IN THE HIGH COURT OF NEW ZEALAND
NAPIER REGISTRY

CIV 2009-441-437

IN THE MATTER OF	an appeal pursuant to s 93 of the Weathertight Homes Resolution Services Act 2006
BETWEEN	DAVID LINDSAY CAMERON, BRENDA MURIEL CAMERON AND GEOFFREY HEWIT MYLES AS TRUSTEES OF THE NORMAC TRUST Appellants
AND	DAVID LAWRENCE STEVENSON First Respondent
AND	CHRISTOPHER JOHN CHOTE Second Respondent
AND	BMW PLUMBING LIMITED Third Respondent

Hearing: 23 September 2009

Counsel: J de Lange for the appellants
A J Harris and Ms Trusler for the first respondent
R B Philip for the third respondent
C J Chote (In person) second respondent

Judgment: 5 November 2009 at 4 p.m.

JUDGMENT OF POTTER J

In accordance with r 11.5 High Court Rules
I direct the Registrar to endorse this judgment
with a delivery time of 4 p.m. on 5 November 2009.

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Introduction

[1] The appellants own what was a "leaky building" at 130 Whakapirau Road, Hastings.

[2] Their applications to the Weathertight Homes Tribunal ("the Tribunal") have been the subject of two determinations by the Tribunal in claim 02891 ("the 02 claim") and claim 05461 ("the 06 claim"). The determination in the 06 claim, Procedural Order 2 dated 12 June 2009 ("the 06 determination"), struck out the first, second and third respondents ("the respondents") as parties to the 06 claim on the basis that the causes of action/legal issues/subject matter were determined in the 02 claim.

[3] The appellants appeal against that determination under s 93 of the Weathertight Homes Resolution Services Act 2006 ("the 06 Act"). They say that since the determination of the 02 claim on 20 June 2006 ("the 02 determination"), new causes of water ingress (defects) have been discovered and new damage has become apparent which were not discoverable at the time of the 02 claim, that the 06 claim needs to proceed to a full adjudication hearing and the striking out of the respondents is premature.

[4] The respondents say the doctrine of res judicata applies and the appellants are estopped from relitigating the 06 claim issues which are essentially the same as those in the 02 claim. They say the 06 determination is correct and should be upheld.

[5] In support of the appeal and pursuant to a minute of Miller J dated 28 July 2009, the appellants filed an affidavit of Graham Leslie Linwood sworn 21 August 2009 ("Mr Linwood's affidavit") and an application to adduce this as further evidence on appeal. I received this evidence *de bene esse* at the commencement of the appeal hearing. No further evidence was filed by the respondents.

Issues

[6] The issues in this appeal are:

a) Whether the doctrine of res judicata applies, because of either cause of action estoppel or issue estoppel, to all the appellants' causes of action against the respondents in the 06 claim; and

b) Whether the Tribunal was correct to strike out the 06 claim against the respondents.

Chronology of main events

[7] In 2000 the appellants' dwellinghouse at 130 Whakapirau Road, RD4 Hastings ("the house") was erected. From July 2004 the appellants experienced leaking problems in the house and in November 2004 applied for an assessor's report under s 9 of the Weathertight Homes Resolution Services Act 2002 ("the 02 Act"). On 26 April 2005 Christopher John Phayer completed an assessor's report in the 02 claim pursuant to s 10 of the 02 Act ("the first report"). On 25 October 2005, the appellants filed a notice of adjudication and pursued the respondents through the Tribunal. On 20 June 2006 the 02 claim was determined by the 02 determination.

[8] In May 2007 remedial work commenced to the stairwell and adjacent area of the house ("the stair area"). In the course of the remedial work further defects were discovered. On 8 June 2007 the appellants applied for a second assessor's report, this time pursuant to s 32 of the 06 Act, which repealed and substituted the 02 Act with effect from 1 April 2007. A second assessor's report was completed by Mr Phayer on 30 July 2007 ("the second report").

[9] The appellants filed a notice of adjudication on 22 February 2009 and a statement of claim. The first, second and third respondents applied to be removed from the 06 claim on various dates between March and June 2009.

[10] On 12 June 2009 the 06 determination was issued striking out the respondents from the 06 claim.

The 06 determination : Procedural Order 2

[11] The adjudicator defined the issue as being whether the 06 claim involved a determination of the same questions or issues that were involved in the 02 determination. The adjudicator said at para 30:

> The answer to this question depends to some degree on how broadly or narrowly one defines these questions and issues in dispute.

[12] The adjudicator summarised the background:

- The house was constructed during 2000 and built by the first respondent with plastering work being done by the second respondent and some plumbing work by the third respondent. Carter Holt Harvey Limited, the fourth respondent, is allegedly the manufacturer and the installer of the roofing of the house.

- The first significant indication of leaks occurred in July 2004 following which the appellants filed an application with the Weathertight Homes Resolution Service ("WHRS") and the first report followed.

- The first report identified the causes of water entry as including:

    - Failure of joints between aluminium joinery and stucco cladding;

    - Inadequate installation of jamb flashings;

    - Inadequate finishing and flashings and penetrations through the cladding.

- In general the assessor considered the framing did not remain durable because the cladding system was failing and some replacement was necessary. The assessor considered at that stage the damage was localised but that further damage could show once wall linings were fully removed.

- The 02 determination that followed the adjudication hearing found negligence and breach of contract against the first respondent, Mr Stevenson, and BMW Plumbing Limited. The claims against Mr Chote and a Mr Brown were dismissed.

- In May 2007 remedial work was commenced which disclosed further damage and that more comprehensive remedial work was required.

- That led to a new claim, the 06 claim, and the second report. The new claim was determined to be an eligible claim under the 06 Act.

- The respondents then filed strike out applications. All parties agreed that the applications for removal or strike out could be heard on the papers.

[13] The adjudicator accepted that the 02 claim and the 06 claim were essentially claims in relation to the responsibility for weathertightness issues concerning the claimants' property. She found that the first report was not a report on certain localised areas of the dwelling and that the causes of damage identified in both reports were "similar". The causes of damage in the second report were:

- Joints between aluminium joinery and stucco cladding having failed;

- Inadequate joint flashings;

- Inadequate clearances between the stucco cladding and adjacent ground levels;

- Areas of un-coated stucco between areas such as ends of spouting and inadequate finishings.

[14] The adjudicator held at para 35:

> The claims filed under the 2002 Act and with the Tribunal are similar in that they both relate to the same leaky home, the causes of action against the parties are the same, and the causes of damage identified in both assessors' reports are in some cases identical but in any event are sufficiently similar to

> conclude that in terms of the issue of causation, the questions to be determined by the Tribunal are the same as those determined (in) the 2002 Act adjudication. The major difference between the two claims is that the cost of the remedial work and to a lesser extent, the damage that has been established.

[15] She continued at para 36:

> I accept that there is now more evidence of damage to the dwelling but the fact that the claimants now have better and more detailed evidence of leaking is not in itself sufficient justification for finding that the doctrine of res judicata does not apply in the circumstances of this case.

[16] And at para 37:

> The situation the claimants find themselves in is indeed very unfortunate (but) … Allowing relitigation of a leaky homes claim based on increased remedial costs after an adjudication based on estimates, would be contrary to both of the reasons underpinning the doctrine of res judicata.

[17] While not ruling out that there may be cases where subsequent claims can be pursued where it is clear the basis of those claims relates to significant causes of damage that were not identified in the original adjudication or litigation, the adjudicator concluded that the scope and issues addressed by the assessor in the first report and in the second report were largely the same. She found that the 02 adjudication included consideration of the whole house, and the causes of action against the respondents in those proceedings were the same as those in the current proceedings, with the exception that the claimants appeared to have dropped the claim in negligence against Mr Stevenson.

[18] Accordingly, the adjudicator granted the application for removal of the respondents as parties to the proceedings. She declined the application by Carter Holt Harvey Limited to be removed as a party because she considered it arguable that the claim against Carter Holt Harvey Limited is on different issues to the 02 Act adjudication, particularly if the damage that has resulted from the roofing defects is distinct from other damage to the house.

Introductory matters

[19] There is common ground between the parties on a number of matters to which I need refer only briefly.

Approach on appeal

[20] A right of appeal arises under s 93 of the 06 Act in respect of a claim "that has been determined by the tribunal" on a question of law or fact. The parties accept that the 06 determination striking out the respondents is a final determination of the claims in respect of those parties: *Future Holdings Trust v Argon Construction Limited & Ors* HC AK CIV 2008-404-7316 18 May 2009, Asher J.

[21] The parties are also agreed that the approach on appeal is governed by *Austin, Nichols & Co Inc v Stichting Lodestar* [2008] 2 NZLR 141:

- The Court is entitled to take a different view to the Tribunal if it considers the 06 determination was decided wrongly.

- The onus is on the appellants to satisfy the Court that it should differ from the 06 determination.

- The Court is responsible for arriving at its own assessment of the merits of the case.

- The Court is not in error if it pays little attention to the Tribunal's reasons for its conclusions in the 06 determination.

Strike out principles

[22] The relevant provisions in the 06 Act are:

Section 57(2) -

> In managing adjudication proceedings, the Tribunal must comply with the principles of natural justice.

Section 112(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.

[23] The "fair and appropriate" test applies under both ss 34 of the 02 Act and 112 of the 06 Act.

[24] In *Kay v Dickson Lonergan Ltd & Ors* HC AK CIV 2005-483-201 31 May 2006, Ellen France J in considering a strike out application under s 34 of the 02 Act said at [36]:

> It is common ground that the relevant principles for the strike out equate with those applying to a strike out in either the District or the High Courts, in other words as the adjudicator accepted, the power is to be exercised sparingly and in clear cases.

[25] The jurisdiction is to be exercised sparingly, and only in a clear case where the Court is satisfied it has the requisite material. The causes of action must be so clearly untenable that they cannot possibly succeed: *Attorney-General v Prince & Gardner* [1998] 1 NZLR 262 at 267.

Res judicata principles

[26] The statement of principle in *Shiels v Blakeley* [1986] 2 NZLR 262 at 266 was adopted by all parties, though they differ in its application to the facts of this case:

> Where a final judicial decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, is estopped in any subsequent litigation from disputing or questioning the decision on the merits.

[27] The doctrine is commonly justified on two grounds:

a) Public interest: It is in the interests of the state that there should be an end to litigation.

b) Hardship on the individual: No one should be proceeded against twice for the same cause.

(*Lockyer v Ferryman* (1877) 2 App Cas 519,530)

[28] In *Z v Dental Complaints Assessment Committee* [2009] 1 NZLR 1, which concerned disciplinary charges brought against a practitioner by the Dental Complaints Assessment Committee, Elias CJ said at [63]:

> Whether a proceeding attempts in substance to relitigate a controversy already settled by final determination and amounts to an abuse turns on what Lord Bingham described in the context of court litigation as a:
>
> > … broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focussing attention on the crucial question whether in all the circumstances a party is misusing or abusing the process of the court: *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 31.
>
> Key in that consideration in the present case will be whether the disciplinary charges are the same or substantially the same as the criminal charge in respect of which the dentist was acquitted.

The purpose and scheme of the 06 Act

[29] The purpose of both the 02 and 06 Acts is stated to be:

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

[30] The scheme of the legislation is usefully summarised in *Kells v Auckland City Council & Ors* HC AK CIV 2008-404-4812 30 May 2008, Asher J at [19], which I adopt. The references are to sections in the 06 Act:

> A claim under the Weathertight Homes Act is commenced when an owner of a dwellinghouse applies for an assessor's report: s 9 and s 32. The chief executive of the Department of Building and Housing then makes an initial assessment as to whether the claim meets the eligibility criteria in subpart 2: s 32. If it does, the chief executive appoints an assessor to prepare a report

> in respect of the dwellinghouse: s 32. The assessor then prepares a report in respect of the damage to the dwellinghouse: s 42. The chief executive evaluates the assessor's report and determines finally whether the claim meets the eligibility criteria: s 48(1). An eligible claimant may then file an application for adjudication: s 62. The chair of the Weathertight Homes Tribunal assigns a Tribunal member to act as the Tribunal: s 64. The Tribunal then conducts adjudication proceedings pursuant to ss 65 to 73. The Tribunal may refer the claim to mediation under subpart 6: s 73. If a claim cannot be resolved, it is to be determined by the Tribunal: ss 89 and 90. The Tribunal must manage adjudication proceedings to ensure that they are "speedy, flexible and cost-effective" and comply with the principles of natural justice: s 57(1).

[31] There is an important difference between the provisions of the 02 Act under which the first report was made in this case and the 06 Act under which the second report was made.

[32] Section 10 of the 02 Act required the assessor's report (if in the assessor's opinion the claim meets the criteria in the Act), to state the assessor's view as to:

> (i) the cause of water entering the dwellinghouse; and
>
> (ii) the nature and extent of any damage caused by the water entering the dwellinghouse; and
>
> (iii) the work needed to make the dwellinghouse watertight and repair that damage; and
>
> (iv) the estimated cost of that work; and
>
> (v) the persons who should be parties to the claim.

[33] Under s 42(2) of the 06 Act, if the criteria are met, the report must state the assessor's view on:

> (a) why water penetrated the dwellinghouse concerned; and
>
> (b) the nature and extent of the damage caused by the water penetrating the dwellinghouse; and
>
> (c) the work needed to repair the damage; and
>
> (d) the work needed to make the dwellinghouse weathertight (both in relation to the deficiencies that enabled the damage to occur and in relation to any deficiencies that are likely in future to enable damage to be caused to the dwellinghouse by water penetrating it); and
>
> (e) the estimated cost of the work referred to in paragraphs (c) and (d); and

(f) the persons who should be parties to the claim.

[34] The Weathertight Homes Resolution Services (Remedies) Amendment Act 2007 ("the Amendment Act") expanded the remedies available to claimants to include general damages or any other remedy that could be claimed in a Court of law.

Appellants' submissions

[35] The appellants submit that not all of their causes of action against the respondents were determined by the 02 determination and accordingly res judicata does not and cannot apply. Accordingly, they submit that the respondents should not have been struck out of the proceeding because the strike out principles provided by the 06 Act and relevant case law were not satisfied.

[36] They say:

a) The second report identified further *causes* of water ingress and distinct damage to the house which gave rise to separate causes of action against the respondents and these have not yet been determined.

b) After the second report further *causes* of water ingress and distinct damage were discovered which gave rise to separate causes of action against the respondents and these have not yet been determined.

c) The majority of the defects/causes of water ingress found in the house were not discovered until after both the first and second reports (referring to Mr Linwood's affidavit).

d) The actual cost of repairs totalled approximately $520,000 which far exceeds the $11,250 (including GST) awarded in the 02 determination and the $391,441 (including GST) estimated in the second report.

e) The two policy considerations justifying res judicata (refer [27] above) do not apply in this case.

f) Striking out the respondents was contrary to the statutory regime of the 02 and 06 Acts.

[37] Mr de Lange emphasised two factors which he submitted are critical in the circumstances of this case:

a) The first report was given under the 02 Act while the second report is given under the 06 Act. There is a critical difference between s 10 of the 02 Act and s 42 of the 06 Act (these provisions are set out at [32] and [33] above). The 02 Act was limited to "damage caused by water entering the dwellinghouse" while s 42 of the 06 Act requires an assessment of both existing and future damage.

b) The first report was provided and the 02 determination on 20 June 2006 was carried out and concluded in relation to the defects and causes of water ingress discoverable at the time. These were located in the stair area. The causes of action in the 06 claim against the respondents relate to the defects and causes of water ingress that were discovered *since* the 02 determination. Therefore they cannot have been determined by the 02 determination.

[38] The appellants say this is not an attempt to re-litigate the defects and causes of water ingress in the stair area which were the subject of the first report. They accept the causes of action arising against the respondents from the first report are res judicata. But they say new and distinct damage and new and distinct causes of that damage have been identified by the second report and discovered since the second report, as identified in Mr Linwood's affidavit.

[39] The appellants submit that in the case of latent defects (which they say clearly is the case with the defects identified in the second report and Mr Linwood's affidavit) the cause of action against the parties responsible accrues when the defects

become "reasonably discoverable". They refer to identification of the point of "reasonable discoverability" as determined by the Privy Council in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513, 526:

> In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs.

[40] Counsel referred to the judgments in *Future Holdings Trust v Argon Construction Ltd & Ors* and *Body Corporate No 169791 & Ors v Auckland City Council & Ors* HC AK CIV 2004-404-005225 19 May 2009, Cooper J as cases where the Court has recognised that multiple causes of action can accrue at different times in building defect claims when sufficiently separate and distinct damage to that initially identified leads to the discovery of new causes of water ingress. In such cases of latent defects, it is submitted, the *Hamlin* test applies to each of the various defects discovered at different times.

[41] In support of their contention that in this case new and distinct damage was discovered after the 02 determination which could not have been earlier discovered in terms of the "reasonable discoverability" test in *Hamlin*, the appellants referred to the defects and consequent damage having been discovered at three approximate intervals:

a) By the assessor when preparing the first report;

b) By the assessor when preparing the second report;

c) By Mr Linwood after the second report.

[42] The first report identified the causes of water entry as including those matters accepted by the adjudicator in the 02 determination (as set out at [12] above).

[43] The damage identified as a consequence of these causes of water ingress was in the stair area. The adjudicator said at paragraph 5.9 of the 02 determination:

> Having considered all this material and the evidence at the hearing I have come to the conclusion that the only evidence of leaks causing damage for which there can be any liability on the part of the respondent is around the stairwell and windows area.

[44] At paragraph 5.13 the adjudicator recorded the assessor's concern that there *may be* other aspects of leaking or damage from similar window joinery and finishings on other windows but said there was simply no evidence that was the case, and he was not prepared, or able, to speculate:

> … there is no evidence of any other leaks causing damage nor any other liability on the part of any respondent to contribute to the cost of "recommended repairs ..."

[45] The first report estimated that essential repairs would cost $16,933 including GST. The adjudicator awarded $10,000 plus GST ($11,250) which he apportioned between the parties he found liable, recording that $7,330 had been received by the Camerons from the Hastings District Council, which was one of the respondents.

[46] The appellants say that the second report identified substantially more damage than the first report. The cost of repairing current damage to stop current leaks was estimated at $243,201 (including GST) broken down into costs relating to the north-east elevation, the north-west elevation, the south-west elevation and the south-east elevation. The assessor separately assessed the costs of preventing future leaks at $148,240 (including GST).

[47] The causes of defects identified by the second report included those matters accepted by the adjudicator in the 06 determination (as set out at [13] above).

[48] The appellants accept that the identified defects in the two reports are similar, but maintain that the second report clearly identifies further causes of water ingress. They point out that this was recognised by the adjudicator when at paragraph 44 of the 06 determination she acknowledges that the 02 determination did not include a claim in relation to the roof and that roofing defects were not mentioned in the first report. The adjudicator states that it is therefore arguable that the claim against Carter Holt Harvey Limited is on different issues to the 02 determination, but:

> It is too early to make a factual conclusion on this issue.

(at paragraph 45)

[49] Carter Holt Harvey Limited was not struck out as a respondent. The appellants submit that as it was Mr Stevenson, the first respondent, who engaged Carter Holt Harvey Limited as a subcontractor it is illogical to strike out Mr Stevenson on the basis that the claims against him have been determined while recognising that claims against Carter Holt Harvey Limited are yet to be determined.

[50] The appellants submit that while the adjudicator in the 06 determination recognised that new substantial and distinct damage had been discovered since the determination of the 02 claim, she then failed to assess whether this further damage could be the result of causes of water ingress that were not identified in the first report. The 06 determination acknowledges at paragraph 24 that:

> When commencing the remedial work in May 2007, (the appellants) discovered that the damage was more extensive than anticipated and more significantly the remedial work would cost substantially more than the amount they had been awarded under the earlier adjudication.

[51] But it then continued at paragraph 37:

> … allowing re-litigation of a leaky homes claim based on increased remedial costs after an adjudication based on estimates, would be contrary to both the reasons underpinning the doctrine of res judicata.

[52] The appellants say this finding is wrong. The issue here, they say, is not increased costs for remedying discovered defects but a situation where further causes of water ingress/defects have been discovered that have caused separate damage and have contributed to the damage caused by the defects identified in the first report.

[53] The appellants refer to the recognition by the adjudicator in paragraph 38 that subsequent claims can be pursued where the basis of those claims relate to significant causes and damage that were not identified in the original adjudication or litigation, but say the adjudicator is wrong in then stating at paragraph 39 that in this case:

> … the earlier adjudication did consider whether there was more extensive damage but concluded there was no evidence on which to base such a finding.

[54] The appellants submit that the evidence available in the second report disclosed further *causes* of water ingress and substantially more consequent damage but that even the *possibility* that further defects (and corresponding causes of action) could have been discovered, should have satisfied the adjudicator that the respondents should not at this stage be struck from the proceedings but that it should proceed to a full adjudication. They say the premature striking out of the respondents has denied the appellants the opportunity to submit further evidence in support of their claim at an adjudication hearing. This would have included the evidence of the independent expert, Mr Linwood. It is submitted the adjudicator did not follow the principle she accurately stated at paragraph 2 of the 06 determination:

> An adjudicator should not attempt to resolve genuinely disputed issues of fact unless he or she has all the necessary material before him or her. Even then the jurisdiction to strike out should be exercised judiciously and sparingly because evidence is often disputed and requires testing and determination at hearing.

Respondents' submissions

[55] Mr Harris for the first respondent took primary responsibility for the submissions for the respondents. His submissions were essentially adopted by Mr Chote and counsel for the third respondent. In referring to the respondents' submissions, I treat their submissions together.

[56] The respondents submit that the Tribunal was correct to strike out the 06 claim.

[57] They say:

a) The issues in the 02 determination were the same, or substantially the same, as those in the 06 claim;

b) The respondents' liability for weathertightness defects for the entire house was in issue in the 02 determination;

c) The respondents' liability to the appellants for watertightness construction and materials defects in respect of the entire house has been judicially determined. The appellants are estopped from bringing a subsequent claim in respect of the respondents' liability for construction and materials defects in respect of the house;

d) The Tribunal's decision to strike out the 06 claim could have also been justified on the grounds that the 06 claim was commenced outside the six year limitation period specified in s 4 of the Limitation Act 1950;

e) The Tribunal's decision to strike out the 06 claim was in accordance with the policy of res judicata/estoppel and the purposes of the 02 Act and the 06 Act as amended by the Weathertight Homes Resolution Services (Remedies) Amendment Act 2007 ("the Amendment Act").

[58] The respondents contend that the subject matter of the 02 determination was the watertightness defects and damage to the house and consequent liability of the respondents. They say the adjudicator's finding that the only evidence of leaks causing damage was around the stair area, did not limit the subject matter of the 02 determination. Rather, it was a determination of what the appellants had proved.

[59] They submit that the respondents' liability in respect of the building work undertaken on the house has been judicially determined and it is not open to the appellants to relitigate the same subject matter again, even if additional and more comprehensive evidence has subsequently become available.

[60] They contend the following findings in the 06 determination are correct:

> The adjudication under the 2002 Act included consideration of the whole house (paragraph 41); and
>
> The earlier adjudication did consider whether there was more extensive damage but concluded there was no evidence on which to base such a finding (paragraph 39).

[61] They emphasise the finding of the adjudicator in the 06 determination that:

> The original assessor's report [in the 02 claim] was not a report on certain localised areas of the dwelling (paragraph 31) and that the 02 determination related to the "whole house" (paragraph 41).

[62] Further, that the first report included the assessor's view of:

> The causes of water entering the dwellinghouse (paragraph 6.1 of the first report);
>
> The nature and extent of any damage caused by the water entering the dwellinghouse (paragraph 6.2 of the first report); and
>
> The work needed to make the dwellinghouse watertight and repair the damage (paragraph 6.3 of the first report).

[63] The respondents refer to detail in the first report as identifying general rather than localised risk factors, for example the finding at paragraph 6.2.1 of the first report:

> The epicentre of severe damage appears to be in the under stairs corner area, but further damage will likely show once all linings are removed to facilitate practical repairs.

At paragraph 6.2.3:

> Without prompt or temporary remedial works, it is inevitable that moisture ingress will continue unhindered and increase timber decay damage and mould growths in the concealed structure.

And at paragraph 6.4.4:

> Final costs may vary, subject to the extent of concealed damage that will become more defined as such areas are fully exposed during remediation ...

[64] The respondents submit that the adjudicator in the 06 determination correctly concluded that the questions to be determined by the 06 claim were the same or sufficiently similar to those determined in the 02 claim, for two reasons. First, the subject matter of the first report and the 02 determination was the watertightness defects and damage to the entire house. It follows therefore, it is submitted, that any subsequent report addressing any part of, or the entire, house must include the same or substantially the same subject matter and questions. Second, all the causes of water ingress identified in the second report are identified in the first report.

[65] It is further submitted that the adjudicator in the 06 claim was correct to find that because there is now more evidence of damage to the house, that is not itself sufficient justification for finding that the doctrine of res judicata does not apply in the circumstances of this case (paragraph 36). The quality of the evidence, it is submitted, does not alter the position that the subject matter of the 02 determination and the 06 claim is the same and that the respondents' liability in respect of defects regarding the house has been determined.

[66] The respondents further submit that even on the appellants' analysis, the defects and problems with water ingress had been clearly identified by the first report in respect of the whole of the dwelling and the appellants had been fully alerted to the possibility of further damage beyond that identified in the stair area. In this respect, Mr Harris submitted this case is consistent with *Pullar v Secretary for Education* [2007] NZCA 389 because the defects were obvious and at that point the market value of the house was affected. Counsel submitted that the cause of the damage to the house then being obvious, the appellants' cause of action accrued.

[67] Mr Harris referred to ss 22 and 23 of the 02 Act, which preserve the rights of claimants to submit any matter in relation to a claim to another dispute resolution procedure including the courts, and submitted that, having been alerted to the defects in relation to the whole house by the first report, the appellants had then to elect whether to proceed under the 02 Act with the limited remedies available in relation to *actual* damage or to proceed through the court to access all available remedies, including remedies for future damage. He submitted that the appellants' cause of action had accrued prior to the 02 determination but the appellants, having elected to proceed under the 02 Act, were limited to the remedies provided by that Act.

[68] He sought to distinguish the situation here from that in *Body Corporate No 169791 & Ors v Auckland City Council* where the Court distinguished the facts in that case from those addressed in *Pullar* because the "Belgravia report" did not identify any defect that was giving rise to the leaks being experienced and it was not until the "Jones report" was received that there was any appreciation of the real causes of the problems and the remedial action required: at [92].

[69] It is submitted that in this case all problems were identified or substantially identified by the first report and the problems subsequently identified are all subsumed within one of the heads of defects identified in the first report. Consequently the adjudicator in the 06 determination was correct in stating that allowing re-litigation of leaky homes claims based on increased remedial costs after an adjudication based on estimates would be contrary to both the reasons underpinning the doctrine of res judicata (paragraph 37).

[70] The respondents further refer to the purpose of the 02 Act, essentially carried through to the 06 Act in precisely the same terms (set out in [29] above).

[71] That purpose, it is submitted, is given effect by the provisions of the 02 Act which placed assessors' reports at the forefront of proceedings, provided for claims to be made without the necessity for formal pleadings and provided for hearings without usual court formalities.

[72] The respondents say that the 02 Act adjudications invariably involved a broad assessment of the evidence in respect of a dwellinghouse, without limitation, and a determination of liability in respect of it. They say that is what happened in the 02 determination where the Tribunal performed its purpose. They submit that the purpose of the 02 Act and the 06 Act will not be achieved by allowing claims to be made incrementally with sequential publicly funded assessments and reports in respect of the same house being produced with sequential adjudications.

Discussion and conclusions

The 02 claim and the 06 claim

[73] The adjudication that followed the 02 claim and resulted in the 02 determination was necessarily limited and constrained by:

a) The provisions of the 02 Act which limited claims to the "nature and extent of any damage caused" by water entering the house and the cause of the leaking that resulted in that damage; and

b) The assessor's report (the first report) and the evidence at the hearing that the only damage to the house was in the stairwell and windows area (refer [43] and [44] above).

[74] The adjudicator in the 02 determination did not have jurisdiction to consider "any deficiencies that are likely in future to enable damage to be caused to the dwellinghouse by water penetrating it": s 42(2)(d) 06 Act. He properly declined to do so, stating that in the absence of current damage, he would not speculate.

[75] Thus, while the first report related to the whole house, the damage and the cause or causes of it identified in the report were confined to the actual damage then able to be discovered by the assessor, which he determined was in the stair area.

[76] The second report identified substantially more damage to the house, not limited to the stair area, and further causes of that damage which were similar to the causes of the original damage. Mr Linwood's affidavit identifies twenty four further causes of water ingress identified during remedial works completed between May 2007 and July 2009, which he says could not have been discovered at the time of the second report: para 18(b) Mr Linwood's affidavit.

[77] If the assessor Mr Phayer was unable to identify at the time of the first report, the further damage discovered at the time of the second report, and if Mr Linwood is of the opinion that still further damage identified in the course of the remedial work could not have been discovered at the time of the second report, how could the appellants have "reasonably discovered" that damage at the time of the first report, in terms of the test in *Invercargill City Council v Hamlin*? Plainly, they could not.

[78] The inspection and assessment of the whole house to which the first report was directed did not identify damage in areas apart from the stair area. In the stair area the damage was patent, but elsewhere the damage was latent. Further damage,

separate and distinct from the damage located in the stair area at the time of the first report, has subsequently been discovered and new causes of water ingress, albeit similar but not the same as the original causes, have been identified.

[79] As Asher J recognised in the *Future Holdings Trust* case, the discovery of new and distinct damage, and new defects, can give rise to new causes of action.

[80] In the *Future Holdings Trust* case, a report from an independent expert had been obtained in 1997 and repairs carried out as recommended by that report to achieve weathertightness of the building in issue. The building continued to leak. The owners applied for an assessor's report in 2004. The respondents applied to be struck out of the proceeding under s 4 of the Limitation Act 1950 on the basis that the proceeding was brought more than six years after the defects had been or could reasonably have been discovered, and were successful before the Tribunal. The Tribunal's decision was reversed on appeal and the matter was referred back to the Tribunal to be determined fully at an adjudication hearing. Asher J said:

> [65] I am satisfied that the Tribunal erred in concluding that the defects and therefore the loss were discovered in 1997, and therefore that the cause of action accrued then. The problem is not the Tribunal finding that a cause of action accrued in 1997, but rather it finding that all of the Holdings Trust's claim against Argon was time-barred because a cause of action accrued in 1997. The Tribunal did not sufficiently consider whether more causes of action could have arisen after 1997, because of new and distinct damage, and because of the discovery of new defects. It was too ready to assume that the discovery of some leaks and defects fixed the start of the limitation period. …
>
> [66] After the discoveries in 2003/2004, there can be no doubt that the building was worth much less from that point of time. The discovery that lead to that loss in value could be seen as giving rise to a new cause of action. In the words of Gault J in *S v G* [1995] 3 NZLR 681 at 687, it may be sufficiently separate and distinct damage to give rise to a new cause of action. That will be an issue of fact and degree, best determined at the hearing and not on the papers in a strike out.

[81] The *Future Holdings Trust* case was concerned with *when* a subsequent and different cause of action may accrue. This case is concerned with *whether* a subsequent and different cause of action may accrue. But the same principles apply. It will be a question of fact and degree whether damage is sufficiently distinct to

result in a separate cause of action in negligence: *Bowen v Paramount Builders (Hamilton) Limited* [1977] 1 NZLR 394 (CA) at 424; *S v G*.

[82] When the damage in the stair area of the house was first identified by the appellants in mid-2004, resulting in the first report, the market value of the house would have depreciated, but possibly only moderately so, because on the basis of the first report the causes of the only identified damage could be remedied at comparatively moderate cost. However, the subsequent discovery of previously latent damage led to a potentially much more serious situation of economic loss which may well give rise to a new cause or causes of action against the respondents. That is a matter best determined at the adjudication hearing and not on the papers in a strike out.

[83] While the adjudicator in the 06 determination was correct in generally describing the 02 and the 06 claims as both relating to weathertightness issues concerning the appellants' property, she mis-directed herself that the 06 claim was to be treated as a claim "based on increased remedial costs after adjudication based on estimates": para 37. The 02 adjudication was not based on estimates. It was based on the actual damage identified in the stair area and the cost of remedying that actual damage, with which the appellants take no issue. The adjudicator expressly and correctly declined to adjudicate in respect of other areas of concern noted by the assessor, as speculative and outside his jurisdiction. Consequently the subsequent damage, latent at the time of the first report, and the causes of it, have not yet been the subject of adjudication.

[84] In those circumstances, it was not "fair and appropriate" in terms of s 112 of the 06 Act to strike out the respondents from the proceeding. This is not a case where the appellants clearly cannot possibly succeed in the 06 claim.

Cause of action estoppel or issue estoppel

[85] Mr Harris, counsel for the first respondent, made detailed submissions about the distinction between cause of action estoppel and issue estoppel. He submitted that rather than being a case of cause of action estoppel this case raises issue

estoppel, the issue, he said, being the weathertightness of the house. He cited from *Laws of New Zealand, Estoppel* at para 20:

> Under issue estoppel, a party is precluded from contending the contrary to any precise point which, having once been distinctly put in issue, has been determined against that party even if the objects of the first and second actions are different.

[86] Paragraph 20 from which Mr Harris cited continues:

> The matter must, however, have been directly in issue in the first action rather than collaterally or incidentally in issue. Although the principle applies whether the point involved in the earlier decision as to which the parties are estopped is one of fact, one of law, or one of mixed fact and law, it is fundamentally important that it be the same question.
>
> The earlier decision relied upon must determine, not the existence or non-existence of the cause of action, but some lesser issue which is necessary to establish (or demolish) the cause of action set up in the later proceedings. An issue estoppel can only be founded on the determinations which are fundamental to the earlier decision and without which it cannot stand.

[87] Ultimately, however, Mr Harris advocated the "... broad, merits-based judgment" approach of Lord Bingham in *Johnson v Gore Wood & Co* adopted in *Z v Dental Complaints Assessment Committee* (set out at [28] above). He said at paragraph 19 of his submissions:

> Overall, the question is whether a proceeding attempts **in substance** to re-litigate a controversy already settled by a final determination.

[88] I agree this must be the ultimate test. The key consideration in this case is whether substantially the same subject matter as was determined in the 02 determination is sought to be re-litigated by the appellants in the 06 claim, such that the appellants are misusing or abusing the processes under the 06 Act.

[89] The 06 determination summarised from [11] above is somewhat confusing as to the approach taken. At para 30 the issue is defined as:

> ... whether the claim currently before the Tribunal involves a determination of the same questions or issues that were involved in the 2002 Act adjudication.

[90] However, the adjudicator accepted that the scope and issues addressed by the assessor in the first report and the second report were largely the same and the causes

of action against the respondents were the same, except that the 06 claim did not plead negligence against Mr Stevenson: para 41. This was the basis on which she granted the application to remove the respondents (other than Carter Holt Harvey).

[91] I have held that the separate and distinct damage and causes of it discovered after the 02 adjudication may give rise to a distinct cause or distinct causes of action against the respondents or one or more of them.

[92] I accept, as I have said above at [73], the ambit of the 02 determination was limited, both by the facts and by the jurisdiction of the Tribunal. The issues of subsequent damage and the causes of it were not before the Tribunal at all, let alone directly. They were certainly not fundamental to the 02 determination. Consequently, adjudication of the appellants' 06 claim will not be an attempt in substance to re-litigate a controversy already settled by the 02 determination.

Public policy

[93] The appellants submit it is in the interests of public policy to ensure this matter is returned to the Tribunal and heard at a full substantive hearing because:

a) The Tribunal is a specialist body established by the Government to assist the owners of leaky buildings to recover their losses from those responsible for their loss;

b) The appellants have not been the author of their own demise. They have done everything that is expected of them.

[94] Counsel referred to the explanatory note to the Weathertight Homes Resolution Services Amendment Bill which explains the background to the enactment of the 06 Act. It stated that with no change the current legislation would:

> Prevent homeowners obtaining compensation for the full extent of the damage to their houses, disadvantaging WHRS users relative to homeowners using the Court system where people can sue for costs of restoring a property to the condition it would have been in if there were no defects.

Further that:

> The status quo restricts claims for damage to evident damage. This *leads to repeat claims when additional damage is sustained and becomes evident, which is inefficient. It is also at odds with damage able to be claimed through the Court process*. (emphasis added)

[95] It is submitted that the entire reason behind the amendment is to prevent the exact situation that has occurred in this case.

[96] It is further submitted that even under the 02 Act the appellants would still have been entitled to have their claim heard at adjudication and the respondents should not have been struck out. The appellants referred to s 60(1) of the 06 Act which provides that the owner of a dwellinghouse has the *right* to apply to the Tribunal to have the claim adjudicated if it is an eligible claim. The 06 claim was accepted as an eligible claim and consequently the appellants claim they have a right under this provision to have their claim determined at a full hearing.

[97] The respondents note that the Amendment Act has as its purpose to provide for the Tribunal to grant the same remedies as claimants would be entitled to in the courts: s 4. However, the respondents emphasise the 06 Act as amended by the Amendment Act does not provide for 02 claims to be re-litigated, in fact to the contrary. Section 5 provides that the amendments apply to claims initiated under the 02 Act if they are not withdrawn, terminated or otherwise disposed of before the commencement of the Amendment Act. Accordingly, it is submitted, the extended remedies available for 06 Act (as amended) claims are not available for 02 claims that have been disposed of. If Parliament had intended to permit the re-litigation of 02 claims there would have been express statutory provisions in that regard. The respondents say that the appellants' 02 claim has been "disposed of" by the 02 determination and accordingly cannot be re-litigated.

[98] The respondents further submit that for the appellants to be allowed to re-litigate a controversy which the respondents say was in substance settled by the 02 determination would create inherent hardship on the respondents, who would be called upon to address the same or substantially the same subject matter again.

[99] I accept the appellants' submissions. The respondents' reliance on s 5 of the Amendment Act does not assist them. It provides that claims "disposed of" before the commencement of the Amendment Act may not be re-litigated. The appellants do not seek to re-litigate the 02 determination. For the reasons already given, the 02 determination did not "dispose of" the 06 claim, which remains to be adjudicated.

Limitation argument

[100] Mr Harris referred to the statement by the adjudicator in the 06 determination that the causes of action in the 02 claim against the first respondent were in negligence and contract but in the 06 claim in contract only, referring to paragraph 6 of the statement of claim dated 17 February 2009 which states:

> The claimants sue the first respondent in contract.

[101] He contended that the claim against the first respondent is statute-barred by s 4 of the Limitation Act 1950 because the first respondent's breach of contract occurred in 2000 when the defective construction was undertaken, and the 06 claim for breach of contract was commenced on 8 June 2007, outside the six year limitation period for contract claims. It was noted that the appellants have not filed an amended statement of claim nor sought leave.

[102] Mr de Lange said that the claim against the first respondent had always been in tort, as are all causes of action against the respondents, and that he had made this clear to counsel for the respondents. He said the statement of claim alleging breach of contract is incorrect, but noted that no formal pleadings are required in relation to claims under the 06 Act.

[103] I do not see that the respondents can rely on an incorrect pleading in contract, which was not even required to be filed, to found a limitation argument. The error in the pleading can readily be rectified.

Mr Linwood's affidavit

[104] Mr Linwood states that he was employed by the project manager of the remedial work at the appellants' house and received the first report. Remedial work to the stair area in relation to the recommended targeted repairs in the first report commenced in May 2007. He became concerned that the causes of water ingress in the stair area may also exist in other areas of the house. He notified the appellants, who made a further application to the WHRS which resulted in the second report.

[105] He says the second report identified:

a) Substantially more damage than the first report, i.e. to areas around the entire house not just to the stair area;

b) The causes of water ingress present in the stair area were also present in other locations throughout the house;

c) Two further distinct causes of water ingress which were unidentified by the first report existed throughout the house.

[106] His terms of engagement were then expanded and remedial works were carried out between October 2007 and July 2009. He says that further causes of water ingress continued to be discovered throughout the remedial work process. He details these multiple causes of water ingress in a schedule attached to his affidavit. The schedule identifies the causes of water ingress in stages. Those are set out in the first report (six of a total of thirty two in the schedule), those identified in the second report (two of thirty two), and those identified subsequently to the second report (twenty four of thirty two). The schedule also describes the damage resulting from the defects in general terms, and denotes responsible parties.

[107] Mr Linwood expresses the opinion that the causes of water ingress identified during the remainder of the remedial works (twenty four of thirty two) could not have been discovered at the time of the second report.

[108] Mr Linwood's affidavit provides a useful summary of the three stages in which defects and their causes have been identified, by the first report, by the second report and subsequently to the second report. However, it is not essential evidence in relation to the determination of the issues on appeal, for the first and second reports speak for themselves. My conclusion that separate and distinct damage and causes of action arising therefrom may accrue to the appellants, is not dependent in any way on Mr Linwood's affidavit. I grant the application to adduce this evidence on appeal but note I have not needed to place any reliance on it and have not done so. It will no doubt provide evidence relevant in the adjudication of the 06 claim.

Result

[109] The appeal is allowed. Under s 95(1)(a) of the 06 Act, the 06 determination is reversed. The 06 claim is referred back to the Tribunal for a full adjudication.

Costs

[110] The appellants are entitled to costs on a 2B basis. The parties should be able to agree costs but if not, memoranda may be filed, the appellants within 21 working days and the respondents within 28 working days.