within the limitation period" (emphasis added). The Court summarised the two exceptions:

(a) **Continuing torts exception** — When proof of damage is required and "continuing conduct causes continuing damage, each fresh occurrence … can give rise to a fresh cause of action".[61] The Court referred to the example of a continuing nuisance where the cause of action will refresh each day but damages can be recovered "only for that part of the loss which arose within the limitation period".[62]

(b) **Successive actions exception** — Where damage occurs on different occasions as a result of a wrongful act / omission, "successive actions could lie for each successive and distinct accrual of damage".[63] There is a "new cause of action each time that damage occurs".[64]

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55 At [23]–[25].
56 At [27].
57 At [41]–[42]
58 At [43].
59 At [45]–[49].
60 At [46].
61 At [47].
62 At [46].
63 At [46].
64 At [47].

4.8 In the result, the High Court found that the nuisance action would not be time-barred under the LA1950.[65] The Court considered it arguable the nuisance was a continuing tort on the basis that the defendant's "continuing conduct" caused continuing damage. Alternatively, the successive actions exception may have been available.[66]

4.9 The decision in *Moot v Crown Crystal Glass Ltd* illustrates these principles at work.[67] The plaintiff worked in a glass factory near loud machinery which from 1960 caused progressive hearing loss. The exposure to noise ceased in 1971 when the factory required employees to wear earmuffs. On 9 May 1975 the plaintiff sued the factory in negligence causing personal injury.

4.10 Unless an exception applied, the claim would be barred under the LA1950 as the negligence action accrued more than six-years before the claim was filed. The harm inflicted — hearing loss — started in 1960 and was "adversely affected progressively" until July 1971.[68] For that reason, the action accrued in 1960 and was, therefore, out of time. To rely on the exception, Somers J said the plaintiff needed to show the following:[69]

> Damage is the gist of the action in tort … It would not be possible for Mr Moot to claim in respect of any breach of duty (common law or statutory) which occurred before 9 May 1969 and which gave rise to damage before that date. Nor could he claim for damage arising after 9 May 1969 but occasioned by an antecedent breach of duty if that damage were no more than the continuation or progression of damage which arose before that which occurred before. In the context of the present case I think Mr Moot has to show *some alteration to, some aggravation of, his condition as at 9 May 1969. That involves demonstrating a breach of duty within the limitation period and damage flowing from that breach.* That is because the evidence indicates that each significant exposure to noise is accompanied by its own damage. If there be any deterioration after May 1969 to injury occasioned before that date, that is excluded.

4.11 What is required is proof of a "new wrong" committed within the limitation period and "damage arising from *that* wrong".[70] Without satisfying those two elements (fresh breach and loss), the continuing damage suffered by Mr Moot would instead be causally attributable the statute-barred action. On the state of the pleadings, he could not discharge that burden.

Leading Australian authorities require repeated breaches and fresh loss

4.12 Repetition of the wrongful act / omission together with fresh loss are also the two pre-conditions in Australia for application of the continuing torts principle.

4.13 The leading authority is Glass JA's reasons in *Hawkins v Clayton* (NSWCA). Starting with basic principles, he found that the accrual date for a negligence claim is governed by the rules set down by the House of Lords in *Cartledge* and *Pirelli*.[71] The right of action accrues as soon as the wrongful act causes

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65 At [50].
66 At [49]–[50].
67 *Moot v Crown Crystal Glass Ltd* [1976] 2 NZLR 268 (SC).
68 At 272.
69 At 273 (emphasis added).
70 At 274 (emphasis added).
71 *Hawkins* (CA), above n 13, at 124. Glass JA's reasoning has been applied in later decisions: see for example *Clutha v Miller* [2002] NSWSC 362; and *Clutha v Miller (No 3)* [2002] NSWSC 642. See also Dal Pont on Limitation, above n 9, at 126–127.

non-trivial damage. Time does not restart in the situation where there exists "further injury arising from the same cause of action". Rather the cause of action rule applies so that any subsequent loss forms part of the earlier barred claim.[72] However, the exception is available if the plaintiff can show:[73]

> Assuming a continuing duty of care, a fresh cause of action will only arise if a *fresh breach* causes loss *going beyond the loss resulting from the barred cause of action*. Such a fresh cause of action was established in *Adams v Ascot Iron Foundry Pty Ltd* (1968) 72 SR (NSW) 120, where the plaintiff being statute barred in respect of lung disease caused by negligence before the limitation period was able to prove subsequent negligent exposure to dust which rendered his condition worse than it would have been as a consequence of the statute barred negligence.

4.14 On the facts, the plaintiff could not establish "superadded loss", meaning that the second condition of the exception was not satisfied. The claim was by an executor who alleged that the testator's lawyers were continuously negligent in failing to locate the executor to inform them of the will. The testator died on 18 January 1975, yet the solicitors only located and contacted the executor in February 1981. The negligence action accrued in 1976 when the principal asset (a house) should have vested in the plaintiff, leading to the right to receive rental income.[74] The claim was not filed until 1982. Glass JA declined to apply the continuing tort exception.[75] Even though the continuing breach created the circumstances in which the lost rental income continued to grow, Glass JA found that it was not truly *fresh* loss:[76]

> The evidence here fails to establish a fresh breach inflicting superadded loss for the following reasons. The assumed breach of duty occurring before the limitation period of six years was the failure to take care to locate the beneficiary. Since the evidence showed a continuing omission to take steps which would have led to the discovery of his whereabouts, there is some difficulty in postulating a succession of breaches of duty arising from the continuing inaction. Do they occur at yearly, monthly, daily or hourly intervals? Nevertheless, if it be assumed in favour of the argument that there was a continuing breach of a continuing duty there is an insurmountable obstacle with respect to proving an aggravation of the damage otherwise suffered. The loss of income flowing from the putative breach of duty within the six year period viz after November 1976 was no different from the loss of income which would have been recoverable in an action for the earlier breach of duty had it not been statute barred.

4.15 By majority, the Hight Court of Australia overturned *Hawkins*.[77] None of the majority Judges challenged Glass JA's logic on continuing breach, instead resolving limitation on alternative grounds. Only Deane J addressed the continuing torts exception. Like Glass JA, he focused on the requirement (in obiter) for additional damage caused by a continuing breach of duty within the limitation period. Absent those features, there would be no basis to treat the continuing breach as triggering a "distinct cause of action each time *new damage* was incurred".[78] So, Deane J referred to how the firm's negligence caused new damage of "varying forms" such as a fine for late lodgement of

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72 At 124.
73 At 124–125 (emphasis added).
74 At 123–124.
75 At 124.
76 At 124.
77 *Hawkins v Clayton* (1988) 164 CLR 539.
78 At 589.

the death duty and additional legal costs for seeking probate of a copy of the will rather than the original document.[79]

4.16 Following *Hawkins*, the New South Wales Supreme Court held in *Clutha* that Glass JA's framing of the continuing torts exception applied.[80] Not only had it received Deane J's approval (in obiter) in *Hawkins*,[81] but it accorded with elementary tort law principles.[82] Even if it were correct to treat a defendant's failure to discharge a duty as a continuing breach for so long as the failure continues, it does not automatically follow that a series of separate causes of action would accrue.[83] Orthodoxy dictates that the right of action is complete once measurable damage is suffered even though further damage continues to accrue.[84] The starting principle is, therefore, that subsequent losses do not trigger a new right of action. Against that background, Glass JA's insistence on a fresh breach of duty *together* with superadded loss is justified — without those twin requirements, the continuing torts exception would nullify orthodox tort law principles.

United Kingdom authorities are to the same effect

4.17 Similarly, in the United Kingdom the continuing torts exception requires both a fresh breach and new loss. A leading authority is the High Court's decision in *Phonographic Performance*, which has been subsequently applied in later appellate decisions and endorsed in academic commentary.[85] At issue was the Crown's failure (in breach of its obligations) to implement a copyright directive of the Council of the European Communities. Under the directive, producers would have been entitled to receive remuneration each time their work was played, broadcast or communicated to the public.

4.18 Phonographic Performance Ltd (PPL) sued. It was a representative body of record companies in the UK. PPL's tort claim alleged that the Crown's failure to implement the directive caused financial loss to producers who did not (as a result) receive remuneration to which they would otherwise be entitled. The Crown argued that the claim accrued on 1 July 1994, being the date when the UK ought to have implemented the directive. Because the action was filed on 10 March 2003, it was accordingly time-barred.[86] By contrast, PPL submitted that the Crown was continuously in breach of its duties.

4.19 In addressing limitation, the High Court distinguished between single actions (falling under the Cause of Action Rule) and continuing torts in these terms:[87]

> In this connection it is important to recognise that there are different ways in which such a breach may cause damage. Thus, an isolated event

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79 At 589.
80 *Clutha*, above n 71, at [32]–[36].
81 At [35].
82 *Clutha (No 3)*, above n 71, at [18]–[20].
83 At [20].
84 At [20].
85 *Phonographic Performance Ltd v Department of Trade and Industry* [2004] EWHC 1795 (Ch), [2004] 1 WLR 2893, referred to in *Edmonds*, above n 19. The test set down in *Phonographic* has been reaffirmed by subsequent United Kingdom authorities: see for example *Spencer v Secretary of State of Work and Pensions* [2008] EWCA Civ 750, [2009] 1 All ER 314 and *Iqbal v Legal Services Commission* [2005] EWCA Civ 623.
86 At [8].
87 At [14] referring to *Arkin v Borchard Lines Ltd* [2000] EU LR 232.

> amount to such a breach may cause a chain of damage development commencing when the effects of the breach first affect the claimant, and those [effects] may continue for a long period of time. If that period commences prior to the cut-off date for the purposes of a period of limitation, the claim will prima facie be time-barred notwithstanding that the effects of the breach may continue beyond that date. The position is similar to a claim in tort for negligence. By contrast, there may be a continuing or repeated breach of statutory duty, over an extended period, such as an unlawful emission of toxic fumes which continues to affect and injure those exposed to it over the whole period of that breach. In such a case, if the limitation cut-off date occurs during the period, the claimant's cause of action for the damage suffered after the date in question will not be barred.

4.20 Applying those principles, the High Court found in PPL's favour. The Crown was continuously in breach of its obligations for so long as it failed in its duty to implement the directive. The damage suffered after the Crown's breach in July 1994 could not all be "attributed to the initial breach".[88] Instead, PPL was deprived of remuneration on each subsequent occasion that a sound recording was played in circumstances where the directive would have entitled the producer to payment.[89] For those reasons, both the fresh breach and fresh loss requirements of the continuing tort exception were satisfied.

4.21 Two appellate decisions illustrate those principles in operation. The Supreme Court in *Jalla v Shell International Trading* recently distinguished between genuine continuing nuisances and one-off breaches.[90] The former involves repeated activity by the defendant (i.e. a fresh breach) that interferes with the claimant's land on a daily or regular basis (i.e. fresh damage). By contrast, if the ongoing interference is merely created by the lingering effect of an earlier nuisance before the limitation cut-off, the continuing torts exception will not apply. Allowing time to refresh in that latter circumstances would extend the limitation period indefinitely and thereby undermine the policy rationale of the law of limitation.[91]

4.22 In *Homburg*, the House of Lords considered whether deterioration to cargo progressively suffered over the course of a shipping voyage due to prior negligence created one or multiple causes of action.[92] Although the decision did not concern limitation, the test stated by Lord Hoffmann has been treated as delimiting the scope of the continuing breach exception within the field of limitation law.[93] The House held that the trial Judge was incorrect to treat the property deterioration as establishing new causes of action on a daily basis.[94] Lord Hoffmann explained the test.[95] Where there exists a "unifying element" tying subsequent damage to the initial breach, there is a single right of action.

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88 At [25].
89 At [25].
90 See *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16, [2024] 1 AC 595 at [24]–[33].
91 At [36].
92 *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 AC 715. In *Edmonds*, the Court of Appeal held that the "distinction between those tortious acts which create a continuing cause of action and those which do not emerges (as the Crown submitted) from the discussion in *Homburg*": see *Edmonds*, above n 19, at [64].
93 See for example *Phonographic Performance*, above n 85, at [15]–[16].
94 *Homburg*, above n 92, at [89].
95 At [90]–[91] per Lord Hoffmann.

Conversely, in the absence of a unifying element (i.e. new loss), the claim is able to be segregated. No fresh damage existed in *Homburg*.

5 Continuing torts exception does not apply on these facts

5.1 Applying the correct legal test to the facts, the continuing torts exception is not available to Mr Daisley. The limitation date is 14 August 2009, being six years before he filed proceedings. WDC did not commit a fresh breach of its duty after that date. Nor are any of the losses suffered by Mr Daisley after 14 August 2009 new or additional to the losses which began to accrue in September 2006. For those reasons, the requirements of the exception are not satisfied. The Court of Appeal's judgment to that effect was correct.

No fresh breach of duty after 14 August 2009

5.2 WDC's duty was to keep records and produce them on request and to carry out reasonably diligent inquiries into the existence of the LUC.[96]

5.3 As noted by the Court of Appeal, Mr Daisley's pleading did not allege any repeated breach of that duty after 14 August 2009:[97]

> There was no allegation of repeated breached after 14 August 2009. The statement of claim pleaded no new breach of duty between that date and 22 September 2009, when the 1988 land use consent was disclosed. Thereafter it pleaded failure to withdraw the enforcement proceeding and alleged that the Council's conduct caused continuing loss and evidenced bad faith, but these are not allegations of continuing breach of the duty to keep and disclose records. Nor did the particulars of misfeasance extend to anything done after 14 August 2009.

5.4 The High Court's findings also do not support a conclusion that WDC breached its duty after 14 August 2009. While the Court described the Council as "continuously" breaching its duties from November 2004 until September 2009,[98] it did not identify any post-August 2009 breach of duty. It treated the Council's conduct from 2006 to September 2006 as being a single uninterrupted course of wrongful conduct even though (i) WDC's breaches of duty occurred on particular dates (identified in the High Court's decision) and were separated by significant time intervals and (ii) the final breach identified by the High Court took place in July 2009, meaning the Council's conduct did not extend into the limitation period let alone to September 2009 when the LUC was discovered. Having analysed the High Court's findings, the Court of Appeal decided that the "most recent breach of duty was the enforcement proceeding commenced in the Environment Court on 31 July 2009".[99] This is far from a 'true' continuing breach case which involves wrongful acts or

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96 HC judgment, above n 31, at [185] and [276(a)].
97 CA judgment, above n 40, at [86].
98 HC judgment, above n 31, at [276].
99 CA judgment, above n 40, at [87]. This is supported by an analysis of the High Court's judgment. The High Court identified WDC's breaches as occurring at the point when it archived the LUC (which meant it failed to have a version of the LUC in its current files); when it failed to diligently search for the consent before issuing the 21 February 2005 abatement notice and the subsequent notices (the last of which was issued on 28 November 2008), in 2006 when Mr Daisley applied for a consent, and before filing enforcement proceedings on 31 July 2009 in the Environment Court; and each time the Council misadvised Mr Daisley regarding the existence of the LUC in reply to his requests for information.

omissions occurring on a daily or other regular basis (e.g. a daily nuisance as discussed in *Jalla* or an ongoing false imprisonment).

No additional or fresh loss suffered inside limitation period

5.5 Irrespective of whether WDC committed a fresh breach after 14 August 2009, Mr Daisley did not suffer fresh loss inside the limitation period going beyond the losses which began to accrue in September 20006. Rather, all the post-August losses were merely a continuation of the damage caused by WDC's breaches of duty before the 14 August 2009 limitation date. Accordingly, the damages awarded by the High Court are all time-barred and irrecoverable.

5.6 Breaking down the various heads of loss awarded by the High Court:[100]

(a) **Lost profits** — the High Court awarded damages of $4,089,622 as lost profits for the 12-year period from 2006–2017 in which Mr Daisley was not able to quarry his land as he planned. The lost profits incurred after 14 August 2009 were caused by the initial time-barred beach of WDC's duty and were merely the continuation of the losses which began to accumulate in September 2006. None were fresh. Therefore, the Court of Appeal was correct to conclude that the lost profits "*continued unchanged*" from 2006.[101]

(b) **Lost value of the Knight Road property** — Mr Daisley sold his property at a loss in November 2009. The High Court attributed that $90,000 to WDC's negligence,[102] and the Court of Appeal found that such loss was sufficiently distinct to constitute a fresh cause of action under the successive actions doctrine. WDC submits that this loss was neither fresh (for the purposes of the continuing breach doctrine) nor distinct (for the purposes of the successive actions doctrine):

(i) While the $90,000 loss crystallised in November 2009, it was not the first property-related loss caused by WDC's breaches of duty. The first loss of that kind occurred in 2006 when WDC maintained that no LUC existed and rejected Mr Daisley's resource consent application. Logically the value of the property (and consequently also the capacity to secure borrowings against it[103]) was similarly impacted in 2006 as it was in 2009 because market value must have assumed commercial quarrying activities were restricted because of the absence of a consent.[104] The loss of value was finally quantified in 2009 when the property was sold, but Mr

[100] See the HC judgment, above n 31, at [556].
[101] CA judgment, above n 40, at [87].
[102] HC judgment, above n 31, at [555]–[559].
[103] This is analogous the loss that Court of Appeal held was sufficient to start the limitation clock running in *Stratford v Phillips Shayle-George* (2001) 15 PRNZ 573 (CA). The solicitor's negligence caused Mrs Stratford to encumber her property to secure Mr Stratford's debts reducing her ability to deal freely with the property, including sale or borrowing (see at [20]).
[104] The High Court relied on evidence which valued the Knight Road property in 2009 at a market value of $530,000. That valuation excluded the income generating potential of the quarry ("This quarry is a potential income earner but obviously only when and if consents are approved. We have not allowed for this potential in our assessment"): HC judgment, above n 31, at [555]–[556]. See also at [276(c)(iii)] where the Court described the loss as the sale of the property at a "lower price than it would have attracted had it been sold as a property comprising a working quarry".

Daisley could have sued for that loss and quantified it by valuation evidence in 2006. Property-based losses therefore first arose before 14 August 2009, with the result that the $90,000 loss is not fresh. It is time-barred.

(ii) Furthermore, the $90,000 loss was not "distinct" from losses that occurred before 14 August 2009 as it was a further consequence of the lost profits and direct costs which started to accrue in 2006. To borrow language from *Bowen* the $90000 was "consequential upon" — and arose "indirectly" through — the earlier losses, not "directly" from WDC's wrongful act.[105] Mr Daisley sold the land to Ark Contractors Ltd to avoid a mortgagee sale.[106] He pleaded that his inability to commercially operate the quarry due to WDC's negligence meant he lost "revenue streams that would have seen [him] avoid financial difficulties and financial trauma",[107] and that he sold to Ark Contractors because there was no "recourse" for achieving revenue from the property.[108]

When awarding the $90,000, the High Court explicitly referred to the link between the loss on the Knight Road property and earlier lost profits / direct costs. It ascribed 75 per cent of the lost value to WDC's negligence by taking account of the "debilitating effect on Mr Daisley's finances of having to fight the Council because of its negligent failure to discover the [LUC]".[109] Additionally, it said that his dealings with WDC "impeded Mr Daisley's ability to focus on his business activities"[110] and that the land would have sold for a higher price if it comprised a "working quarry".[111] It held that the forced sale to Ark Contractors "must have been attributable to the fire financial circumstances in which Mr Daisley found himself".[112] Based on the Court's reasoning, therefore, the $90,000 was not distinct. It was the continuation of (or an indirect consequence of) the existing losses that began to accrue in September 2006.

(c) **Direct costs** — Mr Daisley incurred $50,000 of direct costs in dealings with WDC in relation to the LUC and his quarrying activities. Following 14 August 2009, these costs were expended to defend WDC's enforcement action brought in the Environment Court. However, these costs were not distinct from the other direct costs Mr Daisley started to incur prior to 14 August 2009. As the Court of Appeal held, Mr Daisley had "already begun to incur costs in connection with the action" before August 2009 because he "briefed his lawyer".[113] Additionally, the High

[105] *Bowen*, above n 4, at 424 quoting from *Salmond on Torts*.
[106] HC judgment, above n 31, at [12] and [555].
[107] Fourth Amended Statement of Claim [101.0019] at [205].
[108] At [137].
[109] HC judgment, above n 31, at [559].
[110] At [559].
[111] At [276(c)(iii)].
[112] At [556].
[113] CA judgment, above n 40, at [87].

Court awarded other direct costs including legal and consultant fees in connection with the 2006 consent application and costs expended as a response to abatement / infringement notices issued by the Council.[114] Direct costs incurred after 14 August 2009 were, therefore, of the same type as (and thus merely a continuation of) costs Mr Daisley incurred in 2006. For that reason, none of the costs after August 2009 are "new". They are therefore time-barred under the LA1950.

Part D: Successive actions exception does not apply

6 No basis to Mr Daisley's second ground of challenge

6.1 Mr Daisley's second ground in relation to his r 20A challenge is that the High Court decision was justified based on the "legal tests" established in *Bowen* and *Johnson*.[115] He submits that the Court of Appeal erred because it failed to address the High Court's reliance on those two authorities, preferring instead to base its decision on *Jalla* which Mr Daisley says is not relevant.[116]

6.2 By that submission, it appears that Mr Daisley seeks to invoke the successive actions doctrine as laid down in *Bowen* and *Johnson* (and discussed above). Those authorities endorsed and applied an extract from *Salmond on Torts*:[117]

> [W]here the act of the defendant is not actionable per se, but is actionable only if it produces actual damage, and it produces damage twice at different times, is there one cause of action, or are there two? If, for example, the defendant by an act of negligence has created a source of danger which on two successive occasions causes personal harm to the plaintiff, is the plaintiff barred from recovery for the second harm because he has already recovered damages or accepted compensation for the first? Both on principle and on authority it seems that when an act is actionable only on proof of actual damage, successive actions will lie for each successive and distinct accrual of damage. But where the damage sued for in the second action is not in reality distinct from that sued for in the first, but is merely a part of it or consequential upon it, it cannot be recovered. For it is clear that the second damage in order to be recoverable in a second action must arise directly from the wrongful act of the defendant and not indirectly through the damage already sued for.

6.3 Contrary to Mr Daisley's submission, there is no error in the Court of Appeal's decision on this point. Nor does the successive actions doctrine apply. WDC's submissions on this point can be shortly stated.

6.4 Firstly, the High Court's decision to extend time did not rely on the successive actions exception. For the reasons above at [3.3], the High Court determined that it would be "artificial" to regard WDC's behaviour as "separate breaches of duty"[118] giving rise to "separate and distinct" damage at different times.[119] It rejected that characterisation and instead determined that WDC engaged in a course of conduct causing damage over a period of time but not "materially distinct from the losses" that began to accrue in 2006. Put another way, the Court rejected the key premise of the successive actions doctrine — the need

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[114] HC judgment, above n 31, at [562].
[115] Continuing Breach Submissions at [51].
[116] Continuing Breach Submissions at [51].
[117] *Bowen*, above n 4, at 424 per Cooke J. See also *Johnson*, above n 4, at 239 and 243–244.
[118] At [376]–[377] referring to *Bowen*, above n 4, at 424 and *Johnson*, above n 4, at 239.
[119] At [231].

for successive and "*distinct*" occasions of damage. As the High Court did not invoke the exception, Mr Daisley's criticism that the Court of Appeal failed to engage with the doctrine is misplaced.

6.5 Secondly, in any case, the Court of Appeal in fact addressed and rejected the application of the successive actions doctrine. The Court referred to the test from *Bowen* which requires distinct damage. From there, it held that none of the damages suffered by Mr Daisley following August 2009 were sufficiently distinct from losses incurred outside the limitation period to be recoverable.[120] Mr Daisley has not identified any error in the Court's analysis.

Dated: 21 January 2025

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[120] CA judgment, above n 40, at [87]. The sole exception was the $90,000 loss on sale of the Knight Road property (see at [88]) but the error in the Court of Appeal's analysis on this point has already been addressed above at [5.6(b)].