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 8

Removal application by sixth respondent

Dated 15 March 2022

Introduction

[1] Wilton Joubert Limited, the sixth respondent, has applied to be removed as a party to this claim.

Legal principles

Removal

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

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

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

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

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

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

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

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

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

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

The claim

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

[10] In about 2009, the trustee claimants engaged TAB Design Ltd (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 structural engineering design.

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[4] *Vero Insurance* at [22].
[5] *Saffioti* at [38], [43]; *Vero Insurance* at [20].
[6] *Yun v Waitakere City Council* HC Auckland CIV-2010-404-5944, 15 February 2011 at [70].
[7] *Saffioti* at [53].

[11] 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 Wanaka Ltd (Tiling Solutions), the third respondent.

[12] 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.

[13] 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 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. Further cracks later occurred. From time to time various repair works were unsuccessfully carried out by a number of respondents.

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

[15] 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 other 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).[8]

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

[17] On 10 September 2021 in Procedural Order 2, the Tribunal joined Wilton Joubert on the application of the council. It was found there was tenable

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

evidence supporting a claim against Wilton Joubert. The council's claim was for contribution under s 17(1)(c) of the Law Reform Act 1936.

Removal sought

Submissions of Wilton Joubert

[18] Mr MacRae represents Wilton Joubert. In his submissions (12 October 2021), he sets out the grounds for seeking removal:

1. Wilton Joubert's involvement in the construction of the house was limited to structural design issues only.

2. The claim does not include structural issues.

3. There is no evidence that it was involved in matters concerning the issues in the claim.

4. In any event, the claim is time-barred under s 393(2) of the Building Act 2004.

5. It is fair and appropriate for it to be removed.

6. The claims against it are so untenable that they are unlikely to succeed.

[19] It is submitted that the claim concerns issues with the exterior plaster (EIFS) wall cladding. It was TAB Design which prepared the architectural construction drawings and building consent application. The assessor said the drawings lacked site specific details and there was limited information on movement control joints.

[20] According to Mr MacRae, contrary to what the council said in the joinder application:

1. Wilton Joubert was engaged to undertake engineering design only and there is no allegation of structural deficiencies.

2. Wilton Joubert's design and PS1 covered B1 of the Building Code, not the design of the cladding or E2. It had no involvement in the design of the cladding.

3. Wilton Joubert is a structural engineering company and it was not engaged to supervise construction, nor did it issue instructions to the builder or TAB Design to change the cladding from Rockcote to Wattyl.

4. Wilton Joubert cannot have any culpability in relation to any lack of control joints within the plaster cladding or any defects claimed by the trustees.

[21] It is submitted that the drawings and emails relied on by the council on joinder do not concern any of the matters identified by the assessor or set out in the claim.

[22] Furthermore, those communications sent by Mr Wilton from the Wilton Joubert email address which were unrelated to the engineering work, were sent as a trustee and not a director of the company. He used the email address for convenience and Wilton Joubert cannot reasonably be said to be responsible for those communications.

[23] Mr Wilton's memorandum (13 February 2013) regarding carrying out or supervising design work, relied on in joining Wilton Joubert, was provided after the CCC was issued. It related to a separate garage and carport which is not included in the claim.

[24] It is contended that it is not appropriate for the council to join a party simply because it was involved in design and/or building work, in the absence of any evidence demonstrating that the party may be culpable for the loss.

[25] Notwithstanding that the claim against Wilton Joubert lacks merit, any claim in relation to design is time-barred. While the *BNZ Branch Properties* judgment is authority for allowing a contribution claim after the 10-year longstop, that does not mean that such a claim can include any issue arising out of an act or omission more than 10 years before the application for the assessor's report.[9] If not, the council could simply join any party to a claim at any time and the longstop would not apply.

[9] *BNZ Branch Properties Ltd v Wellington City Council* [2021] NZHC 1058.

[26] The trustees' application was filed on 1 May 2020. Given that Wilton Joubert's design and the PS1 were undertaken in 2009, any claim against it is time-barred pursuant to the longstop limitation of 10 years.

[27] There is an affidavit from Mr Wilton (sworn 27 October 2021). He deposes that Wilton Joubert was engaged to carry out structural engineering design work. Its design and PS1 did not cover design of the cladding. Wilton Joubert did not at any time have any involvement with the cladding or non-structural design work. None of the issues in the claim involve structural engineering design.

[28] There are further submissions (25 February 2022) from Mr MacRae replying to the council's opposition to removal. It is reiterated that the structural design drawings did not include control joints, or details of the cladding. Wilton Joubert did not design control joints or the cladding.

[29] It is not alleged that the engineering design ought to have specified control joints and the lack thereof is the cause of damage. The cladding originally specified was appropriate and the cause of damage relates to the suitability of the cladding/control joints and/or inadequate installation of the substituted cladding. This issue has nothing to do with structural design and whether it included control joints.

[30] After issuing the PS1 (23 November 2009), Wilton Joubert had no further involvement in the design or construction.

[31] As for Mr Wilton's emails, he used his work address for convenience only. After issuing the PS1, any involvement was in his capacity as a trustee only. The emails referred to by the council are clearly not sent as a representative of Wilton Joubert.

[32] It is acknowledged that *BNZ Branch Properties* is the applicable law. It is not disputed that a contribution claim can be made for acts or omissions after 1 May 2010, even when it is made after the expiry of the 10-year longstop period. However, a contribution claim cannot be made in relation to Wilton Joubert's work that predates 1 May 2010. Notwithstanding the lack of merit of the claim against Wilton Joubert, it is time-barred in any event.

Submissions of the council

[33] There is a memorandum (15 November 2021) from Ms Entwistle, counsel for the council, opposing Wilton Joubert's removal.

[34] It is submitted that Wilton Joubert has provided no evidence that it was engaged to undertake structural design work only, and it was not involved in the design and specification of the cladding. There are emails from Mr Wilton at his work address which show that Wilton Joubert had input into the design of the control joints. Mr Fluit has stated that, save for the exterior cladding, the house was built in accordance with TAB Design's consented design, which included the drawings of Wilton Joubert. The Tribunal was satisfied of the existence of tenable evidence supporting a claim against Wilton Joubert, in joining it to the claim.

[35] Furthermore, according to Ms Entwistle, there is a correlation between the structural design and the cladding. Even if Wilton Joubert's engagement was limited to structural design work only, it should have made allowance for control joints.[10]

[36] It will be an issue for the substantive hearing as to who is responsible for any defective design. It is contested and will require expert evidence. It is therefore not a matter to be resolved by summary application.

[37] Counsel notes that there are conflicting High Court authorities as to whether the 10-year longstop in s 393(2) of the Building Act 2004 overrides claims for contribution under s 17 of the Law Reform Act 1936. The High Court confirmed in *BNZ Branch Properties* that the longstop does not override the limitation period of two years for contribution claims. Accordingly, a claim for contribution can be brought within two years after a defendant's liability is determined.

[38] It is acknowledged that the recent decision of the High Court in *Body Corporate 328392* disagreed with *BNZ Branch Properties* and found that the longstop overrode the limitation period for contribution claims.[11] Accordingly, the issue of whether the claim against Wilton Joubert is time-barred is open for

[10] Citing Resene Construction Systems (undated) at [1.4.2] and NuTherm BRANZ Appraisal (30 August 2013) at [9.1].
[11] *Body Corporate 328392 v Auckland Council* [2021] NZHC 2412.

argument at the substantive hearing. The claim is not destined to fail as a matter of law and should not be struck out.

Discussion

[39] Wilton Joubert seek removal on two grounds:

1. It had no involvement with the cladding, which is the issue in the claim.

2. The claim is time-barred.

No involvement with cladding

[40] There is evidence from an independent expert, Mr Downie, an MBIE appointed weathertight assessor, that the unconsented exterior plaster cladding was the defect allowing leaks. In particular, there was a lack of control joints.

[41] It is not disputed that the structural design was that of Wilton Joubert. Mr Wilton says that does not include cladding and that Wilton Joubert had no involvement with cladding or indeed any non-structural design work.

[42] The council contends there is a correlation between the structural design and the cladding. In other words, even if Wilton Joubert's engagement was limited to structural design only, it should have made allowance for control joints. It relies on the Resene Construction Systems specification and the NuTherm BRANZ Appraisal. The relevance of the undated Resene specification is not established.

[43] I agree with Ms Entwistle that the issues of whether control joints for cladding (which, to this non-expert, appears to be non-structural) bear any relation to control joints for structure and whether the structural engineer needs to make any allowance for cladding design, is beyond the scope of an interlocutory application. That requires expert evidence, which can be tested at a full hearing.

[44] Furthermore, Mr Wilton's evidence that Wilton Joubert did not, at any time, have any involvement with cladding, will also need to be tested at a

hearing. As Ms Entwistle points out, there is evidence that Mr Wilton did have some knowledge of and/or involvement in the cladding design at the time he and his firm were engaged in the structural design.

[45] Mr Wilton's knowledge of the original cladding design can be seen in a series of emails exchanged between Mr Wilton (at his Wilton Joubert address) and Mr Bennett of TAB Design.[12] They deal with various building design/specification issues. One of the issues raised was plaster cladding, including control joints and the potential for cracking.

[46] Mr Wilton says such emails were sent in his capacity as an owner, using Wilton Joubert's email address for convenience. The emails on their face appear to support that contention. However, given the possible correlation between structural design and cladding, that must be a matter of evidence and argument at a hearing. While the Tribunal has previously found there is no evidence that Mr Wilton as a structural engineer has any expertise in the weathertightness qualities of plaster cladding or paint, these emails show he had some knowledge and possible involvement in a yet to be determined capacity of the subject-matter of what has transpired to be the primary defect.[13]

[47] As found in Procedural Order 2, there is tenable evidence of a claim against Wilton Joubert.

Limitation

[48] Mr MacRae additionally submits that the claim is time-barred under s 393(2) of the Building Act 2004:

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

[12] See particularly, email (6 July 2009) Wilton to Bennett (WFT.01.0335).
[13] Procedural Order 7 (17 December 2021) at [95].

> (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,—
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> (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
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> (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.

[49] It is also necessary to consider the jurisdiction to permit contribution claims under s 17(1)(c) of the Law Reform Act 1936:

> **17 Proceedings against, and contribution between, joint and several tortfeasors**
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> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not)—
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> …
>
> (c) any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought.

[50] It is not disputed that Wilton Joubert's work was completed by November 2009, yet the application by the trustees to MBIE for an assessor's report (which 'stops the clock') was not made until 1 May 2020. Hence, it is contended, the claim against Wilton Joubert is time-barred, being more than 10 years after its acts or omissions alleged to be negligent.

[51] It is to be remembered that Wilton Joubert was not originally a party to the claim but was joined by a respondent, the council. The council's claim against the firm is for contribution under s 17(1)(c) of the Law Reform Act. There is a limitation period of six years after quantification of the council's liability (if any) to the trustees for work falling under the Limitation Act 1950

(before 1 January 2011), or two years after quantification for work from 1 January 2011.[14] That quantification is yet to occur.

[52] In *BNZ Branch Properties*, the High Court stated that s 17(1)(c) and the relevant limitation statute create a code for bringing contribution claims which is untouched by the longstop in s 393(2) of the Building Act.[15] The longstop does not override the statutory limitation period for contribution claims.

[53] More recently, *BNZ Branch Properties* was not followed by the High Court in *Body Corporate 328392*. In that case, the Court found that the Building Act's longstop of 10 years did override the limitation period for contribution claims.[16]

[54] As to these competing authorities, Ms Entwistle says that the issue of whether the council's contribution claim against Wilton Joubert is time-barred is open for argument at the substantive hearing, with the benefit of full legal submissions.

[55] Mr MacRae accepts, at least for the purpose of this application, that *BNZ Branch Properties* is the applicable law. He does not dispute that a contribution claim can be made for acts or omissions after 1 May 2010, even if that contribution claim is made after the expiry of the longstop of 10 years subsequent to the conduct of the tortfeasor sought to be joined (as it was here).

[56] It is Mr MacRae's argument that *BNZ Branch Properties* does not allow a contribution claim to include any issue arising out of an act or omission more than 10 years before the application for an assessor's report. A contribution claim can be made outside the 10-year longstop, but it cannot be made for acts or omissions out of time on the original claim, being for work done before 1 May 2010. The Tribunal has already decided that work done before 1 May 2010 is out of time.[17]

[57] On the assumption that *BNZ Branch Properties* remains the law, the question of limitation for the contribution claim here is not straightforward.

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[14] Limitation Act 1950, ss 4(1)(a), 14; Limitation Act 2010, s 34(4).
[15] *BNZ Branch Properties v Wellington City Council*, above n 9 at [69].
[16] *Body Corporate 328392 v Auckland Council*, above n 11 at [54].
[17] Procedural Order 7 (17 December 2021) at [104].

[58] A claim for contribution can only be made for shared responsibility for the "same damage", whether as a joint tortfeasor or otherwise.[18] Section 17(1)(c) is intended to provide a broad basis for contribution and is available between those responsible for independent wrongful acts causing the same damage.[19]

[59] In a classic contribution case, the tortfeasors will have performed their wrong acts or omissions at or about the same time. Accordingly, if the plaintiff (claimant) is out of time in suing one tortfeasor, he or she will be out of time for the other tortfeasor. The second tortfeasor cannot be joined by the first, because the first tortfeasor cannot be liable to the plaintiff anyway.

[60] That is not the case here. At 1 May 2020 when an application was made for an assessor's report (the equivalent in this jurisdiction of commencing proceedings in a court), it would have been too late for the trustees to make a claim against Wilton Joubert. As to their claim against the council, they were out of time in respect of any defective work performed by the council prior to 1 May 2010 (for example, issuing the building consent and any inspections before that date). However, the work performed by the council between 1 May 2010 and 31 December 2011 is within time.[20] It is noted that the issue of the CCC by the council on 13 February 2012 is outside the Tribunal's jurisdiction for another reason.[21]

[61] The council is therefore potentially liable to the trustees for negligent inspections between 1 May 2010 and 31 December 2011. In making a claim for contribution, the council is asking Wilton Joubert to share liability for the "same damage" for which the council is found liable (if so). That same damage must arise out of Wilton Joubert's defective work, as well as that of the council, otherwise the damage is not the same.

[62] In other words, the council's argument is as follows. If the trustees succeed in establishing an inspection where the council failed to identify a defect causing leaks (for example, the lack of control joints on the cladding), which defect stems from Wilton Joubert's design work, then the council can seek a contribution from the engineers. The damage (water penetration)

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[18] Law Reform Act 1936, s 17(1)(c).
[19] *Hotchin v New Zealand Guardian Trust Company* [2016] NZSC 16 at [73], [138]–[139] & [184].
[20] Procedural Order 7 (17 December 2021) at [104]–[105].
[21] Weathertight Homes Resolution Services Act 2006, s 14(a).

arising from the council's defective inspection and Wilton Joubert's earlier defective design is plainly the same. The council's negligent act of inspection (as alleged) is within time (for liability to the trustees), but Wilton Joubert's prior negligent act of design (as alleged) is not.

[63] Is this a defence to the claim for contribution, available to Wilton Joubert?

[64] The answer is 'no'. This is because a claim for contribution can be made under s 17(1)(c) where the other tortfeasor (Wilton Joubert) "would if sued in time" have been liable.[22] It does not matter under the Law Reform Act whether Wilton Joubert could have been sued on 1 May 2020 or indeed when its work was undertaken, provided:

1. The trustees' claim against the council in respect of its work is in time.

2. The damage is the same.

3. The contribution claim meets the limitation period for such claims under the relevant limitation statute.

[65] Of course, if the longstop in the Building Act overrides the limitation period for contribution claims, then the contribution claim against Wilton Joubert is too late. That is not, however, the applicable law for this removal application.

[66] Accordingly, the council can seek contribution from Wilton Joubert for the council's defective work (if any) undertaken on or after 1 May 2010 causing weathertight damage to the trustees, in circumstances where Wilton Joubert is liable for the same damage, irrespective of when Wilton Joubert performed its defective work (if any).

Conclusion

[67] There are genuine and reasonably disputed factual issues concerning whether Wilton Joubert had any engagement with the design of the cladding

[22] See discussion in *Body Corporate 328392* at [30].

and the contribution claim against it is not time-barred. It is not fair and appropriate to remove Wilton Joubert.

Order

[68] The application to remove Wilton Joubert is dismissed.

DATED this 15th day of March 2022

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D J Plunkett
Chair