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 7

Removal application by third and fourth respondents

Dated 17 December 2021

Introduction

[1] Tiling Solutions Wanaka Ltd (Tiling Solutions) is the third respondent and Queenstown Lakes District Council (the council), is the fourth respondent. They have applied to be removed as parties to the claim, on the ground that the claim against them is time-barred.

The claim

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

[3] In about 2009, the trustee claimants engaged TAB Design Ltd (TAB Design) as architects to produce drawings and specifications. The council 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 structural engineering design.

[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 (Valspar), the fifth respondent. It was installed by Tiling Solutions.

[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 (CCC) on 13 February 2012.

[6] It was shortly after moving into the house that the trustees first noticed efflorescence. In about 2012, the trustees noticed cracking to the exterior plaster. Mr Wilton says Tiling Solutions refixed the cladding at its own cost in about 2013 (denied by Tiling Solutions).

[7] Mr Wilton sent an email to a Valspar manager on 31 January 2014 stating that his house leaked and querying why remedial work could not be

sorted out (this email is discussed in more detail later as it is relied on by the parties seeking removal).

[8] Further cracks occurred and in April/May 2019, repair works (a skim coat layer of plaster and then repainting) were carried out by and at the cost of the builder and Valspar.

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

[10] 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, notably a lack of control joints in the plaster cladding. 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, the builder, together with the plasterer and cladding installer (Tiling Solutions).[1]

[11] The trustees filed an application for adjudication in the Tribunal on about 23 March 2021.

Legal principles

Removal

[12] Section 112(1) of the Weathertight Homes Resolution Services Act 2006 (the WHRSA) 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".

[13] 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

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

can be fair and appropriate "to strike out a party in circumstances other than where no reasonable cause of action is disclosed".[2]

[14] The learned Judge in *Vero Insurance*[3] adopted the comments of Katz J in *Saffioti v Jim Stephenson Architect Ltd*[4] 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 claims which may ultimately prove to be meritorious not be prematurely struck out at an interlocutory stage.

[15] 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.[5]

[16] The Tribunal is not restricted to considering the pleadings only and may assess evidence in determining whether to remove a party.[6] 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".[7] This can include the early receipt and assessment of evidence.

[17] 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

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[2] *Vero Insurance New Zealand Ltd v Weathertight Homes Tribunal* [2014] NZHC 342 at [19].
[3] *Vero Insurance* at [21].
[4] *Saffioti v Jim Stephenson Architect Ltd* [2012] NZHC 2519.
[5] *Vero Insurance* at [22].
[6] *Saffioti* at [38], [43]; *Vero Insurance* at [20].
[7] *Yun v Waitakere City Council* HC Auckland CIV-2010-404-5944, 15 February 2011 at [70].

disputed factual issues which could impact on the success of the claim are generally not suitable for summary determination.[8]

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

Limitation

[19] The work of Tiling Solutions alleged to be negligent occurred in 2010, during the currency of the Limitation Act 1950 (the LA 1950). The work of the council alleged to be negligent occurred from about January 2010 to about February 2012, straddling both the LA 1950 and the Limitation Act 2010 (the LA 2010). The earlier statute continues to be applicable to acts and omissions before 1 January 2011.[9]

Limitation Act 1950

> **4 Actions of contract and tort, and certain other actions**
>
> (1) Except as otherwise provided in this Act, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say,—
>
> (a) actions founded on simple contract or on tort:
>
> …

Limitation Act 2010

> **11 Defence to money claim filed after applicable period**
>
> (1) It is a defence to a money claim if the defendant proves that the date on which the claim is filed is at least 6 years after the date of the act or omission on which the claim is based (the claim's *primary period*).
>
> (2) However, subsection (3) applies to a money claim instead of subsection (1) (whether or not a defence to the claim has been raised or established under subsection (1)) if—
>
> (a) the claimant has late knowledge of the claim, and so the claim has a late knowledge date (*see* section 14); and
>
> (b) the claim is made after its primary period.

[8] *Saffioti* at [53].
[9] Limitation Act 1950, s 2A.

(3) It is a defence to a money claim to which this subsection applies if the defendant proves that the date on which the claim is filed is at least—

(a) 3 years after the late knowledge date (the claim's *late knowledge period*); or

(b) 15 years after the date of the act or omission on which the claim is based (the claim's *longstop period*).

…

14 Late knowledge date (when claimant has late knowledge) defined

(1) A claim's *late knowledge date* is the date (after the close of the start date of the claim's primary period) on which the claimant gained knowledge (or, if earlier, the date on which the claimant ought reasonably to have gained knowledge) of all of the following facts:

(a) the fact that the act or omission on which the claim is based had occurred:

(b) the fact that the act or omission on which the claim is based was attributable (wholly or in part) to, or involved, the defendant:

(c) if the defendant's liability or alleged liability is dependent on the claimant suffering damage or loss, the fact that the claimant had suffered damage or loss:

(d) if the defendant's liability or alleged liability is dependent on the claimant not having consented to the act or omission on which the claim is based, the fact that the claimant did not consent to that act or omission:

(e) if the defendant's liability or alleged liability is dependent on the act or omission on which the claim is based having been induced by fraud or, as the case may be, by a mistaken belief, the fact that the act or omission on which the claim is based is one that was induced by fraud or, as the case may be, by a mistaken belief.

(2) A claimant does not have late knowledge of a claim unless the claimant proves that, at the close of the start date of the claim's primary period, the claimant neither knew, nor ought reasonably to have known, all of the facts specified in subsection (1)(a) to (e).

(3) The fact that a claimant did not know (or had not gained knowledge), nor ought reasonably to have known (or to have gained knowledge), of a particular fact may be attributable to causes that are or include fraud or a mistake of fact or law (other than a mistake of law as to the effect of this Act).

[20] There are also limitation provisions in the WHRSA and the Building Act 2004 (the BA).

Weathertight Homes Resolution Services Act 2006

> **14 Dwellinghouse claim**
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> The criteria are that the claimant owns the dwellinghouse to which the claim relates; and—
>
> (a) it was built (or alterations giving rise to the claim were made to it) before 1 January 2012 and within the period of 10 years immediately before the day on which the claim is brought; and
>
> …
>
> **32 Application for assessor's report**
>
> (1) An owner of a dwellinghouse who wishes to bring a claim in respect of it may apply to the chief executive—
>
> (a) to have an assessor's report prepared in respect of it; or
>
> (b) to have an assessor's report that was prepared in respect of it on the application of a former owner approved as suitable for the owner's claim.
>
> …
>
> **37 Application of Limitation Act 2010 to applications for assessor's report, etc**
>
> (1) For the purposes of the Limitation Act 2010 (and any other enactment that imposes a limitation period), the making of an application under section 32(1) has effect as if it were the filing of proceedings in a court.
>
> …

Building Act 2004

> **393 Limitation defences**
>
> (1) The Limitation Act 2010 applies to civil proceedings against any person if those proceedings arise from—
>
> (a) building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.

> (2) However, no relief may be granted in respect of civil proceedings relating to building work if those proceedings are brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.
>
> (3) For the purposes of subsection (2), the date of the act or omission is,—
>
> (a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and
>
> (b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.

[21] The trustees' cause of action against Tiling Solutions and the council is in the tort of negligence.[10]

[22] For work before 1 January 2011, the primary limitation period is six years from the date the cause of action accrued.[11] Since damage is a critical component of negligence, the cause of action accrues when the damage is discovered. In the case of a hidden or latent defect, accrual occurs when the defect is discovered or could with reasonable diligence have been discovered.[12] The postponement of the primary period of six years for latent defects is subject to a longstop of 10 years from the act or omission (the defective work) giving rise to the damage.[13]

[23] The leading case as to when accrual occurs for latent damage is *Hamlin*:[14]

> But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious. …
>
> In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert.

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[10] Particulars of Claim (12 March 2021) at [36], [48] & [50].
[11] Limitation Act 1950, s 4(1)(a).
[12] *Minister of Education v H Construction* [2018] NZHC 871 at [235], *Body Corporate 328392 v Auckland Council* [2021] NZHC 2412 at [10].
[13] Building Act 2004, s 393(2).
[14] *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 526, followed in *Cole v Pinnock* HC Auckland, CIV-2011-404-3743, 16 December 2011 at [38] & [47] and *Hum Hospitality Ltd v Stylo Medical Services Ltd* [2021] NZHC 1287 at [52].

[24] For work on or after 1 January 2011, the primary limitation period is six years from the act or omission on which the claim is based.[15] However, if a claimant has late knowledge of the claim and so has a "late knowledge date", it is a defence to such a claim that the defendant proves that the claim was filed three years after the late knowledge date (known as the late knowledge period) or 15 years after the act or omission on which the claim is based (the longstop period).[16] For civil proceedings relating to building work, the longstop period is not 15 years, but 10 years.[17]

[25] The late knowledge date is defined in s 14 of the LA 2010. In particular, a claimant must prove that, at the close of the start date of the primary period, the claimant neither knew, nor ought reasonably to have known, certain facts.[18]

[26] The concept of reasonable discoverability requires the exercise of reasonable, not exceptional, diligence.[19]

[27] For claims filed in this Tribunal, it is the application for an assessor's report under s 32 of the WHRSA which 'stops the clock running' for limitation purposes.[20]

[28] In respect of the trustees' claim, that was on 1 May 2020.

Removal sought

Submissions from Tiling Solutions and the council

[29] Tiling Solutions is represented by Ms Rusher and the council by Ms Walton and Ms Entwistle. They have filed a joint memorandum (15 October 2021) seeking leave to file a joint application for Tiling Solutions and the council to be removed from the claim, together with the joint application itself (15 October 2021, amended 20 October 2021).

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[15] Limitation Act 2010, s 11(1).
[16] Limitation Act 2010, s 11(2) & (3).
[17] Building Act 2004, s 393(1) & (2).
[18] Limitation Act 2010, s 14(2).
[19] *New Zealand Bloom Ltd v Cargolux Airlines International SA* [2012] NZHC 3012 at [37](b).
[20] Weathertight Homes Resolution Services Act 2006, s 37(1).

[30] In their joint memorandum, counsel acknowledge that the Tribunal had directed removal applications by 26 July 2021. Reasons for the late application are given. It is noted that the proceeding is at an early stage. It is not considered that any prejudice would be caused to the trustees as a result of leave being granted.

[31] The ground of removal upon which the application is based is that the claims against Tiling Solutions and the council are statute barred.

[32] It is noted by counsel that the dwelling was consented on 28 January 2010 and constructed between January 2010 and September 2011, with the CCC issued on 13 February 2012.

[33] On 31 January 2014, Mr Wilton sent an email to Valspar complaining that his house leaked.

[34] It was on 1 May 2020 that the trustees lodged a claim with WHRS.

[35] Counsel submit that the claim against Tiling Solutions is time-barred. The last act in completing the cladding works was on 21 September 2010 and its last day on site was 6 October 2010 for the purpose of cleaning up the site and removing its tools. It had no involvement with the repair works, nor its payment as alleged.

[36] For the purpose of s 4 of the LA 1950, it is contended that it is apparent that the trustees had knowledge of weathertightness issues even before 31 January 2014 and therefore had the requisite knowledge before then, more than six years before the trustees made their application on 1 May 2020.

[37] Similarly, for the purpose of s 11(1) of the LA 2010, Tiling Solution's completion date is more than six years before the application on 1 May 2020 and is beyond the late knowledge period of three years which expired on 31 January 2017.

[38] Furthermore, for the purpose of both s 14(a) of the WHRSA and s 393(2) of the BA, the last date for Tiling Solutions being on site was more than 10 years before the claim was filed.

[39] Counsel also submit that the claim against the council, as it relates to the consent, inspections and CCC, is statute barred by s 4(1)(a) of the LA 1950

and/or s 11 of the LA 2010 and/or s 14(a) of the WHRSA and/or s 393(2) of the BA.

[40] The consent issued in January 2010 is more than 10 years before the application (for an assessor's report) was made. The council's last act in relation to construction was issuing the CCC on 13 February 2012. For the purpose of s 11(1) of the LA 2010, this was more than six years before the application was made. By 31 January 2014, the trustees knew that the dwelling leaked. For the purpose of s 11(3)(a) of the LA 2010, the email demonstrates that the trustees had knowledge of weathertightness issues for more than six years before the application was made, satisfying the three-year late knowledge period.

[41] For the purpose of s 4(1)(a) of the LA 1950, the date of accrual of the cause of action is 31 January 2014, more than six years before the application was made. Indeed, it is apparent that the trustees had knowledge of weathertightness issues even before 31 January 2014.[21]

[42] Ms Rusher, on behalf of Tiling Solutions, replied to the opposition to removal from the trustees and the builder (submissions 26 November 2021).

[43] Counsel points out that there is no contractual relationship between the trustees and Tiling Solutions, since the contract for services was between the builder and Tiling Solutions. It is acknowledged that a duty of care was owed to the trustees to perform to the standard of a professional plasterer, but that liability does not extend in perpetuity. The leaks existed since at least 2013.

[44] The trustees state that the cause of action accrues at the point in time in which all the components of the cause of action are capable of being asserted. The decision in *Hamlin* established that the cause of action accrues when any reasonable homeowner would call an expert to address the issue. The authorities are clear that it is the manifestation of the issue and not the diagnosis of a cause or remedy that is the critical factor commencing the limitation period.

[21] Particulars of Claim (12 March 2021) at [17]–[23].

[45] According to Ms Rusher, the trustees had specialist knowledge and expertise in diagnosing structural issues and in how weathertightness issues are resolved by experts. It was on notice of a water issue some time before 2013.

[46] Tiling Solutions is only licensed to fit one form of proprietary cladding product and it was engaged to complete the works after decisions had been made regarding the construction products.

[47] The repair involving Tiling Solutions in a separate area of the house is unrelated to the scope of the claim and is not indicative of a cause of action accruing. The remedy agreed between the trustees and Valspar did not involve Tiling Solutions, which was given no opportunity to rebut Valspar's statements and was not requested to identify the cause or rectify the water ingress. It was not involved in the repair work and did not pay for it. Its sole involvement was to provide information as to its work on site and to refer the trustees to the product warranty.

[48] As for the longstop period in s 393 of the BA, it does not apply because the cause of action accrued more than six years before the claim was lodged on 1 May 2020. Section 393 is subject to the LA 2010. The issues, the subject of this claim, manifested prior to 2013, so the claim is time-barred.

[49] In respect of the builder's opposition to removal, Ms Rusher states that any contribution claim by the builder is contingent on the trustees proving the builder is liable to it. The removal of Tiling Solutions will not prejudice the claim between the trustees and the builder. The builder will have two years following quantification of that claim to bring a contribution claim. The builder is not therefore prejudiced by the removal of Tiling Solutions from the current claim.

[50] There are further submissions (26 November 2021) from Ms Walton and Ms Entwistle, on behalf of the council, replying to the opposition to removal from the trustees and the builder.

[51] Counsel note the contention by the parties opposing that leave to apply for removal should be refused, since the primary ground for removal relied on, that the claim is time-barred, was available to the council from the outset. That is not correct. The email of 31 January 2014 was disclosed by

way of discovery. Importantly, neither the trustees nor the builder have asserted that any prejudice will be caused by granting leave.

[52] Counsel submit that under the LA 1950 and the LA 2010, where there are latent defects, the cause of action arises when the damage occurred or the defect became apparent or manifest, and "the latter appeared to be the more reasonable solution".[22]

[53] It is untenable that Mr Wilton did not consider his home to be leaky until 2019. He expressly said "MY HOUSE LEAKS" in his email of 31 January 2014. He was acknowledging that the damage was not merely negligible, even if it was capable of remediation. That is sufficient for the purpose of the limitation statutes.

[54] According to counsel, at this stage, it has not been determined that the house requires anything more than replastering.

[55] The longstop of 10 years has no application because the accrual of the cause of action was more than six years before the claim was lodged on 1 May 2020. Section 393 of the BA is subject to the LA 2010.

[56] The council further says that there is no causal connection between the change in cladding and the trustees' alleged loss. The alleged defects were caused by the builder's installation of the cladding, since no allowance was made for control joints, for which the council was not responsible. In any event, the trustees and the builder failed to apply for an amended building consent.

[57] Counsel for the council further submit that its removal does not preclude a separate claim being brought later by the builder to recover a contribution. Such a potential claim should not preclude removal when there is a valid limitation defence. The position between respondents is not a relevant consideration as to whether primary liability to the trustees is established. This is because liability is contingent. The builder must be found liable first. No directions have been made for crossclaims and nor did the parties contemplate crossclaims in their joint memorandum to the Tribunal of 14 April 2021.

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[22] Counsel relying on *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) and *Hamlin*, above n 14.

Submissions from the trustees

[58] Removal of Tiling Solutions and the council is opposed by the trustees, in Ms Eckford's memorandum of 12 November 2021. It is submitted that the claims against them are likely to succeed and that it is neither fair nor appropriate that the claims are struck out.

[59] The trustees do not deny that there have been leaks at the property since 2013. It can be seen from the January 2014 email that the perceived cause of the leaks was improperly cured plaster, not systemic weathertightness issues. It was considered rectifiable with another coat of plaster. From 2013 onwards, the trustees were negotiating repairs proposed by Valspar which they were told would rectify the problems. These were carried out in 2019, but the leaks continued.

[60] The building work straddles the 1950 and 2010 limitation statutes. Both statutes provide a primary limitation period of six years. The approach of the statutes to late knowledge is largely the same. The date of accrual under the LA 1950 is when all components entitling the plaintiff's cause of action are capable of being asserted. Under the LA 2010, the date of accrual is when the plaintiff has actual or reasonable knowledge of all factors on which a cause of action may be based.

[61] Mr Wilton in his affidavit sets out the reasoning as to why he did not consider his home to be leaky until 2019 at the earliest. His discussions with the builder, Tiling Solutions and Valspar over the period from 2014 until 2019 suggested that the leaks were caused by either:

1. The exterior paint being applied before the plaster coat had cured; or

2. The Valspar paint having an insufficient LRV (light reflective value).

[62] It is submitted that this is not a case where the trustees have simply done nothing for many years. A reasonable rectification programme was proposed and undertaken in 2019, although ultimately unsuccessful. Mr Wilton's evidence does not support the contention that the trustees had the requisite knowledge under either limitation statute.

[63] Although Mr Wilton is an engineer and director of Wilton Joubert, his involvement in the build was limited to structural engineering. He has no experience or specialist knowledge of cladding and was not consulted on the decision to replace the Rockcote system with the Wattyl system.

[64] In *Tsai*, the Tribunal determined that the date at which the cause of action accrued was when the claimants engaged an expert to assess the home's weathertightness.[23] The claimants were entitled to rely on a pre-purchase report which said the property was in sound condition, despite water ingress at the time. It concluded that the damage was not reasonably discoverable until an expert report was obtained in 2015, at which point the damage became patent and quantifiable.

[65] While the trustees in this claim were aware the house leaked in 2013, the actual damage and loss were not known until the assessor's report was obtained in 2020. Limitation does not run if damage is merely negligible or minimal. It was Mr Wilton's impression until late 2019 that the leakage was capable of remediation by way of relatively minor re-plastering work. The accrual did not occur until the assessor's report was received in July 2020 setting out the actual damage. This was the first time the trustees had knowledge of all the components of the cause of action.

[66] In terms of the longstop, s 393 of the BA excludes claims brought more than 10 years after the relevant act or omission. The claim was lodged on 1 May 2020 and hence limitation would apply to any act or omission prior to 1 May 2010.

[67] Tiling Solutions says it did not complete its work until 21 September 2010 and indeed was on site on 6 October 2020. There is therefore a valid claim for work that took place between 1 May and "28" September 2010 (or 6 October 2010). The longstop does not apply. Tiling Solutions was involved in repair work. It says that was in 2013, but that work would seem to have been in 2019. Certainly, Mr Wilton was liaising with Tiling Solutions as late as 2017.

[23] *Tsai v Upper Hutt City* [2018] NZWHT Auckland 1.

[68] For the council, the CCC was issued on 13 February 2012, so there has been no breach of the longstop period. In addition, at least nine inspections were carried out between 1 May 2010 and the CCC.

[69] An affidavit (12 November 2021) from Mr Wilton has been filed in support of the trustees' opposition to the removal of Tiling Solutions and the council.

[70] Mr Wilton says that the Wattyl system was installed without his knowledge. It was supplied by Valspar. The builder engaged Tiling Solutions to install it.

[71] As a structural engineer with Wilton Joubert, Mr Wilton drafted the structural engineering drawings in 2009. He was not otherwise involved in the construction of the house.

[72] Mr Wilton and his family moved into the house in 2011. He sets out in his affidavit the history of the discovery of the leaks. In 2012, they noticed what appeared to be paint cracking over the plaster. In 2013, Mr Hardaker of Tiling Solutions discovered that the western wall cladding was not properly fixed. Tiling Solutions refixed it at its own cost.

[73] Further leaks were noticed in 2013 and Mr Wilton could see small cracks in the paintwork. He thought the water was getting in through those cracks. He spoke to Mr Hardaker and was told it was probably an issue with the paint. Mr Wilton therefore contacted Valspar and a manager visited the property on 17 December 2013.

[74] This was followed by Mr Wilton's email to Valspar on 31 January 2014. It confirmed what the manager had told him. The paint had been applied before the plaster had sufficiently cured, so Valspar would repaint the house as Tiling Solutions was a licensed applicator. When Mr Wilton met with Mr Fluit and the manager at the house in February 2014, it seemed to Mr Wilton that Valspar was accepting responsibility for the rectification work. It was just a question of when that would happen.

[75] However, by 2014, there was construction work next door and he agreed to await its completion as dust would affect the repaint. That work was completed in October 2015. Mr Wilton then contacted Valspar a number of

times as he became impatient with the lack of action. He did the same in May 2016. An email was copied to Mr Hardaker. Valspar then arranged for a sample of cracked polystyrene to be taken and the builder arranged for thermal imaging. Mr Wilton says he was advised in February 2017 that Valspar had asked for a quote for the repairs. In May 2017, Valspar informed him it had received a price, but it raised a query about the control joints in the concrete (communication copied to Mr Hardaker and Mr Fluit).

[76] Then in May 2018, Valspar told him that its warranty was void, as the house had been painted in a colour that did not meet the required LRV.

[77] In April/May 2019, the repair works were finally carried out at the cost of the builder and Valspar. This involved applying a skim coat layer of plaster over the entire house and then re-painting it.

[78] Within two months, the plaster started cracking again. At this stage, Mr Wilton seriously doubted that the cause of the leaks was the LRV or the lack of curing when originally applied. He then decided to go to the Tribunal. He was shocked to read of the extent of the weathertightness defects in the assessor's report. If he had known of the extent of the damage, he would have engaged an expert sooner. He always believed that the cracking would be repaired by the builder, Tiling Solutions and/or Valspar.

Submissions from the builder

[79] Mr Johnstone acts for the builder. In his notice of opposition to removal (11 November 2021), it is submitted that it is neither fair nor appropriate for Tiling Solutions and the council to be removed. The builder has an actionable and arguable crossclaim against each respondent for contribution towards any liability it may have to the trustees, relying on *Heaney* and *BNZ Branch Properties*.[24] That claim will have to be made within two years.[25] There is compelling evidence of the involvement and responsibility of both respondents.

[24] *Heaney v Auckland Council* [2018] NZHC 2738, *BNZ Branch Properties Ltd v Wellington City Council* [2021] NZHC 1058.
[25] Limitation Act 2010, s 34(4).

[80] Leave for the applications should be refused, as the failure to meet the deadline under Procedural Order 1 has not been adequately explained. The primary ground relied on is that the claims are time-barred, but that was available from the outset.

[81] Tiling Solutions supplied and installed the exterior plaster system under contract to the builder. The performance of that work is central to the issues before the Tribunal. There are real questions about the quality of the work, the observance of the manufacturer's specifications and the validity of the producer statement prepared by Mr Hardaker. These issues were not manifest at the time of construction.

[82] As for the council, it inspected the building work and issued the CCC, without identifying the substituted exterior cladding system.

Discussion

Leave to apply for removal

[83] Since there is no prejudice to any party, leave is given for both respondents to make this removal application, despite the application being outside the timetable originally set by the Tribunal for such applications.

Removal sought

[84] The starting point is that there is credible evidence from the assessor that both Tiling Solutions and the council bear some responsibility for the leaks.[26] The Tribunal agrees with the builder that the performance by Tiling Solutions of its work is central to the issues before the Tribunal. As for the council, it says that there is no causal connection between the change of cladding and the trustees' alleged loss. It contends it is not responsible for the lack of control joints. While these are all matters to be determined at the substantive hearing, the Tribunal has the assessor's independent evidence which impugns both Tiling Solutions and the council.

[26] Assessor's report (23 July 2020) at [3.4] & [7].

[85] Tiling Solutions says that its work was completed on 21 September 2010. The council's last work was on 13 February 2012. They contend that the trustees' claim against them, if any, accrued not later than 31 January 2014. Whether the work is subject to the 1950 or 2010 statutes, the primary period is six years. That being the case, submit these respondents, the claim filed on 1 May 2020 is time-barred.

[86] Tiling Solutions and the council rely on an email Mr Wilton sent to a Valspar manager on 31 January 2014. Relevantly, it states:

> When it rains with a strong north-westerly wind MY HOUSE LEAKS. It comes in through a crack in the paint coat right above where the moisture enters the house.
>
> Now I've put that on a separate line so that its significance is not missed. Luckily so far we've got no damage apart from a blotchy concrete floor which should clear up in winter when we turn the under floor heating on. However given it has been nearly two months since I alerted everyone to this problem and almost three months since Paul was told that water was getting in through the paint coat on the eastern side of the house, the fact that no-one has even attempted a temporary solution does not give me confidence that I am going to get a resolution any time soon. If you want to wait until the 10th to make a plan that's fine, but please be aware that any damage due to moisture ingress from now on is at your cost.
>
> As you and I discussed on the 17th December the paint coat has failed due to application of the paint before the plaster coat had cured sufficiently and the remedy is as simple as another coat, so I'm not sure what the value is in making a plan on the 10th. It seems pretty straight forward to me what needs to happen and that could be sorted out today with a phone call to Paul.

[87] The parties seeking removal say that by 31 January 2014, the trustees knew that the house leaked. A reasonable homeowner would have called in an expert to address the issue. It is said to be the manifestation of the issue and not the diagnosis of a cause or remedy that is the critical factor commencing the limitation period. Tiling Solutions and the council contend that Mr Wilton's assertion that he did not consider his home to be leaky until 2019 is not tenable in the face of the January 2014 email which acknowledges that the damage is not merely negligible. That is sufficient for limitation purposes. It is to be remembered that it has not been determined that the house requires anything more than replastering.

[88] To this, Mr Wilton says in his affidavit that he did not consider his home to be leaky until 2019 at the earliest. The discussions with the builder,

Tiling Solutions and Valspar from 2014 to 2019, suggested that the leaks were caused by:

1. The exterior paint being applied before the plaster coat cured; or

2. The paint having an insufficient LRV.

[89] According to Mr Wilton, it was not a case where the trustees did nothing. A reasonable rectification programme was proposed and later undertaken in April/May 2019, although it was ultimately unsuccessful. That repair involved a skim coat of plaster and repainting the entire house. Within two months, the exterior plaster started cracking again. He then seriously doubted that the cause of the leaks was the curing or the paint's LRV. At that point, he applied to the WHRS. When he read the assessor's report (July 2020), he was shocked to see the extent of the weathertight defects.

[90] The question for the Tribunal is whether, as at 31 January 2014 or earlier for that matter, the trustees should reasonably have called in an expert to comprehensively assess the house's weathertight problem. Plainly, they knew by then that the house leaked. Mr Wilton had called in certain experts by then, Mr Fluit (the builder), Mr Hardaker (the plasterer) and the Valspar manager. Was this sufficient and would a reasonable homeowner have suspected a bigger problem than the paint issues? If so, the trustees' cause of action against the respondents had accrued and filing on 1 May 2020 would be too late. If not and a reasonable homeowner would have undertaken the proposed remedial work first, then the claim is within time.

[91] The state of Mr Wilton's knowledge at 31 January 2014 can clearly be seen from the email. He was aware the house leaked and had been since at least 2013. He was emphatic about that in the email, capitalising the assertion that his house leaked. Before the Tribunal, Mr Wilton accepts that. But it is equally clear to the Tribunal that Mr Wilton is being truthful in his affidavit when he says he thought then, and indeed until 2019, that the problem was cracked paint. That is what the email says. Aside from the cracks causing the leaks, he knew then of no consequential damage apart from a blotchy concrete floor which only needed drying out.

[92] Mr Wilton had discussed the leaks with Mr Fluit, Mr Hardaker of Tiling Solutions and the Valspar manager and had been led to believe the problem

was the paint. His email was directed at the paint supplier. There is no evidence he was pursuing anyone else then. That is because he thought, based on what the expert tradesmen were telling him, that the problem lay with the paint. Mr Wilton's patience in waiting for Valspar to undertake the repairs also supports his position that he did not see a more serious problem.

[93] So, Mr Wilton did not then believe he had a larger weathertight problem. The next question is whether it was reasonable for him to believe this was just a paint problem which was not particularly serious. In terms of the *Hamlin* test, was he shutting his eyes to the obvious? Would a reasonable homeowner have suspected a wider problem, whether with the choice and installation of the exterior plaster system or otherwise, and called in a weathertight expert?

[94] Mr Wilton was faced with what appeared to be non-serious leaks without any damage manifest other than a blotchy concrete floor. He had consulted those whom he believed to be potentially responsible, all experts in their fields, who undertook to fix it at no cost to him. The Tribunal finds that a reasonable homeowner would leave it to those tradesmen. There was no reason for him to believe he had a more fundamental problem, such as the failure of the exterior plaster system because of its inadequate installation and/or a lack of control joints. Reasonable discoverability requires the exercise of reasonable, not exceptional, diligence.

[95] There is no evidence that Mr Wilton, a structural engineer, has any expertise in the weathertightness qualities of plaster cladding or paint.

Conclusion

[96] The trustees' cause of action accrued in about July 2019 when the recommended repairs failed. At this point, the problem was so obvious that any reasonable homeowner would call in an expert to comprehensively assess the weathertightness problem.

[97] Accordingly, on the basis of the evidence before the Tribunal, the trustees have established that the filing of the claim on 1 May 2020 is within the primary limitation period under the LA 1950.

[98] For work on or after 1 January 2011, it is the LA 2010 which applies to limitation issues (though it is not yet clear whether any such work is going to be relevant to weathertight issues).

[99] On the basis of the evidence before the Tribunal, the trustees have proven that, at the close of the start dates of the primary periods (for each act or omission), they did not know nor ought reasonably to have known all of the facts specified in the relevant parts of s 14(1)(a) to (e) of the LA 2010. In particular, they did not know of the defects in the exterior plaster system or of any serious water damage, nor that any such defects might be attributable to Tiling Solutions and/or the council.

[100] The Tribunal is therefore satisfied the trustees had late knowledge of the claim. The late knowledge date is about July 2019. Neither Tiling Solutions nor the council has proven that the date the trustees sought the assessor's report was at least three years after the late knowledge date or at least 10 years after the relevant acts or omissions.

[101] The trustees' claims against Tiling Solutions and the council based on the original build are not time-barred. It is therefore not fair and appropriate to remove Tiling Solutions or the council.

[102] There is no need for the Tribunal to assess whether the failed repairs in 2013 and 2019 give rise to a fresh and later cause of action, nor is there any need to assess whether any crossclaim from the builder is a valid basis to deny removal.

[103] There are, however, two limitation qualifications to the validity of the claims against Tiling Solutions and the council.

[104] The first, as the trustees acknowledge, is that any loss based on negligent acts or omissions before 1 May 2010 would be time-barred.[27] As both Tiling Solutions and the council were involved in the work after that period, this qualification does not give rise to removal.

[27] Submissions (12 November 2021) at [12] & [26].

[105] The second qualification is that any building work on or after 1 January 2012 cannot be the subject of a WHRS claim.[28] The council's CCC issued on 13 February 2012 is outside the scope of the Tribunal's jurisdiction.

Order

[106] The application to remove Tiling Solutions and the council is dismissed.

DATED this 17th day of December 2021

D J Plunkett
Chair

[28] Weathertight Homes Resolution Services Act 2006, s 14(a).