CLAIM NO: WHT 30-07/TRI-2007-100-000002

UNDER the Weathertight Homes Resolution Services Act 2006

IN THE MATTER of an adjudication

BETWEEN **Stephen John Partridge and June Rose Partridge as Trustees for the Partridge Family Trust**

Claimants

AND **John Robert McClune**

First Respondent

AND **Lockhead Design Limited**

Second Respondent

AND **Michael Tucker**

Third Respondent

AND **Miles Everton**

Fourth Respondent

TRIBUNAL ORDER

Dated 16 August 2007

The applications for removal

1. John Robert McClune, the first respondent; Lockhead Design Limited, the second respondent; Michael Tucker, the third respondent and Miles Everton, the fourth respondent, have all applied to be removed as parties to the adjudication. The removal of the parties is opposed by the claimants.

2. The applications for removal are based generally on two grounds. First, the respondents assert that the claims were brought outside the time allowed by section 393(2) of the Building Act 2004 and therefore cannot succeed. In addition most of the respondents have also applied to be removed on factual grounds.

3. Mr McClune has sought to be removed as he submits he was not the builder/developer as alleged in the application and he does not owe the claimants a duty of care.

4. The second respondent, Lockhead Design Limited, applies to be removed on the basis that there is no evidence pointing to negligence in relation to the design work it undertook in relation to the property. Mr Lockhead noted that this work complied with acceptable standards of the day. In addition the cladding material used was not the same as the material specified and so his company cannot be held responsible for any leaks which have subsequently occurred.

5. Mr Tucker applied to be removed on the basis he was a labour only contractor and was not engaged in the exterior plaster work or plumbing. He stated he was not required to install side flashings to windows or attend to other matters which have resulted in leaks.

6. Mr Everton applied to be removed on the basis he did not carry out any plastering work at 387B Ocean Beach Road, Mount Maunganui, nor was he an employee, director, shareholder or partner in the company or partnership that was contracted to carry out the plastering work.

7. Given the nature of the applications and the key jurisdictional issues involved, the parties were given an option of requesting a hearing to deal with the removal

applications should they believe it be appropriate. Two of the respondents requested a hearing and accordingly a hearing convened in Tauranga on Tuesday 7th August 2007.

8. I will deal first with the application for removal based on section 393(2) of the Building Act 2004. In this regard I would note that the second respondent, Lockhead Design Limited, did not specifically raise the limitation defence in its application for removal. However as I indicated at the hearing, if this defence is successful in relation to other respondents, it would also apply to Lockhead Design Limited. Accordingly the application for removal based on section 393(2) will be considered in relation to all four respondents.

Respondents' submissions

9. All the respondents state that any claims against them are statute barred by virtue of the provisions of section 393(2) of the Building Act 2004. They submit the claims against each of the respondents cannot possibly succeed because the date of the acts or omissions on which the proceedings are based occurred more than ten years before the claim was filed with the Weathertight Homes Resolution Service. They advise that all the relevant design and construction work they each undertook which could possibly have contributed to the dwelling leaking all took place before the end of July 1996. The claim was filed with the Weathertight Homes Resolution Service on 18th December 2006.

10. Mr Rooney, counsel for Mr McClune, in particular, submitted that the relevant acts or omissions in this case are the specific acts or omissions comprising the design or workmanship in connection with the window/cladding junctions and the other causes of weathertightness issues as detailed in the assessor's report. As all those acts and omissions occurred more than ten years before the claim was brought, the claim cannot continue.

11. It was further submitted that the only possible cause of weathertightness issues as identified in the assessor's report that involved work done after December 1996 was the landscaping work. However Mr Rooney submitted that even for this, the cause of action dated from when the plastering work was done, not from when the

landscaping was complpleted. This is because the ground levels were as provided for in the building permit and the cause of action arose due to the plasterer's work rather than the work of the landscapers.

12. The submissions made by the respondents relied on a number of leading cases including ***Hamilton City Council v Rogers*** (High Court, Hamilton, 23 April 1998; Robertson J; A92-97), and ***Johnson v Watson*** [2003] 1 NZLR 262.

Opposition by claimants

13. Counsel for the claimants opposed the applications for removal on the basis that it would not be fair and appropriate in all the circumstances for the Tribunal to remove the parties. In this regard he submitted that where there is a genuine factual dispute about whether or not a party seeking removal should be removed, then the dispute should not be resolved without hearing all of the evidence. In this particular case he submitted that there was a dispute in relation to when building work was completed. He referred to various items of work done subsequent to 18 December 1996, some of which he submitted may have contributed to the fact the dwelling now leaks.

14. In particular, he referred to the installation of polycarbonate barriers in the balustrade handrails. He also made reference to the fact that the Code Compliance Certificate for the dwelling was not issued until 23 September 1997 which is clearly within the ten year period. He suggested there could also be other evidence that may come to light through the adjudication process and therefore it was inappropriate for a decision to be made on the limitation period outside the formal adjudication.

15. In relation to section 393(2) of the Building Act 2004, counsel for the claimant submitted that the respondents gave a too narrow an interpretation to the meaning of the phrase *"act or omission on which the proceedings are based".* He preferred an interpretation which suggested that any omissions could not be considered to have taken place until the building had been completed and the Code Compliance Certificate issued. This did not occur until September 1997. He further submitted that section 393 does not require an examination of specific causes or acts, but

rather that the building process should be taken as a whole. Therefore the date of completion of the house was the time which any limitation period should be backdated.

Decision

16. Section 112 of the Weathertight Homes Resolution Services Act 2006 ("the Act") provides that the Tribunal may

> *(1) Order that a person be struck out as a party to adjudication proceedings if the tribunal considers it fair and appropriate in the circumstances to do so."*

17. Whilst no criteria or guidelines are set out in the section beyond the reference to "fair and appropriate" the Tribunal applies a threshold analogous to that of strike out, or summary judgment, applications in the High Court. In other words, for a respondent to be removed, the claim against that respondent must be shown to be so clearly untenable that it cannot succeed.

18. In this case the respondent have submitted that the claims against them cannot possibly succeed by virtue of the longstop provisions contained in section 393(2) of the Building Act 2004. This section states:

> *"(2)… Civil proceedings relating to building work may not be brought against a person after ten years or more from the date of the act or omission on which the proceedings are based."*

19. In considering the applications for removal, I have taken into account all the information and evidence that has been presented to date. This includes the assessor's report, the application filed with the Tribunal, the affidavits produced by the respondents and the statements and evidence copied and provided to the tribunal by the claimant. I note that exchange of documents has, by and large, taken place and that the claimant has had access to all the records still in existence held by both the first and second respondents in particular. The first respondent's discovery documents total hundreds of pages of receipts, invoices, cheque butts and other documentation.

20. I do not consider that the applications should be declined simply because the claimant has stated there are factual matters in dispute. As I indicated at the hearing, I required a party opposing the removal on this ground to point to some cogent evidence which suggested that there was a genuine factual dispute. It is not sufficient for a party to claim that there is the potential of a factual dispute.

21. The claimant refers to a number of items of work that were completed after December 1997. However, while there was some internal fit-out work, the only work that could possible relate to weathertightness issues that took place subsequent to 18 December 1996, is the landscaping work and the installation of the polycarbonate barriers.

22. I do not accept that the latter had any effect on the weathertightness issues of the home as they were clipped into place and did not require any structural work to be installed. The landscaping work on the other hand may have been a contributing factor to the dwelling leaking. The landscaper however is not a party to these proceedings nor has it been alleged that any of the other parties have responsibility for the landscaping work. In addition I accept the submission of the first respondent that the issue to do with the lack of ground clearance arose at the time the plastering work was completed rather than when the landscaping work was done.

23. Accordingly I conclude there is no genuine factual dispute that the work undertaken by the four respondents that could have resulted in weathertightness issues was all completed well before December 1996. The only issue of contention therefore is whether the *"act or omission"* relates to the actual work that was done or the building work in its totality.

24. The Court of Appeal in ***Johnson v Watson*** [2003] 1 NZLR 262, in considering when the act or omission occurred, made reference to work that was *"causative of the problems to which this proceeding relates".* In that case although some building work continued through until 1991 the Court accepted that the work that had caused the problem was completed by December 1990. Therefore the Court upheld the High Court decision granting summary judgment to the defendant and striking out the claim against him. It is clear from this decision that it is the actual

work that gives rise to the problem that is the act or omission, and not the completion of the building work in total as suggested by counsel for the claimant.

25. Accordingly I conclude that the acts or omissions upon which the claimants' claim is based occurred more than ten years before the claimants filed their claim. Therefore the claims against the four respondents cannot succeed. The first, second, third and fourth respondents are therefore entitled to be removed from the claim.

26. The result of this decision is that it effectively leaves no parties other than the claimant in the adjudication. I will not terminate the claim at this stage however, as clearly any claim that could be brought in relation to the issue of the Code Compliance Certificate would not be limitation barred. The claimant has one month from the date of this order to file an application to join any further parties to the adjudication. An extension of this one month time limit can be requested, but good reasons will need to be provided for an extension to be granted.

27. I further note that if a further party is joined to these proceedings and the claim in relation to that party is not time-barred under either the Limitation Act or section 393 of the Building Act 2004, any newly joined respondent may apply for the joinder of further respondents, possibly including some of the respondents that have been removed.

28. If this were to occur, my preliminary view is that the principles enunciated in the case of ***Cromwell Plumbing Draining & Services Limited v De Geest Brothers Construction Limited*** (1995) 9 PRNZ 218 apply. Although the judgment relates to section 91 of the Building Act 1991 there is no substantive change that would affect this application in the now applicable section 393 of the Building Act 2004. In particular there is no suggestion that section 393 was intended to amend the outcome achieved by the judgment in ***Cromwell Plumbing***. In making this preliminary finding I have taken into account comments of Justice Courtney in ***Dustin v Weathertight Homes Resolution Services and ors*** (High Court, Auckland; 25 May 2006; Courtney J; CIV2006-404-276). Her Honour stated that the decision in the ***Cromwell Plumbing*** case was wrong. However she emphasised that these comments were *obiter*. Accordingly until such time as there

is a further definitive decision on this point by the High Court or Court of Appeal, I consider the Weathertight Homes Tribunal is obliged to follow the decision in the *Cromwell Plumbing* case.

29. That judgment refers to the provisions of section 17(1) of the Law Reform Act 1936, which enables contributions to be made where damage is suffered as the result of tort, and section 14 of the Limitation Act 1950. The Court found that the claim for contribution was a separate statutory cause of action which did not arise until the party claiming contribution from others had been found liable or had compromised that action. In practical terms this means a respondent can successfully seek to join a party even where any claim the applicant may have against that party is limitation barred under either the Limitation Act 1950 or section 393(2) of the Building Act 2004.

30. Should there be any further applications to rejoin the parties that have not been removed from these proceedings, I will at that stage take into account the submissions they have made regarding the factual reasons for their removal which are not based on the longstop provision.

Conclusion

31. The applications for removal filed by the first, second, third and fourth respondents granted and all four are removed from these proceedings.

32. The claimants have one month from the date of this order to file any further applications for joinder. If no application for joinder is filed, and no extension of time granted, by 17 September 2007, this claim will be terminated.

DATED the 16th day of August 2007

P A McConnell
Chair