

WHT Case Number: TRI-2007-000067

UNDER the Weathertight Homes Resolution
Services Act 2006

IN THE MATTER of an Adjudication Claim

BETWEEN

24 Bath Street Limited

Claimants

AND

Hulena Architects Limited

First Respondent

AND

Auckland City Council

Second Respondent

AND

Andrew Wall

Third Respondent (Now Removed)

AND

Lew Gerick Hansen

Fourth Respondent

AND

John Robert Williams

Fifth Respondent

FINAL ORDER
Dated 26 May 2008

Background

[1] The claim by 24 Bath Street Limited (“24BS”) was filed on 29 November 2007. On 22 February 2008, following an application by the second respondent, Auckland City Council (“the Council”), I joined Lew Gerick Hansen as fourth respondent.

[2] On 7 April 2008 Mr Hansen filed an application for removal. This application was made on the ground that, as 24BS was not the registered owner at the time the application was made to the Weathertight Homes Resolution Service (“WHRS”), the application was an unlawful nullity. Mr Kelly, counsel for Mr Hansen, submitted that, as a result, this application could not stop time running for the purpose of limitation and that therefore the claim against Mr Hansen was time-barred. The first respondent, Hulena Architects Limited, filed an application for removal on the same grounds.

[3] Before addressing the issues for determination, it is useful to set out a chronology of the key dates in relation to this claim:

2 May 1997	Code of compliance issued by Council
1 June 2005	Sale and purchase agreement, vendors to Nigel Loy
21 June 2005	24BS incorporated
1 July 2005	Deed of trust executed
12 July 2005	Property transferred to Nigel Loy
6 May 2006	24BS applies for WHRS assessor’s report
10 April 2007	Transfer of property to 24BS

Jurisdiction

[4] The applications for removal raised issues which needed to be determined before the claim proceeded to a substantive hearing. I therefore scheduled a hearing on 14 May 2008 and in Procedural

Order No 7 directed the parties to file written submissions on the interim issues for determination.

[5] Counsel directed their submissions on jurisdiction to the powers of the Tribunal to strike out the claim and the threshold for such a determination. Given the decision that follows, it has not been necessary for me to determine whether the Tribunal has jurisdiction to review eligibility or to strike out this claim.

THE ISSUES FOR DETERMINATION

[6] The issues that I have addressed are:

- a) the effect of the trust deed executed on 1 July 2005
- b) whether the property was owned by 24BS at the time of application to WHRS
- c) the effect of the transfer of the property from Nigel Loy to 24BS on 10 April 2007

The effect of the trust deed

[7] Mr McCartney, counsel for the fifth respondent, argued that the trust is a nullity because the trust deed states that *at the request of the beneficiary* the trustee entered into the agreement dated 1 June 2005 to purchase the dwelling that is the subject of this claim. Mr McCartney submits that, as 24BS was not incorporated until 21 June 2005 it cannot have made the request which is the basis of the trust. Therefore he argues that the trust is a nullity and the claimant has no basis for claiming to be the beneficial owner.

[8] My finding on the effect of the transfer of the property from Nigel Loy to 24BS makes it unnecessary to determine the status of the trust. However the fact that the deed was executed in

contemplation of the incorporation of the company is not necessarily fatal to the claimant's action in this case.

The beneficiary as owner

[9] The question of ownership requires consideration of whether the definition of owner in s 8 of the Weathertight Homes Resolution Services Act 2006 ("the Act") includes a beneficial owner.

[10] The claimant submits that the meaning of owner includes a beneficial owner and that 24BS, as the sole beneficiary of the trust, is able to advance the claim before this Tribunal. Mr Morris, counsel for the claimant, argues that it is wrong to restrict the definition of an owner to a registered proprietor. He submits that the definition of owner in section 8 of the Weathertight Homes Resolutions Services Act 2006 ("the Act") is capable of wide interpretation because the definition does not restrict ownership to a registered proprietor and specifically includes a company shareholder.

[11] Counsel for the respondents made thorough submissions on the issue of ownership and the ability of a beneficiary to sue. I accept Mr Kelly's submission that the extension of the definition of owner in s 8 of the Act is intended to include one particular form of ownership, shareholding, which might not otherwise be in doubt. The definition indicates an intention to restrict, not expand, the meaning of ownership for the purposes of the Act and is not intended to imply a broad, open-ended interpretation of ownership. I therefore find that a beneficial owner is not an owner for the purposes of the Act.

The right of a beneficiary to sue

[12] The cases of *Nimmo v Westpac Banking* [1993] 3 NZLR 218 and *Farr & Farr v Shrimski & Ors* CIV 2004-404-3705, HC Auckland, Faire AJ, 18 February 2005 are authority for trustees, not

beneficiaries, being the proper plaintiffs in claims involving trusts. *Nimmo*, as a case about a bare trust, is directly relevant to the case of 24BS.

[13] I therefore find that, even if I am wrong about whether a beneficiary is an owner for the purpose of the Act, I am bound to follow the decisions referred to above and find that a beneficiary has no right to act as claimant.

The effect of the transfer of the property on 10 April 2007

[14] The dwellinghouse that is the subject of this claim changed ownership in accordance with the sale and purchase agreement between Nigel Loy and 24BS on 10 April 2008. Mr Morris argued that this was not ‘an arm’s length transaction’ such as that intended by s 55(2) of the Act. I do not accept this argument. The sale and purchase formed the basis of the trust deed and must have had some import. It is not acceptable for the claimant to argue that, for some purposes such as the formation of the trust, the sale and purchase agreement is a genuine transaction but for others it is not to be taken at face value.

[15] Pursuant to Section 55 of the Act provides that:

- (1) A change in ownership of a dwellinghouse on or after the transition date terminates any claim made in respect of that dwellinghouse alone by its former owner.
- (2) For the purposes of this section, a change in the ownership of a dwellinghouse arising out of an agreement for its sale and purchase occurs on the day on which the sale and purchase is settled.

[16] Counsel did not address this issue in their submissions and at the hearing there appeared to be some confusion about the transition

date. Section 2 of the Weathertight Homes Resolution Services Act 2006 Commencement Order states that:

... The Weathertight Homes Resolution Services Act 2006 (except for sections 1 and 2 and subpart 7 of Part 2) comes into force on 1 April 2007.

[17] The claim is not saved by s 55(3) which excludes transfers by operation of law, a change in the name of a trustee or trustees or a change in company shareholding.

[18] The effect of the transfer on 10 April 2007 is therefore that the claim must be terminated and accordingly I make the following order:

Order

[19] Claim No: 2007-100-67 is terminated in accordance with s 55(1) of the Weathertight Homes Resolution Services Act 2006.

Dated this 26th day of May 2008

S. Pezaro
Tribunal Member