IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2020-100-001

BETWEEN	**ROSEMARY ALICE ALCHIN and SIMON FRANCIS SCOTT** Claimants
AND	**HAMILTON CITY COUNCIL** First Respondent

PROCEDURAL ORDER 9
(Declining recall application)
Dated 9 March 2022

Application

[1] The Tribunal released my determination of this claim in favour of the claimants on 4 February 2022. On 17 February 2022, counsel for the parties filed a joint memorandum seeking an extension to the timetable for submissions regarding consequential losses.

[2] On Friday 18 February 2022, I granted their request for an extension.

[3] On 22 February 2022, counsel for the claimants filed a memorandum, dated 19 February 2022, requesting that the determination dated 4 February 2022 be recalled and amended to adjust the quantum of the remedial costs.

Background

[4] At the beginning of day 1 of the hearing on 6 May 2021, I queried what the claimants were claiming for remedial costs.[1] That early discussion mentioned figures of $402,426, Woodview Construction's cost summary of $358,000 and Mr Bodger's $411,816, all inclusive of GST.

[5] In their closing submissions of 29 November 2021, the claimants sought total remedial costs of $480,000.

[6] My determination rejected that quantum of remedial costs in favour of Mr Gilling's quantity surveyors estimate of $468,471.79 (inclusive of GST) outlined in his addendum report of 11 June 2021. Mr Robertson for the respondent, did not agree with the claimants' quantum for remedial costs.[2]

[1] NoE, pp 8–9.
[2] Final determination (4 February 2022) at [106]–[112].

[7] Mr McKenna, at the conclusion of the hearing on Thursday 21 October 2021, expressed concern at the increasing building prices. There was no mention then or in the claimants closing submissions that they were considering updating remedial costings and filing further evidence on quantum. Mr McKenna did seek in the claimants' submissions of 11 November 2021, that I defer quantification of remedial costs until remedial work is completed and actual costings are known. I rejected this at [105] of my determination.

[8] I indicated at the end of the hearing that I would issue the determination as soon as possible. I subsequently indicated that "it is unlikely the Tribunal's determination will be issued before the end of March 2022, at the earliest". This was not equivocal. The claimants' response to the respondent's closing submissions was filed on 3 December 2021. The claimants' concerns over increasing building costs and that they were considering introducing newer costings, could have been raised at that stage but were not.

[9] The claimants state in their application that by the time my decision was issued, the cost estimate upon which the determination was based was some eight months old.

[10] The claimants submitted that, due to rising building costs, on the 2nd February 2022 their counsel approached Robert Hughes, a quantity surveyor engaged by Mr Gilling for his estimate of remedial costs, seeking updated costings in light of the reported increase in building costs.

[11] The claimants received an updated costing from Mr Hughes of $501,986 (GST inclusive).[3] Subsequently, Mr Hughes produced an estimate of increased costs to completion, expected to be late 2022, of

[3] Mr Hughes, remedial works 29 Cavendish Drive, Rototuna (7 February 2022).

$598,619.04 with the proviso that he "would expect the final amount to be in the range of $580,000 and $620,000 (GST inclusive)."[4]

The law, discussion and determination

[12] The claimants apply for my final determination to be recalled and reissued to reflect the higher remedial costs estimate received by the claimants' post-determination.

[13] The claimants refer to the impact of the COVID-19 pandemic and the unprecedented rise in building costs, as very special reasons justifying recall of the determination. The application asks for the determination to be corrected to reflect the actual costs of repairs.

[14] The grounds of recall of a judgment that has not been perfected are set out in *Horowhenua County v Nash (No.2)*:[5]

(a) Firstly, where since the hearing there has been an amendment to a relevant statute or regulation or a new judicial decision of relevance and high authority;

(b) Secondly, where counsel have failed to direct the court's attention to a legislative provision or authoritative decision of plain relevance; and

(c) Thirdly, where for some other very special reason, justice requires that the judgment be recalled.

[15] The third ground is the only possible ground relevant in this application, "where for some other very special reason, justice requires that the judgment be recalled".

[4] Mr Hughes, remedial works 29 Cavendish Drive, Rototuna (15 February 2022).
[5] *Horowhenua County v Nash (No.2)* [1968] NZLR 632 (SC).

[16] In *Faloon v Commissioner of Inland Revenue*, the High Court elaborated on this third ground, saying:[6]

> While the third category is not defined with particularity in the judgments, it is quite clear that the discretion to recall must be exercised with circumspection, and it must not in any way be seen as a substitute for appeal. In particular there are some things that it can be said the power to recall does not extend to. It does not extend to a challenge of any substantive findings of fact and law in the judgment. It does not extend to a party recasting arguments previously given, and representing them in a new form. It does not extend to putting forward further arguments, that could have been raised at the earlier hearing but were not.

[17] The claimants' application requesting recall has the characteristics highlighted in the quoted paragraph of *Faloon v Commissioner of Inland Revenue*. It seeks to update substantive findings of fact in the determination, and it puts forward further evidence that could have been raised before the determination was issued but was not.

[18] As mentioned, the claimants highlight in the application that the final determination was released before the updated estimate of building costs was obtained and the release was earlier than expected. Increased building costs could have been raised earlier by the claimants but were not.

[19] In any event, I am not persuaded that recall in the sense contemplated by *Horowhenua* is applicable in this situation.

[20] Mr McKenna identifies that s 90 of the Weathertight Homes Resolution Services Act 2006 (the Act) allows the Tribunal to make any order that a court of competent jurisdiction could make in relation to a claim. *Horowhenua* establishes that the principles of recall in that decision apply to judgments that have not been perfected by the sealing process under the relevant rules of court. It has been held by this Tribunal in past determinations that the Tribunal's determinations are not sealed, that there

---

[6] *Faloon v Commissioner of Inland Revenue* (2006) 22 NZTC 19, 832 (HC) at 13.

is no requirement in the Act that the Tribunal's determinations be sealed, and that the Tribunal's determinations are final (or perfected) when signed and issued.[7]

[21] There is no jurisdiction under *Horowhenua* to recall a perfected judgment.

[22] The claimants have also raised *R v Smith*, which provides that the courts have an inherent power to revisit their decisions in exceptional circumstances when required by the interests of justice.[8] This is an implied power necessary for the court to maintain its character as a court of justice. Recourse to the power to reopen was not to undermine the general principles of finality. It was available only where a substantial miscarriage of justice would result if a fundamental error in procedure were not corrected and where there was no alternative effective remedy reasonably available. The present application fails to meet this very high threshold.

Order

[23] For the reasons set down above, the application for recall is declined.

DATED this 9th day of March 2022

_____

K D Kilgour
Tribunal Member

[7] See *Gravelle v Auckland Council* WHT Auckland TRI-2014-100-34 Procedural Order 15 and *Gazza Trust v Auckland City Council* WHT Auckland TRI-2009-100-74 Procedural Order 6.
[8] *R v Smith* [2003] 3 NZLR 617 (CA) at [36].