IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2021-100-001

BETWEEN	**BODY CORPORATE 408209, ZQN APARTMENTS** Claimant
AND	**QUEENSTOWN LAKES DISTRICT COUNCIL** First Respondent
AND	**CONCEPT BUILDERS QUEENSTOWN LIMITED (COMPANY NUMBER 1287989)** Second Respondent
AND	**JUST BUILD IT LIMITED (COMPANY NUMBER 1261902)** Third Respondent **REMOVED**
AND	**LEUSCHKE KAHN ARCHITECTS LIMITED (COMPANY NUMBER 377993)** Fourth Respondent **REMOVED**
AND	**MALTBYS LIMITED (COMPANY NUMBER 1944601)** Fifth Respondent
AND	**MIKE COBURN** Sixth Respondent **NOT SERVED**
AND	**ADHESION SEALING 2007 LIMITED (COMPANY NUMBER 1935420)** Seventh Respondent
AND	**MCNEE LIMITED (COMPANY NUMBER 1510187)** Eighth Respondent

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PROCEDURAL ORDER 9
(Removal of Fourth Respondent)

Dated 13 December 2021

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[1] The second, fourth and eighth respondents have applied to the Tribunal to be removed from these proceedings in terms of s 112 of the Weathertight Homes Resolution Services Act 2006 (the Act).

[2] This Procedural Order will determine the fourth respondent's removal application.

The fourth respondent's application for removal

[3] On 16 July 2021, the first respondent, Queenstown Lakes District Council, made application to the Tribunal under s 111 of the Act to join to this claim, amongst other respondents, the fourth respondent.

[4] In Procedural Order 2, I joined the fourth respondent to this proceeding.

[5] Leuschke Kahn Architects Limited, the fourth respondent, was engaged by Nigel Boland, developer for ZQN apartments, on a limited retainer to prepare architectural drawings and plans for resource consent and building consent purposes only.

[6] The fourth respondent did prepare final drawings which Mr Boland used to apply for building consent from the first respondent. Mr Boland made the application for building consent in May 2006. The fourth respondent was not involved in the consent process. The fourth respondent was not instructed during the construction process and at no time during construction was the fourth respondent called upon for further details, amendments to design or clarification of its architectural drawings and plans.

[7] The above factual background was presented by Paul Leuschke in the fourth respondent's application for removal dated 16 August 2021, and from its counsel's submissions of 26 November 2021.

[8] There is no evidence before the Tribunal refuting the above factual background.

[9] Furthermore, it is not in dispute that the fourth respondent's involvement with ZQN apartments finished in May 2006. This proceeding accepts that the ZQN residential apartments were built between June 2008 and November 2009. The claimant applied for a WHRS assessor's report under s32 of the Act on 7 September 2018. Under s37 of the Act, that application had the effect of "stopping time" for limitation as if it were the filing of proceedings in a court.

Criteria for removal under s 112 of the Act

[10] Section 112 of the Act provides that the Tribunal may order that a person be removed from adjudication proceedings if it considers it fair and appropriate in all the circumstances to do so.

[11] The High Court decision of *Auckland City Council v Unit Owners in Stonemason Apartment 27 Falcon Street, Parnell* determined the test for removal as:[1]

> It is generally accepted that an application for removal or strike out should only be made as a preliminary issue where a claim is so untenable in fact and law as to be unlikely to succeed.

[12] The Tribunal's approach to removals has been to consider whether the claims against a prospective party are tenable. In *Saffioti v Jim Stephenson Architect Ltd*, Katz J cautioned against removing parties at a preliminary stage in circumstances where the claims asserted against them are tenable, but weak.[2] Wylie J in *Lee v Auckland Council* supports the approach summarised by Katz J in *Saffioti*.[3]

[13] Wylie J in *Lee* acknowledged that the Tribunal has an inquisitorial role and that it may be better informed as to the relevant facts than the High Court when considering a strike out application. He also agreed with Ellis J's observation in *Yun v Waitakere City Council* that leaky home cases frequently involve many defendants because of the initial desire to spread, share or avoid liability and that therefore the Tribunal is given an

[1] *Auckland City Council v Unit owners in Stonemason Apartment 27 Falcon Street, Parnell* HC Auckland CIV-2009-404-3118, 11 December 2009 at [21].
[2] *Saffioti v Jim Stephenson Architect Ltd* [2012] NZHC 2519 at [44].
[3] *Lee v Auckland Council* [2015] NZHC 1196.

extra gate keeping role to ensure that adjudication proceedings progress in an expeditious and cost effective way.[4] However, Wylie J in *Lee* warned that the discretion conferred by s 112 of the Act needs to be exercised with caution.

[14] Brewer J in *Auckland Council v Abraham* stated that the discretion conferred by s 112 is not unfettered and must be exercised on a principled basis and in accordance with applicable law.[5] Katz J in *Saffioti* commented that genuinely and reasonably disputed factual issues which could impact on the success or otherwise of the claim are generally not suitable for determination at the removal stage.

[15] Whether the claim is capable of succeeding based on the information provided is always an important factor in determining whether it is fair and appropriate to remove a party in the circumstances of each case. The onus is on the party seeking to be removed to show that it is fair and appropriate to remove them.

[16] I intend to apply these principles when determining the fourth respondent's removal application.

[17] I approach this application for removal by considering whether there is, or could be, a tenable claim against the fourth respondent and whether such a claim can be summarily dismissed at this interlocutory stage or whether it should proceed to a final determination.

Fourth respondent discussion and determination

[18] The fourth respondent, at this stage self-represented, made application for removal on 16 August 2021 alleging that the claim against it was time-barred, and because both the cladding and the roof (which it alleges together appear to be the cause of the water ingress) was substituted from the drawings that the fourth respondent specified.

[4] *Yun v Waitakere City Council* HC Auckland CIV-2010-404-5944, 15 February 2011 at [70].
[5] *Auckland Council v Abraham* [2015] NZHC 415.

[19] As mentioned earlier, the fourth respondent's engagement was limited to preparation of resource consent and building consent drawings. Site observation and contract administration was excluded from its retainer. The fourth respondent alleges that building and construction of the ZQN apartments was different to the consented plans.

[20] This was confirmed by the WHRS assessor's report and the assessor was not privy to the terms of engagement of the fourth respondent. The assessor's impartial report of 6 December 2018 found that the ZQN apartments were not built in accordance with the consent plans, including the roof material, wall structure and claddings.[6]

[21] The first respondent, Queenstown Lakes District Council, on 12 November 2021, through its counsel, filed submissions opposing the removal of the fourth respondent.

[22] The only expert evidence presently before the Tribunal is that of the assessor's report. It confirms the submission of the fourth respondent that construction failed, in large amounts, to follow the approved building consent plans and drawings.

[23] The fourth respondent's removal application of 16 August 2021 submitting that construction was not built in accordance with the fourth respondent's design was acknowledged and not disputed by the first respondent's opposition.[7] There is no evidence before the Tribunal alleging otherwise. I accept on the basis of the information before the Tribunal that there is no dispute as to the ZQN apartments being built contrary to consented drawings and plans. The first respondent's opposition notes the fourth respondent addresses technical replies to some of the alleged defects identified by the assessor in its application for removal. The first respondent submits that input from an expert architect or building surveyor is necessary to determine whether the fourth respondent's design has caused any of the alleged defects. It is submitted this cannot be determined at this preliminary stage.

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[6] WHRS assessor's full report dated 6 December 2018 at sections 4.3 and 5.
[7] See p9, para [46] of first respondent's opposition to removal (12 November 2021).

[24] I am satisfied that the apartments were not built in accordance with the fourth respondent's plans and design. The design issues suggested by the first respondent are not relevant in any event because of the limitation defence raised by the fourth respondent and concentrated upon in the first respondent's opposition submissions.

[25] The first respondent expressed material opposition to the limitation defence as there is currently conflicting High Court authority as to whether the ten-year longstop provision in s 393(2) of the Building Act 2004 overrides s 34 of the Limitation Act 2010 in claims for contribution under s 17 of the Law Reform Act 1936.

[26] The fourth respondent's submission that the claim against it is time-barred is the critical issue requiring determination in this application for removal. Issues of design are time-barred if I determine that s 393(2) of the Building Act 2004 applies in circumstances where more than 10 years have passed since the drawings were completed and the application for the joinder of the fourth respondent to this proceeding .

[27] The first respondent submits that the 10 year longstop provision in s 393(2) of the Building Act does not apply to claims for contribution (arguing that the claim against the fourth respondent by the first respondent is for contribution) because it relies on the recent case of *BNZ Branch Properties Limited v Wellington City Council*[8] which was the governing High Court decision at the time I joined the fourth respondent to this proceeding, and I did then consider that it had application requiring the joinder. However, that decision is a major departure from the historic case law relating to the issue of the ambit and breadth of s 393(2).

[28] Since the *BNZ Branch Properties* decision, Associate Judge Bell in *Body Corporate 328,392 v Auckland Council*[9] declined to follow *BNZ Branch Properties* and chose to uphold the line of significant authorities on the issue of the 10-year longstop applying over the general provisions of the Limitation Act.

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[8] *BNZ Branch Properties Limited v Wellington City Council* [2021] NZHC 1058.
[9] *Body Corporate 328392 v Auckland Council* [2021] NZHC 2142.

[29] I agree with the fourth respondent's counsel's submission that the *BNZ Branch Properties* decision is a major departure from the established case law and the decision of *Body Corporate 328392* has fully examined Justice Clark's reasoning in *BNZ Branch Properties* and declined to follow her judgment. Counsel for the fourth respondent submits that this is not a complicated matter and the claim against the fourth respondent is quite clearly time-barred under s 393(2) of the Building Act. I agree with that submission and my reason for preferring the judgment of Associate Judge Bell is as follows:

[30] Section 393 of the Building Act 2004 states:

> **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
>
> (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
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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.

[31] As identified by the parties, to an extent there is conflicting High Court authority on the application of s 393(2) of the Building Act 2004 to a claim for contribution. The two recent High Court decisions *BNZ Branch Properties* and *Body Corporate 328,392* represent the alternative approaches: respectively, whether the limitation statutes provide a code

for limitation defences relating to contribution claims, or whether s 393(2) of the Building Act 2004 applies to a claim for contribution.

[32] Before *BNZ Branch Properties*, the High Court had previously found that a claim for contribution was not barred by the otherwise-applicable limitation defence in s 91(2) of the Building Act 1991, the predecessor to s 393(2) of the current Act. In *Cromwell Plumbing Drainage & Services Ltd v De Geest Brother Construction Ltd*, Hansen J held:[10]

> In my view, s.17 of the Law Reform Act, 1936 and s.14 of the Limitation Act provide a specific and self contained code laying down the time frame allowed for a claim for contribution …
>
> In my view, s.91(2) does not override the provisions of s.17 of the Law Reform Act, and s.14 of the Limitation Act. The effect of s.17 is to give a right to contribution from another tortfeasor who would have been liable jointly, or otherwise, if sued in time. The statutory cause of action for contribution does not arise until judgment against the tortfeasor claiming contribution, or compromise by that tortfeasor. The tortfeasor claiming contribution then has six years to bring the proceedings for contribution. If s.91(2) had the effect contended for by Mr Logan, it could easily truncate the statutory period presently allowed for the claiming of contribution. In my view, if that was the intended effect of s.91 the statute would need to specifically say so.

[33] *BNZ Branch Properties* was broadly decided on a similar basis. After reviewing the legislative history and the relevant statutory provisions, the High Court stated:

> [69] In a sense s 17(1)(c) of the Law Reform Act, together with the operative provisions of the 2010 Act, (and before it the Limitation Act 1950) create a code for the bringing of contribution claims. The right to contribution is untouched by s 393 and the longstop in s 393(2) (and was untouched by s 91 and the longstop in s 91(2))). The "civil proceedings" to which s 393 of the Building Act applies are original claims. Civil proceedings, that is original claims, are governed by the Limitation Act 2010 and attract the defences in that Act, except that a longstop period of 10 years applies to such proceedings instead of the 15-year longstop under the 2010 Act. The Building Act's 10-year longstop does not override the specific two-year longstop in relation to contribution claims to which s 34 of the Limitation Act 2010 apply.

[34] *Cromwell Plumbing* and *BNZ Branch Properties* represent the two judgments, in 1995 and 2021 respectively, that establish the line of authority that contribution claims are not subject to s 393(2) of the Building

[10] *Cromwell Plumbing Drainage & Services Ltd v De Geest Brother Construction Ltd* [1995] 9 PRNZ 218 (HC).

Act 2004. However, in the interval between the two judgments, *Cromwell Plumbing* has not been followed by the High Court repeatedly, and has not been followed by this Tribunal on that basis in several instances.[11] *BNZ Branch Properties* did not cite *Cromwell Plumbing.*

[35] *BNZ Branch Properties* did address that successive High Court decisions held that "powerful policy considerations support an interpretation of s 393(2) that makes no distinction between a primary claim and a claim for contribution", but declined to follow these authorities, having the benefit of "detailed submissions on the legislative history leading to the enactment of s 17(1)(c) of the Law Reform Act and of its subsequent amendment" combined with "insight provided by the various Law Commission reports and papers and legislative materials".

[36] The first decision to identify issues with the relevant conclusion in *Cromwell Plumbing* was *Dustin v Weathertight Homes Resolution Services*.[12] In *Dustin,* Courtney J held the objective of the long stop period is to create finality, which will inevitably result in otherwise valid claims being precluded:

> [22] It is clear… that the learned Judge was influenced in his decision by the perception that if s 91(2) Building Act 1991 applied it would truncate the statutory period allowed for claiming contribution so as to render s 17(1)(c) LRA meaningless in all cases relating to buildings. It is, of course, true that the effect of s 91(2) Building Act 1991 is to truncate the period within which claims relating to building work can be brought. But this is not a valid reason for not applying the section to claims for contribution. The objective of a long stop period is to create finality by preventing claims being brought outside it. The inevitable result is that some, otherwise valid, claims will be precluded. However, that result is inherent in the concept and operation of the long stop period. Its purpose is to ensure fairness to all parties, given the effect of time on the freshness of memories and availability of witnesses. Further, it gives certainty for intended defendants so that they can plan such things as document destruction and liability insurance. These issues are just as relevant in the context of a claim for contribution as in a primary claim.
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> [23] It may be that the effect of the long stop period is more noticeable in claims for contribution because there can be a significant delay between the bringing of the plaintiff's claim and the

[11] For example see *Gainsford v Griffin* TRI 2010-100-33 PO5 (3 August 2010) at [10]; *Roy v Thames Coromandel District* TRI 2010-101-20 PO3 (27 July 2010) at [16]; and *Aldridge v William* TRI 2009-100-67 PO6 (9 July 2010) at [40].

[12] *Dustin v Weathertight Homes Resolution Services* HC Auckland CIV-2006-404-276, 25 May 2006.

> commencement of the claim for contribution. This will be lessened where the claim for contribution is brought as a third party claim in the plaintiff's proceeding. However, as John Hansen J observed, a claim for contribution does not accrue until the defendant has had judgment entered against it or has compromised the claim. This means that the cause of action could easily accrue outside the long stop period. This is undoubtedly what John Hansen J was concerned about. However, even allowing for that fact, I respectfully think that it overstates the position to say that applying the long stop period to claims for contribution would render s 17(1)(c) LTA meaningless in relation to building claims. Many claims for contribution will remain unaffected and the fact that some may be precluded reflects the very nature of the long stop period. Further, in the context of claims brought under the WHRS Act, it is usual for all potentially liable parties to be joined as early as possible, thus minimising the time between the commencement of the plaintiff's claim and the claim for contribution.

[37] Courtney J also indicated that it was not a valid objection that the limitation defence in the Building Act did not specifically state it applied to contribution claims. Her Honour held the section was as plainly worded as possible:

> [24] Nor can it be a valid objection to the application of s 91(2) Building Act 1991 to a claim for contribution that the section did not specifically state that it was intended to apply to such claims. Section 91(2) Building Act 1991 is as plainly worded as it is possible to be; the clear effect is that if the proceeding concerned is a civil proceeding and it relates to building work (as defined) then it is subject to the long stop period. I see no need for the Act to go further and specify that it applies to claims for contribution as well as to claims by plaintiffs.

[38] Courtney J highlighted the Court of Appeal's observations in *Johnson v Watson* (in the context of alleged concealment by fraud) as to the wording of s 91(2) in support:[13]

> [8] … Section 91(2) is … concerned with the act or omission on which the proceedings are based. An act or omission occurs on a particular day. No question of extension of time can logically arise when the starting point is measured from the day of the occurrence of an act or omission. Furthermore, it is clear from the introductory words of s 91(2) that the provisions of the Limitation Act do not apply to the subs (2) time limit of ten years. Subsection (2) is in this respect a statutory bar which is self-contained, both as to the commencement of the period allowed and its duration. In short, s 91(2) means exactly what it says. A plaintiff cannot in any circumstances sue more than ten years after the act or omission on which the proceedings are based, if the case involves, as this one clearly does, building work associated with the construction of a building.

[13] *Johnson v Watson* [2003] 1 NZLR 626 (CA) at [8].

[39] Courtney J also accepted that a claim for contribution is a civil proceeding in terms of s 91(2) , and that it was an error to focus on the statutory nature of the cause of action under s 17 of the Law Reform Act 1936:

> … it was an error to focus on the statutory nature of the cause of action under s 17(1)(c). Whether a cause of action arises at common law, by statute or by virtue of contract, its nature as a civil proceeding does not alter. It is perfectly clear that a claim for contribution under s 17(1)(c) is a civil proceeding.

[40] Although Courtney J's decision on the effect of s 91(2) in *Dustin v Weathertight Homes Resolution Services* was strictly obiter on the facts of that case (it was a judicial review proceeding, and the adjudicator was entitled to follow *Cromwell Plumbing* despite Courtney J's view on the merits), it was the progenitor for a series of High Court decisions that declined to apply *Cromwell Plumbing*, instead favouring the reasoning in *Dustin*.

[41] In *Minister of Education v James Hardie New Zealand*, Fitzgerald J surveyed the High Court judgments post-*Dustin* and observed that:[14]

(a) In *Carter Holt Harvey Ltd v Genesis Power Ltd*,[15] Randerson J agreed with Courtney J's conclusions and analysis of the issue.

(b) In *Davidson v Banks*,[16] Associate Judge Faire preferred the reasoning in *Dustin* over *Cromwell Plumbing*.

(c) In *Body Corporate 169,791 v Auckland City Council*,[17] Lang J also adopted the *Dustin* approach.

(d) In *Perpetual Trust v Mainzeal Property and Construction Ltd*,[18] Andrews J adopted similar reasoning to Courtney and Lang JJ.

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[14] *Minister of Education v James Hardie New Zealand* [2018] NZHC 22.
[15] *Carter Holt Harvey Ltd v Genesis Power Ltd (No 8)* HC Auckland CIV-2001-404-1974, 29 August 2008.
[16] *Davidson v Banks* HC Auckland CIV-2006-404-6150, 23 March 2009
[17] *Body Corporate 169,791 v Auckland City Council* HC Auckland CIV-2004-404-5225, 17 August 2010.
[18] *Perpetual Trust Ltd v Mainzeal Property and Construction Ltd* [2012] NZHC 3404.

[42] In *Body Corporate 169,791 v Auckland City Council*, Lang J concluded that s 393(2) of the Building Act 2004 imposed a separate limitation period in respect of all civil proceedings, and overrode the general limitation provisions contained in the Limitation Act. Lang J said:

> [40] The principal concern that I have about the reasoning in Cromwell is that it concentrates almost exclusively on the right of a defendant to seek a contribution from a concurrent tortfeasor, and the impact that application of s 91(2) would have on that right. It does not place any weight at all upon the plain and unambiguous wording used in s 91(2).
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> [41] I consider that Parliament has worded s 91(2) and s 393(2) carefully. In using the phrase "civil proceedings", it has endeavoured to capture every form of civil proceeding regardless of its source or makeup. Similarly, in using the words "relating to building work" Parliament has attempted to capture every civil proceeding that arises out of building work as that term is defined in s 2 of the Act. If Parliament had intended s 91(2) or s 393(2) to apply only to claims between a plaintiff and a defendant, it would have used wording that would have made that fact clear.
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> [42] That conclusion is supported by powerful policy considerations. The enactment of s 91(2) and s 393(2) signalled that Parliament intended that civil proceedings relating to building work were to be subject to a 10 year long stop period. That policy decision was taken in the interests of achieving a higher goal, and its implementation has necessarily been at the expense of some claims that would otherwise have been valid. I see no justification for distinguishing in this context between a primary claim by a plaintiff against a defendant and a claim for contribution by a defendant against a concurrent tortfeasor.

[43] In *Perpetual Trust v Mainzeal Property and Construction Ltd*,[19] Andrews J observed the legislative history of the limitation defence in the Building Act and said:

> [45] It is clear from the speech just cited that Parliament's intention was that the ten-year longstop would apply to all claims against people in the construction industry. No distinction was made as to who was to make such claims, or in which form; that is, whether it was claims by owners against building professionals, or cross-claims as between building professionals. The intention was that building professionals should be able to obtain insurance cover, and such cover is required in respect of cross-claims between professionals as much as it is for claims by owners against building professionals.

[44] Having considered the above decisions and the reasoning contained in them, Fitzgerald J respectfully agreed with the approach adopted in the *Dustin* line of cases.[20] Her Honour stated that to exclude

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[19] *Perpetual Trust Ltd v Mainzeal Property and Construction Ltd* [2012] NZHC 3404.
[20] *Minister of Education v James Hardie New Zealand* at [63].

contribution claims relating to building work from the limitation defence in the Building Act would be contrary to the plain wording of the provisions and the clear Parliamentary intent:

> [64] In my view, to exclude contribution claims which clearly relate to building work would be contrary to the plain wording of the longstop provisions in both the 1991 and 2004 Acts, as well as the clear Parliamentary intent which lies behind those provisions. As Andrews J noted in Perpetual Trust, there is no suggestion in the legislative history that cross-claims as between building professionals and/or territorial authorities, or third party contribution proceedings, were to be excluded from the finality and certainty which was sought through the longstop provision. Had such an important and broad exclusion been intended from the otherwise plain words used, one might have expected Parliament to have said so expressly.
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> [65] I respectfully agree with Lang J's observations as to the reasoning in Cromwell, in that it unnecessarily focuses on the legal basis or cause of action giving rise to the defendant's obligation to the claimant in the contribution proceedings, rather than on the matters to which those proceedings relate. I therefore also respectfully agree with Andrews J's reasoning in rejecting the submission made in Perpetual Trust that as a contribution claim is a statutory cause of action between two defendants (or one defendant and a third party) independent of the main claim by the plaintiff, it is not therefore a "proceedings relating to building work". I also consider it would be technical and artificial to approach a proceeding which clearly relates to building work as not being such a proceeding simply because it is brought by way of a claim for contribution. I do not consider Parliament intended the finality and certainty intended by the longstop provision to depend on the arbitrariness of whether a party is sued directly by the plaintiff or by a defendant by way of a contribution claim, when the nature of the claim against that party is the same in both cases.

[45] Fitzgerald J therefore concluded that s 393(2) of the Building Act 2004 applies to contribution claims to the extent the claim relates to building work:

> [92] I accordingly conclude that the Building Act longstop provisions apply to contribution claims, to the extent the claim relates to building work. There was no suggestion that, other than because they are contribution claims, CHH's claims against the Councils do not relate to building work.

[46] The approach of Bell AJ in *Body Corporate 328,392* followed and endorsed the above line of High Court authority.

[47] Bell AJ recognised that previous judgments have found the purpose of s 393(2) and its predecessors was to provide finality and certainty in the construction industry, and that these purposes apply when considering how s

393(2) applies in contribution cases.[21] Bell AJ held that while s 14 of the Limitation Act 1950 and s 34 of the Limitation Act 2010 provide that time does not start to run for contribution claims until the defendant's liability is fixed by agreement or judgment, s 393(2) applies when the claim is a civil proceeding relating to building work.[22] He stated that while *BNZ Branch Properties* recorded these arguments, Clark J said they do not apply.[23]

[48] In *BNZ Branch Properties*, Clark J drew a distinction between "original claims" and "ancillary claims" such as contribution claims, and found that the time limits for contribution claims were exclusively found in the Limitation Acts, so s 393(2) did not apply to claims for contribution.[24] Clark J held there was a consolidation of the right to contribution into a code under the Limitation Acts, and characterised s 393 as a general provision, whereas she characterised s 34 of the Limitation Act 2010 as a specific provision.[25] The specific provision was said to prevail under the canon *generalia specialibus non derogant*.

[49] In response, Bell AJ noted that it was difficult to argue a statute represents a code when the enactment expressly provides that it may be overridden by other acts, noting s 33 of the Limitation Act 1950 and s 40 of the Limitation Act 2010.[26] Bell AJ also noted that s 393 expressly applies the Limitation Act, but then makes those rules subject to the ten-year longstop, and declined to read down the words of s 393:

> [50] … That is reinforced by s 393 which expressly applies the Limitation Act, but then makes those rules subject to the ten-year longstop. As on any ordinary reading s 393 overrides the general limitation statute, a suggestion that s 393 should be read down on account of other rules in the limitation statute is not convincing

[50] Bell AJ also recognised the distinction between original and ancillary claims does not support Clark J's reasons for treating s 393 as not applying to contribution claims.[27] Noting the discretion to allow relief for an ancillary claim when relief is allowed for an original claim in s 50 of the Limitation Act 2010, Bell AJ held that s 50 only applied to limitation rules under the 2010 Act,

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[21] At [36]–[37].
[22] At [37].
[23] At [39].
[24] At [40]–[41].
[25] At [42]–[43].
[26] At [48]–[49].
[27] At [51].

and that it had nothing to do with limitations under other acts, including the Building Act 2004. [28] Bell AJ also noted that the Building Act does not draw any distinction between original claims and ancillary claims. [29]

[51] Importantly for the jurisdiction of this Tribunal, there is also no distinction between original and ancillary claims under the Act. When this Tribunal joins a party, it joins them as a respondent.[30] The Act at s72(2) empowers the Tribunal to determine any liability of any respondent to other respondents. It is this provision which gives the Tribunal powers to make orders for " contribution " and captures the treatment of " ancillary " claims.

[52] Bell AJ concluded as follows:

> [54] With great respect, I disagree with Clark J. In my opinion the arguments that s 393(2) overrides the limitation periods in s 14 of the 1950 Act and s 34(4) of the 2010 Act are stronger than those set out in her judgment. They are consistent with the purpose of setting a firm longstop and with the text which makes it clear that the section overrides the Limitation Act. The attempt to carve out an exception for contribution claims is strained and unsuccessful.

[53] While the Tribunal recognises there is conflicting High Court authority on whether s 393(2) of the Building Act 2004 applies to claims for contribution, the weight or preponderance of High Court authority lies in the approaches recorded in *Dustin*, *Carter Holt Harvey Ltd v Genesis Power Ltd, Davidson v Banks, Body Corporate 169,791 v Auckland City Council*, *Perpetual Trust v Mainzeal Property and Construction Ltd*, and *Minister of Education v James Hardie New Zealand*. *Body Corporate 328,392* represents the latest statement from that line of authority in the High Court declining to follow the *Cromwell Plumbing* approach, including for the further reasons provided in *BNZ Branch Properties*. The Tribunal therefore concludes that the preponderance of authority supports that s 393(2) of the Building Act applies to contribution claims to the extent the claim relates to building work.

[54] In summary I am satisfied that there is no evidence before the Tribunal of any impugned design defects (as alluded to by the first

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[28] At [52].
[29] At [53].
[30] Section 111(1) of the Act.

respondent in its submissions opposing removal) or, that if there were, they had been carried through to construction. I am satisfied that there is no evidence disputing that the ZQN apartments were built contrary to the fourth respondent's plans and drawings and in any event, issues of design are time-barred for more than 10 years have passed since the fourth respondent completed its drawings and plans.

[55] Considering all the evidence before the Tribunal responding to the fourth respondent's removal application, I am satisfied that there is no tenable claim against the fourth respondent and that such claim as alleged in the first respondent's application for joinder can be summarily dismissed.

[56] For the reasons set down above, I consider it fair and reasonable that the fourth respondent's application for removal be granted. Leuschke Kahn Architects Limited is removed from these proceedings.

DATED this 13th day of December 2021

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K D Kilgour
Tribunal Member