Kay (John Hendy & Victoria) v Dickson Lonergan Ltd, Wanganui District Council, Phil Durston, Building Research Association of New Zealand & J M Ten Broeke

IN THE MATTER OF an adjudication involving the Weathertight Homes Resolution Services Act 2002

AND IN THE MATTER OF the District Courts Act 1947. (Appeal from strike out)

JUDGMENT OF ELLEN FRANCE J : High Court New Zealand. Auckland Registry. 31st May 2006

Introduction

[1] The appellants, Dr and Mrs Kay, filed a claim on 14 December 2002 with the Weathertight Homes Resolution Service. The claim alleges negligence in relation to the design and construction of their home. In a decision dated 20 June 2005, the adjudicator struck out parts of their claim on the basis those parts were out of time in terms of the Limitation Act 1950.

[2] The appellants say it was wrong to strike out any part of the claim. The respondents cross-appeal and say all of the claim is time barred.

Factual background

[3] The appellants bought a property at 23 Oakland Avenue, Wanganui, in 1993. At about that time, they entered into a contract with Dickson Lonergan Limited, the first respondent. Dickson Lonergan were to design a residential dwelling to be built on the property and to supervise the construction.

[4] A Building Consent 93/5281 was issued by the Wanganui District Council, the second respondent, for construction of the dwelling on or about 10 May 1993.

[5] The appellants moved into the dwelling on or about 17 December 1993 and construction was completed in or around January of the following year. The plastering of the home was undertaken by Phil Durston Ltd, the third respondent, a company operated by the fourth respondent, Mr Phil Durston.

[6] In about March 1994, the appellants told Dickson Lonergan of various problems with their house. Those problems were as follows:

a) Cracks in the stucco cladding;
b) Damp carpet and skirting boards;
c) Water runs on interior linings;
d) Bubbled interior paint;
e) Musty smells; and
f) Water pooling on the garage and cupboard floor (under the stairs).

[7] Dickson Lonergan's reaction was to get the fifth respondent, the Building Research Association of New Zealand Incorporated (BRANZ) to undertake a site visit and report their findings. BRANZ duly reported in January 1995. The BRANZ report was sent by Dickson Lonergan to the appellants along with a letter in which Dickson Lonergan took issue with aspects of the BRANZ report.

[8] Dickson Lonergan organised for remedial works to be carried out on the house between March and August 1996. The cost of those works was $8,572.90.

[9] Those works were as follows:

a) Quality Decorating Ltd (painting) $196.70;
b) R & P Edmonds Ltd (painting of exterior) $4,736.25;
c) Garth Mason (repairs to shower, glass door and tiles) $2,989.95;
d) Mike Bates Plumbing and Gasfitting (repair shower leak and cap flashing to rafters to outside porch) $495.00; and
e) Ashamans Roofing (repairs to Butynol roofing) $155.00.

[10] The Council issued a code compliance certificate in relation to the original building consent on 13 August 1996.

[11] Once these initial remedial works were carried out, the appellants did not experience any further leaks for a period of over two years. It was not until about May 1999 that the appellants again noticed cracks appearing in the stucco cladding. They instructed Joyce Group Ltd, a firm of architects, engineers and building consultants, to investigate.

[12] Joyce Group finished its report in November 2000. That report confirmed that there were various construction defects in the dwelling which meant water penetrated the stucco cladding and affected the structural integrity of the home. After receiving the Joyce report, the appellants registered their property with the Weathertight Homes Resolution Service. They did that on 14 December 2002. They have since obtained various reports which confirm the defects in construction highlighted by Joyce Group.

[13] After the appellants filed their amended adjudication claim on 2 May 2005 the Council filed an application for orders removing the Council as a party to the adjudicat ion on the grounds the claim was time barred and that in all the circumstances it was fair and appropriate to remove the Council.

[14] Next, on 3 May 2005, Dickson Lonergan also applied for orders striking out the first and second causes of action.

[15] The adjudicator determined the applications in Procedural Order No.6 dated 20 June 2005. The adjudicator decided that claims in negligence by the appellants which derived from the defective plaster cladding were time barred. Claims deriving fro m other defects were not struck out.

The appellants' adjudication claim

[16] The appellants in this case have elected to use the adjudication services provided under the 2002 Act. Their amended adjudication claim alleges that their ho me was built with various design and construction defects which have meant water has gone into the structure of the building and caused it significant damage. They also claim that as a result of the defects and resultant damage they have suffered and will suffer various losses. Damages are sought.

[17] The first claim against Dickson Lonergan is one of negligent design. This claim focuses on Dickson Lonergan's alleged failure to ensure the designs, specifications, etc. met the applicable standards.

[18] The second of the claims against Dickson Lonergan relates to negligent project management. The third claim is based on Dickson Lonergan's failure to advise the appellants about the defects and their failure to ensure the 1996 repairs prevented water getting into the exterior cladding.

[19] As against the Council, there is a claim in negligence which relates to an alleged breach of the duty of care owed in respect of the Council's actions in issuing the building consent, inspecting the building work, and issuing the code compliance certificate.

[20] The claims relating to negligence for damage arising from defective plaster are not, in the present pleading, separated out from the other claims. Obviously, as is accepted by the appellants, a further amended adjudication claim will be necessary.

[21] The other respondents are, very loosely, third parties who have been joined on the basis they may attract some liability or contribution.

Statutory context

[22] The Weathertight Homes Resolution Services Act 2002 was passed to provide home owners of leaky buildings, "*with access to speedy, flexible, and cost- effective procedures for assessment and resolution of [their] claims*". (s 3; and see the discussion of the statutory scheme by Harrison J in ***Auckland City Council v Weathertight Homes Resolution Service*** (HC AK CIV 2004-404-4407 28 September 2004)).

[23] To achieve that purpose, the Act provides for the matters set out in s 4 (the overview section) namely, the *"Assessment and evaluation of claims in relation to leaky buildings". Hence, there is a mechanism for home owners to submit their claim, to have that claim evaluated, and to be given an assessor's report (ss 7 12), and in particular provision is made under s 4 for the:*

> *(b) Mediation of claims*
> *Sections 13 to 21 make provision for access to a special mediation service that is available to dwellinghouse owners with eligible claims.*
>
> *(c) Compulsory adjudication of claims*
> *Sections 22 to 55, and the Schedule, set up a mechanism whereby dwellinghouse owners can have their eligible claims referred to adjudicators whose powers and procedures are flexible and whose determinations, subject to appeal, are binding and enforceable:*
>
> *(d) Miscellaneous provisions. ...*

[24] In order to provide the relevant mediation and adjudication services, s 24 of the Act makes provision for the appointment of adjudicators one of whom is appointed by the Governor-General as the chief adjudicator.

[25] The jurisdiction of the adjudicators is set out in s 29 as follows:

> *(1) In relation to any claim that has been referred to adjudication, the adjudicator is to determine*
> *(a) the liability (if any) of any of the parties .. and*
> *(b) remedies ..*
> *(2) In relation to any liability determined under subsection (1)(a), the adjudicator may also determine*
> *(a) the liability (if any) of any respondent to any other respondent; and*
> *(b) remedies in relation to any liability determined under paragraph (a).*

[26] The adjudicator is given various other powers in relation to the conduct of the adjudication. First, with the written consent of all parties, claims may be consolidated (s 32). Second, the adjudicator may order joinder of parties as respondents under s 33(1) if the adjudicator considers that -

> *(a) the person ought to be bound by, or have the benefit of, an order of the adjudicator; or*
> *(b) the person's interests are affected by the adjudication; or*
> *(c) for another reason it is desirable the person be joined as a respondent.*

[27] Third, there is power to remove a party. Section 34 states:

> *34. Removal of party from proceedings*
> *An adjudicator may, on the application of any party or on the adjudicator's own initiative, order that a person be struck out as a party to the adjudication proceedings if the adjudicator considers it fair and appropriate in all the circumstances.*

[28] The adjudicator has the duties set out in s 35, namely to:

(1) ..

(a) act independently, impartially, and in a timely manner; and

(b) avoid incurring unnecessary expense; and

(c) comply with the principles of natural justice; and

(d) disclose any conflict of interest to the parties to an adjudication; and

(e) if paragraph (d) applies, withdraw from the adjudication unless those parties agree otherwise.

[29] The powers of the adjudicator under s 36 include the following:

(a) conduct the adjudication in any manner that he or she thinks fit, including adopting an inquisitorial process; and ..

(e) appoint an expert adviser to report on specific issues ..

(f) call a conference of the parties; and

(g) carry out an inspection of the dwellinghouse ..

(h) request the parties to do any other thing during the course of an adjudication that he or she considers may reasonably be required to enable the effective and complete determination of the questions that have arisen in the adjudication; and

(i) issue any other reasonable directions that relate to the conduct of the adjudication.

[30] Section 42 relevantly provides that -

(1) An adjudicator may make any order that a court of competent jurisdiction could make in relation to a claim in accordance with principles of law.

(2) However, if an adjudicator makes an order under subsection (1) that requires a person to take any action other than the payment of money, the adjudicator must also determine an amount of money that is payable by the person required to take the action, and a date by which that amount is payable if that person fails or refuses to take the action before that date. ..

[31] Section 63 enables the Governor-General to make rules regulating the practice and procedure of District Courts in proceedings under the Act.

Section 63(3) provides that -

In the absence of any rules under this section, or in any situation not covered by any of those rules, the rules in relation to civil proceedings for the time being in force under the District Courts Act 1947 apply, with all necessary modifications, to proceedings under this Act.

[32] The right of appeal to this Court is on a question of law or fact "that arises fro m the determination" (s 44(1)).

[33] In terms of s 46, in determining the appeal,

(1) .. the court may do any 1 or more of the following things:

(a) confirm, modify, or reverse the determination or any part of it:

(b) exercise any of the powers that could have been exercised by the adjudicator in relation to the claim to which the appeal relates.

(2) A determination under subsection (1)

(a) has effect as if it were a determination made by an adjudicator for the purposes of this Act; and

(b) is a final determination of the claim.

(3) Subsection (2)(b) does not prevent any proceedings between the claimant and respondent to the adjudication to which the appeal relates from being heard and determined at the same time as the appeal.

[34] Finally, s 55 provides that for the purposes of the Limitation Act, proceedings are deemed to be filed when an application is made under s 9(1) of the 2002 Act for an assessor's report.

Approach to strike out

[35] In their notice of appeal, the appellants said that the adjudicator had no power to strike out parts of a claim. This was based on the submission that s 34 of the Act only gives the adjudicator power to remove a person as a party. The appellants did not pursue this and so I do not deal with that question. The focus of the appeal has been on whether the power to strike out was properly exercised.

[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.

[37] The appellants say the adjudicator was wrong to strike out the claims relating to the plaster cladding. The respondents say the claim relating to the other defects should have been struck out. I take each in turn.

The claim based on the plaster cladding

[38] In reliance on the Privy Council's decision in ***Invercargill City Council v Hamlin*** [1996] 1 NZLR 513, the adjudicator said the issue on the strike out application was whether more than minimal damage had occurred in a form which ought to be reasonably discoverable by an ordinary prudent homeowner.

[39] The adjudicator said that on the appellants' own evidence they were aware of cracked plaster cladding and water penetration in or about March 1994 and certainly by January 1995 when they received a copy of the BRANZ report. The adjudicator concluded that, by then, they were aware or ought to have been aware that the plaster cladding had been applied inappropriately and was causing water to penetrate their ho me. In other words, the adjudicator said, *"it must have been obvious to [the appellants] that there was a significant problem with*

the plaster cladding." They then "*shut their eyes to the obvious"*. The adjudicator said Dr Kay's actions in discussing the BRANZ report with Dickson Lonergan, pressing for remedial work to be done, and then instructing solicitors to assist in resolving the issues, showed the appellants knew they had a problem with the plaster cladding.

[40] The parties all say the test is that set out in Hamlin at 526 in the following terms:

Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and not for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.

But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious. ..

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.

Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not: see ***Ruxley Electronics and Constructions Ltd v Forsyth*** [1995] 3 WLR 118.

[41] Their Lordships continued, at 526 527, saying: *This approach avoids almost all the practical and theoretical difficulties to which the academic commentators have drawn attention, and which led to the rejection of Pirelli by the Supreme Court of Canada in Kamloops. The approach is consistent with the underlying principle that a cause of action accrues when, but not before, all the elements necessary to support the plaintiff's claim are in existence. For in the case of a latent defect in a building the element of loss or damage which is necessary to support a claim for economic loss in tort does not exist so long as the market value of the house is unaffected. Whether or not it is right to describe an undiscoverable crack as damage, it clearly cannot affect the value of the building on the market. The existence of such a crack is thus irrelevant to the cause of action. It follows that the Judge applied the right test in law.*

Their Lordships repeat that their advice on the limitation point is confined to the problem created by latent defects in buildings. They abstain, as did Cooke P, from considering whether the "reasonable discoverability" test should be of more general application in the law of tort.

[42] The Court of Appeal more recently in **Murray and Ors v Morel & Co Ltd** CA86/04 22 December 2005, observed that what the Privy Counsel emphasised in Hamlin is that, the owner of a house which is found to contain defects sues not for physical damage to the house or foundations but for loss to his or her pocket. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations. If he or she resells the house at full value before the defect is discovered, he or she has suffered no loss. Thus, as the authors of Todd (ed) The Law of Torts in New Zealand (4ed 2005) say at [27.5](3)(a), *"in the common case the occurrence of the loss and the discovery of the loss will coincide"*. They say: "*Once this point is appreciated the difficulties surrounding the limitation question fall away."*

Hamlin, therefore, far from being authority for a general proposition that "reasonable discoverability" is or ought to be the norm, in fact is authority for the contrary (traditional) view. (See also, Weston "Limiting Limitation" [2006] NZLJ 85.)

[43] The appellants also rely on the application of Hamlin by Chisholm J in ***Andrew Housing v Tutbury*** (HC INV AP 34/97, 28 November 1997). In that case, the respondent had noticed cracks in the brickwork of her home and found that some of the doors were sticking. She complained to the City Council and to her insurers but nothing happened. Her next step was to consult solicitors which she did in April 1989. They arranged for a firm of engineers to be engaged. The engineers, in reports provided during April and July 1989, assessed the physical defects but did not establish the cause.

[44] Proceedings were issued on 20 September 1991. Chisholm J noted that "*even at that stage*" there remained uncertainty about the cause of the physical defects and the engineers carried on with investigations. It was not until 1995 that the engineers decided that the physical defects were caused by problems in the piles and their footings.

[45] The appellant in that case argued the District Court Judge was wrong to consider the causes of the damage. The respondent knew about the damage well before December 1989 and should have realised economic loss would result.

[46] Chisholm J said that it was significant that the Privy Council in Hamlin upheld the *"reasonable discoverability*" test applied by the trial Judge. The trial Judge in Hamlin had concluded that the reasonably prudent homeowner would not have discovered that "the true cause" of the defects was the subsidence of the foundat ions until they received expert advice. On that analysis, Chisholm J upheld the District Court Judge's reliance on causation issues.

[47] The appellants in the present case say it is at least arguable that the defects causing the problems they experienced were neither discovered nor reasonably discoverable until May 1999. That was when the cracks re-appeared and the appellants instructed Joyce Group. The appellants base this submission on the nature of the defects noticed in 1994 and on the context in which they raised these matters with Dickson Lonergan. As to the

first aspect, the appellants say the remedial work was minor in nature. Further, while the appellants were well aware of the symptoms, they did not know about the cause. Hence, the appellants say the situation is analogous to that considered by Chisholm J in Tutbury.

[48] On the second aspect, the context in which Dickson Lonergan was asked to address the problems, the appellants emphasise two matters. One, the defects were raised in the course of the three month defects liability period provided for in their contract with Dickson Lonergan. Two, Dickson Lonergan's response to the BRANZ report was such as to stop any further duty of inquiry on the part of the appellants. The appellants concede that if they had received the BRANZ report directly, i.e. if they had engaged BRANZ themselves, the situation would be different. Here, they only received the BRANZ report in the context of Dickson Lonergan's response.

[49] The respondents say this is not a case of latent defects. Rather, by the time the appellants saw the cracks and experienced water damage or at the latest by the time of the BRANZ report, the Hamlin test was met. In other words, by then the damage was discovered. Further, the damage was so obvious that the appellants did in fact call in an expert. The advice given by BRANZ and by Dickson Lonergan does not then postpone the limitation period.

[50] The relevant evidence comes from Dr Kay who says that soon after moving into the house (mid December 1993), he noticed dampness in the living room and in a bedroom. He also saw some cracks had begun to appear in the stucco cladding.

[51] Dr Kay then says that he contacted Dickson Lonergan about the cracks and leaks in March 1994. He continues: [Dickson Lonergan] *were dismissive of my complaints saying that the cracks in the plaster exterior were just due to house movement and could be expected with a new house. [Dickson Lonergan] then asked me to test one wall with water from the hose and see if the water soaked the carpets inside. I did this and again experienced damp carpet. [Dickson Lonergan] then got PCL to put in a novofill drain along the base of the wall on the exterior.*

[52] Dr Kay says that this did not stop the leaks. Again, over the next few months, when there was moderate to heavy rainfall, they experienced, damp skirting boards, water runs on the interior lining of the walls and bubbled interior paint. .. Water had begun pooling on the garage floor and in the cupboard under the stairs.

[53] Dr Kay's evidence is that he "*repeatedly*" contacted Dickson Lonergan about the leaks. He understands that Dickson Lonergan commissioned BRANZ to undertake a site visit and report their findings. In January 1995, he explains that Dickson Lonergan wrote to them enclosing a copy of the BRANZ report. He says when he first received the report he did not read it in "any great detail." Rather, he said he relied on the letter accompanying it from Dickson Lonergan and Dickson Lonergan's knowledge and expertise. He said it was "obvious" from this letter that Dickson Lonergan had reviewed the BRANZ report and researched the suggested remedial work. Dr Kay continues:

> *To ensure that I had a correct understanding of [Dickson Lonergan's] letter I contacted them. In a telephone discussion with Barry Lonergan .. he advised that the BRANZ report indicated that the "job was alright" and requested me not to talk to other people about the issue. However, [Dickson Lonergan] acknowledged to me that there was a problem with the application of the plaster that was needed to be remedied.*
>
> *While I was aware that the BRANZ Report stated that there were defects with my home, I accepted [Dickson Lonergan's] position when it criticized the BRANZ report and accepted that these defects would be remedied with a new coat of paint as suggested by* [Dickson Lonergan].

[54] The BRANZ site visit report is dated 9 January 1995. It explains that the reason for the visit was to determine the causes of water penetration onto the floor at the base of stucco clad external walls.

[55] The "diagnosis" set out in the report is as follows:

6.1 The details on the drawings and used on site do not comply with NZS 3604 Appendix G, Fig G1. The cavity between the wall framing and stucco has been omitted.

6.2 The specified 3:1 plaster mix is stronger than that recommended in NZS 4251 Code of Practice for Solid Plaster. A stronger mix results in higher shrinkage.

6.3 The work consists of two coats, while three were specified. This makes it difficult to form proper movement control joints.

6.4 No control joints have been provided.

6.5 The "drummy" areas are due to the second coat being stronger than the first coat and inadequate curing.

6.6 The curing has not been in accordance with the specifications. This is clearly evident from the more severe cracking on the sunny sides of the house, whilst the shaded side has very few cracks.

[56] The report identified the main cause of the problem as the lack of proper curing and the strong plaster mix. The report also identified the absence of proper control joints and the omission of the cavity between stucco and wall framing as permitting water to reach the floor inside.

[57] The report contained a number of recommendations, in the following terms:

8.1 In one of the areas of water penetration cut the interior wall lining for the full height of the wall. Hose the outside of the wall working up from the bottom and observe where the water penetrates. If there are defects in the building paper, repair them.

8.2 On the outside of the wall scrub off the lime wash. When completely clean apply to the wall a "Sikagard 550 Elastic" system. Follow the manufacturers instructions exactly .., except that the "Modocryl" can remain on the wall.

8.3 Allow the system to cure for at least one week before applying the lime- wash.

[58] The associated letter from Dickson Lonergan made the following observations:
Please note there are a number of inaccuracies in their "diagnosis".
Essentially the curing and application of the plaster is at fault.
BRANZ's questioning of the construction detail is their view, the local building inspectors do not agree with them as do a large number of people in the industry. Much discussion of this has been held through nationwide seminars.
At present there has been no published conclusion from the seminars (forums).
P.S. The suggested remedy of Sikagard 550 turned out to be quite wrong.

[59] In these circumstances, the appellants say they were entitled to conclude that the defects they had seen were minor in character. The defects were not then reasonably discoverable in 1994. Even if they were, the appellants say they have separate claims arising from the failed repair. Those claims, the appellants argue, are so linked to the claims relating to the plaster cladding that it was wrong to strike out the plaster cladding claims.

[60] I consider the adjudicator was right that at the time the appellants called in Dickson Lonergan, the Hamlin test was met. At that point, the damage was so obvious a reasonable homeowner would have called in the expert. The situation is different from that in Tutbury. Here, at least in terms of the plaster cladding, both damage and cause was known once the BRANZ report was obtained.

[61] The fact the resultant advice from one of the experts may have downplayed the problems was not such as to stop the limitation period running. That advice and/or the resultant remedial work may give rise to another claim and, indeed, that does form the basis of the appellants' third claim which is still extant. Nor does the fact the matter was raised within the three month defects liability period alter the posit ion. The evidence of Dr Kay puts matters more bluntly with his reference to repeated contact with Dickson Lonergan.

[62] It cannot realistically be said the damage and/or the remedial works were so minor as to equate with, for example, the sticking doors in Hamlin. Indeed, as Mr Leman for Dickson Lonergan put it, the problems here were *"not hidden but patent"*. Finally, the BRANZ report did recommend a further investigation but the appellants chose not to carry out that exercise.

[63] The Supreme Court is to consider aspects of the doctrine of reasonable discoverability in ***Trustees Executors Limited v Murray and Ors*** (see [2006] NZSC 23). This case, in the end, does not turn on the scope of the doctrine. The facts are such that the damage and its cause were discovered, at least in relation to the plaster cladding.

Limitation concealment by fraud

[64] The appellants also say it is at least arguable that Dickson Lonergan fraudulently concealed the appellants' right of action. The allegation relates to Dickson Lonergan's actions on receiving the BRANZ report. If the appellants are right that s 28(b) of the Limitation Act applies, this would mean the appellants' cause of action against Dickson Lonergan was not time barred. Section 28(b) provides that where the right of action is "concealed by fraud", the limitation period does not begin to run until the plaintiff has discovered the fraud or could "with reasonable diligence" have discovered it.

[65] Fraud in s 28(b) includes conduct which amounts to equitable fraud.

[66] The appellants submit there is an inconsistency between Dickson Lonergan's claim now that the damage was discoverable and the suggestion Dickson Lonergan did not conceal the seriousness of the problem. The adjudicator took the view there was no evidence of either wilful concealment or that Dickson Lonergan "turned a blind eye" to the problem. Nor was there any evidence that Dickson Lonergan knew what they were doing may be a wrong and kept the appellants ignorant.

[67] I agree with the adjudicator there is no basis for a finding of concealment by fraud. Indeed, as Dickson Lonergan submit, their actions suggest the opposite. They engaged BRANZ and sent the BRANZ report to the appellants. While they took issue with the report they did not challenge the finding that the curing and applicat ion of the plaster was at fault.

[68] As to the suggested inconsistency in Dickson Lonergan's approach, the two aspects are different. Dickson Lonergan can say the appellants were on notice without necessarily having acted to conceal at the time.

Estoppel

[69] Finally, the appellants say it is at least arguable that Dickson Lonergan is estopped from raising the limitation defence.

[70] The appellants say that Dickson Lonergan cannot now seek to resile from its representation that re-painting would fix the leaks.

[71] The problem for the appellants is that Dickson Lonergan do not resile from that view. Estoppel is inapt in that context. Therefore, I do not need to go on to consider the adjudicator's conclusion there had been reliance on an incorrect representation. The adjudicator was plainly right to query how the appellants had suffered any detriment, in any event. The appeal is accordingly dismissed.

The cross-appeals other defects

[72] Dickson Lonergan and the Council cross-appeal against the decision not to strike out the whole of the first and second causes of action but only to strike out the claims concerning the original external plaster cladding. The third and fifth respondents filed submissions which support the cross-appeals.

[73] The adjudicator was not satisfied that the appellants were aware or ought reasonably to have been aware prior to 14 December 1996 of the other problems which are now claimed to cause, or contribute, to water coming into the house. The account from Ashmans Roofing was, the adjudicator considered, minimal ($155.00) and was not evidence of major remedial work being done in relation to defective roofing in 1996.

[74] The adjudicator took the view that time in relation to other damage ran from May 1999 which was the point when the appellants instructed Joyce Group Ltd to investigate and prepare the report about the leaks they saw in the ceiling over the entrance area. The adjudicator continued:

> *It is a question of fact and degree whether later damage was sufficiently distinct to result in a separate cause of action and notwithstanding Mr Robertson's submission that following Hamlin, the relevant damage is the loss in value of the house and any further physical damage is not "fresh damage" and will only increase the loss in value of an existing claim, there needs to be factual findings as to the cause and nature of the [appellants'] loss and that enquiry is a matter that will be resolved at the hearing.*

[75] Although the adjudicator considered there may be causation issues for the appellants, he was not satisfied the Council had discharged the onus of showing on the balance of probabilities that the appellants could not succeed with their claim based on negligence or that the claim was so untenable so as to be incapable of success. The adjudicator noted that while the amended adjudication claim describes a single cause of action it was clear this allegation arose in three ways:

a) Issuing the building consent; and
b) Inspecting all building work carried out under the building consent; and
c) Issuing the code compliance certificate.

[76] The adjudicator said that the Council could attract liability to the extent that its involvement with the building had caused loss in any respect other than in relat ion to the original plaster cladding.

[77] The adjudicator applied the same approach to the claim against Dickson Lonergan.

[78] The respondents essentially say there is only one cause of action. The first respondent also observes the appellants in their claim make no differentiation between water coming in from one cause as opposed to another.

[79] The respondents say this is not a case of latent defects. Rather, the appellants noted the leaking and sought expert advice. Further investigation should and could have detected these other issues. The other issues are, in any event, only particulars of damage rather than a new cause of action.

[80] The Council also submits that after the issue of the code compliance certificate on 13 August 1996, everything had happened which was necessary to bring the claim in negligence against the Council.

[81] The third respondent also submits that there is no evidence or any claim that it was involved in anything other than the application of the plaster cladding. Any part of the claim relating to the cladding, other than the advice given by Dickson Lonergan and BRANZ in or about 1994 to 1996, is statute barred.

[82] In my view, in the context of a strike out, the adjudicator was right to say it was appropriate to go to a hearing on this. Whether the claim in this respect is time- barred is a question of fact and degree. That is illustrated by the submission of the third respondent which deals with the claim relating to the failure of sealants in the roof. The third respondent's primary submission is that this failure was known before December 1993 but, the third respondent continues by noting that the extent to which the failure of adhesives or construction could be called a *"latent"* defect is "*highly debatable"* given the *"associated criticisms of matters such as the design and fall of the roof and guttering system which has allowed ponding on the roof over areas where adhesive has been applied."* My point is that there are some factual questions here which can only be resolved in the context of a hearing.

[83] There has been no error in approach by the adjudicator in this regard. The cross-appeals are not successful.

Other matters

[84] In the context of the hearing of the appeal, the Council sought to amend its notice of appeal. It wanted to also challenge the adjudicator's decision not to remove the Council on more general grounds.

[85] This relates to the adjudicator's power to remove a party where that is fair and appropriate in all the circumstances (s 34). In this context, the Council says that the passage of time, the uncertainty of any situation in which the Council owes a duty of care in relation to the issue of a code compliance certificate, and the intervening remedial work, are relevant factors.

[86] The appellants opposed the grant of leave to amend and said, in any event, the adjudicator's decision was correct.

[87] The adjudicator has a broad discretion in this regard. No error in approach in the exercise of that discretion has been identified. Accordingly, while leave to amend is granted, there is no basis for interfering with the decision of the adjudicator to decline to remove the Council as a party.

Result

[88] Both the appeal and the cross-appeal are dismissed.

Costs

[89] The parties are agreed costs on a 2B basis should follow the event but note that some parties played a lesser role in the appeal. As matters have transpired, success is fairly evenly divided. For this reason, I have concluded costs should lie where they fall and I make no order as to costs.

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