

Weathertight Homes Tribunal

CHAIR'S DIRECTIONS

(for Multi-Unit Claims)

1. Introduction

1.1 These directions are effective from 21 September 2015 and are issued pursuant to section 114 of the Weathertight Homes Resolution Services Act 2006 (the Act) and set out the procedures which are to apply to all applications for adjudication by the Weathertight Homes Tribunal of multi unit claims.

1.2 A multi unit complex is defined in section 8 of the Act as being a complex that contains two or more dwellinghouses and is a company-share complex, cross-lease complex, or unit title complex.

1.3 Unit owners within a multi-unit complex can only file a claim with the Tribunal as part of a multi-unit complex claim unless:

- Their unit is the only unit in the complex that leaks, or
- They have an eligible claim under the 2002 Act and have not withdrawn their claim to be part of a multi-unit complex claim under the 2006 Act.

1.4 The Tribunal is not a court of pleadings. Tribunal applications and responses are however required to contain sufficient information to fairly inform the other parties of the nature of the claim being made or the defences being raised.

1.5 Applications are to:

- Include clear particulars of the claims being made against each party including both the factual and legal basis of each claim.
- Clearly identify the defects in the dwelling for which it is alleged each party is liable.
- Include the amount being sought against each party.

1.6 Responses should not just contain bare admissions, denials or refusals to admit but:

- Set out which matters in the claim are accepted or agreed
- Set out the material facts relied upon
- Include details of any affirmative defences
- Include any set-off, claim for apportionment or cross claim

2. Filing Applications for Adjudication

2.1 Multi unit complex claims are to be filed and signed by the representative, or the duly authorised agent of the representative. Who can be the representative is prescribed in section 8 of the Act as:

- The company – for the owners in a company-share complex
 - The body corporate – for the owners in a unit title complex
 - The person authorised by the owners in a cross lease complex or standalone complex
- 2.2 Multi-unit complex owners should only file their application with the Tribunal when they are ready to proceed with their case having obtained all the necessary evidence, costings and relevant documents.
- 2.3 Multi-unit complexes who wish to file an application before final costs and other necessary information is available should note this in a covering letter and provide reasons why all information is not yet available and the appropriate time frame within which final information is likely to be filed.
- 2.4 Applications are to be lodged on the multi-unit application form and must contain sufficient information to fairly inform the other parties of the substance of the claim. The application should include, or have attached, a typed document summarising, in numbered paragraphs, and attached schedules, the following information:
- A chronology of events
 - A summary of the damage to the complex and the causes of the damage
 - The ground or grounds in relation to each respondent including both:
 - (a) the legal basis indicating for example whether it is in contract or tort and specifying the precise nature of the legal breach alleged; and
 - (b) the factual basis of the claims against each respondent
 - A breakdown of the amounts being claimed
 - The ownership details in relation to each unit included in the claim, including the date of purchase
 - The occupation status of each unit, i.e. whether it is owner occupied or tenanted
- 2.5 The following documents should be filed with the application:
- Confirmation of the authority of the representative to bring the claim, for example, that the person acting on behalf of the Body Corporate is the duly authorised representative of the Body Corporate.
 - A copy of the Ministry of Building Innovation and Employment's Assessor's report/s.
 - Receipts for repairs, or quotations or estimates for repairs, if not relying on the assessor's report.
 - If relying on additional technical information to the assessor's report copies of those reports or briefs of evidence of expert witnesses.
 - The required application fee.

In addition to the above documents claimants will be required to disclose the documents listed in 10.4 of these directions.

2.6 Applications must name the respondent(s) accurately, and clearly state the addresses of the respondent(s), unless further steps need to be taken to ascertain the identity and location of specific potential parties. Particular care is required in the case of limited liability companies, trading partnerships and where company directors are being named as parties.

3. Addresses for Service

3.1 All parties are required to provide the tribunal with their appropriate address for service. The address for service must include:

- A street address
- A postal address (if different from the above),
- An email address, and
- A telephone number.

4. Legal and Expert Representatives

4.1 Parties may represent themselves in the tribunal or may appoint a legal, lay or expert representative. When a party appoints such a representative the address for service of the representative must be provided in accordance with 3.1 above.

4.2 Where a party appoints a legal or lay representative the representative, and not the party, will be the person served with all notices, documents and other communication in relation to the claim. It is the representative's responsibility to ensure all information is then passed on to the party he or she represents.

4.3 If a party appoints an expert to represent them in the hearing that expert can not act as both a representative and an expert witness in the same claim. (ref para 6 Chair's Directions – Expert Witnesses)

5. Transitional Claims (i.e. claims filed before 1 April 2007)

5.1 Single unit claims that form part of the same multi-unit complex will be consolidated into as few adjudications as possible.

5.2 When a new single unit claim that forms part of a multi-unit complex is filed with the Tribunal, the Tribunal will give notice to other claimants in the same complex that have filed a claim but have not yet applied for adjudication. The notice will set out the steps that must be taken by the other claimants and the timeframe within which they must take those steps. The notice will include:

- A direction to attend the preliminary conference
- A requirement to confirm in writing whether they are intending to file a claim with the Tribunal and if so when it is likely to be filed. If they are intending to delay filing they will be requested to provide the reasons for the proposed delay.
- Notification that if they are wishing to proceed to adjudication their claim will be consolidated with the other claim/s already filed unless leave of the

Tribunal is granted for their claim to proceed separately. Very good reasons will need to be provided for the claim not to be consolidated.

5.3 Where a multi unit claim is filed with the Tribunal in accordance with the provisions of ss19 – 21 of the Act (eg a claim filed by a Body Corporate on behalf of the majority of unit owners) the following directions will apply to any single unit claim found eligible under the 2002 Act not incorporated into that representative multi-unit claim:

- The single unit claimant/s will be given notice that the “representative” claim has been filed and of the date of the preliminary conference.
- The single unit claimant will be required to attend that preliminary conference and advise the Tribunal and other parties of the status of their claim and whether they are intending to lodge an application with the Tribunal.
- The single unit claim/s will be consolidated with the “representative” claim unless leave of the Tribunal is granted. If leave is not granted and the single unit claim does not complete and file the appropriate application form they can be prevented from having their claim adjudicated in the future.
- The single unit claimants will be entitled to separate representation even if their claim is consolidated to be heard together with the “representative” claim.
- Failure to comply with the timetable for filing their claim or providing any other documentation directed by the Tribunal could result in the claim by the single unit owner being terminated.

6. Preliminary Conferences

6.1 A preliminary conference will be convened within 12 to 25 working days of the respondents being served with the application for adjudication.

6.2 The agenda for the preliminary conference will include:

- confirmation of the parties’ details, including those of their legal or other representatives
- provision and exchange of relevant documents by the parties
- a discussion on who was involved in the development and construction and their various roles
- consideration as to whether there are other parties who should be joined to the claim
- confirmation that the parties understand what they are required to do, so that the matter can proceed to a hearing at the earliest practicable time
- determination of any other procedural matters raised by any party
- determination as to whether the application should be referred to mediation.
- setting a timetable for the further steps in the adjudication of the claim

- 6.3 All parties are required to attend the preliminary conference in person. Legal or lay advisors may accompany the parties **but each party is required to appear in person (or where appropriate by telephone) including the representative (see 2.1) and all respondents** even if they are legally represented.
- 6.4 Where the multi unit complex is location in the greater Auckland regions the conference is likely to be convened at the Tribunal's hearing rooms at Level 8, 99 Albert Street, Auckland City. In other locations the preliminary conference is likely to be convened by telephone.
- 6.5 The Tribunal generally does not adjourn preliminary conferences unless the majority of the parties agree to an adjournment. Claimants should advise the Tribunal when filing applications if they, or their lawyer or representative, are unavailable on any days during the period when the preliminary conference is likely to be convened.

7. Joining Parties

- 7.1 Where any party identifies another person or company who they think should be involved in the claim, they may seek to join that party as a party or additional respondent. This can be done by written application, giving the reasons why the named person or company should be joined, and providing the address for service of that person/company. Joinder applications are to be made within the time-table set by the Tribunal. Late applications, that if granted will require the timetable to be revised, are only likely to be considered if they are supported by the majority of the parties.
- 7.2 Any party seeking to join another party must provide an address for service for the proposed party and reasonable evidence of the new party's breach of duty and a causative link to the remedial work required to be done. In other words they must provide a legal and factual basis for the new party to be joined to the claim.

8. Removing Parties

- 8.1 Respondents may seek to be removed as a party on the grounds that they have no liability to the claimant or other respondents.
- 8.2 There is no formal third party claim procedure under the Act but s 72(2) empowers members of the Tribunal to determine liability of any respondent to any other respondent.
- 8.3 If there are genuinely disputed issues of fact which cannot be resolved in the context of a removal application then the removal application will be dismissed. Where a party is opposing a removal on the basis of disputed facts they must produce or point to some cogent evidence in support of their opposition. It is insufficient to say that there are disputed facts without providing some detail of what they are. In addition it is insufficient to say there

could be disputed facts or to require the Tribunal to go on a fishing expedition to see if some conflicting evidence may arise in the course of adjudication.

- 8.4 Any party seeking removal should raise the matter with all other parties because if they agree that the party seeking removal should be removed, they are expected to consent to the removal, which can then be formalised by the assigned member of the Tribunal.
- 8.5 Applications for removal will be dealt with on the papers unless the member assigned directs otherwise.

9. Responses to the Claim

- 9.1 The Act states respondents must file their responses within 25 working days after receiving the claim. With multi-unit claims however the Tribunal is likely to authorise an extension of this time limit to enable documents to be exchanged, all parties to be identified and where appropriate respondents' experts to inspect and provide reports for parties.
- 9.2 To prepare their formal responses, respondents need to analyse the application and accompanying documents (including MBIE's Assessor's report(s) and other material or reports relied upon by the claimant), and then state in writing:
- Which matters in the claim are accepted or agreed
 - Which matters are disputed, with reasons why
 - The matters for which responsibility/liability is accepted
 - The matters for which responsibility/liability is denied.
 - Details of any defences or mitigation issues intended to be raised at mediation or hearing.
- 9.3 The written response should address the causes of water entering the complex identified in the claim filed. The response should either accept liability for each major defect or deny liability, and state the reasons why.
- 9.4 Copies of any written expert's reports, summaries or costings that will be relied on at mediation should be filed with the response if not adequately covered in the responses filed.

10. Disclosure of Documents

- 10.1 One of the first steps required in the adjudication process is for parties to provide all relevant documents. Production of Documents will be an agenda item at the Preliminary Conference.
- 10.2 The Tribunal will issue procedural orders outlining the type of documents to be disclosed and the timetable for disclosing documents after the preliminary conference and when new parties are joined.

- 10.3 If the claim goes to a hearing, parties will be required to swear on oath, or affirm, at the hearing that all relevant documents have been produced or identified to the other parties. In addition parties can be precluded from producing or relying on documents that have not been disclosed to other parties in accordance with the timetable set.
- 10.4 The documents to be provided, subject to any specific Tribunal directions, should include:
- Any contracts (for example building documents, sale and purchase documents, and other relevant contractual documents)
 - Any invoices, receipts relating to the construction and any remedial work
 - The conveyancing files for each unit owners purchase including any pre purchase inspection or reports
 - Body corporate or company share minutes, reports and other documentation including authorities given for the representative to bring the claim
 - Documents that relate to any tenancy agreement or lease of any of the units where claims of loss of rent form part of the claim
 - Plans, scopes of work, building permits and consents for both the original construction and any remedial work
 - Any expert's reports and pre purchase inspections
 - Any relevant photographs, video or audio tapes, or other evidence
- 10.5 Material to be provided, including discovery documents, is to be provided both in an electronic version (for example, by email, on CD or memory stick) and in hard copy unless this is impractical or impossible (eg large format plans).

11. Compliance with Tribunal Timetables & Adjournments

- 11.1 Compliance with the timetable, fixture dates and other directions set by the Tribunal is mandatory, and can only be altered with the leave of the Tribunal.
- 11.2 Applications for adjournment must, unless precluded by the circumstances, be made in writing and well in advance of the date set by the Tribunal. Applications for adjournment must clearly state the reasons for the application, and be accompanied by supporting documentation, where available. The party seeking the adjournment should advise the other parties to the claim, and ascertain and obtain the written consent of the other parties, where possible.
- 11.3 Unless an adjournment is expressly granted, the parties should assume that the conference, mediation or hearing for which the adjournment is sought will proceed, and attend as directed with all appropriate witnesses, representatives and documentation.
- 11.4 Applications for leave to depart from Tribunal directions, including these Chair's Directions, will be required to establish that the departure from directions is necessary for the adequate running of the case, was not

avoidable by management of the proceedings with due diligence, and that the leave, if granted, will not unduly disadvantage any other party.

- 11.5 Failure to comply with a member of the Tribunal's requests and directions, or failure to provide information within the time allowed, does not affect the assigned member of the Tribunal's power to make decisions on a claim. Failure, without reasonably cause, to provide documents in accordance with the timetable may preclude a party producing or relying on a document if the claim goes to a substantive hearing.

12. Experts' Reports

- 12.1 Where any party instructs an expert to provide a report that is to be part of that party's application, response or evidence they must ensure the expert complies with the following guidelines.

- 12.2 The duty of every expert witness is to assist the assigned member of the Tribunal impartially in relation to technical matters that lie within that expert's area of expertise. All expert witnesses should be familiar with, and at all times comply with, the Tribunal's Code of Conduct for Expert Witnesses.

- 12.3 Expert witnesses should, when reporting on or giving evidence of the causes of leaks to the complex, include in their reports or statements a defects list of summary setting out their views on the:

- The cause or causes of the leaks
- The extent of the resulting damage, or future probable damage, and the contribution of each defect to the damage
- Recommended remedial work
- Cost of the remedial work (if within their area of expertise)
- Summary of any maintenance issues that affect the claim

13. Experts' Conference

- 13.1 An experts' conference is likely to be convened before the hearing for all multi unit claims. With the agreement of the parties an experts' conference can be convened prior to mediation.

- 13.2 An experts' conference is a meeting between the expert witnesses at which the experts discuss the issues on which they have prepared reports, for the purposes of identifying:

- Factual matters on which the experts agree
- Matters in dispute and the reasons for the disagreement.

- 13.3 The process is designed to narrow points of difference and save hearing time.

- 13.4 Conferences will be chaired or facilitated either by a member of the Tribunal, an independent expert or an appropriately qualified person appointed by the Tribunal. The role of the experts' conference chair does not include the

making of orders or directions in the claim, or the giving of evidence as to the conference. Apart from the agreed statement, evidence of things said and done at the conference is not generally admissible in the hearing. If a member of the Tribunal chairs the conference, that member will not be the member assigned to the claim.

- 13.5 The duty of every expert witness is to assist the Tribunal impartially in relation to technical matters that lie within that expert's area of expertise. All expert witnesses should be familiar with, and at all times comply with, the Tribunal's Code of Conduct for expert witnesses.
- 13.6 It is for the Tribunal to determine whether a person qualifies as an expert and may attend the experts' conference. Such decisions will generally be made by the member assigned to the claim but may also be determined by the person chairing the experts' conference.
- 13.7 Any expert who acts as an advocate for a party or who does not act impartially during the course of the experts' conference may have their involvement in the experts' conference limited, or in extreme cases, be excluded from the conference.
- 13.8 Any expert who is not authorised to reach agreement on appropriate factual matters or to participate appropriately in the experts' conference may have their role in the conference limited. In addition any party who does not allow their expert to attend or participate in the experts' conference, without good cause, may be restricted in the ways they can challenge the matters agreed to at the experts' conference.
- 13.9 The case manager assigned to the claim will arrange the date and venue of the conference, and advise the parties and the experts. It is noted that:
- Experts should, unless directed otherwise by the Tribunal member, prepare their reports or briefs of evidence in advance of the conference and they are to be circulated to all the other experts attending the conference.
 - The Tribunal member assigned to the claim will set out the agenda for the conference which will be circulated before the conference.
 - The experts will confer in the absence of the parties and their legal advisors
 - The experts must try to reach agreement on the agenda which will generally include items in the leaks list or schedule (that is, the location and / or causes of leaks, the extent of damage, the remedial work required and remedial costs) or state their reasons for disagreement.
 - The agenda and matters agreed to at the conference should not cover decisions as to the liability of any particular party for the damage.
- 13.10 At the conclusion of the conference, the experts should prepare and sign a joint statement stating the matters on which they agree and the matters on which they do not agree, including the reasons for disagreement. This joint statement must be prepared without the assistance of the legal advisors or the parties.

13.11 The joint statement will be provided to the assigned case manager, who will circulate it to all parties to the claim.

13.12 The Tribunal may restrict the calling of any further evidence and limit cross examination of experts on the factual matters agreed to at the experts' conference. The Tribunal will however allow further evidence and questioning of experts on the issues of liability.

14. Inspections and Site Visits

14.1 Respondents and their expert advisors are entitled to inspect the claimant's property for the purposes of responding to the claim. The timing and length of any inspection must be reasonable and arranged by appointment. Arrangements for inspections should be made directly with the claimants or, if specified, through their lawyer or representative. If parties cannot agree on the time or extent of any inspection appropriate directions can be sought from the Tribunal.

14.2 The assigned member of the Tribunal will generally view the complex prior to the hearing. All parties will be given notice of the time of the site visit, and each party is entitled to attend.

14.3 The site visit is to enable the member of the Tribunal and other parties to view the subject matter of the dispute. Observations made on the site visit may be used to assist understanding of the evidence and also in determining the issues in dispute.

15. Withdrawal of Applications

15.1 A claim can only be withdrawn with the consent of the other parties or by order of the Tribunal. Where a claimant wishes to withdraw an application to the Tribunal they must serve written notice of withdrawal on the Tribunal. The Tribunal will then circulate that notice to all other parties and:

- If no party objects the claim will be withdrawn, or
- If a party objects set a timetable within which submissions can be made at the end of which the Tribunal will decide whether or not the claim can be withdrawn.

16. Hearing preparation and Documents

16.1 All people whose evidence will be relied upon in the hearing will be required to provide a written witness statement in advance of the hearing in accordance with the timetable set.

16.2 It is likely that each unit owner will need to file a witness statement detailing circumstances of purchase, discovery of leaks and information on special and general damages claimed such as interest or loss of rent.

- 16.3 Parties and witness statements must set out the whole of their evidence, and should be typewritten and 1.5 line spaced. Headings and subheadings should be used where possible. The parties' statements and submissions should be typed with numbered paragraphs, be clear, concise and easy to follow, and should only include what is relevant. Any documents referred to in the statements and submissions should be included in the common bundle and referred to by the appropriate document or page number.
- 16.4 All documents to be relied on at the hearing must be included in the common bundle and provided to the Tribunal and all other parties before the hearing within the timeframes set. This includes any reports or information that parties will be using or referring to in the course of questioning other parties or their witnesses.

17. The Hearing

- 17.1 The Tribunal must manage proceedings, including the hearing, in a manner that best ensures a speedy, flexible and cost-effective service.
- 17.2 The Tribunal is not bound by the Evidence Act 2006 but is bound by the rules of natural justice. It is not however required to permit cross-examination, although generally it will permit relevant and appropriate questions of parties and witnesses.
- 17.3 The purpose of the hearing is to clarify and test the written evidence and witness statements that will have been provided prior to the hearing by the parties and their witnesses. The focus of the process will be an inquiry on the part of the member of the Tribunal.
- 17.4 Hearings are conducted in public, which means that any member of the public or the media may attend the hearing. It can be reported unless there is a very good reason to restrict reporting or to hold part of, or all of, the hearing in private.
- 17.5 All party and witness statements and expert's reports will be taken as read, and will not be read out at the hearing. All witnesses who have filed statements or reports are expected to be available to attend the hearing so they can answer questions put to them. Parties will be asked to indicate in advance of the hearing, which of the other parties' witnesses they will require to be present at the hearing for questioning.
- 17.6 A draft agenda for the hearing of witnesses will be circulated before the pre-hearing telephone conference and confirmed in advance of the hearing.
- 17.7 No person shall, without the leave of the assigned member of the Tribunal, be called as a witness unless that person's statement or report has been provided to the Tribunal and circulated to the other parties in advance of the hearing.
- 17.8 No document shall be relied upon, without the leave of the assigned member of the Tribunal, unless it is included in the party's material previously provided

to all other parties. This includes any reports that parties may wish to refer to in questioning of parties and witnesses.

- 17.9 A party may represent themselves or may have legal, technical or other representation at the hearing. The costs of any such representation will be met by that party.
- 17.10 All hearings are recorded. The Tribunal will provide an audio copy of the recorded evidence on request. Transcripts are not provided as a matter of course.
- 17.12 Each party will be invited to make a brief opening statement, then each party and any witnesses shall answer any questions asked by the assigned member of the Tribunal, and then questions raised by the other parties or their representatives. It is likely that expert witnesses will be heard concurrently in a panel or series of panels.
- 17.13 The Tribunal may time-limit cross-examination and will restrict repetitive, irrelevant and unnecessary questions. The member may also limit questioning of experts on the matters agreed to at an experts' conference.
- 17.14 As far as practicable the dates and times various witnesses must attend will be tim- tabled in advance.
- 17.14 At the conclusion of the hearing, each party will be given an opportunity to make closing statements or submissions. These may be given orally or a timetable set for the filing of written submissions.
- 17.15 The assigned member of the Tribunal will give a written decision, including reasons, as soon as practical after the hearing. It is likely that only one decision will be issued in relation to the whole complex. However, where appropriate, the determination will include a discussion and findings in relation to each unit included in the claim and also the common property
- 17.16 The Tribunal will provide a copy of the decision to each party as soon as practical after the decision is made.
- 17.17 In all cases, the Tribunal's decision will be published on the Tribunal's website at www.justice.govt.nz/tribunals/wht/decisionsofthetribunal.

P. McConnell
Chair, Weathertight Homes Tribunal
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