IN THE WEATHERTIGHT HOMES TRIBUNAL
TRI 2008-101-000111

BETWEEN	**CHRISTOPHER & JULIE BROWN** Claimants
AND	**CHRISTCHURCH CITY COUNCIL** First Respondent
AND	**GLENN RYAN MUNRO** Second Respondent
AND	**BERNARD LAWRENCE O'FAGAN** Third Respondent
AND	**PATRICIA FRANKLAND (REMOVED)** Fourth Respondent
AND	**BRENT HOBBS (REMOVED)** Fifth Respondent
AND	**JOHN LINDSAY JAMES CURTIN (REMOVED)** Sixth Respondent
AND	**PETER SLOANE (REMOVED)** Seventh Respondent

PROCEDURAL ORDER 4
Application for Removal of Third Respondent, Developer
Application for Removal of Fourth Respondent, Vendor
Application for Removal of Fifth Respondent, Plasterer
Application for Removal of Sixth Respondent, Designer
Application for Removal of Seventh Respondent, Builder
Dated 9 April 2009

Introduction

1. A further telephone conference on this matter was held on Friday 20 March to deal with the following applications:

    - Application for Removal of Third Respondent, developer;
    - Application for Removal of Fourth Respondent, vendor;
    - Application for Removal of Fifth Respondent, plasterer;
    - Application for Removal of Sixth Respondent, designer;
    - Application for Removal of Seventh Respondent, builder.

Application for Removal of Third Respondent

2. The third respondent has made application for removal. Mr O'Fagan conceded on the evidence before the Tribunal at this point in time the application will be unlikely to succeed. Mr O'Fagan declined to withdraw his application. In the interests of clarity the Tribunal hereby determines this application for removal is declined.

Application for Removal of Patricia Frankland, Fourth Respondent

Submissions by Counsel that this matter needs to go to a full hearing

3. It has been submitted the application concerning Ms Frankland cannot be determined at this juncture. The Tribunal rejects this submission. All relevant matters are before the Tribunal in either affidavit form or in the documents including the sale and purchase agreement. There is nothing to justify the expense of parties continuing in the proceedings if there isn't sufficient evidence. In this case the fourth respondent was not

the vendor in the contract for sale and purchase to require her to wait for the final hearing would not be appropriate.

Was Ms Frankland the owner/vendor?

4. The fourth respondent, Ms Frankland, is a trustee of the Courtenay Trust. That trust entered into an agreement with the claimants for the sale of 28 Courtenay Street, Christchurch on 26 April 2004. Despite the vendor being the trust the claimants allege Ms Frankland personally was liable as vendor in both contract and tort having sold a dwelling that was defective, had design faults and did not comply with the building consent, Building Act 1991 and the Building Code where eleven alleged breaches are specified.

5. The Tribunal considers there is no contractual relationship between the fourth respondent and the claimants and therefore she did not personally enter into any warranty. The Christchurch City Council continues to allege Ms Frankland was the developer on the basis she had obtained a mortgage over the property prior to the construction of the house. This has previously been dealt with; Ms Frankland was never the developer. There is no basis for Ms Frankland being a party.

Application for removal of Ms Frankland treated as application opposing Joinder of Courtenay Trust

6. Ms Frankland is one of three trustees but she has not been joined as a trustee. However in order to avoid unnecessary duplication of costs the Tribunal will deal with the matter on its merits and will approach the matter as being an application by the trust to oppose its joinder to these proceedings.

Courtenay Trust as developer/.builder/works supervisor

7. Ms Frankland denies either personally, or as a trustee having anything to do with the actual building works. 28 Courtenay Street had been built by Tui Projects and Developments Ltd (Tui). The building consent was obtained in that company's name and all work was carried out by that company. A Code Compliance Certificate was issued in December 1999. She was an occupier of the property until it was sold in April 2004. The trust was entitled to rely on the City Council's Code of Compliance Certificate.

8. In his submissions counsel for Ms Frankland states:

> "As is clear from the building consent, the applicant is Tui Projects and Developments Limited (Tui). This entity contracted with the vendor for the construction of the dwelling house at 28 Courtenay Street. …. The Courtenay Trust relied totally upon Tui/Bernie O'Fagan who managed the entire construction project. The Courtenay Trust relied upon Tui-Bernie O'Fagan to obtain the required permit and is entitled to assume that following the Christchurch City Council issuing a code compliance certificate that, firstly, works have been completed in compliance with the permit and, secondly, that the obligations under the Building Act 1991 were complied with."

9. The evidence indicates the Trust was not the developer/.builder/works supervisor, and neither it ,or any of the trustees had hands on involvement in the building. No claim can be sustained against it on this ground.

Claim in Contract

10. Counsel for the fourth respondent said she accepted there was a *prima facie* case (terminology usually confined to criminal law) of breach of warranty under clause 6.2(5). The Tribunal does not accept that this concession reflects the legal position.

11. The Sale and Purchase Agreement was on the form approved by the Real Estate Institute in New Zealand and by the Auckland District Law Society, seventh edition, July 1999. Clause 6.2 provides:

"Where the vendor has done or caused or permitted to be done on the property any works for which a permit or building consent is required by law:

a) The required permit or consent was obtained; and
b) The works were completed in compliance with that permit or consent; and
c) Where appropriate, a Code Compliance Certificate was issued for those works; and
d) All obligations imposed under the Building Act 1991 were fully complied with."

12. The first respondent cited the decision of the High Court at Wellington in *Ford v Ryan* CIV 2005-485-845, MacKenzie J, 13 December 2007 as a case where a vendor was held to be in breach of warranty. In *Ford* the Court held that clause 6.2(5)(c) had been breached as no Code Compliance Certificate was issued. (In this case the Code Compliance Certificate was issued). *Ford* is not authority with regard to the interpretation of 6.2(5)(d), the relevant clause in the Brown claim.

Approach to interpretation of contractual term

13. In *Pyne Gould Guinness Limited v Montgomery Watson (NZ) Ltd* [2001] NZAR 789, the Court of Appeal at [29] said:

"The proper approach to take to interpreting a contract is to consider the words of a contract, ascertain their natural and ordinary meaning in the context of the document as a whole, then use the factual background to cross check whether some modified meaning was intended."

14. The Court of Appeal at [23] went on to say the construction or interpretation had to accord with common-sense. Other cases which have followed this approach include *Jowada Holdings Limited v Cullen Investments Limited* CA248/02, 5 June 2003 and *Wholesale Distributors Limited v Gibbons* (2007) 5NZCONV194 (SC).

Clause 6.2 (5)(d) What is its scope?

15. Clause 6.2(5) (d) must be read in the context of the preceding sub-clauses 6.2(5) (a), (b) and(c). Each of the sub-clauses refers to permits, council consents and council Code Compliance certificates issued pursuant to the Building Act. The intended meaning of *"All obligations"* is therefore governed by the scope of the preceding sub-clauses.

16. It is the obtaining of permits which is the crux of the warranty provision. The purchaser wants to know that the building, or any alterations, have been compliant with the Building Act, and the means of securing that assurance is for the vendor to warrant that the requisite permits have been obtained from the council and the completed structure approved by council.

The factual background cross-check

17. The *Pyne Gould Guinness Limited* guideline that where there is ambiguity in meaning an aid to the interpretation of a clause is to cross-check the word(s) natural meaning(s) against the factual background. In the present case the warranty is to be read in the light of the fact that councils are responsible for oversight of domestic house construction in New Zealand and the clause is there to ensure that the subject property has been vetted and approved in accordance with council and building code requirements.

18. The *Hamlin* Rule in the Court of Appeal decision in *Invercargill City Council v Hamlin* [1994] 3NZLR Richardson J described the matrix behind the evolution of NZ law and Council responsibility for home construction supervision. His Honour stated:

*"… it has never been a common practice for new house buyers**, including those contracting with builder for construction of houses,** to commission engineering or architectural examinations or surveys of the building or proposed building ... It accorded with the spirit of the times for **the local authorities to provide a degree of expert oversight rather than expect every small owner to take full responsibility** and engage an expert adviser"*. (at page 525, lines 17-27).

19. To give the clause a wide meaning would result in a person who whilst as owner is protected by "*Hamlin*", as vendor becomes potentially liable for any building faults. It would expose to the very risk which the Court of Appeal held is totally inappropriate. (*Hamlin* page 528).

20. The interpretation which the claimants and Council seek to place on clause 6.2 (5)(d) would effectively place The Trust in the position of underwriter to the inspection and certification regime of the council. This

flies in the face of conveyancing reality. 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 1991 would be to defy common sense, to use the words of the Court of Appeal in *Pyne Gould Guinness Limited* (supra). I consider the Trust has no liability in contract.

Claim in Tort

21. In *Ford* (supra) the Court considered liability in negligence. The Court stated:

"[16] The starting point for the liability, if any, of the defendants to the plaintiff's must be the terms of the contract between them. An important consideration is that, although the defendants had undertaken the construction of the house while they owned the property, this contract was a sale of a completed dwelling. It was not a building contract, or a contract to sell a building in the course of construction. That distinction is important, when considering the potential liability of the vendors."

First Respondent's grounds of opposition to removal

22. Ms Frankland's removal is opposed by the first respondent, the Christchurch City Council. The first respondent was not a party to the contract for sale and purchase, however it relies on an unreported decision in *Heng & Ors v Walshaw and Ors* WHRS Cl No.0734,30/01/08, Adjudicator Green. The *Heng* decision is not authority for the proposition Ms Douglas placed upon it namely that a vendor indemnifies local authorities as the vendor owes a duty of care to them. Subsequently in written submissions S A Thodey (also a counsel for the Christchurch City Council) cited *Ford*(supra) as authority for the proposition that owners who become vendors no longer have a right of

indemnity from a Council. The Tribunal does not accept either submission as being the law.

23. The Christchurch City Council also argues that *Riddell v Porteous* [1999] 1 NZLR 1 is authority for the proposition a Council has a right to seek contributory negligence as a defence against owners who fail to engage competent contractors. (In *Riddell* the owners did engage reputable contractors). The Tribunal can find nothing in that decision to support this particular legal proposition.

24. Counsel for the Council submitted that the fourth respondent should not be removed/joined on the basis she/it could rely on an indemnity from the local authority. The decision in *White v Rodney District Council* TRI 2007-100-64, 4 March 2009, (Adjudicator Kilgour) was said to support the proposition that vendors are not entitled to complete indemnity from the builder and/or the Council. This is not the *ratio* of *White*.

25. Having decided there is no legal liability in contract, it follows in the light of *Ford* there is no liability in tort.

Section 111 Considerations

26. If the Tribunal is incorrect on the law concerning liability in contract and tort consideration needs to be given to the provisions of section 111 of the Weathertight Homes Resolutions Services Act 2006 (As noted this is being treated as an application to join the Trust as fourth respondent). This decision can only be arrived at after applying the criteria for removal/joinder.

27. The Tribunal needs to weigh up a range of factors including, but not necessarily limited to:

(a) likelihood of success against the party to be joined;

(b) the nature and quality of the evidence as to the liability for the leaks in the building;
(c) the relative significance of the allegations of breach of duty in the context of the overall claim;
(d) the possible quantum any award against the party to be joined;
(e) proportionality of liability with the costs likely to be incurred.

28. In this case the Trust was not the builder. It did not cause a single leak. The Trust itself had relied on the Council's inspection process and the Code Compliance Certificate when it finalised payments on the building contract with Tui. Thus 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. Lastly the fourth respondent has already incurred costs and future costs for attending mediation and a final hearing would be disproportionate to any possible liability. The grounds for making the Trust a party have not been made out.

Application for Removal of Fifth Respondent

29. Mr Hobbs is bankrupt. He comes out of bankruptcy in May 2010. There is little point in him remaining. After further consideration the Tribunal makes an order removing Mr Hobbs. He did provide information concerning the roofing of the project. He said he was a mere employee of Steel and Tube in Christchurch. The first respondent has given consideration to joinder. However this will not be allowed to affect the current timetable.

Application for Removal of Sixth Respondent, the Designer

30. The application for the removal of the designer, Mr Curtin, was partly traversed in the hearing on 27 January 2009.

31. In *Hartz Vs Christchurch City Council and Ors* WHT TRI-2008-101-96, Procedural Order 5, 27 January 2009, the Tribunal dealt with an application for the joinder of Mr Curtin as designer. It is common ground that Mr Curtin designed all three properties. The Christchurch City Council will be aware that the two reports undertaken by the same assessor are virtually identical relating to watertightness issues. In particular the conclusions at paragraph 6 are the same being that the cause of water entering the dwelling is primarily as a result of entry by diffusion and gravity, and around the ends of spouting and fascias that are buried in the ERFS cladding. The salient point is that none of these leaks were attributable to design.

32. At [6] of the *Hartz* Procedural Order 5 the Tribunal held:

"It is quite clear from the evidence before the Tribunal, including the memorandum supplied by Mr Calvert, senior building support officer for the Christchurch City Council dated 23 January 2009, there is nothing inherently wrong with the plans or specifications."

33. Mr Calvert has done a declaration in this claim however there is no reference to design faults. As noted he had earlier said there were none causing leaking.

34. One is at a loss to understand the failure of the Christchurch City Council and its counsel to address matters raised in the Hartz, or to refer to it in submissions. The Council, as noted had agreed there were no design issues. Mr Curtin is removed as a party. He may apply for costs.

Application for Removal of Seventh Respondent, builder

35. Mr Sloane is alleged to have been the builder. He has sworn an affidavit dated 19 February. Mr Sloane states that he is a specialist in interior

finishing completing an apprenticeship in carpentry and joinery in the United Kingdom after five years of study and holding a City and Guild advanced craft certificate. He says he was employed by Tui Projects and Developments Limited as an individual carpenter on an hourly rate and his responsibilities were mainly related to interior finishing. He says there was no building contract. He further says that there were other labour only carpenters on the site.

36. At paragraph 7 of his affidavit he states:

"My involvement did not extend to anything involving the outer envelope of the dwelling or its flashings. Therefore the allegations by the claimants relating to the installation of spouting and fascia and its clearance to allow the EIFS to be installed or finished properly, compliance with the building consent, design plans and specifications cannot be directed against me.

Similarly I was not involved with the installation of head, jamb and sill flashings for windows, or flashings for external doors.

Nor was I involved with the capping of the parapets."

37. Mr Sloane goes on to say that he was not the foreman although he was the onsite point of contact for subtrades.

38. At the hearing on 20 March Mr O'Fagan made comment. He indicated there was a dispute as to the extent of Mr Sloane's role. It is noted that no evidence has been adduced to show Mr Sloane was hired as a building supervisor. Mr O'Fagan was clearly the project manager.

39. Mr Calvert in his affidavit opposing the removal makes general observations about the building process. At [13] of his affidavit sworn on 23 February 2009 he says that the installation of a steel fascia would require input from the site carpenters or the site supervisor. The

question is whether Mr Sloane performed that role. He has sworn an affidavit he was not the person on site who did this. Mr Calvert's general observations therefore do not apply here.

40. A carpenter cannot be held to be negligent if his contract in employment did not include the responsibilities that parties who have had nothing to do directly with the supervision of the building, are now alleging. It is noted Mr O'Fagan has not committed himself in an affidavit to saying he employed Mr Sloane as a supervising builder. Nor has he sworn any affidavit saying he saw Mr Sloane installing the flashings, capping of parapets or the steel fascia.

41. Mr Sloane has sworn an affidavit denying he was either site manager, project manager or doing any work which has resulted in water ingress.

42. The second respondent, Mr Munro has sworn an undated affidavit. Mr Munro says he would have to physically see Mr Sloane to confirm his identity but believes Mr Sloane was the person he recalled as the site foreman.

43. He makes general observations about what builders generally do but fails to say what specific actions undertaken by Mr Sloane showed he was the site foreman. For instance he does not say he saw Mr Sloane carrying out inspections of work being done or of Mr Sloane making decisions on what materials were to be supplied.

44. Other parties may argue further evidence could emerge at a hearing. With respect, this has been a part hearing of the claim in the Weathertight Homes resolution process. The primary evidence is in along with all the discovered documents. There is sufficient material to make a decision.

45. The Tribunal has reviewed the assessor's report, which at [6.1] sets out the causes of leaks (being the areas of water ingress). There is not any

evidence this respondent was responsible for spouting ends and facias being buried in the cladding, nor for the failed sealing on the parapets. On the question of Mr Sloane having a possible supervisory role the conspicuous silence of Mr O'Fagan on the terms of Mr Sloane's employment is telling. And the fact Mr O,Fagan himself is project manager all point to Mr Sloane being a carpenter only. After a full examination of the material before it the Tribunal concludes that this respondent should be removed. The application is granted.

Cost Effective Resolution

46. The Tribunal's obligation is to carry out its role in terms of the express provisions of the Weathertight Homes Resolution Services Act 2006, s.3 which requires the provision of a resolution service where access is speedy, flexible and cost effective.

47. Cost effectiveness applies to all parties. It is noted that another claim in the same block of buildings was settled with the claimant who was self represented. This claim by comparison has not progressed towards settlement despite having that precedent, with mostly the same parties. For proceedings to be cost effective it requires the parties and their counsel to take a non adversarial approach with a view to settlement.

DATED at WELLINGTON this 9th day of April 2009

SIGNED BY:

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C B Ruthe

Tribunal Member