IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2023-100-001

BETWEEN	**DONALD BRETT HASTIE AND LEANNE GAIL DREDGE as trustees for THE HASTIE & DREDGE FAMILY TRUST** Claimants
AND	**BARRY RONALD BARNES and PAMELA HOLMES** First Respondent
AND	**BARRY RONALD BARNES** Second Respondent
AND	**CHRISTCHURCH CITY COUNCIL** Third Respondent
AND	**GRAEME JACOBS ARCHITECT LIMITED (COMPANY NUMBER 1496058)** Fourth Respondent
AND	**DSF BUILDERS LIMITED (COMPANY NUMBER 1863635)** Fifth Respondent
AND	**CONTRACT HOLDINGS LIMITED (COMPANY NUMBER 636388)** Sixth Respondent

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PROCEDURAL ORDER 4

Removal application by fourth respondent - declined

Dated 16 February 2024

Introduction

[1] The fourth respondent has applied to be removed from this proceeding under s 112 of the Weathertight Homes Resolution Services Act 2006 (the Act).

[2] The fourth respondent seeks removal upon the grounds of:

(a) delay;

(b) there being a full and final settlement of all claims in respect of the property between the fourth respondent and the claimants; and

(c) the Tribunal having no jurisdiction to determine the claim against the fourth respondent as it is not an eligible claim.

The claim and its background

[3] This proceeding relates to a residential property in Christchurch. It was constructed following receipt of a building consent issued on 21 November 2001. The second respondent was the builder. Building commenced in February 2002 and was complete by March 2005. A code compliance certificate was issued by the third respondent on 22 March 2005. The first respondents, as vendors, sold the property to the claimants and settlement occurred on either 31 March 2005 or 4 April 2005.

[4] The claimants became aware of mould and water ingress concerns around the beginning of 2008. An application for an assessor's report was received on 13 June 2008. The Department of Building and Housing determined the claimants to be eligible to use the resolution process under the Act.

[5] The claimants then engaged the fourth respondent's architectural services around mid-2009 in respect of remedial works and other alterations to the property. The parties agree that they entered into a written agreement for the work. However, no signed copy of the agreement exists as the fourth respondent could not locate it and the claimants say their copy had been lost or destroyed in the Canterbury earthquakes.

[6] The fourth respondent prepared architectural designs and submitted a building consent application with the local authority in or around June 2009.

Amended design drawings were submitted on or around 17 August 2009. Building consent for the remediation works was issued on 25 August 2009.

[7] The fourth respondent sent tenders to various builder contractors on or around 30 June 2009. On 5 August 2009, the claimants notified their acceptance of the fifth respondent's tender. An agreement was entered into between the claimants and the fifth respondent in October 2009. The fourth respondent was appointed as the architect under the agreement. At this point, it is to be noted that the fifth respondent has notified the Tribunal that it will not be participating in this proceeding as the company has no assets and is no longer in trade. The Registrar of Companies has initiated action to remove the company from the companies register.

[8] From October 2009 to April 2010, the fourth respondent performed various tasks in respect of the remedial works, including providing the fifth respondent with a list of defects requiring remedy. Then, on 1 April 2010, the fourth respondent replied to an email sent by the claimants on 25 March 2010 (a copy of which cannot be located) which stated that the claimants had unilaterally suspended or terminated the architecture contract with the fourth respondent and the building contract with the fifth respondent. The fourth respondent's final involvement in the matter was on 15 April 2010, in an email replying to the claimants' expression of dissatisfaction with the services provided by the fourth and fifth respondents.

[9] An addendum to the assessor's report was issued on 2 October 2014 and concluded that the fourth respondent should not be a party to the claim as its "plans have been completed to an acceptable standard". A further addendum was issued on 26 October 2018 which concludes that the fourth respondent should be included as a party to the claim but does not explain why his conclusion differs from that in the first addendum.

[10] On 20 February 2023, the claimants applied for adjudication and filed their particulars of claim with the Tribunal.

Criteria for removal under s 112 of the Act

[11] Section 112 of the Act provides that the Tribunal may order that a person be removed from adjudication proceedings if it considers it fair and appropriate in all the circumstances to do so.

[12] The High Court decision of *Auckland City Council v Unit Owners in Stonemason Apartment 27 Falcon Street, Parnell* determined the test for removal as:[1]

> It is generally accepted that an application for removal or strike out should only be made as a preliminary issue where a claim is so untenable in fact and law as to be unlikely to succeed.

[13] The Tribunal's approach to removals has been to consider whether the claims against a prospective party are tenable. In *Saffioti v Jim Stephenson Architect Ltd*, Katz J cautioned against removing parties at a preliminary stage in circumstances where the claims asserted against them are tenable, but weak.[2] Wylie J in *Lee v Auckland Council* supports the approach summarised by Katz J in *Saffioti*.[3]

[14] Wylie J in *Lee* acknowledged that the Tribunal has an inquisitorial role and that it may be better informed as to the relevant facts than the High Court when considering a strike out application. He also agreed with Ellis J's observation in *Yun v Waitakere City Council* that leaky home cases frequently involve many defendants because of the initial desire to spread, share or avoid liability and that therefore the Tribunal is given an extra gate keeping role to ensure that adjudication proceedings progress in an expeditious and cost effective way.[4] However, Wylie J in *Lee* warned that the discretion conferred by s 112 of the Act needs to be exercised with caution.

[15] Brewer J in *Auckland Council v Abraham* stated that the discretion conferred by s 112 is not unfettered and must be exercised on a principled basis and in accordance with applicable law.[5] Katz J in *Saffioti* commented that genuinely and reasonably disputed factual issues which could impact on the success or otherwise of the claim are generally not suitable for determination at the removal stage.

[16] Whether the claim is capable of succeeding based on the information provided is always an important factor in determining whether it is fair and appropriate to remove a party in the circumstances of each case. The onus is

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[1] *Auckland City Council v Unit Owners in Stonemason Apartment 27 Falcon Street, Parnell* HC Auckland CIV-2009-404-3118, 11 December 2009 at [21].
[2] *Saffioti v Jim Stephenson Architect Ltd* [2012] NZHC 2519 at [44].
[3] *Lee v Auckland Council* [2015] NZHC 1196.
[4] *Yun v Waitakere City Council* HC Auckland CIV-2010-404-5944, 15 February 2011 at [70].
[5] *Auckland Council v Abraham* [2015] NZHC 415.

on the party seeking to be removed to show that it is fair and appropriate to remove them.

[17] It is well accepted that an application for removal should only be made as a preliminary issue where a claim is so untenable in fact and law as to be incapable of success. It is also understood that an adjudicator should not attempt to resolve genuinely disputed issues of fact unless all necessary material is before him or her.[6]

[18] It is accepted that the Tribunal's approach to removals has been to consider whether the claims against a prospective party are tenable and the High Court has cautioned against removing parties at a preliminary stage in circumstances where the claims asserted against them are tenable but weak.[7]

[19] I propose to apply these principles when determining the fourth respondent's removal application.

Delay

[20] The relevant considerations on an application for an order that a party be removed from a claim for delay are set out in *Lovie v Medical Assurance Society New Zealand Ltd*,[8] *Auckland Council v Weathertight Homes Tribunal*,[9] *Hermann v Weathertight Homes Tribunal*,[10] and *Gwak v Sun*.[11]

[21] The High Court has held that it was not a question of asking whether a respondent was "entirely" prevented from raising a defence, but whether – as between the parties – it was "just, or fair and appropriate", that a respondent's defences were limited to the extent they were.[12]

[22] In so doing, the Tribunal is required to undertake a balancing exercise. It is exercising a judicial discretion.

[23] In *Auckland Council v Albany Stonemasons*, Brewer J described this exercise in the context of a removal application:[13]

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[6] *Auckland City Council v Unit Owners in Stonemason Apartment 27 Falcon Street, Parnell*, above n 1.
[7] *Saffioti v Jim Stephenson Architect Ltd*, above n 2.
[8] *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244 (HC) at 248.
[9] *Auckland Council v Weathertight Homes Tribunal* [2013] NZHC 3274.
[10] *Hermann v Weathertight Homes Tribunal* [2018] NZHC 1843.
[11] *Gwak v Sun* [2022] NZHC 2296.
[12] *Hermann*, above n 10, at [17].
[13] *Auckland Council v Albany Stonemasons* [2015] NZHC 415 at [8].

> In my view, on the clear wording of s 112, a discretion is conferred. The use of the word "may" and the nature of the evaluation, "fair and reasonable in all the circumstances", do not establish a requirement to reach a particular decision following an objective assessment of decided facts against a defined test. Rather s 112 requires, as Collins J put it, "the careful evaluation of options". Therefore, I have to examine the Tribunal's decision to see whether it made an error of law or principle, took account of irrelevant considerations, failed to take account of a relevant consideration, or reached a decision that was plainly wrong.

[24] In undertaking this "standing back" assessment, the Tribunal must take into account both the claimants' and the fourth respondent's respective relevant interests.[14]

[25] On the one hand, a claimant should not be lightly deprived of the right to sue a respondent who they allege is liable to them under an otherwise eligible claim.

[26] On the other hand, a respondent should not be required to answer a claim in circumstances where the claimant's inordinate and inexcusable delay seriously prejudices that respondent to an extent which is inequitable. The analogy of such a respondent being described as "being like a boxer with one arm tied firmly behind his back" is apposite.

[27] The enquiry is whether, as between the parties, it is just, or fair and appropriate that the fourth respondent's defences are limited to the extent they are claimed to be as a result of the claimants' delay. This is a balancing act.

[28] The claimants sue the fourth respondent for negligence in the repair of their home. The adequacy of discharge of that work and any other function carried out by the fourth respondent may well prove to be a key cause of the failures in the claimants' home that followed.

[29] The claimants have a legitimate interest in pursuing their claims against the fourth respondent arising from those defects. Whether or not those claims will ultimately succeed is not required to be determined at this early stage.

[30] The fourth respondent, self-evidently, has an interest in not being exposed to claims unnecessarily. It has a legitimate interest in being able to defend the claims with the benefit of as much information as is available and

[14] At [15].

not to have that information restricted or their defences jeopardised, by the inexcusable effluxion of time.

[31] Those interests are balanced in this Procedural Order.

Submissions for removal

[32] Counsel for the fourth respondent submits that the delay by the claimants in bringing this proceeding is inordinate and inexcusable. Counsel refers to several authorities that have previously found a delay of four years,[15] six and a half years,[16] seven years,[17] and eight years[18] to have constituted inordinate delay. Counsel points out that there has been extensive delay by the claimants in bringing their claim as it has been over nine years since the assessor's 2014 Addendum Report and over four years since the 2018 Addendum Report.

[33] Counsel further submits that the delay is compounded by the claimants' failure to provide the fourth respondent with notice of the alleged issues, which was a factor considered in favour of removal in *Hill v Queenstown Lakes District Council*.[19]

[34] The fourth respondent claims that the claimants' delay has seriously prejudiced its ability to respond to the claimants' allegations. It says it no longer holds a copy of its file or records of the technical information and relevant guidance documentation that would enable it to respond to the substance of the claim. In particular, it no longer has access to copies of relevant manuals and design details from the cladding manufacturer, PBS Distributors Ltd. That company no longer exists and was removed from the companies register in 2013. According to the fourth respondent, this material is important to its defence as the claimants allege the fourth respondent's designs do not accord with the manufacturer's guidelines at the time. However, due to the loss of those materials and because PBS Distributors Ltd is no longer in business, it says it is prejudiced in its ability to respond to the allegations. The fourth respondent also says that due to the lack of evidence as to correspondence between the fourth respondent, the claimants and other third parties, it is

[15] *Hill v Queenstown Lakes District Council* WHT TRI-2012-100-032 (Procedural Order 7 dated 27 August 2012) at [18].
[16] *Snelling v Christchurch City Council* HC Christchurch, CIV-2010-109-2346, 9 August 2011 at [53].
[17] *Auckland Council v Weathertight Homes Tribunal* [2013] NZHC 3274 at [6]–[8].
[18] *Gwak*, above n 11.
[19] *Hill*, above n 15, at [17] and [22].

unclear what works were carried out after the fourth respondent's services were terminated.

[35] Counsel also submits that the fourth respondent is prejudiced by the unavailability of witnesses. For example, witnesses that were employed by PBS Distributors, as well as independent experts who had experience with PBS Distributors, who could have commented on the designs at issue in this claim, are now unavailable. Counsel goes on to submit that the fifth respondent is unavailable as it is no longer trading or taking part in this proceeding. According to counsel, it is also too late to identify witnesses who could have given evidence about other events such as what damage the property suffered during the earthquakes.

[36] The fourth respondent further submits that it is seriously prejudiced by the delay due to damage to the property following the Canterbury earthquakes and further works being carried out on the property by third parties. It says that more than 12 years have passed since the February 2011 earthquake in the Canterbury region. Therefore, it will be difficult to segregate the damage that was caused by various factors such as the earthquakes, any pre-existing issues with the property, the fourth respondent's allegedly defective designs and further works carried out after the fourth respondent ceased its involvement with the property.

[37] Finally, the fourth respondent submits that the claimants' delay is aggravated as they repudiated their agreement with the fourth respondent when they withheld certain payments from the fourth respondent under the architecture services agreement.

Submissions opposing removal

[38] The claimants accept that the delay in bringing this proceeding has been inordinate. However, the claimants submit that the delay is excusable due to the events referred to in Mr Hastie's affidavit having had a significant impact on the claimants. Those events include, among others:

(a) the local authority failing the final inspection for the remedial works;

(b) the Canterbury earthquakes causing further damage to the property;

(c) the claimants attempting to obtain amended building consents and a code compliance certificate from the local authority;

(d) the claimants corresponding with the Ministry of Business, Innovation and Employment and seeking its assistance in resolving their claim with the Earthquake Commission;

(e) the claimants engaging experts to prepare reports to determine the extent of the earthquake damage; and

(f) the Tribunal rejecting the claimants' claim in 2017 due to errors in its application.

[39] In respect of the loss of documentation, the claimants submit that sufficient documentation still exists to determine the role of each respondent and provide assistance to their defence.

[40] In response to the fourth respondent's claim of the unavailability of expert witnesses, the claimants submit that there is no evidence of any attempt by the fourth respondent to find an appropriately qualified expert. According to the claimants, it is relatively easy to identify experts with the requisite experience, as is evident from the first, second and sixth respondent's ability to do so.

[41] The claimants submit that all parties have been prejudiced by the loss of documentation caused by the earthquakes. As such, the claimants say they cannot be criticised for matters outside their control and that a prejudice shared by all cannot provide sufficient grounds to justify the removal of any of the respondents.

[42] The claimants conclude that it is in the interests of justice and is fair and appropriate for the fourth respondent to remain a party to the claim. The claimants say their delay was inordinate, but was excusable and did not result in significant prejudice to the parties. Furthermore, the claimants say that the removal of the fourth respondent would be to the prejudice of the remaining respondents who will lose the ability to claim contribution from the fourth respondent.

[43] Even if the Tribunal finds the claimants' delay to be inexcusable and has caused serious prejudice, the claimants submit that the interests of justice

still require the parties to remain in the claim. The claimants rely on *Martin v Hermann*,[20] where the Tribunal held that, relevantly:

(a) the destruction of a party's own documents is not determinative of its ability to defend the claim if there is a significant amount of documentary evidence before the Tribunal;[21]

(b) where a respondent is a professional, they are well equipped to draw on their own expertise and experience in receiving, considering and responding to the evidence against them;[22] and

(c) any serious prejudice suffered by the respondent can be ameliorated by directions from the Tribunal.[23]

[44] The third respondent similarly submits that although the claimants have unduly delayed in bringing this claim, the fourth respondent has not been seriously prejudiced by the delay and it is not fair and just to remove the fourth respondent from the claim. The third respondent submits that the remedial work is available for inspection, and the overlap with any earthquake damage is a matter for expert evidence. Furthermore, it submits that the loss of documentation will have no material impact on the liability of the fourth respondent as Mr Jacobs is available to give evidence, technical information relating to the cladding system can be made available from other sources, and the local authority's building consent records and addendum reports for the remedial works remain available.

Is the delay inordinate?

[45] As the claimants in their submissions opposing the removal of the fourth respondent accept that the delay is inordinate, the first limb of the test for delay is made out.

Is the delay inexcusable?

[46] The claimants were aware of alleged defects in the fourth respondent's work in 2010, as evidenced by the fourth respondent's email (dated 15 April 2010) replying to an email from the claimants expressing their dissatisfaction

[20] *Martin v Hermann* WHT TRI-2017-100-6, 5 November 2018 (Procedural Order 9).
[21] At [24]–[26].
[22] At [43].
[23] At [54].

with the fourth respondent's work. The fourth respondent could not locate a copy of the claimants' email. The fourth respondent's work was first assessed in the 2014 addendum to the assessor's report. However, the assessor concluded that the fourth respondent should not be joined to this claim. In the 2018 addendum, a different assessor concluded that the fourth respondent should be joined to this claim. The most favourable position for the claimants is that they were aware of a possible claim against the fourth respondent by 26 October 2018 when the second addendum was issued. The claimants applied for adjudication of this claim in February 2023. That is still a delay of over four years.

[47] The reasons for the delay put forth by the claimants do not make it excusable. It is unfortunate the claimants have met setbacks caused by the Canterbury earthquakes, and they were understandably occupied with their claim with the Earthquake Commission and quantifying the extent of repairs required on their home. However, any challenges that arose as a result should not have significantly affected their ability to file these proceedings by the time the second addendum to the assessor's report was issued. The claimants say they sought advice from the Ministry of Business, Innovation and Employment in resolving the claim, but the Ministry is not a proper forum from which to seek advice. The claimants have not provided any reasonable excuse as to why they could not file their application for adjudication before this Tribunal at the same time they were progressing with their claim with the Earthquake Commission.

[48] What is also relevant is that by the time the second addendum had been issued, more than eight years had passed since the fourth respondent's services were terminated. At that point, there would be issues regarding the reliability of witnesses and the ability to locate documentary evidence. It would have been critical for the claimants to at least notify the fourth respondent of their intent to commence proceedings in order to allow the fourth respondent to prepare and preserve what documents it still possessed.

[49] The claimants also refer to personal health and finance concerns which necessarily would have occupied their energy. Whilst the Tribunal has sympathy for the health concerns of Ms Dredge, it is not a sufficient excuse for delay.[24] The claimants' financial concerns are not persuasive either, especially when considering the claimants were self-represented up until only recently.

[24] *Gwak v Sun* WHT TRI-2020-100-6, 25 February 2022 (Procedural Order 5) at [56].

Financial concerns would have had little impact on the claimants' ability to file their claim.

[50] The fourth respondent has also rightly pointed out that the claimants own the property in their capacity as trustees of the family trust. The claimants therefore have obligations to the beneficiaries of the trust. If they had difficulty in advancing the claim for the trust, it was open to them to appoint new or additional trustees that could have progressed the claim in a timely manner.

[51] Having regard to the circumstances and the reasons for the delay given by the claimants, I find that the delay in commencing this claim is inexcusable. While the emotional impact the discovery of weathertightness defects can have on owners is acknowledged, I am required to consider and balance the interests not only of owners but also respondents.

[52] Waiting more than 13 years to commence a claim is not excused by the pressures of business, health, finance, remedial works and claims with the Earthquake Commission. It is simply too long a period to take no action. To cite from Snelling, it was a period that was materially longer than the time usually regarded by the Courts and the profession as an acceptable period of time [to act].

Has the delay seriously prejudiced the fourth respondent?

[53] I do not consider that the fourth respondent has been seriously prejudiced as a result of the claimants' delay. Despite the inability to locate relevant documentation from PBS Distributors, there is still available sufficient evidence to assess the fourth respondent's work. For example, the 2018 addendum to the assessor's report constitutes expert evidence that impugns the fourth respondent's work. The failed remedial works on the home has not been repaired and is available for the parties to inspect. This presents a genuine factual issue that the Tribunal cannot determine in an interlocutory application and must go to hearing.

[54] The fourth respondent also claims that it is prejudiced by the unreliability of witnesses' memories as they may have faded over time and can become biased by the dispute process. It cites the Court of Appeal case of *Street v Fountaine* as support.[25] Although there are valid concerns about the reliability of witnesses, both the fourth respondent and the claimants have

[25] *Street v Fountaine* [2018] NZCA 55 at [128].

submitted comprehensive affidavits, which points to their memory of events being sufficiently detailed so as not to give rise to the issue of unreliability.

[55] Furthermore, the claimants bear the onus of proving each of the defects they seek recovery for. Should they be unable to prove that any particular defect was in fact a defect and why the fourth respondent is liable for the creation or allowance of that defect, then they will fail in that part of their claim. The fourth respondent will have all the usual rights to challenge any evidence against it and to put the claimants to proof on its alleged responsibility for any of the claimed defects.

[56] I also do not accept the fourth respondent's claim that it will be difficult to identify independent experts and witnesses. There certainly is no lack of independent building experts that the fourth respondent could engage. The sixth respondent, for example, has already engaged an appropriately qualified expert. The fourth respondent has provided no reason as to why it will face difficulty in doing the same.

[57] The fourth respondent's concerns over separating the different causes of damage to the home is also a matter for expert evidence that cannot be determined at this stage. Again, it will be for the claimants to prove the extent of the damage caused by the fourth respondent's work.

[58] Any prejudice to the fourth respondent by way of the loss of evidence will have to be addressed as best as can be with the assistance of the contemporaneous evidence and the recollection of the witnesses. Such prejudice as exists will have to be addressed at hearing. The Tribunal can adopt various strategies to deal with such issues, such as requiring the claimants to provide very detailed explanations of the defects complained of and their causes before the proceeding progresses to a hearing.

[59] I therefore consider that the delay has not seriously prejudiced the fourth respondent.

Overall interests of justice considerations

[60] Jagose J in *Hermann v Weathertight Homes Tribunal* reinforced that the question was not whether the fourth respondent was "entirely" prevented

from defending himself but whether as between the parties it was "just, or fair, or appropriate", that his defences are limited to the extent they are.[26]

[61] I do not consider that it is fair or appropriate that I remove the fourth respondent from this claim. It is not unfairly prevented from defending itself, as it has a wide range of information available.

[62] Applying the "standing back" consideration, weighing the rights and interests of both parties, the Tribunal finds that the overall justice of the case does not favour the fourth respondent's application that it should be removed from this claim for delay.

Settlement agreement

[63] The fourth respondent also submits that the claim against it is barred pursuant to a settlement agreement between the parties. While remedial works were being carried out by the fifth respondent, the claimants were dissatisfied with aspects of the fourth respondent's architectural works and withheld certain outstanding payments from the fourth respondent.[27] The fourth respondent engaged a debt collection agency to recover the outstanding debt. On 12 May 2011, the claimants sent a letter to the fourth respondent proposing the terms of a settlement between the parties.[28] There were only three terms of the offer, which provided that:

(a) the claimants will pay $15,000 to the debt collection agency;

(b) the payment will be "in full and final settlement of all claims between the parties"; and

(c) the offer will be open for acceptance for five working days and payment will be made within two working days of acceptance.

[64] A further letter from the claimants dated 18 May 2011 refers to a fax from the fourth respondent dated 17 May 2011, and confirms that the claimants have paid the $15,000 to the debt collection agency.[29] The fourth respondent submits that the parties agreed to the settlement offer and that the words "in

[26] *Hermann*, above n 10.
[27] BoE of Graeme Robert Jacobs (14 September 2023) at [22] and [25]–[26].
[28] BoE of Graeme Robert Jacobs (14 September 2023) at [30]–[31]; and bundle of documents attached to BoE of Graeme Robert Jacobs (14 September 2023) at 53.
[29] Bundle of documents attached to BoE of Graeme Robert Jacobs (14 September 2023) at 54.

full and final settlement of all claims between the parties" preclude the claimants from making a claim against the fourth respondent.

[65] Furthermore, the fourth respondent says that when settlement was reached, the claimants were fully aware of the local authority refusing to issue code compliance for the remediation works undertaken on the property. Therefore, it is submitted that the claimants cannot claim they had no basis for believing they might have other claims against the fourth respondent.

Submissions opposing removal

[66] In its submissions opposing the fourth respondent's removal, the claimants do not deny that a settlement was entered into, but say that it only related to the outstanding payment claims. The claimants submit that the nature of the settlement with the fourth respondent is consistent with a separate settlement agreement that the claimants entered into with the fifth respondent which specifically excluded settlement of matters relating to the quality of the fifth respondent's work.[30] It further submits that no copy of the settlement agreement is available, so its terms are in dispute.

[67] The third respondent has also filed submissions opposing the fourth respondent's removal. The third respondent similarly submits that the settlement agreement only pertained to the outstanding payments claims as that was what was in dispute at the time.

Discussion

[68] I agree with the claimants that the terms of the settlement agreement are genuinely in dispute. The only evidence available before the Tribunal at this stage are two letters from the claimants' solicitors setting out a proposal for the terms of the settlement agreement, and later confirming payment made as part of the settlement. There is no signed copy of a settlement agreement, or a letter from the fourth respondent unequivocally accepting the terms.

[69] It may very well be that, as the fourth respondent claims, the terms proposed by the claimants' solicitors were accepted by the fourth respondent and nothing further was required between the parties. However, that does not necessarily mean that the words "full and final settlement" should be interpreted as including a potential claim for allegedly defective work by the fourth

[30] Appendix L of Donald Hastie's BoE (30 November 2023) at cl 3.1.2.1.

respondent. Part of the relevant background to the settlement was the outstanding payments claims and the risk that the fourth respondent would pursue the debt through legal proceedings. The claimants had already been through a similar situation where the fifth respondent issued proceedings against the claimants for unpaid payment claims, which was subsequently settled. It is likely that the parties here also agreed to the settlement to avoid the costs of court proceedings. On a *prima facie* basis, it does not make sense for one party to make a single payment of $15,000 and forego their claim in a leaky building dispute. In my preliminary view, the $15,000 payment was made in settlement of the fourth respondent's claim against the claimants for the outstanding payment claims.

[70] In any case, there is a genuine factual dispute as to the scope of the settlement agreement. In circumstances where the evidence is contentious or challenged, the Tribunal is wary of attempting to resolve such matters in the context of a removal application. Genuinely and reasonably disputed factual issues which could impact on the success of the claim are generally not suitable for summary determination.[31] Accordingly, the settlement issue must proceed to hearing and the removal application based on the settlement agreement is declined.

Jurisdiction

[71] As an alternative ground for removal, the fourth respondent submits that the Tribunal does not have jurisdiction to determine the claim against it as the claim has not been determined to be an eligible claim under s 48 of the Act. It says that the 2014 addendum to the assessor's report, which involved an analysis of the works done by the fourth respondent, was simply an update to the 2008 report. According to the fourth respondent, the 2014 report is therefore not an eligibility assessor's report pursuant to s 41 of the Act and it does not constitute a full assessor's report pursuant to s 42 of the Act. Furthermore, the report has not been evaluated by the chief executive, and no decision, as required by s 48 of the Act, has been made as to whether the claim is eligible.

[72] When looking at the criteria for a full assessor's report under s 42 of the Act, it is clear that the 2014 addendum constitutes a full report. The addendum report contains the assessor's opinion that the claim meets the

[31] *Saffioti*, above n 2, at [53].

eligibility criteria along with his views on why the house leaks, the nature and extent of the damage caused by the leaks, the repairs necessary, the costs of that repair, and who should be parties to the claim.

[73] I do not accept the fourth respondent's submission that the claim against it is not an eligible claim as the chief executive has not made an eligibility decision on the 2014 addendum report. The addendum report is an update to the original assessor's report issued in 2008, as is made clear by the purpose of the addendum report, which states that it "must be read in conjunction with the original report". It merely builds upon the original report and does not constitute a new claim. The chief executive has already made an eligibility decision in relation to the claim, and there is no need for another eligibility decision for what is essentially an update to the claim. In other words, the claim against the fourth respondent is part of the claim assessed as eligible by the chief executive.

[74] Furthermore, the chief executive's role in making an eligibility evaluation is to decide whether the claim meets the eligibility criteria set out in s 14 of the Act. Those criteria are that:

(a) the house was built before 1 January 2012 and within the period of 10 years immediately before the delay on which the claim is brought;

(b) the house is not part of a multi-unit complex;

(c) the house has leaks caused by some aspect of its design, construction, alteration or the materials used in its construction or alteration; and

(d) the leaks have caused damage.

[75] The fact that the fourth respondent was involved in remedial works after the chief executive's eligibility decision was made does not affect how the claim meets these criteria.

[76] I would also note the *Ponsonby Gardens* determinations, where the Weathertight Homes Resolution Service held that claimants are not restricted to only matters raised in the assessor's report.[32] The adjudicator held that once a claim is found to be eligible, the claimant is free to extend its claim, provided

[32] See for example *EL 1 Ltd v Lay* WHRS Claim No 923, 11 March 2005 at [5.3.6].

respondents are fully aware of the claims made against them and the claims relate to leaky buildings matters.[33]

[77] Finally, I cite a relevant comment made by this Tribunal in *Engelbrecht v Christchurch City Council*.[34] In a procedural order concerning removals, the Tribunal held that in cases where there is defective remedial work, two causes of action arise – a claim for the original work, and an additional and distinct cause of action for the defective remedial work, which is deemed to be an additional and concurrent cause of the damage.[35] Applying that reasoning, I do not accept the fourth respondent's submission that the claim against it is not an eligible claim. The fourth respondent's remedial work is directly tied to the leaks that are the subject of the eligible claim. It is difficult to separate the claim against the fourth respondent from, for example, the claim against the second respondent for its allegedly defective work on the original construction of the home. The fourth respondent's ground for removal based on jurisdiction therefore fails.

Conclusion

[78] Overall, I do not consider it fair or appropriate for the fourth respondent to be removed from this claim. Although the fourth respondent has raised a valid complaint about the claimants' delay in commencing this claim, that delay has not seriously prejudiced its ability to defend against the claim. There are also genuine factual disputes that cannot be resolved in this removal application and must be determined at a hearing.

[79] Accordingly, the fourth respondent's application to be removed from this claim is denied.

Further case management matters

[80] The determinations of the removal applications by the first and second respondents and the sixth respondent will be issued by mid March 2024. A case management conference to progress this claim closer to resolution will then be convened.

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[33] At [5.3.7].
[34] *Engelbrecht v Christchurch City Council* [2012] NZWHT 6 (Procedural Order 6).
[35] At [43].

DATED this 16th day of February 2024

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K D Kilgour
Tribunal Member