

IN THE WEATHERTIGHT HOMES TRIBUNAL

**TRI-2010-101-000009
[2010] NZWHT WELLINGTON 14**

BETWEEN GORDON AND KATHYRYN BEATTIE
 Claimants

AND PORIRUA CITY COUNCIL
 First Respondent

AND HOMECREATORS LTD
 Second Respondent

AND STEVE MACKFALL TRADING AS
 TEXTURITE COATINGS LTD
 Third Respondent

AND TOM REID TRADING AS ROOFING
 DIRECT LTD
 (Removed)
 Fourth Respondent

AND NU LOOK WINDOWS AND DOORS
 (Removed)
 Fifth Respondent

AND BARBARA DONALDSON
 (Dismissed)
 Sixth Respondent

AND INSPECT IT 1ST LTD
 Seventh Respondent

Hearing: 7 May 2010

Appearances: Claimants – In person
 First Respondent – No appearance
 Second Respondent – No appearance
 Third Respondent – No appearance
 Fourth Respondent – No appearance
 Fifth Respondent – No appearance
 Sixth Respondent – Mr Gallaway
 Seventh Respondent – Mr Bennett in person

Decision: 14 May 2010

**INTERIM DETERMINATION
Adjudicator: C Ruthe**

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I SETTING THE SCENE

Procedural Matters

[1] Mr Galloway for the sixth respondent submitted the claim against his client was discrete and should be heard and determined at a separate hearing from the claims against the other respondents.

[2] Mr Galloway said his client was not seeking removal in the light of the decision of the High Court in *Fenton v Building Code Consultants Ltd* HC Auckland, CIV-2009-404-6348, 15 March 2010. Ms Donaldson did not wish to pursue a removal application as it was unlikely to succeed because of the requirement for the Tribunal to treat factual allegations in pleadings as being correct at the removal/strike out stage.

[3] The High Court in *Fenton* held that s 112 and its provision enabling the Tribunal to strike out a party if it considered it was fair or reasonable to do so was restricted to the limits imposed by the High Court Rules on strike out. The Tribunal accepts counsel's submission, without making a ruling on it, that the sixth respondent would have faced almost insurmountable hurdles in pursuit of a removal application.

[4] Section 72 of the WHRS Act provides:

72 Matters tribunal may determine in adjudicating claim

- (1) In relation to any claim in respect of which an application has been made to the tribunal to have it adjudicated, the tribunal can determine—
 - (a) any liability to the claimant of any of the parties; and
 - (b) any remedies in relation to any liability determined.

- (2) In relation to any liability determined, the tribunal can also determine —
 - (a) any liability of any respondent to any other respondent; and
 - (b) remedies in relation to any liability determined.

[5] Section 73 of the WHRS Act provides:

73 Powers of tribunal in adjudication proceedings

- (1) The tribunal may do any or all of the following things in relation to adjudication proceedings or the parties to them:
 - (a) conduct the proceedings in any manner it thinks fit, including adopting processes that enable it to perform an investigative role;

- (2) The tribunal also has the powers specified in Part 2 of Schedule 3.

[6] The Tribunal can hear this claim against the sixth respondent pursuant to these statutory provisions.

[7] The matter proceeded as a hearing of the claim against Ms Donaldson, and the decision to dismiss the claim was given orally on 7 May 2010, with reasons to follow. The reasons are set out below.

[8] It is recorded that all parties were aware that this matter was being heard. Immediately prior to this hearing the other parties had attended a procedural conference in which other applications were heard and these applications have been dealt with in a separate procedural order. The other parties elected not to participate in this hearing save for Mr Bennett, a director of the seventh respondent.

Outline of Claim against Sixth Respondent

[9] Mr and Mrs Beattie purchased 93 The Masthead, Whitby from the sixth respondent, Ms Donaldson. In Mr and Mrs Beattie's application for adjudication they alleged Ms Donaldson had provided false and misleading information to secure the sale of the property.

[10] As part of the application for adjudication was a form entitled "*Claim Summary – 19 February 2010*". The issue as articulated by the claimants was that Ms Donaldson had made a negligent misstatement which was acted on by the claimants, being one major factor and inducing to purchase the property. At [98] to [112] of the *Claim Summary* a number of allegations against Ms Donaldson were made. All these were withdrawn prior to the hearing and again at the hearing. There is therefore no need for further discussion on these allegations.

[11] The claimants had originally sought compensation for what they described as "economic loss" or "stigma" loss. This part of the claim was abandoned after the first procedural conference, the claimants electing to pursue the remedies available under the Weathertight Homes Act for losses suffered from leaking.

[12] Ms Donaldson however was deeply concerned about the allegation at [104] that she falsely represented that a stain on the carpet in the lounge was due to stains from the plant pot to misrepresent that no water was entering the house.

[13] Ms Donaldson appears to have failed to understand that this part of the claim had been abandoned, though it was clearly reiterated in Mr Beattie's submissions at paras [7] to [9] filed prior to the hearing. The relevance of this point is that Ms Donaldson remained concerned that she was accused of acting fraudulently. This was not the case. Mr Beattie put it well at [22] that:

“Ms Donaldson accuses Mr Beattie of stating that she was acting fraudulently. Mr Beattie has never used this terminology to his knowledge in these proceedings. Fraudulent suggests that Ms Donaldson is dishonest and this has never been uttered.”

[14] The allegations about a carpet stain weighed on Ms Donaldson’s mind. The Tribunal fully accepts Ms Donaldson’s evidence that it simply was a stain left by a pot plant and there had been no attempt to cover up an underlying defect.

[15] Mr Beattie’s comprehensive witness statement, which was part the evidence he gave, set out the claimants’ view of the facts relating to Ms Donaldson’s role. The central assertion was that the assessor, Mr Lyttle, identified Ms Donaldson as a party.

[16] Mr Beattie had methodically gone through the Assessor’s Report highlighting where the assessor had identified that earlier attempts at repairs had been undertaken. All of them related to window sill repairs.

II FACTS IN ISSUE

[17] The two questions that need to be answered are:

- Did Ms Donaldson effect any repairs on the property?
- Did Ms Donaldson know that the house was leaking?

III Decision

Did Ms Donaldson Effect Any Repairs on the Property?

[18] Mr Lyttle properly identified that there had been remedial work, but he could not say who had done the work. Evidence given at the procedural conference immediately prior to this hearing indicated that the owners prior to Ms Donaldson had been concerned

about leaking and sought and requested the original contractors to fix the faults.

[19] Mr Lyttle spoke to his report. He confirmed that he believed that the person who had undertaken the repairs itemised in his report would have had their suspicions raised concerning weathertightness issues. The Tribunal accepts this evidence.

[20] Ms Donaldson denied undertaking any of the repairs outlined by Mr Beattie. I find Ms Donaldson did not have any work undertaken during the three years and three months that she owned the property. Ms Donaldson was an honest and truthful witness. I accept she had no idea that the house leaked.

Did Ms Donaldson Know that the House was Leaking?

[21] Having concluded Ms Donaldson did not have repairs carried out, there is no other evidence to suggest she could or should have been aware of leaks. This conclusion is reinforced in two ways. First, the evidence of Mr Beattie in which he said it was only after he engaged someone to install a heat pump that the weathertight issues became apparent to him. By that stage he and his wife had occupied the house for one year.

[22] Secondly that of Mr Bennett who had carried out the pre-purchase inspection by Inspect It 1st Limited for Mr Beattie. (He was anxious to give evidence in support of Ms Donaldson). He said he saw no sign of leaking.

[23] To summarise the Tribunal concludes Ms Donaldson did not undertake repairs and was unaware of any leaks. The claim against her is dismissed.

III COSTS

[24] Ms Donaldson sought costs pursuant to section 91(1) of the Weathertight Homes Resolution Services Act 2006. It was submitted on her behalf that the claims made as to her fraudulent and negligent conduct were without any evidential basis and therefore without substantial merit and made in bad faith.

[25] Mr Galloway submitted the claimants had failed to withdraw the claims with regard to fraud. As noted above this was not correct. Mr Beattie stated at the first procedural conference he was not pursuing claims described as “economic loss” and therefore any allegations of fraudulent and negligent misrepresentation fell by the wayside.

[26] The Tribunal heard Mr Beattie give evidence. It was clear he was not pursuing the claim against Ms Donaldson in any inappropriate way. He stressed he was relying on comments and contents of the Assessor’s Report that a previous owner undertaking the repairs should have been alerted to weathertight issues.

[27] The Tribunal accepts Mr Beattie acted throughout in good faith. It was not within his knowledge, nor was it in the knowledge of the assessor as to who carried out the repairs – evidence on this issue still needs to be heard. The application for costs is dismissed.

DATED this 14th day of May 2010

C Ruthe
Tribunal Member