

Claim No: 981

Under the Weathertight Homes Resolution Services Act 2002

In the matter of An adjudication claim

Between **Dawn Bridson**

Claimant

And **Ken Barry Griffin**

First respondent

And **Greg Moffat**

Second respondent

And **Tony Fisken trading as Fisken Design**

Third respondent

And **Bay Building Certifiers Limited (in Liquidation)**

Fourth respondent

And **Tauranga District Council (Struck Out)**

Fifth respondent

**Determination
Monday 8 August 2005**

1. Hearing

1.1 I commenced the hearing of this Weathertight Homes Resolution Service (**WHRS**) claim at 10.00am on 8 August 2005 and at the hearing were:

1.1.1 Mr Venter for the claimant with the claimant, Ms Bridson;

1.1.2 Mr Griffin in person;

1.1.3 Mr Crombie on behalf of the second respondent with Mr Moffat in person;

- 1.1.4 Mr Fiskén, the third respondent; and
 - 1.1.5 Ms Divich as counsel for the fifth respondent.
- 1.2 The fourth respondent had been placed in liquidation and the earlier Procedural Orders refer to that matter.
 - 1.3 The hearing commenced with my being advised that a settlement had been reached between the claimant on the one hand and the third and fifth respondents on the other hand and the terms of that settlement were explained to me. They provide for respective payments by those two respondents. The question then arose as to whether those respondents should be struck out as parties. There was no opposition to the striking out of the fifth respondent as a party and I struck it out as a respondent at that time, I being satisfied that the grounds for striking out under section 34 of the Weathertight Homes Resolution Services Act 2002 (**the Act**) had been met.
 - 1.4 As to the third respondent there was opposition to his being struck out as a party because the second respondent through counsel indicated that a cross-claim under the Law Reform Act would be made against him by the second respondent. Mr Fiskén remained as a party to the adjudication at that point and he remained at the hearing.
 - 1.5 I was then advised that there were settlement discussions between the parties and time was taken to allow those to occur outside the adjudication room. When we finally resumed at 2.00pm I was advised that a settlement had been reached and a settlement agreement had been negotiated between the remaining parties (except Mr Fiskén who was included in the earlier settlement agreement direct between him and the claimant).
 - 1.6 In the circumstances it became apparent that the third respondent should be struck out also as a respondent, the grounds under s34 of the Act

having been made out in respect of him, namely that it is fair and appropriate in all the circumstances, these including that he has reached a settlement with the claimant and that, because the other respondents have now reached a settlement with the claimant, they have no cross-claim against him and pursuant to s34 of the Act I therefore **ORDER** that he be struck out as a respondent.

2. **Request to Record Settlement in Form of Determination**

2.1 The terms of that settlement agreement between the claimant and the first and second respondents were discussed and presented to me and I was asked by all parties to record the settlement in the form of a Determination in terms of that settlement agreement. The provisions of section 42(5) of the Act read as follows:

"If a claim is settled by agreement between the parties before the adjudicator's determination is given, the adjudicator –

- (a) must terminate the adjudication proceedings; and
- (b) if requested by the parties, may record the settlement in the form of a determination on agreed terms."

2.2 In terms of that agreement I am therefore obliged to terminate the adjudication proceedings and, as I have said, I have been requested by the parties to record the settlement in the form of a Determination. The requirements of section 41 of the Act as to the form of the Determination include:

- "(i) must be in writing; and
- (ii) must contain the reasons for the determination; and
- (iii) in a case where the adjudicator determines that a party to the adjudication is liable to make a payment, must include a statement setting out the consequences for the party if the party takes no steps in relation to an application to enforce the adjudicator's determination by entry as a judgment."

2.3 In terms of that section therefore, if I am to comply with the request of the parties to record the settlement in the form of a Determination then I should meet the requirements of that section.

2.4 The issue was discussed as to whether there could be a Determination under the Act given that both the first and second respondents had denied that they were liable to the claimant under the claim and that their agreement to payment in terms of the settlement agreement is in that context. I formed the view that it is in order for me to make a determination which complies with the formal requirements of s41 on the one hand, but also records the settlement in terms of section 42(5)(b) on the other.

3. **Determination**

3.1 Having read the settlement agreement dated 8 August 2005 and having heard submissions on the topic from counsel and the parties I have formed the view that I should determine this adjudication in terms of the settlement agreement which are annexed hereto and are to be read in full as part of this Determination but which provide essentially on the one hand for payment by Mr Griffin, the first respondent, to Ms Bridson, the claimant, of the sum of \$7,150.00 on or before 5 September 2005 and payment by the second respondent, Mr Moffat, to the claimant, Ms Bridson, of the sum of \$7,150.00 on or before 22 August 2005 with further provision that if either of those payments are not made within 7 days and after the appropriate notices referred to in clauses 10 and 11 of the settlement agreement have been given, there will be a liability for further liquidated damages as set out in those clauses which in each case is agreed between the parties as \$7,500.00.

3.2 I am satisfied on the basis of the information given to me of the settlement terms reached between the claimant and the third and fifth respondents and on the basis of the fact that the second respondent and the claimant have been separately and independently advised legally about these terms and further on the basis of comments made to me by Mr Griffin, the first respondent, about his understanding of the terms and conditions, that the terms of the settlement agreement are appropriate terms to determine the payments respectively that should be made by the

first and second respondents to the claimant but in the context that they have both respectively denied liability under the claim. That denial of liability is a factor to be taken into account in reaching the decision to determine this adjudication claim in terms of that settlement agreement.

4. **Result**

- 4.1 The result is that I terminate the adjudication and order in the context of the terms of the settlement agreement that the first and second respondents make payment to the claimant of the sums respectively referred to and of the terms and conditions referred to in the terms of the settlement agreement dated 8 August 2005.

5. **Statement of Consequences**

- 5.1 Under section 41(1)(b)(iii) I am required to include a statement setting out the consequences for each party if the party takes no step in relation to the application to enforce the adjudicator's Determination by entry as a judgment (refer para [2.2] above). I made it clear at the hearing and this is a statement that is included in this written form of Determination that if either Mr Griffin, the first respondent, or Mr Moffat, the second respondent, do not make payment of the sums of money that are referred to in the schedule, namely \$7,150.00 each, on or before the dates that are set out in that schedule, namely 5 September 2005 for the first respondent, Mr Griffin, and 22 August 2005 for the second respondent, Mr Moffat, those parties will respectively become liable for the liquidated damages that are prescribed in clauses 10 and 11 which in the case of Mr Griffin, the first respondent, is a further payment of \$7,500.00, and in the case of the second respondent, Mr Moffat, a like sum, \$7,500.00, and I further include the statement that the consequences are that if those payments are then still not made by the respective respondents to the claimant there can be liability as if this were a District Court judgment and enforcement of that judgment can be carried out in the usual way according to the District Court Rules.

6. **Record**

- 6.1 I orally gave the substance of this Determination at the conclusion of the hearing and am now recording the same as at that date.

DATED at Tauranga this 8th day of August 2005

David M Carden
Adjudicator