IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2021-100-002

BETWEEN	**HELEN BERNADETTE O'SULLIVAN, FIONA CHERIE WHITE & ANDREW RODGER WILTON as trustees of the WILTON FAMILY TRUST** Claimants
AND	**DEANE FLUIT BUILDER LTD** First Respondent
AND	**TAB DESIGN LTD (Removed)** Second Respondent
AND	**TILING SOLUTIONS WANAKA LTD** Third Respondent
AND	**QUEENSTOWN LAKES DISTRICT COUNCIL** Fourth Respondent
AND	**VALSPAR PAINT (NZ) LTD** Fifth Respondent
AND	**WILTON JOUBERT LTD** Sixth Respondent

PROCEDURAL ORDER 4

Costs application by second respondent

Dated 5 November 2021

Application for costs

[1] TAB Design Ltd (TAB Design), the second respondent, has been removed from the proceedings. It now applies for costs pursuant to s 91 of the Weathertight Homes Resolution Services Act 2006 (the Act).

The claim

[2] The claim concerns a stand-alone house in Wanaka which leaks.

[3] In about 2009, the trustee claimants engaged TAB Design as architects to produce drawings and specifications. The Queenstown Lakes District Council (the council), the fourth respondent, issued a building consent on 28 January 2010. In about February 2010, Deane Fluit Builder Ltd (the builder), the first respondent, commenced construction. The structural engineer was Wilton Joubert Ltd (Wilton Joubert), the sixth respondent. One of the trustees is Andrew Rodger Wilton (Mr Wilton), a director of Wilton Joubert. Mr Wilton was responsible for the engineering design.[1]

[4] The consented drawings and specifications provided for a "Rockcote Plaster System". Contrary to the consent, another exterior plaster system was installed. The trustees believe it is Wattyl's "Nu-Age-Nu-Therm Plaster System". It was supplied by Valspar Paint (NZ) Ltd, the fifth respondent. It was installed by Tiling Solutions Wanaka Ltd (the plasterer), the third respondent.

[5] The house was built in the period from February 2010 to September 2011. The council's final inspection was on 2 September 2011. In the same month, the Wilton family moved into the new dwellinghouse. The council issued a Code Compliance Certificate on 13 February 2012.

[6] It was shortly after moving into the house in September 2011 that the trustees first noticed efflorescence. In about 2012, the trustees noticed cracking to the exterior plaster. Certain remedial work was carried out from time to time.

[7] On 1 May 2020, the trustees lodged a claim with the Weathertight Homes Resolution Service of MBIE.

[1] Procedural Order 2 (10 September 2021) at [27].

[8] The weathertight assessor, Mr Downie, completed his report on 23 July 2020. He noted that the plaster cladding was not that consented. Mr Downie identified the defect causing damage current at that time as inadequate installation of the plaster cladding to the northern elevation. He set out the particulars of inadequate installation. He considered that inadequate installation of the wall cladding to the eastern, southern and western elevations would likely cause future damage. He estimated the remedial cost as $684,791.65. In his view, the potential parties to the claim were TAB Design, the council, builder, plasterer and cladding installer (with the express caveat that he was not giving an opinion on liability).[2]

[9] The trustees filed an application for adjudication in the Tribunal on about 23 March 2021. TAB Design was one of the respondents against whom the trustees claimed was negligent and liable for the damage.

[10] On 28 September 2021, the Tribunal ordered the removal of TAB Design from the claim following an application on 21 September 2021. The trustees consented to the order, with the other respondents not opposing. Directions were made at the same time concerning an outstanding application from TAB Design for costs.

TAB Design seeks costs

Submissions from TAB Design

[11] Following an indication of consent from the trustees to removal and prior to formally seeking removal, TAB Design had applied to the Tribunal for a contribution of $21,648.49 towards their costs and expenses:

Legal costs District Court Rules	$ 7,735.50
Expert Fee	$13,912.99
	$21,648.49

[12] Mr Sherriff and Ms Sawant represent TAB Design. In their memorandum (20 August 2021), counsel set out the background, relying on an affirmation from Tony Andrew Bennett (affirmed 22 July 2021). Mr Bennett is an architectural designer and director of TAB Design.

[2] Assessor's report (23 July 2020) at [7].

[13] According to Mr Bennett, TAB Design was approached by Mr Wilton in 2008 and was engaged in June 2009 to prepare detailed drawings and specifications. This work was completed by December 2009. On 7 December, TAB Design applied to the council for building consent. It prepared further architectural drawings at the request of the council in the first half of January 2010, with the council issuing the consent on 28 January 2010. TAB Design's substantive role ended with the issue of the consent. It did not perform an observation or project management role during the construction.

[14] Mr Sherriff notes, importantly, that the material prepared by TAB Design specified the Rockcote cladding system. The Rockcote system was substituted with the Wattyl system. This change occurred without the knowledge of TAB Design. It was not consented by the council.

[15] The trustees' solicitors wrote to TAB Design on 1 December 2020 alleging it was liable for weathertightness issues. TAB Design's solicitors replied denying liability on 23 December 2020. There followed further correspondence between the solicitors.

[16] In the interim, on about 23 March 2021, the claim for adjudication was commenced in the Tribunal naming TAB Design as a party. At a preliminary conference on 15 April 2021, the Tribunal set out a timetable for discovery and removal applications.

[17] TAB Design's solicitors wrote to the trustees' solicitors on 19 April 2021 raising the issue as to whether the claim against TAB Design was time-barred.

[18] In summary, says Mr Sherriff, TAB Design's solicitors in their three letters (23 December 2020, 17 March and 19 April 2021) collectively stated:

1. TAB Design's design work was reasonable and contained sufficient detail.

2. TAB Design had no involvement after consent was issued in January 2010.

3. The change to the cladding system occurred without the knowledge of TAB Design and was the material cause of the issues.

4. The cladding should have been the subject of an updated design provided to the council.

5. Even if TAB Design's was deficient, it was not relevant because of the substituted cladding system.

6. The trustees' application for an assessor's report on 1 May 2020 was more than 10 years after TAB Design's involvement, so any claim against it was out-of-time.

[19] In the letter of 19 April 2021, TAB Design's solicitors also asked the trustees to agree to TAB Design being removed before further costs were incurred, including for discovery and a removal application.

[20] As there was no response from the trustees' solicitors, TAB Design's solicitors sent a further letter on 3 May 2021 noting that discovery and removal had been timetabled and they would need to get the processes underway. They asked to be notified by 7 May 2021 as to whether the trustees agreed to remove TAB Design as a party.

[21] The trustees' solicitors replied on 28 May 2021 stating that discovery had to occur to establish that TAB Design was not involved in the construction after the consent was issued.

[22] In other words, submits Mr Sherriff, the trustees wanted to progress through discovery in the hope that a document might show that TAB Design was on-site during construction in order to avoid the 10-year long-stop limitation period, despite Mr Wilton from the trust being the engineer involved in the construction and being in a position to know such detail.

[23] TAB Design served its discovery on 8 June 2021 and the timetable for removal applications was extended until 26 July 2021. No document produced by any party demonstrated that TAB Design had any further involvement or mentioned it being liable. It became apparent that the house had experienced weathertight issues from October 2013 and perhaps earlier. Mr Wilton, a chartered professional engineer, had knowledge of the issues for more than six years before an assessor's report was requested.

[24] On 23 July 2021, Bill Skews, an independent registered architect, prepared a draft report commenting on TAB Design's work. He confirmed it did not breach its duty. According to Mr Skews, there was no detail lacking in TAB

Design's drawings and specifications. It was the change to the Wattyl system that was instrumental in the cladding's failure. A new design was required for the Wattyl system.

[25] It is submitted by Mr Sherriff that a limitation period of six years is applicable.[3] This is extended by the principle of reasonable discoverability. In the case of latent defects, a cause of action in negligence accrues:[4]

> … when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert.

[26] The High Court has more recently said:[5]

> The cause of action accrues when the defects are discovered or could with reasonable diligence have been discovered.

[27] It is contended that Mr Wilton had knowledge of the defects at the end of January 2014 when he sent an email to the cladding manufacturer (the fifth respondent) stating, "MY HOUSE LEAKS" and that he would hold the manufacturer responsible for the damage. He demanded the manufacturer undertake investigations and solve the weathertight issues. But the claim was not made until more than six years later on 1 May 2020.

[28] Mr Sherriff, citing the Tribunal's jurisdiction to award costs in s 91 of the Act, notes the comment of the High Court:[6]

> The Weathertight Homes Resolution Service is not a scheme that allows a party to cause unnecessary costs to others through pursuing arguments that lack substantial merit.

[29] The Tribunal itself has said:[7]

> … the bar for establishing "without substantial merit" should not be set too high. There needs to be an ability to award costs against claimants and respondents who join other parties to cases based on allegations which they should reasonably know they cannot establish.
>
> Where allegations are made against a party which have little evidential support, costs can and in many cases will be awarded. However, I accept that costs in pursuing or defending aspects of claims should not be considered as being incurred unnecessarily where there are genuinely disputed issues of fact and law if there is tenable evidence supporting the allegations made by a party even though ultimately unsuccessful.

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[3] Limitation Act 1950, ss 2A, 4(1).
[4] *Hamlin v Invercargill City Council* [1996] 1 NZLR 513 (PC) at 526.
[5] *Body Corporate 202692 v Auckland Council* [2019] NZHC 1976 at [13].
[6] *Trustees Executors Ltd v Wellington City Council* HC Wellington CIV 2008-485-739, 16 December 2008 at [67].
[7] *Holland v Auckland City Council* [2010] NZWHT Auckland 7 at [10]–[11].

[30] According to Mr Sherriff, it was not until the afternoon of 23 July 2021, the last working day before a removal application could be filed by TAB Design, that the trustees agreed to removal. In the interim, TAB Design had undertaken discovery, reviewed the discovery of other parties, and prepared material for a removal application (including Mr Bennett's affirmation, submissions and Mr Skews' draft report).

[31] None of these steps led to a position differing from that expressed to the trustees on at least three occasions.

[32] In the view of counsel, what stands out is the role of Mr Wilton. He was directly involved in the construction, knew about the change of cladding and knew who was involved in the construction. The points raised by TAB Design were within Mr Wilton's knowledge. The trustees should have engaged their own expert.

[33] It is submitted by Mr Sherriff that the claim against TAB Design had no merit. It therefore had to incur costs to confirm there was no merit. Those costs were incurred unnecessarily.

[34] A schedule attached to Mr Sherriff's memorandum has a breakdown of the legal costs of $7,735.50 claimed, in accordance with Schedule 4 of the District Court Rules 2014, category 2B at $1,910 daily. It comprises 4.05 days, starting with the preliminary conference on 15 April 2021 and encompasses discovery, production, inspection and preparing the costs submissions.

[35] The draft report of Mr Skews was also sent to the Tribunal, as was his final report (23 September 2021).

[36] There is a further memorandum (8 October 2021) from Mr Sherriff, replying to Ms Eckford's memorandum opposing costs.

[37] Mr Sherriff states that TAB Design has not since the end of 2020 wavered from the position that the principal ground upon which it sought removal was that the claim against it lacked merit. It has consistently asserted that its designs provided sufficient detail and that it was the change of cladding that was an intervening event. That change required amended drawings and building consent.

[38] Discovery had been completed by 28 June 2021, with removal applications due by 26 July 2021. TAB Design therefore needed evidence to support a removal application, including on the principal ground that TAB Design was not negligent. Mr Skews was therefore appointed to provide a draft written opinion. He confirmed:

1. There was no information lacking in TAB Design's work;

2. The Rockcote system was appropriate;

3. TAB Design met the standard expected of an "engineer" (Mr Skews actually said "architectural designer");[8]

4. The subsequent change to the Wattyl system was instrumental in the cladding failure; and

5. New documentation needed to be provided and the building consent amended.

[39] None of the underlying facts relied on by Mr Skews or his conclusions depended upon material that was not in the trustees' possession prior to discovery. The position presented by TAB Design as to its liability and confirmed by Mr Skews has been readily ascertainable during the past 7.5 years.

[40] It would have been remiss of TAB Design to wait until 23 July 2021 for the trustees to respond and then scramble to bring an application the next working day (26 July) solely on the limitation ground, when it also had an equally strong further ground for removal. It was reasonable for TAB Design to obtain an opinion from an expert.

[41] The assessor's report does not conclusively state that TAB Design's work was deficient. It noted the substitution of the Wattyl cladding system for the Rockcote system specified by TAB Design. As Mr Skews states and TAB Design repeatedly emphasised in correspondence, this substitution rendered the cladding design of TAB Design as redundant.

[42] Mr Wilton told the assessor that cracks had manifested in 2012. The trustees were aware of the underlying defects from January 2014, at the latest.

[8] Skews final report (23 September 2021) at [4.5].

It is from then that time started to run for limitation purposes and not when the trustees decided 6.5 years later to ask MBIE to investigate.

[43] As for the costs claimed, the trustees' suggested tweaks ignore the principle that the costs recovered from the scale should be predictable and expeditious. It is not just the base number of documents produced, but the exchanges between counsel and client, oversight of extensive searches for documents and distilling the relevant from irrelevant documents.

Submissions from the trustees

[44] Ms Eckford is counsel for the trustees. In her memorandum (5 October 2021), the trustees oppose costs. It is submitted there is a clear presumption in the Act that costs lie where they fall, unless s 91 is satisfied.

[45] The dwellinghouse has weathertight issues. The assessor, Mr Downie, concluded that the drawings prepared by TAB Design lacked certain details for the cladding system and this caused the damage. For the avoidance of doubt, the trustees were not involved in the construction. Mr Wilton, through his company, was involved in the engineering, but this was not identified by the assessor as a source of damage.

[46] Counsel notes that the trustees wrote to TAB Design on 1 December 2020 notifying it of liability. It responded on 23 December 2020 denying liability on the basis that it was not consulted on the substitute plaster system. TAB Design did not respond to the other errors, the lack of details in the drawings, until 17 March 2021 when it denied liability on the merits.

[47] The trustees maintain that there is substantial merit in the claim that the consented drawings were prepared negligently resulting in inadequate installation of the plaster system which has caused ongoing weathertightness issues.

[48] In the letter of 19 April 2021, TAB Design requested for the first time to be removed from the claim on the basis of a limitation defence. The trustees replied on 28 May 2021 outlining the extent to which TAB Design was involved in construction and advising that the start date for the limitation defence could only be determined after all the parties had completed discovery.[9]

[9] The Tribunal notes that the letter does not say TAB Design was involved in construction, only that any such involvement would be determined after discovery.

[49] Discovery was completed by 28 June 2021. Inspection revealed that TAB Design was not involved in the construction after consent was issued on 28 January 2010. Hence, its limitation defence had merit. The trustees notified TAB Design they would consent to its removal on 23 July 2021.

[50] TAB Design argues that the limitation period of six years started with Mr Wilton's email of 31 January 2014. Ms Eckford contends that email goes nowhere close to establishing that the trustees knew all the factors for the claim to accrue and it shows that the damage was latent. There were a number of potential reasons for water ingress mooted at the time – possible moisture in the substrate, the LVR value of the paint and the application of the paint before the plaster coat had cured sufficiently. Attempts were made at rectifying these, before resorting to litigation.

[51] The Tribunal has recently determined that the date at which a cause of action accrues is when the claimants have engaged an expert to assess the home's weathertightness.[10] The damage was said to be not reasonably discoverable until receipt of an expert report, at which point the damage became patent and quantifiable.

[52] Although the Wilton trustees were aware of leaks as early as 2014, the actual damage was not known until the assessor's report was obtained in July 2020. At this point, the extent of the defects, the material facts, the components of the cause of action and the extent of the loss became apparent. This was when accrual occurred. Accordingly, the claim had merit notwithstanding the proposed limitation defence.

[53] As for recovering costs under s 91(1)(b) of the Act, it is submitted that the High Court has said that in deciding whether a lack of substantial merit exists, the Court should consider whether the claimant should have known about the weakness of its case and whether it pursued litigation "in defiance of common sense".[11]

[54] According to Ms Eckford, the trustees were entitled to rely on the assessor's report that the consented drawings lacked certain details. Whether TAB Design was involved in the construction after consent was issued was a

[10] *Tsai v Upper Hutt City Council* [2018] NZWHT Auckland 1. The Tribunal notes that this is said at [90].
[11] *Trustees Executors*, above n 6, at [52].

question of fact only capable of resolution once inspection of discovered documents was completed.

[55] No costs are therefore payable. However, if the Tribunal takes a different view, the costs sought are excessive. The trustees have assessed reasonable legal costs at $3,438.00. The instruction of the expert was premature, especially in the context of the correspondence from the trustees indicating they would reassess TAB Design's removal after discovery was complete.

Discussion

[56] The Tribunal has jurisdiction under s 91 of the Act to award costs:

> **91 Costs of adjudication proceedings**
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> (1) The tribunal may determine that costs and expenses must be met by any of the parties to the adjudication (whether those parties are or are not, on the whole, successful in the adjudication) if it considers that the party has caused those costs and expenses to be incurred unnecessarily by—
>
> (a) bad faith on the part of that party; or
>
> (b) allegations or objections by that party that are without substantial merit.
>
> (2) If the tribunal does not make a determination under subsection (1), the parties to the adjudication must meet their own costs and expenses.

[57] In *Trustees Executors*, the High Court gave guidance on the discretion in s 91:[12]

> [51] … the scheme of the Act is that generally costs should lie where they fall…meeting the threshold test of no substantial merit must take one a considerable distance towards successfully obtaining costs, but they are not synonymous. There is still a discretion to be exercised.
>
> [52] The issues that I see as important are whether the appellants should have known about the weakness of their case, and whether they pursued litigation in defiance of common sense.

[58] In *Riveroaks Farm*, the High Court observed that the mere fact an allegation is not accepted will not of itself expose a party to liability for costs.[13] It was said that in many cases, a party will advance a claim that requires

[12] *Trustees Executors*, above n 6.
[13] *Riveroaks Farm Ltd v WB Holland* HC Tauranga CIV 2010-470-584, 16 February 2011 at [9]–[10].

careful consideration by the Tribunal, but which is ultimately rejected. The expression "substantial merit" denotes claims which "do require serious consideration by the Tribunal".

[59] The approach in *Trustees Executors* found favour in the High Court's judgment in *Clearwater Cove*.[14] The learned Judge said that the nature of litigation is that one party will generally be unsuccessful. It did not follow that their claims or defences lacked substantial merit. The inquiry into whether there was a lack of substantial merit has to be made without the benefit of hindsight. The Court considered that the Tribunal should have the ability to award costs against those making allegations which a party ought reasonably to have known could not be established.

[60] Plainly, the bar for establishing "without substantial merit" is lower than bad faith (which requires a lack of merit and an impermissible motive). Nor is the bar as high as "without merit". Costs might be considered as unnecessarily incurred and therefore awardable, where there is some merit to the claim but an absence of substantial merit. In other words, a party claiming costs need not show that the claim against it completely lacked merit.

[61] However, as the High Court points out, it needs to be borne in mind that it is not just because a claim or allegations are ultimately unsuccessful that the costs incurred defending such a claim or allegations can be recovered. Where at the time the claim was commenced there were genuinely disputed issues or tenable evidence supporting a claim, costs would not be recoverable.

[62] The starting point in assessing whether in late March 2021 the trustees' claim against TAB Design had substantial merit is that the trustees have a house that leaks. Of course, that begs the question as to who is liable, if anyone. The trustees say that it was reasonable to assert TAB Design was one of the liable parties because of the report of the assessor on 23 July 2020.

[63] The assessor does impugn TAB Design as a potentially liable party, with the reason given as:

> Prepared the architectural construction drawings and Building Consent application. The drawings lack site specific details for the [plaster] cladding system and there is limited information on movement control joints in relation to the [plaster] cladding system.

[14] *Clearwater Cove Apartments Body Corporate No 170989 v Auckland Council* [2013] NZHC 2824 at [24]–[27].

[64] The defect causing leaks identified by the assessor was the inadequate design and installation of the exterior plaster system. Indeed, this was the only defect he found. He was aware that the consented Rockcote cladding system had not been installed, but a Wattyl system instead. The assessor commented on the inadequate installation of the cladding in some detail, including the lack of control joints. However, he recorded that he did not have access to Wattyl's technical literature, so his comments on the inadequacies of the design and installation of the plaster system were based on the Rockcote requirements.[15]

[65] Claimants in the Tribunal place great reliance on the reports of assessors. It is usually reasonable to do so. They are independent experts, well experienced in investigating the causes of leaks in residential dwellings. It is clear from the letters of the trustees' solicitors to those of TAB Design prior to filing the claim in the Tribunal and from the Particulars of Claim itself that great weight was placed by the trustees on the assessor's report.

Should the trustees have relied on the assessor's report?

[66] The cladding system, as Mr Wilton well knew, had been replaced. He is not just the owner's representative for the project, but he was also the engineer. He was responsible for the engineering design, though the Tribunal has not been referred to any evidence that he was involved directly in the actual construction.[16] Importantly, in the face of TAB Design's allegation that he knew about the change of cladding, Mr Wilton does not say that at the time of construction he was unaware of the cladding change.[17] He does not say that he was duped by the builder and/or plasterer, with the consented plastering system being substituted without his knowledge.

[67] Mr Wilton would also have known that TAB Design had no involvement in the replacement of the cladding system. As Mr Sherriff contends, Mr Wilton knew who was involved in the construction.[18]

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[15] Assessor report (23 July 2020) at [8.6], [9.2]–[9.3].
[16] Mr Wilton does not expressly deal with his personal involvement or knowledge of the actual construction in his affidavit (27 October 2021) filed in support of Wilton Joubert's outstanding application for removal. He states that Wilton Joubert had no involvement with the cladding or non-structural design work. Its only involvement with design or building was structural engineering design, unrelated to weathertight issues.
[17] Memorandum of Mr Sherriff (20 August 2021) at [46].
[18] As above.

[68] It is not apparent that the assessor, who impugns TAB Design, was aware that it had no knowledge of the change in cladding. That being the case, his opinion as to TAB Design being a potential party, based on what the assessor regarded as a lack of detail in the drawings made for another cladding system, is undermined. If Mr Wilton was in any doubt as to whether the assessor knew about TAB Design's lack of involvement in the cladding change, he could have asked him. They were in direct contact with each other.

[69] In the letter of 23 December 2020 from TAB Design's solicitors to the trustees' solicitors, liability had been denied on the basis it was not consulted on the substitution of the plaster system. The trustees' solicitors replied on 18 February 2021 noting that liability was denied on the ground of a lack of knowledge of the substitution, but referring to the further errors and omissions identified by the assessor, being the lack of site specific details and information concerning movement control joints. It was asserted that TAB Design had therefore negligently prepared drawings.

[70] TAB Design's solicitors responded on 17 March 2021 stating that all cladding manufacturers produce specifications, including details and information on movement control joints, specific to a particular cladding system. As soon as the cladding system was substituted, those aspects of the design became redundant and new design documentation should have been provided.

[71] The trustees' solicitors filed the claim in the Tribunal about one week later without answering the letter of 17 March 2021.

[72] After the claim was filed and the Tribunal's preliminary conference on 15 April 2021, TAB Design's solicitors wrote again to the trustees' solicitors on 19 April 2021 raising the limitation issue, as well as repeating their point about a lack of substantial merit. The trustees were expressly put on notice that costs unnecessarily incurred from that point would be sought.

[73] The Tribunal finds that it was not reasonable for the trustees to rely solely on the assessor's report to make a claim against TAB Design, from 17 March 2021 at the latest.

[74] The assessor's opinion as to TAB Design being a potentially liable party was undermined by the lack of acknowledgement in his report that TAB Design had no involvement with the substitution of the consented cladding system. His opinion was additionally seriously undermined by his

acknowledgement of a lack of access to Wattyl's technical literature and that the defects identified by him were based on the Rockcote system for "reference purposes only".[19]

[75] Despite the assessor's mention of Rockcote and its literature as a "comparative solution", his apparent lack of knowledge of TAB Design's non-involvement and his inability to access Wattyl's literature were 'red flags' for the trustees.

[76] The assessor's report is not, and never was, tenable evidence against TAB Design. Its weakness is apparent from the face of the report itself. It should certainly have been clear to the trustees on receipt of the letter from TAB Design's solicitors on 17 March 2021, at the latest, that they could not rely on the assessor's opinion concerning TAB Design being a potential party. The solicitors state what appears to be common sense, that the assessor's comments about a lack of detail in the drawings and specifications for the plaster system, were product dependent. There is no evidence from the trustees that site specific details and movement control joints are common for all such external plaster systems.[20]

[77] On 17 March 2021, if not earlier, the trustees should have instructed an independent expert if they wished to pursue TAB Design.

[78] The claim set out in the trustees' Particulars of Claim (12 March 2021) against TAB Design is based solely on the assessor's report identifying the inadequate design and installation of the plaster system. Yet TAB Design had no involvement with the plaster system installed.

[79] The Tribunal finds that the trustees should have known about the weakness in their case against TAB Design at the time they filed in the Tribunal. They ought reasonably to have known then they could not establish the allegations against that particular party. Their pursuit of the designers in the absence of an expert report (a report from an expert who knew that the designers were unaware of the change of plaster system and who could access Wattyl's technical literature) defied common sense. It is not a claim which would have required serious consideration by the Tribunal.

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[19] Assessor's report (23 July 2020) at [8.6].
[20] Mr Skews says the details are product dependent, though his report was not available to the trustees.

[80] The claim against TAB Design was without substantial merit at the time it was commenced in the Tribunal in March 2021. This is not because of any limitation issue. It is not necessary to assess whether the claim against TAB Design was time-barred. That is not a straight-forward issue and it has arisen in other interlocutory applications before the Tribunal involving other respondents. It will be resolved there in relation to those respondents. The claim against TAB Design had no substantial merit because the evidence that existed as to its liability, being the assessor's report, could not be relied on for a reason known to Mr Wilton.

[81] The trustees learned nothing by requiring TAB Design to undertake the discovery process. Mr Wilton always knew the designers had no involvement after the council issued consent, that they had no involvement in the change of plaster and that they had not been appointed to observe or supervise construction.

[82] The expenses claimed by TAB Design, both the legal costs and the expert's fee, were unnecessarily incurred.

[83] TAB Design has therefore satisfied the criteria in s 91(1)(b). There is no reason for the Tribunal not to exercise its discretion to make the order for costs and expenses.

Are the costs and expenses claimed reasonable?

[84] In respect of their legal costs, TAB Design claims $7,735.50 (a total of 4.05 days) in accordance with the District Court scale. The trustees say $3,438 (1.8 days) would be reasonable.

[85] Given TAB Design's limited discovery of 29 documents (and it is unlikely they were identified among a large volume of files), the claim of 1.75 days for discovery/production (at band B) will be reduced to 1.0 day (at band A). The other items claimed are reasonable. The award will be $6,303 (3.30 days).

[86] The fee of the expert is recoverable. TAB Design was faced with a deadline for making a removal application and it was reasonable for it to appoint Mr Skews well before it heard from the trustees' solicitors on 23 July 2021 consenting to removal. An expert report, along the lines of that prepared

by Mr Skews, would have considerably bolstered any such opposed application. His fee of $13,912.99 is reasonable.

Order

[87] The trustees are directed to pay TAB Design Ltd the sum of $20,215.99 within 14 calendar days.

DATED this 5th day of November 2021

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D J Plunkett
Chair