IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2013-485-719
[2013] NZHC 2852

UNDER	section 93 of theWeathertight Homes Resolution Services Act 2006
IN THE MATTER OF	an appeal from a determination of the Weathertight Homes Tribunal under the Weathertight Homes Resolution Services Act 2006
BETWEEN	BODY CORPORATE 85978 Appellant
AND	WELLINGTON CITY COUNCIL First Respondent
	TULLOW LIMITED Second Respondent
	D J LARKHAM Third Respondent
	M A EBERT Fourth Respondent
	OPUS INTERNATIONAL CONSULTANTS LIMITED Fifth Respondent
	S J ROOFING LIMITED Sixth Respondent

Hearing:	25 September 2013
Counsel:	D J Parker and A V Williamson for appellant D J Heaney QC and A K Hough for first respondent S P Pope and K R Muirhead for second respondent S L Rees-Thomas for third respondent (given leave to withdraw) No appearance for fourth, fifth and sixth respondents
Judgment:	30 October 2013

RESERVED JUDGMENT OF DOBSON J

Contents

[1] The appellant is the body corporate for a complex of apartments in a group of buildings in central Wellington known as St Paul's Apartments (the Body Corporate). The Body Corporate is pursuing a claim on behalf of apartment owners in that complex before the Weathertight Homes Tribunal (the Tribunal), pursuant to provisions in the Weathertight Homes Resolution Services Act 2006 (the Act).

[2] The first respondent (the Council) applied to the Tribunal to strike out three groups of apartment owners who were part of the larger number that the Body Corporate was representing. The Council's application was largely successful before the Tribunal.[1] First, the Tribunal's determination dated 28 March 2013 excluded from the Body Corporate's claim some 20 apartments where their owners had taken initiatives to join the Body Corporate's action only in February 2012, which was more than 10 years after the complex was built and which the Tribunal determined to be time-barred.

[3] Secondly, the Tribunal's jurisdiction is confined to claims in relation to "dwellinghouses" as that concept is defined in s 8 of the Act. The determination ruled that the claim should no longer apply to the claims brought by owners of 21 apartments, on the basis that their current use by the Quest hotel chain (Quest) took them outside the definition of a dwellinghouse.

---

1 *Body Corporate 85978 v Wellington City Council* [2013] NZWHT Auckland 9.

[4] Thirdly, the Council sought to strike out a third group of apartment owners who it claimed had acquired their interests with knowledge of the defects to which the claims relate. The Council had argued that such owners knowingly acquired their apartments subject to the defects and could therefore not bring claims. The Tribunal was not prepared to deal with that as a preliminary argument, taking the view that it required evidence of each new owner's extent of knowledge. Ultimately, the Council did not seek to revisit that decision in this appeal.

[5] The Body Corporate has appealed against the first two determinations. The Council cross-appealed on two points. One, relating to the third aspect of the determination, was not pursued. The other can be dealt with as an aspect of the Council's response to the Body Corporate's arguments on a point of law.

The factual background

[6] The St Paul's Apartments complex was constructed in three stages, with the Council issuing code compliance certificates between October 1998 and December 1999. On 20 June 2008 the Body Corporate commenced the claim under the Act by applying for an assessor's report pursuant to s 32 of the Act.

[7] In order to do so in terms of the process under the Act, the Body Corporate had to confirm that it had the approval of not less than 75 per cent of the owners of apartments in the complex.[2] It also had to provide authorities, from the owners of the apartments in respect of which claims were made, for invasive testing as a part of the assessment process.[3] Initially, such authorities were provided for 89 apartments. Later in 2008, the owners of a further eight apartments provided the requisite authorities. Thereafter, an assessment was undertaken, leading to a claim eligibility decision being issued for the Chief Executive of the Department of Building and Housing (DBH) on 23 November 2009.[4]

[8] In correspondence during 2008 from Mr Sharp, an officer of DBH handling the claim, to Mr Crew, the person responsible for the claim within the Body

---

2 Section 19(1)(b).
3 Section 19(1)(a)(ii).
4 Section 48.

Corporate, the eligibility of apartments that were being used by Quest to provide short and long term rented accommodation was raised. In a letter dated 2 July 2008, reference was made to previous discussions, implicitly about 20 apartments and a café within the St Paul's complex. The letter continued:

> Given that the apartments are managed by Quest and are short term accommodation of a motel type nature this excludes them from being part of a claim with this service. Please refer to Part 1, 8 (dwellinghouse) and section 14 of the Weathertight Homes Resolution Services Act 2006.

[9] Mr Crew has deposed that he understood from discussions with Mr Sharp at the time of that letter that it was not a formal ruling that the apartments leased to Quest were ineligible. He understood from Mr Sharp that Mr Sharp had no authority to make eligibility decisions and that a decision on eligibility of the Quest apartments would be made by the Tribunal as part of the adjudication process. Mr Crew also recalls a subsequent discussion in which the same points were made by Mr Sharp.

[10] In the covering letter of 23 November 2009 confirming that the Body Corporate's claim was eligible to be processed under the Act, and the contemporaneous notice confirming the eligibility decision, reference was made to 81 properties being the subject of the claim. It is accepted that the only rationale for the difference between the 81 properties referred to in those documents, and the 100 apartments on whose behalf the Body Corporate was pursuing the claim at that time, was because of the exclusion of 19 apartments that were then leased to Quest.

[11] The eligibility decision did not specify why some apartments had been left out, and nor did it identify the criterion on which that had occurred. The physical inspection of the apartments within the complex had included those that were leased to Quest.

[12] The Council's strike out application was pursued in relation to all of the 100 apartments, that is, including those apartments that were leased to Quest. Mr Heaney QC did not offer a reason why the challenge included those apartments, when in other respects the analyses for the Council treated the smaller number of

apartments referred to in the November 2009 eligibility decision as indicating the exclusion of the Quest apartments from that time.

The statutory process

[13] The first among the two purposes of the Act specified in s 3(a) is:

> to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost-effective procedures for the assessment and resolution of claims relating to those buildings; …

[14] Section 9 of the Act provides that a person brings a claim under the Act in respect of a dwellinghouse by applying for an assessor's report in respect of it. Section 37 provides that the making of an application for an assessor's report has the same effect as commencement of court proceedings, for the purposes of time running for limitation purposes.

[15] Subpart 3 of Part 1 of the Act then provides for the types of claims that may be brought in respect of multi-unit complexes. Relevantly in the present case, s 19 provides:

> **19 Representative claims in respect of dwellinghouses in multi-unit complexes**
>
> 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, and any common areas, as if those dwellinghouses and areas were a single dwellinghouse, and as if the representative were its owner, if—
>
> (a) each owner has given the representative a written notice—
>
> (i) authorising the representative to bring and resolve a claim; and
>
> (ii) authorising invasive testing by an assessor relating to the owner's dwellinghouse; and
>
> (b) the owners together own at least 75% of the dwellinghouses in the complex; and
>
> (c) subsection (1), (2), or (3) (as the case requires) of section 22 has been complied with; and

(d) the representative (or, if the representative is a body corporate, an officer or member of the representative) attaches to the application for an assessor's report—

(i) a written notice authorising invasive testing by an assessor relating to any common areas in the complex; and

(ii) a statutory declaration that paragraphs (a) and (b), and subsection (1), (2), or (3) (as the case requires) of section 22, have been complied with.

[16] Section 30 includes deeming provisions so that a reference to the owner of a dwellinghouse includes a reference to the representative of the owners of dwellinghouses in a multi-unit complex. References to a party or parties include a reference to the representative of the owners of the dwellinghouses in a multi-unit complex. Those deeming provisions also mean that the provisions of s 32 that provide for an application for an assessor's report include a representative of owners in a multi-unit complex having standing as the owner wishing to bring a claim, to apply to the Chief Executive for an assessor's report.

[17] Sections 26 to 29 include provisions for the addition or withdrawal of the owners of units in multi-unit complexes. They require the representative pursing such claims on behalf of owners to give notice of a change of ownership of any unit, with a consequence that a selling owner drops out of the claim and the claim proceeds in respect of the other dwellinghouses. The new owner of such a unit may be added to the claim under s 26.

[18] Subsections 26(1) and (2) provide as follows:

26 Adding further owners to representative claims in respect of multi-unit complexes or stand-alone complexes

(1) Before adjudication of a claim under section 19 or 21 has been initiated, the representative can, in the way stated in section 27(1), add the owner of a dwellinghouse in the multi-unit complex or stand-alone complex concerned to the claim.

(2) After adjudication of a claim under section 19 or 21 has been initiated, a further owner of a dwellinghouse in the multi-unit complex or stand-alone complex concerned can, in the way stated in section 27(2), be added to the claim by the representative, but only with the tribunal's consent.

...

[19] The procedure for adding further owners is spelt out in s 27 as follows:

> **27 How addition under section 26(1) or (2) effected**
>
> (1) To add the owner of a dwellinghouse in a multi-unit complex or stand-alone complex to a claim in respect of the complex under section 26(1), the representative must give the chief executive—
>
> (a) a written notice that the owner wishes the claim to extend to his or her dwellinghouse; and
>
> (b) a copy of a written notice from the owner—
>
> (i) authorising the representative to take action (unless the person concerned is taken to be the representative under section 21(2), in which case that kind of authorisation is not required); and
>
> (ii) authorising invasive testing by an assessor relating to the owner's dwellinghouse.
>
> ...

The Tribunal's jurisdiction to strike out individual apartment owners

[20] Before challenging the substantive rulings in issue, the Body Corporate disputed the jurisdiction of the Tribunal to strike out individual apartment owners in a representative action taken by the Body Corporate. The Council's interlocutory initiative had invoked s 112 of the Act, which appears in a group of sections headed "Tribunal's powers, etc relating to adjudication proceedings". Section 112 appears after s 111, which authorises the Tribunal to order that a person be joined as a respondent in adjudication proceedings. Section 112 provides relevantly as follows:

> **112 Removal of party from proceedings**
>
> (1) The tribunal may, on the application of any party or on its own initiative, order that a person be struck out as a party to adjudication proceedings if the tribunal considers it fair and appropriate in all the circumstances to do so.
>
> …

[21] In challenging the Tribunal's jurisdiction, Mr Parker's argument was that individual apartment owners did not have standing as parties to the claim, with the consequence that no jurisdiction existed to remove them. Mr Parker contrasted the reference to "owners" in ss 26 to 28 of the Act in relation to the addition or removal

of owners of other units in a multi-unit complex claim. His argument was that if the jurisdiction given to the Tribunal to remove a party was intended to extend to individual owners in the present context, then s 112 would have been explicit in relation to the power to strike out an "owner" as well as a "party".

[22] Mr Parker pursued the same challenge to the Tribunal's jurisdiction in the determination before it. The Tribunal was inclined to accept that, on a strict definition of "party", individual owners did not qualify as such. Notwithstanding that acknowledgement, the Tribunal reasoned that its power to regulate claims being adjudicated must necessarily extend to providing directions that a claim ceased to relate to particular apartments if the Tribunal established that the owners of such apartments had no right to be part of the claim. If the Tribunal did not have that ability to regulate the scope of claims at a preliminary stage, its working would become unnecessarily unwieldy, and inconsistent with the first of the purposes in the Act to provide for flexible and cost-effective procedures.

[23] It seems likely, given the location of s 112 immediately following the section that authorises the joinder of parties as further respondents, that the legislature contemplated s 112 applying, primarily at least, to the removal of respondents. Experience shows that scatter guns are routinely deployed in attributing responsibility for leaky buildings as widely as possible amongst designers, manufacturers and installers of component parts of structures that have subsequently failed, so that a power to both add and remove respondents is likely to be resorted to routinely.

[24] In contrast, at least in the context of representative claims brought in relation to multi-unit complexes, the co-ordinated structure provided for in the Act contemplates a single claimant party.

[25] Notwithstanding that apparent asymmetry, it would impede the efficient working of the Tribunal if it was powerless to consider applications of the type presented here. Accordingly, I would be reluctant to attribute to Parliament the constraint Mr Parker argued for, unless it was essential as a matter of interpretation to do so. I am satisfied that it is not. A purposive approach to the scope of "party" in

s 112 can, in the present context, extend to the individual apartment owners who comprise a claimant party, when a claim is brought by a representative of owners in a multi-unit complex.

[26] Section 112 creates a jurisdiction that should only be invoked at a preliminary stage on questions of law or possibly where the standing of a participant depends on irrefutable facts. There is no logical justification for constraining the Tribunal from considering the removal of certain apartment owners, in circumstances such as those that occurred here. An alternative view of what the Tribunal has done here is that it has elected to address questions of law separately, in a prior determination. Section 73 of the Act sets out the Tribunal's powers in adjudication proceedings. Those include the power to conduct the proceedings in any manner it thinks fit, and to request the parties to do any other thing during the course of the proceedings that it considers may reasonably be required to enable the effective and complete determination of the questions that have arisen.[5] Separate determinations of questions of law, which accurately characterises the determination here, must be within the options open to the Tribunal under s 73.

[27] I note that the Council pursued the removal of a third category of apartment owner, namely those who had purchased allegedly with knowledge of the existence of the claim. The Tribunal declined to remove that category of owner, essentially because the extent of relevant knowledge that might be held against particular claimants was a contested matter of fact that would have to go to adjudication. Sensibly, the Council dropped its challenge to that aspect of the determination. The Tribunal's approach to it accords with the view I take as to the appropriate scope of s 112.

[28] I am therefore satisfied that the Tribunal did have jurisdiction to consider and determine the issues that are now challenged.

---

5 Section 73(1)(a) and (i).

Did the original commencement of the claim stop time running for all apartment owners?

[29] The Tribunal determined:[6]

> 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. …

[30] The Tribunal considered that the contrary position as advanced for the claimants, which would involve time ceasing to run for the owners of all apartments once the representative requested an assessor's report, would establish an "arbitrary timeline … regardless of when [unit owners] were added to the claim and asked for their units to be assessed".[7]

[31] In argument before the Tribunal, Mr Parker had relied on the decision in *Kells v Auckland City Council*, in which the limitation period was held to stop running at the same time for all respondents where one respondent to the claim later sought to join other respondents.[8] The Tribunal distinguished the decision in *Kells* because the conclusion there that "the legislature intended that time would stop running for all purposes at the time of the initial request for an assessor's report" was made in the context of joining additional respondent parties who might be liable to contribute to the cost of repairs. It was also distinguished on the basis that it did not address the situation of multi-unit claims, but rather considered the situation of a stand-alone dwellinghouse with a single claimant.

[32] In essence, the Tribunal treated the provisions of ss 26 and 27 as being subject to their own limitation provisions requiring any unit owners joining an existing claim pursuant to those provisions to bring themselves within the relevant

---

6 *Body Corporate 85978 v Wellington City Council*, above n 1, at [48].
7 At [47].
8 *Kells v Auckland City Council* HC Auckland CIV-2008-404-1812, 30 May 2008.

limitation period, independently of the steps previously taken by the representative on behalf of owners under s 32.

[33] Since the Tribunal's determination, the application of limitation periods to subsequently added claims has been considered by the High Court in *Auckland Council v Chief Executive of the Ministry of Business, Innovation and Employment (Bamford)*.[9] The factual circumstances in *Bamford* were somewhat different in that each of a Ms Coleman and a Ms Bamford owned separate dwellinghouses within a unit title development in Auckland. Both units suffered from lack of weathertightness. Ms Coleman had initiated a claim within time under the Act, and subsequently, more than 10 years after her unit had been built, Ms Bamford added a claim to the existing eligible claim that had been brought by Ms Coleman. The Chief Executive had permitted the joinder of Ms Bamford's claim and eventually a Tribunal determination was made in her favour, against the Council. The Council appealed, arguing that Ms Bamford's claim was statute-barred.

[34] Heath J determined, on the wording of s 18 (which is the equivalent for a dwellinghouse in a stand-alone complex to s 19 for units in a multi-unit complex) that in law what Ms Coleman had done was to commence a claim relating to the whole complex in which her dwelling was situated. Ms Coleman's reliance on s 18 preserved the right of owners of other units within the same stand-alone complex to join later, if they wished to do so. That had been effected in relation to Ms Bamford's claim. The Judge reasoned that ss 26 and 27 provide the mechanism by which an owner of a dwellinghouse in either a multi-unit complex, or a stand-alone complex, may be added. That process involved giving written notice to the Chief Executive as required by s 27. Once an initial eligibility decision had been made in relation to Ms Coleman's application, that was all that was needed for Ms Bamford's claim to be added to it.

[35] The Judge observed:[10]

---

9 *Auckland Council v Chief Executive, Ministry of Business, Innovation and Employment (Bamford)* [2013] NZHC 912.

10 At [33]–[34] (footnotes omitted).

> The answer to [counsel for the Auckland Council's] policy point, in relation to the limitation provisions, is that Parliament decided that a claim in respect of a single dwellinghouse within a stand-alone complex would provide the foundation on which other owners of units within the complex could join the claim. The underlying assumption must be that once one dwelling in a complex has been shown to have qualified as a claim, there is reason to believe that other dwellinghouses may be similarly affected by water penetration damage.
>
> That is a logical and practical approach to take in regard to such complexes. The fact that the limitation period begins to run from the time at which the first eligible claim is made is consistent with the policy of the Act: to "provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible, and cost effective procedures for the assessment and resolution of claims relating to those buildings". Nothing in the provisions entitling addition of claims relating to a single stand-alone complex clashes with that overriding objection. It is also consistent with the Select Committee's report.

[36] The Select Committee report to which Heath J referred is that of the Social Services Committee that considered submissions on the Weathertight Homes Resolution Services Amendment Bill that became the 2006 Act. That report included the following:[11]

> The bill allows a class action to be taken for multi-unit buildings and makes the [Weathertight Homes Resolution Services] more accessible to this type of claim. The main purposes of the multi-unit amendments are to ensure that as far as possible a "whole of complex" approach can be taken to these leaky buildings, and to enable bodies corporate and other groups to bring claims to the [Weathertight Homes Resolution Services]. With a few exceptions, single residential unit owners will not be able to bring separate claims. Instead, a representative will bring a claim for all weathertightness damage to common areas and residential units in a multi-unit complex.

[37] Mr Parker submitted that I was either required to follow Heath J, or alternatively that I should do so, given that the point had been fully argued, and was the subject of a thoroughly reasoned decision.

[38] For the Council, Mr Heaney argued that I should not follow Heath J's analysis of the permissive approach to subsequent joinder of later claims, because there was no clear indication that the Act was intended to extend limitation periods, and the settled structure of such limitation provisions should not be subverted by any form of implied interpretation.

---

[11] Weathertight Homes Resolution Services Amendment Bill 2006 (75-2) (Select Committee Report) at 4.

[39] I pressed Messrs Heaney and Hough on the forms of prejudice that are likely to arise from the prospect of subsequent claims being joined for other apartments in a multi-unit complex. They were inclined to accept that such additional claims would be unlikely to add discrete criticisms of the work done by respondent parties. The initiation of a claim by an original request for an assessor's report would, in all probability, identify the types of deficiency said to be relevant to the claim. Claims subsequently added for additional apartments are likely to add to the amounts claimed, but are unlikely to introduce new forms of criticism of the work that had been involved. To the extent that a claim related to damage to common areas, it would all be in issue from the original request for an assessor's report.

[40] Ms Pope's argument for the second respondent adopted a somewhat different analysis as to the relative importance of respecting settled limitation regimes. She submitted that s 37 of the Act recognises the application of statutory limitation periods, such as in the Limitation Act 2010 and s 393 of the Building Act 2004. The latter provision has introduced a "long-stop" limitation period in relation to claims for defective buildings, and as a matter of policy that is to be strictly construed. Section 37 is already exceptional to the extent that it recognises a request for an assessor's report as the substitute to filing proceedings in court. That is a dispensation in favour of claimants because a request for an assessor's report does not require the same analysis and work as would precede the commencement of proceedings for a claim of this type.

[41] To preserve the position of well-settled limitation defences, which have their own policy rationale, Ms Pope submitted that s 37 ought not to be broadened implicitly by treating a request for an assessor's report as holding open indefinitely the prospect of additional owners subsequently joining a claim, despite their being out of time.

[42] Reflecting on the factors which Heath J relied upon, and measuring those against the limited forms of prejudice that Messrs Heaney and Hough raised in criticising his approach, I am satisfied that Heath J's approach to the joinder of subsequent claims in multi-unit complexes is correct. I have revisited the Tribunal's rationale for distinguishing *Kells* in light of the submissions that both supported and

challenged the manner in which it dealt with it, and the further reflections in *Bamford* on the policy underlying the Act. I consider that *Kells* does indeed correctly reflect how the regime should operate, more broadly than in the circumstances of adding respondents to claims in relation to a single dwellinghouse.

[43] For the second respondent, Ms Pope submitted that *Kells* can be distinguished on the ground that it raised the separate power in s 111 to join respondents, whereas what Mr Parker was arguing for was an open-ended ability to add claimants. I do not accept that allowing additional claimants because they can coat-tail on an existing claim is materially different from adding to the range of potentially liable parties, simply because, in the first case, claimants are being added, whereas in the second, potentially liable parties are being joined. Certainly conceptually, the joinder of further claimants increases the size of the claims, whereas joinder of additional respondents introduces the prospect of spreading the same extent of liability between a greater number of liable parties. However, that is not a distinction relevant to the policy behind the application of time limits under this Act. The concerns to achieve efficient resolution apply equally in multi-unit claims, and the balancing of interests for later-added owners as claimants, and later-added potentially liable parties as respondents, are comparable.

[44] The concerns raised for the second respondent that interpretation of these provisions in the Act should not create an implicit exception to otherwise well-settled limitation rules is not sufficient to override respect for the policy drivers behind the regime established by the Act. Fears that the approach I have adopted to s 37 holds open the prospect of additional claims on an indefinite basis are, with respect, somewhat overstated. The claims resolution service provided for dwellinghouses is intended to be flexible and efficient. Apartment owners wishing to join an existing claim will have to do so before the existing claims are determined.

[45] The Tribunal's approach in effectively implying additional limitation provisions into the procedure under ss 26 and 27 was influenced by a concern that an owner acquiring a unit in a multi-unit complex would be deemed to have commenced a claim before acquiring that interest, unless a distinct limitation provision applied to owners who acquired units after a representative claim had been

commenced. I do not agree that that consequence justifies the implication of a further time limit.

[46] The provisions for adding further owners to a representative claim in ss 26 and 27 are to be seen in the context of the provisions of s 29, which confine the entitlement to claim to current ownership. That is reflected in the terms of subss 29(1) and (2) which provide as follows:

> **29 Notifying changes of ownership after claim brought in respect of dwellinghouses in multi-unit complex or stand-alone complex**
>
> (1) Within 5 working days of becoming aware of a change in the ownership of a dwellinghouse to which a claim under section 19 or 21 relates, the representative concerned must give written notice of the change—
>
> (a) to the chief executive, if adjudication has not been initiated; or
>
> (b) to the tribunal and all parties, if adjudication has been initiated.
>
> (2) The effect of a change in the ownership of a dwellinghouse to which a claim under section 19 or 21 relates is that the claim ceases to relate to that dwellinghouse; but—
>
> (a) the claim may proceed in respect of the other dwellinghouses to which it relates; and
>
> (b) the new owner may be added to the claim under section 26.

[47] A primary requirement for jurisdiction to exist in present circumstances is current ownership of an apartment in a complex where a representative claim is being pursued. The concept that a new owner will inherit the entitlement to join a representative claim, which is inherent because the apartment comprised one of a multi-unit complex in respect of which a representative claim is being pursued, should not be seen as objectionable merely because that entitlement was inherent prior to a new claimant assuming ownership. It is not an additional entitlement in the sense of expanding those owners who might bring a claim, but rather in substitution for the entitlement that the selling owner had enjoyed until the change of ownership occurred.

[48] The structure of the jurisdiction contemplated by ss 26 and 27, in circumstances where there is a change of ownership of apartments whilst the representative claim is being pursued, varies the position that would apply at common law. It would be unnecessary for a claimant pursuing claims in contract and tort to continue as owner of the defective unit through until judgment. In most circumstances, a sale of the damaged property would render relief seeking specific performance of remedial work by liable parties irrelevant. However, such a sale would not prevent pursuit of claims for damages that would presumably be quantified as the difference between the sale price that would have been achieved, had the unit been weathertight in all respects, and the reduced sale price accepted by the claimant, on account of the requirement for such repairs to be effected.

[49] The statutory jurisdiction of the Tribunal excludes claims of that type. Instead, the Tribunal can only adjudicate on claims brought by those who are current owners at the time of adjudication. Conceptually at least, it is irrelevant how many owners the apartment has had since it was completed. Issues as to quantum may well arise in relation to claims brought by owners who acquired their interests after the extent of defects were discovered, and the likely cost of remediation quantified. A range of possible alternative scenarios is likely to arise.

[50] I acknowledge one practical difficulty for respondents, in interpreting the provisions in this way. That is that a claim will be deemed to have been commenced in respect of apartments that later join the representative claim, before the owners of those apartments have provided the authority for invasive testing which they must provide under s 27(1)(b) when giving notice that they are joining the representative claim.

[51] In some situations, the delay in providing authority for assessors to inspect and, where necessary, invasively test claimed deficiencies in weathertightness will impede the efficiency with which the claims can be resolved. Conceptually at least, it may also prejudice the interests of one or more respondent parties.

[52] However, for the most part, those difficulties are likely to be more perceived than real. The representative will only have standing to initiate the claim when its

pursuit is supported by at least 75 per cent of the owners of apartments in a multi-unit complex. Although there will be exceptions, for the most part an initial assessment will be of the vast majority of the apartments adversely affected. The additional tasks in bringing relatively modest numbers of apartments up to speed is a realistic price for the overall efficiency of the scheme that focuses multiple claims under one head. Where it becomes inefficient, the Chief Executive can dispense with the need for further testing by an assessor.[12]

[53] The procedures under the Act limit the opportunity for any unit holders to utilise the procedures available under the Act, other than by joining a claim already underway. The "whole of complex" approach is important, and appropriately dictates the manner in which limitation provisions apply.

[54] It follows that the Tribunal's determination on the claims added after 2008 is wrong, and those claims are not time-barred.

Are apartments leased to Quest outside the definition of "dwellinghouse"?

[55] It appears to be common ground that the plans submitted to the Council for building consent purposes, and on which the construction proceeded, reflected apartments intended for private residential use. However, from a range of dates and in a range of circumstances, the owners of some 21 of the apartments have now leased them to Quest. Quest has been managing this portfolio of apartments, making them available for short or longer term occupancy on a commercial basis.

[56] The respondents sought the exclusion of all such apartments that are leased to Quest by their owners, on the ground that they did not come within the definition of "dwellinghouse". That is set out in s 8 of the Act in the following terms:

> **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

[12] Section 26(4)(b).

(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

[57] In considering whether the apartments leased to Quest qualified as "dwellinghouses", the Tribunal held that with such multi-unit complexes, the issue of intended use for the purposes of subpara (a) of the definition should, in most cases, be determined on the basis of the plans and accompanying details lodged with the Council. On that approach, the status of a building as a dwellinghouse would depend on whether, at the time plans for it were submitted to the Council, it was intended that its principal use would be for occupation as a private residence.

[58] However, the Tribunal considered that the use being made of premises at the time an application was made under the Act should determine whether any of the exclusions in subpara (d) of the definition of dwellinghouse apply. It followed that if apartments had been designed for occupation as private residences, but subsequently were transformed into some form of hotel or motel or another of the institutional-type uses contemplated by the exclusion in subpara (d) of the definition, then that current use would exclude the unit from the processes under the Act.

[59] The Body Corporate challenged the second aspect of the Tribunal's approach, arguing that the scope of exclusion should depend on what was intended for the premises when the building consent was sought, and not be subject to a test as to actual use at the later point in time when owners sought to invoke the jurisdiction for resolving claims under the Act.

[60] On the other hand, the Council pursued a cross-appeal, contending that the ascertainment of intended use for the purposes of subpara (a) of the definition should

reflect current use in the same way as the Tribunal had approached the scope of the exclusion in subpara (d). On this approach, the impression conveyed by the applicant for a building consent as to the then intended use would be irrelevant to whether the Tribunal would subsequently have jurisdiction. Instead, jurisdiction would depend on whether the building's intended use at the time an application was brought under the Act was principally for occupation as a private residence or residences.

[61] The Tribunal's approach to the intended use as specified in subpara (a) of the definition reflected that taken by the Supreme Court in the so-called *Sunset Terraces* litigation.[13] The issue there was the existence of a duty of care owed by territorial authorities, where the law previously distinguished between the circumstances in which a property was intended to be used for commercial purposes on the one hand, or residential uses on the other. The Supreme Court adopted the use intended at the time of construction as determinative in assessing the existence of a duty of care.

[62] In this case, the issue is whether the jurisdiction of the Tribunal would extend to certain buildings or units within them, rather than whether a territorial authority would owe a duty of care in respect of them. However, there is a relevant analogy between the two in that the scope of liability on the one hand, and the scope of jurisdiction on the other, can relevantly be measured by the situation confronting the territorial authority when it assumes responsibility for discharging the functions involved in issuing a building consent, and subsequently monitoring compliance of the works with relevant building codes.[14]

[63] I agree with the analogy drawn by the Tribunal. The jurisdiction has been created in the Act as a form of consumer protection. The scope of it logically must be determined by the type of building the territorial authority (and others involved in its design and construction) are notified that they are dealing with at the time they authorise or contribute to its construction.

---

13 *North Shore City Council v Body Corporate 188529 (Sunset Terraces)* [2010] NZSC 158, [2011] 2 NZLR 289.

14 At [48].

[64] As to the time at which the exclusion in subpara (d) of the definition is to apply, logic and consistency suggests that the scope of the relevant exclusions is also to be determined at the time the territorial authority and those contributing to the design and construction of the building discharged their respective responsibilities. If that approach applies, then all potential respondents will know, at the time that they contribute to the design or construction of the building, that where the owners intend the principal use of a building to be for private residences, and that intended use does not constitute some form of institution such as a hospital, hotel or motel, then owners may subsequently pursue claims against them by following the process provided for in the Act.

[65] The alternative approach to the scope of the exclusions in subpara (d) would lead to the statutory process applying haphazardly, on a basis unrelated to the circumstances in which territorial authorities and other potential respondents assumed responsibilities in relation to the completion of the building. For instance, a building originally constructed as an apartment hotel that carried out business for, say, three years, and was then transformed into private residences with each individual apartment passing into individual ownership under a body corporate structure, would come within the jurisdiction of the Tribunal. That result would be entirely unforeseeable and unpredictable to the territorial authority and those potential respondents who contributed to the design and completion of the building, at the time of their relevant acts or omissions. The converse would also be the case if a building started life as apartments for individual owner occupancy as residences, and it was subsequently purchased to be operated as a hotel. At the time their contributions to its construction were made, potential respondents to claims could reasonably have expected that any claims would be pursued under the Act, but for entirely unrelated and fortuitous reasons subsequently arising, that jurisdiction would not exist.

[66] There was no focus during the argument on the original status of a café in the complex. Consistently with the approach discussed above, its status for the purposes of the Tribunal's jurisdiction should be determined by reference to its status at the time of the planning consents. In its decision, the Tribunal noted that unit 55 had

always been intended as a coffee shop or café.[15] If, indeed, it was identified for a commercial use, then it is excluded.

[67] The approach I favour reflects what has been described as a "bright line" approach. That attributes primacy to ascertaining the nature of responsibilities that are deemed to be assumed by those involved (or, by analogy in the present context, the forum in which any liability may be tested) at the outset, when potential respondents make their contribution to the work, the quality of which is subsequently challenged.

[68] Such a "bright line" approach was adopted in *Sunset Terraces*.[16] Although the "bright line" approach did not survive the Supreme Court's decision in the *Spencer on Byron* litigation,[17] that was because of the broader approach taken to the scope of duties of care owed by territorial authorities in certifying compliance with building codes, regardless of the nature of the premises, whereas the nature of the premises had previously been relevant.

[69] A bright line is still justified in the present context, as the scope of the Act is confined to private residences or dwellinghouses. The scope of the jurisdiction for the process provided for in the Act is to be determined by assessing the intended use at the time the potential range of respondents undertook the activities that are likely to be relevant to such claims.

[70] It follows that I am satisfied the Tribunal was correct in assessing intended use for the purposes of subpara (a) of the dwellinghouse definition at the time the plans were submitted to the Council, but was in error in its hybrid approach in assessing whether the exclusion in subpara (d) applied, by reference to current use.

[71] Applying both aspects of the inquiry at the time that the work was undertaken (in this case by the Council and the second respondent) means that the apartments were intended for individual ownership and to be occupied as private residences.

---

15 *Body Corporate 85978 v Wellington City Council*, above n 1, at [70].

16 *North Shore City Council v Body Corporate 188529 (Sunset Terraces)*, above n 13, affirming *North Shore City Council v Body Corporate 188529* [2010] NZCA 64, [2010] 3 NZLR 486.

17 *Body Corporate 207624 v North Shore City Council (Spencer on Byron)* [2012] NZSC 83, [2013] 2 NZLR 297.

Despite having been leased to Quest, they continue to enjoy status as dwellinghouses. I am reinforced in my view that that is the correct legal analysis by the effect of the leasing arrangements between apartment owners and Quest. It appears that the owners would remain liable for the cost of any major structural repairs. A lacuna or other undesirable inconsistency in the regime for potential remedies would arise if the fact of the leases to Quest excluded such owners from the ability to pursue claims under the Act. It would follow that those owners would have to commence their own Court proceedings, and bear the larger risks and cost implications when they might become owner-occupiers again on three months' notice at any time. That important difference would be forced on them, despite their complaints being the same as current owner occupiers, and the deficiencies alleged against respondents also being the same. Such an inefficient outcome is antithetical to the primary purpose of the Act.

[72] Mr Parker also maintained a process criticism of the Tribunal, contending either that there had been a breach of the rules of natural justice in the way the Quest apartments had been excluded, or otherwise that the earlier dealings with the Body Corporate's representative claim estopped the Tribunal from subsequently withdrawing them. His argument was that the Body Corporate had commenced the claim on behalf of the owners of all the 113 apartments in the complex, and that the advice in November 2009 from the Chief Executive that the claim was eligible did not adequately signal the exclusion of the Quest units. There is a requirement under s 48(3) for the Chief Executive to convey reasons for a decision that a claim does not meet the criteria for adjudication under the Act. Here, no reasons for any ineligibility decision were provided. Mr Parker treated the incidental reference in the heading of the letter to "81 properties" as inadequate to identify those that had been excluded, and the reasons for doing so.

[73] This criticism does not deal with the exchanges from July 2008 in which warnings were given that the Quest apartments might be excluded.[18]

[74] I accept that more might reasonably have been expected of the Chief Executive when the eligibility decision was conveyed, as relating to less than all the

---

[18] See [8]–[10] above.

units in the complex on whose behalf the Body Corporate had requested an assessor's report. However, anyone monitoring the claim on behalf of the Body Corporate would have known of the provisional views emanating from DBH to the effect that the Quest apartments were ineligible. Thereafter, the eligibility decision related to a lesser number of apartments than proposed on behalf of the Body Corporate, with the logical rationale being the exclusion of those Quest apartments.

[75] I am not satisfied that the Tribunal's process involved any breach of obligations of natural justice owed to the Body Corporate as a claimant. Nor do I consider the sequence of events would have given rise to any form of enforceable estoppel against the Tribunal, for having purported to accept a claim on wider terms than has now been resolved in its determination. I accept that, in the event the Tribunal had been correct as a matter of law on the ineligibility of the Quest apartments, then owners of those apartments may have been entirely deprived of a remedy because they would now be out of time to pursue their own court proceedings. Such concerns could not force the Tribunal to treat itself as having jurisdiction to entertain the claims for the Quest units, if on a correct analysis of the scope of the statutory regime, they did not. Such an outcome would be futile because, although the Quest apartments remained in for the time being, a lack of jurisdiction for the Tribunal to deal with them substantively would inevitably have required their subsequent exclusion.

Quest apartments not in any event a hotel or motel?

[76] Mr Parker's fallback argument, in the event that he did not succeed in respect of the time at which the exclusion in subpara (d) of the definition of dwellinghouse was to be assessed, was that the present use of the apartments leased to Quest does not in any event mean that they are operating as a hotel or motel.

[77] Against the contingency that I am wrong in having upheld the submission as to the time at which the exclusion in subpara (d) is to be assessed, I will review his fallback argument briefly and indicate what my view on it would have been, had it been necessary to decide it.

[78] The facilities offered by Quest do not include any form of restaurant, bar or any room services. Nor is there a concierge servicing the apartments offered for occupancy by Quest within the St Paul's complex. The norm for owners leasing their apartments to Quest is an entitlement for owners to re-take possession on three months' notice.

[79] Mr Parker argued that these were, in essence, serviced apartments, and as such that they fell outside the scope of the subpara (d) exclusions. Mr Parker invited analogy with another decision of Heath J that has been delivered since the Tribunal's determination in the present case. That decision arose in three judicial review applications brought in relation to determinations on behalf of the Tribunal upholding jurisdiction for claims of weathertightness defects in student accommodation (the Townscape decision).[19] In that case, Heath J analysed the characteristics of relatively long-term student accommodation, to find that it did not come within the exclusion in subpara (d).

[80] The Judge's analysis in that case included the following:[20]

> … A self-contained unit, designed for the principal purpose of being a place of residence for a person away from his or her usual home, in which the traveller can relax, cook, host guests and use independent shower and toilet facilities is one to which a considerable degree of privacy attaches.
>
> In my view, that type of serviced apartment, designed for longer-term accommodation, is more nearly analogous to a "dwellinghouse", than a hostel. The comparator is the use of a hotel room for a shorter period of time. A hotel is expressly excluded from the definition of "dwellinghouse", in s 8. The assessors' reports indicate that the units that are available to the students serve the same type of function as a serviced apartment. The accommodation units in issue in this proceeding more closely resemble a serviced apartment than a hotel, motel, or any other form of like institution not specifically mentioned within the exceptions to the "dwellinghouse" definition.

[81] I would not be persuaded that the analysis adopted by Heath J would apply to the Quest apartments. They are, in effect, available as motel units for short or longer-term occupancy by members of the public contracting with Quest as the manager of them.

---

19 *Townscape Akoranga Ltd v Auckland Council* [2013] NZHC 2367.

20 At [53]–[54] (footnotes omitted).

[82] The evidence included the form in which the Quest apartments are promoted on that organisation's website. That inarguably attributes an institutional context to the availability of short or long-term accommodation, and the absence of a restaurant in the same building, or a reception area or concierge facilities are not sufficiently material to transform this from commercially available accommodation in the nature of a hotel or motel, into something that falls within the "dwellinghouse" concept.

Summary

[83] The Body Corporate's appeal is successful on both its challenges. Once the Body Corporate had commenced the claim by requesting an assessor's report, that was sufficient to bring within time additional components of the claim brought subsequently by the owners of additional apartments pursuant to ss 26 and 27.

[84] Further, the determination of whether an apartment constitutes a dwellinghouse for the purposes of the definition in s 8 of the Act, and whether an intended use comes within the exclusions to that definition in subpara (d), are both to be determined at the time when plans for the complex, and a description of the nature of the intended use, are conveyed to the territorial authority. The Council's cross-appeal contending for the contrary interpretation of the relevant definition is dismissed.

Costs

[85] The appellant has been successful and is entitled to costs on a 2B basis, together with disbursements, jointly and severally against the first and second respondents. I will receive memoranda if the extent of the entitlement cannot be agreed.

Dobson J

Solicitors:
Parker & Associates, Wellington for appellant
Heaney & Partners, Auckland for first respondent
Russell McVeagh, Auckland for second respondent
Rees-Thomas Law, Wellington for third respondent
Hazelton Law, Wellington for fifth respondent