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 5

Removal application by the sixth respondent - declined

Dated 22 February 2024

Introduction

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

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

(a) there being no tenable claim against the sixth respondent;

(b) limitation;

(c) the claimants having waived any claim against the sixth respondent; and

(d) delay.

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. 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 accepted on 13 June 2008. The Department of Building and Housing determined the claimants to be eligible to use the resolution process under the WHRSA.

[5] In 2009, the claimants engaged the fourth respondent as the architect and the fifth respondent as the builder to carry out remedial works on the property. The fourth respondent prepared two lists of defects for the fifth respondent to repair. At this point, it is to be noted that the fifth respondent by its counsel 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.

[6] In or around March or April 2010, the claimants fell out with the fourth and fifth respondents. The claimants terminated their agreement with the fourth respondent. The fifth respondent commenced High Court proceedings against the claimants for unpaid payment claims.

[7] Around that time, Peter Jamieson, a director of the sixth respondent, was made aware of the claimants' issues with their disputes and the property by a mutual acquaintance. Mr Jamieson was told the claimants needed limited assistance in administering a list of finishing defects to be tidied up. He agreed to help on behalf of the sixth respondent. He visually inspected the property and prepared a list of defects requiring repair.

[8] The claimants then entered into a deed of settlement with the fifth respondent.[1] Only a partially signed copy of the deed has been provided to the Tribunal. However, an email from the claimants' solicitor at the time confirms that the deed has been signed by the claimants and the fifth respondent.[2] The deed relevantly provided that:

(a) the fifth respondent repair the defects identified in two lists (comprising of defects identified by the fourth respondent and Mr Jamieson);

(b) the sixth respondent be appointed as the architect to administer the completion of those defects; and

(c) it was the claimants' obligation to obtain a code compliance certificate for the remedial work.

[9] Throughout July and August 2010, Mr Jamieson and the claimants' solicitor exchanged correspondence regarding the sixth respondent's role in the remediation of the property. The claimants and the sixth respondent entered into an agreement for engineer's services, but the deed of settlement referred to the sixth respondent as the architect. Mr Jamieson's understanding was that the sixth respondent would act as the engineer, meaning its role was to administer the repairs of the listed defects, confirm their completion and act as an intermediary between the claimants and the fifth respondent.

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[1] Deed of Settlement (undated) marked as annexure "I" within affidavit of Peter Jamieson (14 September 2023).
[2] Email from Glen Ryan (13 July 2010) marked as annexure "J" within affidavit of Peter Jamieson (14 September 2023).

[10] The fifth respondent proceeded to work on the listed defects. In August 2010, Mr Jamieson visited the property to check on the progress of the fifth respondent's work and ensure that the claimants were satisfied with the work. On 26 August 2010, the sixth respondent issued a certificate of practical completion for the work and a three-month maintenance period commenced. There were still a number of items requiring completion before a final code compliance certificate could be issued. These items were allegedly not part of the listed defects.

[11] In or around November 2010, Mr Jamieson visited the property and confirmed there were no issues with the repaired listed defects that required further work. The maintenance period concluded. On 29 November 2010, Mr Jamieson sent an email to the claimants explaining that he had been to the property and that the final payment to the fifth respondent could be released.

[12] On 1 December 2010, the claimants sent a reply email asking Mr Jamieson to confirm that he had received from the fifth respondent all documents required to obtain a code compliance certificate. On 2 December 2010, Mr Jamieson sent a reply to the claimants confirming he had received all documents required for code compliance from the fifth respondent and had forwarded them onto Tony Earl of New Zealand Build Ltd (engaged by the claimants to complete the remaining items on the property and remediate damage caused by the Canterbury earthquakes).

[13] Mr Jamieson's next and final involvement with the property was in late-2012 when the claimants approached him for help in obtaining a code compliance certificate. Mr Jamieson emailed the cladding installer and the cladding supplier advising them that the cladding did not meet Building Code standards or manufacturer's installation guidelines. He set up a meeting with the installer and supplier, as well as with Mr Earl from New Zealand Build, to help bring the project to a close.

[14] The property failed the third respondent's final inspection on 10 February 2011. A code compliance certificate has never been issued and further remedial works have not been undertaken on the property.

[15] Three addendums to the assessor's report were issued on 2 October 2014, 26 October 2018 and 5 May 2023. They point out a number of construction defects in relation to various works done on the property.

[16] 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 WHRSA

[17] Section 112 of the WHRSA 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.

[18] The High Court decision of *Auckland City Council v Unit Owners in Stonemason Apartment 27 Falcon Street, Parnell* determined the test for removal as:[3]

> 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.

[19] 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.[4] Wylie J in *Lee v Auckland Council* supports the approach summarised by Katz J in *Saffioti*.[5]

[20] 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.[6] However, Wylie J in *Lee* warned that the discretion conferred by s 112 of the WHRSA needs to be exercised with caution.

[21] 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.[7] Katz J in *Saffioti* commented that

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

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.

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

[23] 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.[8]

[24] 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.[9]

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

No tenable claim

[26] The sixth respondent submits that the claimants have no tenable claim against it. The claimants in their particulars of claim allege that the sixth respondent breached the architecture agreement by failing to obtain a code compliance certificate, and breached its duty of care by failing to ensure all defective works were remedied. However, the sixth respondent's position is that obtaining a code compliance certificate was beyond its scope of engagement and that there was no evidence it breached its duty of care. It submits that it was only engaged to oversee the remediation of the defects identified in the two lists.

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[8] *Auckland City Council v Unit Owners in Stonemason Apartment 27 Falcon Street, Parnell*, above n 3.
[9] *Saffioti v Jim Stephenson Architect Ltd*, above n 4.

[27] The relevant background leading to the sixth respondent's engagement is largely set out by Mr Jamieson in his affidavit. The relevant chronology is set out below.

[28] On 6 July 2010, the claimants' solicitor advised Mr Jamieson that the claimants wanted him to fulfil the normal role of an architect under a standard architect agreement. The sixth respondent was to administer the completion of the listed defects. It was also noted that appointing the sixth respondent as architect was not something initially contemplated by the claimants. Mr Jamieson understood this appointment to merely be a procedural step to allow the claimants to move forward with the settlement. His belief was that his role did not include certifying that the property or the remedial works had been completed to a standard required to obtain a code compliance certificate.

[29] On 13 July 2010, the claimants' solicitor emailed Mr Jamieson to confirm that the deed of settlement between the claimants and the fifth respondent has been signed. The solicitor then suggested arranging the contractual relationship between the claimants and Mr Jamieson.

[30] On 9 August 2010, the claimants' solicitor advised Mr Jamieson that the sixth respondent's engagement was to formalise what was outlined in the deed of settlement, so its role would be as an engineer and not an independent arbitrator. On the same day, Mr Jamieson replied, saying he understood his role to be that of an engineer.

[31] According to Mr Jamieson, an engineer's role in relation to the claimants' property would be to ensure that a builder was repairing the listed defects and confirm the completion of the repairs. An engineer would not warrant the standard of the works. In contrast, an architect's role is to design the works and send them to the engineer who would administer construction.

[32] Mr Jamieson says that on 12 August 2010, he emailed the claimants' solicitor confirming that the sixth respondent would do the work but explained that it could not be referred to as completing architectural services as that is a term reserved for architects. He said the sixth respondent should be appointed as the engineer to the project. The claimants' solicitor provided Mr Jamieson a copy of the draft agreement for engineer's services.

[33] Mr Jamieson further said that on 13 August 2010, the claimants' solicitor explained to him that the word "architect" had to be used to describe

the sixth respondent's work as the deed of settlement uses that word to identify the sixth respondent's role. Mr Jamieson asked the claimants' solicitor to proceed with the agreement with the sixth respondent. Again, his understanding was that the use of the word "architect" was a procedural step to move forward with the deed.

[34] Copies of the 12 and 13 August emails have not been provided to the Tribunal.

[35] Mr Jamieson understood the sixth respondent's role to be an engineer and not an architect as described in the deed of settlement. The sixth respondent was to ensure that all the listed defects were completed to the standard required by the deed (which referred to the standard required by the fifth respondent's original services agreement with the claimants). It was not however required to certify that the remedial works had been completed to a standard required to obtain a code compliance certificate or to examine all aspects of the property, particularly the works that were outside the scope of the listed defects.

Submissions for removal

[36] In its submissions, the sixth respondent points out that neither the agreement for engineer's services nor the deed of settlement impose on it an obligation to obtain a code compliance certificate. To the contrary, it submits that cl 10.6 of the deed of settlement and cl 3.5.1(c) of the construction contract with the fifth respondent provide for the claimants to be responsible for obtaining a code compliance certificate.

[37] Furthermore, Mr Jamieson in his affidavit says that after the sixth respondent completed its work, the claimants requested New Zealand Build to compile all relevant information to enable a final inspection and apply for a code compliance certificate. He has also provided an email from Mr Earl which relevantly states:[10]

> Below I will note what we require from each party in relation to what was discussed today and what we will require to satisfy the council so we can obtain Code of Compliance for this project.

[10] Email from Troy Earl (20 November 2012) marked as annexure "W" within affidavit of Peter Jamieson (14 September 2023).

[38] It is submitted that this is evidence of New Zealand Build assuming responsibility for obtaining a code compliance certificate.

[39] The sixth respondent relies on cl 1.2.2 of the agreement for engineer's services and submits that it was only engaged to remedy the items identified in the two lists of defects. Clause 1.2.2 provides that:

> The scope of the project is agreed to be performance by Jamieson of the role of "Architect" under the Deed of Settlement, such that Jamieson will act … to ensure that all defects identified in the Deed of Settlement are remedied in full to the standard required by the Deed of Settlement.

[40] The standard required by the deed links back to the construction contract with the fifth respondent. The sixth respondent then refers to Mr Jamieson's affidavit, who says that the sixth respondent was only required to monitor the work to the items identified in the two defects lists and, when complete, certify that they have been remedied.

[41] The sixth respondent has provided an affidavit from Phil Tolley of Maynard Marks, an experienced registered building surveyor. Mr Tolley says that the sixth respondent's role was only to ensure the identified defects were remedied to an acceptable standard, and it was not required to perform any investigation of hidden elements that had already been inspected by the third and fourth respondents. Mr Tolley further says that it would be unreasonable for the sixth respondent to identify the defective building works recorded in the three addendum reports given its limited scope of engagement. According to Mr Tolley, the sixth respondent had properly completed its contractual obligations.

[42] The sixth respondent further submits that the claim against it is not valid under s 14 of the WHRSA. Section 14 requires a claim to satisfy certain criteria, one of which is water having penetrated the property due to some aspect of its design, construction or alteration.[11] According to the sixth respondent, this means that only those who have caused such water damage to the home by their contribution to some aspect of its construction, design or alteration can be joined as respondents to the claim.

[43] The sixth respondent submits that its work in remediating the defects identified in the two defects lists did not contribute to any weathertightness defects in the property. Mr Tolley in his affidavit says that the listed defects

[11] Weathertight Homes Resolution Services Act 2006, s 14(c).

were relatively minor, and the defects identified in the 2014 addendum report were hidden and would not have been reasonably identified by the sixth respondent given its scope of engagement. Therefore, the sixth respondent submits that no damage has been caused by it for the purposes of s 14 of the WHRSA and accordingly there is no jurisdiction to consider the claim against it.

Submissions opposing removal

[44] The claimants submit that it is irrelevant whether it was their obligation to apply for a code compliance certificate. They submit that the sixth respondent was responsible for ensuring all defects were remediated so that a code compliance certificate could be obtained.

[45] In terms of the sixth respondent's scope of work, the claimants submit that it was responsible for the identification of all defects in the fifth respondent's work. The claimants rely on Item D in the "Background" section of the deed of settlement, which provides that:

> The parties engaged Peter Jamieson … to review the quality of the work carried out by or on behalf of DSF at the Property.

[46] In relation to the sixth respondent's submission that it was unreasonable for it to have identified the defects recorded in the addendum reports, the claimants point out how the sixth respondent relies on the fact that the third and fourth respondents did not identify those defects either. The claimants submit that the negligence of others cannot excuse the sixth respondent's own negligence.

[47] The claimants also refer to the sixth respondent's certificate of practical completion issued on 26 August 2010. That certificate provides that:

> I hereby certify that the work included in the above named contract have been substantially completed …

[48] The claimants submit that the contract referred to can only be the construction contract with the fifth respondent. Clause 11.2.1 of that contract provides that:

> If the Architect decides the Contract Works, have attained Practical Completion, the Architect must issue a certificate of Practical Completion of the Contract Works …

[49] Relevant definitions can be found in the interpretation section of the construction contract:

> Contract Works means everything to be carried out by the Contractor as stated in the Contract Documents including Temporary Works
>
> …
>
> Practical Completion: The Contract Works attain Practical Completion when:
>
> …
>
> (b) everything has been done except for minor omissions and minor defects the Architect and the Contractor agree …

[50] The claimants submit that therefore the certificate of practical completion certified that all of the fifth respondent's work was practically complete and not only the defects identified in the two defects lists.

[51] The claimants submit that there is clearly a factual dispute between the parties as to whether the sixth respondent was required to resolve the defects in order to obtain a code compliance certificate. Therefore, the claimants submit that the sixth respondent's removal application should be declined.

[52] The third respondent similarly submits that the sixth respondent owed a duty of care to the claimants to ensure that the remedial works were completed in accordance with the building consent and the Building Code. It submits that there is a tenable claim that the sixth respondent breached its duty by failing to identify the defects recorded in the final inspection and in the three addendum reports. The third respondent also submits that the extent of defects that existed at the time the sixth respondent issued the certificate of practical completion is a factual matter requiring a hearing and expert evidence to determine.

Discussion

[53] I will first address whether the sixth respondent's obligations included obtaining a code compliance certificate for the remedial works. The evidence before the Tribunal clearly establish that it is the claimants who are responsible for obtaining a code compliance certificate. In particular, cl 10.6 of the deed of settlement provides that:

> Hastie and Dredge acknowledge that it is their obligation to obtain the Code Compliance Certificate in accordance with the Construction Contract.

[54] Clause 3.5.1(c) of the construction contract also provides that:

> 3.5.1 The Principal must in a timely manner,
>
> …
>
> (c) obtain all licenses, code compliance certificates and any other approvals required by authorities for the Contract Works to be used when Practical Completion has been attained;
>
> …

[55] There is nothing in the architect's agreement (or any of its amendments set out in the engineer's agreement) that imposes such an obligation on the sixth respondent.

[56] On that basis, I find that the sixth respondent did not have an obligation to obtain a code compliance certificate.

[57] I now turn to the claimants' submission that the sixth respondent was engaged to inspect all of the fifth respondent's building works. The claimants rely in part on Item D in the "Background" section of the deed of settlement. However, this is not sufficient evidence of the sixth respondent's obligations. Item D provides that Mr Jamieson "was engaged" to "review the quality of the work carried out by or behalf of DSF …" This is framed in past tense and is most likely referring to when Mr Jamieson was asked by a mutual acquaintance to inspect the claimants' property and produce a list of defects, which he did. The deed cannot be referring to the contractual engagement of the sixth respondent because the agreement for engineer's services had not been entered into until after the deed was signed. Furthermore, Item D of the deed only sets out part of the surrounding context to the deed, as is made clear by the fact that it is under the heading "Background". Item D, properly interpreted, does not impose a contractual obligation on the sixth respondent, but merely describes in broad terms what had happened leading up to the deed.

[58] However, other evidence available before the Tribunal appear to conflict as to the scope of the sixth respondent's engagement. These include:

(a) An email from the claimants' solicitor to Mr Jamieson (dated 6 July 2010) stating that:

> At this point, our clients are prepared to accept liability to pay your fees for this role, provided it is understood by all parties … that you would be fulfilling the normal role of an architect under the NZIA Standard Agreement (though given the circumstances, there may need to be some modifications) and therefore acting as agent of our clients in accordance with those arrangements, as opposed to a strictly independent certifier. While this is not perhaps the arrangement that was initially contemplated (certainly not by our clients), this is the position that DSF insists that it wishes to be in place, and accordingly I wanted to clarify in advance … that you were content to fulfil the role in that way …

(b) A reply email from Mr Jamieson (dated 7 July 2010) confirming he "would agree to your request".

(c) A later email from the claimants' solicitor to Mr Jamieson (dated 9 August 2010) stating that:

> Re your assumed role … The engagement agreement will largely simply formalise [the deed of settlement]. I think the key point to note is that, as previously advised, your role is as an engineer appointed by Donald and Leanne, not an independent arbiter between the parties.

(d) The agreement entered into between the claimants and the sixth respondent being headed as "Agreement for Engineer's Services".

(e) Clause 1.1 of the agreement for engineer's services, which provides that:

> Hastie and Dredge agree to engage Jamieson as "Architect" (as that term is used) under the Deed of Settlement in the terms set out in the Jacobs Agreement …

(f) Clause 1.2.2 of the agreement for engineer's services, which provides that:

> The scope of the project is agreed to be performance by Jamieson of the role of "Architect" under the Deed of Settlement, such that Jamieson will act … to ensure that all defects identified in the Deed of Settlement are remedied in full to the standard required by the Deed of Settlement.

(g) Clause 9.1 of the deed of settlement, which provides that:

> … the parties agree that the Architect will be asked to certify Practical Completion for all works carried out at the Property pursuant to the Construction Contract, this Deed, or both.

(h) The definitions of "Contract Works" and "Practical Completion", and cl 11.2.1 of the construction contract, as set out at [48]–[49].

[59] Based on this conflicting material, it is difficult to ascertain the exact scope of the sixth respondent's work in the remediation of the property. This presents a genuine factual dispute between the parties that can only be resolved at a hearing. As already mentioned, the High Court has emphasised that it is not appropriate for the Tribunal to determine genuinely and reasonably disputed factual issues in a removal application.[12] Furthermore, the question of whether the sixth respondent failed to ensure whatever defects it was required to rectify had been properly remedied before issuing a certificate of practical completion constitutes another factual dispute to be determined after a hearing.

[60] Turning to the sixth respondent's submission on jurisdiction, I do not accept the submission that the Tribunal has no jurisdiction to consider the claim against it by virtue of s 14 of the WHRSA. Section 14 determines whether the property is eligible for the resolution process under the WHRSA, and not whether the Tribunal has jurisdiction to determine claims against certain respondents. Section 14 also only requires that water has penetrated the home by some aspect of its design, construction or alteration. It does not require claimants to, at this early stage of the proceeding, substantially prove that the respondents joined to the claim have caused water damage to the property. Causation is a matter that will require expert evidence and a hearing to be properly determined.

[61] For those reasons, I determine that the sixth respondent should not be removed from this proceeding on the basis that there is either no tenable claim against it, or the Tribunal has no jurisdiction to consider the claim.

Limitation

[62] Section 2A of the Limitation Act 1950 (the LA) provides that the Act will apply to claims based on acts or omissions before 1 January 2011.

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[12] *Saffioti*, above n 4; and *Queenstown Lakes District Council v Concept Builders Queenstown Ltd* [2022] NZHC 1742.

[63] The application and oppositions rely on the LA. This is because the acts or omissions of the sixth respondent occurred before 1 January 2011.

[64] Section 4(1)(a) of the LA provides that an action founded on simple contract or tort may not be brought after the expiration of six years from the date on which the cause of action accrued.

[65] There are also limitation provisions in the Weathertight Homes Resolution Services Act and the Building Act 2004 (the BA).

> *Weathertight Homes Resolution Services Act 2006*
>
> **32 Application for assessor's report**
>
> (1) An owner of a dwellinghouse who wishes to bring a claim in respect of it may apply to the chief executive—
>
> (a) to have an assessor's report prepared in respect of it; or
>
> …
>
> **37 Application of Limitation Act 2010 to applications for assessor's report, etc**
>
> (1) For the purposes of the Limitation Act 2010 (and any other enactment that imposes a limitation period), the making of an application under section 32(1) has effect as if it were the filing of proceedings in a court.
>
> …
>
> *Building Act 2004*
>
> **393 Limitation defences**
>
> …
>
> (2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
>
> …

[66] The claimants' causes of action against the sixth respondent are the tort of negligence and breach of contract.

Submissions for removal

[67] The sixth respondent submits that the claim against it is time-barred. It points out that it was engaged in 2010 and completed its work in the same year. However, the claimants' eligibility for the resolution process under the WHRSA was based on the 2008 assessor's report – two years before the sixth respondent undertook any work on the property, or such work was even contemplated.

[68] Therefore, according to the sixth respondent, a new application for an assessor's report was required to stop time from running for limitation purposes pursuant to s 37(1) of the WHSRA. It submitted that there was no eligibility decision (as required by s 32(2) of the WHRSA) in respect of the sixth respondent's work. Therefore, it is submitted that s 37(1) of the WHRSA does not apply. In other words, the limitation period did not stop running in relation to any work done by the sixth respondent.

[69] The sixth respondent submits that as the claimants filed the proceeding in the Tribunal on 20 February 2023, it has been more than 10 years since the sixth respondent completed its work. Therefore, it is submitted that by virtue of s 4 of the Limitation Act 1950, and s 393 of the Building Act 2004, the claimants are prevented from bringing a claim against the sixth respondent.

Submissions opposing removal

[70] The claimants submit that the clock was stopped in relation to the sixth respondent's work when they applied for an addendum to the assessor's report in 2014. The 2014 addendum report assessed the remedial work undertaken on the property, including the work done by the sixth respondent. That addendum report also confirmed that the property met the eligibility criteria under the WHRSA.

[71] The sixth respondent worked on the property in 2010. As the claimants applied for an addendum report within six years of the sixth respondent's work, it is submitted that the claim is not time-barred by either the WHRSA, the LA or the BA.

Discussion

[72] The key issue to be determined here is whether the 2014 addendum report stopped time running for limitation purposes.

[73] I accept the claimants' submission that time stopped running in relation to the sixth respondent's work when they applied for the addendum to the assessor's report in 2014. When looking at the criteria for a full assessor's report under s 42 of the WHRSA, it is clear that the 2014 addendum constitutes a full report. The report contains the assessor's opinion that the claim meets the 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. As such, I determine that the application for the addendum report had the same effect as if the claimants had applied for a new assessor's report in relation to the sixth respondent's work.

[74] I do not accept the sixth respondent's submission that another eligibility decision in relation to its remedial work was required for s 37(1) of the WHRSA to take effect. 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 sixth respondent is part of the claim assessed as eligible by the chief executive.

[75] This Tribunal made a relevant comment in *Engelbrecht v Christchurch City Council*.[13] 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.[14] Applying that reasoning, the sixth respondent's remedial work can be said to be directly tied to the leaks that are the subject of the eligible claim. It is difficult to separate the claim against the sixth respondent from, for example, the claim against the second respondent for its allegedly defective work on the original construction of the home. As

[13] *Engelbrecht v Christchurch City Council* [2012] NZWHT 6 (Procedural Order 6).
[14] At [43].

such, it was not necessary for the claimants to obtain another eligibility decision in relation to the sixth respondent's work.

[76] Therefore, I determine that the application for the 2014 addendum report meets the criteria of s 32 of the WHRSA. Pursuant to s 37(1) of the WHRSA, that application had effect as if it were the filing of proceedings in a court. The claimants applied for the addendum report on 22 July 2014, which is within six years from when the sixth respondent performed work on the property in 2010. Therefore, the claim against the sixth respondent is not time-barred by either the LA or the BA. This part of its removal application fails.

Waiver of liability

[77] As an alternative ground for removal, the sixth respondent submits that its liability (if any) to the claimants have been contractually waived or limited.

[78] The deed of settlement between the claimants and the fifth respondent provided for the sixth respondent to be appointed as the architect in the remediation of the property. The claimants and the sixth respondent then entered into an agreement for engineer's services. That agreement provided for the sixth respondent to act on the terms of the original architect's agreement that was signed between the claimants and the fourth respondent, with some amendments. All references to "the Architect" in that agreement were to be references to the sixth respondent. Only unsigned versions of the architect's agreement and the engineer's agreement are available.

[79] The sixth respondent relies on two clauses in the architect's agreement. Firstly, it relies on cl E1(d) of the agreement, which provides that:

> Neither the Architect nor the Client shall be liable to the other for any loss or damage which has occurred as a result of any breach of this Agreement that is not notified in writing within 6 years of the date of this Agreement.

[80] It is submitted that there is no evidence that the claimants notified the sixth respondent of their claim for breach of contract within six years of the date of the agreement (which is presumed to be around August 2010 at the latest). Therefore, the sixth respondent says the claimants have contractually waived their right to their claim against it.

[81] Even if the claimants did not waive their right to their claim, the sixth respondent relies upon cl E1(h) of the architect's agreement, which provides that:

> The maximum amount payable by the Architect, whether in contract, tort or otherwise, in relation to claims, damages, liabilities, losses or expenses arising from breaches of this Agreement is limited to $100,000 or five times the Architect's fee for the Agreed Service, whichever is the lesser.

[82] The sixth respondent submits that it charged a total of $4,083.76 for its services, and thus its maximum liability to the claimants is five times that amount – $20,418.80. The claimants in their particulars of claim have claimed $520,354.31 against the sixth respondent. The sixth respondent submits that the claimants' claim is an overstatement and the balance of it should be struck out as frivolous, vexatious and an abuse of process. It relies on the High Court decision in *CBL Insurance Ltd (in liq) v Harris* where one of the plaintiff's claims were partially struck out for seeking damages far beyond the contractual liability cap.[15] The plaintiff was however given leave to replead that part of its claim.

Discussion

[83] The issue with this ground of removal is that it is unclear what the terms of the actual agreement entered into between the claimants and the sixth respondent were. As mentioned, the Tribunal has only been provided with unsigned copies of the architect's agreement and the engineer's agreement. Mr Jamieson in his affidavit said he could not confirm whether the version of the engineer's agreement discovered by the claimants was the actual agreement.

[84] As will be discussed later in this determination, the sixth respondent submits that it is prejudiced by the fact that it has to rely on an unsigned and unverified version of the agreement. The claimants in their particulars of claim allege that this version of the agreement is the signed version. The sixth respondent cannot rely on the terms of the unsigned agreement (of which the sixth respondent itself is unsure is the actual agreement) as grounds for removal from this proceeding.

[85] The terms of the actual agreement entered into by the parties is important in determining the scope of the sixth respondent's liability (if it is found liable), and in particular whether it has been excluded or limited by the

[15] *CBL Insurance Ltd (in liq) v Harris* [2021] NZHC 1393 at [118].

agreement. As the parties are not in clear agreement of what the terms of the sixth respondent's engagement were, this presents a genuine factual dispute between the parties that can only be resolved at a hearing. It is not appropriate for the Tribunal to determine these issues in this removal application.

[86] Even if cl E1 was part of the actual agreement, it would not justify the sixth respondent's removal from this proceeding. The wording of cl E1(d) excludes claims for "loss or damage … as a result of any breach of this Agreement". The wording of that provision clearly excludes liability for claims for breach of contract. The claimants however also claim negligence against the sixth respondent. In order for a contractual provision to exclude liability for negligence, it must be worded in clear and unambiguous terms.[16]

[87] The sixth respondent referred to authority for the proposition that it is not necessary for the exclusion clause to specifically reference negligence as long as the clause makes it clear that all conceivable liability is excluded.[17] However, I do not accept that cl E1(d) is worded to clearly exclude all liability, including negligence. The words "as a result of any breach of this Agreement" limit the scope of the clause to claims arising out of breach of contract. It is not sufficiently wide or clear to exclude claims arising out of a negligent breach of a tortious duty.

[88] Furthermore, in contrast to cl E1(d), other provisions such as cls E1(c), (g) and (h) have been drafted to expressly provide for claims based in tort. Each of those provisions include the words "whether under the law of contract, tort …", "in tort or otherwise" and "whether in contract, tort or otherwise …" respectively.

[89] On that basis, the specific omission of claims based in tort in cl E1(d) supports an interpretation that it only operates to exclude claims for breach of contract. I do not accept the sixth respondent's submission that the wording of the provision should be interpreted as excluding causes of action other than breach of contract. That interpretation is at odds with the way the provision and the surrounding provisions have been worded.

[90] Therefore, although the claimants' breach of contract claim may be excluded by cl E1(d), their negligence claim is not.

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[16] *DHL International (NZ) Ltd v Richmond Ltd* [1993] 3 NZLR 10 (CA) at 18.
[17] Stephen Todd *A to Z of New Zealand Law* Tort (Thomson Reuters) at [59.20.5.1], citing *Shipbuilders Ltd v Benson* [1992] 3 NZLR 549 (CA) at 561.

[91] In terms of cl E1(h), the wording of the provision expressly provides for both claims based in tort and contract. If it is determined to be part of the actual agreement entered into between the parties, then it will have the effect of limiting the sixth respondent's liability, if it is found liable. However, it is not necessary to require the claimants to replead this part of its claim as I do not accept that it is frivolous, vexatious or an abuse of process. Furthermore, the contractual liability cap can be taken into account when quantifying the extent of the sixth respondent's liability (if any) during the final determination of this proceeding.

[92] For the above reasons, I find that the ground of contractual waiver does not justify the sixth respondent's removal from this proceeding.

Delay

[93] 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*,[18] *Auckland Council v Weathertight Homes Tribunal*,[19] *Hermann v Weathertight Homes Tribunal*,[20] and *Gwak v Sun*.[21]

[94] The principles on which an application for removal for delay are determined are:

(a) whether the claimant has been guilty of inordinate delay;

(b) whether such delay is inexcusable; and

(c) whether the delay has seriously prejudiced the applicant.

[95] Then, the overriding consideration is whether, if these criteria are met, justice can be done despite the delay.

[96] 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.[22]

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[18] *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244 (HC) at 248.
[19] *Auckland Council v Weathertight Homes Tribunal* [2013] NZHC 3274.
[20] *Hermann v Weathertight Homes Tribunal* [2018] NZHC 1843.
[21] *Gwak v Sun* [2022] NZHC 2296.
[22] *Hermann*, above n 20, at [17].

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

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

> 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.

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

[100] 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.

[101] 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.

[102] The enquiry is whether, as between the parties, it is just, or fair and appropriate that the sixth 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.

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

[104] The claimants have a legitimate interest in pursuing their claims against the sixth respondent arising from those defects. Whether or not those

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[23] *Auckland Council v Albany Stonemasons* [2015] NZHC 415 at [8].
[24] At [15].

claims will ultimately succeed is not required to be determined at this early stage.

[105] The sixth 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 not to have that information restricted or their defences jeopardised, by the inexcusable effluxion of time.

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

Submissions for removal

[107] The sixth respondent submits that the delay is inordinate. Counsel refers to several authorities that have previously found a delay of six and a half years,[25] seven years,[26] and eight years[27] to have constituted inordinate delay. Counsel points out that the claimants in this proceeding took 14 years to bring this proceeding since the assessor's report was issued and an eligibility decision made in 2008. Furthermore, counsel says the claimants had all the necessary information available to advance their claim to adjudication when they received the 2014 addendum to the assessor's report. However, eight years have passed since then before the claimants filed this proceeding.

[108] The sixth respondent further says the delay is not excusable. According to the sixth respondent, the claimants in their particulars of claim explain the delay as being caused by the inability to find a builder to assist, having no financial means to perform repairs or engage a lawyer, the Canterbury earthquakes and potentially some unspecified health concerns. However, the sixth respondent refers to *Snelling v Christchurch City Council* and *Gwak v Sun* where similar reasons given for delay were not considered to be sufficient.[28]

[109] It is also submitted that the sixth respondent has been seriously prejudiced by the claimants' delay. It submits that in or around 2020, it had destroyed relevant company records, file notes and communications with the fifth respondent in relation to the defects, and other documents. Therefore, it

[25] *Snelling v Christchurch City Council* HC Christchurch, CIV-2010-109-2346, 9 August 2011 at [46].
[26] *Unit Owners at 19 Kenwyn St v Auckland Council* WHT TRI-2013-100-15 (Procedural Order 9 dated 9 October 2013)
[27] *Gwak v Sun* [2022] NZWHT 5 (Procedural Order 5).
[28] *Snelling*, above n 25; and *Gwak*, above n 27.

submits it is prejudiced as it only has access to documents obtained through discovery, including the unsigned version of the service agreement (and it is not known whether this was the final version of the agreement). It submits that its interest in defending the claim with the benefit of as much information as is available has been hindered by the claimants' delay. The sixth respondent also highlights the lack of notice of the claim given by the claimants and its loss of ability to pursue other parties. It submits that if it was notified of the claim earlier, it could have taken steps to preserve relevant documents and would have been able to cross-claim against the fourth and fifth respondents (who are now no longer trading and have stated they have no assets).

[110] The sixth respondent submits that similarly to *Gwak*, the claimants' long delay means that justice cannot be done on the claim against it. Therefore, it submits that it is entirely fair and appropriate that it be removed from the proceeding.

Submissions opposing removal

[111] 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.

[112] 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.

[113] 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.

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

[115] 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*,[29] 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;[30]

(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;[31] and

(c) any serious prejudice suffered by the respondent can be ameliorated by directions from the Tribunal.[32]

[116] The third respondent similarly submits that although the claimants have unduly delayed in bringing this claim, the prejudice to the sixth respondent is not insurmountable. The third respondent points out the availability of

[29] *Martin v Hermann* WHT TRI-2017-100-6, 5 November 2018 (Procedural Order 9).
[30] At [24]–[26].
[31] At [43].
[32] At [54].

correspondence involving the sixth respondent and the fact that the defective remedial works remain unrepaired.

Is the delay inordinate?

[117] 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?

[118] The claimants allege that the sixth respondent's role in the remediation of the property included obtaining a code compliance certificate. In their particulars of claim, it is submitted that the sixth respondent became liable to the claimants when the property failed its final inspection on 10 February 2011. Even if they were not aware of a potential claim against the sixth respondent on that date, they certainly would have become aware by 2 October 2014 when the first addendum to the assessor's report was issued and identified defects in the remedial works. The claimants applied for adjudication of this claim in February 2023. That is still a delay of more than eight years.

[119] 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.

[120] What is also relevant is that by the time the second addendum report had been issued, around eight years had passed since the sixth respondent's work was complete. If the claimants delayed any longer, issues regarding the reliability of witnesses and the ability to locate documentary evidence were likely to arise. It would have been critical for the claimants to at least notify the

sixth respondent of their intent to commence proceedings in order to allow the sixth respondent to prepare and preserve what documents it still possessed.

[121] 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.[33] The claimants' financial concerns are not persuasive either, especially when considering the claimants were self-represented up until only recently. Financial concerns would have had little impact on the claimants' ability to file their claim.

[122] I also note 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.

[123] 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.

[124] 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 sixth respondent?

[125] I do not consider that the sixth respondent has been seriously prejudiced as a result of the claimants' delay. Despite it having destroyed or otherwise being unable to locate documents relevant to its work on the property, there is still available sufficient evidence to ascertain the scope of its work and assess it. For example, the three addendums to the assessor's report constitute expert evidence that impugn the sixth respondent's work. Mr Jamieson has submitted a comprehensive affidavit showing he retains a

[33] *Gwak v Sun*, above n 27, at [56].

detailed memory of the events and the role the sixth respondent had in the remediation of the property. He may be called as a witness to give relevant evidence on the work of the sixth respondent. Both Mr Jamieson and Mr Tolley in their affidavits mention their review of certain documents that are clearly relevant to the claim. Furthermore, the failed remedial works on the home has not been repaired and is still available for the parties to inspect.

[126] The sixth respondent points out that the copy of the engineer's services agreement discovered by the claimants is an unsigned version. Mr Jamieson in his affidavit said he could not verify if that version of the agreement was the actual agreement that was signed by the parties. He considers it to be highly prejudicial to the sixth respondent.

[127] The terms of the actual agreement between the parties are key to determining the scope of the sixth respondent's role in the remediation of the home, which in turn will be significant in determining whether it is liable to the claimants. As discussed earlier in this determination, the terms of the agreement and the scope of the sixth respondent's work present genuine factual disputes that are not appropriate for determination in a removal application and must advance to a hearing.

[128] I also do not accept that the sixth respondent has been significantly prejudiced by the loss of ability to claim contribution from the fourth and fifth respondents. The first, second and third respondents are still participating in this proceeding and the sixth respondent will accordingly be able to claim contribution from each of them should they be found liable. The loss of ability to claim contribution from the other two respondents does not constitute significant prejudice to the sixth respondent.

[129] It is also important to note that the claimants bear the onus of proving each of the defects or breaches of duty/contract they seek recovery for. Should they be unable to prove any particular defect or breach and why the sixth respondent is liable for the defect or breach, then they will fail in that part of their claim. The sixth 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 or breaches.

[130] Any prejudice to the sixth 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.

[131] The Tribunal is satisfied that the sixth respondent has access to sufficient salient documents to mount a defence to the claim. This is illustrated by Mr Jamieson's and Mr Tolley's references to such documents in their affidavits.

[132] I therefore determine that the delay has not seriously prejudiced the sixth respondent.

Overall interests of justice considerations

[133] 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.[34]

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

[135] 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 sixth respondent's application that it should be removed from this claim for delay.

Conclusion

[136] Overall, I find the sixth respondent's removal application to be finely balanced. However, I do not consider it has established that it will be fair or appropriate for it to be removed from this claim. Although the sixth 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.

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[34] *Hermann*, above n 20.

[137] I also do not consider the claim to be untenable. The claim is not time-barred and it has not been waived by the claimants.

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

Sixth respondent's costs application

[139] The sixth respondent submitted that if this removal application is successful, it will claim costs under s 91 of the WHRSA. Although it has been unsuccessful in this removal application, if the claimants fail to establish its liability after a hearing, the Tribunal will allow the sixth respondent to raise the costs issue again.

DATED this 22nd day of February 2024

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K D Kilgour
Tribunal Member