**IN THE WEATHERTIGHT HOMES TRIBUNAL**
**TRI 2008-101-000059 & 66**

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| **BETWEEN** | **BRODAV LIMITED**<br>Claimant 1 |
| **AND** | **COOK FAMILY TRUST**<br>Claimant 2 |
| **AND** | **COLIN & PAMELA WATERS**<br>First Respondents |
| **AND** | **WILLIAM MCMULLAN (REMOVED)**<br>Second Respondent |
| **AND** | **WAIMAKARIRI DISTRICT COUNCIL (REMOVED)**<br>Third Respondent |
| **AND** | **PRIME BUILDING COMPLIANCE LIMITED (REMOVED)**<br>Fourth Respondent |
| **AND** | **AVON ROOFING (1999) LIMITED (REMOVED)**<br>Fifth Respondent |
| **AND** | **TIM FIELD ARCHITECT LIMITED (STRUCK OFF)**<br>Sixth Respondent |
| **AND** | **LIONEL WHEELER**<br>Seventh Respondent |
| **AND** | **TIMOTHY FIELD**<br>Eighth Respondent |
| **AND** | **CRAIG COLLINGS**<br>(as to claim 66 only)<br>Ninth Respondent |

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**DETERMINATION**
**Dated 31 March 2009**

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## INTRODUCTION

1. Counsel and parties appearing:

   - Mr Martin Bell, Counsel for Brodav Limited and Cook Family Trust;
   - Mr Geoff Brodie, Counsel for First Respondents, Colin & Pamela Waters;
   - Ms Marilyn Cook and Mr Stephen Young, Cook Family Trust Trustees;

2. This matter was set down for Hearing commencing 23 February 2008 at Christchurch. The Brodav Ltd and Cook Family Trust claims were previously consolidated. At the commencement of the hearing, Counsel indicated they were close to settlement and asked for time to continue their negotiations. This was granted. It proved to be a fruitful exercise.

3. To the extent that this matter has been settled the terms of the settlement agreement are deemed to be a determination pursuant to s.91(6) of the Weathertight Homes Resolution Services Act 2006 (as amended).

## PARTIAL DETERMINATION ON AGREED TERMS

4. Counsel produced a 'Memorandum of Terms of Settlement' which provides (inter alia) as follows:

   *The parties agree to settle the within proceedings on these terms and conditions.*

   <u>Brodav Claim</u>

   *1. Mr and Mrs Waters will pay to Brodav Limited the sum of $16,500 in one lump sum without deduction, payment to be made within 14 days and each party to bear their own costs. This payment is to be*

*made to Corcoran French and represents full and final settlement of Brodav's claim against Mr and Mrs Waters.*

2. *There still remains the claims against Lionel Wheeler who is the bricklayer and Craig Collings who was the roofing contractor involved with the Brodav claim. Brodav hereby assigns the benefit of these two claims to Mr and Mrs Waters.*
3. *Mr Waters wishes to reserve his claim against Lionel Wheeler, it being expected that a satisfactory contribution is going to be negotiated. The first respondents will advise the Tribunal whether any orders are required against Lionel Wheeler by 23 April 2009.*
4. *Craig Collings, the roofing contractor, has taken no step in proceedings. Mr Waters seeks a direction that Mr Collings be required to contribute to this settlement.*
5. *Brodav has reserved the right to apply for costs against Lionel Wheeler and Craig Collings.*

<u>Cook Claim</u>

6. *Mr and Mrs Waters undertake to carry out the remedial work specified in paragraphs 15.6 and 15.7 of the assessor's report and generally to the same standard and extent as the work done on the Brodav house. Mr and Mrs Waters will obtain the necessary consents and obtain a code compliance certificate for the work undertaken.*
7. *A building permit to be applied for within two weeks. The remedial work to be completed within six weeks of issue of the building permit.*
8. *The Cook Family Trust is to pay against the first $5,000 of invoices received.*
9. *The Cook Family Trust to retain the remaining $5,000 settlement monies held in the trust account of Corcoran French.*
10. *The parties agree that this memorandum represents full and final settlement of the Cook claim and there are no issues as to costs.*

**Claim against ninth respondent, roofer**

5. I now consider the claim against Mr Craig Collings the roofing contractor (ninth respondent) in the Brodav Ltd claim. The Claimant in the Brodav Ltd claim has assigned the benefit of these claims to the first respondents and the claim against Craig Collings is dealt with below. The claim against Lionel Wheeler is likely to settle and this is to be confirmed by 23 April 2009.

6. At the hearing Mr Brodie said he relied on paragraphs [9.1] and [15.2] of the assessors report as evidence of the roofer's fault in relation to the property. Unfortunately, the report he was referring to was that prepared by Mr Rennie in relation to the Cook Family Trust claim being the property situated at 277B King Street Rangiora, not the Brodav Ltd property.

7. The assessor's report in the Brodav Ltd claim notes a failure of the apron flashings by electrolytic corrosion between the galvanised sheet shelf angles and the colorsteel apron flashings as being a reasonable probability of water entry. These faults are attributable to Mr Collings. The Tribunal finds he was negligent in the way in which he affixed the colorsteel apron flashings.

8. It was contended Mr Collings may have been responsible for installing the butyl roof membrane. Usually such a membrane is applied by a specialist applicator. Unfortunately Mr Collings did not appear to resolve this question. However a perusal of the invoices that have been produced in the discovery process do not indicate that Mr Collings charged for installing butyl, and Mr Brodie did not refer the Tribunal to any documents supporting his contention. The Tribunal is not prepared to draw the inference that he undertook this work.

Apportionment of Responsibility

9. The Tribunal has been advised by counsel the effective settlement of the claim by Brodav against the first respondent was $28,500.00. It is this figure which the Tribunal considers relevant in assessing the quantum of damages to be payable by Mr Collings. The question is the degree of responsibility of Mr Collings the Tribunal is of the view that Mr Collings' liability for the claim is less than 10% and awards the sum of $2,500.00 in damages.

**Application for Costs Against Eighth Respondent**

10. Costs are sought by the first claimant, Brodav Ltd, against the ninth respondent.

**Bad Faith**

11. Section 91 of the Weathertight Homes Resolution Services Act 2006 (hereinafter called “the Act”)provides that:

*"Costs can be awarded by a Tribunal against any of the parties to adjudication … if it considers that a party has caused those costs and expenses to be incurred unnecessarily by –*

*(a) Bad faith on the part of that party; or*

*(b) Allegations or objections by that party that are without substantial merit."*

12. The applicable subsection is s.91(a). The claimant submits that by taking no steps and refusing to take up or respond to settlement proposals the ninth respondent was acting in bad faith. By his inaction the ninth respondent made it inevitable no overall settlement could be reached with all the respondents prior to the hearing as respondents would not settle without some contribution being made by the roofer. He was considered by all the negotiating parties to be partly liable.

13. Counsel further submitted that this was a case of persistent failure to respond to offers of settlement, in particular the Calderbank offer, made by Brodav Limited prior to Christmas 2008 - a clear demonstration of continuing bad faith, resulting in unnecessary costs being incurred by the claimant.

14. The context here is the Weathertight Homes Act where the purpose is to have speedy, flexible and cost effective procedures. Currently over 80% of claims before the Tribunal are being settled during the stages prior to determination, consistent with Parliament's intent.

15. The objectives of speedy resolution and cost effectiveness are significantly advanced by settlement, thus movement towards settlements prior to hearing are actively encouraged by the Tribunal. In this case most parties did participate in this exercise. Unfortunately the ninth respondent did not.

16. The Tribunal accepts the roofer's non-participation had a negative effect on an earlier final settlement prior to the hearing date.

17. Can it be considered" bad faith" by a party where an earlier probable resolution is aborted by a deliberate refusal to participate in the processes which enable speedy and cost-effective resolution of a claim?

<u>Bad faith – the law</u>

18. The phrase "bad faith" has received judicial consideration in a number of decisions including:
*Nalder & Biddle (Nelson) Ltd v C & F Fishing Ltd* [2007] 1 NZLR 721,[2006] NZSC 98 (SC) at [87]-[89]; *R v Reid* [2008] 1 NZLR 575 SC; *R v Williams* [2007] 3 NZLR 207( – ruling that police had acted in

bad faith); NZLR; *WEL Energy Trust v Waikato Electricity Authority*, 31 August 1994, HC Hamilton Penlington J.; *Cannock Chase District Council v Kelly* [1978] 1 AII ER 152; *Webster v Auckland Harbour Board* [1983] NZLR 646 (CA); *Latimer Holdings Ltd v SEA Holdings NZ Ltd* [2005] 2 NZLR 328;(CA); *R v Strawbridge (Raymond)* [2003] 1 NZLR 683; *Transpac Express Ltd v Malaysian Airlines* [2005] 3 NZLR 709, Smellie J at [61] (bad faith by in-house counsel).

19. Where the alleged bad faith involves public authorities or abuse of executive power the courts give a more restrictive meaning to "bad faith" by requiring an element of dishonesty be proven. As McMullin J stated in the Court of Appeal decision in Webster v Auckland Harbour Board (supra) there is generally difficulty in establishing bad faith against public authorities. (page 683) A broader interpretation is given in other situations, such as in this claim.

20. An overview of the case law indicates the meaning to be attached to the words 'bad faith' depends on the circumstances in which it is alleged to have occurred and the range of conduct warranting the label can range from the dishonest to a disregard of a legislative intent.

21. Context and statutory intent were held to be the key in the recent High Court of Australia decision in Parker v Comptroller-General of Customs [2009] HCA; (2009) 252 ALR 619. French CJ undertook a consideration of the statutory framework (in that case it was the Customs Act) before considering the contextual meaning of "impropriety" at [27] and [29]. The Court arrived at the statutory meaning of the words taking into account their meaning in ordinary usage by looking through the eye-glass of the of the overall statutory framework. This is the approach to be applied here in deciding what amounts to bad faith.

22. In terms of public policy a too narrow an interpretation placed on the phrase *"*bad faith*"* as used in s91 of the Act would effectively condone parties who by take no steps and refuse to participate in settlement negotiations (often in the hope of escaping any liability), and who in so doing jeopardise the settlement process. I conclude the answer to the question, can it be considered" bad faith" by a party where an earlier probable resolution is aborted by a deliberate refusal to participate in the processes which enable speedy and cost-effective resolution of a claim is yes.

**Amount of Costs**

23. The claimants have submitted alternative approaches in deciding the appropriate amount of costs that should be awarded. The first is the actual costs since the Calderbank offer made on 23 December 2008, relying on the decision in Willis Trust v Laywood and Rees CIV 2006 – 404 – 809. Alternatively they seek costs for work since the Calderbank offer based on Category 2B of the District Court Rules scale. On this basis the sum of $6,144.00 is sought.

24. In light of the limited liability of the ninth respondent an award of such an amount would be too high. However the Tribunal considers award in the sum of $1,450.00 is appropriate.

**DATED** at WELLINGTON this 31st day of March 2009

**C B Ruthe**
Tribunal Member