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 6

Removal application by sixth respondent

Dated 8 September 2021

Introduction

[1] Powell Fenwick Consultants Ltd (Powell Fenwick), the sixth respondent, has applied to be removed as a party 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.
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> [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 claims which may ultimately prove to be meritorious not be prematurely struck out at an interlocutory stage.

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[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.

[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 Powell Fenwick 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.
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> [42] The relevant principles are well established. The applicant must show that:
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> - 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.
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> [43] 'Inordinate' has been defined as a period of time which has elapsed which is materially longer than the time usually regarded

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[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).

> 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.
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> [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*.
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> *Was the delay in this case inexcusable and inordinate?*
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> [46] The authorities draw a distinction between delay before the issue of proceedings (pre-issue) and delay after the issue of proceedings (post-issue).
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> - 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

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[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. Mr Kevin Simcock was the responsible engineer. The plaster cladding work was carried out by Peter Norman Olds (Mr Olds), the seventh respondent, 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.

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[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, 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. Mr Olds' new company, IRock Ltd, the eighth respondent, 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 Powell Fenwick on 24 May 2021, on the application of JC Builder.

Removal sought

[35] Powell Fenwick is represented by Mr Garth Gallaway. There are detailed submissions in his memorandum of 12 July 2021. In support, there is an affidavit (sworn 9 July 2021) from Susan Mary Halliday, general manager of Powell Fenwick. Mr Gallaway relies on the following grounds:

1. Limitation

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

2. No reasonably arguable case

3. Want of prosecution

Limitation

[36] Counsel adopts the submissions of the Foley parties in Ms Paterson's memorandum of 21 June 2021. It is submitted that any claim had to be made within six years of the completion of Powell Fenwick's services, in accordance with clause 8 of the agreement between Mr Engelbrecht and Powell Fenwick.[18] In accordance with the Limitation Act 1950, the last date for proceedings to be filed was May 2007, since all of Powell Fenwick's work was completed by April 2001. However, the application for an assessor's report, which commenced this proceeding, was made in August 2008. That was more than six years from the date Mr Engelbrecht was aware of the issues. The claim is therefore out of time.

[37] There is no legitimate basis to say that the issue of the producer statement in February 2005 brought the claim within time. No claim has been made based on the issue of the statement. Powell Fenwick has been joined on the basis that its original work might be defective. It is noted that Mr Engelbrecht has been a common owner of the property since its construction.

No reasonably arguable case

[38] It is contended that there is no reasonably arguable cause of action against Powell Fenwick.

[39] The Tribunal considered that there was tenable evidence that it should be joined on the basis of a lone statement in one of the assessor's reports that Powell Fenwick could be responsible for:

1. Poor concrete fill compaction to the polyblock walls; and

2. the drainage systems were not working.

[18] This agreement bears the date 1 February 2000, but is unsigned.

[40] Following the assessor's report, remedial works were carried out in 2010 to rectify those defects. Those remedial works included rectifying the drainage and applying tanking to the block walls. The subsequent assessor's reports do not identify Powell Fenwick as a potentially liable party.

[41] The work identified by the Tribunal as a basis for the joinder of Powell Fenwick was carried out not later than April 2001.

[42] It is submitted that the joinder of Powell Fenwick on the basis that the leaking issues persisted after the remedial work (which was designed to address the issues in the assessor's report of 2009) conflates the claim for the original work and the failed remedial work.

[43] The correct approach is to recognise that, in cases where remedial works have failed, two causes of action arise:

(1) a claim for the original work; and

(2) 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.

[44] If Powell Fenwick has any liability, it can only be for the original works which were completed by April 2001. If the remedial works were defective, there can be a separate and distinct cause of action in respect of them.

[45] Furthermore, it is submitted that any claim now made regarding the original construction of the drainage and retaining walls could not be fairly analysed because those building elements were:

(1) modified by the Creighton and Foley parties during the 2010 remedial works; and

(2) damaged by the Canterbury earthquake sequence.

Want of prosecution

[46] Powell Fenwick was joined to this claim in May 2021, which is more than 20 years after Powell Fenwick's work was completed and 19 years after the leaks were first noticed. It is even 17 years after the first assessor's report

and 12 years after the assessor identified Powell Fenwick as a contributing party. The Creighton parties who applied to join Powell Fenwick have not said why they waited so long to do so. They have known of the weathertightness issues since 2003 or 2004 at the latest. It was the Creighton parties who drove the preparation of the remedial scope of works, but they did not involve Powell Fenwick.

[47] If Powell Fenwick is not removed it will suffer significant prejudice:

(1) it no longer has its file;

(2) Mr Simcock has been retired for 11 years and it is extremely unlikely that he or any other witness would be able to provide reliable evidence about what Powell Fenwick did 20 years ago;

(3) the other parties would likely have had some benefit from having reflected on the work and refreshed their memories as a result of their continued engagement with the WHRS claim and the remedial works; and

(4) as noted by the Foley parties:

(a) the application for financial assistance failed; and

(b) the cost of remedial works has escalated by more than 4,000 per cent since the first assessor's report.

[48] To the extent that the trustees say it results from the failed remedial works, it is submitted that this further illustrates the prejudice faced by Powell Fenwick. It was not given the opportunity to influence the scope of the remedial works.

[49] The overarching consideration must be whether justice can be done. It is submitted that, in respect of Powell Fenwick, that is not possible. It is fair in all the circumstances that it be removed from the proceedings.

[50] In her affidavit (9 July 2021), Ms Halliday confirms that none of the current staff has any knowledge of the claim now in the Tribunal. Mr Simcock retired in 2010. The firm's files were retained for 10 years and then destroyed. Only 14 documents, now disclosed, were discovered by the firm's IT team.

These documents do not provide a complete record of the file Powell Fenwick would have held. One document found was an unsigned agreement with Mr Engelbrecht. It would ordinarily have been signed and retained on the file.

[51] There is a further memorandum (19 August 2021) from Mr Gallaway replying to the opposition to removal filed by the Creighton parties and the council.

[52] Mr Gallaway repeats that Powell Fenwick's primary defence is that the claim against it is time-barred. There is no meaningful challenge to that defence.

[53] Powell Fenwick also maintains that any claim against it is an abuse of the Tribunal's processes and will cause unfair prejudice to it.

[54] It is contended that the Viden Group structural report is irrelevant because it relates to alleged structural engineering issues outside the Tribunal's jurisdiction.

[55] It is not the case that the Creighton parties or the council face the same delay and difficulties as Powell Fenwick. The latter is in a unique position because it is the only party which had no knowledge of or involvement in the remedial works.

Removal opposed

[56] Removal of Powell Fenwick is opposed by JC Builder and Mr Creighton in Ms Grace Moore's memorandum of 16 July 2021.

[57] It is noted by Ms Moore that Powell Fenwick prepared the structural engineering design. A report by Viden Group Consulting Engineers (10 March 2021) stated that the strength capacity of the retaining wall in the basement appeared to be insufficient to accommodate the applied loads. The cost of remediating the retaining wall is sought under the Statement of Claim (11 November 2020).

[58] An assessor identified issues with fill compaction to the polyblock walls and the drainage systems.[19] Powell Fenwick issued a producer statement in

[19] Assessor's report (11 March 2009) at [16.1].

2005 for inspecting the foundations, ground floor slab and block walls. This provides tenable evidence to join Powell Fenwick.

[59] 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.

[60] Removal of Powell Fenwick is also opposed by the council in Ms Macky's memorandum of 5 August 2021. It is submitted there are tenable claims against Powell Fenwick. Furthermore, if the various respondents seeking to be removed succeed, so should the council and Creighton respondents. No specific points are made by Ms Macky in relation to Powell Fenwick.

Discussion

[61] A party may be removed where it is "fair and appropriate in all the circumstances to do so".[20] 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.

Limitation

[62] Mr Gallaway submits that the claim against Powell Fenwick is out of time. There is an argument based on a provision in the agreement between Mr Engelbrecht and Powell Fenwick. That agreement is unsigned, though conceivably a signed copy has been lost in the years since then. Moreover, it does not bind the Creighton parties. It is not relevant.

[20] Weathertight Homes Resolution Services Act 2006, s 112(1).

[63] Mr Gallaway has another limitation argument. He adopts the submission of Ms Paterson for the Foley parties in her memorandum of 21 June 2021. The current claim was filed in the WHRS on 15 August 2008, more than six years after the original build (Powell Fenwick's work was completed by April 2001) and the discovery of the leaks (May 2001).[21]

[64] 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 running then.[22] 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.[23]

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

[66] 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'.[24]

[67] However, Mr Engelbrecht then sold the property to a family trust in March 2005, comprising himself and two others as trustees. This led to a fresh claim by the new trustee owners being made on 15 August 2008. It was found to be eligible on 5 September 2008, following which the earlier claim was closed on about 8 October 2008. The filing of the new claim, being outside the limitation period of six years from May 2001, is therefore said to be statute barred.

[68] 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 earlier claim by Mr Engelbrecht.[25] Accordingly, while the

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[21] The Creighton parties' claim against Powell Fenwick 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.
[22] Limitation Act 1950, s 4(1)(a).
[23] Building Act 2004, s 393(2).
[24] Weathertight Homes Resolution Services Act 2006, s 37.
[25] 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.

original claim may have been administratively closed, it was not statutorily terminated in accordance with the Act.

[69] 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".[26] 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.

[70] 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.

[71] There is another reason why the limitation defence fails. Powell Fenwick's work did not finish in April 2001. Mr Simcock issued a producer statement for "construction review" on 18 February 2005, following "periodic reviews of the work". The statement recorded Mr Simcock's belief that the building work had been completed in accordance with the design. Mr Gallaway says that no claim has been advanced based on the statement, but that is because the Tribunal has not yet directed the Creighton parties to provide particulars of their claim against Powell Fenwick.

[72] I find that the claim before the Tribunal against Powell Fenwick is not out of time.

No reasonably arguable case

[73] Mr Gallaway acknowledges that there is some evidence that the engineers may be liable for weathertight defects. This was the opinion of Mr Casey, an assessor, in his report.[27] He identified poor concrete fill compaction and drainage systems not working.

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[26] Sections 10, 14 & 60(1).
[27] Assessor's report (11 March 2009) at [16.1].

[74] As to this defect (in the opinion of Mr Casey), Mr Gallaway says that the remedial works in 2010/2011 rectified the drainage and applied tanking to the block walls. He observes that the subsequent assessors' reports do not identify Powell Fenwick as a potentially liable party.

[75] It is submitted that joining Powell Fenwick, on the basis of leaking issues persisting after the remedial work, conflates the claim for original work with that of the failed remedial work. The liability of Powell Fenwick, if any, can only be for the original work.

[76] Additionally, it is submitted that any claim made regarding the original construction of the drainage and retaining walls, being the only issues identified by Mr Casey, could not now be fairly analysed because those building elements were modified by the Creighton and Foley parties in the remedial work and were damaged by the Canterbury earthquakes.

[77] Ms Moore, for the Creighton parties, focuses on the report of the expert structural engineer of 10 March 2021 identifying an issue with the strength of the retaining walls. The cost of remediating this alleged defect is said to have been claimed in the Statement of Claim.

[78] The structural report concerns the strength of the basement walls and earthquake damage. It is not a weathertight report. Ms Moore does not explain the relationship of the allegedly defective strength to the house's weathertight issues. As explained in Procedural Order 3, this evidence is irrelevant.[28]

[79] Ms Moore advances no arguments to contradict any of Mr Gallaway's contentions.

[80] I agree with Mr Gallaway that there is no longer any reasonably arguable case against Powell Fenwick. Ms Moore does not point to any evidence of post-remediation leaks in the basement area, though there is in fact some evidence of such leaks.[29] However, any such leaks should have been remediated in 2010/2011. Accordingly, if there are such leaks, they result from the failed remediation as Mr Gallaway contends.

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[28] Procedural Order 3 (24 May 2021) at [44].
[29] Assessor's report (24 September 2018) at [3.5].

[81] Nor is it likely to be possible to identify what existing damage is caused by original defects and what is caused by the failed remediation. As Mr Gallaway contends, the difficulty, if not impossibility, of identifying what damage now is caused by any defects in Powell Fenwick's original work, is aggravated by the Canterbury earthquakes of 2010 and 2011. It is apparent these caused significant damage to the basement walls and floor slab and may have allowed water penetration.[30] This is not contested by Ms Moore.

[82] I find there is no reasonably arguable case against Powell Fenwick based on the condition of the dwelling today.

Want of prosecution

[83] Mr Gallaway points out that Powell Fenwick was joined to this claim in May 2021. He says that is more than 20 years after the completion of its work, but this is not correct. Its work appears to have been completed with the producer statement in February 2005, so the claim was served more than 16 years after its work.

[84] On any basis, the delay in notifying Powell Fenwick is inordinate. There is no explanation from JC Builder, the party who joined Powell Fenwick. Mr Creighton has always known of the leaks and has known of the WHRS claim since at least 2006.[31] He would say he had no need to join Powell Fenwick until he was served with the claim in November 2020. While the delay is not the fault of JC Builder, it is real and must be taken into account. In the absence of an explanation, the delay is inexcusable.

[85] 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 Powell Fenwick.

[86] This brings me to the heads of prejudice caused by the delay, as claimed by Powell Fenwick.

[87] It is said that Powell Fenwick no longer has its file and that Mr Simcock retired 11 years ago. Neither he nor any other witness will be able to provide reliable evidence about what Powell Fenwick did 20 years ago. The

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[30] Viden structural report (10 March 2021) at [2.14], [2.17] & [2.20].
[31] Statement of Claim (11 November 2020) "Chronology of Events" at "June/July 2006".

other parties will have had the benefit of reflecting on their work and refreshing their memories as a result of the continual engagement with the remedial works and the WHRS process. Furthermore, the application for financial assistance failed and there has been a significant escalation in the cost of remedial work. Additionally, it is difficult, if not impossible, to discern now whether any issues which persist are the result of Powell Fenwick's design. Finally, it would be unjust to put Powell Fenwick to the considerable cost and expense of engaging experts and defending itself.

[88] Mr Gallaway highlights the general prejudice of delay with the loss of the file and fading memories. He does not identify any specific records now lost which might exonerate Powell Fenwick (if indeed, their design is defective). Furthermore, such matters affect all the parties, notably the Creighton parties who bear the burden of proof against Powell Fenwick. Nor do I consider material the failure of the trustees to obtain financial assistance or the escalation in the cost of remedial work. This is dealt with more fully in Procedural Order 4 issued at the same time.

[89] This brings me to what I regard as serious prejudice to Powell Fenwick, as a result of 16 years delay. This is the difficulty of identifying what damage existing today, if any, is the fault of any defective work by Powell Fenwick, given the attempted remediation and the earthquakes. This overlaps with the assessment above of whether there is an arguable case against the engineers. There is considerable force in Mr Gallaway's contention that it is difficult, if not impossible, to now isolate what Powell Fenwick is responsible for. I also accept that the cost of doing so would be considerable. Accordingly, there is real injustice to Powell Fenwick to retain it as a party.

[90] On the other hand, the removal of Powell Fenwick would not cause injustice to any other party. It does not seem to me that the liability of Powell Fenwick, if any, is important to any party. It is not material to the trustees who advance no claim against it. Nor do I consider it important to the Creighton parties or other respondents. It is not possible to assess now what proportion of damage to the dwelling Powell Fenwick could be liable for (if any), but it would not appear to be a high proportion.[32]

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[32] See the range of weathertight defects identified in assessor's report (11 March 2009) at [13.1]–[13.5.4] & [15].

Conclusion

[91] There is no reasonably arguable case against Powell Fenwick and it will suffer serious prejudice if it is not removed. It would be unjust to require it to mount a costly defence to this claim. If Powell Fenwick is removed, there is justice to all the parties. It is fair and appropriate to remove Powell Fenwick from the claim.

Order

[92] The application to remove Powell Fenwick Consultants Ltd is granted. It is hereby removed from the proceedings.

DATED this 8th day of September 2021

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D J Plunkett
Chair