IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2020-100-007

BETWEEN	**BERT KURT ENGELBRECHT, JORG ENGELBRECHT and DAVID ALAN SHACKLETON, as trustees of the BERT ENGELBRECHT FAMILY TRUST** Claimants
AND	**CHRISTCHURCH CITY COUNCIL** First Respondent
AND	**JOHN CREIGHTON BUILDER LTD** Second Respondent
AND	**JOHN ROBERT CREIGHTON** Third Respondent
AND	**PAUL MAURICE FOLEY** Fourth Respondent
AND	**FOLEY GROUP ARCHITECTURE LTD** Fifth Respondent
AND	**POWELL FENWICK CONSULTANTS LTD (Removed)** Sixth Respondent
AND	**PETER NORMAN OLDS** Seventh Respondent
AND	**IROCK LTD** Eighth Respondent

PROCEDURAL ORDER 5

Removal application by seventh and eighth respondents

Dated 8 September 2021

Introduction

[1] Peter Norman Olds (Mr Olds) and IRock Ltd (IRock), the seventh and eighth respondents respectively, collectively described as the Olds parties, have applied to be removed as parties to this claim.

Legal principles

Removal

[2] Section 112(1) of the Weathertight Homes Resolution Services Act 2006 (the Act) provides that the Tribunal may order that a person be removed from adjudication proceedings if it considers it "fair and appropriate in all the circumstances to do so".

[3] The Tribunal's jurisdiction to remove a party from proceedings is akin, but not completely analogous, to the jurisdiction of the High Court to strike out proceedings on the ground that it discloses no reasonably arguable cause of action or defence. The jurisdiction is wider than that of the High Court and it can be fair and appropriate "to strike out a party in circumstances other than where no reasonable cause of action is disclosed".[1]

[4] The learned Judge in *Vero Insurance*[2] adopted the comments of Katz J in *Saffioti v Jim Stephenson Architect Ltd*[3] urging caution in removing a party:

> [44] Nevertheless, it is my view that the cases where it will be "fair and appropriate" for the Tribunal to remove a party from a proceeding in circumstances where the relevant causes of action would not be struck out on traditional strike out grounds will be relatively rare. Section 112 should not be seen as providing carte blanche to strike out parties at a preliminary stage in circumstances where the claims asserted against them are tenable, but weak. Often in litigation claims which appear weak at an early stage may gain momentum at trial, whereas other claims which appeared strong at the outset are later revealed to be fatally flawed.
>
> [45] It is necessary to be cautious when approaching applications under s 112 in order to prevent injustice to claimants who may in fact have a good claim once all the evidence is before the Tribunal, including thorough cross-examination in appropriate cases. Too broad an approach to the jurisdiction under s 112 would involve a risk of injustice to claimants. It is important that

---

[1] *Vero Insurance New Zealand Ltd v Weathertight Homes Tribunal* [2014] NZHC 342 at [19].
[2] *Vero Insurance* at [21].
[3] *Saffioti v Jim Stephenson Architect Ltd* [2012] NZHC 2519.

> claims which may ultimately prove to be meritorious not be prematurely struck out at an interlocutory stage.

[5] Andrews J in *Vero Insurance* added that, while recognising the need to prevent injustice to claimants, it was also necessary to consider the interests of those against whom claims are made.[4]

[6] The Tribunal is not restricted to considering the pleadings only and may assess evidence in determining whether to remove a party.[5] Ellis J has observed that if the Tribunal is to hear and determine claims in an "expeditious and cost-effective way, [it] must be able to perform an active gate-keeping role in terms of both the joinder and removal of parties."[6] This can include the early receipt and assessment of evidence.

[7] In circumstances where the evidence is contentious or challenged, or a party's veracity is in issue, the Tribunal is wary of attempting to resolve such matters in the context of a removal application. Genuinely and reasonably disputed factual issues which could impact on the success of the claim are generally not suitable for summary determination.[7]

[8] One of the grounds for removal advanced by the Olds parties is that there has been inordinate and inexcusable delay in bringing the claim against them and this has caused serious prejudice. The relevant legal principles were set out in *Snelling v Christchurch City Council*:[8]

> [41] Strike out for want of prosecution in the High Court is regulated by r 15.2.
>
> [42] The relevant principles are well established. The applicant must show that:
>
> - The plaintiff has been guilty of inordinate delay.
> - Such delay is inexcusable.
> - The delay has seriously prejudiced the defendant.
> - The over-riding consideration is whether justice can be done despite the delay.

---

[4] *Vero Insurance* at [22].
[5] *Saffioti* at [38], [43]; *Vero Insurance* at [20].
[6] *Yun v Waitakere City Council* HC Auckland CIV-2010-404-5944, 15 February 2011 at [70].
[7] *Saffioti* at [53].
[8] *Snelling v Christchurch City Council* HC Christchurch CIV-2010-409-2344, 9 August 2011, following *Lovie v Medical Assurance Society New Zealand Ltd* [1992] 2 NZLR 244 (HC) (citations omitted).

> [43] 'Inordinate' has been defined as a period of time which has elapsed which is materially longer than the time usually regarded by the Courts and the profession as an acceptable period of time.
>
> [44] In my view, these principles neatly encapsulate what would be fair and appropriate in all the circumstances. If the Tribunal concluded that justice could still be done notwithstanding delay, it would in my view be unthinkable that the Tribunal could nevertheless remove a party. Conversely, if it was satisfied justice could not be done, it would be a perverse result for it to withhold removal.
>
> [45] In short, in determining what is fair and appropriate in the case of applications based on delay, the Tribunal should apply the principles articulated in *Lovie*.
>
> *Was the delay in this case inexcusable and inordinate?*
>
> [46] The authorities draw a distinction between delay before the issue of proceedings (pre-issue) and delay after the issue of proceedings (post-issue).
>
> - By itself, delay prior to the issue of proceedings cannot constitute inordinate and inexcusable delay for purposes of a strike out application.
> - If such delay has occurred, further delay after issue of proceedings will be looked at more critically by the Court and will be regarded more readily as inordinate and inexcusable than if the proceeding had been commenced earlier.
> - The defendant must show prejudice caused by the post-issue delay. If, however, the defendant has suffered prejudice as a result of pre-issue delay, he will need to show only something more than minimal additional prejudice to justify striking out the proceeding.
> - It is the cumulative effect of delay that must be considered.

[9] The principles set out in Snelling were applied in *Auckland Council v Weathertight Homes Tribunal*.[9]

[10] The onus is on the party seeking to be removed to show that removal is fair and appropriate.

Personal liability

[11] All those involved in the construction of a house – builders, subcontractors, architects and engineers – owe a duty to use reasonable skill

[9] *Auckland Council v Weathertight Homes Tribunal* [2013] NZHC 3274 at [17]–[18].

and care to prevent damage to those whom they should reasonably expect to be affected by their work.[10]

[12] Directors of such companies can be personally liable for their personal wrongs committed on behalf of the company.[11] The fact of being a director is not sufficient for a personal duty of care and therefore liability. There must be evidence of personal control and instruction. The touchstone has been said to be the assumption of responsibility, actual or imputed.[12] But the assumption of responsibility can arise or be imputed where the director (or even employee) exercises control over an operation or activity.

[13] More recent higher court authority rejects an 'assumption of responsibility' approach for negligent deeds, confining it to negligent words.[13] The test is:[14]

> … the primary question is likely to be whether the director (or humble employee) exerts a sufficient degree of control over the relevant acts or omissions. It would, of course, support a plaintiff's case if the director actually carried out relevant acts or omissions resulting in the plaintiff's loss.

Background

[14] In brief, this claim concerns a standalone house which leaks.

[15] The claimants are the owners, Bert Kurt Engelbrecht, Jorg Engelbrecht and David Alan Shackleton, as trustees of the Bert Engelbrecht Family Trust (the trustees).

[16] A brief chronology, to the extent known at this early stage in the process, is set out below.

[17] The then owner of the property, Bert Engelbrecht, entered into a contract with John Creighton Builder Ltd (JC Builder), the second respondent, on about 26 July 2000 to build a house. The sole director of the builder is John Robert Creighton (Mr Creighton), the third respondent. The house was

---

[10] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 406, 410, 419, 425; *Morton v Douglas Homes Ltd* [1984] 2 NZLR 548 (HC) at 593–595; *Hermann v Martin* [2020] NZHC 688 at [39].
[11] *Morton*, above n 10.
[12] *Trevor Ivory Ltd v Anderson* [1992] 2 NZLR 517 (CA) at 527.
[13] *Hsu v Mahoney* [2021] NZHC 1611 at [186]–[194], relying on the Court of Appeal in *Body Corporate 202254 v Taylor* [2008] NZCA 317, [2009] 2 NZLR 17.
[14] At [203] (footnote omitted).

designed by Paul Maurice Foley (Mr Foley), the fourth respondent, possibly on behalf of Paul Foley Design Ltd (PFDL). The structural engineer was Powell Fenwick Consultants Ltd, the sixth respondent. The plaster cladding work was carried out by Mr Olds, possibly on behalf of PN Olds Ltd (PN Olds).

[18] The Christchurch City Council (the council), the first respondent, granted building consent on 21 August 2000 and carried out inspections throughout the build. A final inspection on 24 April 2001 failed. Further inspections were later carried out. No code compliance certificate was issued.

[19] Leaks were first noticed by Mr Engelbrecht in about May 2001. He completed a Weathertightness Registration Form and lodged it with the relevant government department. He was advised on 3 December 2002 that a preliminary review indicated he was eligible for assistance from the Weathertight Homes Resolution Service (WHRS). Mr Engelbrecht then made a formal application to the WHRS on about 6 December 2002 (WHRS case no. 00174). Assessor's reports were issued on 10 March 2003, undated (following a site visit on 18 June 2003) and on 30 October 2003. The house was found to be eligible under the WHRS.

[20] JC Builder made various attempts to rectify the defects.

[21] The property was sold by Mr Engelbrecht to the trustees on 15 March 2005.[15]

[22] A new claim by the trustees (WHRS case no. 05745) was received by the WHRS on 15 August 2008. It was found to be eligible on 5 September 2008.[16]

[23] A notice to close the earlier WHRS claim was signed by Mr Engelbrecht on 1 October 2008. The reason given was the sale of the dwelling. He was notified by the WHRS of the closure of the claim on 8 October 2008.

[24] Another assessor's report was issued on 11 March 2009.

[25] The council issued a notice to fix on 11 January 2010.

---

[15] Statement of Claim (11 November 2020), "Chronology of Events".
[16] Assessor's eligibility report (5 September 2008) at [10].

[26] On 19 August 2010, the council issued building consent for repairs. The designer was Mr Foley of Foley Group Architecture Ltd (FGAL), the fifth respondent.

[27] There was an earthquake in Christchurch on 4 September 2010.

[28] Remedial work was commenced by JC Builder in about October 2010. IRock carried out the plaster work. It was personally done by Mr Olds.

[29] There was another earthquake in Christchurch on 22 February 2011. One or both of the earthquakes caused damage to the property. Remedial work ceased.[17]

[30] Claims were made by the trustees to the Earthquake Commission (EQC) and their insurer, AMI Insurance / Southern Response Earthquake Services Ltd. The trustees received payouts from both EQC and their insurer.

[31] Additional weathertight assessor's reports were produced on 16 January 2015 and 24 September 2018.

[32] The council issued further notices to fix on 24 July 2017, 29 August 2017, 25 July 2018 and 20 September 2019.

[33] The trustees applied to the Tribunal for adjudication on about 26 November 2020.

[34] The Tribunal joined the Olds parties on 24 May 2021, on the application of JC Builder.

Removal sought

[35] The Olds parties are represented by Mr Chris Shannon and Ms Cecilia Milne. There are detailed submissions in their memorandum of 9 July 2021. There is a statement in support from Mr Olds (12 July 2021). The Olds parties rely on the following grounds:

1. No personal liability

2. Limitation

[17] Statement of Claim "Chronology of Events" at "22/02/2011". Mr Olds says his remedial work continued until June 2011.

3. Delay

No personal liability

[36] While it is contended by Mr Creighton that Mr Olds was operating during the original build as a sole trader, that is not correct. Mr Olds had incorporated PN Olds Ltd on 21 July 2000. He and his wife were the directors. It was liquidated and removed from the Companies Register in 2007. The incorporation occurred four days before Mr Engelbrecht entered into the contract with JC Builder. Mr Olds had ceased trading as a sole trader prior to the construction of the dwellinghouse.

[37] Nor was the company a 'one-man band'. It had employees who carried out plastering work. Mr Olds did some of the 'hands-on' work himself, as well as managing the business. He would have been on site from time to time while the cladding was being applied and may have applied some of the cladding himself. He would have had several jobs on the go, so he would not have been able to be physically present at every job all of the time.

[38] Furthermore, Mr Olds and his wife travelled frequently to Australia around the period was constructed.

[39] It is noted in a draft Producer Statement that PN Olds undertook the external cladding. It gives a date range for the cladding application of 20 December 2000 to 15 January 2001.

[40] At law, a director is not generally liable for the actions of his or her company. A company is a distinct legal entity from its directors. It requires something out of the ordinary to proceed against a director, such as:

(1) whether the director did or said anything to assume a special level of responsibility beyond the norm, or

(2) the director personally had a degree of control over the actions or omissions in question.

[41] Mr Olds never assumed any special level of personal responsibility for the original cladding work beyond that of a normal company director of a small business. In the leading case of *Trevor Ivory*, the director was a one man band and was not held to be liable because he did not assume any special level of

responsibility.[18] Nor did Mr Olds have a high degree of control, as was the case in *Starik*.[19] Conduct must be looked at on a case by case basis as to the degree of control exercised by the person in question. Mr Olds' level of control was minimal and was limited to him being a director of PN Olds.

[42] At the time of construction, the weathertightness issues with direct fixed plaster cladding systems were not well known. Neither Mr Olds nor his company designed the dwelling or the original cladding system. The role of the company was to apply the cladding as per the design prepared by others.

[43] As for the remedial works, Mr Olds is not personally responsible for that. It was undertaken by IRock. It is accepted that Mr Olds is a director of IRock and he physically applied the plaster on behalf of IRock.

[44] Mr Olds became aware of the issues with the property generally and the cladding in early 2010, when he was contacted by Mr Creighton regarding remedial work. Mr Creighton did not tell Mr Olds that the owners had made a WHRS claim. This was 10 years after the original cladding work and it was the first Mr Olds had been informed of any weathertightness issues.

[45] Mr Olds attended a site meeting in 2010 with Mr Creighton, Mr Foley and Mike Olds of Resene Construction Systems. By 2010, the IRock business had been downscaled significantly and Mr Olds was primarily involved in other business ventures. His involvement in the 2010 meeting was "passive".

[46] It was Mr Creighton, with input from Mr Foley and Mike Olds, who determined the scope of the work required. It was decided that a partial reclad would fix the alleged issues with the cladding. Mr Olds was not responsible for the scoping or design of the remedial work. His involvement, via IRock, was limited to attending the site and physically applying the cladding in accordance with the strategy prepared by others.

[47] The statements by JC Builder – that IRock provided technical advice for the cladding repair methodology and that Mike Olds, an employee of IRock, entered into a verbal agreement to undertake the remedial work – is incorrect.[20]

---

[18] *Trevor Ivory*, above n 12.
[19] *Starik v Auckland Council* [2016] NZWHT Auckland 5.
[20] Memorandum of counsel for second respondent (19 March 2021) at [25]. Mr Creighton corrected the information concerning Mr Mike Olds in his statement (10 May 2021) at [12].

IRock never provided technical advice, nor was Mike Olds ever an employee or contractor of IRock.

[48] As a gesture of goodwill and in order to try and resolve matters for the homeowner, IRock agreed to do the plastering work for the partial reclad free of charge. Resene Construction Systems similarly agreed to supply the materials at no cost. IRock's involvement in the remedial work took place from November 2010 until June 2011.

[49] Mr Creighton had also asked IRock for a quote for a full reclad, which IRock provided on 1 June 2010, but he later advised that the owner was not prepared to pay for this.

[50] One of the alleged issues with the remedial works is that rotten or degraded framing had been left *in situ* and/or not treated with preservative. Mr Olds attended to the site only after the framing work had been completed by Mr Creighton and covered with building wrap. The plaster was applied on top of the building wrap.

Limitation

[51] Mr Engelbrecht discovered the leaks almost immediately in May 2001. He made an original WHRS claim in 2002, but then sold the property in March 2008 (actually March 2005). The original claim was closed on 15 August 2008 and a fresh claim was made by the new trustee owners. This was more than six years after the defects were first discovered and the claim is therefore statute-barred by s 4 of the Limitation Act 1950.

Delay

[52] Mr Olds and IRock should be removed as their joinder constitutes an abuse of process and is in breach of natural justice. The inordinate and inexplicable delay in bringing the claim against the Olds parties will result in serious prejudice and injustice to them. The length of time between the discovery of the original defects and the present claim is almost two decades. It is clearly at odds with the purpose and mandate of the WHRS to achieve speedy, flexible and cost-effective resolution of the weathertightness claims.[21]

[21] Weathertight Homes Resolution Services Act 2006, s 3.

[53] The Tribunal has the power to diligently monitor and hurry along slow claims and to terminate dilatory claims.[22] A recent case is *Snelling*. This concerned a 6.5-year delay. The Court found the delay to be inordinate and inexcusable, but found that the council was not seriously prejudiced and that overall justice could be done. The same could not be said of Mr Olds and IRock, who face delays of 20 years and 10 years respectively. There has been serious prejudice to the Olds parties:

(1) the cost of repairs has escalated from $20,000 in 2003 to more than $873,000 in 2018 and likely will have increased even further since 2018;

(2) few records are available and personal recollections have faded; and

(3) in the past 20 years the Olds parties have never at any point been notified that the property was subject to a claim in the WHRS. They were not put on notice to preserve any documents. Documents have been destroyed by the Olds parties and by others in keeping with standard business practices. Few documents exist from either the original construction or the partial remediation. Because of this, the Olds parties will be seriously prejudiced in defending themselves if the substantive claim proceeds against them.

[54] In reply to the opposition to removal of both the Creighton parties and the council, there is a further memorandum (20 August 2021) from Mr Shannon. He adopts the submissions of Ms Paterson (27 July 2021) replying to the Creighton parties' opposition to removal of the Foley parties.

[55] It is noted by Mr Shannon that the Creighton parties' opposition does not address the key arguments made by the Olds parties' removal application:

(1) the claim is statute barred;

(2) delay (over 20 years) and abuse of process issues;

(3) the joinder of the Olds parties based on incorrect recollections, inferences or assumptions; and

[22] *Lee v Whangarei District Council* [2016] NZSC 173.

(4) a lack of evidence from the Creighton parties to rebut the points made by the Olds parties.

[56] Mr Shannon states that the Olds parties fundamentally disagree with Mr Creighton's recollections about the nature and extent of their involvement. The Olds parties deny providing technical advice in relation to the remedial works. The remedial works were undertaken by IRock and not Mr Olds in his personal capacity. There is no tenable evidence that Mr Olds assumed personal liability to the trustees or others. Nor have the Creighton parties provided any evidence that Mr Olds was aware of the claim.

[57] According to Mr Shannon, the key issue identified in the 2018 assessor's report was untreated timber framing being left *in-situ*. But the Olds parties were not involved with this, nor did they know about it.

[58] In reply to the council's opposition, Mr Shannon contends that *Hsu*, relied on by the council, is very recent, *obiter dicta* and untested. Furthermore, negligent advice is an aspect of the claim here, as the Creighton parties allege (wrongly) that the Olds parties provided technical advice. Hence the assumption of responsibility test remains relevant to the joinder of the Olds parties in respect of remedial work. It is contended there has been no assumption of responsibility.

Removal opposed

[59] Removal of the Olds parties is opposed by JC Builder and Mr Creighton in Ms Grace Moore's memorandum of 16 July 2021.

[60] Ms Moore notes the involvement of Mr Olds personally in the original build and IRock in the remediation work. Mr Olds was present at a meeting in 2010 when the WHRS claim was discussed. He was made aware of the claim. His level of control in the application of the cladding was not minimal. IRock provided technical advice for the remedial works. Furthermore, the assessors identified issues with the cladding. The liability of the Olds parties is a critical issue for determination at the hearing.

[61] It is submitted by Ms Moore that the arguments for removal here are primarily limitation defences or otherwise fair trial complaints (abuse of process or want of prosecution). The respondents can plead such matters as limitation, contributory negligence, betterment and failure to mitigate. These evidential

contests are matters for a hearing and cannot be properly tested until then. The Tribunal cannot be expected to assess the whole evidential picture in a summary way or evidential vacuum.

[62] Removal of the Olds parties is also opposed by the council in Ms Macky's memorandum of 5 August 2021. It is submitted there are tenable claims against the Olds parties. The assumption of responsibility, as required by *Trevor Ivory*,[23] is not an element of the tortious claim against them. It is a necessary element of the cause of action in negligent advice, but not for defective plastering work.[24] Hands on involvement or control over the work is the relevant test. Furthermore, if the various respondents seeking to be removed succeed, so should the council and Creighton respondents.

Discussion

[63] A party may be removed where it is "fair and appropriate in all the circumstances to do so".[25] Caution is exercised in removing a party. It is important that claims against a party, which may ultimately prove to be meritorious, are not prematurely struck out at the interlocutory stage. Where evidence is contentious or challenged, the Tribunal is wary of resolving such disputes in the context of a removal application. The onus is on the party seeking removal to establish that it is fair and appropriate, having regard to the interests of all parties.

[64] It is not being disputed on this application for removal that the plastering work done by Mr Olds and/or PN Olds and/or IRock may be defective.[26] The defects causing leaks are not confined to untreated timber being left *in-situ* unknown to Mr Olds. Whether the Olds parties' work is proven to be defective and causative of leaks will be determined at trial.

No personal liability

[65] The contention of the Olds parties is that Mr Olds has been wrongly joined to the claim in his personal capacity. He was not a sole trader at the time of the original build, with the plastering work having been undertaken by his company, PN Olds.

---

[23] Above, n 12.
[24] Above, n 13.
[25] Weathertight Homes Resolution Services Act 2006, s 112(1).
[26] See Procedural Order 3 (24 May 2021) at [53] & [55].

[66] There is very limited documentary evidence as to which entity undertook the cladding work for the original build, unsurprising given the effluxion of time since then, but there is at least one document showing it could have been the company.[27]

[67] For the purpose of this application, I will make the assumption that the company undertook the original cladding work.

[68] As Mr Shannon acknowledges, that does not mean Mr Olds cannot be personally liable for any defective work. He was a director of the company, but it was not a 'one man band' as it had employees other than Mr Olds who carried out plastering work. As the company was a distinct legal entity from its directors, it must be shown Mr Olds, whether he was a director or not, either undertook the work or had control over it. I regard *Hsu* as correctly setting out the law applicable to Mr Olds' liability.[28] There is no need to show an assumption of responsibility by him.

[69] Mr Creighton says it was Mr Olds whom he dealt with on the project. It was Mr Olds who quoted for the work and he saw him personally working on site applying the Rockcote cladding.[29]

[70] Mr Olds accepts he was on site from time to time and "may" have done some of the plastering work.[30]

[71] As for the remediation in 2010/2011, Mr Creighton refers to a meeting attended by Mr Olds in February 2010.[31] He says he personally spoke to Mr Olds about what needed to be done and had an oral agreement with him that there would be no charge.[32] According to Mr Creighton, it was Mr Olds who undertook the remedial plastering work.[33] It was Mr Olds who signed the IRock quote of 1 June 2010 (which was not accepted, with the plastering work being done free of charge).

---

[27] Draft producer statement (undated) on PN Olds letterhead.
[28] *Hsu v Mahoney*, above n 13.
[29] Statement of Mr Creighton (10 May 2021) at [5], [6] & [10].
[30] Statement Mr Olds (12 July 2021) at [16] & [18.4].
[31] Statement of Mr Creighton (10 May 2021) at [12].
[32] At [10] & [15].
[33] At [14].

[72] Mr Olds accepts he attended the meeting and that, on behalf of IRock, he agreed to do the partial re-clad free of charge.[34] He accepts he carried out the physical work on site.[35]

[73] It is noted that Mr Olds does not identify any other person from PN Olds or IRock who supervised the plastering work. Someone did. He was the only director of both companies who was onsite and undertook plastering work (there is no evidence the other director, his wife, had technical expertise or was on site). He was the person who was involved in the discussions with the builder about the original work and the remediation.

[74] The evidence is equivocal as to who designed the plastering work or provided technical advice in relation to it. I put that to one side. It is clear, however, that Mr Olds was onsite undertaking plastering work for both the original build and the remediation. He does not deny this, though does contest the extent of it.

[75] While a final determination cannot be made at this interlocutory stage, there is credible evidence that Mr Olds controlled the plastering work for both the original build and the remediation. He undertook some of the original build work and the bulk of the remediation plastering work. He therefore personally owed a duty of care to others, including JC Builder, Mr Creighton and the trustees.

Limitation

[76] Mr Shannon submits that the claim against the Olds parties is out of time, as the current claim was filed in the WHRS on 15 August 2008, more than six years after the original build (completed by May 2001) and the discovery of the leaks (also May 2001).[36] The work of the Olds parties was completed by about 15 January 2001.

[77] There is no dispute that discovery of the leaks occurred in May 2001. Accordingly, the limitation period of six years (for the original build) started

---

[34] Statement of Mr Olds (12 July 2021) at [23] & [28].
[35] At [31].
[36] The Creighton parties' claim against the Olds parties is for contribution or indemnity, which has its own limitation rules. They are discussed in *BNZ Branch Properties Ltd v Wellington City Council* [2021] NZHC 1058. They have not been addressed by any party, so I will not deal with them.

running then.[37] The longstop limitation period of 10 years does not extend time in this case, as the leaks were almost immediately discovered at the end of construction.[38]

[78] So, when did the limitation clock stop?

[79] An application for an assessor's report was first made by Mr Engelbrecht, as the then owner of the property, on about 6 December 2002. This was well within the limitation period. This application had the effect of 'stopping the clock'.[39]

[80] However, Mr Engelbrecht then sold the property to a family trust in March 2005, comprising himself and two others as trustees. This led to the closure of the first application to the WHRS, with a fresh claim by the new trustee owners being made on 15 August 2008. This claim was found to be eligible on 5 September 2008. The filing of this claim, being outside the limitation period of six years from May 2001, is therefore said to be statute barred.

[81] It is not clear to me why a second claim was initiated in August 2008. The provisions of the Act governing termination of a claim concerning a dwelling (which is not part of a complex) would not have required the termination of the claim by Mr Engelbrecht.[40] Accordingly, while the original claim may have been administratively closed, it was not statutorily terminated in accordance with the Act.

[82] It follows that the original claim by Mr Engelbrecht in December 2002 remained alive under the Act. I regard the 2008 claim as a continuation of the 2002 claim. Mr Engelbrecht continued to be and remains a current "owner" with the right to apply to the Tribunal, given that he has an "eligible claim".[41] He is not a subsequent purchaser of the property, but an owner at the time of the original build, as well as at the time of the December 2002 claim and also at the time of the confirmation or revision of the claim in August 2008. There is just one claim here.

---

[37] Limitation Act 1950, s 4(1)(a).
[38] Building Act 2004, s 393(2).
[39] Weathertight Homes Resolution Services Act 2006, s 37.
[40] Weathertight Homes Resolution Services Act 2006, ss 55(1) & 56(2). The "transition date" is 1 April 2007, so s 55(1) is not applicable.
[41] Sections 10, 14 & 60(1).

[83] The notice of closure of 1 October 2008 of the 2002 claim is not a withdrawal of Mr Engelbrecht's claim, as by then he had already filed the 2008 claim (a claim in which he is a claimant). This notice carried no legal consequences.

[84] In addition to the claim arising out of the original build, there remains a valid claim against both Mr Olds and IRock arising out of the remediation in 2010. This part of the claim cannot be out of time.

[85] I find that the claim before the Tribunal (concerning both the original build and the remediation) is not out of time.

Delay

[86] It is contended by the Olds parties that the claim should be struck out as an abuse of process on the basis of inordinate delay and want of prosecution. The leaks were discovered in May 2001, yet the Olds parties heard nothing following remedial work in 2010 until the claim was served in May 2021, 20 years after the leaks were first discovered. Not only has the delay been inordinate, but it is inexcusable. It has also seriously prejudiced the Olds parties in the ways identified earlier.

[87] The law is settled that where removal is sought on the basis of delay, the overriding consideration is whether justice can be done despite the delay. In calculating the delay, the focus is on 'post-filing' delay, but where there is such delay, any delay prior to issuing the proceedings will also be considered. In the context of a claim before the Tribunal, the relevant 'filing' is the application to the WHRS for an assessor's report. In respect of this claim, that was in December 2002.

[88] It is self-evident that the delay in this case is inordinate. It took more than 18 years for the claim to be served on the Olds parties, being 20 years after the building was completed. I appreciate that the Olds parties were joined by JC Builder, which was not responsible for the delay. While Mr Creighton always knew about the leaks, he was not served with the trustees' claim made in the Tribunal until November 2020 (though he has known of the WHRS claim since at least 2006).[42] Until he was served, he would say there was no need

[42] Statement of Claim (11 November 2020), Chronology of Events at "June/July 2006".

for him to join any other party. Nonetheless, the delays are real and must be taken into account, even though the joining party is not at fault.

[89] Despite the obviously prolonged delay, the Olds parties cannot say they were unaware of the leaks or of the possibility of a claim throughout that period of 20 years. After all, both were heavily involved in the remediation in 2010/2011. Mr Olds was present at a meeting in February 2010 to discuss the remedial works. There is a dispute in the evidence as to whether he was told then about the WHRS claim. But, at the very least, from that point he was plainly on notice of a possible claim against the Olds parties. Mr Olds was additionally involved in further discussions on more remedial work, also involving the council, in October 2017. He was approached again by Mr Creighton in March 2019 about such work.

[90] However, I accept that whether the delay in notifying the Olds parties is regarded as 20 years or less than that, it is extreme.

[91] Additionally, I accept that the delay was inexcusable.

[92] Accordingly, the real issue is whether, notwithstanding the inordinate and inexcusable delay, justice can be done. This is justice for all the parties, not just for the Olds parties.

[93] This brings me to the heads of prejudice caused by the delay, as claimed by the Olds parties. I will deal with each head in turn.

[94] Mr Olds points out that documents, particularly relating to the original build, have not been retained and that personal recollections may have faded. I accept that there are few documents relating to the plastering work now available, but there may have been very few in the first place.

[95] It is notable that Mr Olds does not identify any documents now missing which might have been important in his defence. The critical evidence is going to be expert technical evidence – whether given by the respondents themselves, the assessors or other experts called by the parties – as to what has caused the leaks and whether that amounted to a breach of the duty of care. It is not apparent why such evidence will be dependent on allegedly missing documents. To the extent that the house has been changed since the original build, Mr Olds is aware of the remediation.

[96] Of course, Mr Olds is right in observing that memories will have faded over 10 years (since remediation), let alone 20 years (since the original build). But, as noted above, it is the technical evidence as to the cause of the damage and the standards at the time that will be important. Furthermore, the fading memories affect all the parties, including the party making the claim against the Olds parties and which bears the burden of proof against them.

[97] As for the escalation of costs, that is dealt with more fully in Procedural Order 4 issued at the same time as this Order. To the extent that additional damage has occurred over time, it is irrelevant to the liability of the Olds parties if it was not caused by their defective work (if any). To the extent there was any lack of reasonable mitigation by the trustees or there is contributory negligence, that can be assessed at trial. The escalation of costs in repairing any defective work of the Olds parties is yet to be quantified. It is doubtful that such escalation, of itself, would be sufficient to remove a party.

Conclusion on Delay

[98] I find that the Olds parties can fairly defend the claim against them. Notwithstanding the prolonged delay and a material (but not serious) level of prejudice to the Olds parties, justice can be achieved for all the parties.

Conclusion on removal

[99] The claims against the Olds parties are genuine and contentious. It is not fair and appropriate in the circumstances to remove them from the claim. The interests of justice, considering all the parties, are such that the Olds parties should remain as parties.

Order

[100] The application to remove Peter Norman Olds and IRock Ltd is dismissed.

DATED this 8th day of September 2021

_____

D J Plunkett
Chair