



## **SUMMARY**

**Case:** Brown & Anor v Christchurch City Council & Ors – Procedural Order No. 4

**File No:** TRI 2008-101-000111/ DBH 04840

**Court:** WHT

**Adjudicator:** CB Ruthe

**Date of Decision:** 9 April 2009

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### **Background**

In this Procedural Order, the Tribunal deals with the removal applications filed by the third respondent, Mr O’Fagan (developer), fourth respondent, Ms Frankland (vendor), fifth respondent, Mr Hobbs (plasterer), sixth respondent, Mr Curtin (designer), and seventh respondent, Mr Sloane (builder).

### **Summary of Decision**

#### *Removal of Mr O’Fagan (developer)*

Mr O’Fagan conceded that at this point in time his application for removal would be unlikely to succeed. However Mr O’Fagan declined to withdraw his application. The Tribunal therefore declined his application for removal in the interests of clarity.

#### *Removal of Ms Frankland (vendor)*

The Tribunal treated this removal application as also an application by the Courtenay Trust opposing its joinder to the proceedings.

#### *(a) In contract*

Ms Frankland is a trustee of the Courtenay Trust, which entered into an agreement with the claimants for the sale of the dwelling. Despite the vendor being the Trust, the claimants alleged that Ms Frankland was personally liable as a vendor both in contract and tort having sold a dwelling that was defective, had design faults, and did not comply with the necessary building requirements.

Submissions were made to the Tribunal that Ms Frankland’s removal application could not be determined at this stage. However the Tribunal held that since all relevant matters had been filed, there was nothing to justify the parties’ expense in continuing with the proceedings. Furthermore, Ms Frankland was not the vendor in the agreement for sale and purchase and so to require her to wait for the final hearing would not be appropriate.

The Tribunal considered there was no contractual relationship between Ms Frankland and the claimants, and therefore she did not personally enter into any warranty.

The vendor warranty clause is located at clause 6.2 of the standard agreement. The Council referred to *Ford v Ryan* where the High Court found that clause 6.2(5)(c) had been breached as no Code Compliance Certificate was issued. In the present claim however, the Code Compliance Certificate was issued. The Tribunal therefore held that *Ford v Ryan* was not authority for the interpretation of clause 6.2(5)(d) in terms of this present claim.

Nevertheless, clause 6.2(5)(d) must be read in the context of sub-clauses (a)-(c). Each of those sub-clauses refers to permits, consents and Code Compliance Certificates issued under the Building Act. The intended meaning of “All obligations” in sub-clause (d) is therefore governed by the scope of the preceding sub-clauses. To interpret clause 6.2(5)(d) as placing on a vendor a duty to remedy any defect that was shown retrospectively not to comply with the Building Act would be to defy commonsense. The Tribunal therefore held that the Trust has no liability in contract.

*(b) In tort*

Tui Projects and Developments Ltd obtained the building consent and that company carried out all the building work to which a Code Compliance Certificate was issued in December 1999. Ms Frankland was an occupier of the property until it was sold. She denies, either personally or as a trustee, having anything to do with the actual building work.

The Tribunal held that having decided that Ms Frankland has no legal liability in contract, in light of *Ford v Ryan* there is no liability in tort.

Regarding the position of the Trust, the Tribunal found that the evidence indicated that the Trust was not the developer/builder/works supervisor and neither it, nor any of its trustees had hands-on involvement in the building. Instead the Trust itself relied on, and were entitled to rely on, the Council’s inspection process and the Code Compliance Certificate when it finalised payments on the building contract with Tui Projects and Developments Ltd. Therefore if there is any claim against the Trust, it would be indemnified by the Council if liability were to be attributed to a faulty inspection process by the Council. The Tribunal therefore held that the grounds for making the Trust a party were not made out.

*Removal of Mr Hobbs*

Mr Hobbs is bankrupt and comes out of bankruptcy in May 2010. There was therefore little point in him remaining as a party. The Tribunal therefore made an order removing Mr Hobbs.

*Removal of Mr Curtin*

The Tribunal dealt with an application for the joinder of Mr Curtin as a designer in another claim filed at the Tribunal. It was therefore common ground that Mr Curtin designed all three properties. However according to the reports prepared by the WHRS assessor, none of the leaks were attributable to design issues. Mr Curtin was therefore removed as a party and is entitled to apply for costs.

*Removal of Mr Sloane*

Mr Sloane was alleged to have been the builder. Mr Sloane stated that he was employed by Tui Projects and Developments Limited as an individual carpenter and his responsibilities were mainly related to interior finishing.

The installation of a steel fascia would require input from the site carpenters or the site supervisor. The question therefore was whether Mr Sloane performed that role.

In reviewing the assessor's report, the Tribunal found no evidence indicating that Mr Sloane was responsible for spouting ends and fascias being buried in the cladding, nor for the failed sealing on the parapets. In relation to Mr Sloane’s possible supervisory role, the evidence indicated that Mr Sloane was only a carpenter on the site, particularly since Mr O’Fagan was the project manager and was silent as to the terms

of Mr Sloane's employment. After a full-examination of the material, the Tribunal concluded that Mr Sloane ought to be removed from these proceedings.

#### *Cost-Effective Solution*

Self-represented claimants had brought a claim relating to their dwelling located in the same block of buildings. That claim has been settled between the parties. By comparison however, the present claim has not progressed towards settlement despite having that precedent with mostly the same parties. The Tribunal advised that in order for proceedings to be cost-effective it requires the parties and their counsel to take a non-adversarial approach with a view to settlement.

#### **Result**

The Tribunal removed Ms Frankland, Mr Hobbs, Mr Curtin and Mr Sloane as parties in these proceedings. Mr O'Fagan's removal application however was declined. The Tribunal also found that the grounds for joining the Courtenay Trust were not made out and so that Trust was not joined to these proceedings.