IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV-2014-404-3039
[2015] NZHC 572

UNDER	the Companies Act 1993
IN THE MATTER OF	an application by the Wellington City Council for an order that SALAMANCA INVESTMENTS LIMITED (in liq) be restored to the companies register
BETWEEN	WELLINGTON CITY COUNCIL Applicant
AND	REGISTRAR OF COMPANIES First Respondent
	TIMOTHY OWEN DROMGOOL Second Respondent
	ALLAN McKENZIE FRASER Third Respondent
	WILLEMSTAD DEVELOPMENTS LIMITED Fourth Respondent
	SECRETARY OF THE TREASURY Fifth Respondent

Hearing:	5 February 2015
Appearances:	F Divich and B Martelli for Applicant K P McDonald for Second and Third Respondents S P Pope and A J Nelder for Fourth Respondent No apperance for Fifth Respondent (abides decision of court)
Judgment:	26 March 2015

JUDGMENT OF ASSOCIATE JUDGE R M BELL

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*This judgment was delivered by me on **26 March 2015** at **3:00pm** pursuant to Rule 11.5 of the High Court Rules*

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Registrar/Deputy Registrar

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Introduction

[1] I heard this case on 4 February 2015 and issued a minute on 5 February giving my decision, but without reasons. A prompt decision was required to give the applicant time in which to make an application in a related proceeding in the Weathertight Homes Tribunal. This judgment gives my reasons.

[2] A development company, Salamanca Investments Ltd, builds an apartment complex. Some time after the end of the project, the company goes into voluntary and apparently solvent liquidation. When that is completed, it is removed from the Companies Register. The apartment complex leaks. The body corporate and apartment owners bring a claim in the tribunal. They do not sue Salamanca because it has been removed from the register. Instead, they sue the Wellington City Council. It wants to make a contribution claim against Salamanca under s 17(1)(c) of the Law Reform Act 1936, but before it can do so, the company needs to be restored to the register.

[3] Salamanca's directors and shareholder oppose the company being restored. They say that at relevant times the council was not a creditor of the development company or someone with an undischarged claim against the company. The effect of that position – if it is upheld – is that those behind the development company will have been able to carry out this project and withdraw any profits from it, but leave either the apartment owners or those with secondary liability to carry the costs of the defects in the development.

[4] While that is the main issue, there are others. The Wellington City Council asks for restoration and ancillary orders:

(a) It applies for leave under r 19.5 of the High Court Rules 2008 to proceed by originating application.

(b) Under s 329 of the Companies Act 1993 it asks for Salamanca to be restored to the register and, if leave to apply is required, seeks it.

(c) It asks for the liquidator's final report to be reversed under s 284 of the Companies Act and seeks leave to apply for that order.

(d) It asks for the liquidator appointed by the shareholder to be replaced by liquidators of its choice, again invoking s 284.

(e) It seeks an order under s 248(1)(c) of the Companies Act to continue proceedings against the company while in liquidation.

[5] The application has been served on the Registrar of Companies and Treasury but, as usually happens, they abide the decision of the court. Salamanca's directors, Messrs Dromgool and Fraser, and its shareholder, Willemstad Developments Ltd, oppose all orders sought.

Facts

[6] Salamanca was incorporated on 26 November 1992. Messrs Dromgool and Fraser were its directors until it was removed from the register. It was part of the Newcrest group of companies. Salamanca's shareholder was Newcrest Developments Ltd, now known as Willemstad Developments Ltd. Willemstad's shareholder is Newcrest Holdings Ltd, now known as Tullow Ltd.

[7] Salamanca was the developer of the St Paul's Apartments, a complex at 43 Mulgrave Street, Thorndon, Wellington. The development went in stages. Work started on the first stage in July 1997. A code of compliance certificate was issued in October 1998. Construction of the second stage began in October 1998. A code of compliance certificate was issued in December 1999. For the third stage of construction a code compliance certificate was issued in December 1999. In 2007 a conservatory was built on the top of one of the apartment buildings but that is not relevant, as Salamanca had been removed from the register by then.

[8] In September 2005 Salamanca went into liquidation by shareholders' resolution.[1] Before the company went into liquidation, the directors passed a

[1] Under the Companies Act 1993, s 241(2)(a).

resolution that Salamanca would, upon the appointment of a liquidator, be able to pay its debts.[2] Bruce Sheppard and Greg Rathbun were appointed joint liquidators. Mr Rathbun resigned in 2006. The liquidation was unremarkable. Mr Sheppard made his final report under s 257 of the Companies Act on 3 August 2006. Salamanca was removed from the register on 5 September 2006.

[9] The St Paul's Apartments were found to have watertightness defects. There is no evidence in this proceeding when those defects became apparent but I was advised from the bar that in a proceeding in the tribunal there is a live issue as to when any causes of action in negligence against the developer and the council arose.

[10] On 20 June 2008, the body corporate and apartment owners of the St Paul's Apartments applied for an assessor's report under the Weathertight Homes Resolution Services Act 2006. Under s 37 of that act, the date of the application is important for limitation purposes. A full assessor's report, finding that the owners' claim was eligible, was given on 29 June 2009.

[11] On 3 February 2012 the St Paul's body corporate and apartment owners began a claim against the council in the tribunal.[3] The tribunal set a deadline of 23 July 2012 for applications for joinder. The council applied to join further respondents under s 111 of the Weathertight Homes Resolution Services Act 2006. Tullow, Salamanca's ultimate holding company, was joined on 7 August 2012. Others were joined on 30 August 2012. Tullow applied to be removed on the grounds that it was not the developer of the St Paul's apartments, but that Salamanca was. Tullow has the same lawyers as Willemstad, its subsidiary. On 16 January 2013 the Tribunal declined Tullow's application to be removed. The council would have known long before that date that Salamanca was the developer, but in case it had forgotten, Tullow had reminded it. The council did not however apply to have Salamanca restored to the register or joined as a respondent in the proceeding.

[12] The proceeding in the tribunal has gone through its interlocutory stages, including discovery, mediation, exchange of evidence and experts' conferences.

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2 The resolution is relevant to whether the liquidator calls a creditors meeting: Companies Act 1993, s 243(8).

3 *Body Corporate 85978 v Wellington City Counci*l WHT Auckland TRI-2012-100-008.

The claim has been set down for a hearing of up to eight weeks beginning on 16 March 2015.

[13] The council began this proceeding by originating application on 13 November 2014. On 25 November 2014 the council filed a memorandum with the tribunal advising that it had applied for Salamanca to be restored to the register. On 26 November 2014 without hearing from other parties, the tribunal issued a procedural order which included this:

> In the memorandum the Council has provided no information as to why the application to restore Salamanca has been made so late in the process.
>
> I note that the information upon which the application appears to have been made has been available for a year or more. In addition, it has been clear since 2012 when Tullow applied to be removed, that Tullow was arguing that Salamanca was the developer of the St Paul's apartments.
>
> The hearing of this application is scheduled to commence in March 2015. While there might be a strong case for joining Salamanca if it is restored to the register, this is only likely to happen if the current hearing dates can be retained. Any application to join Salamanca, or any other additional party, is unlikely to be granted if doing so is likely to require an adjournment of the scheduled hearing.

The council's case

[14] Part of the assessor's report of 29 June 2009 under subpart 4 of Part 1 of the Weathertight Homes Resolution Services Act 2006 has been put in evidence. It states that the criteria set out in the Act are met. The report finds building defects. It identifies as potential parties both the council and Salamanca (as well as others). It estimates the repair costs at $5.1million, but in the tribunal the St Pauls owners are claiming damages of about $21 million.

[15] The council was the local authority responsible for the issue of the building consent, inspections during construction, and the issue of a code of compliance certificate under the Building Act 1991. I gather that it will be resisting the owners' claims on liability, limitation, contributory negligence and quantum. Notwithstanding those defences, it is at risk of adverse liability findings. In that event, it wants others involved in the construction of the apartments to share the burden of any damages awarded. It had Tullow joined in the tribunal proceeding on

the theory that Tullow was a co-developer with Salamanca. Tullow strongly rejects that characterisation. One of its defences in the tribunal is that Salamanca was the sole developer; Tullow was no more than the ultimate holding company; and it was not subject to the developer's non-delegable duty of care.[4]

[16] From discovery and evidence apparently given in the tribunal, the council has formed the view that there were transfers from Salamanca to Tullow which merit further investigation by an independent liquidator and which might produce some recovery for creditors. It has therefore decided that it is worthwhile having Salamanca joined in the tribunal proceeding. To do that it needs Salamanca to be brought back into existence. For its part, Tullow strongly contests the allegations that there was anything in the way of distributions from Salamanca which could now be disturbed. Similarly, Salamanca's directors reject the possibility that an independent investigation of the affairs of Salamanca could reveal any viable cause of action against them.

[17] With an eight week hearing about to begin in the tribunal in March, the council proposes that Salamanca be joined as a fresh respondent in that proceeding, so that the council can pursue a claim against it for contribution under the Law Reform Act 1936. Its case will be that if it, as a territorial authority, is liable as a tortfeasor for not having identified defects in the design and construction of the St Paul's apartments, Salamanca will also be liable to the owners under its non-delegable duty as developer. It will look to Salamanca to carry the bulk of the liability.[5]

[18] Unsurprisingly, Willemstad and the directors take the point that the council has left its run far too late. They say that delay should count not only in any joinder application in the tribunal, but also in this application.

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4 As established in *Mt Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA).

5 In *Mt Albert v Johnson* (at 241) the Court of Appeal apportioned liability between developer and council four-fifths to one-fifth. That provides an appropriate example to support the council in this case.

Companies Act, s 329 and 330

[19] Section 329 of the Companies Act allows the court to restore a company to the register:

> **Court may restore company to New Zealand register**
>
> (1) The court may, on the application of a person referred to in subsection (2), order that a company that has been removed from the New Zealand register be restored to the register if it is satisfied that,—
>
> (a) at the time the company was removed from the register,—
>
> (i) the company was still carrying on business or other reason existed for the company to continue in existence; or
> (ii) the company was a party to legal proceedings; or
> (iii) the company was in receivership, or liquidation, or both; or
> (iv) the applicant was a creditor, or a shareholder, or a person who had an undischarged claim against the company; or
> (v) the applicant believed that a right of action existed, or intended to pursue a right of action, on behalf of the company under Part 9; or
>
> (b) for any other reason it is just and equitable to restore the company to the New Zealand register.
>
> (2) The following persons may make an application under subsection (1):
>
> (a) any person who, at the time the company was removed from the New Zealand register,—
> (i) was a shareholder or director of the company; or
> (ii) was a creditor of the company; or
> (iii) was a party to any legal proceedings against the company; or
> (iv) had an undischarged claim against the company; or
> (v) was the liquidator, or a receiver of the property of, the company:
>
> (b) the Registrar:
>
> (c) with the leave of the court, any other person.
>
> (3) Before the court makes an order restoring a company to the New Zealand register under this section, it may require any provisions of this Act or any regulations made under this Act, being provisions

> with which the company had failed to comply before it was removed from the register, to be complied with.
>
> (4) The court may give such directions or make such orders as may be necessary or desirable for the purpose of placing the company and any other persons as nearly as possible in the same position as if the company had not been removed from the New Zealand register.

[20] Under s 330(2), a company restored to the register is deemed to have continued in existence as if it had not been removed.

A procedural matter - leave to apply by originating application – r 19.5

[21] Rules 19.2-19.4 of the High Court Rules specify those proceedings which must or may be started by originating application. Under r 19.5, the court may in the interests of justice permit other proceedings not mentioned in rr 19.2 to 19.4 to be commenced by originating application. Creditors' applications under ss 248, 284 and 329 of the Companies Act are not within rr 19.2-19.4. The council has applied for permission under r 19.5. The directors and Willemstad oppose.

[22] While r 19.5(2) allows an applicant to apply for permission without notice, in this case the council applied on notice. When there is a staged approach, with the permission application heard ahead of the merits, the court needs to forecast how the case should be run – at an early stage and when all issues may not have been adequately identified. I am not under that disadvantage. The permission application and the merits of the substantive applications have been argued together. Instead of assessing the matter prospectively, I can consider whether the use of the originating application has not allowed for a just hearing of the parties and the issues.

[23] In *Hong Kong and Shanghai Banking Corporation Ltd v Erceg*, Asher J reviewed the cases under r 19.5 and said: [6]

> [25] These cases show that the type of proceeding suited to the originating application procedure is a straightforward application, not requiring detailed pleadings or interlocutory orders for its fair resolution. Such a type of proceeding tends to be an application under a specific statutory provision, where the issue that arises can be clearly defined, and the issues confined. The procedure is not well suited to the determination of substantive rights involving the application of common law doctrines as

6 *Hong Kong and Shanghai Banking Corporation Ltd v Erceg* (2010) 20 PRNZ 652 at [25]-[26].

> distinct from statutory tests. It is not well suited to cases involving multiple parties, and cases where there is the possibility of crossclaims or counterclaims.
>
> [26] I do not consider that the dicta of McGechan J and Randerson J (*Floorlines (NZ) Limited v The Commissioner of Inland Revenue* HC Auckland M501/87 3 July 2001, at [9]) present two mutually incompatible approaches. Randerson J's statement that the matters covered by the originating application procedure is much wider than earlier envisaged is, with respect, undoubtedly correct. It is no longer right to say that it cannot be utilised where there is an opposing party. Nevertheless, while the procedure is not limited to applications where there is no opposing party, it is nevertheless, in relation to contested proceedings not listed in r 19.2, an exceptional procedure. It is limited to cases where it is not necessary in the interests of justice for there to be the usual particularised pleadings, or interlocutory steps such as discovery, for the proper determination of the issues. While the types of proceedings where the originating application procedure can be used as of right under r 19.2 have been expanded, and can include the determination of substantive personal and property rights, this expansion does not create a carte blanche to commence any urgent matter by way of originating application. If a party wishes to obtain an urgent hearing and a truncated procedure in such a circumstance, it should file a standard proceeding in the usual way and seek priority, or allocation to the Fast Track, or some other step within the ambit of the standard procedure that will reduce time limits. A party should not treat the originating application procedure as a short cut for urgent cases.

[24] Asher J identified "exceptional procedure" as being those cases where it is not necessary in the interests of justice for the usual interlocutory steps to be followed. I also note that whereas r 19.2 requires an originating application under certain enactments, one purpose of r 19.5 is to allow originating applications in those cases where they are not required.

[25] The respondents relied on *Watercare Services Ltd v Registrar of Companies*.[7] In that case Associate Judge Faire refused leave to apply by originating application for a proceeding under s 329. He decided the leave application prospectively, before seeing the full case for each side. I am not under that disadvantage. That case came before Randerson J's decision in *Commissioner of Inland Revenue v McIlwraith*,[8] which is generally taken as indicating a less restrictive approach to applications under r 19.5, and before *Hong Kong and Shanghai Banking Corporation Ltd v Erceg*, which reconciled Randerson J's decision with earlier authorities. Judge Faire followed earlier authorities that held that cases under r 19.5 had to be a genuine

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7 *Watercare Services Ltd v Registrar of Companies* HC Auckland CIV 2004-404-2063, 16 June 2004.

8 *Commissioner of Inland Revenue v McIlwraith* (2003) 21 NZTC 18,112 (HC).

exception.[9] In the light of later decisions, that no longer represents the current approach.

[26] The respondents focus only on the restoration application under s 329 in opposing the proceeding by originating application. They do not suggest that any of the other orders sought by the council should not be decided by originating application. Having heard full arguments on the applications, I am satisfied that – with one exception – the issues were fully and fairly canvassed and that no one has been disadvantaged. The exception is the failure to make Mr Sheppard a party to the proceeding.

[27] The respondents played up the need for full pleadings, full discovery, and the opportunity to cross-examine witnesses. They had in mind a procedure which would not ensure a hearing for at least another six months, long after the tribunal hearing will have been completed. Those general submissions did not impress.

[28] More specifically, Willemstad alleged various shortcomings in the council's application.

Insufficient particulars of just and equitable ground

[29] Willemstad noted that the council relied on the "just and equitable" alternative under s 329(1)(b) of the Companies Act. Because I find that the council is a creditor under s 329(1)(iv), it is not necessary for me to consider that alternative. If I considered that the council was not a creditor and did not have an undischarged claim against Salamanca, I would assess whether it was just and equitable to restore Salamanca to the register. If I had taken a limited meaning of "creditor", such as that Willemstad pressed for, the enquiry would be whether it is just and equitable that a future tort claimant, not a creditor at the time of removal from the register, should be able to have the company restored.

[30] Willemstad alleged that because the council had not given proper particulars of the "just and equitable" ground, it was embarrassed in not knowing whether the

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9 For example, *Jones v H W Broe Ltd* (1989) 5 PRNZ 206 (HC).

council was alleging misconduct as grounds to investigate Tullow or Salamanca's directors. I would have considered the just and equitable ground only if I had not found that the council was a creditor and had an undischarged claim. In that case I would have found it just and equitable to restore. That is not because of any allegations of misconduct by Willemstad or the directors. It would be just and equitable to allow restoration, because the council would not otherwise qualify, even though it has shown an arguable case for recourse against Salamanca.

[31] In addition, the council made it clear that it saw benefits in restoring the liquidation of Salamanca to allow its affairs to be investigated. Willemstad and the directors responded to that. The respondents have not been embarrassed.

Insufficient pleading as to council's status as creditor

[32] Next, Willemstad alleged that the council had not given any proper basis for how it came to be a creditor or a party with an undischarged claim against Salamanca. Willemstad clearly appreciated that the council was relying on its rights of contribution under the Law Reform Act 1936 against Salamanca as a concurrent tortfeasor to found a claim to be a creditor. That required legal argument more than an examination of evidence. Willemstad came armed with argument on the point.

Insufficient evidence on delay

[33] Willemstad complained about lack of evidence on the question of delay. Willemstad pleaded delay in its notice of opposition. The issue was clearly articulated. There was sufficient evidence in the affidavits on which I could make findings as to delay. The absence of pleadings and discovery has not hindered me. The shortcomings in the council's evidence led to my making adverse findings against the council but that position would not have improved if it had been required to draw up a statement of claim.

Not all required parties joined

[34] Willemstad also says that all the required parties had not been joined. It says that if an application had been made under r 18.7 for directions to service, this difficulty could have been avoided. Specifically, it says that Mr Sheppard, the original liquidator, the St Paul's owners, the tribunal and Tullow all ought to have been joined in this application.

[35] In naming as respondents the Registrar of Companies, Salamanca's shareholders and directors, and the Secretary of the Treasury, the council was following the guidance given by Master Williams QC in *Re Durweston Properties Ltd*.[10] While Master Williams specified those people who should be served, the decision is not to be read as limiting service just to those listed in that decision.

[36] As for joinder of the tribunal and the parties to that proceeding, the respondents misconceive the role of this court on a restoration application. On a restoration application, the court does not do case management for the tribunal. While it is relevant to the restoration decision that the applicant wishes to restore the company so as to be able to bring a claim against it, the court does not need to hear from the other parties to that litigation. On restoration, the tribunal will consider whether Salamanca should be joined as a respondent in that claim. That is the tribunal's job; not mine. When the tribunal makes that decision, it will be able to hear from all the parties in that proceeding.

[37] Salamanca's shareholders and directors are the ones with the greatest interest in the restoration application. They have been given the opportunity to oppose that application, and they have taken full and proper advantage of it. In their notices of opposition, evidence, and submissions they properly canvassed the issues requiring consideration. The absence of pleadings by way of statement of claim and statement of defence, of discovery and of cross-examination, has not stood in the way of justice being done.

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[10] *Re Durweston Properties Ltd* (1992) 6 PRNZ 95 (HC) at 98.

[38] In this proceeding the council is also seeking orders against Mr Sheppard as liquidator. The council wants him removed. It can hardly be right to remove him as liquidator without giving him the opportunity to be heard. He ought to have been joined. That did not require an application under r 18.7. The council ought to have worked that out by applying the normal principles for joinder of parties. Later in this decision I make decisions in respect of Mr Sheppard, but my orders are not intended to be adverse to his interests.

[39] The council is seeking orders against Mr Sheppard in its application under s 284 of the Companies Act, not in its application for Salamanca to be restored to the register. There is no objection to the use of the originating application for the s 284 parts of the case. For the restoration application, Mr Sheppard swore an affidavit for Willemstad. As liquidator he has properly given the court information as to Salamanca's liquidation, even though he is not a party. The failure to join Mr Sheppard is a defect, but that did not require the restoration application to be run as a proceeding under Part 18 of the High Court Rules.

[40] Many proceedings under Part 16 of the Companies Act are routinely brought by way of originating application. That includes proceedings which must be brought by application (such as voidable transaction applications under s 295) but also creditors' applications under s 284 (where permission must be sought) and liquidators' applications under s 284 (where applications may be brought as of right). I have found dealing with the applications in this case little different from dealing with a contested originating application brought under other provisions of Part 16.

[41] In short, leaving the matter of Mr Sheppard aside, there has been no failure of justice in hearing this as an originating application. Leave is granted under r 19.5.

Three preliminary matters

[42] On the substantive issues, there are three matters which can be conveniently considered at the outset, as they recur:

(a) Limitation

(b) As a matter of law was the council a creditor of Salamanca?

(c) Delay by the council

Limitation

[43] The council's purpose in having Salamanca restored to the register is to bring a contribution claim against it. Salamanca's involvement in the development of the St Paul's apartments ended long ago. That raises the question whether any claim would now be time-barred. It is not clear when some events occurred. In those cases I have assumed indicative dates. Greater precision is not required for this part of the decision.

Limitation for a negligence claim in this court

[44] While the Limitation Act 1950 has been repealed, it continues to apply to causes of action based on acts or omissions before 1 January 2011.[11] Where a claim is based on acts or omissions after 1 January 2011, the Limitation Act 2010 applies.

[45] Any acts or omissions of Salamanca giving rise to liability in negligence for the construction of the St Paul's apartments happened in the 1990s. While there is no evidence as to the actual times that Salamanca was involved in the development of the St Paul's apartments, the issue of the last code compliance certificate in December 1999 gives a good indication that any relevant conduct of Salamanca is likely to have taken place before then.

[46] In building defects claims in negligence, there is a discoverability rather than an occurrence test for when the cause of action accrues.[12] There is no evidence when the body corporate and St Paul's owners discovered the building defects. It must have been before June 2008, when they applied for an assessor's report. I was advised from the bar that in the tribunal proceeding the defence will be running arguments that the damage came to light earlier – perhaps as early as 2002.

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11 Limitation Act 2010, ss 57, 59 and 61; Limitation Act 1950 s 2A.

12 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC); *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721.

Salamanca does not appear to have been notified. It apparently went into liquidation on the assumption that it was not under any liability for a claim for building defects. The period under the Limitation Act 1950 within which the St Paul's owners could bring a proceeding in this court against the council or against Salamanca was six years from when defects could reasonably have been discovered.[13]

[47] So if the damage resulting from the building defects became reasonably discoverable only in 2007, then under the Limitation Act 1950 the owners would have until 2013 in which to sue Salamanca or the council in this court. That is, however, subject to the longstop of 10 years under s 393(2) of the Building Act 2004. The 10 year longstop period runs from the date of the act or omission on which the proceeding is based. Any acts or omissions of the council giving rise to liability would presumably have occurred no later than the date of the last code of compliance certificate – December 1999. No doubt Salamanca's work finished about the same time. Therefore the council could not be sued more than 10 years after the issue of the last relevant code of compliance certificate and Salamanca could not be sued more than ten years after it completed its work on the apartments.[14] Even if the owners' causes of action against the council or Salamanca accrued in 2007, they would have had only until late 2009 at the latest in which to start a negligence proceeding in this court.

Limitation for a contribution claim in this court

[48] The claim which the council wishes to make against Salamanca is for contribution as a concurrent tortfeasor under s 17(1)(c) of the Law Reform Act 1936. Under the Limitation Act 1950, in a claim for contribution the cause of action is deemed to have accrued at the first point of time when everything had happened which would have to be proved to enable judgment to be obtained for a sum due in respect of the claim.[15] The relevant event giving rise to a claim for contribution is a judgment fixing liability on the party claiming the contribution. As that event has

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13 Limitation Act 1950, s 4(1)(a); Building Act 2004, s 393(1).

14 If Salamanca had come back on site and carried out further work after completion, then the longstop period for the further work would run from when it was carried out: *Johnson v Watson* [2003] 1 NZLR 626 (CA).

15 Limitation Act 1950, s 14.

not occurred yet, the Limitation Act 2010 will apply. Under s 34(4) of that Act, the limitation period is two years from the date on which the liability of the party claiming the contribution is quantified by agreement, award or judgment. As the council's liability to the St Paul's owners has not yet been fixed by agreement, award or judgment, time has not yet started to run under the Limitation Act 2010.

[49] The council's right to claim contribution is also subject to the 10 year longstop under s 393(2) of the Building Act 2004.[16] Accordingly, in a proceeding in this court it is now too late for the council to sue Salamanca for contribution. Because of s 393, a contribution claim became statute-barred at the end of 2009, even though the council's cause of action had not then accrued under the Limitation Acts 1950 and 2010.

Winding the clock back under s 329(4) of the Companies Act

[50] For part of that 10 year longstop period, Salamanca has not been in existence and therefore could not be sued: it had been removed from the register. When a company is restored to the register, the court may give "as you were" directions under s 329(4) of the Companies Act 1993:[17]

> The court may give such directions and make such orders as may be necessary or desirable for the purpose of placing the company and any other person as nearly as possible in the same position as if the company had not been removed from the New Zealand register.

[51] This power has been used to "wind the clock back" for limitation purposes. If the limitation period has expired during the period while the company is removed, parties, such as those claiming to be creditors, are entitled to be put back into the position they were in before the reinstatement. If they could sue at the date of removal from the register, they will still be allowed to do so on restoration. The lead decision, *Re Donald Kenyon Ltd*,[18] has been followed in New Zealand.[19]

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16 *Dustin v Weathertight Homes Resolution Service* HC Auckland CIV-2006-404-276, 25 May 2006; *Lee v North Shore City Council* HC Auckland CIV-2009-404-2091, 12 April 2010; and *Body Corporate 88863 v Pimento Holdings Ltd* [2012] NZHC 2225; cf *Cromwell Plumbing Drainage & Services Ltd v De Geest Bros Construction Ltd* (1995) 9 PRNZ 218 (HC), which goes the other way, has generally not been followed.

17 Companies Act 1993, s 329(4).

18 *Re Donald Kenyon Ltd* [1956] 3 All ER 596 (Ch).

19 *John Hammonds & Co Ltd v Registrar of Companies* [1999] 3 NZLR 690 (HC) at [21]-[22];

[52] If a company is to be restored to the register, the question arises whether the clock can be turned back so as to defeat the 10 year longstop period under s 393 of the Building Act. The parties had not prepared submissions on this before the hearing, but I heard argument on it. In reply, the council accepted that the longstop period should prevail. That was an appropriate concession. In *Dustin v Weathertight Homes Resolution Service*, Courtney J said:[20]

> The objective of a long stop period is to create finality by preventing claims being brought outside it. The inevitable result is that some, otherwise valid, claims will be precluded. However, that result is inherent in the concept and operation of the long stop period. Its purpose is to ensure fairness to all parties, given the effect of time on the freshness of memories and availability of witnesses. Further, it gives certainty for intended defendants so that they can plan such things as document destruction and liability insurance. These issues are just as relevant in the context of a claim for contribution as in a primary claim.

[53] That policy is as applicable in the case of companies that have been removed from the register as in other contribution cases. After all, once a company has been removed from the register, it is likely that its records and insurance cover may no longer be maintained.

[54] In *Johnson v Watson*, the Court of Appeal said in respect of s 91 of the Building Act 1991 (the predecessor to s 393 of the Building Act 2004):[21]

> Subsection (2) is in this respect a statutory bar which is self-contained, both as to the commencement of the period allowed and its duration. In short, s 91(2) means exactly what it says. A plaintiff cannot in any circumstances sue more than ten years after the act or omission on which the proceedings are based, if the case involves, as this one clearly does, building work associated with the construction of a building.

[55] That applies equally under s 393 of the Building Act 2004 and prevents the court extending time by winding the clock back under s 329(4) of the Companies Act. Accordingly, if the council's only remedy were to sue Salamanca for contribution in this court, the proceeding would be statute-barred. Restoring Salamanca to the register would not serve any useful purpose, because the court

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Spencer v Commissioner of Inland Revenue (2004) 21 NZTC 18,818 (HC) at [63]; *Thornton Estates Ltd v Registrar of Companies* (2006) 3 NZCCLR 590 (HC).

20 *Dustin*, above n 7, at [22].

21 *Johnson v Watson*, above n 14, at [8].

could not wind the clock back under s 329(4) so as to get around the 10 year longstop.

Limitation under the Weathertight Homes Resolution Services Act 2006

[56] The limitation periods work differently when a claim is filed under the Weathertight Homes Resolution Services Act 2006. For limitation purposes, the key event is when the owner of a defective building applies for an assessor's report under s 32(1). Section 37(1) says:

> (1) For the purposes of the Limitation Act 2010 (and any other enactment that imposes a limitation period) the making of an application under s 32(1) has effect as if it were the filing of proceedings in a court.

[57] The St Paul's owners applied for their report on 20 June 2008 but they did not begin their proceeding in the tribunal against the council until 3 February 2012. That was more than 10 years after the last of the council's relevant acts or omissions, but because they had applied for an assessor's report in 2008, they were within the 10 year longstop under the Building Act.

[58] The benefit of applying for an assessor's report under s 32 applies not only for owners, but also for other parties to the proceeding. Under s 72(2)(a) the tribunal can determine not only liabilities to the claimants, but also liabilities of one respondent to another.[22] Under s 111, the tribunal may order a person to be joined as a respondent. Even though a new party may be joined as a respondent outside the ordinary limitation period, by virtue of s 37 the claim against the respondent will be held to have started within time. Asher J explained this in *Kells v Auckland City Council*:[23]

> [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

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22 Weathertight Homes Resolution Services Act, s 72(2)(a).

23 *Kells v Auckland City Council* HC Auckland, CIV-2008-404-1812 and CIV-2008-404-2903, 30 May 2008, at [43]-[44], Asher J. Similarly for the St Pauls Apartments claim in the tribunal, this court has held that s 37 allows fresh claimants to be added if the claim is in time under s 37: *Body Corporate 85978 v Wellington City Council* [2013] NZHC 2852.

> 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.

[59] If the tribunal were to make an order under s 111 joining Salamanca as a respondent to the claim by the St Paul's owners, s 37 will take effect so that the council's contribution claim will be treated as having been made on 20 June 2008. Without any "wind the clock back" order, the St Paul's owners would be able to claim in the Tribunal against Salamanca for its acts or omissions since 20 June 1998 (the longstop period) that gave rise to building defects that became discoverable in the six years before 20 June 2008.[24] The council would be able to make a contribution claim against Salamanca as a concurrent tortfeasor based on acts or omissions of Salamanca in the 10 years before 20 June 2008.

[60] If a "wind the clock back" order were made under s 329(4) of the Companies Act with s 393 of the Building Act continuing to apply, the effect would be that the St Pauls owners could claim in the tribunal against Salamanca for damage that became discoverable in the six years before 9 September 2006, the date of removal, if it arose from acts or omissions of Salamanca within the 10 years before 20 June 2008. And if the council were also found liable as a concurrent tortfeasor with Salamanca, it would have a contribution claim against the company for its liability for the same damage.

[61] In summary, any damages claim in negligence by the council against Salamanca in this court would be statute-barred, but limitation will not be a defence in the pending claim in the tribunal, if the council is able to have Salamanca joined as a respondent.

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[24] The six years is under the Limitation Act 1950, s 4(1)(a) and the Building Act 2004, s 393(1).

As a matter of law was Wellington City Council a creditor of Salamanca?

[62] Whether the council is a creditor of Salamanca goes to these aspects of its applications:

(a) The Council's standing to apply for restoration under s 329. Those entitled to apply under s 329(2)(a) include a creditor at the time of removal and a person with an undischarged claim against the company at that time.

(b) The grounds for its application: under s 329(1)(a)(iv), a ground for restoring to the register is that the applicant was a creditor or had an undischarged claim against the company at the time of removal.

(c) Its standing to apply with leave under s 284 of the Companies Act to reverse Mr Sheppard's final report and have him removed as liquidator.

(d) Its ability to apply for an order under s 248(1)(c) of the Companies Act to take proceedings for monetary relief against Salamanca while it is in liquidation.

[63] There are differences as to time. For (a) and (b), the relevant time is at the removal from the register. For (c) and (d), it is the time of the application to court.

[64] I will consider the question of creditor as a matter of law, assuming that the St Paul's owners and the council will be able to make out the claims they assert.

[65] Willemstad denies that the council was and is a creditor of Salamanca at the date of liquidation, at the date of removal from the register, and now. It notes that in *Re West,* Ronald Young J took a confined view of "creditor" in s 329 as requiring either an acceptance by the company that it owed the applicant money or by resolution by an independent body that the money was owed.[25] It accepted that in

[25] *Re West* HC Napier, M37/02, 15 May 2003 at [6].

Commissioner of Inland Revenue v Registrar of Companies, Hammond J had taken a wider view.[26] It also relied on dicta of Associate Judge Gendall in *Satara Co-Operative Group Ltd v FUS Ltd (In Liq)*, that a contingent creditor had to demonstrate a real prospect of becoming a creditor of the company.[27] Willemstad further submits that as a claim for contribution accrues on the date when the liability of the party claiming the contribution has been ascertained - either by judgment or by agreement – no cause of action by the council against Salamanca has yet accrued. In addition, it submits that, as there was no claim against the council as at 2 September 2006, the council had not suffered any loss for which it could make a contribution claim against any other party.

[66] Willemstad also submits that because Salamanca went into liquidation in September 2005, the council could never have a claim against Salamanca. It acknowledges the meaning of claims that may be made in a liquidation under s 303 of the Companies Act, the requirement under s 306 for the amount of the claim to be ascertained at the date and time of the commencement of the liquidation, and s 307, under which a liquidator may make an estimate when a claim is subject to a contingency as to damages or was not certain for some other reason. Notwithstanding those provisions, it says that at the date of liquidation Salamanca was not under any legally enforceable liability and therefore the council could have no claim in the liquidation.

[67] That argument assumes that at the dates of liquidation and of removal from the register no cause of action had accrued against Salamanca and, in the absence of an accrued cause of action, there was no basis upon which the council could claim to be a creditor of Salamanca. The ramifications of that argument are important in leaky building litigation. It is common practice for developers to establish single-purpose companies to carry out a development. Once a development is completed and profits are distributed, the single-purpose company is wound up and removed from the register. In leaky building claims, damage arising from building defects

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[26] *Commissioner of Inland Revenuie v Registrar of Companies* (2002) 20 NZTC 17,846 (HC) at [15].

[27] *Satara Co-Operative Group Ltd v FUS Ltd (In liq)* HC Napier CIV-20008-441-856, 28 July 2011 at [24].

takes time to become apparent. After all, that is why the courts have accepted a discoverability test for the accrual of a cause of action. If the law requires causes of action to accrue before claims can be recognised in a liquidation or under s 329, developers will be able to extract their profits from the single-purpose development company while leaving those who have suffered actionable damage without an effective remedy against the company, if the damage has not become apparent by the time the company is removed from the register.

[68] I call this the future tort question. Where torts claims turn on the discovery of damage, are victims to be deprived of a claim in a liquidation because the damage has not been discovered at the date of liquidation or the date the company is removed from the register?

[69] The starting point is the Companies Act. Section 240 says:

> (1) In this Act, unless the context otherwise requires –
>
> **Creditor** means a person who, in a liquidation, would be entitled to claim in accordance with section 303 that a debt is owing to that person by the company; …

Section 303 says:

> **303 Admissible claims**
>
> (1) Subject to subsection (2) of this section, a debt or liability, present or future, certain or contingent, whether it is an ascertained debt or a liability for damages, may be admitted as a claim against a company in liquidation.
>
> (2) Fines, monetary penalties, and costs to which section 308 of this Act applies are not claims that may be admitted against a company in liquidation.

[70] Under s 306(1) the amount of the claim must be ascertained as at the date and time of the commencement of the liquidation. Section 307 says:

> **307 Claim not of an ascertained amount**
>
> (1) If a claim is subject to a contingency, or is for damages, or, if for some other reason, the amount of the claim is not certain, the liquidator may—
>
> (a) make an estimate of the amount of the claim; or

(b) refer the matter to the court for a decision on the amount of the claim.

(2) On the application of the liquidator, or of a claimant who is aggrieved by an estimate made by the liquidator, the Court shall determine the amount of the claim as it sees fit.

[71] The statement of admissible claims in s 303(1) is a standard provision as to debts and liabilities recognised under insolvency law. It is in wide terms so as to allow a range of debts and liabilities to be recognised. Claims may be in debt but also for other forms of liability. They need not be certain. They may need to be estimated, a matter of some difficulty with uncertain variables. Claims in tort may be recognised, even if the company has not admitted liability and also if a court has not so far found the company liable. Because future liabilities may be admitted as claims, future tort claims are admissible. That means that it is not necessary for the cause of action to have accrued at the date of liquidation. Whether an apprehended claim will become an accrued cause of action will be subject to future events, but claims are admissible even if they are subject to contingencies. At this stage, future tort claims are capable of being admitted in a liquidation.

[72] The case law supports this. A leading decision is *Re Sutherland*.[28] That was a tax case, but the principles it established have been applied to insolvency law. The question was the meaning of "contingent liability". Lord Reid said:[29]

> No doubt the words "liability" and "contingent liability" are more often used in connection with obligations arising from contract than with statutory obligations. But I cannot doubt that if a statute says that a person who has done something must pay tax, that tax is a "liability" of that person. If the amount of tax has been ascertained and it is immediately payable it is clearly a liability; if it is only payable on a certain future date, it must be a liability which has "not matured at the date of death" within the meaning of s 50(1). If it is not yet certain whether or when tax will be payable, or how much will be payable, why should it not be a contingent liability under the same section?
>
> It is said that where there is a contract there is an existing obligation even if you must await events to see if anything ever becomes payable, but that there is no comparable obligation in a case like the present. But there appears to me to be a close similarity. To take the first stage, if I see a watch in a shop window and think of buying it, I am not under a contingent liability to pay the price: similarly, if an Act says I must pay tax if I trade and make a profit, I am not before I begin trading under a contingent liability to pay tax

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28 *Re Sutherland(deceased)* [1963] AC 235 (HL).

29 At 247-248, see also 253-254 per Lord Birkett.

> in the event of my starting trading. In neither case have I committed myself to anything. But if I agree by contract to accept allowances on the footing that I will pay a sum if I later sell something above a certain price I have committed myself and I come under a contingent liability to pay in that event. This company did precisely that but its obligation to pay arose not from contract but from statute. I find it difficult to see why that should make all the difference.

Lord Guest said:[30]

> Contingent liabilities must, therefore, be something different from future liabilities which are binding on the company, but are not payable until a future date. I should define a contingency as an event which may or may not occur and a contingent liability as a liability which depends for its existence upon an event which may or may not happen.

The Court of Appeal relied on Lord Reid's speech in a bankruptcy case where the question was one of contingent liability.[31]

[73] *Re T & N Ltd*, an English case, shows that approach being applied to future tort claims.[32] There a company was in administration. The questions were whether future torts claims could be admitted, first in the administration and second, in a liquidation. Under the United Kingdom legislation there were different tests for the meaning of "creditor" for administration[33] and for liquidation.[34] The company had been involved in large scale mining of asbestos and in the manufacture and distribution of asbestos products. Like others in the asbestos industry, it was subject to numerous claims by employees, former employees, employees' families, third parties who worked with asbestos and others who had been exposed to asbestos dust. There were claims for personal injuries, for property damage and for contribution from other asbestos producers. In asbestos claims, there may be a long period between the exposure to asbestos and the appearance of symptoms of resulting disease. Sometimes symptoms take decades to appear. It was necessary to decide whether those who had been exposed to asbestos, but were not yet suffering disease, could claim as creditors. Any cause of action would not accrue until the discovery of damage.

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30 *Re* Sutherland, above n 28, at 262-263.
31 *Commissioner of Inland Revenue v Duncan* [2007] NZCA 235, [2007] 3 NZLR 360 at [16].
32 *Re T & N Ltd* [2005] EWHC 2870, [2006] 1 WLR 1728 (Ch).
33 Companies Act 1985 (UK), s 425.
34 Insolvency Rules 1986 (UK), rr 12.3(1) and 13.12.

[74] Under s 425 of the Companies Act 1985 (UK), which provided for compromises or arrangements proposed between the company and its creditors (or a class of them) to become binding on the company by specified procedures, there was no statutory definition of "creditors". Relying on *Re Sutherland (Deceased)* and *Secretary of State for Trade and Industry v Frid*,[35] David Richards J held that "creditors" included contingent claims in tort where a cause of action had not yet accrued:[36]

> [60] The principles established by *In Re Sutherland* and *Secretary of State for Trade and Industry v Frid* are applied to this case, it is right in my judgment to conclude that T & N is subject to contingent liabilities to pay damages to those who have already been carelessly exposed to asbestos by the actions of T & N and who later suffer compensatable loss, resulting in claims for damages in negligence against T & N. The creditors in respect of those contingent liabilities are the persons who have been carelessly exposed to asbestos and who will have claims in negligence if they suffer loss as a result. Reverting to Lord Reid's speech, the contingent liability to pay damages is a liability which, by reason of something done by the person (by the use or distribution by T & N of asbestos products) will necessarily arise or come into being if one or more certain events occur (ie the onset of asbestos-related conditions in persons previously exposed to asbestos by T & N). Lord Guest referred specifically to the contingent debtor being "automatically involved by the operation of law in the payment" of the debt once the contingency occurred. That precisely describes the situation here. The careless exposure of persons to asbestos by T & N will automatically, by the operation of the law of negligence lead to the liability to pay damages, assuming the existence of the other necessary elements of a claim in negligence.
>
> [61] … In this case there is no question of volition. There is nothing which T & N can do to incur or avoid the liability. There is no medical intervention which can prevent the development of asbestos-related conditions in those who have been exposed to asbestos. Nature will take its course.
>
> [62] .... the existing exposure of the company to asbestos-related personal injuries claims in the future would, in my view, have constituted contingent liabilities. They go beyond something which "in a business sense is morally certain and for which every businessman ought to make provision".
>
> [63] In my judgment, it makes no difference that the source of the liability is the common law of negligence, rather than a contract or statute. There is no logical reason why it should make a difference. Lord Guest in *Re Sutherland* did not limit the source to contract or statute but referred to the operation of law.

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35 *Secretary for State for Trade and Industry v Frid* [2004] UKHL 24, [2004] 2 AC 506 at [60].

36 Above, n 32.

[75] David Richards J was careful to limit his finding as to contingent liability to those cases where all events giving rise to liability had occurred save for the occurrence or discovery of damage:

> [67] In reaching this conclusion, I emphasise that I do so on the basis of the facts relevant to asbestos claims, principally that the relevant acts or omissions of T & N are complete, the potential claimants have been exposed to asbestos and the existence of a claim in tort depends solely on whether a relevant asbestos condition develops. I have not considered circumstances where all the relevant events excluding damage have not occurred, as, for example, where a company has negligently made a product but the putative claimant has not acquired it or used it. By way of extreme example, if aero-engines are negligently manufactured and are in use but have not (yet) caused an air crash, it could hardly be supposed that there exists a contingent liability to the victims of a possible future crash. …

[76] He went on to consider whether these claims would also be provable in the liquidation of the company under the Insolvency Rules 1986 (UK). Those rules contained a standard admissibility provision in terms comparable to s 303 of the New Zealand Companies Act. But that was in turn subject to this qualification in r 13.12(2) for tort claims:

> In determining for the purposes of any provision of the Act or the Rules about winding-up, whether any liability in tort is a debt provable in the winding-up, the company is deemed to have become subject to that liability by reason of an obligation incurred *at the time when the cause of action accrued*.
>
> [Emphasis added.]

[77] He held that because no cause of action had accrued, asymptomatic asbestos claims did not qualify by reason of r 13.12. It is of interest that, as a result of that decision, the Insolvency Rules were amended to allow claims in tort if the cause of action would have accrued but for the fact that no actionable damage had occurred at the date of the liquidation.

[78] The part of his decision dealing with claims admitted in liquidation is not relevant for this case, as it dealt with a modified meaning of "creditor". But his finding that "creditor" used without further qualification in company legislation included future torts claimants, where damage had not yet become apparent, goes to the admissibility of future tort claims under s 303 of our Companies Act.

[79] The principles in that case can be applied to leaky building claims. While the acts or omission giving rise to liability may occur quite some time before the damage becomes manifest, liability will follow as a matter of law. Salamanca completed its development by the end of the 1990s. Once its building work was over (and time started running under the longstop provisions[37]) and it had sold its apartments, liability would follow by operation of law, in this case the law of negligence. Salamanca could not influence whether damage occurred or not. Liability would follow independently of its own volition.

[80] At the date it went into liquidation, Salamanca was subject to contingent liabilities to the owners of the St Paul's apartments for damage resulting from building defects, even if damage was not apparent then. Similarly, when Salamanca was removed from the register, it was also subject to contingent liabilities to the owners of the St Paul's apartments, even if the damage on which the owners are now suing had not occurred or had not become discoverable.

[81] That establishes the St Paul's owners as contingent creditors at the time Salamanca was removed from the register. But here the question is whether the council could also count as a contingent creditor of Salamanca.

[82] The St Paul's owners have claimed against the council, as the last man standing, for the defects giving rise to the same damage as in any claim they might have against Salamanca. Both the council and Salamanca stand to be liable to the St Pauls owners as tortfeasors in respect of the same damage. Under s 17(1)(c) of the Law Reform Act 1936 one tortfeasor may recover contribution from another, the amount to be fixed according to the court's finding as to what is just and equitable.[38] Salamanca's liability for any damage to the St Paul's apartments will be first to the building owners. If it meets their claims in full, the council will have no contribution claim against it. On the other hand, if Salamanca does not meet the owners' claims, but the council does, the council will be entitled to recover from Salamanca so much of what it has paid to the owners as is just and equitable under s 17(2) of the Law Reform Act. Accordingly, the council's contribution claim against Salamanca is

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37 Building Act 1991, s 91, and s 393 of the Building Act 2004, s 393.
38 Law Reform Act, s 17(2).

subject to further contingencies: the owners' claims against the council succeeding and the council meeting those claims, which also discharge the owners' claims against Salamanca. But the point remains that Salamanca is under a contingent liability to the council for a contribution claim. In Salamanca's liquidation the council would not be able to claim in competition with the St Paul's owners – the rule against double proof would apply.[39] The council, with secondary liability, cannot have a claim when the creditor with primary entitlement is not satisfied.

[83] Accordingly, as a matter of law, at the date of liquidation and at the date of removal from the register, the St Paul's owners, as future tort victims, and the council as a claimant for contribution, were contingent creditors of Salamanca. Willemstad's attack on the factual merits of the council's claim is addressed separately below.

[84] Willemstad relied on dicta of Fisher J in *Stotter v Equiticorp Australia Ltd (in liq)* to the effect that a creditor cannot claim for a sum for which a creditor could not have obtained judgment as at the date of the liquidation.[40] Fisher J was, however, careful to add a qualification in the case of assessing the present value of a debt which had not yet accrued due.[41] He did not have to deal with contingent liabilities. While contingent liabilities may be claimed in a liquidation, by their nature they could not result in judgment as at the date of the liquidation. I do not read *Stotter v Equiticorp Australia Ltd (in liq)* as excluding contingent liabilities from being admitted in a liquidation.

[85] I have dealt with the council as a contingent creditor meeting the requirements of s 329. There is another aspect: did it have an undischarged claim against Salamanca? I do not see any need to treat "creditor" and "having an undischarged claim" as mutually exclusive, even though Ronald Young J seems to have thought otherwise in *Re West*. Some overlap seems inevitable. The context does not require "creditor" to be given a narrower meaning than under the definition

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39 See *Re Oriental Commercial Bank, ex parte European Bank* (1871) LR 7 Ch App 99 and *Re Kaupthing Singer & Friedlander Ltd (in administration)(No 2)* [2011] UKSC 48, [2012] 1 AC 804.

40 *Stotter v Equiticorp Australia Ltd (in liq)* [2002] 2 NZLR 686 (HC) at [39]-[40].

41 At [40].

in s 240(1). "Creditor" may apply more widely than "undischarged claimant". It includes those to whom uncontested debts are due, as well as those whose claims are contestable. The express reference to undischarged claims in s 329(2) makes it clear that, notwithstanding the width of "creditor" and "party to any legal proceedings", those with contestable claims against the company who have not started proceedings yet will have standing and a ground to apply for restoration. An "undischarged claim" is a claim capable of discharge. A future tort claimant may give a discharge even before a cause of action has accrued (so long as the right language is used).[42] Accordingly, a contingent creditor for a future tort claim is "a person who had an undischarged claim against the company" under s 329. The council had such a claim at the date of removal.

[86] To sum up at this stage, in law the council had an admissible claim in the liquidation of Salamanca based on Salamanca's contingent liability in negligence for building defects in the St Paul's apartments, even though damage may not have become discoverable at the date of the liquidation, and even though no cause of action may have accrued in favour of either the St Paul's owners or the council when Salamanca was removed from the register. Because the council was and is a contingent creditor of Salamanca, it has standing to apply for restoration under s 329 of the Companies Act, to seek leave to apply for directions under s 284, and to apply for permission to bring a proceeding against Salamanca while it is in liquidation.

Delay

[87] The respondents raise delay as a factor for the court's consideration. Here, I consider whether there was any delay by the council, and what that delay was. Later I consider how the delay influences the restoration application.

[88] While Salamanca was removed from the register in September 2006, the council did not apply for it to be restored until November 2014. Not all of that time is delay. The St Paul's owners did not begin their proceeding in the tribunal until

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[42] Note the difficulty with drafting general releases of unknown claims, seen in *Tag Pacific Ltd v The Habitat Group Ltd* (1999) 19 NZTC 15,069 (CA) and *Bank of Credit and Commerce International SA v Ali* [2001] UKHL 8, [2002] 1 AC 251.

February 2012. Until it was sued, the council has an explanation for not applying for Salamanca to be restored to the register. Until then, it could not know for certain that it was to be sued. Any application the council might have made before 2012 would have run into the objection that the application was premature because it was not known whether the St Paul's owners would make a claim. Accordingly, I am concerned only with the time after the council received the St Paul's owners' claims in 2012.

[89] At that time, the council already knew that Salamanca was the developer of the St Paul's apartments. Salamanca was named as the owner in resource consent applications, in applications for building consents and in code compliance certificates. In 2012 Tullow reminded it when it applied to be removed on the ground that Salamanca was the sole developer.

[90] In the tribunal proceeding there was discovery in 2012 and 2013. Statements of evidence were exchanged in 2013 and 2014. There were experts' conferences as well as mediations. The question of restoring Salamanca to the register, and having it joined in the tribunal proceeding arose only in late 2014. The affidavit of the council's building claims resolutions manager tries to explain the delay, but it is unconvincing. He says that since 2012 the council and other parties have taken the normal steps associated with responding to litigation and that has involved a substantial amount of work because of the number of claimants, a significant amount of discovery and the numbers of issues associated with the alleged defects, repair proposals and the magnitude of the quantum claimed. While the scale of the claim would account for it being given considerable attention and effort, that does not explain why the council did not take any earlier steps to revive Salamanca and join it in the tribunal proceeding.

[91] While the council did not say so, I believe that I can work out what has happened. I assume that the council did not consider joining Salamanca earlier because it believed that there were no assets to be recovered, even if it succeeded in a claim against Salamanca. Instead, it went after Tullow. Its case against Tullow is that that company was a co-developer with Salamanca. The council apparently wishes to prove that Tullow was more than a passive investor and took an active part

in the St Paul's development. The council has apparently received documents on discovery from Tullow which it believes will support that claim. Those documents show financial transfers - funds passing between Salamanca and Tullow. It believes that the net benefit to Tullow Ltd was in the order of $3,000,000. With that, the council appears to have realised late in the piece that there may be benefits in restoring Salamanca to the register with a view to obtaining some recovery from Salamanca through remedies available under Part 16 of the Companies Act. Even if it cannot recover distributions from Tullow, it believes that pooling orders under ss 271-272 of the Companies Act may be available to a liquidator. In my view the late realisation of possible recourse against Salamanca has prompted the present application.

[92] All the same, if that is the explanation, the council has been slow on the uptake. It appears to have had information upon which it could make such an assessment available to it since at least late 2013. In my judgment the council ought to have realised, by the end of 2013 at the very latest, that if it wished to pursue any remedy against Salamanca it should apply to have it restored to the register. The lapse of time since the end of 2013 is unexplained delay. The council had adequate time before that in which to work out its litigation strategy.

[93] Willemstad raises delay as a ground for opposing restoration to the register on two bases:

(a) The delay is prejudicial to Salamanca's ability to take part effectively in the tribunal claim. Besides, allowing Salamanca to be joined in that proceeding would be prejudicial to other parties in that claim.

(b) Aside from the tribunal proceeding, it would not now be possible for liquidators to carry out an appropriate investigation of Salamanca. In particular, the directors' ability to respond is prejudiced by the passage of time.

[94] I will address these aspects further in the restoration application.

Merits of the application to restore Salamanca to the register

[95] In dealing with the merits, it is useful to recall Hammond J's observation in *John Hammonds & Co Ltd v Registrar of Companies* that cases in which the court will decline to restore a company to the register will be quite unusual.[43] While that was a factual remark, not a statement of law, it is still a helpful pointer.

[96] The following extract from *Re Pranfield Holdings Ltd* provides context for restoration applications:[44]

> …the principle must be that the somewhat peremptory power of the Registrar to remove deadwood from the corporate scene, will not prevail against the rights of those so removed, or of others with whom they have dealt, to reinstate the company to pursue remedies provided by substantive law, unless it is plain that the proceeding, if unsuccessful, will still be nugatory. This principle puts grand notions of access to law ahead of mere rules for administrative ease.

[97] Now for the scheme of s 329.[45] Those within s 329(2)(a) and (b) are entitled to apply for a company to be restored; others need leave under (c). The grounds for a restoration order are set out in s 329(1). The just and equitable ground under s 329(1)(b) does not require consideration if the applicant can satisfy the court of at least one of the more specific matters in s 329(1)(a). As to these more specific grounds under (a), even if the court is relevantly satisfied, it has a discretion whether to restore the company. The section is silent on matters to be considered in that residual discretion, but presumably they are negative factors – matters that count against restoration, even if the grounds in (a) have been made out. In other words, if one of the grounds in (a) is proved, restoration should follow, unless some discretionary factor against restoration applies.[46] I do not understand the section to require a residual discretionary hurdle to be surmounted before restoration, in the absence of any negative factors. On the other hand, the more general "just and

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43 *John Hammonds & Co Ltd v Registrar of Companies* [1999] 3 NZLR 690 (HC) at [57].

44 *Re Pranfield Holdings Ltd* (2001) 9 NZCLC 262,577 at [20].

45 See [19] above for the text of the section.

46 Heath J took a similar approach in *Re Trade Indemnity New Zealand Ltd, McSwain v Registrar of Companies* HC Auckland CIV 2003-404-6684, 12 December 2003 at [6]:
"All of the s 329(1)(a) grounds are premised on the continued involvement of the company in business or in the resolution of legal claims made by or against it. The scheme of s 329(1) suggests that the grounds specified in s 329(1)(a) are *prima facie* to be taken as sufficient reason to justify restoration. Nevertheless …the Court retains a discretion to restore the company to the register. And, that discretion must be exercised judicially…"

equitable" basis in (b) allows discretionary factors going both ways to come into consideration.

[98] Under (a) the onus switches. While the applicant needs to satisfy the court of the ground it relies on, it is for the respondent to make out its case for any discretionary factors against restoration.

[99] It is common to refer to principles set out by Hammond J in *Re Saxpack Foods Ltd*.[47] Valuable as they are, it is necessary to note two matters to put them into context. First, that case was decided under the Companies Act 1955, s 336(7) and (7A), as it stood before 1 July 1994.[48] There were only two grounds for restoration: that the company was carrying on business or was in operation at the time of removal; and that it was just and equitable. Under those provisions the more general just and equitable ground had to do more work than under the current section. Second, that case involved an application by a director and shareholder, not a creditor. One of Hammond J's principles, requiring full and frank explanations for how the company came to be removed, may be appropriate when insiders apply for restoration, but it would be odd to require an outsider seeking restoration, such as a creditor, to set out how the company came to be removed.

[100] More generally, while his principles may be more readily applied when the just and equitable ground is invoked, in cases under (a) they will come into play only if the court is asked to exercise its discretion against restoration, if a ground in (a) is established.

[101] In this case the council relies on one of the grounds under (a), that it was a creditor and had an undischarged claim at the time of removal. In the alternative, it relies on the just and equitable ground under (b). The respondents run three main arguments against restoring Salamanca to the register:

(a) They deny that the council was a creditor and had an undischarged claim at the time of removal;

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47 *Re Saxpack Foods Ltd* [1994] 1 NZLR 605 (HC) at 609-610.
48 See Companies Amendment Act 1993, s 42.

(b) The council has delayed in applying for restoration; and

(c) Even if Salamanca is restored, the council will recover nothing.

[102] The council has the onus on the first, the respondents on the other two.

The ground under s 329(1)(a)

As a matter of fact, was the council a creditor under s 329(1)(a)(iv)?

[103] I have already shown that in law the council's claim to be a creditor is sound.[49] The respondents say however that the council has not proved on the facts that it was a creditor or had an undischarged claim against Salamanca.

[104] In cases where a creditor wishes to have a company restored to the register for the purpose of starting or continuing a legal proceeding against the company, the standard for assessing the strength of the applicant's claim remains a little uncertain. In the case of contingent creditors, in *Satara Co-operative Group Ltd v Fus Ltd (in liq)*, Associate Judge Gendall applied a test of "a real prospect of becoming a creditor of the company".[50] An application to restore a company to the register is not the occasion for a thorough examination of the merits of the applicant's claim. The process is a relatively summary one. The cases show that the merits of claims are rarely subject to in-depth scrutiny. In some cases the courts check that claims will not be statute-barred.[51] That aside, as long as the applicant appears to have a genuine case (as opposed to one that is frivolous, vexatious or without merit), which it is pursuing in good faith, the courts have not required an applicant to prove more. *Downsview Nominees Ltd v Registrar of Companies* may be the highwater case.[52] In the context of the long-lasting "Russell Template" tax litigation, the Commissioner of Inland Revenue opposed various companies associated with Mr Russell's tax avoidance schemes being restored on the ground that the intended proceedings

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49 Above [62]-[86].

50 *Satara Co-operative Group Ltd v Fus Ltd (in liq)* above, n 27, at [23]-[24]. He also applied an alternative test, which he found was satisfied.

51 For example, *John Hammonds & Co Ltd v Registrar of Companies*, above n 43.

52 *Downsview Nominees Ltd v Registrar of Companies* (2006) 22 NZTC 19,971, (2006) 3 NZCCLR 80.

would be futile, given that in the light of earlier "Russell Template" decisions there was no prospect of recovery for the taxpayer companies intended to be restored. Ellen France J noted the possibility that there might be refunds, and, given that possibility, the litigation could not be considered futile.[53] In *Re Saxpack Foods Ltd*, Hammond J accepted the genuineness of a patent proceeding without examining its merits, despite the opposition of the defendant in the substantive proceeding.[54] In *Thornton Estates Ltd v Registrar of Companies*, there was no examination of a proposed claim for professional negligence against a company of professional engineers.[55] The explanation for this low threshold is the law's interest in allowing access to the courts and the recognition that the court or tribunal to hear the substantive proceeding will be in a far better position to judge the merits of the case.

[105] Willemstad says that even today the council's liability to the owners remains entirely conjectural. The council has not made out a real prospect of succeeding in a claim for contribution against Salamanca. It criticises the council's evidence for not establishing –

(a) that the St Paul's owners have a strong case against the council;

(b) that the council has a real prospect of joining Salamanca in the tribunal proceeding; and

(c) that the council has a strong claim against Salamanca in that proceeding.

[106] In requiring the council to prove a strong case, Willemstad is submitting for a higher standard than the courts have applied so far. I do not need to apply that stiffer test. Willemstad's submissions took the council to task for not spelling out exactly why it was liable to the St Paul's owners (given that it was opposing their claim), for not explaining what defences it was running and for not setting out the prospects of success. On that, the circumstances of the case are sufficient to show that the council has a reasonable basis for looking to Salamanca for contribution. The

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53 At [45].
54 *Re Saxpack Foods Ltd* above, n 47.
55 *Thornton Estates Ltd v Registrar of Companies* (2006) 3 NZCCLR 590.

council has not yet been found liable to the St Paul's owners. As is common in such cases, the council is taking a two-faced position: while it is denying liability to the St Paul's owners, it also wants to make a contribution claim against Salamanca, in case it is found liable. In that position, it may show that it is at risk of being found liable, but it is not required to confess liability.

[107] As to the merits of any claim by the St Paul's owners against the council, the assessor's report (a full report under s 42 of the Weathertight Homes Resolution Services Act) identifies the defects in the complex, and identifies as parties to the claim Salamanca as the developer and the council as the territorial authority (as well as others). The report writer found that the claim met the eligibility criteria.[56] As the assessor's report identifies defects in the St Paul's apartments, apparently in breach of the building code, it is not fanciful to suggest that there is a reasonable risk of the council being found liable to the St Paul's owners for damage caused by water penetration arising from the design or construction of the complex, which the council failed to address in granting building consents, inspecting in the course of construction or issuing code compliance certificates.

[108] Similarly, it is also not fanciful to say that if there are defects in the complex giving rise to water penetration damage, there is a reasonable risk that Salamanca as the developer will also be found liable to the St Paul's owners for the same damage as that attributable to the council. As between Salamanca and the council, Salamanca as developer has primary liability and cannot look to the council for indemnity.[57] Given the equally reasonable risk that both the council and Salamanca will be found liable to the St Paul's owners, on an apportionment of their respective liabilities under s 17 of the Law Reform Act 1936, Salamanca is likely to bear the brunt.[58] Any contribution claim by the council against Salamanca in the current tribunal proceeding will not be statute-barred for the reasons given above.[59]

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56 See Weathertight Homes Resolution Services Act, s 41(1)(a) and s 42(1)(a). For a multi-unit complex claim the criteria are set out in s 16.

57 *Borough Council*, above n 4, at 241.

58 At 241-242.

59 Paragraphs [36]-[41] above.

[109] The council's ability to claim contribution from Salamanca turns on it being able to have Salamanca joined in the tribunal proceeding. Willemstad submitted that it was a foregone conclusion that any joinder application under s 111 of the Weathertight Homes Resolution Services Act would fail, so that I should now find that the council did not have an arguable case against Salamanca. It referred to the tribunal's procedural order of 25 November 2014. The tribunal had made it clear that there would be no adjournment. Willemstad said that if Salamanca were restored, it would have separate representation from Tullow. Salamanca could certainly not prepare in time for an eight week hearing at such short notice.

[110] Any joinder decision is pre-eminently one for the tribunal. It is master of its procedure. It is better placed than I to say how its proceedings should be managed. There are of course strong reasons why the tribunal would look askance at a late application to join Salamanca: a fixture for eight weeks had already been allocated for March 2015; the St Paul's owners were entitled to have their case heard without further delay; the council has already had ample time in which to apply for Salamanca's joinder; and joining Salamanca may create delay and disruption. In any joinder application, the tribunal would hear from all parties to the proceeding, including Salamanca.

[111] While the council's joinder application will be difficult, in this restoration proceeding I cannot say that it is doomed to fail. There may be ways in which the tribunal could maintain the present fixture, but still allow Salamanca to be introduced into the proceeding. Tullow, the ultimate holding company, has been actively involved in the tribunal proceeding, has fully prepared defences and briefed witnesses for the hearing. As Tullow is alleged to be a developer, its preparation will have been directed at defences available to a developer. It will have close knowledge of what its subsidiary, Salamanca, did in the design and development of St Paul's. Tullow's defence team may be able to handle Salamanca's defence as well with little difficulty. Willemstad's assertion that Salamanca will instruct a separate defence team may be seen as stage-managing. Alternatively, the tribunal might hear all the other parties, but leave the council's contribution claim against Salamanca for hearing later, with the council having to bear the costs from any double handling. At this stage I cannot discard those options as impossible. The

council should have the opportunity of applying for joinder. It will be for the tribunal to decide the application after hearing all parties to its proceeding. Nothing I have said here is intended to say how the tribunal should decide the application. For the restoration application, it is sufficient for me to hold that, notwithstanding the difficulties in the late joinder application, the council has an arguable contribution claim against Salamanca.

[112] On the facts, as well as on the law, the council is a creditor of Salamanca and was at the time of removal. It also has and had an undischarged claim against Salamanca. That gives the council standing under s 329(2)(a)(iii) and (iv). It establishes the ground under s 329(1)(a)(iv), but there is still the residual discretion.

The council's delay in applying for restoration

[113] Delay may be a relevant ground for refusing restoration. In *Re Saxpack Foods Ltd*, Hammond J said:[60]

> The length of time which has elapsed since the striking off is a relevant factor. The statute itself allows up to 20 years. However, the usual judicial principle is that a party must act timeously upon becoming possessed of the necessary knowledge that an application for restoration could or should be made. This is the normal equity principle.

[114] The current Companies Act does not have any time limit for restoration applications. The removal of a time limit gives greater reason for the court to take delay into account on a restoration application. The ability to do so is saved under s 8 of the Limitation Act 2010.[61] In the absence of a statutory time limit or its application by analogy, the equitable principle Hammond J was referring to is found in the doctrines of laches and acquiescence. I do not understand the respondents to be relying on acquiescence. Delay without prejudice is insufficient for a plea of laches to succeed.[62]

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60 *Re Saxpack Foods Ltd* above n 47, at 610.

61 "Nothing in this Act limits or affects any equitable or other jurisdiction to refuse relief, whether on the ground of acquiescence or delay, or on any other ground."

62 *Eastern Services Ltd v No 68 Ltd* [2006] NZSC 42, [2006] 3 NZLR 335.

[115] The respondents focussed mainly on the council's delay with respect to the tribunal proceeding. The tribunal will consider that in the council's joinder application. I have not considered that the delay is so great that it should knock out the council's ability to apply for joinder ahead of any decision of the tribunal.

[116] The respondents also say that, aside from the tribunal proceeding, delay is also relevant to other aspects of the restoration decision. In particular, because of the lapse of time Salamanca's directors would have difficulty dealing with any investigation by an independent liquidator, especially the transfers from Salamanca to Tullow which the council believes merit further inquiry. The respondents' argument comes under the general head of prejudice arising from a belated revival of the company.

[117] The alleged delay needs to be put into context: the time of removal from the register and the period of delay. As a developer Salamanca would have known that by virtue of s 393 of the Building Act it could be subject to claims arising out of its construction work for up to ten years after it completed construction. After ten years, it could dispose of its records and wind up its affairs in the confidence that it could no longer be sued. If its shareholder chose to put it into liquidation during those ten years, it was taking a risk, because the company could still be exposed to claims. It can hardly complain of prejudice if it gambled on no-one making a claim, but the gamble did not pay off. On that basis it could have safely had the company removed from the register only at the start of 2010, when the ten years had lapsed.

[118] Any application by the council to restore Salamanca to the register before 2012 would have met the objection that the application was premature, because the council had not been sued. It was unknown whether it would face a claim. By the end of 2013, if not earlier, the council ought to have realised that if it wanted to claim contribution from Salamanca, it ought to have made an application under s 329. Willemstad could not have complained of delay then.

[119] If the council had applied in the 2012-2013 period, the directors would no doubt have said that they could not be expected to remember transactions that took place before liquidation in 2005. But that would not have prevented the court

ordering restoration – there would be no relevant delay. It is only the last two years or so that can count as relevant delay by the council in applying for restoration. It is not clear that the directors or shareholders have suffered any additional prejudice by reason of that delay, beyond any that had already developed before. They have not shown any persuasive laches argument based on that delay.

[120] It also needs to be remembered that the lapse in time may also be a source of difficulty for a liquidator in investigating the affairs of the company. The delay cuts both ways.

[121] Weighing all the equities, I am not satisfied that the delay of up to two years in applying for restoration is serious enough to warrant dismissing the application, even though the council has made out its ground under s 329(1)(a).

Even if Salamanca is restored, the council will recover nothing

[122] Willemstad relied on dicta of Hammond J in *John Hammonds & Co Ltd v Registrar of Companies* that suggest that the applicant has the onus to establish that any restoration will not be nugatory.[63] Hammond J relied on an Australian decision, *Civil & Civic Pty Ltd v R W Bass Pty Ltd*.[64] With great respect, Hammond J read too much into that decision. There Olney J ordered restoration so as to allow a proceeding which could result in the recovery of damages which "would not be nugatory". That was in the context of a statute that gave the court a wide discretion.[65] The statement in the judgment is directed at the exercise of a discretion, not at setting up thresholds to be crossed before an order can be made. *John Hammonds* was decided under s 336(7) of the Companies Act 1955. Under s 329(1)(a) of the 1993 Act, where the applicant has made out its ground, it does not have to pass an additional test of showing that restoration will not be nugatory. Instead Willemstad, as the party opposing, has to establish that restoration will serve no useful purpose.

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63 *John Hammonds & Co Ltd v Registrar of Companies* above, n 42, at [47].
64 *Civil & Civic Pty Ltd v R W Bass Pty Ltd* (1996) 14 ACLC 1015 (FCA).
65 Corporations Act 1989 (Cth) s 571, cited at 1016 in *Civil & Civic Pty Ltd v R W Bass Pty Ltd*.

[123] Willemstad criticised the council for not having articulated clearly enough what could be gained from restoration, even if the council succeeded in obtaining contribution against Salamanca in the tribunal. The council's suggestion of possible pooling orders under ss 271-272 of the Companies Act was rejected as speculative. Salamanca had no assets, so the council would gain no more than access to a bare cupboard. Nothing could be gained by further investigations by a liquidator appointed to act in the interests of creditors.

[124] Willemstad also submitted that the council's case depended upon a number of remote possibilities all turning out. It would have it that that was so speculative as not to deserve serious consideration.

[125] Willemstad has to do more, if it wishes to establish that any restoration would be nugatory. Much of its case on this point is no more than assertion. In that, its case is little different from submissions made by insolvent companies subject to liquidation applications or debtors facing bankruptcy that the orders sought by creditors will serve no useful purpose. Applications under s 290 of the Companies Act to set aside statutory demands based on assertions of solvency are in much the same boat.[66] For Willemstad to make out a case that restoration to the register and any consequential liquidation would be a barren exercise, it needs to provide comprehensive information to satisfy any concerns. Its evidence is far short of that. The council has shown that an accountant it instructed has identified transactions that may be worth further investigation. At this stage it is premature to hold that any further investigations would be pointless.

[126] In summary, the council has established on the facts that it has an arguable case against Salamanca for contribution. That gives it standing under s 329(2)(a)(iii) and (iv). It has made out the ground under s 329(1)(a)(iv). Willemstad's arguments on discretionary factors, delay and futility, do not have enough weight to persuade me not to make a restoration order. In assessing those discretionary factors, I have not had to consider any countervailing arguments that, notwithstanding the strength of Willemstad's factors, restoration is still required.

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[66] See for example *AMC Construction Ltd v Frews Contracting Ltd* [2008] NZCA 389, (2008) 19 PRNZ 13.

Just and equitable ground under s 329(1)(b)

[127] At [29]-[31] above, I have already set out my consideration of the just and equitable ground. In short, it is necessary to consider it only if the council does not succeed under s 329(1)(a). I have held that the council has made out its case under (a). If it had not, because the absence of an accrued cause of action meant that in law the council did not have an undischarged claim and was not a creditor, I would have used the just and equitable ground to allow restoration.

Leave under s 329(2)(c)

[128] A finding that in law the council did not have an undischarged claim and was not a creditor would mean that it did not have standing under s 329(2)(a)(ii) and (iii). As a fallback, the council asked for leave under s 329(2)(c). If I had found it necessary to make a restoration order on the just and equitable ground as set out in the paragraph above, I would have granted leave to apply.

Wind the clock back under s 329(4)

[129] Willemstad resists a "wind the clock back" order under s 329(4) if restoration is ordered. It refers to Allan J's judgment in *Skeates v Bruce*, where such an order was refused.[67] In that case a shareholder applied to restore a company so as to bring a proceeding in its name. The limitation period expired about six weeks after the company was removed from the register. There was no evidence that the company had made plans to bring proceedings before it was removed. Allan J held that the effect of an order under s 329(4) would be to put the company in a better position post-removal than it would have been if it had not been removed.[68]

[130] As Allan J recognised,[69] cases where the company to be restored is to be sued are different. In those cases, orders under s 329(4) are commonly made. *Skeates v Bruce* does not give reason not to make an order under s 329(4). For reasons already

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67 *Skeates v Bruce* [2008] NZCCLR 27.
68 At [52].
69 At [51].

given, the order will not allow the council to get around the 10 year longstop under s 393 of the Building Act.

[131] At [60]-[61] above I noted the effect of such an order. Without an order Salamanca will be liable only for damage discovered in the six years before 20 June 2008, but with an order it may also be liable for damage discovered in the six years before removal on 9 September 2006. In both cases, by reason of s 393 of the Building Act, it will be liable only in respect of its acts and omissions in the 10 years before 20 June 2008. There is insufficient evidence in this proceeding to know whether the order under s 329(4) will make much difference in the tribunal proceeding. But that does not mean that I should not put the parties in the positions they were in at the date of removal.

Application to reverse the liquidator's final report

[132] In *Registrar of Companies v Body Corporate 307730* the Court of Appeal held that where a company is removed from the register after having been put in liquidation, on restoration the standard procedure is to make an order under s 284(1) of the Companies Act reversing the liquidator's final report under s 257.[70] The effect of such an order is that on restoration the company will again be in liquidation with the same liquidator. The council seeks such an order, as well as leave to apply.

[133] I had floated the idea that instead of putting the company back into liquidation, Salamanca could be restored to shareholder control, so as to allow its shareholder and directors to control defence of the claim in the tribunal. Willemstad took that up by proposing that the liquidation be terminated under s 250 of the Companies Act. I accept however that in light of the Court of Appeal's decision, that would not be appropriate.

[134] As a creditor of Salamanca, the council has standing under s 284, but needs leave. In this case, that follows as a matter of course, given the restoration order. There will also be an order reversing Mr Sheppard's final report of 3 August 2006. He is now back in office as Salamanca's liquidator.

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[70] *Registrar of Companies v Body Corporate 307730* [2013] NZCA 659, [2014] 2 NZLR 623.

Appointment of new liquidators

[135] The council objects to Mr Sheppard as liquidator. It proposes new liquidators. It says that Mr Sheppard is disqualified under s 280 of the Companies Act because he is a shareholder of a related company, Tullow. While the council has not sought an order for Mr Sheppard's removal from office, it is implicit in its application to appoint new liquidators. Its proposed liquidators are independent, experienced insolvency practitioners, who have given consents under s 282 and certificates as to non-disqualification under s 280(4).

[136] There is a question whether the council has applied under the correct provision in the Companies Act. It has applied under s 284(1), under which the court has general powers to supervise a liquidation. That includes the power to declare whether the liquidator was validly appointed – s 284(1)(g). The powers in s 284 are in addition to other powers the court may exercise relating to liquidators.[71] As a creditor, the council needs leave to apply under s 284. Section 286 gives the court specific powers to make orders where liquidators fail to comply with their duties. It also provides powers to remove liquidators, including when they are disqualified under s 280.[72] A creditor does not need leave to apply under s 286.[73] In *McMahon v Ah Sam* I accepted that s 284(1)(g) and s 286(4) may overlap.[74] Being disqualified from acting as liquidator may go to both provisions. In case I am wrong on that, and disqualification from office is to be dealt with only under s 286 (with any vacancies arising to be addressed under s 283), I deal with the matter under both s 284 and s 286. To the extent that the matter comes under s 284, I grant leave to the council to apply.

[137] As to disqualification in this case, under s 280(1)(c), unless the court orders otherwise, a person who was a shareholder of a related company in the two years before liquidation started is disqualified from acting as liquidator. Tullow is a related company of Salamanca under s 2(3)(a) of the Companies Act because it is its holding company under the definition in s 5(1)(b) and (2). The Companies Office

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71 Companies Act, s 284(2).
72 Companies Act, s 286(4).
73 Section 286(1)(d).
74 *McMahon v Ah Sam* [2014] NZHC 659 at [18].

records for Tullow show that Mr Sheppard holds 1,500,000 shares jointly with Mr Dromgool and a further 1,500,000 shares jointly with Mr and Mrs Fraser. On the council's case, he is disqualified as a liquidator.

[138] It does not appear to be a case of Mr Sheppard becoming disqualified after Salamanca went into liquidation. It is not a case of the office becoming vacant because of a change of circumstance – the position under s 283(1).[75] The council says that he was disqualified from the outset.

[139] A procedural difficulty is that while the council seeks his removal, it has not named him as a respondent. Mr Sheppard has sworn an affidavit about the liquidation and the removal of Salamanca from the register, but he has not dealt with the disqualification question. I am not able to make any findings or orders adverse to Mr Sheppard without giving him the opportunity to be heard. But that does not mean that I cannot deal with the situation.

[140] There are disadvantages with the council's proposal to install new liquidators. It is not uncommon in leaky building litigation for defendants to go into insolvent liquidation before the case goes to hearing. Orders are often made under s 248 allowing the proceeding to continue. In those cases, invariably the liquidator does not take any active part in the litigation, aside from assisting with inquiries as to relevant insurance cover for claims under s 9 of the Law Reform Act 1936. That limited work may be understandable because liquidators will not have the funds to meet the costs of defending a claim. They are content to abide the court's decision. The problem here is that liquidators installed at the council's request may follow the same course. They will have no funds. That would suit the council fine in the tribunal proceeding. It would have a penalty shoot-out after choosing the other side's goalkeeper. On the other hand, Salamanca's shareholder, Willemstad, and its ultimate holding company, Tullow, would be impotent, even though they would have every interest in opposing the council's contribution claim.

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[75] Some of the grounds for disqualification need not be in place at the start of liquidation, but may arise later. See for example s 280(1)(d) – bankruptcy, (e) – subject to compulsory treatment order under mental health legislation, (f) – incompetent under the Protection of Personal and Property Rights Act 1988, and subject to other prohibitions under various statutes.

[141] On the other hand, there will be a fairer contest in the tribunal if Salamanca has a liquidator whose interests are aligned with the shareholder. Willemstad and Tullow may choose to fund Mr Sheppard to oppose the St Paul's proceeding. There is obvious sense in Tullow and Salamanca co-ordinating their defences and sharing evidence. That is more likely to happen with Mr Sheppard as liquidator than with liquidators chosen by the council.

[142] Accordingly, it makes sense to leave Mr Sheppard as liquidator. Notwithstanding the apparent ground for his disqualification, I allow him to continue as liquidator. In my minute of 5 February 2015, I indicated that this was an order otherwise under s 280(1), but it is better considered as an order under s 286(4)(b):

> (4) A court may, in relation to a person who … is or becomes disqualified under section 280 to become or remain a liquidator,—
>
> …
>
> (b) order that the person may be appointed and act, or may continue to act, as liquidator, notwithstanding the provisions of section 280.

[143] This permission will last only so long as Salamanca is not found liable in a court or tribunal for a debt or liability which it cannot discharge. At that point, a liquidator will need to act in the interests of creditors and Mr Sheppard would no longer be appropriate.

[144] Although Mr Sheppard is reinstated as liquidator, he should not consider that he is required to act. I do not intend to compel him if he is not willing. He has the option of resigning. If he should do so, I reserve leave to the parties to come back under any available provision of the Companies Act. Because Mr Sheppard remains liquidator, the council's application to appoint other liquidators is dismissed.

Application under s 248 to take proceeding

[145] Under s 248(1)(c) of the Companies Act, proceedings must not be started or carried on against the company in liquidation, unless the liquidator agrees or the court orders otherwise. Willemstad opposes for the same reasons that it opposed restoration: delay and futility.

[146] In *Fisher v Isbey* Master Faire set out principles he derived from the cases on allowing proceedings against companies in liquidation:[76]

> (a) It is a cardinal principle that there must be equality among various creditors…;
>
> (b) It follows that the bringing of proceedings should not produce an advantage to a particular creditor over other creditors…;
>
> (c) The assets of a company should not be dissipated in wasteful litigation particularly if there is a more convenient method for determining the claim…;
>
> (d) The assets of a company The onus is on the party seeking leave to satisfy the Court that leave should be given…;
>
> (e) There is a difference of legal opinion as to the test to be applied. The first position is that the application must show that there is a serious question to be tried. The second position is that the claim should not be clearly unsustainable but the Court will not investigate the merits of the claim;
>
> (f) The Court must determine whether the procedure for determining creditors' claims provided in s 302 and [the] following [sections] of the Companies Act 1993, and the Court's power of review pursuant to s 284(1)(b) of the Companies Act 1993, is appropriate and if not whether the claims should be established in civil proceedings commenced by leave under s 248 of the Companies Act 1993. (Citations omitted)

[147] If the council were refused permission to take a contribution proceeding against Salamanca in the tribunal, its claim would be considered under Part 16 of the Companies Act. A liquidator would need to assess whether a joinder application in the tribunal would succeed. No doubt any order in favour of the St Pauls owners against the council would fix the council's own liability for a contribution claim, but the liquidator would then need to consider whether Salamanca was also liable in respect of the same damage. That would require an extensive inquiry into the building defects, when the conduct causing them occurred, when they were or could have been discovered and the amount of Salamanca's liability to the St Paul's owners. The liquidator would then need to assess how any common liability should be shared between Salamanca and the council. Most insolvency practitioners are not equipped for such an extensive inquiry: their skills and experience are in other areas. Even though they make take legal advice, there is a high risk that that any

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[76] *Fisher v Isbey* (1999) 13 PRNZ 182 at [19].

decision to accept or reject the council's claim would be challenged under s 284. On such a challenge, the court would most likely direct proper pleadings, require discovery and associated interlocutory steps and hear the case as if it were an ordinary opposed civil hearing. In such a proceeding the court would need to assess how the case would have turned out if it had been run in the tribunal: after all, because of the limitation rules, the council's contribution could be assessed only on the basis of what the tribunal would decide.

[148] There is a better alternative: allow the council to make its claim against Salamanca in the tribunal. Other people will not have to assess what the tribunal might have decided, if it had heard the matter: the tribunal will decide instead. Evidence bearing on issues common to all parties, the owners, the council and the alleged developers, will be heard at the same time and there will be consistent findings on fact and law that will bind all parties. The matter may also be heard more promptly, given the very advanced stage of the tribunal proceeding.

[149] In multi-party leaky building cases, I have generally found it more convenient for cases against companies in liquidation to be decided by an ordinary proceeding than under Part 16 of the Companies Act. This is another such case.

[150] On liquidation an unsecured creditor's rights against a company are transmuted into a right to share in any distribution of company assets under Part 16. The council cannot be put in a better position by suing while the company is in liquidation. Accordingly, the relief it may seek in the tribunal will be limited to a declaration as to the extent of relief it would be entitled to, if Salamanca had not gone into liquidation.

[151] In opposing the application under s 248, Willemstad was hoping for a direction that would both bar the council from suing and also forestall any claim in the liquidation. It could only achieve that result if the council did not have an arguable case against Salamanca, as under (e) in Master Faire's principles in *Fisher v Isbey*. Given my findings that the council is a creditor of Salamanca in fact and law and that it has an undischarged claim against the company, the council has an arguable case for the purpose of its application under s 248. Willemstad's delay and

futility arguments merely recycle its arguments on the restoration application, but do not give any fresh reason not to allow the proceeding under s 248.

Outcome

[152] Overall, the council has made out its case for Salamanca to be restored to the register and for the ancillary orders, aside from appointment of its preferred liquidators.

[153] I make these orders:

(a) I grant leave under r 19.5 to the Wellington City Council to apply by originating application;

(b) I restore Salamanca Investments Ltd (in liq) to the register under s 329 of the Companies Act;

(c) If leave to apply is required for the application under s 329, leave is granted;

(d) Under s 329(4) of the Companies Act I direct that that for those creditors whose claims were not statute-barred at 5 September 2006 (the date of removal from the register), the period from removal to the date of restoration shall not be counted for limitation purposes, save that the limitation period under s 393 of the Building Act 2004 will continue to apply;

(e) I grant leave to the council to apply under s 284(1) of the Companies Act to set aside the liquidator's final report and to appoint fresh liquidators;

(f) I set aside the liquidator's final report of 3 August 2006;

(g) Under s 286(4)(b), I allow Mr Bruce Sheppard to act as liquidator of Salamanca Investments Ltd (in liq), notwithstanding that he is a

shareholder of a related company. But this permission lasts only so long as Salamanca Investments Ltd (in liq) is not found liable in a court or tribunal for a debt or liability which it cannot discharge. I reserve leave to Mr Sheppard to apply for further directions under s 284 of the Companies Act, including as to this order (for example, if he seeks clarification);

(h) I dismiss the application to appoint John Larner and David Webb as liquidators of Salamanca Investments Ltd (in liq);

(i) Under s 248(1)(c) of the Companies Act, Wellington City Council may start and carry on proceedings in the Weathertight Homes Tribunal against Salamanca Investments Ltd (in liq) for contribution under s 17(1)(c) of the Law Reform Act 1936 or at equity in respect of any liability for damage to the St Paul's Apartments at 43 Mulgrave Street, Thorndon, Wellington, but relief shall be limited to declarations as to the relief that would have been granted if the company were not in liquidation.

[154] I invite the parties to confer as to costs. If they cannot agree, memoranda may be filed. Any party filing second should file and serve their memoranda no more than five working days after the other.

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Associate Judge R M Bell

Solicitors:
Heaney & Partners, Auckland, for Applicant
Guy Caro for First Respondent
Kevin McDonald & Associates, Auckland, for Second and Third Respondents
Russell McVeagh, Auckland, for Fourth Respondent
Treasury Solicitor, Wellington, for Fifth Respondent