IN THE WEATHERTIGHT HOMES TRIBUNAL

TRI-2012-100-000008
[2013] NZWHT AUCKLAND 9

BETWEEN	BODY CORPORATE 85978 and the UNIT OWNERS OF ST PAULS APARTMENTS Claimants
AND	WELLINGTON CITY COUNCIL First Respondent
AND	ULTRA GLASS COMPANY LIMITED (Removed) Second Respondent
AND	CALDER STEWART INDUSTRIES LIMITED (Removed) Third Respondent
AND	BURNSFIELD ENGINEERING LIMITED (Removed) Fourth Respondent
AND	NEWCREST HOLDINGS LIMITED Fifth Respondent
AND	DENNIS JOSEPH LARKHAM Sixth Respondent
AND	MARK ANDREW EBERT Seventh Respondent
AND	OPUS INTERNATIONAL CONSULTANTS LIMITED Eighth Respondent
AND	SJ ROOFING LIMITED Ninth Respondent

Hearing: 14 March 2013

Appearances: Dan Parker and Amy Williamson for the Claimants
Andrew Hough for the First Respondent
Polly Pope for the Fifth Respondent

Decision: 28 March 2013

DETERMINATION
AS TO THE STATUS OF CERTAIN UNITS
Adjudicator: P A McConnell

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[1] In February 2012 Body Corporate 85978 filed a multi-unit claim with the Weathertight Homes Tribunal. The claim was filed by the Body Corporate both in relation to the common property and on behalf of 113 of the 114 unit owners of the St Pauls Apartments. Accompanying the application was a letter from Parker & Associates requesting that 22 of the 113 owners be added to the representative claim in accordance with ss 26 and 27 of the Weathertight Homes Resolution Services Act. Mr Parker also requested that five former owners be removed as they had sold their units. Purchasers of those units were included in the 22 new owners to be added.

[2] The Council, supported by the fifth respondent, submits that the 51 unit owners listed in Schedule One were either not eligible to be part of the representative claim or alternatively should be removed. These units fall into the following categories:

a) Six units (the new owners) are limitation barred. The owners at the time the claim was found eligible have sold their units and withdrawn their part of the claim. The Council submits that the relevant date for limitation purposes for the new owners of these units is the date they were joined to the claim which was more than ten years after the complex was built.
b) A further 21 units are limitation barred (the limitation units) either because they were not added to the claim under ss 26 and 27 until the claim was filed with the Tribunal, or although found eligible were never properly added to the claim as there is no evidence that they strictly complied with the criteria set down in ss 26 and 27 of the Act.
c) 19 units (the Quest units) plus the unit 55, the cafe, have not appropriately been joined to the claim because they were not part of the eligible claim. These units the Council submits do not fit within the definition of a dwellinghouse as defined in s 8 of the Act because they are leased to Quest and being run as a hotel or motel.
d) The Tribunal has no jurisdiction to receive an application including a further three units (the new Quest units) as although found eligible by the chief executive, they are no

longer dwellinghouses. They also form part of the Quest units and are therefore a hotel or motel.

e) Three should be removed as the unit owners purchased those units with full knowledge of the weathertightness issues (the knowledge units).

[3] The claimants oppose the applications by the Council. Firstly they say that the Tribunal does not have jurisdiction to remove claimants from a multi-unit claim under s 112 of the Act. In addition they submit that once a multi-unit claim is filed under the Act and is found eligible time stops running for limitation purposes in relation to all units in the complex whether or not they were in the initial application.

[4] The claimants also submit that all of the units fit within the definition of a dwellinghouse as the issue of whether they were intended to have as their principal use occupation as private residence should be determined at the time of construction and not on the basis of the use to which a unit is put at any particular time. In addition they submit that the Quest Units are not a hotel or motel.

[5] The claimants are not however disputing the applications by the Council in respect of units 18, 54, 55 and 108 other than in relation to the threshold argument which is set out in a) below. Withdrawals of authority for those units have either been filed or will shortly be filed.

[6] The issues I therefore need to decide are:

a) Does the Tribunal have the power to either remove unit owners from a multi-unit claim or to direct that the claim ceases to relate to individual units within the complex?
b) Do multi-unit claims, once found eligible, include the whole complex or only those units that have been found eligible?
c) Which units are part of the eligible claim and entitled to apply to the Tribunal under s 60 of the Act?
d) What is the date that stops the clock running for limitation purposes for units subsequently added to the claim under ss 26 and 27?

e) Do owners of units that have been found to be eligible have to establish they have filed the appropriate paperwork to be part of the adjudication claim?
f) Are the Quest units dwelllinghouses as defined by the Act?
g) Were the owners of units 17, 19 and 96 entitled to be part of the claim that applied for adjudication under s 60 of the Act as they are now part of the Quest pool?
h) Should the claim by the owner of unit 20 be removed as it knew the unit was part of a leaky complex at the time it purchased?

DOES THE TRIBUNAL HAVE THE POWER TO REMOVE UNIT OWNERS UNDER S 112?

[7] Mr Parker submits that the owners of the individual units are not parties to the claim and therefore there is no jurisdiction to remove them pursuant to s 112. He submits individual owners are not parties if the definition of parties and claimant as set out in s 8 is considered. In particular claimant is defined as meaning "a person who applies to the chief executive to have an assessor's report prepared in respect of a building". In a multi-unit complex claim the person who applies to the chief executive is the representative of the owners. With this complex it is the Body Corporate and not the owners of the dwellinghouses themselves.

[8] Mr Parker therefore submits that individual unit owners are not given party status. He further notes that in ss 26 to 28 of the Act it refers to the claim ceasing to relate, or extending, to the dwellinghouse concerned. It does not refer to the individual unit owners as parties.

[9] Whilst individual unit owners may not fit within the definition of a claimant, and therefore a party, the Tribunal clearly has jurisdiction to direct that a multi-unit claim ceases to relate to a particular unit. In this regard I note that s 29 provides that the chief executive or Tribunal must be advised of a change of ownership of any unit within a multi-unit complex and the effect of the change of ownership is that the claim ceases to relate to that dwellinghouse but can proceed in relation to other dwellinghouses. Section 28 further provides that the effect of a withdrawal of the authority by

an owner of a dwellinghouse of a multi-unit complex means that the claim ceases to relate to the dwellinghouse concerned.

[10] Section 26 also says that an owner of a dwellinghouse can be added to a multi-unit complex claim, with the Tribunal's consent, by applying to the Tribunal in writing and by the unit owner giving written notice authorising the representative to take action and also authorising invasive testing.

[11] Even if Mr Parker is correct in his submission that the Tribunal cannot remove a unit owner as a party, it can direct that a claim cease to relate to a particular dwellinghouse. I further note that s 73(1) of the Act enables the Tribunal to conduct proceedings in a manner it thinks fit, including adopting processes that enable it to perform an investigative role and issue any other reason or directions relating to the conduct to the proceedings. It would also be within the purposes of the Act which are to provide access to speedy, flexible and cost-effective procedures for the resolution of claims for the Tribunal to be able to direct that a claim ceases to relate to a particular unit if it is established that those owners were not eligible to be included in the claim or if the claim in relation to particular units is limitation barred.

[12] If the Council is correct, and the Tribunal had no jurisdiction to accept the application so far as it relates to those unit owners, then even if I can not remove those unit owners as parties I must be able to direct that the claim ceases to relate to those units.

[13] Therefore while I accept that the individual owners are not parties, if the definition of party is strictly applied, the Tribunal can direct that a claim ceases to relate to particular units in circumstances where those units' owners had no right to be part of the claim or where the claim by those units is established to be limitation barred.

[14] All but the application in relation to the knowledge units fall within these categories. For the purposes of the Council's application there is no dispute in relation to the key facts in relation to the Quest Units and the limitation units. The issues in dispute are primarily legal issues and issues of statutory interpretation. Accordingly they are appropriate issues to be

determined in the context of either a removal application or as a preliminary determination on the status of the various units.

DO MULTI-UNIT CLAIMS, ONCE FOUND ELIGIBLE, INCLUDE THE WHOLE COMPLEX OR ONLY THOSE UNITS THAT HAVE BEEN FOUND TO BE ELIGIBLE?

[15] The Act sets out an assessment process for the owners of leaky homes and an alternative process for resolving claims to that offered by the courts. A pre-requisite to accessing the assessment and Tribunal processes is that a claim needs to be found to be eligible as defined by the Act. The 2006 Act introduced specific provisions in relation to multi-unit complex claims, including a class action type approach with individual unit owners in a multi-unit complex that leaks only able to bring claims as part of a multi-unit claim.

[16] The provisions in the Act allowing representative claims in respect of multi-unit complexes are essentially administrative in nature. They require claims by separate owners of dwellinghouses in multi-unit complexes to have their claim treated as a single claim in order to avoid the duplication of resources that would be involved in dealing with each claim separately. They also reduce the difficulty of dealing with claims relating to common property when unit owners file their claims individually. If the claim goes to hearing the Tribunal is still required to analyse the claim in relation to each individual unit owner and address the individual merits of each owner who participates in the claim.

[17] In unit title complexes such as this one the Body Corporate is the agent of the individual owners both in relation to the claim for their units and also as the owners of the common property. Its claim in relation to damage cannot be better than that of the particular unit owners and must be subject to the same defences. If there is contributory negligence or other defences in relation to an individual owner the claim for the proportion of the damage relating to that unit, and also the relevant proportion of the common damage, is deducted from the amounts awarded. In addition individual unit owners can bring unit specific claims against parties such as pre-purchase inspectors, real estate agents and vendors.

[18] Mr Parker is therefore correct in his submission that under the Act a multi-unit complex can bring one claim, initiate and undertake one adjudication and disputes resolution process. Single residential owners are not able to bring separate claims except in exceptional circumstances. However this does not necessarily mean that once a claim is accepted as eligible the entire complex becomes the subject matter of the claim.

[19] Mr Parker submits that the representative procedure for multi-unit claims was designed to avoid the need for every owner to be named or provide authorisation in order to commence the process provided they meet the 80 per cent threshold prescribed in s 2(1). That again is correct but it does not mean that the claim also covers all units, particularly those whose owners have not provided the appropriate authorisation or ones that have not been found eligible. I do not accept Mr Parker's submission that the Select Committee report in relation to the Weathertight Homes Resolution Services Amendment Bill suggests that once found eligible the claim would be for the whole complex. The aim was to, as far as possible, make the claim relate to all units, but it does not automatically mean that the claim once found eligible relates to the whole complex.

[20] Section 19 of the Act states "the representative of some or all of the owners of dwellinghouses in a multi-unit complex may bring a claim under this Act in respect of those dwellinghouses..." This wording makes it clear that the representative claim may relate to some of the units only and not necessarily all of them. In addition if a claim were to be found eligible in relation to all units there would be no need to have the provisions contained in ss 27 and 28 relating to the addition of owners of dwellinghouses or units to a multi-unit claim. In particular there would be no need to give written notice that the owner wishes the claim to extend to his or her dwellinghouse if his or her dwellinghouse was already included in the claim.

[21] The extent of a multi-unit complex claim only relates to those units where the owner has given the representative a written notice authorising the claim and invasive testing that have been found eligible together with units that have been added by either the chief executive or the Tribunal pursuant to ss 26 and 27.

WHICH UNITS WERE PART OF THE ELIGIBLE CLAIM AND ENTITLED TO APPLY TO THE TRIBUNAL PURSUANT TO S 60?

[22] On 20 June 2008 the Body Corporate filed an application with the Department of Building and Housing under s 16 of the Act on behalf of more than 80 per cent of the unit owners. Units 64 and 66 were added to the claim on 10 October 2009 which resulted in a brief addendum report being prepared. Prior to the assessors' invasive investigation there was some communication between the Department of Building and Housing claims advisor, Derek Sharp and Paul Crew, the secretary of the Body Corporate. Mr Sharp advised Mr Crew that the Department's view was that 21 of the units were not being used as private residences and did not fit within the definition of a dwellinghouse. In particular 20 units were being managed by Quest for short-term accommodation of a hotel or motel type nature and one was being used as a coffee shop. No formal notice of withdrawal was filed, nor was there any formal decision in relation to these units not being eligible. The claim however was progressed by the Department of Building and Housing on the basis that the 21 units considered by the Department not to be dwellinghouses would not form part of a claim.

[23] The formal eligibility decision was attached to a letter dated 23 November 2009 and under the heading "Property" it stated "St Pauls Apartments (81 properties)". It then went on to say that the above claim was an eligible claim under the Act. According to the Department of Building and Housing records the 81 properties or units referred to are those set out at Schedule Two of this order.

[24] When the claim was filed with the Tribunal it purported to include all but one unit in the complex. With the notice of adjudication notices of withdrawal were filed in relation to units 18, 25, 36, 37, 41 and 73 as the unit owners at the time the claim was found eligible had sold their units. New applications were simultaneously made to join the new owners of all those units to this claim. Orders removing and joining particular unit owners were made in Procedural Orders 2 and 3 with a proviso that the Council reserved its ability to argue affirmative defences including limitation, causation and contributory negligence.

[25] The claimants' case is based on the premise that the reference to 81 properties in the eligibility decision had no particular meaning and does not mean that only 81 properties formed the eligible claim. Mr Parker noted that there was no reference to the unit numbers of the 81 properties in the eligibility decision nor was there any formal decision finding any other units not eligible. I accept that the eligibility decision should have listed the units that were found to be eligible and should have contained a formal decision as to eligibility for the balance of the units for which authorities had been filed. It is unfortunate that this did not happen as it has created confusion for those not a party to the conversations and correspondence between Mr Crew and Mr Sharp.

[26] However the claim was only ever found eligible in relation to the 81 units that are listed in Schedule Two. Mr Crew the sole director of the Body Corporate, and the person who submitted the applications and dealt with the claims advisor knew only 81 units had been found eligible and that the units known as the Quest units were not part of the eligible claim. While the Chair of the Body Corporate and the individual unit owners may not have fully understood the situation it is Mr Crew who was the contact person and the human face of the claimant for this claim. In addition it appears to be common knowledge that the issue of whether the Quest units could be part of the claim would be something that the Tribunal would need to determine after the claim for adjudication was filed.

[27] The Act makes it clear that only owners of dwellinghouses with eligible claims are able to apply for adjudication with the Tribunal. Section 60 of the Act provides:

> **60 Right to apply for adjudication of claims**
>
> (1) The owner of a dwellinghouse has the right to apply to the tribunal to have the claim adjudicated if it is an eligible claim.

[28] The statutory framework under the Act for multi-unit claims provides that the only way a unit can be part of an adjudication claim is by applying under s 60 as part an eligible claim or by being added to the claim under ss 26 and 27. The claim had only been found eligible in relation to

the 81 units in Schedule Two and therefore only a claim covering those units and the common property would be an eligible claim that could be filed with the Tribunal. To date no application has been made to join the Quest Units as further owners under ss 26 & 27. This means that the Tribunal has no jurisdiction to deal with a claim in relation to the Quest Units.

[29] There appears to be nothing to stop the unit owners of the Quest units from applying under ss 26 and 27 to be added as further owners. If such an application were now made I would need to determine whether they were owners of a dwellinghouse as defined in s 8 of this Act. This is because only dwellinghouses can be part of an eligible claim and also because under s 60 the claimant has to be the owner of the dwellinghouse, or, by implication, the representative of the owners of dwellinghouses.

[30] I will consider later on in this decision whether or not the Quest units fit within the definition of a dwellinghouse. However, if I were to find that the Quest units fit within the definition of a dwellinghouse they could rely on the date of the original application to the Department of Building and Housing for an assessor's report for limitation purposes as they formed part of that application. This would mean that the claim as it relates to the Quest units would not be limitation barred.

WHAT IS THE DATE THAT STOPS THE CLOCK RUNNING FOR LIMITATION PURPOSES FOR UNITS SUBSEQUENTLY ADDED TO THE CLAIM?

[31] Mr Parker submits that the combined effects of ss, 37, 32 and 30 is that the filing of the initial application for an assessor's report stops the clock running for limitation purposes for all units whether or not those owners were owners at the time or were included with the application and signed the necessary authority form.

[32] Section 37 of the Act provides:

> **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.

[33] Section 32(1) states:

> **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.

[34] The effect of these two sections is that time stops running for limitation purposes at the date the owner of a dwellinghouse applies to the chief executive to have an assessor's report prepared in respect of that dwellinghouse. The issue therefore is whether time stops running for unit owners who wish to be added to a multi-unit claim at the time the complex claim is filed or the time they apply under section 26 and 27 to be added to the claim.

[35] The claimants submit that the effect of s 30 of the Act means that time stops running when the representative initially applies for an assessor's report under s 32. Any unit owners who subsequently apply to join the claim under ss 26 and 27 therefore have the advantage of the date the original application was filed for the purposes of the Limitation Act and any other enactment that imposes the limitation period. Section 30 states:

> **30 Application of Act to representative claims in respect of multi-unit complexes or stand-alone complexes**
>
> For the purposes of a claim under section 19 or 20 or 21, this Act applies, unless the context otherwise requires, as if—
>
> (a) every reference in it to a dwellinghouse included a reference to the multi-unit complex or stand-alone complex concerned; and
>
> (b) every reference in it to the owner of a dwellinghouse included a reference to the representative of the owners of the

> dwellinghouses in the multi-unit complex or stand-alone complex concerned; and
>
> (c) every reference in it to a party or parties included a reference to the representative of the owners of the dwellinghouses in the multi-unit complex or standalone complex concerned.

[36] I note that s 30 does not say that every reference to a dwellinghouse with multi-unit claims is replaced by a reference to a multi-unit complex what it says is that the reference to "a dwellinghouse included a reference to the multi-unit complex". In addition s 30(b) says that every reference to the owner of a dwellinghouse **includes** a reference to the representative of the owners of the dwellinghouses in the multi-unit complex. The beginning of that section also provides "unless the context otherwise requires".

[37] Mr Parker also submits that *Kells v Auckland City Council*[1] is authority for the proposition that filing for the assessor's report stops time for all purposes. In particular he refers to paragraph [37] where Asher J concluded "the legislature intended that time would stop running for all purposes at the time of the initial request for an assessor's report".

[38] *Kells* however was not considering the situation of multi-unit claims. It was considering the situation of a standalone dwellinghouse with one set of claimants and the issue there was whether the time stopped running for limitation purposes for parties subsequently joined on the application of another respondent. Justice Asher was not considering the question of whether s 32, in the context of a multi-unit claim, is referring to the date the representative files the claim on behalf of some of the unit owners or the date that another unit owner, not part of the original application, subsequently applies to be added to the claim.

[39] Therefore I do not consider that *Kells* addresses the key issue that needs to be considered in relation to this claim. The key issue here is whether an owner of a unit in a multi-unit complex who wishes to be added to a claim is deemed to have brought the claim when they file their application under ss 26 and 27 or whether the original application for an

[1] *Kells v Auckland City Council* HC Auckland, CIV-2008-404-1812, 30 May 2008.

assessor's report by the representative also stops the clock running for all units that subsequently apply to join the claim.

[40] In considering this question it is relevant to consider the process that needs to be followed by unit owners who wish to be added to the claim filed by the representative. Section 27(1) provides that to add an owner prior to the claim being filed with the Tribunal, the owner of the dwellinghouse must provide the representative with a written notice authorising them to take action and also authorising invasive testing by an assessor relating to their dwellinghouse. Once the claim is with the Tribunal, subsection (2) applies and requires the unit owner, through the representative, to provide written notice authorising the representative to take action and also authorising invasive testing.

[41] Section 26(4) requires the chief executive under s 27(1), or the Tribunal under s 27(2) to consider whether a further assessment should be done and an addendum report prepared or whether the claim can proceed without a further assessment. As noted earlier when units 64 and 66 applied to join the claim a short addendum report was prepared.

[42] The claimants' argument that the filing of the application by the representative on behalf of the majority of the unit owners stops the clock running provides a clear and single answer to the question of the relevant date for limitation purposes. It can therefore be said to be within the purposes of the Act to provide flexible and cost-effective resolution of claims.

[43] Such an interpretation would however lead to an unsatisfactory, and not necessarily rational, conclusion in relation to new unit owners that apply to be joined to the claim. The claimants' interpretation would mean that for those units the time would stop running in relation to their claim from a time before they were even owners and had a claim that they could bring.

[44] This situation applies to the five new unit owners as noted in Schedule One. For all those units the original owner filed a claim which was found to be eligible. The Act however requires that on the sale of the unit the claim ceases to relate to that dwellinghouse. New owners can then

be added to the claim under ss 26 and 27. It would require very clear wording in the legislation if its intent was that subsequent purchasers could rely on the date previous owners filed their claim for limitation purposes in situations which did not include an assignment of the original claim. For these units the claim by the previous unit owners was withdrawn and therefore the claim ceased to relate to those units. The application by the new unit owners to join the claim therefore was effectively an application under s 32(1)(b) to have an assessor's report that was prepared in respect of it on the application of a former owner approved to be suitable for the new owners' claim.

[45] For the new owners therefore the date that stops time running for limitation purposes is the date they applied to be added to the claim and provided the appropriate written authority. Those applications and supporting documentation were filed with the Tribunal claim in February 2012. There is no dispute that date is more than ten years after any act or omission on which the claim is based. The claims in relation to those units are accordingly limitation barred and the claim ceases to relation to units 18, 25, 36, 37, 41 and 73.

[46] The other units that applied to be added to the claim when it was filed with the Tribunal all had the opportunity to be part of the claim when the initial application for an assessor's report was filed. They chose at that time not to be part of the claim and not to give consent for invasive testing. The Council argues that it is not reasonable that they should be able to rely on the date the representative filed the claim when they chose not be part of the claim at that time.

[47] As noted earlier when claims go to hearing the Tribunal is required to consider the claim in relation to each individual unit and different defences may need to be considered in relation to different units. For eligibility purposes it is appropriate to have one date to stop the clock running when determining the "built by" date. However finding a claim eligible does little more than allow the claimants access to the processes provided under the Act. It does not prevent limitation defences being successfully raised by any party during the adjudication process in relation to all or some of the units. There appears to be no overriding policy reason why limitation defences should fit into a separate category and an arbitrary

timeline set that applies to all unit owners regardless of when they were added to the claim and asked for their units to be assessed.

[48] The context of ss 37 and 32 when considering the whole statutory scheme of multi-unit claims does not require s 32 to be interpreted as meaning that the initial application for an assessor's report by the Body Corporate stopped time running for all unit owners regardless of whether they were then part of the claim. I conclude that with multi-unit claims the filing of the representative's application for an assessor's report only stops time running for the unit owners who are part of that claim at that time. For unit owners who subsequently apply to join the claim time does not stop running until the date they apply to be added to the claim under ss 26 and 27. It is at this time that they provide authorisation for invasive testing and apply for an assessor's report. The chief executive, or the Tribunal, then needs to decide whether an addendum report should be prepared or whether the existing reports are sufficient.

[49] Units 1, 20, 44, 51, 57, 58, 69, 78, 86, 89, 92, 102 and 104 did not apply to be added to the claim and provide authority for invasive testing until February 2012. This is more than ten years after any acts or omission on which the claim is based. The claim in relation to those units is therefore statute barred under the long stop provisions of the Building Act. The claim therefore ceases to relate to those units.

[50] I note that although the claimants filed an application to add unit 27 and 30 to the claim they were already among the 81 units found eligible by the chief executive. There was accordingly no need for them to be added and they are able to rely on the date the initial application was filed by the Body Corporate for limitation purposes.

DO OWNERS OF UNITS THAT HAVE BEEN FOUND TO BE ELIGIBLE HAVE TO ESTABLISH THEY HAVE FILED THE APPROPRIATE PAPERWORK TO BE PART OF THE CLAIM?

[51] The Council also argues that there are a further eight units that are limitation barred because there is no evidence that they completed the appropriate authority forms. However all of those units were among the 81 properties that were found to be eligible. The only pre-requisite for filing

with the Tribunal as set out in s 60 is the claimants are required to be the owner of a dwellinghouse which is an eligible claim. These units have fulfilled those requirements.

[52] If the Council is saying the claims should never have been found eligible then that is not a decision the Tribunal can review. The Tribunal only has a very limited right to review the chief executive's decision on eligibility as set out in s 49 of the Act. Those circumstances do not apply here. In any event it is more likely that the relevant authorities and other documents were provided but the paperwork has been lost. In addition claimants do not have to re-establish eligibility when filing with the Tribunal. The Council's claim in relation to these units is therefore dismissed.

ARE THE QUEST UNITS DWELLINGHOUSES AS DEFINED BY THE ACT?

[53] The Council submits that the Quest units are not dwellinghouses because they are a hotel or motel. Consequently the Council says the Quest units can neither be found eligible nor can they be part of a claim filed with the Tribunal under s 60. A prerequisite to filing with the Tribunal is that a unit needs to fit within the definition of a dwellinghouse.

[54] "Dwellinghouse" is defined in s 8 of the Act as:

> **dwellinghouse**—
> (a) means a building, or an apartment, flat, or unit within a building, that is intended to have as its principal use occupation as a private residence; and
> (b) in the case of a dwellinghouse that is a building, includes a gate, garage, shed, or other structure that is an integral part of the building; and
> (c) in the case of a dwellinghouse that is an apartment, flat, or unit within a building, includes a door, gate, garage, shed, or other structure that—
> (i) is an integral part of the building; and
> (ii) is intended for the exclusive use of an owner or occupier of the dwellinghouse; but
> (d) does not include a hospital, hostel, hotel, motel, rest home, or other institution

[55] The key issues I need to determine when considering whether the Quest units are dwellinghouses are:

- What is meant by the phrase “intended to have as its principal use occupation as a private residence”?
- If units are actually being used as a hotel or motel, are they excluded from the definition of a “dwellinghouse”?
- Are the Quest units a hotel or motel?

What is meant by the phrase “intended to have as its principal use occupation as a private residence”?

[56] The Council appears to be submitting that it is the actual use to which a unit is put at any one time that is the determinative factor in relation to the intended use. The definition of dwellinghouse in the Act does not however relate to the nature of its use at the time the application is filed under the Act. The relevant consideration is whether it was intended to have as its principal use occupation as a private residence.

[57] The Act is in part consumer protection legislation and was designed to assist the owners of leaky homes. It was not intended to provide assistance for the owners of commercial properties to resolve disputes in relation to leaky buildings. This is the main reason for limiting eligibility to dwellings that were intended to be used as a private residence. A further reason for the criteria in relation to dwellinghouses was because at the time the legislation was passed residential properties were considered to fit within a different category when considering whether a duty of care was owed.

[58] The assessment and adjudication functions established by the Act are to provide owners of leaky homes with access to speedy, flexible and cost-effective procedures for the assessment and resolution of claims relating to those buildings. The fact that a claim is found eligible does not mean that it will be a successful claim. All it means is that the home-owner is able to access the assessment and resolution process set up by the Act. The eligibility criteria are not designed to place additional barriers in the

way of leaky home-owners, but to prevent claims from proceeding which have little chance of success. Unless precluded by the clear language of the statute, or binding court decisions, the eligibility criteria should be interpreted in such a way that would not unreasonably restrict home owners access to the assessment and adjudication processes under the Act.

[59] The definition of dwellinghouse does not state whether the intended use should be assessed as at the time of construction, the time of purchase by the current owners, or the time of application under the Act. In relation to dwellinghouses within a multi-unit complex it is also silent as to whether a single intention should relate to the whole complex or whether each unit should be considered individually.

[60] Similar issues have been considered by the Supreme Court in the context of whether a territorial authority owes a duty of care to home owners. The Supreme Court in *Sunset Terraces*[2] concluded that it was the intended use at the time of construction that is the relevant consideration in relation to whether territorial authorities owe a duty of care to unit owners.

[61] Since the Supreme Court decision in *Sunset on Byron* there is no longer a distinction between commercial and residential property in relation to whether a duty of care is owed and the issue of whether a duty of care is owed is not the issue to be determined in this case. However a consideration of whether the owners of the premises intended it for use as a home is in substance the same as the question of whether the owners of the units intended the units to have as their principal use, occupation as a private residence.

[62] It would be reasonable to interpret the issue of whether a dwelling was intended to have occupation as a private residence as its principal use consistently with the way Courts have determined whether premises were intended for use as a home. In *Sunset Terraces* this question as to intended use needed to be established on the basis of the plans lodged with the Council.[3] I therefore conclude that with multi-unit complexes the

[2] *North Shore City Council v Body Corporate 188529* (Sunset Terraces) [2010] NZSC 158 [2011] 2 NZLR 289 at [49].
[3] Above n2 at [51].

issue of intention for eligibility purposes should in most cases be on the basis of the plans lodged with the Council.

[63] There will be cases, particularly single dwellinghouse claims, where the intention at the time of the building consent may not be determinative. An example would be where it is established that both the use of the dwelling, and the owner's intention as to the use of their dwelling, are inconsistent with the intention at the time the plans were lodged.

[64] Ms Pope submits that the subsection d) to the definition of a dwellinghouse also provides a statutory exception to the general rule that a unit fits within the definition of a dwellinghouse if it was "intended to be used as a private residence" and that where the dwelling is being used as a hospital, hostel, hotel, motel, rest home or other institution.

If a unit is a hotel or motel, is it excluded from the definition of a "dwellinghouse"?

[65] Ms Pope submits that even though the intent in relation to both the Quest and the new Quest units may have been for them to have as their principal use occupation as a private residence they are now being used as a motel or hotel and therefore do not fit within the definition of a dwellinghouse. She also submits that with a multi-unit complex claim a decision on whether a unit is a dwellinghouse or a hotel or motel should be made on a unit by unit basis and not by consideration of the complex as a whole.

[66] I accept Ms Pope's submission that if a dwelling, although intended for private use, is in fact a hotel, motel or other institution it does not fit within the definition of a dwellinghouse under the Act. Mr Parker however submits that a whole of complex approach should be taken when determining whether it is a hotel or motel and not on a unit by unit consideration.

[67] In *Spencer on Byron*[4] the majority of the Court of Appeal concluded it was not appropriate to impose a duty of care on the Council

[4] *North Shore City Council v Body Corporate (Spencer on Byron) 207624* CA CA760/2009, 21 April 2011.

solely in relation to the owners of residential units and to separate those out from the commercial units. The Court considered the ultimate question of whether it was fair and reasonable to impose a duty of care upon the Council, the complex needed to be looked at as a whole. They did not consider it was feasible to isolate the weatherproofing issues by reference to residential and commercial components in a building in which all units were contained within one structure, the weathertightness of the entire building was interlinked and indivisible and in order to restore the position of the owners of the residential units, it was necessary to repair the entire building.

[68] The Supreme Court however overturned the Court of Appeal's decision[5] on the issue of a duty of care and therefore did not make any specific finding as to whether the complex needed to be considered as a whole or whether different units could have different intended uses. William Young J in his dissenting judgment however preferred a unit by unit approach rather than a consideration of the predominant use of the complex when determining the issue of whether its intended use was as a home.

[69] The issue the Court of Appeal was however considering in the *Spencer v Byron* case was not the interpretation of dwellinghouse in the Weathertight Homes Resolution Services Act 2006 or whether s 30 of the Act requires the complex to be considered as a whole when determining whether a unit is a hotel or motel and therefore not a dwellinghouse.

[70] Therefore when considering whether a multi-unit complex is a dwellinghouse consideration needs to be given both to the use of the complex as a whole and also to the individual units within the dwellinghouse. This multi-unit complex like many others consist of different buildings sometimes constructed at different times and by different people. Different parts of the building can have, and be always intended to have different uses. For example, unit 55 of this complex has always been intended to be a coffee shop or cafe.

[5] *Body Corporate 207624 v North Shore City Council* [2012] NZSC 83.

[71] With other complexes there are clearly defined areas that have been intended to be commercial or shops with other parts being residential. With those complexes it would not be reasonable to interpret the Act in such a way that provided the majority of the complex was being used as private residences the whole complex would be considered a dwellinghouse for the purposes of the Act even if there were clearly delineated areas that were commercial or run as a hotel. Even when considering whether the property was intended to be a private residence it is necessary to consider the complex unit by unit rather than take a whole of complex approach

[72] I therefore conclude that when determining whether a multi-unit claim is a claim by the representative of owners of dwellinghouses consideration needs to be given to each individual unit to determine whether they meet the definition of a dwellinghouse. It cannot be considered on the basis of the complex as a whole.

[73] However the more relevant issue in relation to the Quest units is whether these units are a hotel or motel and therefore should be excluded.

Are the 'Quest' units a hotel, motel, or other institution?

[74] The units that form part of the Quest St Paul's provide serviced accommodation for both short and longer term stays. They can be booked for one night only and have an office reception area. Their website states that people who stay there can have breakfast delivered to their room and they offer on-site parking at extra cost.

[75] Hotel and motel are not defined in the Act but courts have generally concluded that determining factors include such things as habitation for short periods, including overnight [6] and operating the complex for commercial purposes by selling a licence to occupy a room for a specified (but, generally short) times.[7] The *Shorter Oxford English Dictionary* definition includes "an establishment, esp of a comfortable or luxurious kind, where paying visitors are provide with accommodation,

[6] *Te Mata Properties Ltd v Hastings District Council* [2008] NZCA 446; [2009] 1 NZLR 460 (CA) at [64].
[7] *Body Corporate 188529 v North Shore City Council* [2008] 3 NZLR 479 (HC) at [191].

meals or other services" earlier on in the definition reference is made to hotel including serviced units.

[76] In the dwellinghouse definition in the Act, hotel is included with hospital, hostel, rest home or other institution. The common denominator of the institutions named is that they are commercial operations providing services on top of accommodation and the accommodation provided is generally shorter term or specialised in nature.

[77] The business entity known as Quest St Pauls is being run as a commercial operation and provides serviced units primarily for short term accommodation. It is run similar to what one generally considers to be a hotel. It is listed on hotel accommodation providers and has a star rating.

[78] However the Quest units do not fit within a defined part of the complex. They constitute approximately 18 per cent of the units and are scattered throughout the buildings which make up the St Pauls Apartments. Some of the Quest units are also free to withdraw from being managed by the Quest by providing three months notice. While the majority of the Quest units have been part of the Quest pool of units since Quest took over the management rights, one unit which was part of the Quest units at the time of application is now being used as a private residence and three other units have subsequently become part of the Quest pool.

[79] Mr Parker submits that these factors point to a conclusion that the Quest units are not a hotel or motel for the purposes of the Act. He also submits that it would be unworkable to try and assess whether units at St Pauls are eligible or not based on whether they are leased to Quest given the fluid nature of the arrangement. He says it would be absurd and unworkable to assess a unit's eligibility as changing throughout its life with no change to the unit itself.

[80] Mr Parker further submits that considering the usage to which a unit is now put ignores the fact that Heath J analysed the WHRS Act in reaching his conclusion on *Sunset Terraces* that the question of when a determination as to whether a unit is a dwellinghouse is to be made at the date of the building consent. I have already accepted the submission that,

in general, consideration of whether a building is intended to have as its use a private residence should be made at the date of the building consent. The Quest units therefore prima facie fits within the definition of a dwellinghouse. Subsection (d) of the s8 definition however provides an exception and the interpretation of this subsection has not been considered by the courts. In this regard I accept Ms Pope's submission that its effect is that even if a unit is considered to be a private residence it is excluded from being a dwellinghouse if it is a hotel or motel.

[81] She further submits that this issue is appropriately considered on a unit by unit basis and that the decision should be made on the basis of whether or not a unit is leased to Quest. I do not consider a unit by unit approach is unworkable or would be absurd as a matter of principle as suggested by Mr Parker. The Quest units are easily able to be ascertained and it is primarily the unit owner's choice as to whether they put the units with Quest or use them as a private residence. The Act makes it clear that any owner who transfers ownership of their unit has to be removed from the claim. There is no policy reason why a similar situation does not apply on a unit by unit basis if a unit owner chose to lease their unit to become part of a hotel or other institution.

[82] Mr Parker also submits that the unit owners are not running the units as a hotel. He says that an owner who leases the unit to Quest is no different to the position of an owner leasing to a property manager or letting agency and getting them to arrange and manage the letting of the units. The Act however does not provide that the owner of the unit must be the person running the hotel or institution for it to be excluded. It is the use of the dwellinghouse which is the significant issue.

[83] In addition the nature of several of the contracts and lease agreements between the unit owners and the Quest franchise holder are commercial leases, some of which commenced on the settlement of the sale and purchase agreement. Some subsequent leases have been prepared on the ADLS Commercial Lease form and specified the use of the premises as business. Some of these commercial leases were for five year terms usually with a further five year right of renewal.

[84] The nature of the lease arrangements between the unit owners and the Quest franchise holder are clearly different in nature to listing a property with a residential property manager and having them manage it for them. The unit owners leasing to Quest knew that it was going to form part of Quest St Pauls and that the Quest operations are run like a hotel. In particular they would be primarily providing serviced short term accommodation. It is not the unit owners who need to be running the hotel or motel in order for the subsection d) to apply it is the use to which the unit is put.

[85] The fact that the Quest units are scattered throughout the complex is not determinative on whether they are a hotel or other institution. This is not an unusual situation as there are an increasing number of complexes that include both residential and hotel type accommodation and where individual units are privately owned but leased to the hotel or motel operator.

[86] The issue of whether a unit falls within the hotel exception needs to be determined on a unit by unit basis and not by considering the complex as a whole. I conclude that the Quest units are being run as a hotel or other institution. I accordingly conclude that the Quest units are not dwellinghouses and therefore had no jurisdiction to be included in the Tribunal claim. The claim therefore ceases to relate to the Quest units and new Quest units as set out in Schedule One.

THE KNOWLEDGE UNITS

[87] The Council originally applied to strike out the claims in relation to unit 18, 20 and 108 which are all owned by Hall and Rea Limited. Notices of withdrawal however have been filed in relation to units 18 and 108, subject only to the threshold issue discussed in paragraphs [7] to [14]. Therefore the Council's application is now confined to unit 20.

[88] Hall and Rea Limited purchased unit 20 at a mortgagee sale in 2009 some 18 months after the representative claim was lodged with the Department of Building and Housing. The agreement for sale and purchase recorded that the purchaser had received copies of various information including Body Corporate minutes discussing the leaks in the

complex and a summary of the assessor's report from the Weathertight Services Group.

[89] The Council accordingly says that Hall and Rea bought the unit with full knowledge of the weathertightness defects and the existence of the leaky unit claim. Mr Hough submits that on the facts as set out in the affidavit filed on behalf of Hall and Rea it can be clearly established that the claim in relation to unit 20 has no chance of success either because it is a case of volenti non fit injuria, the failure to establish a duty of care, or there is a novus actus interveniens.

[90] Mr Parker however submits that it is the actual knowledge of the purchasers that is relevant and Mr Hall's affidavit shows that he was only aware of certain defects from the information he was given and he did not think that they related to unit 20. Mr Parker submits that Mr Hall was unaware until after purchase that the cladding on all the building had been questioned.

[91] In order for a claimant to have voluntary assumed risk they must have full knowledge of the nature and extent of the risk. That issue is decided subjectively and one must look at the level of knowledge of the individual owner. The onus of proof is always on the party alleging voluntary assumption of risk.

[92] The Council has put up a strong argument that either Hall and Rea voluntarily assumed the risk when purchasing unit 20 or that the level of knowledge was such to an amount to a novus actus interveniens. However that is not an issue that I think can be appropriately decided in the context of a preliminary application in the nature of a removal application particularly as the level of Mr Hall's actual knowledge is in dispute.

[93] However I note that even if the Council is not successful in its main argument as outlined above, Hall and Rea Limited are likely to have any award made substantially reduced on the basis of contributory negligence. Not only were they given information to show this was a leaky complex, the LIM report would have also recorded this information. The Supreme Court in *Spencer on Byron* suggested in these circumstances contributory

negligence could be anything up to 100 per cent. In addition in order to have any success with the claim for unit 20 Hall and Rea will need to establish loss. If the value at which it purchased took into account the fact that it was part of a leaky complex, loss suffered is likely to be minimal.

SUMMARY AND CONCLUSION

[94] The multi-unit claim filed with the Tribunal ceases to relate to the following units as those units do not fit within the definition of dwelling house as defined in s 8 of the Act:

- Units 13, 16, 17, 19, 49, 50, 52, 61, 67, 68, 72, 76, 82, 85, 90, 91, 92, 96, 99, 100 and 101.

[95] The claim ceases to relate to the following units as they are limitation barred. The owners of these units did not apply to join the claim until more than ten years after any act or omission on which the claim could possibly be based:

- Units 1, 20, 25, 36, 37, 41, 44, 51, 57, 58, 69, 73, 78, 86, 89, 92, 102 and 104.

[96] The claim also ceases to relate to units 18, 54, 55 and 108 as the owners of those units have withdrawn their claim.

[97] The applications to remove all other unit owners are dismissed.

DATED this 28th day of March 2013

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P A McConnell
Tribunal Chair

SCHEDULE 1

A	New Owners	18, 25, 36, 37, 41 and 73
B	Limitation – Joined on Application to Tribunal	1, 20, 44, 51, 57, 58, 69, 78, 86, 89, 92, 102 and 104
C	Limitation – Nor property added	5, 11, 19, 22, 27, 30, 71 and 109
D	Quest Units	13, 16, 49, 50, 52, 54, 61, 67, 68, 72, 76, 82, 85, 90, 91, 92, 99, 100 and 101 Unit 55 being a cafe
E	New Quest Units	17, 19 and 96
F	Knowledge Units	18, 20 and 108

SCHEDULE 2

St Paul's Apartments - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)

Unit 2 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 3 - 43 Mulgrave Street - Thorndon - Wellington (Active 27/08/2008)
Unit 5 - 43 Mulgrave Street - Thorndon - Wellington (Active 27/08/2008)
Unit 6 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 7 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 8 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 9 - 43 Mulgrave Street - Thorndon - Wellington 6011 (Active 23/06/2008)
Unit 10 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 11 - 43 Mulgrave Street - Thorndon - Wellington (Active 09/07/2008)
Unit 14 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 15 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 17 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 18 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 19 – 43 Mulgrave Street – Thorndon – Wellington (Active 23/06/2008)
Unit 21 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 22 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 23 - 43 Mulgrave Street - Thorndon - Wellington (Active 29/09/2008)
Unit 24 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 25 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 26 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 27 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 28 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 29 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 30 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)

Unit 31 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 32 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 33 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 34 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 35 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 36 - 43 Mulgrave Street - Thorndon - Wellington	(Active	7/07/2008)
Unit 37 - 43 Mulgrave Street - Thorndon - Wellington	(Active	24/06/2008)
Unit 38 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 39 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 40 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 41 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 42 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 43 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 45 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 46 - 43 Mulgrave Street - Thorndon - Wellington	(Active	24/06/2008)
Unit 47 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 48 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 53 - 43 Mulgrave Street - Thorndon - Wellington	(Active	27/06/2008)
Unit 55 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 56 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 59 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 60 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 62 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 63 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 64 - 43 Mulgrave Street - Thorndon - Wellington	(Active	20/10/2009)
Unit 65 - 43 Mulgrave Street - Thorndon - Wellington	(Active	23/06/2008)
Unit 66 - 43 Mulgrave Street - Thorndon - Wellington	(Active	12/10/2009)

Unit 70 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 71 - 43 Mulgrave Street - Thorndon - Wellington (Active 14/07/2008)
Unit 73 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 74 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 75 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
Unit 77 - 43 Mulgrave Street - Thorndon - Wellington (Active 23/06/2008)
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Unit 88 - 43 Mulgrave Street - Thorndon - Wellington (Active 24/06/2008)
Unit 93 - 43 Mulgrave Street - Thorndon - Wellington (Active 24/06/2008)
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Unit 98 - 43 Mulgrave Street - Thorndon - Wellington (Active 24/06/2008)
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Unit 106 - 43 Mulgrave Street - Thorndon - Wellington (Active 24/06/2008)
Unit 107 - 43 Mulgrave Street - Thorndon - Wellington (Active 24/06/2008)

Unit 108 - 43 Mulgrave Street - Thorndon - Wellington	(Active	24/06/2008)
Unit 109 - 43 Mulgrave Street - Thorndon - Wellington	(Active	26/09/2008)
Unit 110 - 43 Mulgrave Street - Thorndon - Wellington	(Active	24/06/2008)
Unit 111 - 43 Mulgrave Street - Thorndon - Wellington	(Active	24/06/2008)
Unit 112 - 43 Mulgrave Street - Thorndon - Wellington	(Active	24/06/2008)
Unit 113 - 43 Mulgrave Street - Thorndon - Wellington	(Active	24/06/2008)
Unit 114 - 43 Mulgrave Street - Thorndon - Wellington	(Active	24/06/2008)