Martin Kenneth & Craig William Kells v Auckland C.C. (1) Louis Bernard & Veroslava Lipschitz (2) Rodney Graham Pratt (3) Geoffrey Thomas Ward (4) Weathertight Homes Tribunal (5)

JUDGMENT OF ASHER J. High Court, New Zealand, Auckland Registry. 30th May 2008

Introduction

[1] This is an appeal against a decision of the Weathertight Homes Tribunal ("the Tribunal") refusing to strike out the appellants from proceedings. In the alternative it is put as an application to review the decision. The claimants in the Tribunal are Louis and Veroslava Lipschitz, who are the second respondents and second defendants in this proceeding. They are the registered owners of Unit C, 34B Monteith Crescent, Remuera. The first respondent and first defendant, the Council ("*The Council*"), has taken the lead in opposing the appeal and application, and the Lipschitzs have adopted a supporting role. The appellants are Martin and Craig Kells, who were allegedly involved through the developer company, KCM Limited (in liquidation), in building the relevant townhouse.

Factual background

[2] The development at 34B Monteith Crescent consists of ten townhouses. Geoffrey Ward, the fourth defendant and fourth respondent, prepared the plans and specifications for the townhouse development. KCM Limited sought a building consent for the development on 29 November 1995. The Council issued the consent in early 1996. The development was constructed in the second half of 1996. On or about 12 May 1997, the Council issued an interim code of compliance certificate in relation to the construction. Seven years then went by.

[3] On or about July 2004, the Lipschitzs became interested in buying a townhouse at 34B Monteith Crescent. They instructed Property Solutions Inspections (NZ) Limited to provide an independent building inspection and structural report. This was carried out by Rodney Pratt, the third respondent and third defendant, who is the company's sole director and shareholder. The Lipschitzs then agreed to purchase the property from the original owners, and on 9 September 2004 became the registered proprietors.

[4] In December 2004 the Lipschitzs became aware of problems in the building. On 2 March 2005 they applied to have the property assessed for weathertightness pursuant to the Weathertight Homes Resolution Services Act 2002 ("*the 2002 Weathertight Homes Act*").

[5] An extensive report was prepared and issued by an assessor on 19 May 2005. The report concluded that the claim met the eligibility criteria under the Act. The report considered that there were design and construction problems in the building which led to water ingress and consequent damage, and that extensive work was required to repair the leaks.

[6] On 21 November 2005 the Lipschitzs filed a notice of adjudication naming the Council as the respondent. The Lipschitzs then filed a statement of claim with the Weathertight Homes Tribunal. The Tribunal proceeded to make procedural orders.

[7] On 19 November 2007 the Council applied for, amongst other things, an order that the present appellants and applicants, Martin and Craig Kells, be joined as respondents. The Council alleged that the Kells had an interest in the builder of the units, KCM Limited (in liquidation). The Council alleged that they had signed relevant documents and that they had a substantial involvement in the development. The Council claimed that given the control that the Kells had over the development, they were likely to owe the Lipschitzs as subsequent purchasers a non-delegable duty of care to ensure that the construction was carried out properly and complied with the Building Code.

Procedural history

[8] In Procedural Order No. 3, the Tribunal joined Martin and Craig Kells as fourth and fifth respondents respectively and directed that they be served with the procedural order together with other relevant documentation. On 4 March 2008 the Kells applied to be struck out from the claim on the ground that :- "*The ten-year `long stop' limitation period imposed by s 393(2) of the Building Act 2004 ("the Act") prevents them being joined to the proceeding by other claimants or first respondent.*"

[9] The Kells' central allegation was that the application to join them was not made until 19 November 2007, some ten years and six months after the date the limitation period is alleged to have started to run. It is claimed to have commenced on 12 May 1997, when the code compliance certificate was issued by the Council. This start date for the period has not been in contest in this proceeding.

[10] In Procedural Order No. 4, the Tribunal declined to strike out the Kells as parties to the proceedings. The Tribunal held that the date of the commencement of the initial proceedings in the Tribunal, rather than the date of joinder of any additional parties, was the relevant date for measuring compliance with the limitation requirement.

[11] The Kells filed a notice of appeal against that decision. The Council argued that there was no jurisdiction under the Weathertight Homes Resolution Services Act 2006 ("*the Weathertight Homes Act*") to appeal against an interlocutory decision of the type at issue. During the hearing Mr Allan for the Kells, without prejudice to his position that an appeal was the correct procedure, then filed an application to review the Tribunal's decision on the same grounds as in the appeal. No objection was taken to that procedure being followed. It is necessary therefore to consider the challenge on both alternative bases, appeal and review.

[12] The hearing commenced on 29 April 2008. It was only part-heard on that day because the additional application for review required the Tribunal to be joined as a party and served. This has taken place. The hearing then

continued on 20 May 2008, with Mr Goddard QC substituting for Mr Robertson for the Council as Mr Robertson was unavailable for the continued hearing.

Issues

[13] There are three issues to be determined.

[14] First, the substantive question of whether commencing a claim within the tenyear limitation period in s 393(2) of the Building Act means there are no further limitations on the joinder of parties at a later date.

[15] Second, whether in any event the Council's delay in applying to join the Kells was so great that it was unreasonable of the Tribunal to join them. The respondents question whether the issue of delay was ever clearly raised before the Tribunal, and in any event whether the Court has jurisdiction to consider such an issue on judicial review.

[16] Third, whether this proceeding should have been initiated by way of an appeal or by judicial review. While accepting that there is jurisdiction to review the Tribunal's decision, the respondents question whether in its discretion the Court should intervene to review an interlocutory order of this type.

[17] The last issue is logically prior to the first and second issues. However, I consider that it is best determined after having traversed the relevant facts and issues of substance.

The scheme of the Act

[18] The purpose of the Weathertight Homes Act is "*to provide owners of dwellinghouses that are leaky buildings with access to speedy, flexible and costeffective procedures for assessment and resolution of claims relating to these buildings*": s 3.

[19] 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: s32. 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).

The limitation period

[20] Section 393(1) of the Building Act 2004 provides that the provisions of the Limitation Act 1950 apply to proceedings relating to building work. Section 4 of the Limitation Act provides that an action in tort or contract shall not be brought after the expiry of six years after the accrual of the cause of action. However, s 393(2) provides that proceedings relating to building work shall not be brought after ten years from the date of the act or omission on which the proceedings are based. Section 393(2) therefore acts as a 'long-stop' provision. That section provides:

> *393 Limitation defences*
>
> *(1) The provisions of the Limitation Act 1950 apply to civil proceedings against any person if those proceedings arise from*
>
> *(a) Building work associated with the design, construction, alteration, demolition, or removal of any building; or*
>
> *(b) the performance of a function under this Act or a previous enactment relating to the construction, alteration, demolition, or removal of the building.*
>
> *(2) However, civil proceedings relating to building work may not be brought against a person after 10 years or more from the date of the act or omission on which the proceedings are based.*
>
> *(3) For the purposes of subsection (2), the date of the act or omission is,*
>
> *(a) in the case of civil proceedings that are brought against a territorial authority, a building consent authority, a regional authority, or the chief executive in relation to the issue of a building consent or a code compliance certificate under Part 2 or a determination under Part 3, the date of issue of the consent, certificate, or determination, as the case may be; and*
>
> *(b) in the case of civil proceedings that are brought against a person in relation to the issue of an energy work certificate, the date of the issue of the certificate.*

The positions of the parties

[21] The essence of Mr Allan's submission for the Kells is that the ten-year long stop period in s 393(2) prevented their joinder. He submits that any claim against the Kells should have been brought within ten years of the issue of the code compliance certificate, and they therefore could not be brought in as new parties after the expiry of that period.

[22] Mr Allan sought to rely on High Court jurisprudence relating to the claims for contribution, which involved the joinder of third parties at a later state in proceedings. Mr Allan referred first to the decision in Cromwell

Plumbing Drainage & Services Ltd v De Geest Bros Construction Ltd (1995) 9 PRNZ 218. John Hansen J held in that case that the ten-year limitation period in s 91(2) of the Building Act 1993, the predecessor to the present Building Act, did not apply to a cause of action for contribution. This was because the effect of s 17 of the Law Reform Act 1936 and s 14 of the Limitation Act was that the cause of action for contribution did not arise until judgment was entered against or a compromise was reached by the party claiming contribution. This was not a Weathertight Homes case. Mr Allan submitted that this decision was wrongly decided.

[23] He relied instead on the decision in ***Dustin v Weathertight Homes Resolution Services*** HC AK CIV-2006-404-000276 25 May 2006, which concerned an application to review a decision of the adjudicator under the 2002 Weathertight Homes Act. Courtney J expressed the view that Cromwell Plumbing was wrongly decided. She considered that a claim for contribution under s 17(1)(c) of the Law Reform Act was a "civil proceeding" within the meaning of s 91(2) of the Building Act 1991 so that the ten-year long-stop provision applied. The Judge therefore held obiter that all parties had to be actually joined within that ten-year period.

[24] The Council submits in response that the Weathertight Homes Act creates its own limitation period which comes to end in relation to all parties when a claim is commenced. It argues that the two cases relied on by Mr Allan do not address the terms of the Weathertight Homes Act, which in themselves provide an answer to the limitation issue.

[25] The starting point in any consideration must be the provisions of the Weathertight Homes Act itself.

What limitation period applies to a claim under the Weathertight Homes Act?

[26] Section 37 of the Weathertight Homes Act provides:

37 Application of Limitation Act 1950 to applications for assessor's report, etc

(1) For the purposes of the Limitation Act 1950 (and any other enactment that imposes a limitation period), the making of an application under section 32(1) has effect as if it were the filing of proceedings in a court.

[27] The section therefore assumes that but for this provision, a claim under the Weathertight Homes Act is not a "*filing of proceedings in a court*". However, the section gives a claim filed under the Act the status of a *"civil proceeding"* for limitation purposes.

[28] Section 37(1) states that the making of an application under s 32(1) has the effect of filing proceedings in Court, for limitation purposes. Section 32(1) provides that an owner who wants to bring a claim, may apply to the chief executive to have an assessor's report prepared. An application for an assessor's report therefore has effect as if it were the filing of proceedings, and triggers the running of the limitation period under the Limitation Act.

[29] The ten-year long-stop period in s 393 consequently applies to claims under the Weathertight Homes Act. Were it not for s 37, s 393 of the Building Act would not apply to claims under the Weathertight Homes Act because a claim could not otherwise be regarded as a "civil proceeding".

[30] "Civil proceedings" are in fact defined in s 8 of the Weathertight Homes Act as including arbitration and proceedings before the Tribunal for certain stated statutory purposes. Section 63 also states that adjudication proceedings must be treated as actions or proceedings for certain limited stated purposes. By necessary implication of this limited definition all other claims under the Act not covered by it are not therefore "civil proceedings".

[31] There is also a specific ten-year long-stop provision in relation to dwellinghouses under the Weathertight Homes Act itself. Section 14 reads:

14 Dwellinghouse claim

The criteria are that the claimant owns the dwellinghouse to which the claim relates; and

(a) it was built (or alterations giving rise to the claim were made to it) before 1 January 2012 and within the period of 10 years immediately before the day on which the claim is brought, and

(b) it is not part of a multi-unit complex; and

(c) water has penetrated it because of some aspect of its design, construction, or alteration, or of materials used in its construction or alteration; and

(b) the penetration of water has caused damage to it. *[emphasis added]*

[32] However, this claim is a claim in respect of part of a multi-unit complex in terms of s 14(b) so s 14 does not apply. The section does reinforce, however, that the bringing of the claim is the crucial moment in terms of the limitation period specifically provided for by the Act.

The approach to the joinder of parties under the Act

[33] Consistent with a claim under the Act not equating to the filing of civil proceedings in Court, a number of provisions illustrate that the approach to the joinder of parties under the Weathertight Homes Act is different to that in civil proceedings.

[34] As stated, a claim is initiated informally by a request for an assessor's report. No parties are joined at that moment of initiation. No statement of claim or application setting out the grounds of a claim is required. I was given a copy of the claim filed by Mr and Mrs Lipschitz. The form requires routine information identifying the claim and a statement of the damage suffered but no more. It does not require identification of any parties at all, presumably because it is not assumed that they will all be known. It is only after an assessor's report has been provided that a claimant is given the opportunity to name parties. Indeed, a full assessor's report must state the assessor's view as to the persons who should be parties to the claim: s 42(2)(f). There is also explicit provision for

the naming of parties when an adjudication is later initiated under s 62. Section 111(1) also provides that the Tribunal may on the application of any party "or of its own initiative" join a person as a respondent.

[35] If the joining of parties was relevant for limitation purposes, it could be expected that parties would be joined when the initiating event happened under s 32(1). In fact they are not joined, which indicates that making application for an assessor's report under s 32(1) is the only critical time for Limitation Act purposes.

[36] A number of provisions in the Weathertight Homes Act give the Tribunal the power to terminate existing claims where it is convenient to consolidate them or direct that they be brought in a different way. By this means, a multiplicity of different claims can be avoided. These provisions preserve the application for an assessor's report as the limitation cut-off. The Act specifically provides that s 37 applies to the re-constituted claims as if they were brought when the original terminated claim was brought: s 54(2), s 141(4), s 52(4) and s 155(5). For example, s 54 (2) reads:

54. Application of section 37 if claim terminated under section 52(4) or 53(4)
(2) Section 37 applies to the claim under section 19 as if it were brought when the terminated claim was brought.

[emphasis added]

[37] These provisions indicate that the Legislature intended that time would stop running for all purposes at the time of the initial request for an assessor's report. No parties are joined then at all. This indicates that the date of the joinder of parties is irrelevant. If Mr Allan's interpretation is correct, the emphasised part of s 54(2) would have read "as if it were brought when the particular party was joined". It does not.

Third parties and contribution under the Act

[38] Mr Allan sought to rely on High Court cases relating to claims for contribution, which involved the joinder of third parties at a later stage in the proceedings. However, the joinder of third parties and contributions in the sense used in s 17 of the Law Reform Act 1936 does not arise under the Weathertight Homes Act. There is indeed no provision for the joinder of third parties in the Weathertight Homes Act. There is only one type of party, and all are treated the same in procedural terms, in stark contrast to civil proceedings in a Court. Under s 72(1) of the Weathertight Homes Act, the Tribunal can determine any liability to the claimant of any of the parties, and also determine under s 72(2) any liability of any respondent to any other respondent. All parties, whenever joined and however joined, have the same status. Duties of "contribution" in the Law Reform Act 1936 sense are not mentioned.

[39] I therefore do not consider that I need to attempt to reconcile the conflicting views expressed in Cromwell Plumbing and Dustin v Weathertight Homes Resolution Services. Moreover, Cromwell Plumbing and Dustin was not a Weathertight Homes case, and in Dustin the interpretation issues dealt with here were not argued. It is not necessary, therefore, to chose between the two different approaches.

[40] Mr Allan argued, relying on ***Klinac v Lehmann*** (2002) 4 NZ ConvC 193,547 at [21] and [22], that having a long-stop provision had benefits for the construction industry. Architects and engineers would find that the increased certainty would make professional indemnity insurance cheaper. This could result in lower costs being passed on to consumers. However that was not a statement made in the context of the Weathertight Homes legislation, which explicitly recognises the weak position in which claimants find themselves and deliberately prioritises the provision of a simple and quick method for the resolution of claims.

[41] Mr Allan argued that a single end of the *"long-stop"* on the making of a claim would operate most unfairly against people who are susceptible to being joined at a later stage, which could be a relatively long time after the expiry of the ten-year period. There is force in that point, which is of course a reason why limitation periods are imposed in the first place. However, this must be balanced against unfairness and the difficulties that claimants experience in bringing this type of claim as well as the Legislature's intention to create a speedy and informal procedure for the resolution of claims.

[42] Indeed, the unfairness of too much rigidity in the joinder of parties can be seen in this case. The Lipschitzs are the purchasers of a unit built eight years before they acquired it. They had no idea how the original building of their apartment proceeded, and who was involved at the time the claim commenced. It is true that the Council, which is ultimately the party that has joined the Kells, does have those records but it is not the claimant. The Act is designed to assist people in the Lipschitzs' position and must be construed on that basis.

Conclusion as to limitation submission

[43] The position of the joinder of parties in respect of claims under the Act is entirely different from that which applies in civil proceedings in Court. The Weathertight Homes Act clearly contemplates that the necessary parties would not be identified at the time a claim is made. Appropriate parties would be identified as proceedings progressed, which might indeed involve some proceedings being discontinued and others initiated, while the advantage of having claimed within a limitation period is retained. This approach reflects the fundamental purpose of the Act, namely to give access to speedy, flexible, and cost-effective procedures for the assessment and resolution of claims relating to leaky homes. I interpret the Act as having been drafted recognising the difficulty that owners of leaky homes have in identifying bad workmanship, and identifying the cause of the building defects and therefore identifying relevant parties and pursuing claims.

[44] I conclude therefore that the relevant limitation period for the filing of claims under the Weathertight Homes Act is ten years, and that the filing of a claim stops time running as against all parties. In other words, as long as the claim was filed within the ten-year period, further parties can be joined at a later date without limitation concerns.

Exercise of the Tribunal discretion

[45] Mr Allan argued that the Council's delay in seeking the joinder of the Kells was so acute that the application to strike out the Kells as parties should have been allowed for that reason. The Council applies to join the Kells some two years after the filing of the original claim, ten years and six months after the cause of action arose. When I questioned Mr Allan as to the basis on which this objection could be put in a judicial review application, he submitted that permitting the joinder in light of the delay amounted to Wednesbury unreasonableness.

[46] The Kells did not put forward delay as a specific ground in support of their application to the Tribunal to be removed as parties. Delay was mentioned in later paragraphs of the seven-page application setting out in effect submissions in support of the application. The Tribunal did not refer to delay in its decision.

[47] I consider that it was perfectly understandable for the Tribunal not to appreciate that delay was a specific ground put forward in support of the application to remove the Kells as parties and for the Tribunal therefore to make no reference to it. If an applicant wants to have an issue dealt with in an application, it must state the issue as a ground. I do not consider therefore that the Tribunal can be criticised for not ruling on the issue as it was not properly put to it. Any appeal or application for review fails on that ground alone.

[48] In any event, a decision on delay such as this would have been firmly within the discretion of the Tribunal. The long delays must be seen in the context that the problems were only discovered in 2005. The refusal to remove the Kells could not be said to be unreasonable in the sense expressed by Lord Greene MR in ***Associated Provincial Picture Houses Ltd v Wednesbury Corporation*** [1948] 1 KB 223 (CA) at 299. The principle was stated in **Wellington City Council v Woolworths New Zealand Ltd (No. 2)** [1996] 2 NZLR 537 thus at 545:

[I]f the outcome of the exercise of discretion is irrational or such that no reasonable body of persons could have arrived at the decision, the only proper inference is that the power itself has been misused.

[49] That threshold is not remotely crossed. The conclusion reached not to strike out was entirely open to the Tribunal and cannot be described at irrational or outrageous. Indeed, even if the decision was susceptible to appeal, I would not have concluded on the material available that it was clearly erroneous, so as to warrant appellate intervention; although a final decision cannot be reached on this, given that the issue was not properly before the Tribunal.

Appeal or judicial review

Appeal

[50] It is necessary first to consider whether an appeal can be brought against an interlocutory decision declining to strike out a party.

[51] Section 93 of the Weathertight Homes Act provides:

(1) A party to a claim that has been determined by the tribunal may appeal on a question of law or fact that arises from the determination.

[52] As stated, a claim is defined at s 8 as the application for an assessor's report, which leads to the preparation of an assessor's report, and under s 9 that is how a claim is brought under the Act. Pursuant to s 93(1), a claim can conclude in a *"determination"*. That *"determination"* can be appealed. *"Determination"* is not defined in the Act.

[53] It is stated at s 93(3) that *"the amount"* at issue in relation to a determination is the money required to be paid under the determination by the person filing the appeal, or if the Tribunal has declined to require a payment of money, the amount unsuccessfully claimed. The section therefore contemplates a final determination of the issue against the appellant before a right to appeal is triggered. It is also stated at s 95(2)(b) that the decision of the court on appeal is a *"final determination of the claim"*, further suggesting that the claim has otherwise been fully determined.

[54] I consider that a final determination could also include a decision to strike out a party as that would be a final determination of the claim in respect of that party. A struck out party would be released from the proceedings. The only redress from that final result would be an appeal against the interlocutory but nevertheless final order. If however, as here, the application to strike out a party is refused, the effect of the order is not final as there will be an opportunity to appeal the substantive issues raised in the unsuccessful application in a later appeal relating to the final substantive determination.

[55] Mr Allan for the Kells pointed out that in ***Kay v Dickson Lonergan Ltd*** HC AK CIV-2005-483-201 31 May 2006, Ellen France J entertained an appeal against a decision of the adjudicator to strike out part of the claim under the 2002 Weathertight Homes Act. The wording of the appeal section under the earlier provision was the same. However, all parties accepted the availability of the appeal procedure and no argument to the contrary was put to the Court. I do not consider that that case is of much assistance here, where the issue must be squarely addressed.

[56] I therefore conclude that only determinations that have final effect can be appealed. There is no right of appeal in respect of an interlocutory determination except where that determination finally determines a claim against a

party or parties. Thus, even if I had found in favour of the arguments raised by the Kells on the merits, I would not have been able to grant relief on appeal.

Review

[57] It is necessary next to consider whether judicial review of the Tribunal's decision is available.

[58] Several cases have accepted that decisions made by adjudicators under the Weathertight Homes legislation are reviewable. In **Auckland City Council v Weathertight Homes Resolution Service** HC AK CIV-2004-404-004407 28 September 2004, Harrison J entertained an application to review a decision by an adjudicator under the 2002 Weathertight Homes Act, dismissing an application to add five parties. The Judge ultimately dismissed the application. In Dustin v Weathertight Homes Resolution Service, Courtney J entertained an application to review decision by the adjudicator under the 2002 Act declining to strike out a claim. That application was also ultimately dismissed.

[59] In these two cases, no issue was taken with whether judicial review was available. Both those cases were decided under the 2002 Weathertight Homes Act, but the appeal provisions and review considerations are similar.

[60] All parties to this application accepted that the decision by the Tribunal was subject to judicial review. That concession was correctly made. The Tribunal undoubtedly exercises a statutory power of decision.

[61] The Council initially accepted that judicial review was an appropriate route. However on the second day of submissions, the Council submitted that the Court should in its discretion decline to grant relief because to intervene and grant relief to interlocutory decisions by the Tribunal would be contrary to the clear policy of the Act.

[62] In support of his submission that judicial review should not in the Court's discretion be granted, Mr Goddard QC relied on three earlier decisions. In particular he emphasised ***Motor Vehicle Dealers Institute Inc v Auckland Motor Vehicle Disputes Tribunal*** (2000) 6 NZBLC 103,001. In that case the Motor Vehicle Dealers Institute sought judicial review of a decision of the Auckland Motor Vehicle Disputes Tribunal, asserting that the Tribunal had erroneously determined certain matters when determining the merits of the claim.

[63] Anderson J in the High Court withheld relief. Two of the reasons for his decision, as summarised by the Court of Appeal in ***Motor Vehicle Dealers Institute Inc v Auckland Motor Vehicle Disputes Tribunal*** (2000) 6 NZBLC 103,159, were:

a) *The parties directly affected cannot effectively be put in a position to re-litigate before the Tribunal.*

c) *The philosophy of the scheme relating to the Tribunal under the Act is inconsistent with the inherently expensive and technical process of judicial review in the High Court.*

[64] At [31] the Court of Appeal quoted further from the decision of Anderson J:

*[31] Next, the philosophy of the Motor Vehicle Disputes Tribunal scheme is inconsistent with the inherently expensive and technical process of judicial review in the High Court. A party appearing before a Tribunal cannot be represented by a barrister or solicitor - s 99(3). A party dissatisfied with a decision of a Tribunal has a right of appeal under s 133 but there are limitations both of time and grounds stipulated in that section and a decision on appeal is final. In this case the applicant [MVDI] has side-stepped the limitations of the appeal procedure and come straight to the High Court by way of review. As this Court has noted in such cases as **Director-General of Social Welfare v Disputes Tribunal** (199) 6 NZBLC 102,747, in connection with Disputes Tribunals proceedings for judicial review in the High Court are not to be encouraged, and the same principles apply here. [para 18, p 103,006]*

[65] The Court of Appeal concluded at [37]:

We agree with Anderson J that the process of judicial review will usually be inapt in circumstances such as the present. It is clear that the intention of the Legislature through the Act is to provide for a simple and direct method of dispute resolution in respect of small disputes. To enable the MVDI of all bodies to build on to that a right to require the process to start again on an application for review, in circumstances where it is not satisfied as to the outcome of a dispute through the Disputes Tribunal processes, would appear to be contrary to the purposes of the Act.

[66] Anderson J had reached a similar conclusion in Evans v Disputes Tribunal (2000) 14 PRNZ 183.

[67] The discretion not to grant relief was also recognised as being a live issue in **Southern Cross Building Society v Disputes Tribunal** (2001) 15 PRNZ 657. In that case the Court elected to set aside the decision of the Disputes Tribunal because the Tribunal had acted in excess of jurisdiction.

[68] Mr Allan for the Kells sought to distinguish the Disputes Tribunal cases on the basis that they related to Tribunals which dealt with much smaller sums of money than those commonly dealt with by the Weathertight Homes Tribunal. Under the Weathertight Homes Act there is jurisdiction to appeal to the High Court where the amount at issue exceeds $200,000: s 93(2). Claims in the Weathertight Homes Tribunal can, of course, run into the millions of dollars. I note also that in Motor Vehicle Dealers Institute Inc v Auckland Motor Vehicle Disputes Tribunal the applicant had not used his available appeal rights, which is a factor against the exercise of remedial discretion. Here I have found there is no appeal right at all. Thus I accept that these decisions cannot be determinative.

[69] I have already referred to the purpose of the Weathertight Homes Act, which is to provide a speedy, flexible and cost-effective procedure for the assessment and resolution of claims relating to leaky dwellinghouses. It is consistent with this purpose that rights of appeal are limited to final determinations and do not extend to all interlocutory applications. Under s 113 of the Weathertight Homes Act, the Tribunal may refer a question of law

during adjudication proceedings to the High Court and may, if it thinks fit, delay the proceedings until it receives the Court's opinion. The Act therefore provides a regime for appeals and the referral of points of law, which can readily be seen to be consistent with the Legislature's intention to provide a speedy and cost-effective service. It is not surprising that there is no ability to appeal an interlocutory decision. As earlier observed, unless such an interlocutory decision strikes out a party or an aspect of a claim, it does not have final effect and can ultimately be challenged in any general appeal against a substantive decision at a later date. The party concerned will, of course, have to live with the interlocutory decision considered to be erroneous. If it relates to that party's continued presence in the proceedings, as this application for review does, the party will have to go through the cost and stress of the entire proceeding, before a challenge can be made. However, the scheme of the Act suggests that the Legislature has decided that the need for speed and cost-effectiveness outweighs any such disadvantage to an individual party.

[70] There is no doubt that this Court would intervene on a judicial review application in respect of certain errors in interlocutory decisions by the Weathertight Homes Tribunal. However, the alleged errors relied on in this case are a failure to correctly apply a limitation period and a failure to properly exercise a discretion as to the joinder of a party. The issues are points of law, but the Kells did not ask the Tribunal to refer the point to this Court. Rather, when during the hearing of the appeal in this Court it became apparent that an appeal might not be available under s 93, the Kells filed a review application. The Kells in doing so sought to side-step the appeal limitations contained in the Act.

[71] They will still have a right to challenge interlocutory decisions made in due course, if there is an appeal against any substantive decision of the Tribunal. If they have been wrongly joined as parties, that is an issue that could be considered after a final determination and on appeal.

[72] It is inconsistent with the purpose and scheme of the Act to permit a party to circumvent the lack of an appeal right against an interlocutory decision by instead seeking judicial review.

[73] It is not necessary, given my earlier conclusions, that I rule on this issue. I am conscious that it arose late in submissions, and was dealt with on short notice. Given these factors I do not conclude that a remedy of judicial review would not have been granted, even if errors had been made out. However, I express the view that it appears to me to be inconsistent with the purpose and scheme of the Act to allow the appeal provisions to be circumvented and proceedings delayed by applications for judicial review of interlocutory decisions of this nature. This is particular so, where no request for a point of law to be referred to this Court was made, and where there is not any overarching issue of fairness.

[74] Thus, even if the Tribunal had made an error it is likely that I would have declined to exercise the remedial discretion to intervene.

Result

[75] Both the appeal and the application for judicial review are dismissed.

Costs

[76] I award costs against the appellants/ applicants in favour of the Council and the Lipschitzs on a 2B basis.

TJG Allan and JEM Lethbridge for Appellants/Plaintiffs
P Robertson (appearing on 1 May 2008) for First Respondent/First Defendant
D Goddard QC and H Rice (appearing on 21 May 2008) for First Respondent/First Defendant
BM Easton for Second Respondents/Second Defendants
No appearance for Third Respondent/Third Plaintiff
Fourth Respondent in person on 1 May 2008
No appearance for Fifth Defendant - abides the decision of the Court